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 FOR APPELLEE

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

BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

This is an action by the United States seeking to set aside as preempted by federal law, U.S. Const. art. VI, cl. 2, certain provisions of a newly enacted Arizona state law, S.B. 1070, that purport to establish a distinct immigration policy for the state of Arizona that is not subject to the control or priorities of federal immigration enforcement authorities. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1345. The district court entered a preliminary injunction against four provisions of the law on July 28, 2010, and Arizona timely appealed from that order on July 29, 2010. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED

Whether the district court abused its discretion in preliminarily enjoining four provisions of an Arizona law that establish a nondiscretionary state immigration enforcement scheme that is not subject to the control or priorities of federal immigration authorities, and which (1) makes it a state crime for an alien to violate provisions of federal law that require some aliens to complete and carry federal registration documentation; (2) makes it a state crime for an unauthorized alien to seek or obtain employment; (3) mandates all state and local officers to determine, as practicable, the immigration status of persons whom they stop or detain if there is reasonable suspicion that the person is an alien and unlawfully present in the United States, and to verify the immigration status of all persons arrested before they are released; and (4) authorizes state officers to arrest without a warrant any person, including those who are lawfully present in the United States, when the officer has probable cause to believe that the person has at some point committed an offense that makes the person removable from the United States.

STATUTORY AND REGULATORY PROVISIONS

The full text of the Arizona law at issue and pertinent federal statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

The United States instituted this action to have declared invalid and permanently enjoined various provisions of an Arizona law that are preempted by federal law because they create a state immigration policy that makes "attrition through enforcement the public policy of all state and local government agencies in Arizona," regardless of federal immigration policy or enforcement priorities. S.B. 1070, § 1. The United States sought to prevent the Arizona law from interfering with the federal government's exclusive authority to establish the Nation's immigration policy and priorities, to avoid the creation of a patchwork of state immigration enforcement schemes, and to prevent undue burdens on lawfully present aliens. The suit also challenged the new state law in order to guard the federal government's foreign policy prerogatives, and to ensure cooperation with States in aid of the federal government's immigration enforcement rather than diversion of the federal government's resources from its prioritized immigration enforcement against suspected terrorists and criminal aliens.

At issue on this appeal are four provisions of the Arizona law that were enjoined preliminarily by the district court. The court enjoined a provision that makes it a crime in Arizona for a person to violate 8 U.S.C. §§ 1304(e), 1306(a), which require certain aliens to register with the federal government and carry with

them federal registration documentation. S.B. 1070, § 3, codified at Ariz. Rev. Stat. § 13-1509. The court also enjoined a provision that makes it a crime in Arizona for a person who is unlawfully present in the United States to apply for or to perform work as an employee or independent contractor in Arizona. S.B. 1070, § 5, codified at Ariz. Rev. Stat. § 13-2928(C). Another of the enjoined statutory provisions requires all state and local law enforcement officers in Arizona to determine, when practicable, the immigration status of any person whom they stop or detain whenever reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, and to verify the immigration status of any person who is arrested before the person is released. S.B. 1070, § 2, codified at Ariz. Rev. Stat. § 11-1051(B). The fourth enjoined provision authorizes a state officer to arrest a person without any warrant if the officer has probable cause to believe that the person, including a person who is authorized to be in the United States and is lawfully present here, has committed at any previous time a public offense that would make the person removable from the United States. S.B. 1070, § 6, codified at Ariz. Rev. Stat. § 13-3883(A)(5).

On July 28, 2010, the day before the Arizona law was scheduled to take effect, the district court issued a preliminary injunction against enforcement of these four provisions. The court explained that the Constitution vests exclusive

authority in the national government to regulate immigration. Pursuant to that authority, Congress has established a comprehensive framework that governs entrance and admission into the United States by foreign nationals, the consequences of illegal entry, and the procedures for removal and deportation of aliens from this country. Congress has also comprehensively regulated the employment of persons unlawfully present in the United States, and imposed a calibrated scale of civil and criminal penalties on employers who knowingly hire such persons, but declined to impose criminal penalties on such persons who seek or obtain employment.

The district court found that the federal government was likely to succeed in its argument that these attempts by the State to engraft new criminal penalties onto the federal scheme, and to undertake an independent immigration enforcement program, intrude into an area committed exclusively to the federal government and stand as an obstacle to the scheme created by Congress and to the federal government's ability to set immigration enforcement priorities and achieve policy goals.

The State has appealed from the preliminary injunction. The district court declined to enjoin other provisions of the state law that the United States had

sought to preliminarily enjoin. The United States has not appealed from that part of the order, and thus those provisions are not at issue at this juncture.

STATEMENT OF FACTS

A. Federal Immigration Law.

1. The United States Constitution vests the federal government with exclusive authority to establish the Nation's immigration policy. *See* U.S. Const. art. I, § 8, cl. 4 (naturalization); U.S. Const. art. I, § 8, cl. 3 (foreign commerce). The "[p]ower to regulate immigration is unquestionably exclusively a federal power." *De Canas v. Bica*, 424 U.S. 351, 354 (1976). The federal government possesses exclusive authority to determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355.

Exercising this authority, "Congress has created and refined a complex and detailed statutory framework regulating immigration." ER 5. The Immigration and Nationality Act ("INA") generally requires aliens to register upon entering the United States, 8 U.S.C. §§ 1201, 1301, 1302, but it has various exceptions. For example, the registration requirement does not apply to individuals who are in the United States for less than thirty days, *id.* §§ 1302(a)-(b); and to foreign official representatives and their family members in the United States in specified

nonimmigrant status, *id.* § 1303(b). *See generally* 8 U.S.C. §§ 1201(b), 1301-06; 8 C.F.R. Part 264. Aliens who have registered and are eighteen years or older must carry with them any registration certificate or receipt they receive from the federal government. 8 U.S.C. § 1304(e). For those aliens who are required to register, failure to do so is a misdemeanor, *id.* § 1306(a), and failure to carry one's registration document is also a misdemeanor, *id.* § 1304(e).

The INA also establishes the grounds on which an alien is removable from the United States. It sets forth an extensive statutory scheme that covers multiple grounds. *Id.* §§ 1227(a), 1182(a). An alien who has engaged in terrorism or criminal activity that endangers public safety or national security is removable. *Id.* §§ 1227(a)(4)(A)-(B), 1182(a)(3)(B). Aliens who commit certain other specified criminal offenses or were not admissible when they entered the country are also removable. *Id.* §§ 1227(a)(1)-(2); *id.* § 1182(a) (grounds for inadmissibility, including provision making removable those who are present in the United States without being admitted or paroled, *id.* § 1182(a)(6)(A)(i)).[1]

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[1] The criminal offenses that make an alien removable include, *inter alia*, convictions for: felony offenses involving moral turpitude committed within a specified number of years after admission to the country; multiple crimes involving moral turpitude; aggravated felonies; certain controlled substances offenses; certain firearm offenses; certain conspiracies related to espionage, sabotage, and treason, depending on the term of imprisonment; and certain offenses of domestic violence (subject to waiver authority of the Attorney General), child abuse or neglect, or violation of protective orders. 8 U.S.C.

An alien who is removable can be placed in proceedings to determine whether the federal government should order that the alien be removed from the United States, *id.* §§ 1227(a), 1228, 1229a, and such federal proceedings are the "sole and exclusive procedure for determining whether an alien may be . . . removed from the United States," *id.* § 1229a(a)(3). A person charged with a ground of removability is ordinarily issued a notice to appear at a removal proceeding before a federal immigration judge. *Id.* §§ 1229, 1229a(a)(1).[2] "At the conclusion of the proceeding the immigration judge shall decide [based on the evidence at the hearing] whether an alien is removable from the United States." *Id.* § 1229a(c)(1)(A). An alien may apply for various forms of relief from removal, *id.* § 1229a(c)(4), including relief that allows the alien to remain in the United States, such as asylum, *id.* § 1158; cancellation of removal, *id.* § 1229b; and adjustment of status, *id.* § 1255.

Federal law discourages illegal immigration into the United States by penalizing employers for "hiring unauthorized aliens." H.R. Rep. No. 682, 99th

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§§ 1227(a)(2), 1227(a)(7).

[2] In specific circumstances, there are other federal proceedings for determining if an alien is removable from the United States. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(A) (expedited removal for aliens arriving at a port of entry and certain other aliens); *id.* § 1228(b) (administrative removal of certain aliens who have been convicted of aggravated felonies).

Cong., 2d Sess., Pt. 1, 46 (1986). Under provisions added to the INA by the Immigration Reform and Control Act of 1986 ("IRCA"), employers face a range of civil and, ultimately, criminal sanctions for employment of aliens who are not authorized to work. 8 U.S.C. §§ 1324a(e)(4), 1324a(f). Federal law does not, however, impose criminal penalties on such aliens who merely seek or obtain employment in the United States. Nor, more generally, does federal law criminalize mere unauthorized presence in the United States, although such presence may make an alien removable. ER 5.

2. Several federal agencies, including the Department of Homeland Security ("DHS"), the Department of Justice, and the Department of State, establish and coordinate the priorities for enforcement of federal immigration laws and carry out enforcement activities.[3]

a. Within DHS, U.S. Immigration and Customs Enforcement ("ICE") is vested with broad authority over immigration enforcement. Ragsdale Decl. ¶ 16

[3] Under the Homeland Security Act of 2002, the Immigration and Naturalization Service ("INS") was abolished. Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (2002). Congress assigned the administration and enforcement of the Immigration and Nationality Act, as amended, to the Secretary of Homeland Security. Pub. L. No. 108-7, Div. (L) § 105, 117 Stat. 11, 531 (2003). The Attorney General retains responsibility for criminal prosecutions and conducting removal proceedings through the Executive Office for Immigration Review. 8 U.S.C. § 1103(g).

[SER 110]. Approximately 25% of all ICE special agents are stationed in the five Southwest Border offices, including more than 350 agents in Arizona. *Id.* ¶ 8 [SER 107]. During an average day, ICE officers remove from the United States approximately 900 aliens. *Id.* ¶ 5 [SER 105]. Approximately half of those aliens who are removed by federal immigration authorities each day are persons who had committed crimes. *Id.*

Also within DHS is U.S. Customs and Border Protection ("CBP"), which has primary responsibility for safeguarding the Nation's borders both at and between ports of entry. CBP monitors ports of entry into the United States and determines whether individuals who seek admission or entry into the United States at the border are authorized to do so. Since the beginning of fiscal year 2005, in Arizona alone, more than 90,000 persons who sought admission to the United States were refused admission by CBP or withdrew their applications for admission. Aguilar Decl. ¶ 6 [SER 160-61]. CBP also protects the borders by apprehending those attempting to cross the border illegally. *Id.* ¶ 12 [SER 162].

U.S. Citizenship and Immigration Services ("USCIS") within DHS adjudicates immigration benefits petitions and applications. 6 U.S.C. § 271(b). USCIS processes applications for various humanitarian immigration benefits, which authorize aliens to remain in the country if they have been the victim of

certain crimes or fear persecution in their native countries. *See generally* Aytes Decl. [SER 94-103].

The Department of State also has a role in administering visa and certain other aspects of "U.S. immigration law and policy, as well as in managing and negotiating its foreign relations aspects and impact." Steinberg Decl. ¶ 15 [SER 72]. Because the Department of State "is charged with the day-to-day conduct of U.S. foreign affairs," it "bears the burden of managing foreign governments' objections to the treatment of their nationals in the United States." *Id.* [SER 72-73].

The Department of Justice includes the immigration courts and the Board of Immigration Appeals, which determine in many cases whether an individual is subject to removal and also whether, notwithstanding that removability, the person should be permitted to remain in the United States because he or she qualifies for one of the many different forms of relief from removal such as asylum. *See* 8 U.S.C. §§ 1103(g), 1229a.

b. Congress has directed the Secretary of Homeland Security to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, Title II, 123 Stat. 2142, 2149 (2009); Consolidated Security, Disaster

Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, Title II, 122 Stat. 3574, 3659 (2008) (same language). ICE has recognized two particularly crucial priorities. Its highest priority is enforcement of the immigration laws with regard to "aliens who pose a danger to national security or a risk to public safety," including aliens engaged in or suspected of terrorism and aliens convicted of criminal activity. Ragsdale Decl. ¶ 17 [SER 111]. Another critical focus of enforcement is the dismantling of large organizations that smuggle aliens and contraband, which "tend to create a high risk of danger for the persons being smuggled, and tend to be affiliated with the movement of drugs and weapons." *Id.* ¶ 13 [SER 109].

Enforcement activities with regard to persons unlawfully in the country who have committed no criminal offense focus on aliens who have recently entered the United States illegally and aliens who have failed to comply with final orders of removal. *Id.* ¶ 18 [SER 111]. In comparison, "[a]liens who have been present in the U.S. without authorization for a prolonged period of time and who have not engaged in criminal conduct present a significantly lower enforcement priority." *Id.* *See generally* Memorandum from Assistant Secretary John Morton to All ICE Employees, "Civil Immigration Enforcement: Priorities for the Apprehension,

Detention, and Removal of Aliens" (June 30, 2010),[4] *cited in* Ragsdale Decl. ¶ 27 [SER 116].

Federal officials charged with enforcing immigration laws take into account humanitarian interests in appropriate instances, reflecting the federal government's "desire to ensure aliens in the system are treated fairly and with appropriate respect given their individual circumstances." Ragsdale Decl. ¶ 19 [SER 112]. These humanitarian concerns "may, in appropriate cases, support a conclusion that an [otherwise removable] alien should not be removed or detained at all." *Id.* Federal law thus empowers federal officials in a number of ways to exercise their discretion not to apply a specific immigration law provision to an alien who may have unlawfully entered or remained in the United States. *See, e.g.*, 8 U.S.C. §§ 1158, 1254a (protection from removal for fear of persecution or ongoing armed conflict in home country); *id.* § 1182(d)(5)(A) (parole for "urgent humanitarian reasons or significant public benefit"); *id.* § 1227(a)(1)(E)(iii) (waiver of a ground of deportability for purposes of family unity).

3. The INA encourages States to cooperate with the federal government in several ways. For example, Congress authorized DHS to enter into agreements with States to allow appropriately trained and supervised state and local officers to

[4] http://www.ice.gov/doclib/civil_enforcement_priorities.pdf.

perform enumerated immigration related functions. 8 U.S.C. §§ 1357(g)(1)-(9). These agreements are tailored to ensure that state and local officials "exercise federal immigration authority . . . in a manner consistent with [national] priorities." Ragsdale Decl. ¶ 22 [SER 113]; *see* 8 U.S.C. §§ 1357(g)(2)-(3).

The INA further provides, however, that a formal agreement is not required for state and local officers to "cooperate with the [Secretary of Homeland Security] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10); *see also id.* § 1252c (authorizing state officers to arrest and detain aliens who previously had been removed from or left the United States after conviction of a felony). Arizona has been involved in several of the programs of cooperative enforcement. For example, the Alliance to Combat Transnational Threats seeks "to disrupt and dismantle violent cross-border criminal organizations that have a negative impact on the lives of the people on both sides of the border." Ragsdale Decl. ¶¶ 10-11 [SER 108]. In particular, it "seeks to reduce serious felonies that negatively affect public safety in Arizona," such as drug and weapons trafficking; violence; and human trafficking and prostitution. *Id.* ¶ 11.

