No. 11-182

IN THE

Supreme Court of the United States

STATE OF ARIZONA *ET AL.*,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae American Bar Association ("ABA") respectfully submits this brief in support of the Respondent, the United States of America. The ABA urges this Court to conclude that the four enjoined provisions of Arizona's S.B. 1070 are preempted because immigration law and policy are and must remain uniquely federal, with states having no role in immigration enforcement except pursuant to federal authorization and oversight.[1]

The ABA is the largest voluntary professional membership organization in the United States. Its nearly 400,000 members come from each state, territory, and the District of Columbia. They include attorneys working in private firms, corporations, non-profit organizations and government agencies, and in prosecutorial, public defender, and law enforcement and corrections fields. Members also include judges, legislators, law professors, law students, and non-lawyer associates in allied fields.[2]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus,* its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least ten days prior to the due date of *amicus curiae*'s intention to file this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the *(cont'd)*

Since its founding in 1878, the ABA has worked for civil rights, just laws, and fair legal process. The ABA became actively involved in immigration law reform in the 1940s and established a committee focused exclusively on immigration law and policy in 1983. The ABA Commission on Immigration ("Commission"), created in 2002, is now the ABA entity dedicated to immigration issues. Its charge includes advocating for immigration-related statutory and regulatory modifications and reforms that are consistent with ABA policy.[3]

Directly pertinent to the application and enforcement of federal immigration laws is the ABA's experience, through the Commission, in the development and operation of pro bono immigration detainee service programs. Three of these programs are ProBAR in Harlingen, Texas; Volunteer Advocates for Immigrant Justice in Seattle,

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American Bar Association. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] Recommendations become ABA policy only after approval by vote of the ABA House of Delegates ("HOD"). The HOD is composed of more than 550 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. For further information, *see* http://www.americanbar.org /groups/leadership/house_of_delegates.html (last visited March 25, 2012).

Washington; and the Immigration Justice Project in San Diego, California.[4] Through these pro bono programs, ABA member-volunteers and staff, each year, screen and provide Know Your Rights presentations to over 4,500 adult and minor immigration detainees and provide direct representation to hundreds of them.

Another Commission undertaking that has provided first-hand experience was its study, published in 2010, entitled, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (hereinafter the "2010 ABA Study"),[5] which urged a number of recommendations, some of which were similar to the enforcement priorities subsequently announced by the Department of Homeland Security ("DHS"). They included focusing enforcement on national security risks, serious criminals and others of high interest for removal, and expanding the use of prosecutorial discretion to reduce the number of removal cases pending before

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[4] More information about the Commission's pro bono projects and other initiatives is available at http://www.americanbar.org/groups/public_services/immigration/projects_initiatives.html (last visited March 25, 2012).

[5] AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010), *available at* http://www.americanbar.org/groups/public_services/immigration/ publications.html.

the Immigration Courts and the Board of Immigration Appeals.

Through the work of ABA member-volunteers and staff on Commision and other projects, the ABA has concluded that the federal government must maintain control and flexibility in setting and implementing a uniform national immigration enforcement policy. Because the four enjoined provisions of S.B. 1070, by their plain language, conflict with federal control and further, are intended to be enforced by state and local authorities without direction, supervision or training by federal authorities, the ABA urges this Court to conclude that they are not "efforts at cooperative law enforcement," as Arizona asserts in its Question Presented but rather, are preempted by federal law.

SUMMARY OF ARGUMENT

Federal immigration law consists of a framework of federal statutes and regulations that are implemented by a multitude of agencies and specialized courts. Based on the experiences of ABA member-volunteers and staff working with federal immigration detainees, the ABA respectfully submits that none of the four enjoined provisions of S.B. 1070 can be implemented without inevitably conflicting with this federal system. Because ABA experience is particularly relevant to the potential enforcement of Sections 2 and 6, the ABA focus herein is on those sections.

