



# State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070

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## Summary

On April 23, 2010, Arizona enacted S.B. 1070, which is designed to discourage and deter the entry or presence of aliens who lack lawful status under federal immigration law. Potentially sweeping in effect, the measure requires state and local law enforcement officials to facilitate the detection of unauthorized aliens in their daily enforcement activities. The measure also establishes criminal penalties under state law, in addition to those already imposed under federal law, for alien smuggling offenses and failure to carry or complete alien registration documents. Further, it makes it a crime under Arizona law for an unauthorized alien to apply for or perform work in the state, either as an employee or an independent contractor.

The enactment of S.B. 1070 has sparked significant legal and policy debate. Supporters argue that federal enforcement of immigration law has not adequately deterred the migration of unauthorized aliens into Arizona, and that state action is both necessary and appropriate to combat the negative effects of unauthorized immigration. Opponents argue, among other things, that S.B. 1070 will be expensive and disruptive, will be susceptible to uneven application, and can undermine community policing by discouraging cooperation with state and local law enforcement. In part to respond to these concerns, the Arizona State Legislature modified S.B. 1070 on April 30, 2010, through the approval of H.B. 2162.

Whenever states enact laws or adopt policies to affect the entry or stay of noncitizens, including aliens present in the United States without legal authorization, questions can arise whether Congress has preempted their implementation. For instance, Congress may pass a law to preempt state law expressly. Further, especially in areas of strong federal interest, as evidenced by broad congressional regulation and direct federal enforcement, state law may be found to be preempted implicitly. Analyzing implicit preemption issues can often be difficult in the abstract. Prior to actual implementation, it might be hard to assess whether state law impermissibly frustrates federal regulation. Nevertheless, authority under S.B. 1070, as originally adopted, for law enforcement personnel to investigate the immigration status of any individual with whom they have “lawful contact,” upon reasonable suspicion of unlawful presence, could plausibly have been interpreted to call for an unprecedented level of state immigration enforcement as part of routine policing. H.B. 2162, however, has limited this investigative authority.

Provisions in S.B. 1070 criminalizing certain immigration-related conduct also may be subject to preemption challenges. The legal vulnerability of these provisions may depend on their relationship to traditional state police powers and potential frustration of uniform national immigration policies, among other factors. In addition to preemption issues, S.B. 1070 arguably might raise other constitutional considerations, including issues associated with racial profiling. Assessing these potential legal issues may be difficult before there is evidence of how S.B. 1070, as modified, is implemented and applied in practice.

S.B. 1070, as amended, was scheduled to go into effect on July 29, 2010. However, the U.S. Department of Justice filed suit seeking to preliminarily enjoin the enforcement of certain sections of S.B. 1070 on the grounds that they are preempted. On July 28, 2010, a federal district court enjoined Arizona from enforcing those provisions of S.B. 1070 pertaining to immigration status verifications, among other things. Arizona appealed this decision, and on April 11, 2011, the U.S. Court of Appeals for the Ninth Circuit issued an opinion affirming the district court’s decision. Arizona’s governor has reportedly expressed a desire to appeal this decision, and the district court has yet to issue a final ruling as to the merits of the government’s challenge.

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On April 23, 2010, Arizona enacted legislation (commonly referred to as S.B. 1070) intended

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 in the United States.<sup>1</sup>

By so doing, Arizona arguably placed itself in the vanguard of recent attempts to test the legal limits of greater state involvement in immigration enforcement, and prompted significant debate regarding the desirability and effectiveness of S.B. 1070 and similar state or local measures. Supporters of S.B. 1070 argue that federal enforcement of immigration law has not adequately deterred the migration of unauthorized aliens into Arizona, and that state action is both necessary and appropriate to combat the negative effects of unauthorized immigration. Opponents argue, among other things, that S.B. 1070 will be expensive and disruptive, will be susceptible to uneven application, and can undermine community policing by discouraging cooperation with state and local law enforcement. In part to respond to some of these concerns, the Arizona State Legislature modified S.B. 1070 on April 30, 2010, through the approval of H.B. 2162 (unless otherwise specified, references to S.B. 1070 in this report refer to the version amended by H.B. 2162).

Following the enactment of S.B. 1070 but prior to its scheduled date to go into effect (July 29, 2010),<sup>2</sup> the U.S. Department of Justice (DOJ) and a number of private entities filed separate lawsuits challenging the legislation. The central argument made by the petitioners was that aspects of S.B. 1070, both separately and in conjunction, are preempted by federal law and are therefore unenforceable.<sup>3</sup>

On July 28, 2010, Judge Susan Bolton of the U.S. District Court for the District of Arizona granted DOJ's motion to preliminarily enjoin, pending a final ruling on the case, those provisions of S.B. 1070 pertaining to (1) immigration status determinations during stops, detentions, or arrests by state law enforcement; (2) the imposition of state criminal penalties for certain violations of federal alien registration requirements; (3) the criminalization of the solicitation or performance of work by unlawfully present aliens; and (4) the authorization of state law enforcement to make warrantless arrests for public offenses which constitute grounds for deportation under federal immigration law.<sup>4</sup> However, the district court did not enjoin other provisions of S.B. 1070 from taking effect, including provisions allowing legal residents of Arizona to bring suit to challenge state or local policies that restrict enforcement of federal

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<sup>1</sup> The text of S.B. 1070, as amended by H.B. 2162, can be viewed at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

<sup>2</sup> Under the Arizona Constitution, acts approved by the legislature do not become operative until 90 days after the close of the legislative session during which they were passed. ARIZ. CONST. art. 4, § 1(3).

<sup>3</sup> *United States v. Arizona*, No. CV-10-1413, Complaint (D. Ariz. filed July 6, 2010), available at <http://www.justice.gov/opa/documents/az-complaint.pdf> [hereinafter "Arizona Complaint"]; Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof (D. Ariz. filed July 6, 2010) [hereinafter "Plaintiff's PI Motion"], available at [http://www.justice.gov/usao/az/press\\_releases/2010/Arizona%20PI%20Brief%20\(2\).pdf](http://www.justice.gov/usao/az/press_releases/2010/Arizona%20PI%20Brief%20(2).pdf). Besides the federal government, several other entities also brought suit challenging S.B. 1070. See, e.g., *Friendly House v. Whiting*, No. CV 10-1061, Complaint (D. Ariz., filed May 17, 2010), available at [http://www.aclu.org/files/assets/az\\_sb1070\\_complaint\\_20100517.pdf](http://www.aclu.org/files/assets/az_sb1070_complaint_20100517.pdf).

<sup>4</sup> See *United States v. Arizona*, 703 F. Supp. 2d 980, 987 (D. Ariz. 2010) [hereinafter "*Arizona I*"].

immigration laws and provisions criminalizing activities related to the transportation or harboring of unlawfully present aliens.<sup>5</sup>

Arizona appealed the district court's decision,<sup>6</sup> and on April 11, 2011, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit issued a decision affirming the district court's decision to preliminarily enjoin enforcement of those provisions of S.B. 1070 pertaining to immigration status determinations during stops, detentions, and arrests; failure to apply for or carry alien registration papers; the solicitation or performance of work by unauthorized aliens; and warrantless arrests for certain public offenses.<sup>7</sup> The panel unanimously affirmed the district court's injunction order with respect to those provisions of S.B. 1070 relating to alien registration and the performance of work by unauthorized aliens, and split 2-1 in affirmation of those portions of the order relating to status determinations and warrantless arrests. Arizona Governor Jan Brewer announced on May 9, 2011, that Arizona would petition the Supreme Court to hear an appeal of the panel's decision, rather than seeking *en banc* review by the Ninth Circuit.<sup>8</sup> The district court has yet to issue a final ruling as to the merits of the federal government's challenge, but its preliminary injunction remains in effect.<sup>9</sup>

This report discusses S.B. 1070 and notable preemption issues raised by some of its provisions. It examines rulings made by the reviewing district and appellate court concerning the federal government's legal challenge. It also discusses other preemption issues potentially raised by S.B. 1070 or similar legislation, including some issues that have yet to be addressed by the reviewing courts. It should be noted that the upholding of the district court's preliminary injunction by the Ninth Circuit panel is not the final word as to the constitutionality of S.B. 1070 or similar measures which may be contemplated in other states. It is possible that the district court could

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<sup>5</sup> See *Arizona I*, 703 F. Supp. 2d at 987 (listing those sections of S.B. 1070 that the federal government did not seek to preliminarily enjoin); *id.* at 1000, 1003-1004 (finding the United States is not likely to succeed on its claim that sections of S.B. 1070 relating to alien smuggling are preempted by federal law).

<sup>6</sup> Arizona sought expedited review of its appeal by the Ninth Circuit, but this motion was denied. See Circuit Court Denies Motion to Expedite Appeal in AZ SB 1070 Case, AILA InfoNet, Aug. 2, 2010, available at <http://www.aila.org/content/default.aspx?docid=32544>.

<sup>7</sup> 2011 U.S. App. LEXIS 7413 (9<sup>th</sup> Cir. Apr. 11, 2011) [hereinafter "*Arizona II*"]. One judge dissented in part, and would have reversed the district court's finding that the federal government was likely to prevail on the merits of its challenge to those provisions of S.B. 1070 pertaining to immigration status determinations and warrantless arrests. See *id.* at \*81-\*147. A district court decision granting a preliminary injunction is reviewed for abuse of discretion and may be reversed if based on an erroneous legal standard or clearly erroneous findings of fact. *Id.* at \*4. Conclusions on issues of law, including the construction of federal statutes and whether they preempt state or local measures, are reviewed *de novo*. *Id.*

<sup>8</sup> See Ginger Rough and Michael Kiefe, *Gov. Jan Brewer wants Supreme Court to Overturn SB 1070 Ruling*, ARIZ. REP., May 9, 2011.

<sup>9</sup> A motion for a preliminary injunction is granted when, *inter alia*, the plaintiff has shown likelihood of success on the merits and would suffer irreparable harm if the injunction is not granted. See, e.g., *Winter v. NRDC, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008). However, a likelihood of irreparable harm can generally be easily shown where "an alleged constitutional infringement" is involved. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9<sup>th</sup> Cir. 1997). See also *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (stating that a federal court may enjoin "state officers who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution") (internal citations omitted); *Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 771 (10<sup>th</sup> Cir. 2010) (suggesting that irreparable injury is an inherent result of the enforcement of a state law that is preempted on its face). On April 5, 2011, the district court granted the Arizona State Legislature permission to intervene in DOJ's challenge to S.B. 1070. See *AZ State Legislature Will Intervene in Defense of SB 1070 against Obama Justice Department*, JD J., Apr. 6, 2011, available at <http://www.jdjournal.com/2011/04/06/az-state-legislature-will-intervene-in-defense-of-sb-1070-against-obama-justice-department>.

analyze the preemption issues raised by S.B. 1070 differently when it issues its final ruling as to the merits of the government's challenge. Further, it remains to be seen whether the Ninth Circuit might potentially reconsider the issue *en banc*.<sup>10</sup> Moreover, if legislation similar to S.B. 1070 is enacted in another jurisdiction and subsequently faces legal challenge, it is possible that a reviewing court would assess the relevant legal issues differently than the courts currently considering the constitutionality of S.B. 1070.

## I. Background

The foreign born population of the United States has grown rapidly from the 1980s onward. A significant component of this population, an estimated 28% in 2009,<sup>11</sup> resides in the United States without legal authorization, either as a result of fraudulent or surreptitious entry or of overstaying nonimmigrant visas that had allowed their temporary presence in the country. In 1986, approximately 3 million unauthorized aliens resided in the United States. By 2006, the estimated number of unauthorized aliens had more than tripled.<sup>12</sup>

As the population of unauthorized aliens grew, several impacted states sued the federal government to recover the costs of benefits and services they were required to provide unauthorized aliens because of the alleged failure of the federal government to enforce immigration law adequately. These lawsuits failed.<sup>13</sup> Meanwhile, many jurisdictions throughout the country have sought to deter the presence of unauthorized aliens and reduce attendant costs through a variety of enforcement measures of their own.<sup>14</sup>

As a legal matter, states have inherent "police powers" to promote and regulate safety, health, welfare, and economic activity within their respective jurisdictions. The exercise of state police powers may be limited by the rights owed to individuals under the Constitution. Moreover, these powers can be affected by assertions and delegations of federal authority, which may change over time. When they do, state powers can be concomitantly restricted or expanded. Beginning in the 1970s, federal legislation on aliens more frequently regulated the incidents of daily life of noncitizens, lawful and unlawful. Prime examples include rules on noncitizen access to public benefits and programs, and sanctions against employers who hire unauthorized workers. To some degree, new federal restrictions crowded out concurrent state regulation. At the same time, however, the push by Congress to regulate the stay of aliens in the United States more comprehensively also included, particularly in two statutes enacted in 1996,<sup>15</sup> increased authority

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<sup>10</sup> Although Arizona will apparently seek Supreme Court review of the circuit panel's decision, it is possible that it may reconsider, or that it will seek *en banc* review if the Court declines to grant certiorari to review the panel's ruling.

<sup>11</sup> Jeffrey S. Passel & D'Vera Cohn, Pew Hispanic Center, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade*, at iv (Sept. 1, 2010). Recent estimates suggest that both the migration and overall population of unauthorized aliens residing in the United States have decreased to mid-decade levels. *See id.* at 3.

<sup>12</sup> *See* CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem.

<sup>13</sup> *E.g.*, *Texas v. United States*, 106 F.3d 661 (5<sup>th</sup> Cir. 1997); *Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994).

<sup>14</sup> According to one commentator, a total of 1,562 bills on illegal immigration were introduced in the 50 state legislatures in 2007, 240 of which were enacted into law. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMM. L.R. 459, 459 (2008).

<sup>15</sup> Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, Division C; Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), P.L. 104-193.

for the states to mirror federal benefit restrictions and cooperate with immigration enforcement generally.

Laws like Arizona's S.B. 1070, even as modified by H.B. 2162, appear to test the legal limits of a trend toward greater state involvement. Nevertheless, not all jurisdictions have reacted similarly in responding to the influx of unauthorized aliens and the perception of growing state and local authority to react to it. At the one end of the spectrum, some jurisdictions (occasionally referred to as "sanctuary cities") have been unwilling to assist the federal government in enforcing measures that distinguish between legal and non-legal residents of the community, and, in some cases, have actively opposed providing assistance to federal enforcement efforts.<sup>16</sup> Moving toward the middle of the spectrum, some states and localities communicate with federal immigration enforcement officers under limited circumstances (e.g., after arresting an unauthorized alien for a criminal offense), but for various reasons do not take a more active role in deterring illegal immigration.

At the other end of the spectrum are jurisdictions, like Arizona, that have actively sought to deter the presence of unlawfully present aliens within their territory. Some of these jurisdictions have assisted federal authorities in apprehending and detaining unauthorized aliens, including under written agreements with federal immigration authorities made under § 287(g) of the Immigration and Nationality Act (INA).<sup>17</sup> More controversially, some states and localities have considered, and in a few cases enacted, measures intended to deter the presence of aliens who are in the United States without legal authorization, including by limiting access to housing, employment, or municipal services.<sup>18</sup> In May 2011, the Supreme Court ruled in the case of *Chamber of Commerce v. Whiting* that federal law did not preempt a state statute requiring employers to use the federal government's E-Verify system to determine the work eligibility of employees, and which authorized the suspension or revocation of the business licenses of entities that knowingly employed unauthorized aliens.<sup>19</sup> It seems likely that this ruling will inform deliberations by some states or localities as to whether to adopt similar measures.<sup>20</sup>

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<sup>16</sup> The federal government has taken steps to eliminate sanctuary policies. Pursuant to PRWORA § 434 and IIRIRA § 642, states and localities may not limit their governmental entities or officers from maintaining records regarding a person's immigration status, or bar the exchange of such information with any federal, state, or local entity. For further discussion, see CRS Report RS22773, "*Sanctuary Cities*": *Legal Issues*, by Michael John Garcia.

