No. 10-16645

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

State of Arizona, et. al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF *AMICI CURIAE* BRIEF ON BEHALF OF *FRIENDLY HOUSE* PLAINTIFFS

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I. INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Amici are ten individual and fourteen organizational plaintiffs who filed a class action lawsuit challenging the constitutionality of SB 1070 in the district court on May 17, 2010. *Friendly House v. Whiting*, No. 10-CV-1061-PHX-SRB (D. Ariz. May 17, 2010) ("*Friendly House*"). *Amici*'s preliminary injunction motion, which was argued on the same date as the motion granted in this case, is still pending. The *Friendly House* plaintiffs constitute a diverse coalition of organizations and individuals in Arizona and New Mexico who would suffer irreparable harms were the injunction reversed.[1] The district court specifically referred to *amici's* interests in its preliminary injunction ruling, including the harms from racial profiling and "inevitable increase in length of detention while immigration status is determined." *U.S. v. Arizona*, 703 F. Supp. 2d 980, 995 n.6 (D. Ariz. 2010). All parties have consented to the filing of this brief.

The district court rightly found that the United States would likely suffer irreparable harm if SB 1070 §§ 2(B), 3, 5(C), and 6 were implemented, and that these sections are likely preempted. While these harms to the federal government are important, they by no means encompass the full range of harms that Arizona residents and visitors to the state would experience if the injunction was reversed.

[1] The interests of each *amicus* are described in detail in the accompanying motion.

Amici submitted substantial evidence in the district court demonstrating that serious irreparable injury would befall them, and others similarly situated, if the enjoined sections of SB 1070 were allowed to go into effect. In particular, *amici* and others would be subject to unlawful detention and arrest – harms that the state minimizes because it ignores the complexity of determining immigration status. *Amici* and others will also face prosecution under unlawful state immigration provisions, and many would curtail constitutionally protected activities in order to reduce the risk of being improperly questioned, detained, or prosecuted. Importantly, as *amici* showed in the district court, these harms would not be evenly distributed across the population—people of color and those who do not speak English fluently would be at increased risk of unlawful detention and prosecution.

Amici submit this brief for two reasons. First, *amici* are in a unique position to apprise the Court of the serious harms that SB 1070 would visit upon them and others similarly situated if the injunction were lifted. Second, *amici* seek to advise the Court that, although the Court need not reach the issue on this appeal, the State's brief errs fundamentally by failing to acknowledge SB 1070's conflict with the narrow limits that federal law places on state and local enforcement of federal immigration law. That conflict is an additional ground for affirming the district court's order.

II. SB 1070 THREATENS *AMICI* AND OTHER INDIVIDUALS WITH SERIOUS HARM

A. Amici And Others Will Be Subjected To Improper And Unlawful Questioning And Detention As A Result Of Police Profiling Based On Their, Race, Ethnicity, Or Language.

Several *amici* and minority members of *amicus* organizations who are U.S. citizens or non-citizens residing in Arizona with the permission of the federal government have already been subjected to scrutiny by Arizona law enforcement officials on suspicion of being "unlawfully present." For example:

- *Amicus* Jim Shee is a 70-year old U.S. citizen and Arizona resident, of Spanish and Chinese descent. On two occasions in April 2010, Mr. Shee was stopped by law enforcement officers when he was driving, and asked to produce his "papers" – not his license and registration, or other specific documents ordinarily requested at a traffic stop. Decl. of Jim Shee (Doc. 331-7) ¶¶ 1-11.[2] In one instance, the officer told him he was stopped because he "looked suspicious," and in both instances, Mr. Shee was ultimately released without citation. As a result of these stops, Mr. Shee and his wife now carry their passports whenever they drive, even though they are

[2] This and other declarations cited herein, unless otherwise noted, are on file with the district court in *Friendly House*.

concerned that the passports may be lost or stolen. *Id.*

- Latino U.S. citizen members of *amicus* Service Employees International Union, Local 5, have been subjected to greater law enforcement scrutiny since SB 1070 was signed into law. Members report "that they are being pulled over on a pretense so … officers can check their papers, and that the officers think the members and their families are undocumented immigrants based solely on the fact that they are Latinos." Decl. of Gail Gabler (Doc. 331-3) ¶ 3. One member reports "that she now requires her 16-year-old son to carry identification everywhere he goes, even though he is a citizen." *Id.* ¶ 2.

- Members of *amicus* Border Action Network have reported being stopped by local law enforcement and questioned about their immigration status since the passage of SB 1070. Decl. of Jennifer Allen (Doc. 331-1) ¶ 3.

- In March 2009, *amicus* Jose Angel Vargas was arrested by a local police officer for trespassing, even though he was standing on a public sidewalk. Decl. of Jose Angel Vargas (Doc. 236-10) ¶ 6. Mr. Vargas is a lawful permanent resident of the United States who has frequently sought work as a day laborer. *Id.* ¶¶ 1, 4. Approximately ten other men who were

arrested by the police along with Mr. Vargas were deported. *Id.* ¶ 6. The police apparently believed that Mr. Vargas was also likely to be deportable, based on the color of his skin, his limited English proficiency, and/or his lawful solicitation of day labor work.