B. Arizona's S.B. 1070.

On April 23, 2010, Arizona Governor Janice Brewer signed into law S.B. 1070, which, as amended one week later by H.B. 2162, was scheduled to take effect on July 29, 2010.[5]

S.B. 1070 was enacted to make "attrition through enforcement the public policy of all state and local government agencies in Arizona." S.B. 1070, § 1. To that end, the statute prevents any interference with maximum enforcement by Arizona state and local officials of all federal immigration laws, regardless of federal enforcement priorities, by prohibiting any state or local official or agency from limiting or restricting "the enforcement of federal immigration laws to less than the full extent permitted by federal law." S.B. 1070, § 2, codified at Ariz. Rev. Stat. § 11-1051(A). Any state or local official or agency that "adopts or implements a policy that limits or restricts the enforcement of federal immigration laws . . . to less than the full extent permitted by federal law" is subject to civil penalties of up to $5,000 per day. S.B. 1070, § 2, codified at Ariz. Rev. Stat. § 11-1051(H). The statute authorizes any legal resident of Arizona to bring a lawsuit to enforce such penalties against state or local officials or agencies. *Id*.

[5] All references to S.B. 1070 refer to the text as amended by H.B. 2162.

To implement this independent state enforcement program, the Arizona law contains a number of specific provisions designed to "work together" to deter the unauthorized entry, presence, and economic activity of aliens in the United States. S.B. 1070, § 1. Four of those provisions were preliminarily enjoined by the district court and are at issue in this appeal. Two of those measures, Sections 3 and 5, create new state crimes, and we address those first below. The other two provisions impose requirements on Arizona law enforcement officers to verify immigration status and provide arrest authority.

Section 3, codified at Ariz. Rev. Stat. § 13-1509, makes it a crime under Arizona law for a person to violate federal law that requires certain aliens to register with the federal government and to carry federal registration papers (8 U.S.C. §§ 1304(e), 1306(a)). The prohibition is inapplicable "to a person who maintains authorization from the federal government to remain in the United States." Ariz. Rev. Stat. § 13-1509(F). It thus does not punish violations of the federal registration requirements committed by persons who are lawfully present in the United States. Instead, it creates a state crime applicable only to persons who are unlawfully present.

Section 5, codified at Ariz. Rev. Stat. § 13-2928(C), makes it a crime in Arizona for any person who is unlawfully present in the United States and who is

an "unauthorized alien" to apply for or perform work as an employee or independent contractor. As noted above, federal law, by contrast, does not impose criminal penalties on aliens merely for working or seeking work in the United States without authorization.

Section 2, codified at Ariz. Rev. Stat. § 11-1051(B), imposes a nondiscretionary duty on Arizona law enforcement officers to determine, when practicable, the immigration status of any individual who is stopped or detained if there is reasonable suspicion that the person is an alien and "unlawfully present in the United States," and to verify the immigration status of any person arrested before release of that person. Each such individual's status must be determined unless doing so would hinder or obstruct an investigation. Section 11-1051(B) identifies four specific types of documentation that are sufficient to allow an officer to presume that a person who is stopped or detained is not unlawfully present. The first three are: (1) a valid Arizona driver's license; (2) a valid Arizona nonoperating identification license; and (3) a valid Tribal identification document. Ariz. Rev. Stat. §§ 11-1051(B)(1)-(3). The fourth type is identification that was issued by the United States or a state or local government, but only if the issuing "entity requires proof of legal presence in the United States before issuance." *Id.* § 11-1051(B)(4).

Section 6, codified at Ariz. Rev. Stat. § 13-3883, authorizes Arizona officers to arrest without a warrant any person whom the officer has probable cause to believe "has committed any public offense that makes the person removable from the United States." Arizona law defines "public offense" to mean conduct subject to imprisonment or a fine under Arizona law and also, if committed outside Arizona, under the law of the State in which it occurred. Ariz. Rev. Stat. § 13-105(26).

Several other provisions of S.B. 1070, which are not directly at issue in this appeal, are part of the underlying lawsuit and illustrate the scope of the State's enforcement scheme. S.B. 1070 creates a new state crime for a person, "in violation of a criminal offense" and with knowledge or in reckless disregard of an alien's illegal presence in the United States, to transport the alien into the State; to conceal, harbor, or shield the alien in the State; or to encourage or induce the alien to come into the State. S.B. 1070, § 5, codified at Ariz. Rev. Stat. § 13-2929. Another provision amends a statute that makes it a state crime to transport or procure transportation for a person with knowledge or reason to know that the person is not lawfully in the United States. S.B. 1070, § 4, amending Ariz. Rev. Stat. § 13-2319.[6]

[6] In addition, S.B. 1070 amended the Legal Arizona Workers Act, which imposes state-law sanctions on employers who hire unauthorized aliens, and

C. District Court Proceedings.

The United States filed this action on July 6, 2010, alleging that various provisions of S.B. 1070 are preempted by federal law because they impermissibly infringe on the federal government's authority over immigration and have serious consequences for the United States' foreign relations. The same day, the federal government sought a preliminary injunction staying the effective date of specified parts of the new state law. The United States submitted declarations of senior federal officials and local officials explaining the practical and legal problems with the Arizona law.

After conducting a hearing, the district court ruled that the United States is likely to succeed on the merits of its challenges to four provisions of S.B. 1070, but not as to some others.

The court recognized the longstanding federal policy that aliens not be subject to "'the possibility of inquisitorial practices and police surveillance.'" ER 17 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941)). Section 2, the court

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requires Arizona employers to use the federal E-Verify program to check new employees' immigration status. S.B. 1070, §§ 7-9. Separate litigation challenging the Legal Arizona Workers Act on preemption grounds is pending, and that law is not at issue in this litigation. *See Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009) (upholding statute against preemption challenges), *cert. granted sub nom. Chamber of Commerce of the U.S.A. v. Candelaria*, 130 S. Ct. 3498 (2010).

explained, contravenes that policy by establishing a regime of nondiscretionary questioning of persons based on "reasonable suspicion" about their immigration status, a requirement that is triggered by any police stop with respect to any law or ordinance and extends to minor violations such as jaywalking. ER 18-20. The court also recognized that "the federal government has long rejected a system by which aliens' papers are routinely demanded and checked," noting that individuals lawfully in the country may not be carrying the type of identification which, under Section 2, allows a questioned individual to establish a presumption of legal presence. ER 20. The state enforcement mandate thus imposes "an unacceptable burden on lawfully-present aliens," while diverting federal resources from implementation of federal priorities. ER 20. As the court noted, the Arizona statute contemplates inquiries to federal officials when unresolved issues of status are raised. Under federal law, DHS's Law Enforcement Support Center ("LESC") must respond to such state inquiries. 8 U.S.C. § 1373(c); *see also* Palmatier Decl. ¶¶ 3-6 [SER 432-33]. Because the federal government does not control the flow of inquiries, the state scheme "redirect[s] federal agencies away from the priorities they have established." ER 17. The court noted that the burden on federal resources is even more acute "when considered in light of other state laws similar

to this provision," noting parallel legislation being considered in at least 18 other States. ER 17 n.7.

The court explained that the state crimes created by Section 3 and Section 5 impermissibly impose state criminal penalties outside the comprehensive federal framework. In Section 3, Arizona has made violation of the federal registration laws a state crime, thus "alter[ing] the penalties established by Congress under the federal registration scheme." ER 22. This "impermissible attempt by Arizona to regulate alien registration" "stands as an obstacle to" the scheme established by Congress. ER 22-23 (citing *Hines*, 312 U.S. at 67).

Section 5, which establishes a "new crime for working without authorization," similarly "conflicts with a comprehensive federal scheme" to regulate the field of employment of unauthorized aliens. ER 27. The court emphasized that Congress's "determination to reduce or deter employment of unauthorized workers by sanctioning employers, rather than employees, was 'a congressional policy choice clearly elaborated in IRCA.'" ER 26 (quoting *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1370 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991)).

Finally, the court ruled that the United States is likely to succeed on its claim that federal law preempts Section 6's authorization for state and local

officers to arrest an alien without a warrant if there is probable cause that the person "committed any public offense that makes the person removable from the United States," S.B. 1070, § 6, because "there is a substantial likelihood that officers will wrongfully arrest legal resident aliens" under the provision, ER 33. As the court explained, some categories of crimes may be the basis for removal, while others are not. For example, an alien may be removable as a result of a conviction for a felony offense involving moral turpitude but only if committed within a specified number of years after admission to the country, 8 U.S.C. § 1227(a)(2)(A)(i), or for an "aggravated felony," *id.* § 1227(a)(2)(A)(iii). Attempting to make warrantless arrests based on assumptions about the application of these categories in particular circumstances invites a significant possibility of error that "would impose a 'distinct, unusual, and extraordinary' burden on legal resident aliens that only the federal government has the authority to impose." ER 33 (quoting *Hines*, 312 U.S. at 65-66).

The court concluded that failure to enjoin these four provisions would likely cause the United States irreparable harm because "the federal government's ability to enforce its policies and achieve its objectives" regarding immigration law would "be undermined by the state's enforcement of statutes that interfere with federal law." ER 34. The injunction would also prevent placing a burden on legal

aliens that federal law has sought to avoid. ER 35. In contrast, no public interest would be impaired by preventing Arizona from instituting its own immigration scheme outside the control of the federal government. ER 35.

SUMMARY OF ARGUMENT

I. The United States Constitution vests the authority to regulate immigration in this Nation in the federal government, and Congress has enacted a comprehensive statutory framework to govern the eligibility for entry and admission of foreign nationals into the United States, the conditions under which they may remain and must register, sanctions for violations, and the procedures for their removal. Congress has also addressed the employment of unauthorized aliens as an integral part of the federal framework of immigration regulation, and has chosen to address the issue through employer sanctions and penalties on aliens who commit document fraud, and not through the imposition of criminal sanctions on aliens merely for working or seeking work.

In enacting S.B. 1070, the Arizona legislature responded to what the State characterizes as the federal government's "inability (or unwillingness) to enforce the federal immigration laws effectively," Appellants' Br. 1, by enacting its own, state-specific immigration policy of "attrition through enforcement." S.B. 1070, § 1. The various portions of the Arizona law are designed 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." *Id.*

Notwithstanding Arizona's disagreement with the federal government's priorities in the enforcement of the immigration laws, the State may not establish an independent state enforcement scheme outside federal control. The Constitution does not permit a patchwork of such state immigration schemes. A State does not have authority to supplement federal immigration law by criminalizing unlawful presence in the United States or attaching state-specific criminal penalties to the failure to carry federal registration papers, as Arizona has done in Section 3 of S.B. 1070. Nor does a State have the authority to criminalize attempts to work or performance of work by unauthorized aliens, as it has done in Section 5, particularly where, as here, Congress considered and deliberately rejected this very course as a matter of federal law.

The State has compounded the impact of these provisions by establishing an extraordinary requirement, in Section 2 of S.B. 1070, that state and local law enforcement officers determine, when practicable, the immigration status of every person stopped or detained for any reason (including suspected violation of Section 3 or 5), whenever an officer has a "reasonable suspicion" that the person is unlawfully present. This requirement robs officers of all discretion to consider

immigration enforcement priorities under federal law. The federal government balances a number of competing considerations in its choice of how to enforce the immigration laws, including Congress's intent "to protect the personal liberties of law-abiding aliens . . . and to leave them free from the possibility of inquisitorial practices and police surveillance." *Hines*, 312 U.S. at 74. The enforcement regime created by S.B. 1070, in contrast, makes every encounter with the police an occasion on which lawfully present aliens may need to demonstrate their federal status to a state or local official, who may arrest the person for a crime under state law if the person is not carrying a federal registration document. The district court correctly ruled that Section 2, like the warrantless arrest provision of Section 6, would "impose[] an unacceptable burden on lawfully-present aliens," ER 20.

By establishing a regime outside federal control, the Arizona scheme impairs the federal government's conduct of foreign policy and its enforcement of the immigration laws. The significant adverse consequences for the conduct of United States foreign policy, described in the declaration of Deputy Secretary of State James Steinberg, are visited on the national government and the citizens of all the States. Similarly, by creating enforcement mandates independent of federal oversight, the statute prevents true cooperation by state and local officials with the

federal officials responsible for enforcing federal law, and diverts federal resources to respond to Arizona's "reasonable suspicion" inquiries.

II. The district court correctly concluded that the balance of harms weighs strongly in favor of a preliminary injunction to maintain the status quo and prevent S.B. 1070 from undermining "the federal government's ability to enforce its policies and achieve its objectives." ER 34. Because immigration policy is of critical importance in a variety of diplomatic contexts, S.B. 1070 "runs counter to American foreign policy interests, and . . . its enforcement would further undermine American foreign policy." Steinberg Decl. ¶ 58 [SER 93]. The record also demonstrates that S.B. 1070 would burden lawfully present aliens, and divert federal resources from carefully crafted priorities, such as the pursuit of criminal aliens who pose the largest threats to public safety and national security.

Arizona, in contrast, articulates no irreparable harm resulting from the injunction. Its cursory discussion of this issue urges only that its policies and enforcement scheme would assist in deterring illegal immigration. States play a valuable role when offering bona fide assistance to federal immigration officials, consistent with federal policies and priorities. The independent scheme created by the State in this case is not cooperative and is not constitutionally permissible.

STANDARD OF REVIEW

This Court reviews the district court's entry of a preliminary injunction for abuse of discretion, although issues of law are subject to de novo review. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

ARGUMENT

I. The United States Has Demonstrated a Likelihood of Success on the Merits.

A. The Constitution Vests Authority to Regulate Immigration Exclusively in the Federal Government.

1. The district court correctly recognized that "the federal government has broad and exclusive authority to regulate immigration, supported by both enumerated and implied constitutional powers." ER 10; *see* U.S. Const. art. I, § 8, cl. 4 (naturalization); U.S. Const. art. I, § 8, cl. 3 (foreign commerce). The "'power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation[;] . . . whatever power a state may have is subordinate to supreme national law.'" ER 21-22 (quoting *Hines*, 312 U.S. at 68) (alteration and omission in original); *see also Toll v. Moreno*, 458 U.S. 1, 11 (1982); *De Canas*, 424 U.S. at 354; *Mathews*

v. Diaz, 426 U.S. 67, 84 (1976); *Fong Yue Ting v. United States*, 149 U.S. 698, 705-06 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889).

The regulation of immigration is intertwined with the national government's exclusive conduct of foreign policy. "[I]nternational controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." *Hines*, 312 U.S. at 64. It is the national government, not the 50 individual States, that must prioritize the various national interests in such areas because "a single State" that inserts itself into immigration enforcement contrary to federal policies and objectives "can, at her pleasure, embroil us in disastrous quarrels with other nations." *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875). If each State were permitted to enact and enforce its own immigration policy, the resulting patchwork would interfere with the federal government's ability to speak with one voice in international affairs, and to establish and implement a uniform foreign policy for the Nation.

Immigration policy is therefore entrusted to the United States, which, unlike the States, has the "important . . . responsibility to maintain international relationships, for the protection of American citizens abroad as well as to ensure uniform national foreign policy." ER 20 (citing *Hines*, 312 U.S. at 62-66; *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001)). Federal power over immigration

does not preclude "every state enactment which in any way deals with aliens," *De Canas*, 424 U.S. at 355, or bona fide state cooperation with the federal officials responsible for enforcing the INA, *see* 8 U.S.C. § 1357(g)(10); *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983). But because the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *De Canas*, 424 U.S. at 354, any assistance rendered by state and local officers to federal officials in the enforcement of the INA is subordinate to and must remain responsive to the priorities and discretion of the federal officials who are charged with implementing federal law and policy.

2. Arizona does not claim authority to regulate in the sphere of immigration. It urges, however, that it can impose penalties beyond those provided by federal immigration law based solely on an alien's federal immigration status, and that it can itself enforce immigration law independently of the immigration priorities of the federal government.