Section 2 of S.B. 1070 is especially problematic in its requirement of indefinite detention by Arizona state and local authorities of anyone suspected of being unlawfully present until immigration status is verified by federal authorities. In addition to significant due process concerns from state "non-criminal" detention without federal immigration oversight, this Section does not consider the complexity of federal immigration laws and regulations, or that United States citizens and many lawfully present aliens are not required to have or carry identification, or that there are many categories of lawful presence, or that there is no single, accurate database for verifying immigration status.

Of similar concern is Section 6, which requires that state and local officers determine whether an alien is removable based on criminal history. While commission of certain crimes clearly triggers grounds for removal, others require multiple proceedings before a determination can be made, and even then, there are forms of relief that may be available.

Finally, while there are mechanisms for state and local law enforcement assistance under federal supervision, there have been serious problems with state and local action even in these programs. If states are permitted to create a patchwork of conflicting mandates, the decisions about arrest and detention across states may well depend on whether enforcement activity is conducted by federal authorities, or by a state under federal supervision,

or by a state under its own, possibly unique, immigration law. None of the four enjoined provisions of S.B. 1070 mandate actions that are consistent with the role for state and local immigration enforcement that is contemplated under federal law and policy and, accordingly, each should be found to be preempted.

ARGUMENT

THE FOUR ENJOINED PROVISIONS OF S.B. 1070 SHOULD BE FOUND TO BE PREEMPTED BECAUSE IMPLEMENTATION INEVITABLY WILL CONFLICT WITH FEDERAL IMMIGRATION LAW AND POLICY.

As this Court has long held, immigration regulation is exclusively a federal concern. *E.g., De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."). Petitioners assert in their Question Presented that the four enjoined provisions of S.B. 1070 "authorize and direct state law-enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law." Respectfully, the ABA's substantial experience working in federal immigration detention facilities[6] demonstrates that each of these provisions, if implemented, inevitably

[6] These include federal facilities as well as state and county jails and privately operated juvenile facilities at which federal detainees are held pursuant to federal contracts.

will result in conflicts with federal immigration law and policy.

The Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*. ("INA") is a complex and detailed statutory framework regulating immigration which, together with its implementing regulations, establishes a national scheme for uniform immigration law enforcement to be administered by various federal agencies. In 2011, the Immigration and Customs Enforcement arm ("ICE") of DHS announced that its removal priorities would focus on aliens who pose dangers to national security or risks to public safety, recent illegal entrants, repeat violators of immigration law, and aliens who are fugitives from justice or who otherwise obstruct immigration controls.[7] Also in 2011, ICE announced criteria to guide its exercise of prosecutorial discretion. These criteria included the agency's civil enforcement priorities, as well as case-specific factors, such as the length of time the alien had spent in the United States, especially in lawful status, his or her manner of entry, education, military service, criminal history, family ties, and health-related issues.[8] Further, federal law

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[7] *Priorities and the Rule of Law: Oversight Hearing on U.S. Immigration and Customs Enforcement Before the H. Comm. on the Judiciary, Subcomm. on Immigration Policy and Enforcement*, 112th Cong. (2011) (statement of John Morton, Dir., U.S. Immigration & Customs Enforcement), *available at* http://www.ice.gov/doclib/news/library/speeches/111012morton.pdf.

[8] Memorandum from John Morton, Dir., U.S. Immigration & *(cont'd)*

authorizes relief from removal when circumstances involve asylum for refugees (8 U.S.C. § 1158), humanitarian parole (8 U.S.C. § 1182(d)(5)(A)), waiver for purposes of family unity (8 U.S.C. § 1227(a)(1)(E)(iii)), cancellation of removal, *inter alia*, to prevent extraordinary hardship to close relatives (8 U.S.C. § 1229b), and temporary protection from removal based on unsafe conditions in a home country (8 U.S.C. § 1254a).