Amici's experiences are neither isolated nor atypical, and would be replicated across the state were the injunction reversed. The Maricopa County Sheriff ("MCS") has publicly stated that his office has long been investigating immigration status in the manner that SB 1070 mandates, and the evidence shows that this office has engaged in pretextual stops of Latinos to investigate their immigration status. *See* MSNBC NEWS, Apr. 26, 2010, *available at* http://www.youtube.com/watch? v=UHfOBUDzoPo. A comprehensive investigation that studied eight MCS "crime suppression operations" found that the majority of drivers and passengers arrested were Latino, even in predominantly Anglo areas. Daniel Gonzalez, *Sheriff's Office Says Race Plays No Role in Who Gets Pulled Over*, ARIZ. REPUBLIC, Oct. 5, 2008, *available at* http://www.azcentral.com/news/articles/2008/10/05/20081005arpaio-profiling1005.html. The head of the MCS' Human Smuggling Unit has explained that his officers "watch[] for vehicles that appear[] to pick up illegal immigrants. Then, once they spot[] a vehicle picking someone up, detectives … 'would

establish probable cause for a traffic stop.'" Paul Giblin & Ryan Gabrielson, *Reasonable Doubt Part III: Sweeps and Saturation Patrols Violate Federal Civil Rights Regulations*, EAST VALLEY TRIBUNE, July 11, 2008, *available at* http://jornaleronews.ndlon.org/?p=75. MCS is currently the subject of a civil rights investigation by the U.S. Department of Justice and multiple lawsuits alleging racial profiling in immigration enforcement.[3] SB 1070's enjoined provisions encourage these kinds of pretextual stops to allow police to investigate immigration status.

Expert law enforcement officials have confirmed that the enjoined provisions regarding interrogation and questioning are vague and unworkable, cannot be implemented in a race-neutral fashion, and will inevitably lead to profiling and unlawful detentions.[4] Indeed, police chiefs from Arizona and across the country conclude that no amount of training will "prevent officers from resorting to using racial and ethnic appearance to form the requisite suspicion"[5] or

[3] *See United States v. Maricopa County Sheriff's Office*, No. 10-CV-993 (D. Ariz. filed Sept. 2, 2010) (suit to compel compliance with ongoing Department of Justice investigation under Title VI of the Civil Rights Act).

[4] *See* Gascón Decl. (Doc. 235-6) at ¶ 18; Granato Decl. (Doc. 236) at ¶ 16; Gonzalez Decl. (Doc. 235-8) at ¶¶ 16-17; Villaseñor Decl. (*U.S. v. Arizona* Doc. 27-9) at ¶ 6 (officers are "not at all familiar with reasonable suspicion as to immigration status"); Estrada Decl. (*U.S. v. Arizona* Doc. 27-08) at ¶¶ 8-9 (SB 1070 poses "real risk" of constitutional and civil rights violations); Harris Decl. (*U.S. v. Arizona* Doc. 27-10) at p. 7.

[5] Gonzalez Decl. (Doc. 235-8) ¶ 17.

"sufficiently prepare officers to enforce SB 1070 in a uniform manner."[6] Since § 2(B) requires police to attempt to verify whether an individual has authority to remain in the United States in the course of "enforcement of any other law or ordinance of a county, city or town or [the State of Arizona]" police are likely to use various laws as a pretext to stop Latinos and others they suspect—based on sight and sound—of being "unlawfully present" in the United States.[7] The injunction, therefore, prevents the enforcement of a law that "cannot be enforced in a race neutral manner."[8]

In addition, SB 1070's mandate to turn every interaction with law enforcement into an immigration investigation is further reinforced by SB 1070 § 2(H), which allows any legal resident of the state "to challenge any official or agency of this state or a county, city, town . . . that adopts or implements a policy

[6] Granato Decl. (Doc. 236) ¶ 8.

[7] Section 2(B)s requirement that immigration questioning and status determination take place in the course of "enforcement of any other law or ordinance of a county, city or town or [the state]" is no shield against abuse. As *amici's* experience demonstrates, perpetual stops and investigations are commonplace. Indeed, the Arizona traffic code is so comprehensive that much of its enforcement is subject to the broad discretion of, and therefore abuse by, patrolling officers, who effectively have the ability to stop any car at any time. *See, e.g.*, Ariz. Rev. Stat. ("A.R.S.") § 28-730 ("a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent"); David A. Harris, *"Driving While Black" and All Other Traffic Offenses*, 87 CRIM. L. & CRIMINOLOGY 544, 545 (1997) ("These codes regulate the details of driving in ways both big and small, obvious and arcane. In the most literal sense no driver can avoid violating some traffic law during a short drive, even with the most careful attention"). Further, individuals need not violate any law or ordinance to come within the reach of § 2(B)'s provisions requiring a determination of immigration status, since these provisions are triggered merely by an investigation of a possible violation. See A.R.S. § 11-1051(G).