The State fundamentally misunderstands the scope and nature of the States' role under the Constitution in this context and the governing federal statutory framework. Congress has exclusive authority to set the penalties for violations of federal law. And, as the Supreme Court has made clear, where a State has no authority to regulate, the State also has no authority to supplement the remedies

and penalties provided by federal law. Applying that principle, the Supreme Court in *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986), struck down a Wisconsin law that prohibited certain violators of the National Labor Relations Act ("NLRA") from doing business with the State. *Id.* at 283-84. The Court explained that just as States had no independent authority to "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits," so, too, are they prohibited from "providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Id.* at 286; *see also Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) (States may not create their own remedies for fraud against a federal agency).

As the Court reiterated in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), "'conflict is imminent'" when "'two separate remedies are brought to bear on the same activity.'" *Id.* at 380 (quoting *Gould,* 475 U.S. at 286 (quoting *Garner v. Teamsters*, 346 U.S. 485, 498-499 (1953))). That the state scheme may "share the same goals" as federal law, *id.* at 379, does not legitimize the State's attempt to enact a concurrent remedial or enforcement regime. State or local attempts to regulate or deter illegal immigration intrude into an "exclusively federal domain" and "usurp authority that the Constitution has placed beyond the

vicissitudes of local governments." *Lozano v. City of Hazleton*, No. 07-3531, 2010 WL 3504538, at *41 (3d Cir. Sept. 9, 2010) (invalidating ordinance requiring renters to obtain an occupancy permit conditioned on demonstration of lawful immigration status).

B. S.B. 1070 Impermissibly Conflicts with Federal Law and Priorities and Is an Obstacle to the Operation of Comprehensive Federal Immigration Law and the Conduct of Foreign Policy.

The Arizona law is explicitly designed to assert new state authority to regulate immigration and to enforce the INA. The State asserts that "[t]he federal government's inability (or unwillingness) to respond effectively to illegal immigration issues has caused state and local law authorities to deal with the problems." Appellants' Br. 10-11. *See also* Remarks by Governor Jan Brewer, Apr. 23, 2010, at 2 (S.B. 1070 was enacted in light of the federal government's "misguided policy").[7]

Dissatisfied with federal enforcement of the INA, Arizona has made "attrition through enforcement the public policy of all state and local government agencies in Arizona." S.B. 1070, § 1 ("Intent"). The legislature explained that "[t]he provisions of this act are intended to work together to discourage and deter

[7] http://azgovernor.gov/dms/upload/SP_042310_SupportOurLawEnforcementAndSafeNeighborhoodsAct.pdf

the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." *Id*.

To this end, S.B. 1070, in effect, makes unlawful presence in the United States a state crime by criminalizing violation of federal law regarding registration documents, mandating immigration status checks by law enforcement, and authorizing arrests of aliens who committed offenses that would make them removable. And S.B. 1070 makes it a crime for a person unlawfully in the country to seek or perform work. To ensure maximum enforcement of these provisions, and (purportedly) of federal law, the state law establishes a stringent, nondiscretionary enforcement regime, backed by a private right of action and severe penalties. Individually and in combination, these provisions substantially infringe on the exclusive federal regulation of immigration and the conditions placed on the presence of foreign nationals in the United States.

1. Section 3 Impermissibly Makes It a State Crime to Fail to Register with the Federal Government and to Be Unlawfully Present in the United States.

Section 3 makes it a crime in Arizona for an alien to fail to register with the federal government under federal immigration law, 8 U.S.C. § 1306(a), and to fail to carry one's registration papers, *id.* § 1304(e). Section 3 therefore is a direct regulation of immigration — which is "unquestionably exclusively a federal

power," *De Canas*, 424 U.S. at 354 — and therefore is preempted for that reason alone.

Moreover, although couched in terms of documentation, the statute is inapplicable to any "person who maintains authorization from the federal government to remain in the United States." S.B. 1070, § 3, codified at Ariz. Rev. Stat. § 13-1509(F). The effect, as well as the purpose, of Section 3 is thus to make unlawful presence a state crime. The sponsor of the provision, State Senator Russell Pearce, specifically explained that Section 3 "says that if you're in Arizona . . . in violation of federal law, that you can be arrested under a state law." *See* Recording of Meeting of House Committee on Military Affairs and Public Safety, March 31, 2010, 18:15–18:39.[8] This provision is flatly at odds with the federal determination that mere unlawful presence in the United States should not generally subject an alien to criminal penalties, but rather is addressed through the process of removing the alien from the United States if federal officials determine that course is appropriate under the federal statutory scheme. It is "uniform" United States policy that "the unlawful presence of a foreign national, without more, ordinarily will not lead to that foreign national's criminal arrest or incarceration, but instead to civil removal proceedings." Steinberg Decl. ¶ 34

[8] http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7286

[SER 84]. "This is a policy that is understood internationally and one which is both important to and supported by foreign governments." *Id.*

Even when viewed solely as a documentation mandate, Section 3 conflicts with the federal statutory framework. Federal law specifies which aliens must register and the details of registration requirements, and establishes the penalties for failing to register or failing to notify the government of a change in address, *see* 8 U.S.C. § 1306. Indeed, under the federal framework, the determination whether a particular alien is required to register includes consideration of facts such as the length of time in the country, *see* 8 U.S.C. §§ 1302(a)-(b), and any specific requirements that the Secretary of Homeland Security may have created for certain groups of aliens, *see id.* § 1303(a); 8 C.F.R. § 264.1(f).

It has been clear since *Hines v. Davidowitz*, 312 U.S. 52 (1941), that a state immigration-registration regime is preempted by such federal law. Arizona urges that Section 3, unlike the scheme invalidated in *Hines*, does not impose substantive requirements additional to those imposed by federal law, and argues that Section 3 for that reason is not "inconsistent with Congress' objectives in any respect." Appellants' Br. 44. But these arguments fundamentally misapprehend the nature of constitutional and statutory preemption. Where States have no authority to regulate directly, they likewise cannot provide "their own regulatory

or judicial remedies for conduct prohibited or arguably prohibited by the [federal] Act." *Gould,* 475 U.S. at 286. State-specific regulatory and judicial remedies are impermissible even if the States "share the same goals" as the federal government. *Crosby*, 530 U.S. at 379; *see also Hines*, 312 U.S. at 66-67 (holding states may not "complement" federal law).

The Supreme Court's decision in *Buckman* is especially instructive. There, the Court held that a State could not provide a tort remedy for claims premised on fraud against the U.S. Food and Drug Administration, conduct that violated federal law. The Court found it significant that the relationship between the federal government and those it regulates is not an area of traditional state responsibility, because that relationship originates, is maintained, and terminates solely as a matter of federal law. *Buckman*, 531 U.S. at 347. The Court further concluded that imposition of liability under state law could interfere with the selection of enforcement approaches by the federal agency for violation of federal law. *Id.* at 350. The holding of *Buckman* applies *a fortiori* here, because the underlying subject matter (immigration), not merely the relationship between the federal government and those it regulates, is exclusively federal, and imposition of penalties under state law interferes with enforcement discretion under federal law.

Similarly, like the statute at issue in *Gould*, Section 3 "functions unambiguously as a supplemental sanction for [federal] violations" that the State has no authority to prosecute. *Gould*, 475 U.S. at 288. It criminalizes unlawful presence in the State and makes explicit that the state crime is distinct from the crime under federal law, declaring that the state crime is "[i]n addition to any violation of federal law," S.B. 1070, § 3. Thus, Section 3 impermissibly operates to "create state penalties and lead to state prosecutions for violation of federal law," which "alters the penalties established by Congress under the federal registration scheme." ER 22.

Congress is not, as Arizona suggests, required to explicitly preclude States from grafting additional penalties onto federal law. Such state regimes, especially in an area of exclusive federal responsibility like immigration, are fundamentally inconsistent with the relationship between the federal and state governments under the Constitution. The Supreme Court thus has recognized that Congress's "failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply." *Crosby*, 530 U.S. at 387-88. And, as Arizona points out, in the immigration context, when Congress wants States to "reinforce federal alien classifications," it

explicitly invites them to do so. Appellants' Br. 44-45. No such invitation has issued here.

2. Section 5 Impermissibly Makes It a Crime for Persons Unlawfully in the United States to Seek or Obtain Work.

a. Section 5 makes it a state crime for persons unlawfully present in the United States to work or seek work in Arizona. Congress, in contrast, has chosen to discourage illegal immigration through an escalating series of civil and, ultimately, criminal penalties under the INA only for employers who knowingly hire aliens who are not authorized to work. 8 U.S.C. § 1324a. These provisions were designed to deter employers "from hiring unauthorized aliens," which would, "in turn, . . . deter aliens from entering illegally or violating their status in search of employment." H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. 1, 46 (1986). Congress thus has brought regulation of the employment of aliens within the INA's framework for regulation of immigration — traditionally an area of exclusive federal, not state or local, authority.

Indeed, Congress "discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*," but "it ultimately rejected all such proposals." ER 25-26 (quoting *Nat'l Ctr. for Immigrants' Rights v. INS*, 913 F.2d 1350, 1368 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991)). "[T]he determination to reduce or deter employment of unauthorized workers by

sanctioning employers, rather than employees, was 'a congressional policy choice clearly elaborated in IRCA.'" ER 26 (quoting *Nat'l Ctr. for Immigrants' Rights,* 913 F.2d at 1370). Recognizing that "many who enter illegally do so for the best of motives — to seek a better life for themselves and their families," IRCA's legislative history reflects the view that "legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. 1, 46 (1986). As the Supreme Court has recognized, when Congress creates a "'comprehensive federal scheme'" but "'intentionally leaves a portion of the regulated field without controls, . . . the pre-emptive inference can be drawn — not from federal inaction alone but from inaction joined with action.'" ER 25 (quoting *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)).

Moreover, Congress created certain federal criminal sanctions for aliens in the employment context, but only for those aliens who falsely attest, under penalty of perjury, that they are authorized to work as required by federal law. *See* ER 26 (citing 8 U.S.C. § 1324a(b)(2), (5); 18 U.S.C. §§ 1001, 1028, 1546, 1621). And Congress directed that employees' attestations may be used and retained only for purposes of assuring compliance with specified federal laws. 8 U.S.C.

§ 1324a(b)(5); *see also id.* § 1324a(b)(4) (restriction on use of copies of documentation); 8 C.F.R. § 274a.2(b)(4). These provisions underscore that the comprehensive federal scheme leaves no room for general state criminal prohibitions on individual aliens such as those at issue here.

Arizona again mistakes the relevant inquiry when it urges that "Section 5(C) clearly furthers the strong federal policy of prohibiting illegal aliens from seeking employment in the United States" and therefore cannot "stand[] as an obstacle to any congressional objectives." Appellants' Br. 52. Even if the Arizona law may in a general sense "share the same goals" as federal law, *Crosby*, 530 U.S. at 379, disagreement with the means chosen by the federal government to further a particular immigration goal does not permit a State to intrude into an area committed to the national government by choosing a different means, particularly one that Congress expressly considered and rejected in favor of other means. The Supreme Court made clear in *American Insurance Association v. Garamendi*, 539 U.S. 396, 427 (2003), that "thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy."

As *Garamendi* illustrates, state enactments are not saved from preemption even if they occur in an area that Congress has not brought within a

comprehensive federal scheme to regulate a subject that is exclusively federal, such as immigration, but rather concern an area that remains one of traditional state regulation. In *Garamendi*, the Supreme Court invalidated a California statute that sought to facilitate resolution of claims by Holocaust survivors by using the State's authority to examine the bona fides of insurance companies seeking to do business in the State. The provision at issue conditioned an insurance company's authority to conduct business in California on the company's disclosure of information regarding policies that it had sold in Europe during the Holocaust era. Although the statute concerned the field of insurance, which remained for the States to regulate, and although California and the United States shared the same ultimate goals, the Court explained that the California law intruded into a "matter well within the Executive's responsibility for foreign affairs." *Id.* at 420.

Indeed, the Supreme Court has applied the same preemption analysis even when a State's intrusion takes the form of restrictions on its own purchases. Thus, in *Crosby*, the Court invalidated a Massachusetts law that restricted the State itself from purchasing from companies doing business with Burma, even though the statute applied only to the State's own purchases. 530 U.S. at 373 n.7. Similarly, in *Gould*, the statute concerned only the State's own contracting decisions. 475 U.S. at 289.

b. Arizona similarly misconstrues the relevant analysis in relying on IRCA's express preemption provision, which, it notes, preempts "sanctions on *employers* only," while the Arizona statute "is directed at *employees*." Appellants' Br. 49 (citing 8 U.S.C. § 1324a(h)(2)). As the Supreme Court has explained, "neither an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict pre-emption principles.'" *Buckman*, 531 U.S. at 352 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)) (brackets in original). The State points to nothing in the language or legislative history of the 1986 legislation to bolster its assertion that the express preemption of sanctions on employers hiring unauthorized aliens implicitly invited or authorized States to impose criminal sanctions on individual aliens who work or seek work. To the contrary, as explained above, Congress expressly considered and rejected criminal sanctions against individual aliens who work without authorization, consistent with a broader pattern in the INA that includes a determination not to criminalize mere presence. And Congress expressly barred state criminal sanctions even for employers. It would therefore be contrary to the entire thrust of the federal Act to conclude that Congress intended to permit States to criminally prosecute aliens who were not authorized by federal law to work.

When Congress added Section 1324a to the INA in 1986, it created for the first time sanctions against employers who knowingly hire aliens who are not authorized to work. At the same time, Congress expressly preempted state laws ("other than through licensing or similar laws") purporting to create additional criminal or civil sanctions against employers, thus invalidating a number of state statutes that imposed such sanctions on employers. 8 U.S.C. § 1324a(h)(2); *see, e.g.*, United States Gen. Accounting Office, PAD-80-22, *Illegal Aliens: Estimating Their Impact on the United States* 45-46 & tbl.12 (1980) (collecting state statutes). Congress did not legislate against a similar background of state sanctions on employees. Nor did Congress impose criminal sanctions on unauthorized aliens merely for seeking or performing work. Congress thus had no occasion to expressly preempt state laws of the kind now enacted by Arizona, and the express preemption provision sheds no light on whether Section 5 intrudes on the comprehensive federal regime or frustrates IRCA's purpose.

The State's reliance on *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), reflects the multiple difficulties with its reasoning. *See* Appellants' Br. 51. In that case, the Supreme Court held that "the Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats" did not bar state law tort suits for injuries that might have been averted by a propeller guard. *Sprietsma*,

537 U.S. at 65. The Court recognized that a decision not to impose a federal requirement would have "as much pre-emptive force as a decision *to* regulate" if the federal regulation reflected a "determination that the area is best left *un*regulated," but found that the Coast Guard had made no such determination. *Id.* at 66 (internal quotation marks omitted).

Here, by contrast, IRCA reflects a congressional determination to regulate employment of unauthorized aliens primarily by imposing sanctions on employers, and not by imposing criminal sanctions on unauthorized aliens who merely work or seek employment. Arizona may not undermine that determination.

3. Section 2 Impermissibly Mandates Nondiscretionary Immigration Status Checks Outside the Purview of Federal Authority and Without Regard to Federal Priorities.

Section 2 establishes an extraordinary limitation on the discretion of all state and local law enforcement officers who assist federal authorities in enforcement of the immigration laws, requiring that state and local officers check the immigration status of anyone who is stopped or detained whenever there is reasonable suspicion that the person is an alien unlawfully present, and verify the status of any person arrested. The nondiscretionary directive encompasses every stop, with respect to every law or ordinance, including jaywalking, leash laws, and riding a bicycle on a sidewalk (and also, presumably, with respect to suspected

violations of the new state crimes created by Section 3 and Section 5). ER 19. It provides an exception only for cases in which determining immigration status would be impracticable or would "hinder or obstruct an investigation."