Contrary to Petitioner's assertions, the four enjoined provisions of Arizona's S.B. 1070 do not contemplate an enforcement system under which state and local officers operate within the federal government's focused, targeted priorities. Rather, Section 2 of S.B. 1070 requires that local officers detain anyone for whom there is a reasonable suspicion that the person is unlawfully present in the United States unless doing so would hinder or obstruct an investigation and, if the person is arrested, to detain the person pending federal verification of the person's immigration status. Under Section 3, a state crime is created for violation of federal statutes that require certain aliens to

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Customs Enforcement, to All Field Office Dirs. *et al.* (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/ prosecutorial-discretion-memo.pdf; *see also* Memorandum from Peter S. Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, to All Chief Counsel *et al.* (Nov. 17, 2011), *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf.

obtain and carry federal registration documents.[9] Under Section 5, a state crime is created for the application for or performance of work by an "unauthorized alien" as an employee or independent contractor. Under Section 6, Arizona officers are authorized to arrest without a warrant any person whom an officer has probable cause to believe has committed a "public offense" that would make the person removable from the United States, which includes conduct subject to imprisonment or fine under Arizona law or, if committed outside Arizona, under the law of the state in which it occurred.

Rather than being an attempt to "authorize and direct state law-enforcement officers to cooperate and communicate with federal officials regarding the enforcement of federal immigration law," as Arizona asserts in its Question Presented, the four enjoined provisions of S.B. 1070 represent an entirely different system that is based on the detention of any individual for whom there is a reasonable suspicion of unlawful immigration status. In the ABA's experience, this fails to consider either the complexities of federal immigration law or the focused, targeted priorities of federal immigration policy. While the ABA asserts that each of the four enjoined provisions should be preempted, this

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[9] It is unclear how this provision would affect persons who are lawfully present in the United States but not green card holders, since the federal statutes referenced in Section 3 of S.B. 1070 pertain to the alien registration card, *i.e.*, the "green card."

amicus brief is focused on Sections 2 and 6, to which the ABA's experience is particularly relevant.

A. ABA Experience Demonstrates That Mandatory Detention Under Section 2 Of S.B. 1070 Until Immigration Status Is Verified Inevitably Will Result In Wrongful Detentions Of Citizens And Lawfully Present Aliens.

Under Section 2 of S.B. 1070, indefinite continued detention by Arizona authorities is mandatory, even when there is no probable cause for detention based on alleged criminal activity, until the immigration status of an individual is verified by the federal government. By permitting its own version of state "non-criminal" detention, without any oversight from the federal immigration enforcement system, Section 2 raises significant due process concerns. As this Court has stated: "[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis,* 533 U.S. 678, 693 (2001).

Further, Section 2 necessarily places on any person whose status is questioned by an Arizona officer the burden of proof that he or she should not be detained, even though United States citizens and many lawfully present aliens are not required to carry identification. Although verification of a United States citizen's status intuitively appears to

present little problem, the ABA's substantial experience demonstrates that verification is complicated, even for federal officers who have undergone significant training, and ABA member-volunteers and staff regularly encounter improperly detained American citizens and lawfully present aliens. For example, a volunteer attorney representing a detained client successfully established that he was a United States citizen by filing the appropriate forms with United States Citizenship and Immigration Services ("USCIS"), the immigration benefits unit within DHS. The client was released from immigration custody but was later arrested by ICE, and removal proceedings were initiated. He remained in immigration detention for more than one month before ICE was convinced of his citizenship. This is a problem that is sufficiently prevalent that ICE itself has established a hotline staffed 24 hours per day for its detainees who may have claims of United States citizenship.[10]

Consistent with this and other ABA experiences, a recent unpublished report by the Vera Institute of Justice identified 125 people in federal detention centers who were believed by immigration lawyers to have valid citizenship claims.[11] In 2008, the

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[10] The hotline also is open to those who think they may be victims of a crime. *See* http://www.ice.gov/detention-reform/toll-free-hotline/ (last visited March 25, 2012).

[11] Marisa Taylor, *U.S. Citizen's Near Deportation Not a Rarity,* MINNEAPOLIS STAR TRIB., Jan. 26, 2008, *available at* http://www.startribune.com/nation/14456137.html.