[8] Gascón Decl. (Doc. 235-6) ¶¶ 18–20.

that limits or restricts the enforcement of federal immigration laws." A.R.S. § 11-1051(G). Together, these provisions would permit a pervasive climate of police profiling in Arizona. It is unquestionably in the public interest to prevent widespread unconstitutional racial profiling. *See Murillo v. Musegades*, 809 F. Supp. 487, 498 (W.D. Tex. 1992).

The state contends that "reasonable suspicion of unlawful presence will rarely exist for a lawfully-present alien."[9] Ariz. Br. at 32. Yet, the factors identified in the state's own training materials as supporting "reasonable suspicion of unlawful presence" sweep in a wide range of innocent conduct and would cause police to detain multiple *amici* and untold numbers of lawfully present individuals. *See* Intervenor Defs.' Resp. to Plaintiffs' Mot. For Prelim. Inj., Exh. 35 (Doc. 329-3) at 14-15. *Amicus* Vargas, for example, is not fluent in English and has sought work alongside other day laborers, some of whom were in the country unlawfully. He therefore exhibits multiple factors on the Arizona Peace Officer Standards and Training Board's ("AZ POST") non-exclusive list of factors used to establish reasonable suspicion of lack of federal immigration authorization under SB 1070.[10]

[9] Mr. Shee's and Mr. Vargas' experiences highlight the fallacy of this statement.

[10] AZ POST was created to provide training standards and curriculum for peace officers. *See* http://www.azpost.state.az.us. After the passage of SB 1070, AZ POST was charged with creating a training curriculum for Arizona peace officers. *See* http://www.azpost.state.az.us/bulletins/1070_Outline.pdf.

See id. ("Location … including … [a] place where unlawfully present aliens are known to congregate looking for work"; "[s]ignificant difficulty communicating in English."). *See also id*. at 15 ("you may have lots of factors that are not on that list"). Similarly, *amicus* Jane Doe 1 does not have an Arizona identification card or federal registration document and is not fluent in English. She would also be at real risk of being treated as "unlawfully present" by local law enforcement even though her presence is known to federal immigration authorities and they have not acted to remove her. *See*, id. at 14-15 "[p]ossession of foreign identification and lack of English proficiency are factors giving rise to reasonable suspicion").[11]

B. Arizona Grossly Underestimates The Challenges In Determining Federal Immigration Status And The Resulting Harms To Individuals.

The fact that Arizona completely fails to grasp the complexity of immigration status determinations further highlights the danger of allowing the enjoined provisions to go into effect. As the United States has explained, "resolution of … status is not necessarily a short and simple process." U.S. Br. at 56. Even the basic question of whether an individual is a citizen or a non-citizen is frequently not easy to answer. Indeed, the federal government will often have no

[11] Clients of *amici* Friendly House and Arizona South Asians for Safe Families are in the same situation. *See*, *e.g.*, Ibarra Decl. (Doc. 236-2) ¶¶ 7, 13 (describing the risk of detention and arrest of *amicus* Friendly House's T and U visa applicant clients and Violence Against Women Act ("VAWA") petitioners).

information on U.S. citizens. U.S. Br. at 56; *accord* Ariz. Br. at 41 n.22. Thus, an individual who crossed into the country without permission and never came into contact with federal authorities, and a natural-born citizen of the United States—like *amicus* Shee—may both receive the same response from federal authorities in response to a police request: that no record exists for them in the federal databases.

Moreover, many non-citizens who are in the United States with the consent of the federal government lack documentation that could easily confirm that fact, including individual *amici* and members and clients of *amici* organizations. For example, *amicus* Jane Doe 1, who was forced to leave her home village in a South Asian country because of religious persecution as a Christian in a predominantly Muslim country – in the form of kidnapping, sexual abuse, and physical assault, is applying for asylum in the United States. However, she does not have a registration document or other instrument demonstrating that she has federal permission to remain in the U.S. The United States has explained that many other non-citizens similarly do not have "readily available documentation to demonstrate their status," including over 14 million non-citizens admitted in fiscal year 2009 under the visa waiver program who have no federal registration documents. *See* U.S. Br. at 56; *see generally* Aytes Decl. (*U.S. v. Arizona* Doc. 27-2).