This directive is designed to "work together" with Sections 3 and 5 and other provisions of Arizona's state-specific immigration scheme "to discourage and deter the unlawful entry and presence of aliens." S.B. 1070, § 1. In requiring officers to determine an individual's federal immigration status, the statute thus directs state officers to gather the information necessary for the State's independent immigration enforcement measures, including prosecutions for Arizona's new state crimes. *See* Arizona Peace Officers Standards and Training Board, Implementation of the 2010 Arizona Immigration Laws, Statutory Provisions for Peace Officers, at 4 (directing Arizona officers to use information gathered pursuant to Section 2 "in an investigation for a violation of A.R.S. § 13-1509," created by Section 3 of S.B. 1070).[9]

a. S.B. 1070's independent state enforcement regime is not, as the State suggests, a "cooperative" federal-state effort. Although States play an important role in assisting federal officials in enforcing the INA, they have no authority to

[9] http://agency.azpost.gov/supporting_docs/ArizonaImmigrationStatutesOutline.pdf (accessible via http://www.azpost.state.az.us/SB1070infocenter.htm).

regulate immigration independent of the national government. *See De Canas*, 424 U.S. at 354. Rather, a State's power to participate in immigration enforcement is limited to cooperation with officials of the United States Government responsible for enforcing the INA. State and local officers who assist the national government in enforcing federal law must therefore have the freedom to adapt to federal priorities, rather than being restricted by the State's own policy preferences — particularly in the context of immigration, where federal officials' "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (internal quotation marks omitted).

The INA incorporates into the text of the Act the requirement that state enforcement be part of a cooperative relationship with federal officials. Congress has prescribed a number of ways in which States may assist the federal government in its enforcement of the immigration laws. Exercising that authority, the United States has entered into genuinely cooperative agreements with States to allow appropriately trained and supervised state and local officers to perform enumerated immigration related functions. 8 U.S.C. §§ 1357(g)(1)-(9). These agreements are tailored to ensure that state and local officials "exercise federal

immigration authority . . . in a manner consistent with [national] priorities." Ragsdale Decl. ¶ 22 [SER 113].

When state and local officers provide assistance to federal officials outside the context of formal or informal arrangements, that assistance must still be in aid of the federal government's enforcement of the immigration laws. Federal law explicitly provides that the States may "communicate with" and "otherwise . . . cooperate with" federal officials in the federal government's immigration enforcement efforts, without a formal agreement. 8 U.S.C. §§ 1357(g)(10)(a)-(b). It does not, however, authorize States to pursue their own policy objectives. To the contrary, even when the federal government, by agreement, expands state authority to enforce the immigration laws, Congress has specified that the state officers must act at the direction of federal officials. *Id.* § 1357(g)(3). Plainly, Congress did not intend States to avoid subordination to and cooperation with federal authority and priorities by the expedient of creating a separate state enforcement scheme.

The Arizona "attrition by enforcement" policy, S.B. 1070, § 1, is "markedly different from instances in which states and localities assist and cooperate with the federal government in the enforcement of federal immigration laws," Steinberg Decl. ¶ 13 [SER 71]; *see also* Ragsdale Decl. ¶¶ 39-54 [SER 120-27]. Premised

on Arizona's disagreement with federal enforcement priorities, the Arizona law stands as an obstacle to the true cooperative relationship by state and local officials with federal officials provided for in 8 U.S.C. § 1357(g)(10), and undermines the pursuit of federal priorities and the conduct of foreign policy. As the Supreme Court stressed in *Hines*, a State's effort to pursue its own immigration measures may defeat the longstanding goal of federal immigration law to "leave [aliens] free from the possibility of inquisitorial practices and police surveillance that might . . . affect our international relations" and undermine "our traditional policy of not treating aliens as a thing apart." *Hines*, 312 U.S. at 73-74.

As the Supreme Court has also made clear, the national government must be able to calibrate its own regulatory actions in order to engage in effective foreign relations unencumbered by separate approaches in the several States. Thus, in *Crosby*, the Court concluded that the federal government's inability to control the application of the Massachusetts sanctions program against Burma undermined the federal government's ability to pursue foreign policy objectives. The Court explained that the state sanctions were at odds with the flexibility afforded the President in the conduct of foreign relations, and "compromise[d] the very

capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby*, 530 U.S. at 381.[10]

When state officials "take measures that are in line with federal priorities, then the United States retains its ability to speak with one voice on matters of immigration policy, which in turn enables it to keep control of the message it sends to foreign states and to calibrate responses as it deems appropriate, given the ever-changing dynamics of foreign relations." Steinberg Decl. ¶ 13 [SER 71-72]. Where a State establishes a policy outside federal control and without regard to federal policies, the United States is no longer in a position "to review the criticism [of its immigration policy by another nation's government] and determine whether to defend the practices against attack or else to take appropriate action to modify its practices." *Id.* ¶ 55 [SER 92].

Foreign response to the Arizona immigration enforcement scheme is the concern of the national government, which, unlike the legislature of any single State, is charged with the responsibility to safeguard all citizens of the United

[10] Even outside the especially sensitive areas of foreign affairs and immigration policy, a State may not defeat the flexibility inherent in the enforcement of federal law by developing its own independent set of enforcement priorities. *See, e.g., Buckman*, 531 U.S. at 348-49 (where federal statute provided FDA with a "variety of enforcement options that allow it to make a measured response to suspected fraud" and to "pursue[] difficult (and often competing) objectives," *id.* at 349, state law could not be permitted to skew the "balance sought by the Administration" through its enforcement policies, *id*. at 348).

States and, thus, must take into account the impact of domestic actions on American citizens abroad and on achievement of foreign policy goals. Deputy Secretary of State Steinberg notes that the Arizona scheme creates a risk of "reciprocal and retaliatory treatment of U.S. citizens abroad," thereby implicating "the ability of U.S. citizens to travel, conduct business, and live abroad." *Id.* ¶ 9 [SER 69]; *see Boos v. Barry*, 485 U.S. 312, 323 (1988) (noting similar reciprocity concerns). By antagonizing foreign governments, the Arizona law decreases the likelihood of international cooperation on "a broad range of important foreign policy issues," including trade agreements and cooperation in efforts to combat terrorism and drug trafficking. Steinberg Decl. ¶ 10 [SER 69].

Although Arizona characterizes its policy as "much-needed assistance," Appellants' Br. 1, its priorities are at odds with those established by the federal government, and threaten to divert rather than enhance federal resources. The federal government's highest enforcement priorities are accorded to "aliens who pose a danger to national security or a risk to public safety," Ragsdale Decl. ¶ 17 [SER 111], and organizations that smuggle aliens and contraband, *id.* ¶ 13 [SER 109]. With regard to persons who have committed no criminal offense, federal efforts focus on persons who have recently entered the United States illegally or who have failed to comply with final orders of removal. *Id.* ¶ 18

[SER 111]. "Aliens who have been present in the U.S. without authorization for a prolonged period of time and who have not engaged in criminal conduct present a significantly lower enforcement priority." *Id.*

Arizona recognizes no such priorities and directs state and local officers to demand resolution of immigration status resulting from all routine encounters. Federal law directs that the federal government respond to any such inquiries it receives. 8 U.S.C. § 1373(c). The assumption of the statute, however, is that the States are actually assisting the federal government's enforcement efforts. The requirement forms part of a statute designed to facilitate information-sharing between the States and the federal government on immigration matters, which Congress determined could be "of considerable assistance to[] the *Federal* regulation of immigration." S. Rep. No. 249, 104th Cong., 2d Sess., Pt. 1, at 19-20 (1996) (emphasis added); *see* 8 U.S.C. §§ 1373(a)-(b), 1644. The Arizona statute, by contrast, harnesses the federal apparatus in pursuit of a scheme over which the federal government would have no control, and would proceed without regard to federal practice and policy and the essential nature of the cooperative relationship.

Arizona argues that the resulting drain on resources will be less than that found by the district court.[11] Even assuming, *arguendo*, that the district court overstated the number of inquiries resulting from the mandatory enforcement scheme, the requests arising from "even a small percentage of . . . stops, detentions, and arrests" would number in the thousands. Palmatier Decl. ¶ 15 [ER 437]. In any event, the fundamental point is that the State has no authority to create the diversion of resources, regardless of the precise extent to which federal law enforcement efforts are impaired.

b. Arizona defends its enactment on the ground that it is constitutionally permissible for a state officer to investigate an immigration law violation based on reasonable suspicion. Appellants' Br. 26. The issue here, however, is not whether a state officer may provide assistance to federal officials in their enforcement of federal immigration laws, or engage in the type of inquiry properly based on reasonable suspicion regarding unlawful immigration status. As the State points out, *id.*, Section 2's mandate for immigration status checks did not confer any new authority on state officers to take steps consistent with federal law.

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[11] The State's position is based in large part on its assertion that the statute's directive that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released" applies only to those reasonably suspected of being unlawfully present, Appellants' Br. 39-43, a construction the district court properly rejected, ER 14-15.

Section 2's mandate for immigration status checks was likewise not necessary to permit cooperation with federal authorities. Instead, it singles out possible unlawful presence in the United States for investigation procedures accorded to no other type of violation, and removes investigation discretion to the extent possible except in cases in which determining immigration status is impracticable or "may hinder or obstruct an investigation." The effect of the statute is not to induce cooperation with the federal officials responsible for enforcing the INA, but rather to remove discretion of state and local officers to consider federal priorities in their enforcement efforts.

Indeed, the statute gives state officers strong incentive to avoid any suggestion that they have failed to engage in the most vigorous enforcement possible of the mandate for immigration status checks, because the statute bars localities from "limit[ing] or restrict[ing] the enforcement of federal immigration laws to less than the full extent permitted by federal law" and permits any legal Arizona resident to bring a lawsuit to seek penalties of up to $5,000 per day against any state official or agency that "adopts or implements a policy that limits or restricts the enforcement of federal immigration laws . . . to less than the full extent permitted by federal law." S.B. 1070, § 2, codified at Ariz. Rev. Stat. § 11-

1051(A), (H).[12] Section 2 thus operates to force Arizona law enforcement officers to conduct investigations into immigration status that they would not have undertaken had Arizona's immigration policy not supplanted federal immigration priorities.

c. For similar reasons, the State errs in urging that Section 2 has a "plainly legitimate sweep," and is therefore not properly subject to a facial challenge. Appellants' Br. 26 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). The district court did not enjoin state officers from making otherwise permissible inquiries during a lawful detention based on a reasonable suspicion regarding illegal status. Section 2 was not necessary to authorize such actions, and, instead, serves a distinct and impermissible purpose. Together with other provisions of S.B. 1070, including Section 3 and Section 5, it effectuates a concerted state immigration policy of attrition that is outside the control of the federal government, and, indeed, largely outside the control even of state officers and agencies who face the prospect of a civil suit if they stray from maximum enforcement. *See* S.B. 1070, § 2, codified at Ariz. Rev. Stat. §§ 11-1051(A), (H). This independent state enforcement regime is invalid in every

[12] Suggestions in the State's brief that the mandate for immigration status checks is directed to local "sanctuary" policies, *see* Appellants' Br. 30-31, are thus wide of the mark.

application because it stands as an obstacle to — indeed, it bars — actual cooperation with the federal officers Congress has charged with enforcing the INA and vested with discretion in doing so, and prevents consideration by state and local officers of the federal priorities and policies these federal officers adopt and follow.

It is, moreover, wrong for the State to urge that the impact of the State's attrition policy on persons legally present in the country can be divorced from the instances in which the subject of an inquiry is ultimately determined to be an undocumented alien. *See* Appellants' Br. 25-26. The general operation of the statute cannot be sustained on the ground that some persons who are subjected to its procedures will subsequently be found to be unlawfully in the United States.

In seeking to minimize the effect of the statute on lawfully present aliens, the State also ignores other features of Section 2 that form part of the State's immigration policy. Under Section 2, a person suspected of being unlawfully in the United States can establish a presumption of legality only with specified forms of identification, such as an Arizona driver's license or nonoperating identification license or Tribal identification. Persons with other forms of identification may not be able to satisfy this standard. Rather, bearers of other government-issued identification are entitled to a presumption of lawful presence only when the

issuing State "requires proof of legal presence in the United States before issuance." Ariz. Rev. Stat. § 11-1051(B)(4). On this basis, Arizona has instructed its officers to reject driver's licenses from the neighboring state of New Mexico. Arizona Peace Officers Standards and Training Board, S.B. 1070 Public Information Center, Presumptive Identifications[13]; *see* N.M. Stat. Ann. § 66-5-9(B). Thus, a lawful U.S. resident — even a U.S. citizen — living in New Mexico, if pulled over in Arizona for speeding or a minor vehicle infraction, will not necessarily have a document sufficient to prevent a more involved inquiry into his or her immigration status and possible prolonged detention during that inquiry. *See also* Estrada Decl. ¶ 7 [ER 442] (discussing categories of aliens and citizens who likely will not be able to produce documentation necessary to avoid detention, such as minors).

Nor will all categories of foreign nationals legally in or permitted to remain in the United States have readily available documentation to demonstrate their status. These categories include travelers visiting from countries participating in the Visa Waiver Program; individuals who have applied for asylum, temporary protected status, or certain visas for victims of crimes; certain persons who are providing assistance to law enforcement; and abused women petitioning for

[13] http://agency.azpost.gov/supporting_docs/PresumptiveIdentifications.pdf (accessible via http://www.azpost.state.az.us/SB1070infocenter.htm).

immigration relief under the Violence Against Women Act. *See* Aytes Decl. ¶¶ 2, 5, 9, 13, 17, 19, 21 [SER 95-103]; *see also* ER 18-19. In fiscal year 2009, more than 14 million aliens were admitted under the Visa Waiver Program, Aguilar Decl. ¶ 24 [SER 166], and DHS estimates that up to 200,000 individuals were eligible for temporary protected status based solely on the designation of Haiti due to this year's earthquake, Steinberg Decl. ¶ 19 [SER 75-76].

If an individual does not have identification sufficient to create a presumption of his lawful presence, resolution of his status is not necessarily a short and simple process. Many U.S. citizens (who are not required to carry identification) do not appear in DHS immigration databases. Experience indicates that in such circumstances police officers "sometimes want to detain the suspected illegal alien (actually a U.S. citizen) until they can . . . confirm the subject's immigration status." *See* Palmatier Decl. ¶ 19 [ER 438-39]. Moreover, because the verification process may involve multiple databases, the initial DHS inquiry does not always resolve the status issue — last year, almost 10,000 requests from Arizona for immigration-status verification produced an indeterminate answer, which would require DHS to search additional databases and even paper files in an effort to resolve the inquiry. *See id.* ¶¶ 11, 19 [ER 435, 438]; Gentile Decl. ¶¶ 6–7 [SER 176-77]. Because Section 2 mandates that officers determine the

immigration status of any arrested individual before permitting release, persons without acceptable forms of identification are at risk of extended detention. As the Sheriff of Santa Cruz County, Arizona, explained, officers who are waiting for verification of immigration status will feel constrained to "either hold people for prolonged periods of time to verify their status . . . or release people and face liability for not enforcing S.B. 1070 strictly enough." Estrada Decl. ¶ 6 [ER 442].

4. Section 6 Impermissibly Authorizes State Officers to Make Arrests Without Warrants Based on Probable Cause that an Alien Has Committed an Offense that Would Make the Person Removable.