<sup>17</sup> 8 U.S.C. § 1101, *et seq.* INA § 287(g) authorizes the Secretary of Homeland Security to enter a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined ... to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

8 U.S.C. § 1357(g)(1). INA § 287(g)(10) further provides that this section does not require the existence of such an agreement in order for a state or local entity to "cooperate with ... [federal immigration authorities] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10).

<sup>18</sup> See generally CRS Report RL34345, *State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments*, by Kate M. Manuel, Jody Feder and Alison M. Smith.

<sup>19</sup> *Chamber of Commerce of the United States v. Whiting*, 2011 U.S. LEXIS 4018 (U.S. May 26, 2011).

<sup>20</sup> It is unclear how courts will apply the *Whiting* decision when reviewing other state and local immigration measures. *Whiting* focused primarily upon questions of statutory interpretation pertaining to state restrictions upon employing unauthorized aliens, but the majority seemed skeptical of arguments that state enactments in this area disrupted the balance between deterring unauthorized immigration, protecting employers from burdensome requirements, and (continued...)

## II. Major Provisions of S.B. 1070, As Modified

Section 1 of S.B. 1070 declares that the provisions of the legislation are “intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”<sup>21</sup> It further declares the intent to establish a state-wide policy of “attrition through enforcement.”<sup>22</sup> “Attrition through enforcement” has been described by some observers as an approach to deter unlawful migration and encourage the compelled or voluntary exit of unlawfully present aliens through the “steady, across-the-board enforcement of our immigration laws.”<sup>23</sup> This approach is most often associated with more vigorous and efficient implementation of employer sanctions, improved recordkeeping and more secure documents, and other measures to make current law more effective. It can also imply better cooperation between the states and federal immigration authorities, and the adoption of state and local laws that discourage the presence of unauthorized aliens.<sup>24</sup>

These objectives are reflected in the major provisions of S.B. 1070, which can arguably be characterized as falling into two categories: (1) those provisions that seek to bolster direct enforcement of federal immigration law, including through the identification and apprehension of aliens who are unlawfully present in the United States, by state and local law enforcement; and (2) those provisions that criminalize conduct which may facilitate the presence of unauthorized aliens within Arizona. Sections 2 and 6 of S.B. 1070 can be characterized as falling within the former category, while Sections 3-5 fall within the latter.

Section 2 of S.B. 1070 directs state and local law enforcement officers and agencies, whenever making a lawful stop, detention, or arrest pursuant to the enforcement of state or local laws, to make a reasonable attempt whenever practicable to determine the person’s immigration status, if there is reasonable suspicion to believe the person is an alien who is unlawfully present in the country.<sup>25</sup> A person is presumed not to be an unlawfully present alien if he can provide specified documentation, such as an Arizona driver’s license.<sup>26</sup> An attempt to determine status need not be made if it would hinder or obstruct an investigation.<sup>27</sup> The immigration status of a person who is arrested must be determined before the person is released.<sup>28</sup> In implementing these provisions,

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preventing discrimination established under federal law and policy. It remains to be seen whether courts will find the majority’s treatment of balancing with respect to employer sanctions relevant to other immigration matters.

<sup>21</sup> S.B. 1070, § 1.

<sup>22</sup> *Id.*

<sup>23</sup> CRS Report R41207, *Unauthorized Aliens in the United States*, by Andorra Bruno, at 12 (quoting Mark Krikorian, *Attrition by Enforcement is the Best Course of Action*, SPARTANBURG (S.C.) HERALD-JOURNAL (Sept. 30, 2007)).

<sup>24</sup> *Id.* at 12-13.

<sup>25</sup> S.B. 1070, § 2, as amended by H.B. 2162, § 3. Before being modified by H.B. 2162, S.B. 1070 also called for law enforcement to inquire into the immigration status of any person with whom they had “lawful contact,” upon reasonable suspicion that the person was an unlawfully present alien. This language appeared to encompass a far wider range of interactions than the modified provision. See S.B. 1070, § 2 (as originally enacted).

<sup>26</sup> S.B. 1070, § 2.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* There is some ambiguity as to how this provision is to be construed in light of the provision requiring immigration status determinations during lawful stops, detentions, or arrests. On one hand, these provisions could be read separately, meaning that *all* arrested persons would need to have their immigration status verified prior to release. On the other hand, reading these provisions in conjunction might support an interpretation of more limited scope. (continued...)

law enforcement officials “may not consider race, color, or national origin” except to the extent permitted by the U.S. or Arizona Constitution.<sup>29</sup> Section 2 further mandates that the U.S. Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP) be notified when an unlawfully present alien who has been convicted of a crime is released from prison or is assessed a monetary penalty.<sup>30</sup> Additionally, S.B. 1070 authorizes state and local law enforcement officials to transport unlawfully present aliens in their custody to a federal facility.<sup>31</sup>

Section 2 also prohibits restrictions upon state or local officials or agencies sending, receiving, exchanging, or maintaining information relating to the immigration status of an individual for the purpose of determining eligibility for public services or benefits, verifying domicile or residence, or determining whether a person is in compliance with federal alien registration laws.<sup>32</sup> It further provides that any legal resident of Arizona may bring suit to challenge any state or local policy that restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law.<sup>33</sup>

Section 3 criminalizes some activities currently proscribed by federal immigration laws. If a person violates 8 U.S.C. §§ 1304(e) or 1306(a),<sup>34</sup> he will also be guilty of the state crime of “willful failure to complete or carry an alien registration document.”<sup>35</sup> Modifications by H.B. 2162 eliminated the penalty structure under S.B. 1070 for alien registration violations, which would have made these offenses felonies in certain circumstances, and substituted a provision making all violations misdemeanors.<sup>36</sup> This section does not apply with respect to aliens who maintain authorization from the federal government to remain in the United States.<sup>37</sup>

Sections 4 and 5 of S.B. 1070 address activities relating to the transport and harboring of unlawfully present aliens. Section 4 modifies a preexisting Arizona statute addressing alien smuggling, but this amendment does not alter the earlier statute’s substantive scope.<sup>38</sup> More

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Under this more narrow interpretation, Arizona law enforcement officers are generally required to inquire into the immigration status of persons who are stopped, detained, or arrested whenever they have reasonable suspicion to believe such persons are unlawfully present aliens. However, persons who were stopped or detained may be released from custody pending verification of their immigration status with federal authorities, while those who have been arrested may not be released until their status has been verified. In reviewing S.B. 1070, both the district court and a majority of the appellate court panel adopted the former interpretation. *See Arizona I*, 703 F. Supp. 2d at 994; *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*11-\*15.

<sup>29</sup> S.B. 1070, § 2, as amended by H.B. 2162, § 3. Prior to amendment by H.B. 2162, the act provided that race, color, or national origin could not be the “sole factor” for determining reasonable suspicion, except to the extent authorized by the U.S. or Arizona Constitution.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*, § 2, as amended by H.B. 2162, § 3. Prior to being modified by H.B. 2162, S.B. 1070 had authorized residents to bring suits to challenge state and local practices, as well.

<sup>34</sup> 8 U.S.C. § 1304(e) mandates that every alien over the age of 18 carry any certificate of alien registration or alien registration receipt card issued to him, and makes failure to comply a misdemeanor offense. 8 U.S.C. § 1306(a) makes it a misdemeanor offense for an alien who is required to apply for registration and be fingerprinted to willfully fail or refuse to do so.

<sup>35</sup> S.B. 1070, § 3.

<sup>36</sup> *Id.*, as amended by H.B. 2162, § 4.

<sup>37</sup> *Id.*

<sup>38</sup> Specifically, S.B. 1070 provides that in the enforcement of the earlier smuggling statute, ARIZ. REV. STAT. § 13-2319, (continued...)

significantly, Section 5 adds a new criminal statute prohibiting alien smuggling-related activities, when such activities are committed by a person who is also in violation of another criminal offense. Specifically, Section 5 imposes criminal penalties upon the transport of an alien within the state in furtherance of the alien's illegal presence in the United States, when done with knowledge or in reckless disregard of the alien's unauthorized status.<sup>39</sup> Harboring an alien or encouraging an alien to come to or reside in Arizona with knowledge or in reckless disregard of the fact that the alien's presence is in violation of the law is also prohibited.<sup>40</sup> Further, vehicles used in committing an offense under the new smuggling statute are subject to mandatory immobilization or impoundment.<sup>41</sup>

Section 5 also makes it an Arizona crime for an unlawfully present alien to apply for or solicit work in the state, or work as an employee or an independent contractor in the state.<sup>42</sup> Separately, it is unlawful for an occupant of a motor vehicle that is stopped on a roadway to pick up and hire, or attempt to hire, passengers for work at a different location, if the motor vehicle blocks or impedes the normal movement of traffic.<sup>43</sup> Section 5 also makes it unlawful for a person to enter the motor vehicle in such circumstances, in order to be hired by the vehicle's occupant.<sup>44</sup>

Section 6 further authorizes officers to make an arrest without a warrant if they have probable cause to believe the person to be arrested has committed any "public offense" that makes the person removable from the United States.<sup>45</sup> Arizona law elsewhere defines a "public offense" as any "conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state in which it occurred," and, if the act occurred outside Arizona, would have been punishable under Arizona law if it had occurred in the state.<sup>46</sup>

### III. Overview of Preemption

The central issue that has been raised in litigation challenging S.B. 1070 concerns whether its major provisions are preempted by federal law. The doctrine of preemption derives from the Supremacy Clause of the Constitution, which establishes that federal law, treaties, and the Constitution itself are "the supreme Law of the Land."<sup>47</sup> Thus, one essential aspect of the federal structure of government is that states can be precluded from taking actions that are otherwise within their authority if federal law is thereby thwarted. "States cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce

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a law enforcement officer is authorized to stop any person operating a motor vehicle if the officer has reasonable suspicion that the person violated a civil traffic law. S.B. 1070, § 4.

<sup>39</sup> S.B. 1070, § 5.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, § 6. See generally CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia (discussing criminal activity making an alien removable). There is also potential ambiguity as to the meaning of this provision. See *infra* footnote 115 and accompanying text.

<sup>46</sup> ARIZ. REV. STAT. § 13-105(26) (2009).

<sup>47</sup> U.S. CONST. art. VI, cl. 2.

additional or auxiliary regulations.”<sup>48</sup> An act of Congress may preempt state or local action in a given area in any one of three ways: (1) the statute expressly states preemptive intent (express preemption); (2) a court concludes that Congress intended to occupy the regulatory field,<sup>49</sup> thereby implicitly precluding state or local action in that area (field preemption); or (3) state or local action directly conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption).<sup>50</sup> The delineation between these categories, particularly between field and conflict preemption, is not rigid.<sup>51</sup>

The power to set rules for which aliens may enter and remain in the United States is undoubtedly federal, and the breadth and detail of regulation Congress has established in the INA<sup>52</sup> precludes substantive state regulation concerning which noncitizens may enter or remain. Nevertheless, the Supreme Court has never held that “every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised.”<sup>53</sup> In the 1976 case of *De Canas v. Bica*, the Court held that state regulation of matters within their jurisdictions that were only tangentially related to immigration would, “absent congressional action[,] ... not be an invalid state incursion on federal power.”<sup>54</sup> The Court further indicated that field preemption claims against state action that did not conflict with federal law could only be justified when the “complete ouster of state power ... was the clear and manifest purpose of Congress.”<sup>55</sup> Still, the *De Canas* Court recognized that, even in situations where federal immigration law “contemplates some room for state legislation,” a state measure might nonetheless be unenforceable on conflict preemption grounds if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA.”<sup>56</sup>

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<sup>48</sup> *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) (internal citations omitted).

<sup>49</sup> Congressional intent to “occupy the field” to the exclusion of state law can be inferred when “[1] the pervasiveness of the federal regulation precludes supplementation by the States, [2] where the federal interest in the field is sufficiently dominant, or [3] where the object sought to be obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (internal quotations omitted).

<sup>50</sup> See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248-49 (1984); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203-04 (1983).

<sup>51</sup> See *English*, 462 U.S. at 79 n.5 (“By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation.”); *Crosby*, 530 U.S. at 373 n.6.

<sup>52</sup> 8 U.S.C. § 1101, et seq.

<sup>53</sup> *De Canas v. Bica*, 424 U.S. 351, 355 (1976). Indeed, during the nineteenth century, when federal regulation of immigration was far more limited in scope, state legislation limiting the rights and privileges of certain categories of aliens was common. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993). Many of these restrictions would now be preempted by federal immigration law.

<sup>54</sup> *De Canas*, 424 U.S. at 356.

<sup>55</sup> *Id.* at 357.

<sup>56</sup> *Id.* at 363 (internal quotations omitted). See also *Crosby*, 530 U.S. at 373 (2000) (quoting *Hines*, 312 U.S. at 67). *De Canas* concerned a California statute that imposed sanctions on employers who hired unlawful aliens if that employment adversely affected lawful workers. When Congress added federal employer sanctions to the INA in 1986, it expressly preempted state or local laws that sanctioned employers (other than through licensing or similar laws) for hiring unauthorized workers. See INA § 274a(h)(2), 8 U.S.C. § 1324a(h)(2).

A separate but somewhat related legal issue concerns the authority of states and localities to directly enforce provisions of the INA, including by investigating and making arrests for criminal and civil violations of federal immigration law. As a general matter, it appears well established that states have at least implicit authority to make arrests for violations of federal law, unless the nature or purpose of the federal regulatory scheme precludes state action.<sup>57</sup> Historically, the authority for state and local law enforcement officials to enforce immigration law has been construed to be generally limited to certain criminal provisions of the INA.<sup>58</sup> By contrast, the enforcement of the civil provisions, including the apprehension and removal of deportable aliens, has been viewed as a federal responsibility, with states and localities preempted from playing more than an incidental supporting role, except to the extent specifically authorized by federal law.<sup>59</sup>

For the first several decades following the INA's enactment, the prevailing assumption appears to have been that the INA's deportation provisions constituted a pervasive regulatory scheme under which state and local enforcement was preempted.<sup>60</sup> Then in the 1980s and 1990s, some jurisdictions that were heavily impacted by immigration grew more insistent in characterizing federal enforcement of federal immigration law as inadequate. In part to address these concerns, Congress included authority in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) for the Attorney General (now the Secretary of Homeland Security) to enter into cooperative agreements with states and localities under which trained state and local law enforcement officers can, under federal supervision and subject to federal direction, perform certain functions relative to the investigation, apprehension, or detention of unlawful aliens to the extent permitted by state or local law.<sup>61</sup> The enacted version of this measure was significantly narrower than some of those considered (a House-passed version, for example, would have authorized agreements permitting states to carry out all deportation functions, including prosecution, adjudication, and physical removal<sup>62</sup>), but all of the proposals that were seriously considered seem to have reflected a perception that, absent a cooperative arrangement with federal authorities, states and localities would play at most a secondary and supportive role in the enforcement of the civil provisions of the INA.

But a restrictive view of a state and local role in the enforcement of immigration law may be changing. In 2002, the Office of Legal Counsel (OLC) within the DOJ issued a memorandum which concluded that "federal law did not preempt state police from arresting aliens on the basis

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<sup>57</sup> See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."); *Gonzales v. City of Peoria*, 722 F.2d 468, 473 (9<sup>th</sup> Cir. 1983) ("The general rule is that local police are not precluded from enforcing federal statutes."), *overruled on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9<sup>th</sup> Cir. 1999).