The State's claim that non-citizens need not carry documentation to confirm their legal status because most know their alien registration number ("A-number") by heart is absurd. Ariz. Br. at 32-33. Unlike Social Security numbers or even driver's license numbers, A-numbers are not routinely used outside of the federal immigration system, so most immigrants do not commit them to memory; nor has Arizona established that all non-citizens with permission to reside in the country are even provided a document by the federal government assigning them an A-number. Arizona makes these faulty assertions regarding the supposed ease of federal immigration verification by relying on the testimony of a single Border Patrol agent who appears to have limited knowledge of the federal immigration system.[12]

In addition, Arizona's claim that any difficulties in getting a response from the federal government concerning requests to verify whether an individual is "unlawfully present" can be cured by the Arizona law enforcement officers trained under a program operated pursuant to 8 U.S.C. § 1357(g) (Ariz. Br. at 38), is

[12] The agent testified, for example, that he has never encountered anyone with a T- or U-visa or immigration authorization under Temporary Protected Status ("TPS") or the VAWA. Ariz. Br. at 25 n.12. Yet TPS holders alone account for over 500,000 individuals in the United States. U.S. Br. at 56 ("DHS estimates that up to 200,000 individuals were eligible for [TPS] based solely on the designation of Haiti…"); Megan Davy, *The Central American Born in the United States*, Migration Policy Inst. (Apr. 2006) (an estimated 374,000 Central Americans living in the United States under TPS).

unrealistic.[13] Most of Arizona's1357(g) officers are detention officers authorized to conduct only detention functions, and applying their certification to inquiries from the field, as Arizona proposes, would expressly violate the agencies' agreements with Immigration and Customs Enforcement ("ICE").[14]

Against this backdrop, SB 1070 would visit fundamental harms on *amici* and others in Arizona. Individuals would be detained on the basis of race, associations, language, and other improper factors; and the detentions would frequently be prolonged because immigration status determinations are not simple. Section 2(B) provides no limit on the time that individuals may be detained while their immigration status is ascertained. And § 2(B) is particularly pernicious because while law enforcement officers in Arizona routinely arrest and release individuals on criminal misdemeanor charges, § 2(B) would require police to hold these individuals until their immigration status can be verified or the individual can prove that they are a U.S. citizen.[15] For example, under § 2(B), officers who issue a citation for criminal speeding, which technically constitutes an arrest in Arizona,

[13] *See* description of this program at 21, *infra.*

[14] *See, e.g.*, Memorandum of Agreement Maricopa County Sheriff's Office, Appendix D: Standard Operating Procedures ("SOP") Template, *available at* http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gmaricopacountyso102609.pdf.

[15] As the district court explained, the plain language of § 2(B)'s second sentence and its legislative history make clear that it was intended to apply to all individuals who are arrested. *See Arizona*, 703 F.Supp.2d at 993-94.

see State v. Susko, 114 Ariz. 547, 549 (1977), would then be compelled to conduct an investigation of the motorist's immigration status. Because the motorist cannot be released until immigration status is verified, the result is that the motorist would be detained for an extended and indeterminate period of time.[16]

C. The New State Criminal Immigration Provisions in SB 1070 §§ 3 and 5(C) Improperly Threaten *Amici* and Others with Detention and Prosecution.

The new state law immigration provisions in §§ 3 and 5(C) fail to account for the complexities and realities of federal immigration law. Section 3's registration provisions put individuals who, through no fault of their own, do not have recognizable registration documents at risk of constant and repeated criminal prosecution. This is not a risk that they face under the federal registration scheme. As the United States has noted (U.S. Br. at 11-12, 49-50), Congress has directed federal immigration authorities to prioritize the identification and removal of immigrants who have committed serious criminal offenses. Enforcement of the federal registration provisions, on the other hand, has been de-prioritized and the federal regulations that are an integral part of the scheme are woefully out of

[16] In *Escobar v. Brewer*, No. CV-10-249-TUC-SRB (D. Ariz. 2010), Defendant City of Tucson filed a cross claim against Arizona alleging that federal authorities would not be able to respond with an immediate verification of the immigration status of the more than 36,000 persons who were the subject of a misdemeanor cite and release last year. Thus, according to the City of Tucson, SB 1070 § 2(B) would require law enforcement officers in Arizona to incarcerate persons who would otherwise have been released at the time of citation, while waiting for federal verification. Boyd Decl., (Doc. 235-2) Ex 20, Tucson Cross-Comp. at 8-10. The cross claim was subsequently dismissed upon motion of the City in light of the issuance of the preliminary injunction in this case.

date.[17] Boyd Decl., Exh. 5 (Doc. 109-1) (federal government statistics show only 30 such prosecutions nationwide over the entire period from 1994 through 2008). By contrast, Arizona has mandated that § 3, like the rest of SB 1070, be vigorously enforced, and law enforcement agencies that fail to do so are under threat of a civil suit. A.R.S. § 11-1051(H).