Section 6 underscores the extent to which Arizona has taken on responsibilities that are reserved to the federal government, because it authorizes warrantless arrests whenever a law enforcement officer has probable cause to believe that "the person to be arrested has committed any public offense that makes the person removable from the United States." Arizona law prior to S.B. 1070 already authorized "the warrantless arrest of a person who commits a felony, misdemeanor, petty offense, or one of certain criminal violations in connection with a traffic accident." ER 30-31; *see* Ariz. Rev. Stat. §§ 13-3883(A)(1)-(4). The effect of Section 6 is therefore to also allow the warrantless arrest of a person who has violated the laws of a State other than Arizona, but only if the person is an alien. ER 31; *see also* Tr. of Oral Arg., July 22, 2010, at 46-47 [SER 46-47]

(counsel for Arizona describing Section 6 as applying to crimes committed in Nevada).

As the district court recognized, "[c]onsidering the substantial complexity in determining whether a particular public offense makes an alien removable from the United States . . . , there is a substantial likelihood that officers will wrongfully arrest legal resident aliens." ER 33; *see also Lozano*, 2010 WL 3504538, at *43 (noting impossibility of predicting which aliens the federal government will ultimately elect to remove from the country). Section 6's effects are magnified by the other provisions of S.B. 1070, including the provisions imposing monetary sanctions for any limitation on enforcement. S.B. 1070, § 2, codified at Ariz. Rev. Stat. §§ 11-1051(A), (H).

The district court correctly reasoned that Section 6 requires officers to make multiple judgments of unique legal complexity. First, officers must "determine whether an alien's out-of-state crime would have been a crime if it had been committed in Arizona, a determination that requires knowledge of out-of-state statutes and their relationship with Arizona's statutes." ER 31; *see* Ariz. Rev. Stat. § 13-105(26) (limiting "public offense" to conduct that would be criminal if committed in Arizona). Next, Section 6 "requires an officer to determine whether an alien's public offense makes the alien removable from the United States, a task

of considerable complexity that falls under the exclusive authority of the federal government." ER 32. Even if Arizona law enforcement officers elected to contact the federal government before making warrantless arrests, "Arizona did not provide any evidence" that federal officials would be in a position to discern in the limited time allowed whether a particular state offense makes an alien removable, ER 33 n.21 — an inquiry which "'is often quite complex,'" ER 32 (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring)) — much less ascertain whether conduct in another state would constitute a crime in Arizona.

And aliens subject to arrest are not limited to those unlawfully present, but rather includes aliens who are otherwise lawfully present in the United States and who would not be determined by an immigration judge to be removable either under the particular categories of removability in the INA or because of eligibility for relief from removal, such as asylum, adjustment of status, or cancellation. *See*, *supra*, pp. 7-8.

Arizona now contends that Section 6 might be valid in at least some applications because the statute authorizes Arizona officers to "arrest aliens who have previously been deported or left the United States after a felony conviction." Appellants' Br. 54. That was not the purpose of the statute, and its language does

not extend to aliens deported after a felony conviction. Section 6 authorizes warrantless arrest of persons who are removable because they committed a "public offense." Under Arizona law, "public offense" is defined to mean a violation of the law of the State in which it occurred that would also be illegal in Arizona. Ariz. Rev. Stat. § 13-105(26). A federal offense, such as entering the United States after being deported, *see* 8 U.S.C. § 1326(a), does not qualify. Section 6 thus has no application to the scenario Arizona posits.

Similarly, the statute cannot be read to be directed at persons who are subject to an immigration removal order. *See* Appellants' Br. 55-56. Removal orders are federal determinations that an alien may no longer remain in the United States, not "public offenses" as Arizona defines that term.

"What is clear is that the statutory revision targets only aliens — legal and illegal — because only aliens are removable." ER 31. If allowed to take effect, it would therefore "impose a 'distinct, unusual and extraordinary' burden on legal resident aliens that only the federal government has the authority to impose." ER 33 (quoting *Hines*, 312 U.S. at 65-66).

II. The Balance of Harms and the Public Interest Favor a Preliminary Injunction.

A. The State makes virtually no attempt to demonstrate why reversal of the preliminary injunction is required to avoid irreparable harm. After noting

problems perceived to be presented by aliens unlawfully in the United States, its argument reduces to a single sentence: "In enforcing the provisions of S.B. 1070 that the district court enjoined, Arizona seeks to ensure that Arizona's law enforcement officers will provide federal law enforcement agencies the assistance that Congress has expressly invited the states to provide and that the federal agencies desperately require to enforce the federal immigration laws effectively." Appellants' Br. 58-59.

Nothing in the district court's injunction impairs the State's ability to provide federal law enforcement agencies with assistance as provided by Congress. Congress did not invite the States to criminalize unlawful presence in the United States. It did not invite the States to criminalize attempts by persons unlawfully in the United States to seek work. It did not invite the States to develop a mandatory immigration status check regime outside federal control and without regard to federal immigration priorities and foreign policy. And it did not invite the States to authorize the warrantless arrests of aliens who have committed crimes in other States that may or may not support an order of removal.

B. The district court acted well within its discretion in holding that allowing these provisions to go into effect would cause irreparable harm to the United States, because "the federal government's ability to enforce its policies and

achieve its objectives will be undermined by the state's enforcement of statutes that interfere with federal law." ER 34. The Supreme Court has made clear that it is immaterial in this context that a state statute purports to "have substantially the same goals as federal law." ER 34 (citing *Crosby*, 530 U.S. at 379-80 & n.14; *Garamendi*, 539 U.S. at 413, 427).

Preliminary relief is appropriate to avoid irreparable harm to the United States and the public interest. As the record amply demonstrates, allowing the enjoined provisions to take effect would undermine United States foreign policy, divert resources from federal enforcement priorities, and impose an impermissible burden on lawfully present aliens.

Deputy Secretary of State Steinberg explains in his declaration that "S.B. 1070 runs counter to American foreign policy interests" and "its enforcement would . . . undermine American foreign policy." Steinberg Decl. ¶ 58 [SER 93]. Indeed, its mere passage "already has provoked significant international controversy." *Id.* ¶ 34 [SER 84].

S.B. 1070 creates three "serious" foreign-policy harms. *Id.* ¶ 9 [SER 69]. First, the Arizona law creates a risk of "reciprocal and retaliatory treatment of U.S. citizens abroad," thus affecting "the ability of U.S. citizens to travel, conduct business, and live abroad." *Id*. Second, the law "necessarily antagonizes foreign

governments and their populations, both at home and in the U.S., likely making them less willing to negotiate, cooperate with, or support the United States across a broad range of important foreign policy issues." *Id.* ¶ 10. Decreased international cooperation could extend far beyond the immigration context, affecting other areas of foreign relations such as trade agreements and cooperation in efforts to combat terrorism or drug trafficking. *Id.* Finally, the Arizona law "threatens to undermine our standing in regional and multilateral bodies that address migration and human rights matters and to hamper our ability to advocate effectively internationally for the advancement of human rights and other U.S. values." *Id.* ¶ 11 [SER 70].

These assessments of "sensitive and weighty interests of national security and foreign affairs" are "entitled to deference" from this Court. *Holder v. Humanitarian Law Project,* 130 S. Ct. 2705, 2727 (2010); *see Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 378 (2008). And, as the record illustrates, these foreign-policy concerns are neither remote nor speculative. Because of the passage of S.B. 1070, Mexico has already postponed consideration of a bilateral agreement with the United States for coordinating responses to natural disasters and accidents. *See* Steinberg Decl. ¶ 43 [SER 87].

Relatedly, S.B. 1070 would impose an undue burden on the "finite resources" of the United States, which are currently focused on "the criminals who pose the largest threat to public safety or national security risks." Palmatier Decl. ¶ 7 [ER 433]. That burden would be felt acutely by personnel in the Immigration and Customs Enforcement service, whose existing enforcement activities would necessarily be diverted from their current duties. Ragsdale Decl. ¶ 44 [SER 122]. In addition, as noted above, an increased volume of requests from Arizona would have adverse effects on ICE's Law Enforcement Support Center's ability to respond to other, more urgent information requests. Palmatier Decl. ¶ 16 [ER 437]; *see*, *supra*, pp. 50-51.

Nor would the federal government be the only party harmed by enforcement of S.B. 1070. "By enforcing this statute, Arizona would impose a 'distinct, unusual and extraordinary' burden on legal resident aliens that only the federal government has the authority to impose." ER 33 (quoting *Hines*, 312 U.S. at 65-66). These substantial burdens, too, must be taken into account when weighing the public interest. *See* ER 35.

This Court has recognized that "allowing a state to enforce a state law in violation of the Supremacy Clause is neither equitable nor in the public interest." ER 35 (citing *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th

Cir. 2009); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059-60 (9th Cir. 2009)). Where, as here, enforcing a state law "would likely burden legal resident aliens and interfere with federal policy," ER 35, the district court was well within its discretion in entering a preliminary injunction.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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SEPTEMBER 2010

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 13,998 words.

s/ Daniel Tenny
Daniel Tenny

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on September 23, 2010. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Daniel Tenny
Daniel Tenny

STATEMENT OF RELATED CASES

Counsel for appellee are not aware of any related cases, as defined in Ninth Circuit Rule 28-2.6.

s/ Daniel Tenny
Daniel Tenny

STATUTORY ADDENDUM

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Arizona S.B. 1070, as amended by H.B. 2162:[1]

Be it enacted by the Legislature of the State of Arizona:

Sec. 1. Intent

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

Sec. 2. Title 11, chapter 7, Arizona Revised Statutes, is amended by adding article 8, to read:

ARTICLE 8. ENFORCEMENT OF IMMIGRATION LAWS

11-1051. Cooperation and assistance in enforcement of immigration laws; indemnification

A. NO OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE MAY LIMIT OR RESTRICT THE ENFORCEMENT OF FEDERAL IMMIGRATION LAWS TO LESS THAN THE FULL EXTENT PERMITTED BY FEDERAL LAW.

B. FOR ANY LAWFUL STOP, DETENTION OR ARREST MADE BY A LAW ENFORCEMENT OFFICIAL OR A LAW ENFORCEMENT AGENCY OF THIS STATE OR A LAW ENFORCEMENT OFFICIAL OR A LAW ENFORCEMENT AGENCY OF A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE IN THE ENFORCEMENT OF ANY OTHER LAW OR ORDINANCE OF A COUNTY, CITY OR TOWN OR

[1] Additions to Arizona Revised Statutes as a result of S.B. 1070, as amended, are indicated by capital letters; deletions from pre-existing Arizona Revised Statutes are noted with strikeout text.

THIS STATE WHERE REASONABLE SUSPICION EXISTS THAT THE PERSON IS AN ALIEN AND IS UNLAWFULLY PRESENT IN THE UNITED STATES, A REASONABLE ATTEMPT SHALL BE MADE, WHEN PRACTICABLE, TO DETERMINE THE IMMIGRATION STATUS OF THE PERSON, EXCEPT IF THE DETERMINATION MAY HINDER OR OBSTRUCT AN INVESTIGATION. ANY PERSON WHO IS ARRESTED SHALL HAVE THE PERSON'S IMMIGRATION STATUS DETERMINED BEFORE THE PERSON IS RELEASED. THE PERSON'S IMMIGRATION STATUS SHALL BE VERIFIED WITH THE FEDERAL GOVERNMENT PURSUANT TO 8 UNITED STATES CODE SECTION 1373(c). A LAW ENFORCEMENT OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE MAY NOT CONSIDER RACE, COLOR OR NATIONAL ORIGIN IN IMPLEMENTING THE REQUIREMENTS OF THIS SUBSECTION EXCEPT TO THE EXTENT PERMITTED BY THE UNITED STATES OR ARIZONA CONSTITUTION. A PERSON IS PRESUMED TO NOT BE AN ALIEN WHO IS UNLAWFULLY PRESENT IN THE UNITED STATES IF THE PERSON PROVIDES TO THE LAW ENFORCEMENT OFFICER OR AGENCY ANY OF THE FOLLOWING:

1. A VALID ARIZONA DRIVER LICENSE.

2. A VALID ARIZONA NONOPERATING IDENTIFICATION LICENSE.

3. A VALID TRIBAL ENROLLMENT CARD OR OTHER FORM OF TRIBAL IDENTIFICATION.

4. IF THE ENTITY REQUIRES PROOF OF LEGAL PRESENCE IN THE UNITED STATES BEFORE ISSUANCE, ANY VALID UNITED STATES FEDERAL, STATE OR LOCAL GOVERNMENT ISSUED IDENTIFICATION.

C. IF AN ALIEN WHO IS UNLAWFULLY PRESENT IN THE UNITED STATES IS CONVICTED OF A VIOLATION OF STATE OR LOCAL LAW, ON DISCHARGE FROM IMPRISONMENT OR ON THE ASSESSMENT OF ANY MONETARY OBLIGATION THAT IS IMPOSED, THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT OR THE

UNITED STATES CUSTOMS AND BORDER PROTECTION SHALL BE IMMEDIATELY NOTIFIED.

D. NOTWITHSTANDING ANY OTHER LAW, A LAW ENFORCEMENT AGENCY MAY SECURELY TRANSPORT AN ALIEN WHO THE AGENCY HAS RECEIVED VERIFICATION IS UNLAWFULLY PRESENT IN THE UNITED STATES AND WHO IS IN THE AGENCY'S CUSTODY TO A FEDERAL FACILITY IN THIS STATE OR TO ANY OTHER POINT OF TRANSFER INTO FEDERAL CUSTODY THAT IS OUTSIDE THE JURISDICTION OF THE LAW ENFORCEMENT AGENCY. A LAW ENFORCEMENT AGENCY SHALL OBTAIN JUDICIAL AUTHORIZATION BEFORE SECURELY TRANSPORTING AN ALIEN WHO IS UNLAWFULLY PRESENT IN THE UNITED STATES TO A POINT OF TRANSFER THAT IS OUTSIDE OF THIS STATE.

E. IN THE IMPLEMENTATION OF THIS SECTION, AN ALIEN'S IMMIGRATION STATUS MAY BE DETERMINED BY:

1. A LAW ENFORCEMENT OFFICER WHO IS AUTHORIZED BY THE FEDERAL GOVERNMENT TO VERIFY OR ASCERTAIN AN ALIEN'S IMMIGRATION STATUS.

2. THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT OR THE UNITED STATES CUSTOMS AND BORDER PROTECTION PURSUANT TO 8 UNITED STATES CODE SECTION 1373(c).

F. EXCEPT AS PROVIDED IN FEDERAL LAW, OFFICIALS OR AGENCIES OF THIS STATE AND COUNTIES, CITIES, TOWNS AND OTHER POLITICAL SUBDIVISIONS OF THIS STATE MAY NOT BE PROHIBITED OR IN ANY WAY BE RESTRICTED FROM SENDING, RECEIVING OR MAINTAINING INFORMATION RELATING TO THE IMMIGRATION STATUS, LAWFUL OR UNLAWFUL, OF ANY INDIVIDUAL OR EXCHANGING THAT INFORMATION WITH ANY OTHER FEDERAL, STATE OR LOCAL GOVERNMENTAL ENTITY FOR THE FOLLOWING OFFICIAL PURPOSES:

1. DETERMINING ELIGIBILITY FOR ANY PUBLIC BENEFIT, SERVICE OR LICENSE PROVIDED BY ANY FEDERAL, STATE, LOCAL OR OTHER POLITICAL SUBDIVISION OF THIS STATE.

2. VERIFYING ANY CLAIM OF RESIDENCE OR DOMICILE IF DETERMINATION OF RESIDENCE OR DOMICILE IS REQUIRED UNDER THE LAWS OF THIS STATE OR A JUDICIAL ORDER ISSUED PURSUANT TO A CIVIL OR CRIMINAL PROCEEDING IN THIS STATE.