American Civil Liberties Union cited reports of "dozens of United States citizens who have been wrongfully arrested, detained, or deported."[12] And in 2005 – prior to S.B. 1070's enactment – wrongful detentions in Arizona by local police occurred even though the police were then working under federal authorization.[13]

Section 2 enforcement by state and local officials – who lack the same level of experience and understanding of immigration and nationality law as federal officials – can only exacerbate this type of improper detention. First, recognizing and proving American citizenship can be complicated because it is not limited to persons born in the United States. It can be obtained in many ways, including citizenship by acquisition when one or both parents naturalize under 8 U.S.C. § 1431, and citizenship by derivation when, for example, a child is born abroad to one or two United States citizen parents under 8 U.S.C. § 1401(c)-(e), (g)-(h). In fact, in 2010, ABA project staff met with an individual who was a United States citizen by derivation but possessed no documentation of his citizenship. He was detained by ICE and placed in removal proceedings until ABA

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[12] Press Release, Am. Civil Liberties Union, ACLU Demands ICE End Illegal Deportation of U.S. Citizens (Feb. 13, 2008), *available at* http://www.aclu.org/immigrants-rights/aclu-demands-ice-end-illegal-deportation-us-citizens.

[13] Mary Romero & Marwah Serag, *Violations of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona,* 52 CLEV. ST. L. REV. 75, 79-86 (2005).

project staff obtained and submitted copies of his father's naturalization certificate and his birth certificate.

Second, the issues involved in determining lawful immigration status can be complex because this status is not limited to persons who are lawful permanent residents (that is, "green card holders"). Also included are persons with various forms of non-immigrant status, including those admitted on a temporary basis for a limited purpose and duration, such as tourists, students, and those with certain employment-based visas. There are other forms of lawful immigration status for persons in humanitarian status categories, such as refugees, asylees, and immigrant victims of human trafficking and/or crime who may have pending petitions for immigration visas. Even those with final orders of removal may be granted withholding or deferral of removal under the Convention Against Torture, or may have their removals stayed by federal courts or by ICE for a variety of reasons. All of these persons are lawfully present.

The incompatibility of Section 2's mandate of detention by a state official based on reasonable suspicion of unlawful presence with the complexity of determining lawful immigration status under federal law is illustrated by a case handled by an ABA member-volunteer of an asylum seeker from Africa. This man had been recommended for approval by an USCIS Asylum Officer, but his case was undergoing final review. His presence in the United States was therefore authorized and he had

valid employment authorization. However, he did not and could not yet have a green card. While shopping at a convenience store in northern Arizona shortly after the passage of S.B. 1070 in 2010, the shopkeeper asked him for his green card and when he could not produce one, detained him and called the police. The police further detained and interrogated the man until his status could be verified. The result of this frightening and humiliating process was a "self-deportation," in which the man – even though authorized to be in the United States under federal law – abandoned his asylum claim and left the United States.

Moreover, because a variety, and at times a combination, of visas, I-94 cards, work permits, stamps and receipts can establish the lawful presence of aliens, a quick decision by a state or local official without an understanding of these materials may lead to wrongful detention of non-citizens in contravention of federal law. This is an issue, moreover, that cannot be resolved by checking a federal database to verify an individual's status because there is no single database available to law enforcement to check immigration status.[14] Further, it is widely acknowledged that the databases relied on by various federal immigration agencies are

[14] There are a multitude of databases that each provide limited information. These include the National Crime Information Center ("NCIC"), the Interagency Border Inspection System ("IBIS"), the National Immigration Lookout System ("NAILS"), the Deportable Alien Control System ("DACS"), and the Automated Biometric Identification System ("IDENT").

outdated and often contain ambiguous or conflicting information.[15]

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[15] Examples include:

- In an evaluation of the NCIC data, the Migration Policy Institute found that from 2002-2004 there was a 42 percent error rate in the immigration hits from state and local police forces in these data. HANNAH GLADSTEIN *ET AL.*, BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NAT'L CRIME INFO. CENTER DATABASE, 2002-2004 (2005), *available at* http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf.