<sup>58</sup> *Gonzalez*, 722 F.2d at 474-75 (9<sup>th</sup> Cir. 1983). See also Dept. of Justice, Office of Legal Counsel, *Assistance by State and Local Police in Apprehending Illegal Aliens*, 20 Op. O.L.C. 26, 1996 WL 33101191 at \*4-6 (Feb. 5, 1996) [hereinafter "1996 OLC Opinion"]; Jeff Lewis, et al., *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 BENDER'S IMMIGRATION BULLETIN No. 15, at 944 (Aug. 1, 2002).

<sup>59</sup> For further discussion, see CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

<sup>60</sup> *Gonzalez*, 722 F.2d at 474-75. See also 1996 OLC Opinion, *supra* footnote 58, 1996 WL 33101191, at \*13-\*16; Lewis, *supra* footnote 58, at 944.

<sup>61</sup> IIRIRA, P.L. 104-208, Div. C, § 133, adding INA § 287(g), 8 U.S.C. § 1357(g).

<sup>62</sup> H.R. 2202, § 133 (104<sup>th</sup> Cong., 2<sup>nd</sup> Sess.) (House-passed version).

of civil deportability,” and it withdrew the advice of a 1996 OLC opinion which had suggested otherwise.<sup>63</sup> Additionally, a series of cases decided by the Tenth Circuit variously drew no distinction between the criminal and civil provisions of the INA in relation to state and local enforcement authority, or alluded to the “implicit authority” or the “general investigatory authority” of the states to engage in civil immigration enforcement activities.<sup>64</sup> More recently in litigation concerning S.B. 1070, however, a majority of the reviewing Ninth Circuit panel rejected the argument that states have implicit or inherent authority to enforce the civil provisions of the INA.<sup>65</sup>

## **State Enforcement of Immigration Law Under Section 2**

Much of the attention surrounding S.B. 1070 has centered on Section 2 of the enactment. As discussed previously, Section 2 requires state and local law enforcement officials to facilitate the detection of unauthorized aliens in their daily enforcement activities, presumably so that these aliens may be transferred to federal custody for removal. This requirement was challenged in the DOJ’s suit against Arizona, and its implementation was preliminarily enjoined by the district court because the court found that the government was likely to prevail in its argument that the requirement is preempted by federal law. In a 2-1 ruling, the reviewing Ninth Circuit panel affirmed. Other aspects of Section 2 were neither challenged by the DOJ nor enjoined by the district court, including the provision concerning the sharing of immigration-related information by state and local authorities, as well as the provision authorizing Arizona residents to bring suit challenging state or local policies which limit the enforcement of federal immigration law.

## **Sharing of Immigration Status Information Between Government Entities**

Federal law contemplates some level of cooperation between state and federal agencies in the enforcement of immigration laws. In 1996, Congress passed measures intended, at least in part, to deter states and localities from limiting information-sharing with the federal government on immigration matters. Pursuant to IIRIRA § 642 and § 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), states and localities may not limit their governmental entities or officers from maintaining records regarding a person’s immigration status, or bar the exchange of such information with any federal, state, or local entity. In addition to imposing obligations upon states and localities to refrain from restricting their agencies and

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<sup>63</sup> Dept. of Justice, Office of Legal Counsel, *Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations*, at 8 (Apr. 3, 2002) [hereinafter “2002 OLC Opinion”]. Initially, the DOJ did not make the 2002 OLC opinion publicly available. Several immigration and public interest groups sought disclosure under the Freedom of Information Act. See *Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350 (2<sup>nd</sup> Cir. 2005). As a result of this litigation, the DOJ was required to release a redacted version of the opinion, which can be viewed at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf> or [http://www.fairus.org/site/DocServer/OLC\\_Opinion\\_2002.pdf?docID=1041](http://www.fairus.org/site/DocServer/OLC_Opinion_2002.pdf?docID=1041). See also 1996 OLC Opinion, *supra* footnote 58, 1996 WL 33101191, at \*16 (“[W]e conclude that state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability”).

<sup>64</sup> *United States v. Santana-Garcia*, 264 F.3d 1188 (10<sup>th</sup> Cir. 2001); *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10<sup>th</sup> Cir. 1999); *United States v. Salinas-Calderon*, 728 F.2d 1298 (10<sup>th</sup> Cir. 1984). See generally CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

<sup>65</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*58 (“Arizona suggests ... that it has the inherent authority to enforce federal *civil* removability without federal authorization, and therefore that the United States will not ultimately prevail on the merits. We do not agree.”).

officers from communicating with federal authorities regarding immigration matters, IIRIRA § 642 also imposed an obligation upon federal immigration authorities to respond to immigration-related inquiries from states and localities. Specifically, IIRIRA § 642(c) requires federal immigration authorities

to respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.<sup>66</sup>

Aspects of S.B. 1070 have clearly been informed by these measures. Generally, provisions of S.B. 1070 that concern determinations of persons' immigration status require verification with the federal government pursuant to the mechanism established by IIRIRA § 642(c). Other provisions of S.B. 1070 resemble those provisions of PRWORA and IIRIRA that prohibit state and local agencies from restricting the sharing of information related to immigration status with other federal, state, and local entities. Section 2 of S.B. 1070 bars any restriction (other than those imposed by federal law) upon state or local officers and agencies sending, receiving, maintaining, or exchanging information on immigration with other federal, state, and local government entities, when such activity is done for the purpose of determining eligibility for public services or benefits, verifying a person's claim of domicile or residence, or determining whether a person is complying with federal alien registration laws. On their face, these provisions might reasonably be viewed as consonant with provisions of PRWORA and IIRIRA concerning the sharing of immigration-related information by federal, state, and local entities. On the other hand, it is possible that these provisions could be interpreted more broadly to, for example, permit the fostering of inquiries into immigration status by state and local employees beyond those inquiries currently undertaken incident to those employees' official duties.

## **Detection of Unauthorized Aliens By State and Local Law Enforcement under Section 2**

Those provisions of S.B. 1070 which contemplate state and local law enforcement actively participating in the detection of unauthorized aliens raise more significant preemption issues. Especially prior to its modification by H.B. 2162, Section 2 of S.B. 1070 arguably appeared to authorize intensive, daily involvement in immigration law enforcement by state and local officers beyond established precedents. As originally enacted, a component of Section 2 (generally referred to as "Section 2(B)" in the opinions of the district and appellate courts) provided that whenever a law enforcement officer had "lawful contact" with a person and reasonable suspicion existed that the person was an unlawfully present alien, the officer was required, where practicable, to determine the person's immigration status. Case law in the Tenth Circuit has supported the authority of police to inquire into immigration status in certain circumstances incidental to otherwise authorized enforcement of criminal law, violations of state traffic laws, and similar offenses.<sup>67</sup> Inquiring into status pursuant to "lawful contact" perhaps could have been

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<sup>66</sup> 8 U.S.C. § 1373(c).

<sup>67</sup> The Tenth Circuit has upheld inquiries and arrests by state law enforcement officers related to suspected immigration law violations, without appearing to distinguish between violations which are civil or criminal in nature. *See, e.g., Santana-Garcia*, 264 F.3d at 1194 (state law enforcement officers have "implicit authority" within their respective jurisdictions to investigate and make arrests for violations of immigration law, even without express authorization from the state); *Vasquez-Alvarez*, 176 F.3d at 1295 (INA provision authorizing state officials to arrest and detain unlawfully present aliens who had previously been deported on criminal grounds, but only upon confirmation of aliens' illegal (continued...))

read as sufficiently circumscribed to fit within this line of cases (though its reception by the Ninth Circuit, where Arizona rests, appeared less certain at the time when S.B. 1070 was enacted<sup>68</sup>). However, “lawful contact” also appeared susceptible to an interpretation that covered any manner of casual interaction between the police and the public that was “lawful.” H.B. 2162 modified this provision to limit immigration status inquiries to situations where a law enforcement agency or officer made a “lawful stop, detention, or arrest” for a violation of state or local law.<sup>69</sup> In addition, S.B. 1070, as modified, also establishes that persons arrested by state or local law enforcement shall have their immigration status verified with federal authorities prior to their release.<sup>70</sup> Federal immigration authorities also shall be notified when an unauthorized alien is released from prison or has been assessed a monetary penalty, and local law enforcement officials may transport unauthorized aliens in their custody to a federal facility.<sup>71</sup>

Many of the above-described activities are the kind often contemplated in cooperative agreements between the Department of Homeland Security (DHS) and state or local law enforcement authorities. In 1996, Congress authorized the Attorney General (now the Secretary of Homeland Security) to enter into formal agreements with state or local entities that permit those entities to play a direct role in the enforcement of federal immigration law. Agreements entered pursuant to INA § 287(g) (commonly referred to as “287(g) agreements”) enable specially trained state or local officers to perform specific functions relative to the investigation, apprehension, or detention of aliens, during a predetermined timeframe and under federal supervision. For example, the DHS has entered 287(g) agreements with several jurisdictions to allow correctional officers and other jail personnel to question persons who are being detained for crimes about their immigration status and begin paperwork for transferring suspected removable aliens to federal custody upon their release. Some other agreements authorize a limited number of highly trained personnel to more broadly engage in field enforcement under direct supervision of federal immigration agents.<sup>72</sup> State or local officers performing functions pursuant to 287(g) agreements

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status with federal authorities, “does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration law”); *Salinas-Calderon*, 728 F.2d at 1301 n. 2 (“A state trooper has general investigatory authority to inquire into possible immigration violations”). For additional discussion of these opinions, see CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel. See also Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (discussing decisions by the 10<sup>th</sup> Circuit and other federal courts which arguably support the authority of states and localities to make arrests for civil violations of federal immigration law).

<sup>68</sup> See, e.g., *Gonzalez*, 722 F.2d at 476 (“[A]n intent to preclude local enforcement may be inferred where the system of federal regulation is so pervasive that no opportunity for state activity remains. We assume that the civil provisions of the [INA] regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”).

<sup>69</sup> H.B. 2162, § 3. Arizona law contains a few criminal offenses in which unauthorized immigration status is an element of the offense (e.g., smuggling unauthorized aliens, failing to comply with federal requirements for alien registration). Accordingly, an Arizona law enforcement officer’s suspicion that a person is an unauthorized alien might be a relevant factor when assessing whether there is reasonable suspicion to stop the person for a suspected violation of state law. However, neither federal nor state law makes it a criminal offense for an alien to be unlawfully present in the United States. The fact that an officer has reasonable suspicion to believe that an alien is unlawfully present might not alone provide sufficient grounds to reasonably suspect that he has committed a criminal offense. See *infra* text accompanying footnote 177 (describing other requirements besides unauthorized status that are necessary for an alien to be criminally liable under federal alien registration law).

<sup>70</sup> S.B. 1070, § 2.

<sup>71</sup> *Id.*

<sup>72</sup> See CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John (continued...)

are not considered federal employees, except for purposes relating to certain tort claims and compensation matters, but are considered to be acting under color of federal law for purposes of liability and immunity from suit in any civil actions brought under federal or state law.<sup>73</sup> There are several 287(g) agreements in place between federal immigration authorities and Arizona state, city, and county law enforcement agencies, permitting designated officers to perform specified functions under federal supervision.<sup>74</sup>

Section 2(B) of S.B. 1070 does not purport to be based on a delegation of federal immigration enforcement authority under INA § 287(g). Instead, its legal foundation appears premised on the belief that states generally possess inherent power to enforce federal laws, and that federal immigration law does not preempt the kind of enforcement activities contemplated by S.B. 1070.<sup>75</sup> This position appears to be based on similar legal reasoning as that found in the 2002 OLC opinion and the Tenth Circuit cases mentioned above.<sup>76</sup> To the extent that the performance of immigration enforcement functions by Arizona officials is not done pursuant to a 287(g) agreement, arguments may be raised that states and localities are preempted from engaging in such functions. It should be noted, however, that INA § 287(g)(10) plainly states that a written 287(g) agreement is not required for state or local entities to “cooperate ... in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”<sup>77</sup> An issue which may arise in litigation concerning state efforts to enforce federal immigration law is whether the “cooperation” contemplated under INA § 287(g)(10) requires states and localities to consult and coordinate their immigration enforcement efforts with federal authorities, or whether “cooperation” may also be interpreted to permit states and localities to independently enact measures that are consistent with, and arguably further, federal policies related to the detection and removal of unauthorized aliens.

The DOJ challenged the provision of Section 2(B) requiring state law enforcement to investigate the immigration status of stopped persons who are suspected of being unlawfully present aliens, claiming that this provision was preempted. The DOJ argument focused on the “mandatory” nature of this scheme. According to the DOJ, this scheme would result in a “dramatic increase” in

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<sup>73</sup> INA § 287(g)(7)-(8), 8 U.S.C. § 1357(g)(7)-(8).

<sup>74</sup> See U.S. Immigration and Customs Enforcement, Office of State and Local Coordination, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, available at [http://www.ice.gov/pi/news/factsheets/section287\\_g.htm#top](http://www.ice.gov/pi/news/factsheets/section287_g.htm#top) (discussing 287(g) program and providing links to copies of agreements in force).

<sup>75</sup> *United States v. Arizona*, No. CV-10-1413, Defendant’s Response to Motion for Preliminary Injunction (D. Ariz. filed July 20, 2010) [hereinafter “Arizona Response”], at 14, 18 (approvingly citing the DOJ’s 2002 OLC Opinion, which recognized state authority to enforce civil provisions of the INA, and arguing that immigration verification requirements contained in Section 2 of S.B. 1070 codified the state’s “existing authority”), available at [http://azgovernor.gov/dms/upload/PR\\_072010\\_USvAZDefendantsResponsePlaintiffMotionPI.pdf](http://azgovernor.gov/dms/upload/PR_072010_USvAZDefendantsResponsePlaintiffMotionPI.pdf). See also *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*58 (noting Arizona’s argument that it has inherent authority to enforce federal immigration statutes without express federal authorization).

<sup>76</sup> See *supra* text accompanying footnote 67; 2002 OLC Opinion, *supra* footnote 63, at 2-4.

<sup>77</sup> INA § 287(g)(10), 8 U.S.C. § 1357(g)(10). However, state and local authorities engaging in immigration enforcement functions under INA § 287(g)(10) would not appear to possess the same rights and immunities as state and local authorities acting pursuant to a 287(g) agreement. See INA § 287(g)(7)-(8), 8 U.S.C. § 1357(g)(7)-(8) (providing that state and local authorities acting under a 287(g) agreement shall be treated as federal employees for purposes of compensation by the federal government for injuries occurring during the performance of their duties, and also stating that such persons shall be considered to be acting under color of federal law in any civil suit arising from their immigration enforcement activities).

the number of requests for immigration status verification received by federal immigration enforcement authorities,<sup>78</sup> “diverting resources and attention from the dangerous aliens who the federal government targets as its top enforcement priority.”<sup>79</sup> The DOJ also claimed that Section 2(B) would impose impermissible burdens upon lawfully present aliens and U.S. citizens who are stopped or detained by Arizona law enforcement and cannot readily prove their citizenship or legal immigration status; a “form of treatment which Congress has plainly guarded against in crafting a balanced, federally-directed immigration enforcement scheme.”<sup>80</sup> The district court held that the government would likely succeed on this challenge, and a three-judge Ninth Circuit panel affirmed in a 2-1 decision.