The problems with § 5(C), discussed at length in the United States' brief, are further exacerbated by the fact that it criminalizes work by "unauthorized alien[s]" that the federal government elected not to prohibit. Federal law does not require employers to verify the work authorization of casual domestic workers and independent contractors (*see* 8 C.F.R. §§ 274a.1(f), (h), (j)), but § 5(C) does not contain any corresponding limitation. As a result, *amici* who lawfully solicit day labor work could be prosecuted under § 5(C) even though their hiring violates no federal law. In addition, *amici* that operate day laborer centers — Southside Presbyterian Church and Tonatierra Community Development Institute — face the loss of those centers due to their members' fears of detention and prosecution.[18]

D. SB 1070 Would Cause Individuals To Curtail Their Constitutionally Protected Activities.

[17] The regulations that designate immigration "registration" documents do not include some of the most common immigration documents, and therefore, millions of noncitizens with lawful status do not have a "registration" document. *See generally* Aytes Decl. (*U.S. v. Arizona* Doc. 27-2); Cooper Decl. (Doc. 235-4) ¶¶ 28-29.

[18] *See* Harrington Decl. (Doc. 331-4) ¶¶ 18-20; Enrique Decl. (Doc. 236-9) ¶ 15.

Under SB 1070, individuals and organizations, including *amici*, would change or curtail their public activities out of fear that they would be subject to unlawful questioning or detention by local law enforcement officials due to their "foreign" appearance or because they speak a foreign language.[19] Due to the passage of SB 1070, some *amici* began obtaining and carrying additional documentation and altering fundamental aspects of their daily lives -- such as speaking a foreign language in public in the hopes of avoiding unwarranted detention by law enforcement.[20] Because law enforcement officials inevitably would use race or national origin in making determinations under § 2(B), members of minority groups would be discouraged from engaging in protected speech and expressive activity that may be perceived as "alien" or foreign, such as speaking a foreign language or speaking English in public if they have a pronounced accent.[21] Notably, choice of language has been described by this Court as "pure speech" protected by the First Amendment. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 936 (9th Cir. 1995) (en banc), *vacated on other grounds sub nom.*

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[19] *See, e.g.*, Anderson Decl. (Doc. 236-6) ¶ 6; Jane Doe 1 Decl. (Doc. 236-12) ¶ 5; Enrique Decl. (Doc. 236-9) ¶ 3; Hansen Decl. (Doc. 331-2) ¶ 6; Medina Decl. (Doc. 236-6) ¶ 6; Vargas Decl. (Doc. 236-10) ¶ 7; Villa Decl. (Doc. 236-11) ¶¶ 2, 8.

[20] *See, e.g.*, Gabler Decl. (Doc. 331-3) ¶ 4; C.M. Decl. (Doc. 331-5) ¶¶ 7-8, 9; Shee Decl. (Doc. 331-7) ¶10; Allen Decl. (Doc. 331-1) ¶¶ 8,10, Hansen Decl. (Doc. 331-2) ¶ 6; Harrington Decl. (Doc. 331-4) ¶ 22.

[21] These fears are confirmed by the AZ POST's own training materials. Intervenor Defs.' Resp. to Plaintiffs' Mot. For Prelim. Inj., Exh. 35 (Doc. 329-3) at 14-15.

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997). In the absence of a preliminary injunction, racial and national origin minorities in Arizona would thus be faced with the Hobson's choice between suppressing their constitutionally protected speech or risking the possibility of being stopped, questioned, and potentially detained for an extended period.

Amici would also fear reporting crimes or serving as witnesses because of concern that contact with Arizona state law enforcement will subject them to detention … and possible deportation."[22] Individuals who do not possess documents demonstrating their immigration status would also curtail their public activities out of fear of being detained while their immigration status is verified. The injunction in this case averted a disastrous situation in which numerous Arizona residents would be at risk while engaging in innocent daily behavior.

[22] *See* Ibarra Decl. (Doc. 236-2) ¶ 12; *see also* Anderson Decl. (Doc. 235-3) ¶ 8; Jane Doe 1 Dec. (Doc. 236-12) ¶ 6.

III. ARIZONA'S CLAIM THAT FEDERAL LAW AUTHORIZES SB 1070 IS WITHOUT MERIT, AND THE DISTRICT COURT'S DECISION MAY BE AFFIRMED ON THIS ADDITIONAL GROUND

A. Federal Law Provides Only A Narrow Role For States In Civil Immigration Enforcement.

The brief of the United States demonstrates that, at a minimum, any State or local participation in immigration enforcement must "be part of a cooperative relationship with federal officials," U.S. Br. at 45, and accord with federal priorities. As the United States explains, SB 1070 actually "remove[s] discretion of state and local officers to consider federal priorities," U.S. Br. at 52, and substitutes Arizona's priorities and determinations for those of the federal government.[23]

Amici agree with the United States that SB 1070 is invalid because it creates an independent and conflicting state immigration enforcement regime. *Amici* also respectfully submit that, although the Court need not reach the issue in this case, SB 1070 would conflict with federal law *even if* the enforcement it mandated were consistent with federal priorities.