3. IF THE PERSON IS AN ALIEN, DETERMINING WHETHER THE PERSON IS IN COMPLIANCE WITH THE FEDERAL REGISTRATION LAWS PRESCRIBED BY TITLE II, CHAPTER 7 OF THE FEDERAL IMMIGRATION AND NATIONALITY ACT.

4. PURSUANT TO 8 UNITED STATES CODE SECTION 1373 AND 8 UNITED STATES CODE SECTION 1644.

G. THIS SECTION DOES NOT IMPLEMENT, AUTHORIZE OR ESTABLISH AND SHALL NOT BE CONSTRUED TO IMPLEMENT, AUTHORIZE OR ESTABLISH THE REAL ID ACT OF 2005 (P.L. 109-13, DIVISION B; 119 STAT. 302), INCLUDING THE USE OF A RADIO FREQUENCY IDENTIFICATION CHIP.

H. A PERSON WHO IS A LEGAL RESIDENT OF THIS STATE MAY BRING AN ACTION IN SUPERIOR COURT TO CHALLENGE ANY OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE THAT ADOPTS OR IMPLEMENTS A POLICY THAT LIMITS OR RESTRICTS THE ENFORCEMENT OF FEDERAL IMMIGRATION LAWS, INCLUDING 8 UNITED STATES CODE SECTIONS 1373 AND 1644, TO LESS THAN THE FULL EXTENT PERMITTED BY FEDERAL LAW. IF THERE IS A JUDICIAL FINDING THAT AN ENTITY HAS VIOLATED THIS SECTION, THE COURT SHALL ORDER THAT THE ENTITY PAY A CIVIL PENALTY OF NOT LESS THAN FIVE HUNDRED DOLLARS AND NOT MORE THAN FIVE THOUSAND DOLLARS FOR EACH DAY THAT THE POLICY HAS REMAINED IN EFFECT AFTER THE FILING OF AN ACTION PURSUANT TO THIS SUBSECTION.

I. A COURT SHALL COLLECT THE CIVIL PENALTY PRESCRIBED IN SUBSECTION H OF THIS SECTION AND REMIT THE CIVIL PENALTY TO THE STATE TREASURER FOR DEPOSIT IN THE GANG AND IMMIGRATION INTELLIGENCE TEAM ENFORCEMENT MISSION FUND ESTABLISHED BY SECTION 41-1724.

J. THE COURT MAY AWARD COURT COSTS AND REASONABLE ATTORNEY FEES TO ANY PERSON OR ANY OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE THAT PREVAILS BY AN ADJUDICATION ON THE MERITS IN A PROCEEDING BROUGHT PURSUANT TO THIS SECTION.

K. EXCEPT IN RELATION TO MATTERS IN WHICH THE OFFICER IS ADJUDGED TO HAVE ACTED IN BAD FAITH, A LAW ENFORCEMENT OFFICER IS INDEMNIFIED BY THE LAW ENFORCEMENT OFFICER'S AGENCY AGAINST REASONABLE COSTS AND EXPENSES, INCLUDING ATTORNEY FEES, INCURRED BY THE OFFICER IN CONNECTION WITH ANY ACTION, SUIT OR PROCEEDING BROUGHT PURSUANT TO THIS SECTION IN WHICH THE OFFICER MAY BE A DEFENDANT BY REASON OF THE OFFICER BEING OR HAVING BEEN A MEMBER OF THE LAW ENFORCEMENT AGENCY.

L. THIS SECTION SHALL BE IMPLEMENTED IN A MANNER CONSISTENT WITH FEDERAL LAWS REGULATING IMMIGRATION, PROTECTING THE CIVIL RIGHTS OF ALL PERSONS AND RESPECTING THE PRIVILEGES AND IMMUNITIES OF UNITED STATES CITIZENS.

Sec. 3. Title 13, chapter 15, Arizona Revised Statutes, is amended by adding section 13-1509, to read:

13-1509. Willful failure to complete or carry an alien registration document; assessment; exception; authenticated records; classification

A. IN ADDITION TO ANY VIOLATION OF FEDERAL LAW, A PERSON IS GUILTY OF WILLFUL FAILURE TO COMPLETE OR CARRY

AN ALIEN REGISTRATION DOCUMENT IF THE PERSON IS IN VIOLATION OF 8 UNITED STATES CODE SECTION 1304(e) OR 1306(a).

B. IN THE ENFORCEMENT OF THIS SECTION, AN ALIEN'S IMMIGRATION STATUS MAY BE DETERMINED BY:

1. A LAW ENFORCEMENT OFFICER WHO IS AUTHORIZED BY THE FEDERAL GOVERNMENT TO VERIFY OR ASCERTAIN AN ALIEN'S IMMIGRATION STATUS.

2. THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT OR THE UNITED STATES CUSTOMS AND BORDER PROTECTION PURSUANT TO 8 UNITED STATES CODE SECTION 1373(C).

C. A LAW ENFORCEMENT OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE MAY NOT CONSIDER RACE, COLOR OR NATIONAL ORIGIN IN THE ENFORCEMENT OF THIS SECTION EXCEPT TO THE EXTENT PERMITTED BY THE UNITED STATES OR ARIZONA CONSTITUTION.

D. A PERSON WHO IS SENTENCED PURSUANT TO THIS SECTION IS NOT ELIGIBLE FOR SUSPENSION OF SENTENCE, PROBATION, PARDON, COMMUTATION OF SENTENCE, OR RELEASE FROM CONFINEMENT ON ANY BASIS EXCEPT AS AUTHORIZED BY SECTION 31-233, SUBSECTION A OR B UNTIL THE SENTENCE IMPOSED BY THE COURT HAS BEEN SERVED OR THE PERSON IS ELIGIBLE FOR RELEASE PURSUANT TO SECTION 41-1604.07.

E. IN ADDITION TO ANY OTHER PENALTY PRESCRIBED BY LAW, THE COURT SHALL ORDER THE PERSON TO PAY JAIL COSTS.

F. THIS SECTION DOES NOT APPLY TO A PERSON WHO MAINTAINS AUTHORIZATION FROM THE FEDERAL GOVERNMENT TO REMAIN IN THE UNITED STATES.

G. ANY RECORD THAT RELATES TO THE IMMIGRATION STATUS OF A PERSON IS ADMISSIBLE IN ANY COURT WITHOUT FURTHER

FOUNDATION OR TESTIMONY FROM A CUSTODIAN OF RECORDS IF THE RECORD IS CERTIFIED AS AUTHENTIC BY THE GOVERNMENT AGENCY THAT IS RESPONSIBLE FOR MAINTAINING THE RECORD.

H. A VIOLATION OF THIS SECTION IS A CLASS 1 MISDEMEANOR, EXCEPT THAT THE MAXIMUM FINE IS ONE HUNDRED DOLLARS AND FOR A FIRST VIOLATION OF THIS SECTION THE COURT SHALL NOT SENTENCE THE PERSON TO MORE THAN TWENTY DAYS IN JAIL AND FOR A SECOND OR SUBSEQUENT VIOLATION THE COURT SHALL NOT SENTENCE THE PERSON TO MORE THAN THIRTY DAYS IN JAIL.

Sec. 4. Section 13-2319, Arizona Revised Statutes, is amended to read:

13-2319. Smuggling; classification; definitions

A. It is unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose.

B. A violation of this section is a class 4 felony.

C. Notwithstanding subsection B of this section, a violation of this section:

1. Is a class 2 felony if the human being who is smuggled is under eighteen years of age and is not accompanied by a family member over eighteen years of age or the offense involved the use of a deadly weapon or dangerous instrument.

2. Is a class 3 felony if the offense involves the use or threatened use of deadly physical force and the person is not eligible for suspension of sentence, probation, pardon or release from confinement on any other basis except pursuant to section 31-233, subsection A or B until the sentence imposed by the court is served, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.

D. Chapter 10 of this title does not apply to a violation of subsection C, paragraph 1 of this section.

E. NOTWITHSTANDING 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.

F. For the purposes of this section:

1. "Family member" means the person's parent, grandparent, sibling or any other person who is related to the person by consanguinity or affinity to the second degree.

2. "Procurement of transportation" means any participation in or facilitation of transportation and includes:

(a) Providing services that facilitate transportation including travel arrangement services or money transmission services.

(b) Providing property that facilitates transportation, including a weapon, a vehicle or other means of transportation or false identification, or selling, leasing, renting or otherwise making available a drop house as defined in section 13-2322.

3. "Smuggling of human beings" means the transportation, procurement of transportation or use of property or real property by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state or have attempted to enter, entered or remained in the United States in violation of law.

Sec. 5. Title 13, chapter 29, Arizona Revised Statutes, is amended by adding sections 13-2928 and 13-2929, to read:

13-2928. Unlawful stopping to hire and pick up passengers for work; unlawful application, solicitation or employment; classification; definitions

A. IT IS UNLAWFUL FOR AN OCCUPANT OF A MOTOR VEHICLE THAT IS STOPPED ON A STREET, ROADWAY OR HIGHWAY 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.

B. IT IS UNLAWFUL FOR A PERSON TO ENTER A MOTOR VEHICLE THAT IS STOPPED ON A STREET, ROADWAY OR HIGHWAY IN ORDER TO BE HIRED BY AN OCCUPANT OF THE MOTOR VEHICLE AND TO BE TRANSPORTED TO WORK AT A DIFFERENT LOCATION IF THE MOTOR VEHICLE BLOCKS OR IMPEDES THE NORMAL MOVEMENT OF TRAFFIC.

C. IT IS UNLAWFUL FOR A PERSON WHO IS UNLAWFULLY PRESENT IN THE UNITED STATES AND WHO IS AN UNAUTHORIZED ALIEN TO KNOWINGLY APPLY FOR WORK, SOLICIT WORK IN A PUBLIC PLACE OR PERFORM WORK AS AN EMPLOYEE OR INDEPENDENT CONTRACTOR IN THIS STATE.

D. A LAW ENFORCEMENT OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE MAY NOT CONSIDER RACE, COLOR OR NATIONAL ORIGIN IN THE ENFORCEMENT OF THIS SECTION EXCEPT TO THE EXTENT PERMITTED BY THE UNITED STATES OR ARIZONA CONSTITUTION.

E. IN THE ENFORCEMENT OF THIS SECTION, AN ALIEN'S IMMIGRATION STATUS MAY BE DETERMINED BY:

1. A LAW ENFORCEMENT OFFICER WHO IS AUTHORIZED BY THE FEDERAL GOVERNMENT TO VERIFY OR ASCERTAIN AN ALIEN'S IMMIGRATION STATUS.

2. THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT OR THE UNITED STATES CUSTOMS AND BORDER PROTECTION PURSUANT TO 8 UNITED STATES CODE SECTION 1373(C).

F. A VIOLATION OF THIS SECTION IS A CLASS 1 MISDEMEANOR.

G. FOR THE PURPOSES OF THIS SECTION:

1. "SOLICIT" MEANS VERBAL OR NONVERBAL COMMUNICATION BY A GESTURE OR A NOD THAT WOULD INDICATE TO A REASONABLE PERSON THAT A PERSON IS WILLING TO BE EMPLOYED.

2. "UNAUTHORIZED ALIEN" MEANS AN ALIEN WHO DOES NOT HAVE THE LEGAL RIGHT OR AUTHORIZATION UNDER FEDERAL LAW TO WORK IN THE UNITED STATES AS DESCRIBED IN 8 UNITED STATES CODE SECTION 1324a(h)(3).

13-2929. Unlawful transporting, moving, concealing, harboring or shielding of unlawful aliens; vehicle impoundment; exception; classification

A. IT IS UNLAWFUL FOR A PERSON WHO IS IN VIOLATION OF A CRIMINAL OFFENSE TO:

1. TRANSPORT OR MOVE OR ATTEMPT TO TRANSPORT OR MOVE AN ALIEN IN THIS STATE, IN FURTHERANCE OF THE ILLEGAL PRESENCE OF THE ALIEN IN THE UNITED STATES, IN A MEANS OF TRANSPORTATION IF THE PERSON KNOWS OR RECKLESSLY DISREGARDS THE FACT THAT THE ALIEN HAS COME TO, HAS ENTERED OR REMAINS IN THE UNITED STATES IN VIOLATION OF LAW.

2. CONCEAL, HARBOR OR SHIELD OR ATTEMPT TO CONCEAL, HARBOR OR SHIELD AN ALIEN FROM DETECTION IN ANY PLACE IN THIS STATE, INCLUDING ANY BUILDING OR ANY MEANS OF TRANSPORTATION, IF THE PERSON KNOWS OR RECKLESSLY DISREGARDS THE FACT THAT THE ALIEN HAS COME TO, HAS ENTERED OR REMAINS IN THE UNITED STATES IN VIOLATION OF LAW.

3. ENCOURAGE OR INDUCE AN ALIEN TO COME TO OR RESIDE IN THIS STATE IF THE PERSON KNOWS OR RECKLESSLY DISREGARDS THE FACT THAT SUCH COMING TO, ENTERING OR RESIDING IN THIS STATE IS OR WILL BE IN VIOLATION OF LAW.

B. A MEANS OF TRANSPORTATION THAT IS USED IN THE COMMISSION OF A VIOLATION OF THIS SECTION IS SUBJECT TO MANDATORY VEHICLE IMMOBILIZATION OR IMPOUNDMENT PURSUANT TO SECTION 28-3511.

C. A LAW ENFORCEMENT OFFICIAL OR AGENCY OF THIS STATE OR A COUNTY, CITY, TOWN OR OTHER POLITICAL SUBDIVISION OF THIS STATE MAY NOT CONSIDER RACE, COLOR OR NATIONAL ORIGIN IN THE ENFORCEMENT OF THIS SECTION EXCEPT TO THE EXTENT PERMITTED BY THE UNITED STATES OR ARIZONA CONSTITUTION.

D. IN THE ENFORCEMENT OF THIS SECTION, AN ALIEN'S IMMIGRATION STATUS MAY BE DETERMINED BY:

1. A LAW ENFORCEMENT OFFICER WHO IS AUTHORIZED BY THE FEDERAL GOVERNMENT TO VERIFY OR ASCERTAIN AN ALIEN'S IMMIGRATION STATUS.

2. THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT OR THE UNITED STATES CUSTOMS AND BORDER PROTECTION PURSUANT TO 8 UNITED STATES CODE SECTION 1373(C).

E. THIS SECTION DOES NOT APPLY TO A CHILD PROTECTIVE SERVICES WORKER ACTING IN THE WORKER'S OFFICIAL CAPACITY OR A PERSON WHO IS ACTING IN THE CAPACITY OF A FIRST RESPONDER, AN AMBULANCE ATTENDANT OR AN EMERGENCY MEDICAL TECHNICIAN AND WHO IS TRANSPORTING OR MOVING AN ALIEN IN THIS STATE PURSUANT TO TITLE 36, CHAPTER 21.1.

F. A PERSON WHO VIOLATES THIS SECTION IS GUILTY OF A CLASS 1 MISDEMEANOR AND IS SUBJECT TO A FINE OF AT LEAST ONE THOUSAND DOLLARS, EXCEPT THAT A VIOLATION OF THIS SECTION THAT INVOLVES TEN OR MORE ILLEGAL ALIENS IS A CLASS 6 FELONY AND THE PERSON IS SUBJECT TO A FINE OF AT LEAST ONE THOUSAND DOLLARS FOR EACH ALIEN WHO IS INVOLVED.

Sec. 6. Section 13-3883, Arizona Revised Statutes, is amended to read:

13-3883. Arrest by officer without warrant

A. A peace officer ~~may~~, without a warrant, MAY arrest a person if ~~he~~ THE OFFICER has probable cause to believe:

1. A felony has been committed and probable cause to believe the person to be arrested has committed the felony.

2. A misdemeanor has been committed in ~~his~~ THE OFFICER'S presence and probable cause to believe the person to be arrested has committed the offense.