While the district court focused primarily upon the potential burdens that S.B. 1070 would impose on lawful immigrants and federal resources,<sup>81</sup> the majority of the circuit panel found that Section 2(B) was likely preempted for different reasons. Writing for the panel majority, Judge Richard A. Paez stated that Section 2(B) conflicted with the federal immigration enforcement scheme, which the majority characterized as permitting “state officers to systematically aid in immigration enforcement *only* under the close supervision” of federal immigration authorities.<sup>82</sup> In reaching this conclusion, the panel majority focused primarily upon the meaning of INA § 287(g).<sup>83</sup> A majority of the reviewing Ninth Circuit panel found that the provisions of INA § 287(g) authorizing the Secretary of DHS to enter into written agreements enabling state and local officers to perform specific immigration enforcement functions under federal direction to be indicative of congressional intent for state involvement in immigration enforcement to generally occur under federal supervision.<sup>84</sup> The majority further found that INA § 287(g)(10), which refers to state and local “cooperation” in immigration enforcement in the absence of a 287(g) agreement, as encompassing only assistance on “an incidental and as needed basis” when requested by the Secretary or otherwise necessary.<sup>85</sup>

The majority also rejected Arizona’s argument that “Congress has expressed a clear intent to *encourage* the assistance from state and local law enforcement officers” when it required, via enactment of IIRIRA § 642(c),<sup>86</sup> that DHS respond to inquiries from state and local governments regarding the immigration status of individuals. While the Ninth Circuit panel agreed that IIRIRA

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<sup>78</sup> *Plaintiff’s PI Motion*, *supra* footnote 3, at 51.

<sup>79</sup> *Arizona Complaint*, *supra* footnote 3, at 17.

<sup>80</sup> *Id.* at 18.

<sup>81</sup> *See Arizona I*, 703 F. Supp. 2d at 995-98.

<sup>82</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*21-\*22 (emphasis in original).

<sup>83</sup> *Id.*, at \*15-\*22.

<sup>84</sup> *Id.* at \*16-\*17.

<sup>85</sup> *Id.* at \*19. *Id.* at \*18. The majority was concerned that reading INA § 287(g)(10) without reference to subsections (g)(1)-(9) would “nullify” these provisions. Specifically, the majority pointed to use of the word “removal” in subsection (g)(10)(B) as indicating that “cooperation” is generally limited to assistance under a 287(g) agreement because states and localities cannot remove aliens, only the federal government can. *Id.* at \*18-\*20. Apparently taking the view that the federal government must authorize state and local enforcement of federal immigration law, the majority found that INA § 287(g)(10) does not “operate as a broad alternative grant of authority” for state and local officers to enforce federal law absent a 287(g) agreement, or permit them to “adopt laws dictating how and when state and local officers *must* communicate with the Attorney General regarding the immigration status of an individual.” *Id.* at \*18, \*20. The majority did not address the argument that states and localities have inherent authority to enforce federal immigration law in its discussion of Section 2(B), although it did in its discussion of Section 6. *See infra* footnotes 114 to 136 and accompanying text.

<sup>86</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*22-\*23 (emphasis in original).

§ 642(c) “demonstrates that Congress contemplated state assistance in the identification of undocumented immigrants,” the majority opinion concluded that such assistance must occur within the boundaries established by INA § 287(g), rather than “in a manner dictated by a state that furthers a state immigration policy.”<sup>87</sup>

A majority of the circuit panel also held that Section 2(B) was likely preempted because its verification requirements would “interfere[] with Congress’ delegation of discretion to the Executive branch in enforcing the INA.”<sup>88</sup> The court reached this conclusion, in part, through application of the Supreme Court’s decisions in *Crosby v. National Foreign Trade Council* and *Buckman Co. v. Plaintiffs’ Legal Committee*.<sup>89</sup> In *Crosby*, the Court found that a statute prohibiting state agencies from buying goods or services from companies that do business with Myanmar (Burma) was preempted by a federal statute that “Congress clearly intended . . . to provide the President with flexible and effective authority” in dealing with Myanmar,<sup>90</sup> while in *Buckman*, the Court similarly found that tort claims under state law that were based on alleged fraud perpetuated against the Food and Drug Administration were preempted, because such claims would interfere with the “flexibility [which] is a critical component of the [federal] statutory and regulatory framework.”<sup>91</sup> The circuit panel majority described the INA as giving the President similar flexibility in the area of immigration enforcement, and found that Section 2(B) represented an attempt by Arizona “to hijack a discretionary role that Congress delegated to the Executive.”<sup>92</sup>

The panel majority further found that the government was likely to prevail in its preemption challenge to Section 2(B) because of the measure’s “deleterious effect” on foreign relations, as well as “the threat of 50 states layering their own immigration enforcement rules on top of the INA.”<sup>93</sup> In finding that Section 2(B) was very likely preempted on foreign policy grounds, the majority opinion emphasized the Supreme Court’s statement in *American Insurance Association v. Garamendi* that “even . . . the *likelihood* that state legislation will produce something more than *incidental* effect in conflict with express foreign policy of the National Government would require preemption of the state law.”<sup>94</sup> It found such an effect here, given that a number of foreign

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<sup>87</sup> *Id.* at \*23.

<sup>88</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*26. The district court had also found that Section 2(B) imposed an impermissible burden upon the federal government, but its analysis focused upon the provision’s effect upon federal resources. The lower court concluded that Section 2(B) would result in a large number of immigration status requests being received by federal authorities. *Arizona I*, 703 F. Supp. 2d at 995. The court characterized this increase in number as likely to impermissibly tax federal resources and “redirect federal agencies away from the priorities they have established.” *Id.* at 996. The court noted, for example, that a large number of persons are “technically ‘arrested’ but never booked into jail or perhaps even transported to a law enforcement facility.” *Id.* at 995. The court also suggested, but did not address, the possibility that the period of detention for at least some arrestees awaiting verification of their immigration status could be lengthened to such a degree as to violate the Fourth Amendment. *Id.* at 995 n.6.

<sup>89</sup> *See id.* at \*27.

<sup>90</sup> 530 U.S. 363, 374 (2000).

<sup>91</sup> 531 U.S. 341, 349 (2001).

<sup>92</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*28.

<sup>93</sup> *Id.* at \*24. The district court had similarly expressed concern that Section 2(B) could potentially interfere with the federal government’s responsibility “to maintain international relationships, for the protection of American citizens abroad as well as to ensure uniform national foreign policy.” 703 F. Supp. 2d at 997 (citing *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941), and also quoting *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (“We recognize . . . the Nation’s need to ‘speak with one voice’ in immigration matters.”)).

<sup>94</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*29 (quoting with added emphasis *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420 (2003)).

leaders and international organizations have criticized S.B. 1070, and Mexico had taken “affirmative steps” to protest it, including postponing review of a U.S.-Mexico agreement on emergency management cooperation.<sup>95</sup> The majority also found that the possibility of similar enactments by other states weighed in favor of preemption given that “each additional state statute incrementally diminishes the agency’s control over enforcement of the federal statute and thus further detracts from the integrated scheme of regulation created by Congress.”<sup>96</sup>

In addition to joining the majority opinion, Judge John T. Noonan wrote a separate concurrence to emphasize his view that Section 2(B) and other provisions of S.B. 1070 were inconsistent with federal foreign policy. He further characterized the regulation of immigration as a subset of foreign policy, and argued that the “foreign policy of the United States preempts the field entered by Arizona.”<sup>97</sup>

In a partial dissent from the majority’s ruling, including its conclusion that Section 2(B) of the Arizona statute was preempted, Judge Carlos T. Bea disputed the majority’s finding that Section 2(B) impermissibly burdened federal immigration enforcement priorities. According to the dissent, through the enactment of INA § 287(g)(10) and IIRIRA § 642(c), “Congress has clearly expressed its intention that state officials *should* assist federal officials in checking the immigration status of aliens and in the ‘identification, apprehension, detention, or removal of aliens not lawfully present in the United States.’”<sup>98</sup> Additionally, the dissent argued that the verification requirements established by Section 2(B) did not encroach on “federal flexibility,” because the mandatory language of IIRIRA § 642(c) made clear that Congress did not intend for the executive branch to have any flexibility in determining whether to provide states with properly requested immigration status information.<sup>99</sup> The dissent also disputed the majority’s conclusion that Section 2(B) was likely preempted on foreign policy grounds. According to the dissent, preemption is warranted only when a state or local measure conflict with “*established* foreign relations goals,” and no goal had been identified that was in conflict with Section 2(B).<sup>100</sup> The dissent also disagreed with the majority’s conclusion that state measures like Section 2(B) threatened to disrupt the immigration enforcement scheme established by Congress. The dissent viewed the adoption of such measures as being entirely consistent with the immigration enforcement framework established by federal law, which purportedly reflected Congress’s desire for states to play an active role in the identification of unlawfully present aliens.<sup>101</sup>

The Ninth Circuit’s analysis of Section 2(B) did not address every issue raised by the district court. Notably, the appellate court did not directly opine on the lower court’s determination that Section 2(B) was likely preempted because of the burdens it would impose upon lawfully present aliens.<sup>102</sup> In reaching this conclusion, the district court relied heavily on the Supreme Court’s

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<sup>95</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*30-\*31.

<sup>96</sup> *Id.* at \*34 (quoting *Wis. Dep’t of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 288 (1986) (internal punctuation omitted)).

<sup>97</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*75-\*77 (Noonan, J., concurring).

<sup>98</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*86-\*87 (Bea, J., dissent) (quoting INA § 287(g)(10)(B)).

<sup>99</sup> *Id.* at \*115-\*116 (Bea, J., dissent).

<sup>100</sup> *Id.* at \*118-\*119 (Bea, J., dissent).

<sup>101</sup> *Id.* at \*120-\*121 (Bea, J., dissent).

<sup>102</sup> *Arizona I*, 703 F. Supp. 2d at 997-98. When discussing these provisions, the district court also noted, but did not address, the possibility that they could result in impermissible racial profiling. *Id.* at 997 n.11.

ruling in the 1941 case of *Hines v. Davidowitz*.<sup>103</sup> In *Hines*, the Supreme Court struck down a Pennsylvania law that generally required adult aliens to register with the state once a year. According to the *Hines* Court, this requirement “necessarily place[d] lawfully present aliens (and even U.S. citizens) in continual jeopardy of having to demonstrate their lawful status to non-federal officials,” despite Congress’s manifest intent to regulate immigration “in such a way as to protect the personal liberties of law-abiding aliens through one uniform national ... system[] and to leave them free from the possibility of inquisitorial practices and police surveillance.”<sup>104</sup> The district court concluded that, like the state law struck down in *Hines*, the Arizona law’s mandatory immigration status verification requirement would place an impermissible burden upon lawfully present aliens.<sup>105</sup>

It should be noted, however, that Ninth Circuit panel and the district court focused upon the “mandatory” nature of the immigration verification regime established by Section 2(B) in finding that the government is likely to succeed in its challenge. Thus, the courts’ rulings would not necessarily bar Arizona law enforcement from attempting to verify the immigration status of apprehended persons on a more limited, case-by-case basis. In fact, the panel majority’s opinion apparently contemplates such attempts at verification in limited circumstances.<sup>106</sup> The DOJ also seemed to suggest in its argument before the district court that it did not view discretionary attempts by state or local law enforcement to verify the immigration status of individuals as raising the same preemption concerns as Arizona’s “mandatory” requirements relating to status verification.<sup>107</sup>

It is also unclear to what extent the reviewing courts’ respective analysis of the burdens imposed by Section 2(B) upon the federal government and lawfully present aliens is dependent upon the government’s current immigration enforcement priorities and allocation of resources, and whether any future changes in federal enforcement priorities would alter such analysis.<sup>108</sup>

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<sup>103</sup> 312 U.S. 52 (1941).

<sup>104</sup> *Id.* at 74.

<sup>105</sup> Although the status verification requirements of Section 2(B) are directed towards persons suspected of being unlawfully present aliens, the district court stated that lawfully present aliens are also likely to be affected:

Legal residents will certainly be swept up by this requirement, particularly when the impacts of the provisions pressuring law enforcement agencies to enforce immigration laws are considered. Certain categories of people with transitional status and foreign visitors from countries that are part of the Visa Waiver Program will not have readily available documentation of their authorization to remain in the United States, thus potentially subjecting them to arrest or detention, in addition to the burden of “the possibility of inquisitorial practices and police surveillance.”

*Arizona I*, 703 F. Supp. 2d at 997 (internal citations omitted).

<sup>106</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*19-\*20 (noting that state and local authorities can communicate immigration status information obtained or needed in the performance of “regular state duties,” so long as these duties do not entail the systematic enforcement of federal immigration law absent a 287(g) agreement).

<sup>107</sup> *Plaintiff’s PI Motion*, *supra* footnote 3, at 25 (“Before passage of S.B. 1070, Arizona police had the same discretion to decide whether to verify immigration status during the course of a lawful stop as any other state or federal law enforcement officer.”).

<sup>108</sup> *But see Arizona II*, 2011 U.S. App. LEXIS 7413, at \*113-\*114 (Bea, J., dissent) (“The internal policies of ICE do not and cannot change this result. The power to preempt lies with Congress, not with the Executive ... Otherwise, evolving changes in federal ‘priorities and strategies’ from year to year and from administration to administration would have the power to preempt state law, despite there being no new Congressional action.”).

## **Authorization of Private Suits in Response to State or Local Limitations on Enforcement of Immigration Law**

Issues might also be raised with respect to the provision of S.B. 1070 authorizing any legal resident of Arizona to file suit to challenge any policy of a state or local government entity that “limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law.”<sup>109</sup> This authority might be seen as helping to ensure that state and local agencies comply with all applicable federal immigration statutes, and that these entities do not impede the federal government’s ability to carry out its immigration enforcement activities (e.g., by restricting their employees from sharing immigration information with federal authorities).<sup>110</sup> Alternatively, it might plausibly be interpreted more expansively to allow suits challenging whether Arizona officials are actively enforcing federal immigration law to the fullest extent possible. If the latter interpretation is adopted, the extent to which states or localities may permissibly enforce federal immigration law could become an issue in future litigation.

The district court that considered the DOJ’s challenge to S.B. 1070 did not view the federal government as having directly challenged this provision,<sup>111</sup> and it did not enjoin it from taking effect.<sup>112</sup> It did, however, note that this provision could encourage Arizona law enforcement to more rigorously enforce other provisions of S.B. 1070 that raised preemption issues.<sup>113</sup>

## **Warrantless Arrests of Persons Who Have Committed a Criminal Offense Making Them Deportable**

The district court also preliminarily enjoined the enforcement of Section 6 of S.B. 1070, pending a final ruling on the merits of the DOJ’s claims. This holding was affirmed by the reviewing Ninth Circuit panel in a 2-1 decision. As discussed earlier, Section 6 authorizes Arizona law enforcement to make warrantless arrests of aliens when there is probable cause to believe that they have committed “public offenses” which make them removable under the INA. Arizona law defines “public offense” as conduct punishable under a state’s law by fine or imprisonment, provided, in cases where the offense occurs outside Arizona, that the activity would have been punishable under Arizona law if it had occurred in the state.<sup>114</sup> The implications of this provision may depend on how broadly it is interpreted and applied. On one hand, if Section 6 is interpreted in a limited fashion, so as to permit the arrest of persons to face criminal proceedings in Arizona or another state having criminal jurisdiction, it would not facially appear to raise significant

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<sup>109</sup> S.B. 1070, § 2, as amended by H.B. 2162, § 3.

<sup>110</sup> Indeed, H.B. 2162 amended the original language of S.B. 1070 to specify that a person could bring suit against those government entities that were in violation of PRWORA and IIRIRA provisions which bar states and localities from implementing policies which restrict communication with federal authorities regarding immigration matters. H.B. 2162, § 3.

<sup>111</sup> *Arizona I*, 703 F. Supp. 2d at 986. In its complaint, the DOJ had suggested that this provision of S.B. 1070, acting in conjunction with the separate provision requiring law enforcement to investigate the immigration status of stopped, detained, or arrested persons suspected of being unlawfully present, would eliminate officer discretion to decline to apply S.B. 1070’s provisions. *Arizona Complaint*, *supra* footnote 3, at 16-17.