- The DHS Office of Inspector General ("OIG") analyzed DACS, the database that contains biographical data, immigration and criminal histories, and cited numerous problems. The OIG report cited one interview with an analyst who "estimated that approximately 50% of the data in the database is accurate." OFFICE OF INSPECTOR GEN., U.S. DEP'T. OF HOMELAND SEC., AN ASSESSMENT OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S FUGITIVE OPERATIONS TEAMS 15 (2007), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_07-34_Mar07.pdf. Similar conclusions had been made by DOJ years before. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T. OF JUSTICE, THE IMMIGRATION & NATURALIZATION SERV.'S REMOVAL OF ALIENS ISSUED FINAL ORDERS iv-v, 23-24 & Apx. B, (2003) *available at* http://www.justice.gov./oig.reports /INS/e0304/final.pdf.

- Errors are also found throughout other immigration databases, such as the E-Verify system which allows employers to compare employee information with immigration and social security records. *Priorities Enforcing Immigration Law: Hearing Before the H. Comm. on Appropriations, Subcomm. on Homeland Sec.*, 111th Cong. (2009) (testimony of Michael Aytes, *(cont'd)*

Indeed, ABA member-volunteers and staff regularly confront errors in these databases. For example, through an ABA program that conducts weekly screenings of unrepresented individuals facing immigration court proceedings, ABA staff met with a woman in late 2011 who was married to a United States citizen. Based on that relationship, she had obtained conditional lawful permanent resident status and, after two years, as required by law, she had filed an application to remove the condition on her status. However, USCIS placed her in removal proceedings – but did not detain her – and sought to terminate her status on the grounds that she had attempted to procure a visa by fraud or willful misrepresentation. After one month, USCIS issued a motion to reopen her case stating that "a review of the record indicates that the previous decision was based on administrative error." If S.B. 1070 had been applied in her case, she could have been detained until USCIS determined its error.

Other clients of ABA member-volunteers have been erroneously detained by ICE due to database errors and inconsistencies. In one 2002 case, a man had a pending adjustment of status (green card) application in Immigration Court, was married to a

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Acting Deputy Dir., U.S. Citizenship & Immigration Servs.), *available at* http://www.dhs.gov/ynews/testimony/testimony_1238765913599.shtm. The system continues to produce mismatches, including misidentification of individuals as aliens who are in fact United States citizens. *Id.*

lawful permanent resident, and had four children, three of whom were lawful permanent residents and one of whom was a United States citizen. Based on a years-old *in absentia* removal order, ICE sought to arrest him. After the volunteer lawyer was able to provide documents establishing that the order had been vacated and his proceedings had been reopened based on his wife's petition on his behalf, the arrest warrant was cancelled. The ICE Chief Counsel for that locale explained to the volunteer lawyer that old removal orders were not double checked against the active court docket before arrests were made. The man later obtained his green card.

In a 2006 case, a man with a prior removal order had a pending motion to reopen based on an approved visa petition. Although he had been released from custody on an Order of Supervision, he was arrested and taken into ICE custody. Again, he was released after counsel demonstrated the existence of his pending application. He is now a lawful permanent resident with naturalization imminent.

These examples illustrate that errors are made by federal authorities charged with the administration of federal immigration law and policy. They also make clear that enforcement of the enjoined Section 2 of S.B. 1070 by state and local authorities with far less training and experience, and who are working with flawed databases and operating under a mandate of detention whenever they have a reasonable suspicion of unlawful presence in the United States, can only result in the

wrongful detention of individuals who are lawfully present under federal law.

B. ABA Experience Demonstrates That Mandatory Determination Of Removability Under Section 6 Of S.B. 1070 Is Equally Problematic.

Equally problematic is the mandate under Section 6 of S.B. 1070 that local officers determine whether a subject has committed a crime in Arizona or in another state that makes that person removable from the United States. While the commission of certain crimes triggers clear grounds of removability, others can require multiple proceedings and the assistance of counsel and adjudicators trained in immigration issues before such a determination can be made.

Removability, in short, can involve complex legal questions that are subject to a system of hearings and appeals that first fall within the exclusive jurisdiction of the United States Executive Office for Immigration Review ("EOIR"), which operates the Immigration Courts and the Board of Immigration Appeals, and then, potentially, the federal courts of appeals. In countless examples, Immigration Judges, Board of Immigration Appeals members and circuit court judges have considered and overruled charges of removability.