That is because neither this Circuit nor the Supreme Court has ever found that state and local officers may enforce civil immigration laws without specific

[23]Indeed, the fact that the United States is pursuing this litigation to enjoin SB 1070 itself demonstrates that the Arizona law is the antithesis of "cooperation" with the federal government.

authorization from Congress. *Cf.* Ariz. Br. at 26 (asserting that as a general matter Arizona's "law enforcement officers may investigate potential violations of federal immigration laws if they have 'reasonable suspicion based upon articulable facts'"). Rather, the Circuit has on multiple occasions has strongly indicated that it takes a contrary view. *See Gonzales v. City of Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983), *overruled on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *Mena v. City of Simi Valley*, 332 F.3d 1255, 1266 n.15 (9th Cir. 2003), *vacated on other grounds sub nom. Muehler v. Mena*, 544 U.S. 93 (2005).[24] In both *Gonzales* and in *Mena*, this Court strongly suggested that federal

[24]Arizona cites no U.S. Supreme Court or Ninth Circuit precedent in support of this assertion. Instead, the State quotes from a Fifth Circuit case involving arrests by *federal* border patrol officers, which is plainly inapposite. *See United States v. Tarango-Hinojos*, 791 F.2d 1174 (5th Cir. 1986). It also cites a Tenth Circuit case that explicitly disagrees with Ninth Circuit precedent. *See United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001) (disagreeing with *Gonzales*'s analysis of necessary state-law authorization for criminal immigration enforcement). Finally, it cites a Fourth Circuit case that did not squarely address immigration-related enforcement authority. *See United States v. Soriano-Jarquin*, 492 F.3d 495 (4th Cir. 2007).

Elsewhere, Arizona cites an Office of Legal Counsel ("OLC") memorandum that takes a broad view of state and local authority to enforce immigration law. Ariz. Br. at 55-56 & nn. 34-35. That memorandum's reasoning is not persuasive and its weight is further diminished by the fact that it is contradicted by at least three previous formal OLC opinions from both Republican and Democratic administrations, including one that specifically relied on this Court's decision in *Gonzales*. *See* Richard L. Shiffrin, *State Assistance in Apprehending Illegal Aliens – Part II* (Feb. 21, 1996) (unreleased, but discussed in 2002 memo cited by Arizona); Teresa Wynn Roseborough, *Assistance by State and Local Police in Apprehending Illegal Aliens* (Feb. 5, 1996), http://www.usdoj.gov/olc/immstopo1a.htm (citing and relying on *Gonzales*); Douglas W. Kmiec, *Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File* (Apr. 11, 1989), http://www.aclu.org/pdfs/immigrants/1989_olc_opinion.pdf; *see also Bronx Defenders v. DHS*, No. 04 CV 8576 HB, 2005 WL 3462725, at *2 (S.D.N.Y. Dec. 19, 2005) (noting that in 1974, INS concluded that state and local police could not arrest an individual on the basis of a civil deportation warrant).

law generally preempts state and local police authority to enforce the civil provisions of immigration law. In *Gonzales*, the Court explained that:

> an 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 [Immigration and Nationality Act] 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.

722 F.2d at 474-75 (emphasis added, citation omitted). The Court drew a sharp line between the civil provisions of immigration law, which supported an assumption of preemption, and criminal provisions, because "statutes relating to [criminal violations] are few in number and relatively simple in their terms" and "not … supported by a complex administrative structure." *Id.* at 475. The Court explained at length that being "illegally present in the United States … is only a civil violation" that would not support arrest by state or local officers. *Id.* at 476.

In *Mena*, the Court found that while "[a]gents of the INS have limited authority to question and detain an individual suspected of being an illegal alien … the basis for a local police officer to assert such authority is questionable." *Mena*, 332 F.3d at 1266 n.15. The Court explained that absent a formal agreement with the federal government under 8 U.S.C. § 1357(g), state law enforcement officers are not vested with authority to question and detain individuals "suspected" of being undocumented immigrants. *Id.* The Court also noted that 8 U.S.C. §

1252c(a) allows local police to arrest certain previously deported felons, but only if several specific statutory conditions apply. *Id*. at 1266.[25]

Mena may take a narrower view of state and local immigration enforcement authority than *Gonzales*, but both cases plainly do not approve of civil immigration enforcement by state and local police.[26] That position is well-founded, and is shared by several other circuits. *See, e.g.*, *United States v. Urietta,* 520 F.3d 569, 574 (6th Cir. 2008) ("local law enforcement officers cannot enforce completed violations of civil immigration law (i.e., illegal presence) unless specifically authorized to do so by the Attorney General under special conditions"); *Carrasca v. Pomeroy*, 313 F.3d 828, 836-37 (3d Cir. 2002) (noting distinction between civil and criminal law and expressing "uncertainty … with respect to state rangers' authority to detain immigrants"); *but cf. U.S. v. Santana-Garcia*, *supra*.