<sup>112</sup> *Arizona I*, 703 F. Supp. 2d at 986. As originally enacted, S.B. 1070 also allowed suits challenging *practices* that limit or restrict the enforcement of federal immigration law. However, this language was deleted by H.B. 2162.

<sup>113</sup> See *Arizona I*, 703 F. Supp. 2d at 997.

<sup>114</sup> ARIZ. REV. STAT. § 13-105.

preemption issues.<sup>115</sup> On the other hand, more serious preemption issues might be raised if Section 6 is interpreted to permit the arrest of aliens who have already been convicted of a criminal offense and completed their sentences, so that such persons may be transferred to federal custody for removal. The latter interpretation was adopted by both the reviewing district court and Ninth Circuit panel.<sup>116</sup>

When assessing the district court's determination that Section 6 was likely preempted, the circuit panel identified the central legal question as being "whether federal law likely preempts Arizona from allowing its officers to effect warrantless arrests based on probable cause of removability."<sup>117</sup> A majority of the reviewing panel found that Section 6 was likely preempted, because it "interferes with the carefully calibrated scheme of immigration enforcement that Congress has adopted..."<sup>118</sup> The majority noted that Congress had expressly authorized state and local police to make arrests for civil immigration violations in more limited circumstances than permitted under the Arizona statute. Specifically, pursuant to § 439 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA, P.L. 104-132),<sup>119</sup> Congress had expressly authorized state and local police to arrest unlawfully present aliens who had previously been convicted of a felony so that they could be transferred to the custody of federal immigration authorities, provided that certain other requirements were fulfilled. The panel majority viewed Section 6 to be inconsistent with congressional intent because it permits state and local police to arrest aliens for civil deportation violations in a broader set of circumstances than had been authorized under AEDPA § 439 (e.g., in situations where an alien had committed a misdemeanor offense that made him removable). The majority also found it significant that Section 6 gives state and local officers broader authority to make warrantless arrests than federal law provides to federal immigration officers.<sup>120</sup>

In finding that the government is likely to prevail in its challenge to Section 6, the panel majority plainly held that states do not possess the inherent authority to enforce the civil removability provisions of the INA without express federal authorization<sup>121</sup> – a conclusion which had been

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<sup>115</sup> Indeed, in Arizona law enforcement training materials, Section 6 is characterized as "not appear[ing] to change Arizona law." *Arizona I*, 703 F. Supp. 2d at 1004 (quoting Arizona Peace Officer Standards and Training Board, *Implementation of the 2010 Ariz. Immigration Laws - Statutory Provisions for Peace Officers*, at 11 (Jun. 2010), available at [http://agency.azpost.gov/supporting\\_docs/ArizonaImmigrationStatutesOutline.pdf](http://agency.azpost.gov/supporting_docs/ArizonaImmigrationStatutesOutline.pdf)). Under Arizona law, state and local law enforcement were generally permitted to make warrantless arrests for public offenses when probable cause exists (and, in the case of misdemeanors, the underlying conduct was committed in the officer's presence). *Id.* See also ARIZ. REV. STAT. § 13-105(26) (defining "public offense" and "offense" synonymously), § 13-3883 (authorizing warrantless arrests for felony, misdemeanor, and traffic offenses when certain criteria are met). Even under a narrow interpretation of Section 6, it is possible that legal arguments might be raised against the provision, including its authorization of warrantless arrests of misdemeanor offenses. There may be little precedent for warrantless arrests for out-of-state misdemeanors (or for in-state misdemeanors not committed in an officer's presence) with an apparent expectation that the arrestee will be detained and deported.

<sup>116</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*55

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at \*58. The dissent, however, disagreed with the majority's conclusion that AEDPA § 432 represents the "full extent" of the arrest power that Congress intended state and local officers to exercise, as well as the view that state and local officers' authority to make warrantless arrests cannot exceed that of federal officers. *Id.* at \*137-\*140 (Bea, J., dissent).

<sup>119</sup> 8 U.S.C. § 1252c.

<sup>120</sup> *Id.* at \*57. According to the majority, this conflicts with the INA because "we are not aware of any INA provision indicating that Congress intended state and local law enforcement officers to enjoy greater authority to effectuate a warrantless arrest than federal immigration officers." *Id.*

<sup>121</sup> *Id.* at \*58.

suggested, but not definitively decided, in a prior ruling by the Ninth Circuit in the case of *Gonzales v. City of Peoria* (in that same opinion, the court held that state and local officers were not preempted from arresting persons for criminal violations of federal immigration law).<sup>122</sup> In support of this holding, the circuit panel noted that a similar decision had been reached by the U.S. Court of Appeals for the Sixth Circuit.<sup>123</sup> The majority also discussed and rejected the reasoning of a series of decisions by the U.S. Court of Appeals for the Tenth Circuit, which have been understood to support the position that state and local authorities possess the inherent authority to enforce both the civil and criminal provisions of the INA.<sup>124</sup>

The panel majority's conclusion that state and local officers generally cannot arrest persons for civil immigration violations was partially based upon its characterization of various provisions of federal immigration law. In particular, the majority interpreted AEDPA § 439 as reflecting Congress's view that state and local officers generally lack authority to enforce the civil provisions of the INA, absent authorization from the federal government. The majority also found that INA § 287(g)(10) "neither grants, nor assumes the preexistence of, inherent state authority to enforce civil immigration laws in the absence of federal supervision."<sup>125</sup> If INA § 287(g)(10) were understood to confer or recognize such authority, the majority claimed, it would render AEDPA § 439 and the remainder of INA § 287(g) "superfluous, and we do not believe that Congress spends its time passing unnecessary laws."<sup>126</sup> The majority concluded that it was:

not persuaded that Arizona has the inherent authority to enforce the civil provisions of federal immigration law. Therefore, Arizona must be federally-authorized to conduct such enforcement. Congress has created a comprehensive and carefully calibrated scheme—and has authorized the Executive to promulgate extensive regulations—for adjudicating and enforcing civil removability. S.B. 1070 Section 6 exceeds the scope of federal authorization for Arizona's state and local officers to enforce the civil provisions of federal immigration law. Section 6 interferes with the federal government's prerogative to make removability determinations and set priorities with regard to the enforcement of civil immigration laws. Accordingly, Section 6 stands as an obstacle to the full purposes and objectives of Congress.<sup>127</sup>

Additionally, the panel majority found that Section 6 posed a similarly detrimental effect upon foreign affairs as Section 2(B), and could "lead to 50 different state immigration schemes piling on top of the federal scheme."<sup>128</sup>

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<sup>122</sup> In *Gonzales*, the Ninth Circuit had "*assume[d]* that the civil provisions of the [INA] regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with exclusive federal power over immigration." 772 F.2d 468, 475 (9<sup>th</sup> Cir. 1983) (emphasis added) (holding that federal law does not preempt state and local enforcement of the criminal provisions of the INA), *overruled on other grounds by* *Hodgers-Durgin v. de la Vine*, 199 F.3d 1037 (9<sup>th</sup> Cir. 1999).

<sup>123</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*60 (citing *United States v. Urrieta*, 520 F.3d 569 (6<sup>th</sup> Cir. 2008)).

<sup>124</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*63-67\* (recognizing conflict with and expressing criticism of *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10<sup>th</sup> Cir. 1999)). For further discussion regarding the conflicting circuit views concerning the authority of state and local officers to enforce federal immigration law, see CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

<sup>125</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*67.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at \*69-\*70.

<sup>128</sup> *Id.*

In his dissent from the majority's ruling that Section 6 was likely preempted, Judge Bea criticized the panel for holding that states and localities are generally preempted from enforcing the civil provisions of the INA. He characterized most jurisprudence as supporting the proposition that state and local officers are generally not preempted from making arrests for violations of federal law, including arrests for immigration violations.<sup>129</sup> The dissent also construed INA § 287(g)(10) as reflecting congressional recognition that state police may assist in the enforcement of both the civil and criminal provisions of the INA, even in the absence of a 287(g) agreement. The dissent further claimed that AEDPA § 439 was not intended to define the parameters of state authority to arrest aliens for civil immigration violations.<sup>130</sup>

Although the Ninth Circuit panel upheld the lower court's preliminary injunction against Section 6, its preemption analysis was much different. Whereas the appellate court's analysis focused directly on the issue of whether state and local officers were preempted from enforcing the civil provisions of the INA in the absence of express federal authorization, the lower court's analysis focused primarily on the perceived burdens that Section 6 would impose upon lawfully present aliens who might be mistakenly arrested by Arizona law enforcement, given the "substantial complexity [involved] in determining whether a particular public offense makes an alien removable from the United States."<sup>131</sup> The district court viewed Section 6 as requiring state and local officers to make two determinations when arresting persons for offenses in other states: (1) whether the conduct would have been a crime if committed in Arizona,<sup>132</sup> and (2) whether the conduct constituted a deportable offense under federal immigration law. The court characterized the latter determination, in particular, as a "task of considerable complexity that falls under the exclusive authority of the federal government."<sup>133</sup> It further noted that, although some provisions of S.B. 1070 require that DHS be contacted in order to verify immigration status, Section 6 contains no such mandate.<sup>134</sup> Moreover, the court did not believe that DHS officers would necessarily be able to provide Arizona authorities with information as to whether a particular offense made an alien deportable.<sup>135</sup> Rather, the court characterized administrative immigration judges and the federal appellate courts as having the ultimate responsibility for determining whether an alien has committed a deportable offense.<sup>136</sup>

## **Criminalization of Immigration-Related Conduct**

As a general matter, preemption issues may potentially be raised whenever states criminalize immigration-related conduct. State measures addressing issues that have traditionally been subject to state regulation and upon which federal law remains silent seem least susceptible to legal challenge. More serious preemption concerns may be raised when states criminalize matters

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<sup>129</sup> See *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*127-\*128, \*132-\*134 (Bea, J., dissent) (citing and discussing, *inter alia*, *United States v. Di Re*, 332 U.S. 581 (1948) (involving arrest by state officers of person for knowingly possessing counterfeit gasoline ration coupons, in violation of federal law); *Muehler v. Mena*, 544 U.S. 93 (2005) (holding that that local police officers' questioning of an individual regarding her immigration status while they searched the premises of a house she occupied for dangerous weapons did not violate the Fourth Amendment).

<sup>130</sup> See *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*136-\*146 (Bea, J., dissent).

<sup>131</sup> *Arizona I*, 703 F. Supp. 2d at 1006.

<sup>132</sup> *Id.* at 1005.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1006.

<sup>135</sup> *Id.* at 1006 n. 21.

<sup>136</sup> *Id.* at 1005-1006.

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 the entry and removal of aliens from 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 federal law is arguably intended to wholly occupy this field.

Provisions of S.B. 1070 criminalizing immigration-related conduct have been subject to legal challenge. Some, but not all, of S.B. 1070's criminal provisions have been enjoined by the district court from taking effect, pending a final ruling on the merits of the federal government's challenge. The Ninth Circuit unanimously affirmed the district court's injunction of the Arizona provisions relating to alien registration and the solicitation or performance of work by unauthorized aliens.

### **Criminalizing the Hiring of Persons Picked Up Along Roadways**

Section 5 of S.B. 1070 makes it a misdemeanor offense under Arizona law for an occupant of a motor vehicle stopped on the roadway to attempt to hire or hire and pick up passengers for work at a different location, if the motor vehicle blocks or impedes the normal movement of traffic. The law also imposes a misdemeanor penalty upon those persons who enter a stopped motor vehicle to be hired and transported to work at a different location, if the vehicle blocks or impedes the normal traffic flow. Although these provisions cover conduct that often facilitates the employment of unauthorized aliens, the provisions criminalize conduct without regard to the participants' citizenship or immigration status.<sup>137</sup> This provision was not challenged in the DOJ's lawsuit against Arizona, and it has not been enjoined from taking effect. Challenges have been brought against this provision by a few private parties,<sup>138</sup> but the reviewing court has yet to rule on the merits of their claims.<sup>139</sup>

It is well established that not every state law which tangentially touches upon immigration matters is preempted.<sup>140</sup> Further, courts have stated that when a state acts pursuant to its historic police powers, there is a presumption against preemption of the state law, unless federal law evidences a "clear and manifest purpose" to supersede state action.<sup>141</sup> The regulation of the hiring of persons along busy roadways appears well within a state's traditional powers, and federal law

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<sup>137</sup> S.B. 1070, § 5 also makes it a misdemeanor for an unlawfully present alien to knowingly apply for work, solicit work in a public place, or perform work as an employee or independent contractor in Arizona. This provision is discussed elsewhere in this report.

<sup>138</sup> See, e.g., *Friendly House*, *supra* footnote 3, at 36-39;

<sup>139</sup> See *Friendly House v. Whiting*, No. CV 10-1061, Order (D. Ariz., May 10, 2011) (denying without prejudice petitioner's motion for preliminary injunction of S.B. 1070's restriction on roadside hiring, and declining to consider merits of petitioner's argument pending *en banc* decision by the Ninth Circuit in another case involving roadside hiring, as this decision which would likely impact the district court's analysis of S.B. 1070).

<sup>140</sup> *De Canas*, 424 U.S. at 355. See also *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) (striking down portions of state measure that sought to deter unauthorized migration through various state enforcement activities, but upholding portion criminalizing the making or use of false documents to conceal the "true citizenship or resident status" of a person, because state had a legitimate interest in "criminalizing conduct that is dishonest and deceptive").

<sup>141</sup> *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, (1947)). But see *United States v. Locke*, 529 U.S. 89, 108 (2000) ("an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence").

is silent on this matter. Accordingly, it does not appear that this provision facially poses a serious preemption issue, though it is possible that preemption issues could be raised in its application (e.g., if the law was only applied when law enforcement suspected that the prospective employee was an unauthorized alien).

Occasionally, local laws barring solicitation of employment along public streets have been stricken by the courts as violating the First Amendment.<sup>142</sup> The underlying legal theory is that streets are important public forums where the government can impose only narrowly tailored restrictions on speech to serve significant government interests. The requirement in S.B. 1070 that premises a violation on the blocking or impeding of normal traffic may make the provision less vulnerable to First Amendment attack, but the state might nevertheless eventually bear the burden of showing that there are alternative public places for soliciting employment and that other activity that can impede traffic (e.g., solicitation of charitable contributions) is similarly regulated. This argument was not raised by the federal government in its challenge to S.B. 1070, but the district court indicated its view in *dicta* that a recent Ninth Circuit decision in the case of *Comite de Jornaleros v. City of Redondo Beach* “forecloses a challenge to [this provision of S.B. 1070] on First Amendment grounds.”<sup>143</sup> Following the district court’s decision, however, the Ninth Circuit agreed to an *en banc* rehearing of *Redondo Beach*.<sup>144</sup> The *en banc* court’s ruling will likely determine the viability of any First Amendment challenge to S.B. 1070’s restriction on roadside hiring.

## Criminalizing Alien Smuggling Activities

Under INA § 274, the federal government has criminalized various activities relating to the transportation of unauthorized aliens into or within the United States, as well as the harboring of such aliens in the country, or encouraging or inducing such aliens to come to or reside in the United States.<sup>145</sup> For criminal liability to attach, the offender must generally act with knowledge or in reckless disregard of the alien’s unlawful status. Provisions of S.B. 1070 imposing criminal penalties upon alien smuggling activities and amending a previously-enacted Arizona alien smuggling statute have been challenged on the ground that they are preempted by INA § 274, but these challenges have thus far proven unsuccessful.