In one 2009 case, an ABA member-volunteer represented a lawful permanent resident who was placed in removal proceedings by ICE under 8 U.S.C.

§ 1227(a)(2)(A)(ii), which renders a person removable for two convictions for crimes involving moral turpitude not arising out of a single scheme. The person had a conviction for petty theft and another for vandalism. The member-volunteer urged the Immigration Judge to consider *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995), which held that a Washington state crime of second degree malicious mischief was not a crime involving moral turpitude. The volunteer argued that, likewise, the vandalism conviction did not contain the necessary depravity or fraud required to constitute a crime involving moral turpitude. The Immigration Judge agreed, found ICE's charge of removability not sustained, and terminated the removal case. ABA experience shows that similar scenarios occur continuously around the country.

The determination of whether an individual has committed a crime in Arizona or in another state that makes the individual removable from the United States is further complicated because the individual, even when deemed removable, still may be eligible for forms of relief that permit him or her to remain lawfully in the United States.

Additionally, while Congress has established the Law Enforcement Support Center ("LESC"), this Center does not provide information as to whether a given crime would make an individual removable.[16]

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[16] *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., LAW ENFORCEMENT SUPPORT CTR. TRAINING MANUAL (rev. 2005), *available at* http:

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Because this information often turns on complex legal determinations, it cannot be easily added to the LESC. Nevertheless, if Section 6 of S.B. 1070 is permitted to be implemented, it would require Arizona state and local law enforcement officers to make removability decisions under Arizona's "reason to believe" standard. Because there is no litmus test for removability on criminal grounds, enforcement of Section 6 of S.B. 1070 will necessarily result in improper detentions.

C. ABA Experience Demonstrates That State Immigration Enforcement Should Not Be Permitted Without Direct Supervision By The Appropriate Federal Agencies.

Experience with two federal enforcement initiatives involving cooperation with state and local law enforcement demonstrates that direct involvement by federal authorities is crucial.

In the first initiative, begun in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act, Congress authorized DHS to enter into agreements with state and local law enforcement agencies to enforce federal immigration law under § 287(g) of the INA, codified at 8 U.S.C. § 1357. Over the last fifteen years, ICE's Office of State and Local Coordination has negotiated § 287(g) agreements authorizing local law enforcement

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//www.scribd.com/doc/21968082/ICE-Law-Enforcement-Support-Center-LESC-Training-Manual.

officers – after specific training – to participate in federal immigration enforcement with ongoing oversight by ICE. As of June 2011, there were 69 such agreements.[17]

However, many of these programs have been widely criticized. In practice – and even when cooperating with the federal government – state and local officials often are unable to properly implement federal law. As a result, one of the key criticisms of these programs has been insufficient federal oversight of state action.[18] In addition, the 2010 ABA Study reported findings that state action under the § 287(g) agreements often involved racial profiling and increased fear in local communities.[19]

Clearly, even attempts at direct "cooperation" by the states in federal immigration enforcement under § 287(g) agreements have resulted in state action that was problematic in light of federal immigration policy. In its Fiscal Year 2013 budget request, DHS announced it was suspending consideration of

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[17] OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., THE PERFORMANCE OF 287(g) AGREEMENTS FY2011 UPDATE (2011), *available at* http://www.oig.dhs.gov/assets/Mgmt /OIG_11-119_Sep11.pdf.

[18] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009), *available at* http://www.gao.gov/new.items/d09109.pdf.