As *Gonzales* recognizes, Congress designed an intricate and complex *federal* administrative structure to enforce the civil provisions of immigration law. Federal

[25] In Mena's case, the court found that "the police officer could not have asserted the limited authority under § 1252c(a)," but did not decide the question in light of its ruling that Mena's Fourth Amendment rights were violated. *Id.*, at 1266-67. The Supreme Court subsequently found that questioning Mena about her immigration status did not violate the Fourth Amendment because "the Court of Appeals did not hold that the detention was prolonged by the questioning" and therefore there was no seizure or need to address the authority issue. *Muehler v. Mena*, 544 U.S. 93, 101 (2005).

[26] This case does not present the question of whether and to what degree state and local police can enforce the *criminal* provisions of immigration law. In light of the development of the immigration laws since *Gonzales*, in *amici's* view it is apparent that Congress has generally preempted criminal as well as civil enforcement and specific authorization is required where police seek to engage in it. *Cf. Gonzales*, 722 F.2d at 475 (noting that at that time, criminal immigration statutes were "few in number and relatively simple in their terms").

law specifically defines the types of enforcement that federal immigration agents may engage in and the particular classes of agents that are empowered to undertake each type of activity, in light of the specialized training necessary to properly undertake such activity. *See* 8 U.S.C. §§ 1357(a)(1) (interrogation authority); (a)(2) (arrest authority); *see also* 8 C.F.R. §§ 287.5(a)(1) (designating officers with interrogation authority); (b) (designating officers with authority to patrol border); (c) (designating officers with arrest authority and noting training requirements). Federal law "make[s] a very carefully considered distinction between powers which may be exercised without warrant and such where a warrant will be required." H. Rep. No. 82-1365 (1962), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1710. Federal law also requires that when immigration agents make warrantless arrests for immigration violations, the individual arrested is provided with procedural protections that are specifically adapted to the federal immigration system. *See* 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.3.

Moreover, federal law explicitly allows state and local police to enforce civil immigration provisions, but only in very specific situations and never wholly independently of the federal government. The Attorney General may authorize "any state or local enforcement officer" to enforce immigration laws upon certification of "an actual or imminent mass influx of aliens." 8 U.S.C. §

1103(a)(10). As noted in *Mena*, state and local law enforcement officers may arrest and detain previously deported felons,

> but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

8 U.S.C. § 1252c(a). And 8 U.S.C. § 1357(g)(1) allows the federal government to enter into written agreements ("287(g) agreements") with state or local law enforcement agencies in order to allow designated officers to exercise delegated immigration enforcement authority in certain, clearly specified circumstances. Such agreements contain numerous procedural safeguards to ensure that deputized officers enforce immigration policy consistently with federal policies. *See, e.g.*, 8 U.S.C. § 1357(g)(2) (requiring that deputized local officers receive adequate training, and adhere to federal law in performing immigration functions); *id*. at § 1357(g)(3) (deputized officers "shall be subject to the direction and supervision of the Attorney General.")[27]

[27] 8 U.S.C. § 1357(g)(10) provides that the other sections of § 1357(g) "shall [not] be construed to require an agreement under this subsection… for… a [state or local officer]… to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." This is not an affirmative grant of authority, but a limitation of the scope of § 1357(g) itself. It clarifies that where authority to cooperate has been provided, *e.g.*, 8 U.S.C. § 1252c, an additional written agreement is not necessary. In any event, even if § 1357(g)(10) did independently authorize some degree of cooperation, its scope would not be at issue here, because, as explained above and by the United States, SB1070 is not about cooperation.

These specific authorizations and the complex provisions governing interrogation and arrest of immigrants would be rendered superfluous if all state and local police had the ability to engage in civil immigration enforcement.[28] This Circuit's understanding that state and local enforcement of civil immigration law without specific authorization impermissibly conflicts with federal law is plainly correct.

B. The Federal Information Sharing Provisions, 8 U.S.C. §§ 1373 And 1644, Are Not Grants Of Immigration Enforcement Authority To The States.

Two provisions of federal law, 8 U.S.C. §§ 1373 and 1644, allow for information sharing between federal and state actors, but these information sharing provisions do not provide states with any investigation, arrest, or detention authority. Arizona's argument that these information provisions justify its enforcement dragnet under SB 1070 § 2(B), Ariz. Br. at 33-37, fails to acknowledge the text and plain meaning of those provisions.

Section 1644 bars federal and state actors from "prohibit[ing], or in any way restrict[ing], any government entity, from sending to or receiving from the

[28] In proposing 8 U.S.C. §§ 1252c and 1357(g), Members of Congress explained that they were necessary because federal law otherwise preempted state and local enforcement. *See* 142 Cong. Rec. H2190-04 (daily ed. Mar 13, 1996) ("current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encounter[] through their routine duties"); 142 Cong. Rec. H2475-01, H2476-77 ("[t]here is legally nothing that a State or local law enforcement agency can do about a violation of immigration law other than calling the local INS officer to report the case").

Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. § 1644. Section 1373 creates nearly identical information sharing provisions, but also directs federal immigration officials to respond to inquiries by governmental agencies "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… ." 8 U.S.C. § 1373(c). Neither statute confers any enforcement powers on state actors. Indeed, the federal government may only provide citizenship or immigration status information to a state actor when the request is for a purpose that is "authorized by law." 8 U.S.C. § 1373(c). Thus, while §§ 1644 and 1373 permit governmental actors to communicate regarding an individual's immigration status, these sections do not extend the scope of the states' authority to investigate, detain, or arrest individuals in the immigration context.

Section 1644 illustrates how the information sharing mandated by these provisions is distinct from any grant of authority. Section 1644 was enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat 2105 (1996), which establish restrictions on public benefits for non-citizens. Other provisions of PRWORA establish the conditions under which states can permit or deny state public benefits

to different categories of non-citizens. *See* 8 U.S.C. §§ 1621-22 (setting forth state authority to grant or deny state and local public benefits to non-citizens). Section 1644 furthers the operation of those provisions by prohibiting restrictions on states' ability to obtain the information related to immigration status that may be necessary to make eligibility determinations. Similarly, 8 U.S.C. § 1373 does not create authority, but merely provides for the free flow of information where appropriate.

Sections 1373 and 1644 do not modify the limited and well-defined role states have been afforded in immigration enforcement. While §§ 1373 and 1644 are intended to facilitate the sharing of information that may be needed to effectuate federal immigration law and policy, governmental actors must still operate within the bounds of their authority as established in other portions of federal immigration law.

C. SB 1070 Provides for Interrogation and Detention, not mere "Investigation," on Suspicion of Civil Removability.

Arizona's foray into the preempted enforcement area presents a particularly acute problem because SB 1070's §§ 2(B) and 6 extend far beyond consensual inquiries about immigration status; they authorize and mandate detention for the sole purpose of enforcing civil immigration law.

Section 2(B)'s first sentence makes clear that it applies to persons whose liberty is restrained by state or local police: individuals who are "stop[ped], detain[ed], or arrest[ed]," and accordingly are not free to leave. If at *any point* while a person is being detained, police develop "reasonable suspicion" that she is "unlawfully present," § 2(B) *mandates* that the police detain the individual and attempt to determine her immigration status.[29] As discussed *supra* at 9-11, determining immigration status is complex and can be difficult and time-consuming. The State has acknowledged that, at minimum, police will examine documentation, question individuals, and make inquiries to ICE. Ariz. Br. at 31-33 & n.3. Arizona has also acknowledged that those being investigated regarding their immigration status will, in at least some cases, be required to produce additional or different documentation than similarly situated individuals who are not subject to § 2(B)'s mandatory immigration inquiry. Ariz. Br. at 31 (aliens to provide "information … regarding their identity and, if reasonable suspicion exists, their citizenship as well…."). The federal government submitted evidence below indicating that on average, it takes over 80 minutes to obtain a response to an inquiry. Palmatier Decl. (*U.S. v. Arizona* Doc. 27-3) ¶ 8. Thus, determining immigration status under § 2(B)'s first provision involves custodial interrogation,

[29] Being "illegally present in the United States…is only a civil violation," not a crime. *Gonzales*, 722 F.2d at 476-77.

and will extend stops, detentions, and arrests for civil immigration purposes. *U.S. v. Arizona*, 703 F.Supp.2d at 995 (finding that an "increase in length of detention while immigration status is determined" is "inevitable").

The second sentence of § 2(B), and § 6, are even more clearly designed to cause detention based solely on suspicion of civil immigration violations. As the district court explained, the plain language of § 2(B)'s second sentence, and its legislative history, make clear that it applies to all individuals who are arrested. Their "liberty will be restricted while their status is checked," especially in cases where individuals would otherwise not have been jailed. *See Arizona*, 703 F.Supp.2d at 995. The State's submission on appeal that "investigations into … immigration status will be performed only if reasonable suspicion exists to believe that the person is unlawfully in the country" (Ariz. Br. at 41) does violence to SB 1070's text, but it does not save the statute even if it is accepted. That interpretation of the law would still impermissibly require detention on suspicion of a civil immigration violation.

Finally, § 6 authorizes warrantless arrests based on a police officer's assessment of removability – a civil, not criminal, matter under federal immigration law. The State offers no authority to support this broad increase in local power to enforce immigration law, nor could it. Therefore, § 6 is preempted

because the arrests it authorizes are premised solely on suspicion of civil immigration violations. *See* U.S. Br. at 57-60.

IV. CONCLUSION

For all of the foregoing reasons, the Court should affirm the decision of the district court.

Dated: September 30, 2010

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I hereby certify that the foregoing brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1. The brief was prepared in Times New Roman 14-point font and contains 6,904 words.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2010, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal, all of whom are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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