Even prior to the enactment of S.B. 1070, Arizona law imposed criminal penalties for certain activities that are likely also subject to criminal penalty under INA § 274. Arizona’s “human smuggling” statute, which was enacted in 2005, generally makes it a felony under state law for any person, for profit or commercial purpose, to transport or procure transportation for an unauthorized alien, when the offender knows or has reason to know the person’s unauthorized

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<sup>142</sup> E.g., *Comite de Jornaleros v. City of Redondo Beach*, 475 F. Supp. 2d 952 (C.D. Cal. 2006), reversed by 607 F.3d 1178 (9<sup>th</sup> Cir. 2010), *en banc* rehearing agreed to, 623 F.3d 1054 (9<sup>th</sup> Cir. 2010).

<sup>143</sup> *Arizona I*, 703 F. Supp. 2d at 1000 n.16. A month prior to the district court’s ruling, the Ninth Circuit Court of Appeals had found that a provision of a city municipal code that prohibited the act of standing on a street or highway and soliciting employment, business, or contributions from occupants of vehicles constituted a valid time, place, or manner restriction upon speech, in part, because it did not “single out particular ideas for differential treatment.” *City of Redondo Beach*, 607 F.3d at 1187. See also *ACORN v. City of Phoenix*, 798 F.2d 1260, 1273 (9<sup>th</sup> Cir. 1986) (upholding a municipal ordinance which provided that “[n]o person shall stand on a street or highway and solicit, or attempt to solicit, employment, business or contributions from the occupants of any vehicle”).

<sup>144</sup> 623 F.3d 1054 (9<sup>th</sup> Cir. 2010).

<sup>145</sup> 8 U.S.C. § 1324. See also CRS Report RL34501, *Alien Smuggling: Recent Legislative Developments*, by Michael John Garcia.

status.<sup>146</sup> Section 4 of S.B. 1070 makes a minor amendment to this statute that does not affect its substantive scope. More significantly, Section 5 adds a separate criminal offense under state law for any person, “who is in violation of a criminal offense,” to transport or harbor unauthorized aliens, or encourage or induce such aliens to come to or reside in the state, when such activities are done in knowing or reckless disregard of the alien’s unauthorized status.<sup>147</sup> The purpose of the phrase “who is in violation of a criminal offense” is unclear. The offenses described in Section 5 of S.B. 1070 would almost always constitute criminal offenses under INA § 274, meaning that any offense under Section 5 would presumably be committed by a person “who [was also] in violation of a criminal offense” under the federal alien smuggling statute. On the other hand, the phrase “who is in violation of a criminal offense” could be interpreted in a more limited manner to only permit persons to be prosecuted under the new Arizona law for smuggling-related activities when they were also engaged in criminal conduct not described under the state statute.

In sum, Arizona has established criminal penalties under state law, pursuant to the 2005 “human smuggling” statute and the new offense created under Section 5 of S.B. 1070, for conduct similar to that which is prohibited under the federal alien smuggling statute.<sup>148</sup> Because Arizona’s alien smuggling laws operate in an area where the federal government exercises authority via INA § 274 and other immigration statutes, arguments have been raised that these laws are preempted. Federal law does not expressly preempt state or local measures criminalizing activities related to alien smuggling (though a provision of the federal alien smuggling statute impliedly authorizes states and localities to make arrests for violations of the statute<sup>149</sup>). As a result, preemption challenges against the smuggling provisions of S.B. 1070 (or Arizona’s preexisting “human smuggling” statute) have either been based upon arguments that federal alien smuggling restrictions occupy the regulatory field and preclude enforcement of similar state laws, or upon arguments that the Arizona smuggling statute directly conflicts with or otherwise frustrates the purposes of federal immigration law and policy, including by purportedly attempting to regulate the unlawful entry of aliens into the country.<sup>150</sup>

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<sup>146</sup> ARIZ. REV. STAT. § 13-2319 (2009). Although the federal alien smuggling statute also criminalizes the transport of unauthorized aliens, for liability to attach transport must be done in furtherance of an alien’s unlawful presence, whereas the Arizona statute requires that the transport be done with knowledge or in reckless disregard of the alien’s unlawful status and for profit or a commercial purpose. The new smuggling offense added by S.B. 1070 more closely mirrors the language of the federal statute concerning when criminal liability for alien transport attaches. Arizona is not the only state that criminalizes alien smuggling activities. *See, e.g.*, 21 OKL. ST. ANN. § 446 (2009).

<sup>147</sup> S.B. 1070, § 5.

<sup>148</sup> It should be noted that although smuggling offenses under Arizona law closely resemble offenses under the federal alien smuggling statute, the substantive scope of these offenses is not wholly identical. Notable as well, Arizona state and federal district courts have interpreted the state’s preexisting human smuggling statute to cover persons who conspire to smuggle *themselves* into the United States. *See State v. Barragan-Sierra*, 196 P.3d 879 (Ariz. Ct. App. 2008). *See also We Are America/Somos America, Coalition of Arizona v. Maricopa County Bd. of Sup’rs*, 594 F.Supp. 2d 1104 (D. Ariz. 2009) (rejecting field preemption challenge raised with respect to persons charged under Arizona law with conspiring to smuggle themselves), *affirmed in part and reversed in part*, 386 Fed. Appx. 726 (9<sup>th</sup> Cir. 2010).

<sup>149</sup> INA § 274(c), 8 U.S.C. § 1324(c) (“No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.”).

<sup>150</sup> *See, e.g., Plaintiff’s PI Motion, supra* footnote 3, at 39-41, 44-45 (arguing that smuggling provisions of S.B. 1070 constituted an impermissible regulation of immigration); *State v. Flores*, 188 P.3d 706 (Ariz. Ct. App. 2008) (discussing and rejecting preemption arguments raised by criminal defendants prosecuted under the 2005 smuggling statute enacted by Arizona).

The historic police power of states generally permits them to define and punish criminal activities occurring within their territory.<sup>151</sup> Thus far, Arizona's criminalization of smuggling activities occurring within its jurisdiction—both under S.B. 1070 and under the “human smuggling” statute passed in 2005—has been held by reviewing courts to fall within the scope of its traditional police powers,<sup>152</sup> and a presumption may exist that Congress's imposition of criminal penalties upon alien smuggling was not intended to preclude Arizona or other states from enacting and imposing measures consistent with federal law.<sup>153</sup> On the other hand, courts have recognized that a presumption against preemption *does not* exist in cases where a state “regulates in an area where there has been a history of significant federal presence.”<sup>154</sup> Given that federal regulation of alien smuggling has been both long-standing and pervasive in scope,<sup>155</sup> it could be argued that there is no presumption against preemption of Arizona's alien smuggling laws.<sup>156</sup>

Even assuming that Arizona's laws concerning alien smuggling are not entitled to a presumption against preemption given the degree of federal activity in this area, the measures might nonetheless be deemed valid if they are consistent with pertinent federal laws and objectives.<sup>157</sup> Thus far, state and federal courts that have considered challenges to S.B. 1070 and Arizona's 2005 human smuggling statute have rejected field preemption arguments against the statute's enforcement.<sup>158</sup>

Although the federal government requested that S.B. 1070's anti-smuggling provisions be enjoined from taking effect, the district court denied this request. In doing so, it rejected the federal government's arguments that the new smuggling offense established by S.B. 1070 was barred by the Dormant Commerce Clause,<sup>159</sup> and that it was an impermissible attempt by Arizona

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<sup>151</sup> See, e.g., *Abbate v. United States*, 359 U.S. 187, 195 (1959) (“States under our federal system have the principal responsibility for defining and prosecuting crimes.”).

<sup>152</sup> See, e.g., *Flores*, 188 P.3d at 711-712 (finding that “Arizona's human smuggling law furthers the legitimate state interest of attempting to curb ‘the culture of lawlessness’ that has arisen around this activity by a classic exercise of its police power”); *Barragan-Sierra*, 196 P.3d at 890 (holding that Arizona's human smuggling statute was a valid exercise of its police powers). Cf. *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (recognizing that “States have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal”).

<sup>153</sup> See *De Canas*, 424 U.S. at 357 (“[W]e will not presume that Congress, in enacting the INA, intended to oust state authority to regulate ... [employment of unauthorized aliens] in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was ‘the clear and manifest purpose of Congress’ would justify that conclusion.”).

<sup>154</sup> *Locke*, 529 U.S. at 108.

<sup>155</sup> Statutory proscriptions against the illegal importation of aliens into the United States can be found as far back as 1875. Act of March 3, 1875, §§ 2-4, 18 Stat. 477. The modern alien smuggling statute predates the INA, and courts have interpreted it as broadly covering many forms of assistance provided to unauthorized aliens. See generally CRS Report RL34501, *Alien Smuggling: Recent Legislative Developments*, by Michael John Garcia.

<sup>156</sup> See *Maricopa County Bd. of Sup'rs*, 594 F. Supp. 2d at 1111 (appearing to find that a presumption against preemption did not exist with respect to Arizona's “human smuggling” statute, but nonetheless concluding that the statute was not preempted by federal law).

<sup>157</sup> See *De Canas*, 424 U.S. at 357.

<sup>158</sup> *Arizona I*, 703 F.Supp.2d at 1004; *Maricopa County Bd. of Sup'rs*, 594 F. Supp. 2d at 1114; *Barragan-Sierra*, 196 P.3d at 890-91; *Flores*, 188 P.3d at 711-12.

<sup>159</sup> *Arizona I*, 703 F. Supp. 2d at 1003-1004. The court found that the government was unlikely to prevail on its argument that the challenged provision violates the Dormant Commerce Clause because, even assuming the provision has a substantial effect on interstate commerce, it does not discriminate between in-state and out-of-state economic interests. *Id.* at 1004. The “Dormant Commerce Clause” is the name given to the judicial doctrine which recognizes the Commerce Clause of the U.S. Constitution as having a “‘negative’ aspect that denies the States the power unjustifiably (continued...) ”

to regulate immigration. With respect to the latter argument, the reviewing court wrote that the new alien smuggling offense established by S.B. 1070

does not attempt to regulate who should or should not be admitted into the United States, and it does not regulate the conditions under which legal entrants may remain in the United States. Therefore, the Court concludes that the United States is not likely to succeed on its claim that [the new alien smuggling offense established by S.B. 1070] is an impermissible regulation of immigration.<sup>160</sup>

The federal government did not appeal the district court's decision.

While Arizona's 2005 "human smuggling" statute has not been directly challenged by the federal government in litigation concerning S.B. 1070, the statute has been considered by state and federal courts. In 2009, the U.S. District Court for Arizona upheld the statute against a field preemption challenge in the case of *We Are America/Somos America, Coalition of Arizona v. Maricopa County Board of Supervisors*. The plaintiffs in the case, which included six Mexican nationals who had been charged with conspiracy to violate the Arizona statute, argued that the statute was unenforceable on field preemption grounds, as it impermissibly duplicated federal immigration law in object and effect.<sup>161</sup> In declining to exercise jurisdiction to consider claims raised by the Mexican nationals pending completion of the state criminal proceedings against them, the district court found that the plaintiffs could not demonstrate that the Arizona statute was unenforceable on field preemption grounds. The district court noted that the plaintiffs did not argue that the Arizona statute was in disharmony with the INA, but only that it was duplicative. The court rejected the plaintiffs' field preemption challenge, finding that plaintiffs had failed to demonstrate, "either based upon the language or the legislative history of the INA, that 'Congress intended to preclude harmonious state regulation touching on the smuggling of illegal aliens.'"<sup>162</sup> The district court's ruling was subsequently appealed to the Ninth Circuit, where the appellate court affirmed the lower court's ruling in part, including its determination not to exercise jurisdiction to review the Mexican nationals' claims pending completion of state proceedings. With respect to the plaintiffs' field preemption claim, the appellate court simply stated that "Arizona has an important interest in enforcing its criminal statutes, and it's not 'readily apparent' that federal law preempts" either the Arizona statute or its enforcement of the law.<sup>163</sup> The circuit

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to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). "The dormant *Commerce Clause* is implicated if state laws regulate an activity that 'has a substantial effect' on interstate commerce such that Congress could regulate the activity." *Nat'l Ass'n of Optometrists & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9<sup>th</sup> Cir. 2009) (emphasis in original).

<sup>160</sup> *Arizona I*, 703 F. Supp. 2d at 1003. The government apparently abandoned its challenge to the provisions of S.B. 1070 which amended Arizona's 2005 "human smuggling" statute for purposes of its motion for a preliminary injunction. Section 4 of S.B. 1070 amends the earlier Arizona law to add that, "[n]otwithstanding any other law, in the enforcement of this section[,] a peace officer may lawfully stop any person who is operating a motor vehicle if the officer has reasonable suspicion to believe the person is in violation of any civil traffic law." In its motion requesting a preliminary injunction, the federal government sought to enjoin enforcement of Section 4, but not the underlying Arizona statute that it amended. However, its arguments before the district court focused upon the underlying Arizona statute, not Section 4, prompting the court to deny the government's motion for a preliminary injunction as to this provision. *See id.* at 1000 ("Nothing about the section standing alone warrants an injunction.").

<sup>161</sup> *Maricopa County Bd. of Sup'rs*, 594 F. Supp. 2d at 1111.

<sup>162</sup> *Id.* at 1112 (quoting *Barragan-Sierra*, 196 P.3d at 890).

<sup>163</sup> *We Are America/Somos America, Coalition of Arizona v. Maricopa County Bd. of Sup'rs*, 386 Fed. Appx. 726 (9<sup>th</sup> Cir. 2010).

court also stated that the nationals had an adequate opportunity to litigate their constitutional claims in the state court proceedings.<sup>164</sup>

It is possible that Arizona's criminalization of alien smuggling might nonetheless be subject to preemption challenges on other grounds which have not been directly opined upon by federal courts which have reviewed either S.B. 1070 or the earlier smuggling statute. For example, even state laws that are duplicative of federal law may be subject to challenge on preemption grounds if they "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>165</sup> It could be argued, for example, that when Congress established criminal penalties for alien smuggling, it did so under the expectation that offenders would not also be subject to additional criminal penalties under state law. Potential tension may arise between federal and state policies if the federal government declined to prosecute alien smuggling conduct that was subsequently prosecuted by Arizona. Such tension might be particularly significant when the federal government declines to prosecute a non-citizen for an alien smuggling offense, with the intention of permitting the alien's continued presence in the United States, only for the alien to be convicted of the offense in state court. Not only might a state conviction make the alien deportable, but it might also disqualify him from being eligible for many legal forms of relief from deportation (e.g., asylum or temporary protected status).<sup>166</sup> These considerations might merit particular consideration if Arizona opts to prosecute unlawfully present aliens under the statute on the grounds that they conspired with others to smuggle *themselves* into the United States (an interpretation that has been applied with respect to the 2005 Arizona smuggling statute).<sup>167</sup>

Although this argument already has been raised in at least one of the legal challenges to Arizona's "human smuggling" statute,<sup>168</sup> thus far the reviewing courts have concluded that the punishment of alien smuggling activities is consistent with federal objectives to deter that activity.<sup>169</sup> Nonetheless, it is uncertain whether other courts would reach similar conclusions,<sup>170</sup> as the degree

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<sup>164</sup> *Id.*

<sup>165</sup> *Crosby*, 530 U.S. at 373 (2000) (quoting *Hines*, 312 U.S. at 67).