3. The person to be arrested has been involved in a traffic accident and violated any criminal section of title 28, and that such violation occurred prior to or immediately following such traffic accident.

4. A misdemeanor or a petty offense has been committed and probable cause to believe the person to be arrested has committed the offense. A person arrested under this paragraph is eligible for release under section 13-3903.

5. THE PERSON TO BE ARRESTED HAS COMMITTED ANY PUBLIC OFFENSE THAT MAKES THE PERSON REMOVABLE FROM THE UNITED STATES.

B. A peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence and may serve a copy of the traffic complaint for any alleged civil or criminal traffic violation. A peace officer who serves a copy of the traffic complaint shall do so within a reasonable time of the alleged criminal or civil traffic violation.

Sec. 7. Section 23-212, Arizona Revised Statutes, is amended to read:

23-212. Knowingly employing unauthorized aliens; prohibition; false and frivolous complaints; violation; classification; license suspension and revocation; affirmative defense

A. An employer shall not knowingly employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer knowingly contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.

B. The attorney general shall prescribe a complaint form for a person to allege a violation of subsection A of this section. The complainant shall not be required to list the complainant's social security number on the complaint form or to have the complaint form notarized. On receipt of a complaint on a prescribed complaint form that an employer allegedly knowingly employs an unauthorized alien, the attorney general or county attorney shall investigate whether the employer has violated subsection A of this section. If a complaint is received but is not submitted on a prescribed complaint form, the attorney general or county attorney may investigate whether the employer has violated subsection A of this section. This subsection shall not be construed to prohibit the filing of anonymous complaints that are not submitted on a prescribed complaint form. The attorney general or county attorney shall not investigate complaints that are based solely on race, color or national origin. A complaint that is submitted to a county attorney shall be submitted to the county attorney in the county in which the alleged unauthorized alien is or was employed by the employer. The county sheriff or any other local law enforcement agency may assist in investigating a complaint. When investigating a complaint, the attorney general or county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code section 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States. An alien's immigration status or work authorization status shall be verified with the federal government pursuant to 8 United States Code section 1373(c). A person who knowingly files a false and frivolous complaint under this subsection is guilty of a class 3 misdemeanor.

C. If, after an investigation, the attorney general or county attorney determines that the complaint is not false and frivolous:

1. The attorney general or county attorney shall notify the United States immigration and customs enforcement of the unauthorized alien.

2. The attorney general or county attorney shall notify the local law enforcement agency of the unauthorized alien.

3. The attorney general shall notify the appropriate county attorney to bring an action pursuant to subsection D of this section if the complaint was originally filed with the attorney general.

D. An action for a violation of subsection A of this section shall be brought against the employer by the county attorney in the county where the unauthorized alien employee is or was employed by the employer. The county attorney shall not bring an action against any employer for any violation of subsection A of this section that occurs before January 1, 2008. A second violation of this section shall be based only on an unauthorized alien who is or was employed by the employer after an action has been brought for a violation of subsection A of this section or section 23-212.01, subsection A.

E. For any action in superior court under this section, the court shall expedite the action, including assigning the hearing at the earliest practicable date.

F. On a finding of a violation of subsection A of this section:

1. For a first violation, as described in paragraph 3 of this subsection, the court:

(a) Shall order the employer to terminate the employment of all unauthorized aliens.

(b) Shall order the employer to be subject to a three year probationary period for the business location where the unauthorized alien performed work. During the probationary period the employer shall file quarterly reports in the form provided in section 23-722.01 with the county attorney of each new

employee who is hired by the employer at the business location where the unauthorized alien performed work.

(c) Shall order the employer to file a signed sworn affidavit with the county attorney within three business days after the order is issued. The affidavit shall state that the employer has terminated the employment of all unauthorized aliens in this state and that the employer will not intentionally or knowingly employ an unauthorized alien in this state. The court shall order the appropriate agencies to suspend all licenses subject to this subdivision that are held by the employer if the employer fails to file a signed sworn affidavit with the county attorney within three business days after the order is issued. All licenses that are suspended under this subdivision shall remain suspended until the employer files a signed sworn affidavit with the county attorney. Notwithstanding any other law, on filing of the affidavit the suspended licenses shall be reinstated immediately by the appropriate agencies. For the purposes of this subdivision, the licenses that are subject to suspension under this subdivision are all licenses that are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the licenses that are subject to suspension under this subdivision are all licenses that are held by the employer at the employer's primary place of business. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall suspend the licenses according to the court's order. The court shall send a copy of the court's order to the attorney general and the attorney general shall maintain the copy pursuant to subsection G of this section.

(d) May order the appropriate agencies to suspend all licenses described in subdivision (c) of this paragraph that are held by the employer for not to exceed ten business days. The court shall base its decision to suspend under this subdivision on any evidence or information submitted to it during the action for a violation of this subsection and shall consider the following factors, if relevant:

(i) The number of unauthorized aliens employed by the employer.

(ii) Any prior misconduct by the employer.

(iii) The degree of harm resulting from the violation.

(iv) Whether the employer made good faith efforts to comply with any applicable requirements.

(v) The duration of the violation.

(vi) The role of the directors, officers or principals of the employer in the violation.

(vii) Any other factors the court deems appropriate.

2. For a second violation, as described in paragraph 3 of this subsection, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer at the employer's primary place of business. On receipt of the order and notwithstanding any other law, the appropriate agencies shall immediately revoke the licenses.

3. The violation shall be considered:

(a) A first violation by an employer at a business location if the violation did not occur during a probationary period ordered by the court under this subsection or section 23-212.01, subsection F for that employer's business location.

(b) A second violation by an employer at a business location if the violation occurred during a probationary period ordered by the court under this subsection or section 23-212.01, subsection F for that employer's business location.

G. The attorney general shall maintain copies of court orders that are received pursuant to subsection F of this section and shall maintain a database of

the employers and business locations that have a first violation of subsection A of this section and make the court orders available on the attorney general's website.

H. On determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code section 1373(c). The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated testimonial verification pursuant to 8 United States Code section 1373(c).

I. For the purposes of this section, proof of verifying the employment authorization of an employee through the e-verify program creates a rebuttable presumption that an employer did not knowingly employ an unauthorized alien.

J. For the purposes of this section, an employer that establishes that it has complied in good faith with the requirements of 8 United States Code section 1324a(b) establishes an affirmative defense that the employer did not knowingly employ an unauthorized alien. An employer is considered to have complied with the requirements of 8 United States Code section 1324a(b), notwithstanding an isolated, sporadic or accidental technical or procedural failure to meet the requirements, if there is a good faith attempt to comply with the requirements.

K. IT IS AN AFFIRMATIVE DEFENSE TO A VIOLATION OF SUBSECTION A OF THIS SECTION THAT THE EMPLOYER WAS ENTRAPPED. TO CLAIM ENTRAPMENT, THE EMPLOYER MUST ADMIT BY THE EMPLOYER'S TESTIMONY OR OTHER EVIDENCE THE SUBSTANTIAL ELEMENTS OF THE VIOLATION. AN EMPLOYER WHO ASSERTS AN ENTRAPMENT DEFENSE HAS THE BURDEN OF PROVING THE FOLLOWING BY A PREPONDERANCE OF THE EVIDENCE:

1. THE IDEA OF COMMITTING THE VIOLATION STARTED WITH LAW ENFORCEMENT OFFICERS OR THEIR AGENTS RATHER THAN WITH THE EMPLOYER.

2. THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS URGED AND INDUCED THE EMPLOYER TO COMMIT THE VIOLATION.

3. THE EMPLOYER WAS NOT PREDISPOSED TO COMMIT THE VIOLATION BEFORE THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS URGED AND INDUCED THE EMPLOYER TO COMMIT THE VIOLATION.

L. AN EMPLOYER DOES NOT ESTABLISH ENTRAPMENT IF THE EMPLOYER WAS PREDISPOSED TO VIOLATE SUBSECTION A OF THIS SECTION AND THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS MERELY PROVIDED THE EMPLOYER WITH AN OPPORTUNITY TO COMMIT THE VIOLATION. IT IS NOT ENTRAPMENT FOR LAW ENFORCEMENT OFFICERS OR THEIR AGENTS MERELY TO USE A RUSE OR TO CONCEAL THEIR IDENTITY. THE CONDUCT OF LAW ENFORCEMENT OFFICERS AND THEIR AGENTS MAY BE CONSIDERED IN DETERMINING IF AN EMPLOYER HAS PROVEN ENTRAPMENT.

Sec. 8. Section 23-212.01, Arizona Revised Statutes, is amended to read:

23-212.01. Intentionally employing unauthorized aliens; prohibition; false and frivolous complaints; violation; classification; license suspension and revocation; affirmative defense

A. An employer shall not intentionally employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer intentionally contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.

B. The attorney general shall prescribe a complaint form for a person to allege a violation of subsection A of this section. The complainant shall not be required to list the complainant's social security number on the complaint form or to have the complaint form notarized. On receipt of a complaint on a prescribed complaint form that an employer allegedly intentionally employs an unauthorized alien, the attorney general or county attorney shall investigate whether the employer has violated subsection A of this section. If a complaint is received but is not submitted on a prescribed complaint form, the attorney general or county attorney may investigate whether the employer has violated subsection A of this section. This subsection shall not be construed to prohibit the filing of anonymous

complaints that are not submitted on a prescribed complaint form. The attorney general or county attorney shall not investigate complaints that are based solely on race, color or national origin. A complaint that is submitted to a county attorney shall be submitted to the county attorney in the county in which the alleged unauthorized alien is or was employed by the employer. The county sheriff or any other local law enforcement agency may assist in investigating a complaint. When investigating a complaint, the attorney general or county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code section 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States. An alien's immigration status or work authorization status shall be verified with the federal government pursuant to 8 United States Code section 1373(c). A person who knowingly files a false and frivolous complaint under this subsection is guilty of a class 3 misdemeanor.

C. If, after an investigation, the attorney general or county attorney determines that the complaint is not false and frivolous:

1. The attorney general or county attorney shall notify the United States immigration and customs enforcement of the unauthorized alien.

2. The attorney general or county attorney shall notify the local law enforcement agency of the unauthorized alien.

3. The attorney general shall notify the appropriate county attorney to bring an action pursuant to subsection D of this section if the complaint was originally filed with the attorney general.

D. An action for a violation of subsection A of this section shall be brought against the employer by the county attorney in the county where the unauthorized alien employee is or was employed by the employer. The county attorney shall not bring an action against any employer for any violation of subsection A of this section that occurs before January 1, 2008. A second violation of this section shall be based only on an unauthorized alien who is or was employed by the employer after an action has been brought for a violation of subsection A of this section or 33 section 23-212, subsection A.

E. For any action in superior court under this section, the court shall expedite the action, including assigning the hearing at the earliest practicable date.

F. On a finding of a violation of subsection A of this section:

1. For a first violation, as described in paragraph 3 of this subsection, the court shall:

(a) Order the employer to terminate the employment of all unauthorized aliens.

(b) Order the employer to be subject to a five year probationary period for the business location where the unauthorized alien performed work. During the probationary period the employer shall file quarterly reports in the form provided in section 23-722.01 with the county attorney of each new employee who is hired by the employer at the business location where the unauthorized alien performed work.

(c) Order the appropriate agencies to suspend all licenses described in subdivision (d) of this paragraph that are held by the employer for a minimum of ten days. The court shall base its decision on the length of the suspension under this subdivision on any evidence or information submitted to it during the action for a violation of this subsection and shall consider the following factors, if relevant:

(i) The number of unauthorized aliens employed by the employer.

(ii) Any prior misconduct by the employer.

(iii) The degree of harm resulting from the violation.

(iv) Whether the employer made good faith efforts to comply with any applicable requirements.

(v) The duration of the violation.

(vi) The role of the directors, officers or principals of the employer in the violation.

(vii) Any other factors the court deems appropriate.

(d) Order the employer to file a signed sworn affidavit with the county attorney. The affidavit shall state that the employer has terminated the employment of all unauthorized aliens in this state and that the employer will not intentionally or knowingly employ an unauthorized alien in this state. The court shall order the appropriate agencies to suspend all licenses subject to this subdivision that are held by the employer if the employer fails to file a signed sworn affidavit with the county attorney within three business days after the order is issued. All licenses that are suspended under this subdivision for failing to file a signed sworn affidavit shall remain suspended until the employer files a signed sworn affidavit with the county attorney. For the purposes of this subdivision, the licenses that are subject to suspension under this subdivision are all licenses that are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the licenses that are subject to suspension under this subdivision are all licenses that are held by the employer at the employer's primary place of business. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall suspend the licenses according to the court's order. The court shall send a copy of the court's order to the attorney general and the attorney general shall maintain the copy pursuant to subsection G of this section.

2. For a second violation, as described in paragraph 3 of this subsection, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work. If the employer does not hold a license specific to the business location where the unauthorized alien performed work, but a license is necessary to operate the employer's business in general, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer at the employer's primary place of business. On receipt of the order and notwithstanding any other law, the appropriate agencies shall immediately revoke the licenses.

3. The violation shall be considered:

(a) A first violation by an employer at a business location if the violation did not occur during a probationary period ordered by the court under this subsection or section 23-212, subsection F for that employer's business location.

(b) A second violation by an employer at a business location if the violation occurred during a probationary period ordered by the court under this subsection or section 23-212, subsection F for that employer's business location.

G. The attorney general shall maintain copies of court orders that are received pursuant to subsection F of this section and shall maintain a database of the employers and business locations that have a first violation of subsection A of this section and make the court orders available on the attorney general's website.

H. On determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code section 1373(c). The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code section 1373(c).

I. For the purposes of this section, proof of verifying the employment authorization of an employee through the e-verify program creates a rebuttable presumption that an employer did not intentionally employ an unauthorized alien.

J. For the purposes of this section, an employer that establishes that it has complied in good faith with the requirements of 8 United States Code section 1324a(b) establishes an affirmative defense that the employer did not intentionally employ an unauthorized alien. An employer is considered to have complied with the requirements of 8 United States Code section 1324a(b), notwithstanding an isolated, sporadic or accidental technical or procedural failure to meet the requirements, if there is a good faith attempt to comply with the requirements.

K. IT IS AN AFFIRMATIVE DEFENSE TO A VIOLATION OF SUBSECTION A OF THIS SECTION THAT THE EMPLOYER WAS

ENTRAPPED. TO CLAIM ENTRAPMENT, THE EMPLOYER MUST ADMIT BY THE EMPLOYER'S TESTIMONY OR OTHER EVIDENCE THE SUBSTANTIAL ELEMENTS OF THE VIOLATION. AN EMPLOYER WHO ASSERTS AN ENTRAPMENT DEFENSE HAS THE BURDEN OF PROVING THE FOLLOWING BY A PREPONDERANCE OF THE EVIDENCE:

1. THE IDEA OF COMMITTING THE VIOLATION STARTED WITH LAW ENFORCEMENT OFFICERS OR THEIR AGENTS RATHER THAN WITH THE EMPLOYER.

2. THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS URGED AND INDUCED THE EMPLOYER TO COMMIT THE VIOLATION.

3. THE EMPLOYER WAS NOT PREDISPOSED TO COMMIT THE VIOLATION BEFORE THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS URGED AND INDUCED THE EMPLOYER TO COMMIT THE VIOLATION.