[19] See footnote 5, *supra,* and authorities cited therein.

requests for new § 287(g) agreements and eliminating the "least productive" ones.[20] In fact, in Arizona, Maricopa County's § 287(g) agreement was terminated in December 2011 by DHS due to performance problems under Sheriff Joe Arpaio that were identified in a Department of Justice report and which specifically included concerns with discrimination and racial profiling.[21]

The second initiative, Secure Communities, started in 2008 and does not authorize local law enforcement of immigration laws.[22] ICE is now focusing on the expansion of its Secure Communities initiative instead of the § 287(g) agreements. Secure Communities involves a process by which state and

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[20] *U.S. Immigration and Customs Enforcement Fiscal Year 2013 Budget Request: Hearing Before H. Comm. on Appropriations, Subcomm. on Homeland Sec.*, 112th Cong. (2012) (written testimony of John Morton, Dir., U.S. Immigration & Customs Enforcement), *available at* http://www.dhs.gov/ynews/testimony/20120308-ice-fy13-budget-request-hac.shtm; *see also* U.S. DEP'T OF HOMELAND SEC., FY13 BUDGET IN BRIEF 100-01 (2012), *available at* http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf

[21] Press Release, U.S. Dep't of Homeland Sec., Statement by Secretary Napolitano on DOJ's Findings of Discriminatory Policing in Maricopa County (Dec. 15, 2011), *available at* http://www.dhs.gov/ynews/releases/20111215-napolitano-statement-doj-maricopa-county.shtm.

[22] U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., SECURE COMMUNITIES: A MODERNIZED APPROACH TO IDENTIFYING AND REMOVING CRIMINAL ALIENS (2010), *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-brochure.pdf.

local law enforcement agencies are able to check fingerprints against DHS records for the immigration history of everyone taken into custody, not just those suspected of being illegally present. If a person is located in the DHS database, ICE is notified and it decides whether immigration enforcement action is required. DHS has deployed Secure Communities in over 1,000 jurisdictions in 38 states.[23] It is planned for nationwide implementation by 2013.

DHS' years of experience with § 287(g) agreements and its shift to the Secure Communities initiative demonstrate the federal government's need to maintain flexibility in setting and implementing a uniform national immigration enforcement policy. This flexibility will be undermined if Arizona is permitted to mandate that its state and local law enforcement authorities implement – with no federal oversight – the enjoined provisions of S.B. 1070.

Significantly, other states are contemplating or have joined Arizona in passing immigration laws.[24]

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[23] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2012 PERFORMANCE BUDGET 8 (2011), *available at* http://www.justice.gov/jmd/2012justification/pdf/fy12-ara-justification.pdf.

[24] Subsequent to Arizona's passage of S.B. 1070, Alabama, Utah, Georgia, Indiana and South Carolina passed their own immigration laws. Thirty-one other states have contemplated such legislation, with more potentially to follow. *See* IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, A Q&A GUIDE TO STATE IMMIGRATION LAWS: WHAT YOU NEED TO KNOW IF YOUR STATE IS CONSIDERING ANTI-IMMIGRANT LEGISLATION *(cont'd)*

Many of these are quite different from S.B. 1070. If enforcement of state laws that are inconsistent with federal immigration law and policy is permitted, the result will be a patchwork of statutes and regulations under which decisions about arrest and detention may well depend on whether enforcement activity is being conducted directly by federal authorities, by a state under federal supervision, or by a state under its own, possibly unique, immigration laws.[25]

As this Court has stated: "If the purpose of [a federal] act cannot otherwise be accomplished – if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect – the state law must yield to the regulation of Congress within the sphere of its delegated power." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000), quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912). Clearly, determination of immigration

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(2012), *available at* http://immigrationpolicy.org/sites/default/files/docs/State_Guide_to_Immigration_Laws_Updated_021612.pdf.

[25] As an example of this inconsistent patchwork, federal law establishes criminal penalties for employers who engage in a pattern or practice of hiring unauthorized workers (*see* 8 U.S.C. § 1324a) but does not criminalize the act of looking for work by individual aliens. In contrast, Arizona and Alabama do not require a pattern or practice, and criminalize the hiring of day laborers from a vehicle. Moreover, the statutes of Arizona, Alabama, and Indiana also create state criminal penalties for unauthorized immigrants who solicit or perform work, but those of Georgia, South Carolina, and Utah do not. *Id*.

law and policy is and must remain exclusively federal, and states should have no role except under specific federal authorization and oversight. The ABA urges, accordingly, that the enjoined provisions of S.B 1070 be ruled preempted by federal law.

CONCLUSION

For the reasons stated above, *amicus curiae* American Bar Association requests that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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