<sup>166</sup> For example, the INA defines certain offenses as "aggravated felonies," whether committed in violation of federal or state law, including any offense *described* in the federal alien smuggling statute. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). Conviction for an "aggravated felony" is a ground for deportation and also makes an alien ineligible for most forms of relief from deportation. A conviction for an offense under Arizona's "human smuggling" statute would generally appear to fall under this definition. Although the new alien smuggling statute created by S.B. 1070 only imposes a misdemeanor penalty for a first-time offense, courts have recognized that certain misdemeanors fall under the INA's definition of "aggravated felony." See, e.g., *Biskupski v. Attorney General of U.S.*, 503 F.3d 274 (3<sup>rd</sup> Cir. 2007) (holding that misdemeanor offense of federal alien smuggling statute constituted an "aggravated felony" under the INA); *United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9<sup>th</sup> Cir. 2002) (state misdemeanor battery conviction constituted "aggravated felony"). Misdemeanor offenses may sometimes have immigration consequences, even if they do not fall under the definition of "aggravated felony" used by the INA. See *generally* CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

<sup>167</sup> See *Flores*, 188 P.3d at 707-709 (reviewing case of alien who was initially charged with having conspired to have himself smuggled into the United States in violation of Arizona's human smuggling statute, and who subsequently pled guilty to soliciting the commission of a human smuggling offense).

<sup>168</sup> See *We Are America/Somos America, Coalition of Arizona v. Maricopa County Bd. of Sup'rs*, No. CIV 06-2816, 2007 WL 2775134, \*6-7 (D. Ariz., Sept. 21, 2007) (court order in the *Maricopa County Bd. of Sup'rs* litigation recognizing that Arizona's human smuggling statute was consistent with federal immigration policy, and noting that federal government has discretion to mitigate some of the immigration consequences of a state conviction by exercising waiver authority over application of certain INA provisions).

<sup>169</sup> See *id.*; *Barragan-Sierra*, 196 P.3d at 890; *Flores*, 188 P.3d at 711.

to which states may impose additional criminal sanctions upon activities already regulated by the INA remains an unsettled issue.

## **Criminalizing Violations of Federal Alien Registration Requirements**

Section 3 of S.B. 1070 establishes criminal penalties under Arizona law for violations of federal requirements concerning alien registration. The INA generally prohibits a visa from being issued to any alien seeking admission to the United States until he has registered with immigration authorities.<sup>171</sup> Moreover, any unregistered alien present in the United States who is over the age of 14 must apply for alien registration with immigration authorities within 30 days of entry (aliens under 14 must apply for registration within 30 days of reaching their fourteenth birthday).<sup>172</sup> Registration requirements are enforced in part by INA § 266(a), which makes it a misdemeanor offense, subject to imprisonment for up to six months and/or a fine, for an alien to willfully fail or refuse to file a registration form required under federal immigration law.<sup>173</sup> Moreover, INA § 264(e) requires all registered aliens who are at least 18 years of age to carry with them and have in their personal possession “any certificate of alien registration or alien registration receipt card issued” to them.<sup>174</sup> Failure to comply with this requirement constitutes a misdemeanor, and is subject to imprisonment for not more than 30 days and/or a fine.<sup>175</sup> It should be noted that although an alien without legal authorization to be in the country is deportable under the INA, unlawful presence is not a crime under either federal or Arizona law.<sup>176</sup> Indeed, an alien who is

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(...continued)

<sup>170</sup> For example, a few state and federal courts have considered preemption challenges to local ordinances that bar the harboring or renting of property to unauthorized aliens. These courts have generally either concluded that the ordinances are preempted by federal immigration laws, or have enjoined enforcement of the ordinances pending trial on account of the preemption concerns they raise. See, e.g., *Lozano v. City of Hazleton*, 620 F.3d 170 (3<sup>rd</sup> Cir. 2010) (finding that local prohibition on renting or leasing dwelling units to unauthorized aliens constituted an impermissible regulation of immigration that was preempted by federal law); *Garrett v. City of Escondido*, Order Granting Plaintiffs’ Application For Temporary Restraining Order, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (granting temporary restraining order against local ordinance imposing civil and criminal penalties upon persons renting property to unauthorized aliens, in part because serious field preemption concerns existed because of the federal alien smuggling statute). See also *State of New Hampshire v. Barros-Batistele*, No. 05-CR-1474, 1475 (N.H. Dist. Ct. August 12, 2005), available at [http://www.courts.state.nh.us/district/orders/criminal\\_trespass\\_decision.pdf](http://www.courts.state.nh.us/district/orders/criminal_trespass_decision.pdf) (lower state court ruling dismissing on field preemption grounds trespassing charges against an alien on account of his suspected unlawful entry in the United States, as the regime of “offenses, sanctions and penalties” established by the INA left no room for supplemental action by the states).

<sup>171</sup> 8 U.S.C. § 1301. This requirement may be waived in the case of nonimmigrants entering the United States under INA §101(a)(15)(A) (ambassadors and diplomats) or INA §101(a)(15)(G) (representatives to, and officials and employees of, international organizations). INA § 221(b), 8 U.S.C. § 1201(b).

<sup>172</sup> 8 U.S.C. § 1302. For additional discussion regarding alien registration, see CRS Report RL31570, *Immigration: Alien Registration*, by Andorra Bruno.

<sup>173</sup> 8 U.S.C. § 1306(a).

<sup>174</sup> 8 U.S.C. § 1304(e). Accordingly, an alien who was not issued a registration certificate or card would not be in violation of this section. *United States v. Mendez-Lopez*, 528 F. Supp. 972 (N.D. Ok. 1981) (alien who unlawfully entered the United States and had not registered with immigration authorities was not subject to criminal penalties under INA § 264(e), because the provision attaches liability only to those persons who fail to carry an “issued” document).

<sup>175</sup> 8 U.S.C. § 1304(e).

<sup>176</sup> The only situation where unlawful presence is itself a crime is when an alien is found in the country after having been formally removed or after voluntarily departing the country while a removal order was outstanding. INA § 276, 8 U.S.C. § 1326.

unlawfully present in the United States has not necessarily engaged in conduct that would make him criminally liable under alien registration laws.<sup>177</sup>

Pursuant to S.B. 1070, a person is subject to criminal penalty under Arizona state law if he is determined to be guilty of a violation of INA § 264(e) (failure to carry registration documents) or INA § 266(a) (willful failure to complete a registration document). In enforcing the statute, an alien's immigration status may be determined through verification with immigration authorities. Initially, S.B. 1070 made a first-time offense a misdemeanor subject to fine and imprisonment for up to six months, and subsequent offenses were felonies. If aggravating factors existed, offenses would have been subject to more significant felony penalties.<sup>178</sup> H.B. 2162 amended this provision to make all offenses misdemeanors, with available penalties being lesser than or equal to those imposed directly under federal law.<sup>179</sup>

Arizona's criminalization of violations of the federal alien registration requirements was challenged on preemption grounds by the DOJ, and the district court preliminarily enjoined its enforcement after finding that the federal government is likely to prevail on the merits of its argument. The Ninth Circuit panel unanimously affirmed this decision because those sections of the INA establishing federal registration requirements constitute a "comprehensive scheme" and "include no mention of state participation."<sup>180</sup> It found this omission significant given that other provisions of the INA explicitly provide for state and local involvement.<sup>181</sup> The court also expressly rejected Arizona's assertion that those provisions of federal law authorizing states to limit certain immigrants' eligibility for benefits and impose certain sanctions on employers of unauthorized immigrants reflect Congress's "invitation" to states to "reinforce federal alien classifications."<sup>182</sup> According to the court, the authorities that Arizona relied upon in making this claim are separate from the registration provisions, and "[a]n authority from one section does not—without more—carry over to other sections."<sup>183</sup>

Like the district court, the Ninth Circuit relied upon the Supreme Court's ruling in *Hines v. Davidowitz* in finding that Arizona's alien registration provisions are likely preempted. In *Hines*, the Court found that a Pennsylvania statute requiring aliens to register with the state was

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<sup>177</sup> For example, a registered alien who overstayed his visa would not have committed a criminal offense (presuming he carried his registration with him at all times and notified immigration authorities of any change in his address), even though he was unlawfully present. Further, although all nonregistered aliens who are present in the country are required to register with the federal government, criminal liability generally only attaches if the alien *willfully* fails to apply for registration within 30 days of entry. Accordingly, an unauthorized alien present in the country less than 30 days, or who has been in the United States longer than 30 days but is unaware of alien registration requirements, would not be criminally liable. See *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1056-57 (1984) (Brennan, J., dissenting) (describing some of the situations where an unauthorized alien would not have committed a criminal violation of alien registration laws). See also *Bryan v. United States*, 524 U.S. 184, 191 (1998) ("As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.") (internal quotations omitted).

<sup>178</sup> S.B. 1070, § 3.

<sup>179</sup> H.B. 2162, § 4.

<sup>180</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*37.

<sup>181</sup> *Id.* ("By contrast, Congress provided very specific directions for state participation in [INA § 287], demonstrating that it knew how to ask for help where it wanted help; it did not do so in the registration scheme.")

<sup>182</sup> *Id.* at \*38.

<sup>183</sup> *Id.*

preempted by the Federal Alien Registration Act of 1940.<sup>184</sup> Although federal law did not expressly preempt state laws concerning alien registration, the *Hines* Court held that the federal law was intended to preempt states from imposing their own alien registration requirements. Examining the legislative history of the federal law, the Supreme Court concluded that Congress had intended to establish “a single integrated and all-embracing system” for the registration of aliens. This system precluded the enforcement of state laws that “inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations” related to alien registry.<sup>185</sup> According to the Ninth Circuit panel, Arizona’s imposition of penalties for federal alien registration violations is similarly preempted because the INA constitutes a “complete scheme of regulation” that cannot be supplemented by state or local enactments.<sup>186</sup> Additionally, the panel opinion characterized S.B. 1070’s alien registration requirements as likely being preempted because they had the “potential to lead to 50 different state immigration schemes piling on top of the federal one,” and at least two of the three panel members also believed the measure to likely be preempted on account of the “detrimental effect” it could have on foreign affairs.<sup>187</sup>

It should be noted that even if states are preempted from establishing “additional or auxiliary regulations” related to alien registry, including through the enactment of state laws punishing alien registration violations, this does not necessarily mean that they are preempted from enforcing federal alien registration requirements by arresting criminal offenders with the expectation of transferring them to federal law enforcement custody. As previously discussed, it seems well recognized (including in the Ninth Circuit) that states have implied authority to make arrests for many criminal violations of the INA, so long as those constitutional requirements concerning the ability to stop, detain, or arrest persons are satisfied and such arrests are

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<sup>184</sup> The requirements of the 1940 Act were largely incorporated into the INA. Although criminal penalties concerning failure to register were imposed by the 1940 Act, criminal penalties concerning failure to carry registration documents were added by the INA in 1952.

<sup>185</sup> *Hines*, 312 U.S. at 66-67.

<sup>186</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*38-\*39. In the district court litigation, Arizona had argued that *Hines* only precluded states from adopting registration requirements that were substantively different from those established by federal law, and not the imposition of separate state penalties for violations of the federal registration requirements. *Arizona Response*, *supra* footnote 75, at 22. However, the district court rejected this argument because it viewed S.B. 1070 as impermissibly altering the penalties for alien registration violations that had been established by Congress. *Arizona I*, 703 F. Supp. 2d at 999. Although the court did not specify how S.B. 1070 alters the penalties for federal alien registration violations, it might have been alluding to the fact that enforcement of Arizona’s alien registration law could result in the state imposing additional criminal sanctions for federal alien registration violations, separate and apart from those already imposed under federal law. Alternatively, the court might have been concerned that, as the DOJ argued, S.B. 1070 diverges from federal law by imposing the same penalty for all violations of federal registration requirements, while federal law provides for different penalties for each alien registration violation. *See Plaintiff’s PI Motion*, *supra* footnote 3, at 36, n.33 (“Unlike S.B. 1070, Congress carefully calibrated and imposed different penalties for each specific alien registration violation.”). The Constitution’s protections against double jeopardy do not preclude prosecutions for the same acts or omissions by separate sovereigns. *See Bartkus v. People of State of Ill.*, 359 U.S. 121 (1959); *United States v. Lanza*, 260 U.S. 377 (1922); *State v. Berry*, 650 P.2d 1246 (Ariz. Ct. App. 1982) (finding that double jeopardy clauses of the Constitutions of the United States and Arizona did not bar successive prosecutions under federal and Arizona law for same conduct). At one time, Arizona barred state convictions for acts or omissions which had previously been tried by either the federal government or another state, but this statutory prohibition appears to have been eliminated. ARIZ. REV. STAT. § 13-112 (1980). Other restrictions upon dual state and federal prosecutions for alien registration violations might nonetheless still apply.

<sup>187</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*42. In his partial dissent from the majority, Judge Bea noted that he concurred with the most of the majority’s reasoning regarding S.B. 1070’s alien registration requirements, except for the portion which he characterized as “allow[ing] complaining foreign countries to preempt a state law.” *Id.* at \*86 (Bea, J., dissent).

permissible under state law.<sup>188</sup> Arguably, this authority extends to making arrests for criminal violations of federal alien registration requirements.<sup>189</sup> This issue has not been definitively resolved, however, and it is possible that there may be limitations upon a state's ability to arrest persons for suspected criminal violations of federal alien registration requirements.<sup>190</sup> In upholding the lower court's preliminary injunction of Arizona's alien registration requirement, the circuit panel claimed that "[n]othing in the text of the INA's registration provisions indicates that Congress intended for states to participate in the enforcement or punishment of federal immigration registration rules"<sup>191</sup> – a statement that arguably raises some uncertainty as to whether state and local police are preempted from making arrests for federal alien registration violations.<sup>192</sup>

## Criminalizing the Solicitation or Performance of Work by Unauthorized Aliens

Prior to the enactment of the Immigration Reform and Control Act of 1986 (IRCA, P.L. 99-603), federal immigration law did not comprehensively address the employment of unlawfully present aliens, and regulation of such matters was thought to primarily be an issue governed by state law. States were understood to have "broad authority" to regulate employment relationships within their territory to protect workers and state fiscal interests.<sup>193</sup> In *De Canas v. Bica*, decided a decade prior to the passage of IRCA, the Supreme Court recognized that states were largely free to implement measures restricting the employment of unauthorized aliens within their territory, at least so long as such restrictions were focused "directly upon ... essentially local problems and [were] tailored to combat effectively the perceived evils."<sup>194</sup> The Court recognized that a state might have legitimate reasons for restricting the employment of unauthorized aliens, particularly in times of high unemployment, in order to protect the fiscal and economic interests of both the state and its lawfully resident labor force.<sup>195</sup>

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<sup>188</sup> See *supra* "III. Overview of Preemption."

<sup>189</sup> See 1996 OLC Opinion, *supra* footnote 58, 1996 WL 33101191, at \*3 ("absent knowledge of an established federal policy of not prosecuting such offenses, state police may, in our opinion, legally detain alien suspects for disposition by federal agents when there is reasonable suspicion that the suspects have violated or are violating the two commonplace misdemeanor provisions of the INA, 8 U.S.C. § 1304(e) (lack of alien registration documents) or § 1325 (illegal entry), or other criminal provisions of the INA"); U.S. Attorney's Criminal Resource Manual, § 1918, *Arrest of Illegal Aliens by State and Local Officers* (discussing state and local law enforcement officers' ability to make arrests for criminal offenses of the INA, including for criminal violations of the INA's alien registration requirements), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm01918.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01918.htm).

<sup>190</sup> See 1996 OLC Opinion, *supra* footnote 58, 1996 WL 33101191, at \*11 (interpreting Ninth Circuit's ruling in *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216 (9<sup>th</sup> Cir. 1995), as suggesting that state authority to arrest an alien for a criminal violation of federal registration requirements may be legally suspect if there is reason to believe that the federal government will not prosecute the offender for the violation).

<sup>191</sup> *Arizona II*, 2011 U.S. App. LEXIS 7413, at \*42

<sup>192</sup> Indeed, although Judge Bea argued in partial dissent from the majority that state and local police were generally not preempted from assisting in the enforcement of federal immigration law, he nonetheless appeared to take the view that states were preempted from directly enforcing the INA's alien registration requirements. See *id.* at \*122 (Bea, J., dissent) (claiming that Arizona's alien registration law "impermissibly infringes on the federal government's uniform, integrated, and comprehensive system of registration which leaves no room for its enforcement by the state.").

<sup>193</sup> *De Canas*, 424 U.S. at 356.

<sup>194</sup> *Id.* at 357.

<sup>195</sup> The *De Canas* Court described some of the reasons why a state might legitimately act to restrict the employment of unauthorized aliens:

(continued...)

With the enactment of IRCA, Congress amended the INA to establish a scheme to combat the employment of unauthorized aliens, and this system is now “central to the policy of immigration law.”<sup>196</sup> The INA now generally prohibits the hiring, referring, recruiting for a fee, or continued employment of aliens lacking authorization to work in the United States.<sup>197</sup> Violators may be subject to cease and desist orders, civil monetary penalties, and (in the case of serial offenders) criminal fines and/or imprisonment. In establishing this system, Congress also expressly preempted any state or local measure “imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”<sup>198</sup>

In recent years, some states and localities concerned with the employment of unauthorized aliens within their jurisdictions have attempted to supplement federal law with enforcement measures of their own, including by denying or revoking business licenses of entities who have hired unauthorized aliens. Many of these measures have been subject to legal challenge, with courts reaching conflicting rulings as to their permissibility.<sup>199</sup> In 2007, Arizona enacted the Legal Arizona Workers Act, which authorized state courts to suspend or revoke the business licenses of entities found by state officials to have knowingly or intentionally hired aliens who were not authorized under federal law to work in the United States.<sup>200</sup> Arizona also required employers within the state to confirm the employment eligibility of workers via the E-Verify program, a generally voluntary program operated by the Department of Homeland Security and the Social Security Administration that enables employers to verify an employee’s work eligibility. In May 2011, the Supreme Court held in the case of *Chamber of Commerce v. Whiting* that the Arizona Workers Act was not preempted by the INA and other federal measures (the United States had filed an amicus brief in the case, arguing that the Arizona measure was preempted) and did not otherwise conflict with federal law.<sup>201</sup>

Section 5 of S.B. 1070 establishes new measures to deter the employment of unauthorized aliens within Arizona. Whereas most recent state activity in this area, including the Arizona Workers Act upheld by the Supreme Court in *Whiting*, have targeted employers of unlawfully present aliens, S.B. 1070 directly sanctions unauthorized alien employees. Specifically, S.B. 1070 makes it a misdemeanor offense for an unlawfully present alien, lacking authorization to work in the United States, “to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.”<sup>202</sup> The approach taken by S.B. 1070 to deter the

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Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.

*Id.*

<sup>196</sup> *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002) (internal quotations omitted).

<sup>197</sup> INA § 274A; 8 U.S.C. § 1324a.

<sup>198</sup> INA § 274A(h)(2); 8 U.S.C. § 1324a.

<sup>199</sup> For further discussion, see CRS Report RL34345, *State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments*, by Kate M. Manuel, Jody Feder, and Alison M. Smith.

<sup>200</sup> Ariz. H.B. 2745 (2008). Further information regarding the act, as amended, is available at <http://www.azag.gov/LegalAZWorkersAct/>.

<sup>201</sup> *Chamber of Commerce v. Whiting*, 2011 U.S. LEXIS 4018 (U.S., May 26, 2011).

<sup>202</sup> S.B. 1070, § 5. Section 5 of S.B. 1070 also makes minor modifications to the Legal Arizona Workers Act, though (continued...)

employment of unauthorized aliens is markedly different from that established under IRCA, potentially raising preemption concerns.

On its face, Arizona's imposition of criminal penalties upon unlawfully present aliens who seek employment in the state does not appear to be expressly preempted by the INA. The regime established by the INA to deter the employment of unauthorized aliens primarily imposes sanctions upon *employers*, rather than alien employees (though aliens may be subject to penalty if they use fraudulent documents to circumvent work eligibility requirements<sup>203</sup>). While the INA, as amended by IRCA, contains a provision expressly preempting states and localities from imposing criminal or civil penalties upon *employers* of unauthorized aliens, this provision does not expressly preempt state sanctions against unauthorized alien *employees*.

An examination of the legislative history behind the enactment of IRCA suggests its focus upon employers was intentional. Although there appears to have been some consideration given to the possibility of imposing criminal sanctions upon unauthorized aliens who sought employment in the United States, Congress did not pursue this option. Describing the legislative history and purposes of IRCA in 1990, the Ninth Circuit stated that in establishing a federal regime to deter the employment of unauthorized aliens, "Congress quite clearly was willing to deter illegal immigration by making jobs less available to illegal aliens but not by incarcerating or fining aliens who succeeded in obtaining work."<sup>204</sup> Although the INA was amended in 1990 to establish civil penalties for immigration-related document fraud, including the presentation of fraudulent documents to demonstrate work eligibility,<sup>205</sup> and other criminal statutes may apply to those aliens who seek employment through the use of fraudulent documents or false statements,<sup>206</sup> the federal regime does not impose any penalties against aliens solely on account of working or seeking employment in the United States.

In its suit challenging S.B. 1070, the DOJ claimed that the provision of the Arizona statute imposing criminal penalties upon unlawfully present aliens who work or seek employment in the state had been impliedly preempted. The reviewing district court issued a preliminary injunction

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these amendments do not seem to immediately raise any significant issues. It also imposes penalties upon the roadside hiring of laborers. The legal implications of these penalties are discussed *supra*, at "Criminalizing the Hiring of Persons Picked Up Along Roadways."

<sup>203</sup> See INA § 274C, 8 U.S.C. § 1324c (establishing civil penalties for immigration-related document fraud); INA § 274a(b)(2), 8 U.S.C. § 1324a(b)(2) (providing that false attestations of employment eligibility are subject to penalty of perjury).

<sup>204</sup> *National Center for Immigrants' Rights, Inc. v. I.N.S.*, 913 F.2d 1350 (9<sup>th</sup> Cir. 1990) *rev'd on other grounds*, 502 U.S. 183 (1991) ("While Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*, it ultimately rejected all such proposals.... Instead, it deliberately adopted sanctions with respect to the employer only.... Although some continued to argue for restraints against the employee, the approach of controlling employment through *employer* not *employee* sanctions was adjudged by Congress to provide the only realistic and appropriate solution."). See also, e.g., House Jud. Comm., H.REPT. 99-682 (1986)(I), at 48 ("Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.... Now, as in the past, the Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.").

<sup>205</sup> INA § 274C, 8 U.S.C. § 1324c.

<sup>206</sup> For discussion of some of the potentially applicable laws, see CRS Report RL32657, *Immigration-Related Document Fraud: Overview of Civil, Criminal, and Immigration Consequences*, by Michael John Garcia.

barring the provision's enforcement pending a final ruling in the case, having concluded that the government was likely to succeed on the merits of its claim.<sup>207</sup> The Ninth Circuit panel unanimously affirmed, finding that these provisions "conflict[] with what we have [previously] found was Congress' IRCA intent."<sup>208</sup> The court found that the relevant provisions of IRCA constitute a "complex scheme" to discourage the employment of unauthorized immigrants, "primarily by penalizing employers who negligently and knowingly hire them."<sup>209</sup> It also found that penalizing unauthorized workers conflicts with Congress's intent not to criminalize work and provision of affirmative protections for unauthorized workers.<sup>210</sup> While noting that congressional "inaction" (i.e., failure to impose penalties upon unauthorized workers) is not necessarily indicative of preemption, the court found that "Congress' inaction in not criminalizing work, joined with its action of making it illegal to hire unauthorized workers, justifies a preemptive inference that Congress intended to prohibit states from criminalizing work."<sup>211</sup> The court also rejected Arizona's argument that its imposition of penalties against aliens seeking unlawful employment furthers Congress's policy of "prohibiting illegal aliens from seeking employment in the United States."<sup>212</sup> Noting that the Supreme Court has recognized that "conflict[s] in technique can be fully as disruptive to the system Congress erected as conflict in overt policy,"<sup>213</sup> the Ninth Circuit found that the provisions of S.B. 1070 criminalizing the seeking of employment by unauthorized aliens constitute a "substantial departure" from the approach Congress has taken to this problem:

By criminalizing work, S.B. 1070 Section 5(C) constitutes a substantial departure from the approach Congress has chosen to battle this particular problem. Therefore, Arizona's assertion that this provision "furthers [a] strong federal policy" does not advance its argument against preemption. Sharing a goal with the United States does not permit Arizona to "pull[] levers of influence that the federal Act does not reach." By pulling the lever of criminalizing work—which Congress specifically chose not to pull in the INA—Section 5(C) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>214</sup>

The majority of the circuit panel also held that, like the other provisions of S.B. 1070 it considered, Arizona's criminalization of work by unlawfully present aliens was likely preempted because of its "detrimental effect on foreign affairs" and the possibility that it could "lead to 50 different state immigration schemes piling on top of the federal scheme."<sup>215</sup>

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<sup>207</sup> *Arizona I*, 703 F. Supp. 2d at 1000-02.

<sup>208</sup> *Arizona II*, 2011 U.S. App. LEXIS, at \*45-\*46.

<sup>209</sup> *Id.* at \*46.

<sup>210</sup> *Id.* at \*48-\*50.

<sup>211</sup> *Id.* at \*51.

<sup>212</sup> *Id.* at \*51.

<sup>213</sup> *Arizona II*, 2011 U.S. App. LEXIS, at \*51-\*52 (quoting *Gould*, 475 U.S. at 286).

<sup>214</sup> *Arizona II*, 2011 U.S. App. LEXIS, at \*53 (internal citations omitted) (quoting *Crosby*, 530 U.S. at 379-80 ("[A] common end hardly neutralizes conflicting means.")). In a separate opinion, Judge Bea noted that he concurred with much of the majority's analysis regarding provision, as well as its conclusion that it was likely preempted, but dissented from the portion he characterized as permitting "complaining foreign countries to preempt a state law" *Id.* at \*86 (Bea, J., dissent).

<sup>215</sup> *Arizona II*, 2011 U.S. App. LEXIS, at \*53.

## IV. Racial Profiling Issues

In the 1968 case of *Terry v. Ohio*, the Supreme Court held that the Fourth Amendment permits a law enforcement officer to stop and briefly detain a person when the officer reasonably suspects that the person has committed a crime.<sup>216</sup> Reasonable suspicion may not be based on a mere hunch, but instead upon “specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience.”<sup>217</sup> Section 2 of S.B. 1070, as amended by H.B. 2162, generally requires that in the context of a lawful stop, detention or arrest by state and local law enforcement pursuant to the enforcement of a state or local law, law enforcement must determine the person’s immigration status, if practicable, when “reasonable suspicion exists that the person is an alien ... who is unlawfully present in the United States.”<sup>218</sup> Some have expressed concern that this provision may lead to the harassment of certain racial and ethnic groups by Arizona law enforcement. The Arizona statute does not expressly prohibit law enforcement from relying, at least in part, upon an individual’s racial or ethnic background when assessing whether to pursue an inquiry into the person’s immigration status; instead, as amended by H.B. 2162, it provides that law enforcement may not consider the race, color, or national origin of an individual when determining whether there is reasonable suspicion to believe the person is an unlawfully present alien, “except to the extent permitted by the United States or Arizona Constitution.”<sup>219</sup>

Although the issue was not raised in the DOJ’s lawsuit challenging S.B. 1070, some have expressed concern that enforcement of S.B. 1070 would lead to constitutionally impermissible “racial profiling.”<sup>220</sup> Partially to address such concerns, Arizona Governor Jan Brewer issued an executive order on the same day she signed the bill into law, which requires state law enforcement officers to undergo training concerning the implementation of S.B. 1070. Among other things, such training is intended to “provide clear guidance to law enforcement officials regarding what constitutes reasonable suspicion, and shall make clear that an individual’s race, color or national origin alone cannot be grounds for reasonable suspicion to believe any law has been violated.”<sup>221</sup>

Whether or not it is constitutionally permissible for race, ethnicity, or national origin to be considered as a factor by Arizona authorities when determining whether to inquire into a person’s immigration status may depend upon a number of considerations. On several occasions, courts have decided cases involving law enforcement authorities stopping persons for suspected immigration violations on account of those persons’ suspected Mexican ancestry. Supreme Court jurisprudence holds that race or ethnicity cannot be the sole factor giving rise to a law enforcement stop for suspected immigration violations, but that at least in cases near the U.S.-

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<sup>216</sup> 392 U.S. 1 (1968).

<sup>217</sup> *Id.* at 27.

<sup>218</sup> The act does not require a determination to be made when “the determination may hinder or obstruct an investigation.” Further, a person is presumed not to be an unlawfully present alien if he can provide specified documentation. S.B. 1070, § 2.

<sup>219</sup> H.B. 2162, § 3. Prior to amendment, S.B. 1070 provided that race, color, or national origin could not be the “sole factor” considered in determining whether there was reasonable suspicion to believe a person was an unauthorized alien, except to the extent permitted by the U.S. or Arizona Constitutions. S.B. 1070, § 2.

<sup>220</sup> See, e.g., *Friendly House*, *supra* footnote 3, at 47-51.

<sup>221</sup> Arizona State Executive Order 2010-09, Establishing Law Enforcement Training for Immigration Laws, Apr. 23, 2010, available at [http://www.azgovernor.gov/dms/upload/EO\\_201009.pdf](http://www.azgovernor.gov/dms/upload/EO_201009.pdf).

Mexican border, stops may be partially based on race.<sup>222</sup> Nevertheless, the Court has suggested that a different conclusion might be reached if stops based partially on Mexican ancestry occur in places farther removed from the U.S.-Mexican border.<sup>223</sup>

In 2000, the Ninth Circuit, sitting *en banc*, ruled that the Border Patrol could not take into account Hispanic origin when making stops in Southern California, concluding that in areas “in which the majority—or even a substantial part—of the population is Hispanic,” as was the case in Southern California, the probability that any given Hispanic person “is an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.”<sup>224</sup> This ruling would seem to preclude Arizona law enforcement from using Hispanic origin as a factor in the “reasonable suspicion” test in areas with similar demographics as Southern California.

In sum, court jurisprudence indicates that Arizona law enforcement may not stop persons for suspected immigration-related violations solely on account of such persons’ race or ethnicity, but that at least in certain circumstances, suspicion may partially be based on such considerations. Additional considerations, including population demographics, may also affect the weight to which suspicions based on race or ethnicity may be permissibly given.

## V. Conclusion

In recent decades, Congress has increasingly focused federal immigration policy on the daily incidents of alien residency. Concomitantly, Congress has enlarged the opportunities for states to become involved in enforcing immigration law. S.B. 1070 is in the vanguard of testing the legal limits of these increased opportunities, though H.B. 2162 modified some of its more legally ambitious efforts. Although a federal district court has issued a preliminary injunction barring implementation of some provisions of S.B. 1070, the ultimate legal fate of these provisions (as well as those which were not enjoined by the district court) remains to be decided. At least some other states and localities that see themselves as heavily impacted by unauthorized immigration likely will join Arizona on any new ground that S.B. 1070 establishes. And this potential for diverse and possibly fragmented immigration enforcement doubtless will be among the many issues considered by the courts as legal challenges to S.B. 1070 proceed.

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<sup>222</sup> Compare *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (ruling unconstitutional a roving stop of a vehicle by the Border Patrol near the U.S.-Mexican border, when the stop was based solely on the vehicle occupant’s apparent Mexican ancestry) with *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (permitting the stopping of persons at fixed inspection checkpoints near the Mexican border when such stops were partially based on race).

<sup>223</sup> *Martinez-Fuerte*, 428 U.S. at 563, n.17.

<sup>224</sup> *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9<sup>th</sup> Cir. 2000).

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