L. AN EMPLOYER DOES NOT ESTABLISH ENTRAPMENT IF THE EMPLOYER WAS PREDISPOSED TO VIOLATE SUBSECTION A OF THIS SECTION AND THE LAW ENFORCEMENT OFFICERS OR THEIR AGENTS MERELY PROVIDED THE EMPLOYER WITH AN OPPORTUNITY TO COMMIT THE VIOLATION. IT IS NOT ENTRAPMENT FOR LAW ENFORCEMENT OFFICERS OR THEIR AGENTS MERELY TO USE A RUSE OR TO CONCEAL THEIR IDENTITY. THE CONDUCT OF LAW ENFORCEMENT OFFICERS AND THEIR AGENTS MAY BE CONSIDERED IN DETERMINING IF AN EMPLOYER HAS PROVEN ENTRAPMENT.

Sec. 9. Section 23-214, Arizona Revised Statutes, is amended to read:

23-214. Verification of employment eligibility; e-verify program; economic development incentives; list of registered employers

A. After December 31, 2007, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the e-verify program AND SHALL KEEP A RECORD OF THE VERIFICATION FOR THE DURATION OF THE EMPLOYEE'S EMPLOYMENT OR AT LEAST THREE YEARS, WHICHEVER IS LONGER.

B. In addition to any other requirement for an employer to receive an economic development incentive from a government entity, the employer shall register with and participate in the e-verify program. Before receiving the economic development incentive, the employer shall provide proof to the government entity that the employer is registered with and is participating in the e-verify program. If the government entity determines that the employer is not complying with this subsection, the government entity shall notify the employer by certified mail of the government entity's determination of noncompliance and the employer's right to appeal the determination. On a final determination of noncompliance, the employer shall repay all monies received as an economic development incentive to the government entity within thirty days of the final determination. For the purposes of this subsection:

1. "Economic development incentive" means any grant, loan or performance-based incentive from any government entity that is awarded after September 30, 2008. Economic development incentive does not include any tax provision under title 42 or 43.

2. "Government entity" means this state and any political subdivision of this state that receives and uses tax revenues.

C. Every three months the attorney general shall request from the United States department of homeland security a list of employers from this state that are registered with the e-verify program. On receipt of the list of employers, the attorney general shall make the list available on the attorney general's website.

Sec. 10. Section 28-3511, Arizona Revised Statutes, is amended to read:

28-3511. Removal and immobilization or impoundment of vehicle

A. A peace officer shall cause the removal and either immobilization or impoundment of a vehicle if the peace officer determines that a person is driving the vehicle while any of the following applies:

1. The person's driving privilege is suspended or revoked for any reason.

2. The person has not ever been issued a valid driver license or permit by this state and the person does not produce evidence of ever having a valid driver

license or permit issued by another jurisdiction. This paragraph does not apply to the operation of an implement of husbandry.

3. The person is subject to an ignition interlock device requirement pursuant to chapter 4 of this title and the person is operating a vehicle without a functioning certified ignition interlock device. This paragraph does not apply to a person operating an employer's vehicle or the operation of a vehicle due to a substantial emergency as defined in section 28-1464.

4. IN FURTHERANCE OF THE ILLEGAL PRESENCE OF AN ALIEN IN THE UNITED STATES AND IN VIOLATION OF A CRIMINAL OFFENSE, THE PERSON IS TRANSPORTING OR MOVING OR ATTEMPTING TO TRANSPORT OR MOVE AN ALIEN IN THIS STATE IN A VEHICLE IF THE PERSON KNOWS OR RECKLESSLY DISREGARDS THE FACT THAT THE ALIEN HAS COME TO, HAS ENTERED OR REMAINS IN THE UNITED STATES IN VIOLATION OF LAW.

5. THE PERSON IS CONCEALING, HARBORING OR SHIELDING OR ATTEMPTING TO CONCEAL, HARBOR OR SHIELD FROM DETECTION AN ALIEN IN THIS STATE IN A VEHICLE IF THE PERSON KNOWS OR RECKLESSLY DISREGARDS THE FACT THAT THE ALIEN HAS COME TO, ENTERED OR REMAINS IN THE UNITED STATES IN VIOLATION OF LAW.

B. A peace officer shall cause the removal and impoundment of a vehicle if the peace officer determines that a person is driving the vehicle and if all of the following apply:

1. The person's driving privilege is canceled, suspended or revoked for any reason or the person has not ever been issued a driver license or permit by this state and the person does not produce evidence of ever having a driver license or permit issued by another jurisdiction.

2. The person is not in compliance with the financial responsibility requirements of chapter 9, article 4 of this title.

3. The person is driving a vehicle that is involved in an accident that results in either property damage or injury to or death of another person.

C. Except as provided in subsection D of this section, while a peace officer has control of the vehicle the peace officer shall cause the removal and either immobilization or impoundment of the vehicle if the peace officer has probable cause to arrest the driver of the vehicle for a violation of section 4-244, paragraph 34 or section 28-1382 or 28-1383.

D. A peace officer shall not cause the removal and either the immobilization or impoundment of a vehicle pursuant to subsection C of this section if all of the following apply:

1. The peace officer determines that the vehicle is currently registered and that the driver or the vehicle is in compliance with the financial responsibility requirements of chapter 9, article 4 of this title.

2. The spouse of the driver is with the driver at the time of the arrest.

3. The peace officer has reasonable grounds to believe that the spouse of the driver:

(a) Has a valid driver license.

(b) Is not impaired by intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances.

(c) Does not have any spirituous liquor in the spouse's body if the spouse is under twenty-one years of age.

4. The spouse notifies the peace officer that the spouse will drive the vehicle from the place of arrest to the driver's home or other place of safety.

5. The spouse drives the vehicle as prescribed by paragraph 4 of this subsection.

E. Except as otherwise provided in this article, a vehicle that is removed and either immobilized or impounded pursuant to subsection A, B or C of this section shall be immobilized or impounded for thirty days. An insurance company does not have a duty to pay any benefits for charges or fees for immobilization or impoundment.

F. The owner of a vehicle that is removed and either immobilized or impounded pursuant to subsection A, B or C of this section, the spouse of the owner and each person identified on the department's record with an interest in the vehicle shall be provided with an opportunity for an immobilization or poststorage hearing pursuant to section 28-3514.

Sec. 11. Title 41, chapter 12, article 2, Arizona Revised Statutes, is amended by adding section 41-1724, to read:

41-1724. Gang and immigration intelligence team enforcement mission fund

THE GANG AND IMMIGRATION INTELLIGENCE TEAM ENFORCEMENT MISSION FUND IS ESTABLISHED CONSISTING OF MONIES DEPOSITED PURSUANT TO SECTION 11-1051 AND MONIES APPROPRIATED BY THE LEGISLATURE. THE DEPARTMENT SHALL ADMINISTER THE FUND. MONIES IN THE FUND ARE SUBJECT TO LEGISLATIVE APPROPRIATION AND SHALL BE USED FOR GANG AND IMMIGRATION ENFORCEMENT AND FOR COUNTY JAIL REIMBURSEMENT COSTS RELATING TO ILLEGAL IMMIGRATION.

Sec. 12. Severability, implementation and construction

A. If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

B. The terms of this act regarding immigration shall be construed to have the meanings given to them under federal immigration law.

C. This act shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.

D. Nothing in this act shall implement or shall be construed or interpreted to implement or establish the REAL ID act of 2005 (P.L. 109-21 13, division B; 119 Stat. 302) including the use of a radio frequency identification chip.

Sec. 13. Short title

This act may be cited as the "Support Our Law Enforcement and Safe Neighborhoods Act".

Sec. 14. Immigration legislation challenges

A. Notwithstanding title 41, chapter 1, Arizona Revised Statutes, and any other law, through December 31, 2010, the attorney general shall act at the direction of the governor in any challenge in a state or federal court to Laws 2010, chapter 113 and any amendments to that law.

B. Notwithstanding title 41, chapter 1, Arizona Revised Statutes, and any other law, through December 31, 2010, the governor may direct counsel other than the attorney general to appear on behalf of this state to defend any challenge to Laws 2010, chapter 113 and any amendments to that law.

8 U.S.C. § 1304. Forms for registration and fingerprinting

(a) Preparation; contents

The Attorney General and the Secretary of State jointly are authorized and directed to prepare forms for the registration of aliens under section 1301 of this title, and the Attorney General is authorized and directed to prepare forms for the registration and fingerprinting of aliens under section 1302 of this title. Such forms shall contain inquiries with respect to (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the police and criminal record, if any, of such alien; and (5) such additional matters as may be prescribed.

(b) Confidential nature

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only (1) pursuant to section 1357(f)(2) of this title, and (2) to such persons or agencies as may be designated by the Attorney General.

(c) Information under oath

Every person required to apply for the registration of himself or another under this subchapter shall submit under oath the information required for such registration. Any person authorized under regulations issued by the Attorney General to register aliens under this subchapter shall be authorized to administer oaths for such purpose.

(d) Certificate of alien registration or alien receipt card

Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General.

(e) Personal possession of registration or receipt card; penalties

Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d) of this section.

Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed $100 or be imprisoned not more than thirty days, or both.

(f) Alien's social security account number

Notwithstanding any other provision of law, the Attorney General is authorized to require any alien to provide the alien's social security account number for purposes of inclusion in any record of the alien maintained by the Attorney General or the Service.

8 U.S.C. § 1306. Penalties

(a) Willful failure to register

Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both.

(b) Failure to notify change of address

Any alien or any parent or legal guardian in the United States of any alien who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $200 or be imprisoned not more than thirty days, or both. Irrespective of whether an alien is convicted and punished as herein provided, any alien who fails to give written notice to the Attorney General, as required by section 1305 of this title, shall be taken into custody and removed in the manner provided by part IV of this subchapter, unless such alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(c) Fraudulent statements

Any alien or any parent or legal guardian of any alien, who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; and any alien so convicted shall, upon the warrant of the Attorney General, be taken into custody and be removed in the manner provided in part IV of this subchapter.

(d) Counterfeiting

Any person who with unlawful intent photographs, prints, or in any other manner makes, or executes, any engraving, photograph, print, or impression in the likeness of any certificate of alien registration or an alien registration receipt card

or any colorable imitation thereof, except when and as authorized under such rules and regulations as may be prescribed by the Attorney General, shall upon conviction be fined not to exceed $5,000 or be imprisoned not more than five years, or both.

8 U.S.C. § 1324a. Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general
It is unlawful for a person or other entity--

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment
It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(3) Defense
A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

(4) Use of labor through contract
For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after November 6, 1986, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with

respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

(5) Use of State employment agency documentation

For purposes of paragraphs (1)(B) and (3), a person or entity shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of an individual who was referred for such employment by a State employment agency (as defined by the Attorney General), if the person or entity has and retains (for the period and in the manner described in subsection (b)(3) of this section) appropriate documentation of such referral by that agency, which documentation certifies that the agency has complied with the procedures specified in subsection (b) of this section with respect to the individual's referral.

(6) Treatment of documentation for certain employees

(A) In general

For purposes of this section, if--

(i) an individual is a member of a collective-bargaining unit and is employed, under a collective bargaining agreement entered into between one or more employee organizations and an association of two or more employers, by an employer that is a member of such association, and

(ii) within the period specified in subparagraph (B), another employer that is a member of the association (or an agent of such association on behalf of the employer) has complied with the requirements of subsection (b) of this section with respect to the employment of the individual,

the subsequent employer shall be deemed to have complied with the requirements of subsection (b) of this section with respect to the hiring of the employee and shall not be liable for civil penalties described in subsection (e)(5) of this section.

(B) Period

The period described in this subparagraph is 3 years, or, if less, the period of time that the individual is authorized to be employed in the United States.

(C) Liability

(i) In general

If any employer that is a member of an association hires for employment in the United States an individual and relies upon the provisions of subparagraph (A) to comply with the requirements of subsection (b) of this section and the individual is an alien not authorized to work in the United States, then for the purposes of paragraph (1)(A), subject to clause (ii), the employer shall be presumed to have known at the time of hiring or afterward that the individual was an alien not authorized to work in the United States.

(ii) Rebuttal of presumption

The presumption established by clause (i) may be rebutted by the employer only through the presentation of clear and convincing evidence that the employer did not know (and could not reasonably have known) that the individual at the time of hiring or afterward was an alien not authorized to work in the United States.

(iii) Exception

Clause (i) shall not apply in any prosecution under subsection (f)(1) of this section.

(7) Application to Federal Government

For purposes of this section, the term "entity" includes an entity in any branch of the Federal Government.

(b) Employment verification system

The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) of this section are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

(1) Attestation after examination of documentation

(A) In general

The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining--

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

Such attestation may be manifested by either a hand-written or an electronic signature. A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.

(B) Documents establishing both employment authorization and identity

A document described in this subparagraph is an individual's--

(i) United States passport;[2]

(ii) resident alien card, alien registration card, or other document designated by the Attorney General, if the document--

(I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this subsection,

(II) is evidence of authorization of employment in the United States, and

[2] So in original. Probably should be followed by "or".

(III) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

(C) Documents evidencing employment authorization
A document described in this subparagraph is an individual's--

(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or

(ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.

(D) Documents establishing identity of individual
A document described in this subparagraph is an individual's--

(i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or

(ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than a driver's license) referred to in clause (i), documentation of personal identity of such other type as the Attorney General finds, by regulation, provides a reliable means of identification.

(E) Authority to prohibit use of certain documents
If the Attorney General finds, by regulation, that any document described in subparagraph (B), (C), or (D) as establishing employment authorization or identity does not reliably establish such authorization or identity or is being used fraudulently to an unacceptable degree, the Attorney General may prohibit or place conditions on its use for purposes of this subsection.

(2) Individual attestation of employment authorization

The individual must attest, under penalty of perjury on the form designated or established for purposes of paragraph (1), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired, recruited, or referred for such employment. Such attestation may be manifested by either a hand-written or an electronic signature.

(3) Retention of verification form

After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor during a period beginning on the date of the hiring, recruiting, or referral of the individual and ending--

(A) in the case of the recruiting or referral for a fee (without hiring) of an individual, three years after the date of the recruiting or referral, and

(B) in the case of the hiring of an individual--

(i) three years after the date of such hiring, or

(ii) one year after the date the individual's employment is terminated, whichever is later.

(4) Copying of documentation permitted

Notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection.

(5) Limitation on use of attestation form

A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18.

(6) Good faith compliance

(A) In general

Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.

(B) Exception if failure to correct after notice

Subparagraph (A) shall not apply if--

(i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,

(ii) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure, and

(iii) the person or entity has not corrected the failure voluntarily within such period.

(C) Exception for pattern or practice violators

Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section.

(c) No authorization of national identification cards

Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.

(d) Evaluation and changes in employment verification system

(1) Presidential monitoring and improvements in system

(A) Monitoring

The President shall provide for the monitoring and evaluation of the degree to which the employment verification system established under subsection (b) of this section provides a secure system to determine employment eligibility in the United States and shall examine the suitability of existing Federal and State identification systems for use for this purpose.

(B) Improvements to establish secure system

To the extent that the system established under subsection (b) of this section is found not to be a secure system to determine employment eligibility in the United States, the President shall, subject to paragraph (3) and taking into account the results of any demonstration projects conducted under paragraph (4), implement such changes in (including additions to) the requirements of subsection (b) of this section as may be necessary to establish a secure system to determine employment eligibility in the United States. Such changes in the system may be implemented only if the changes conform to the requirements of paragraph (2).

(2) Restrictions on changes in system

Any change the President proposes to implement under paragraph (1) in the verification system must be designed in a manner so the verification system, as so changed, meets the following requirements:

(A) Reliable determination of identity

The system must be capable of reliably determining whether--

(i) a person with the identity claimed by an employee or prospective employee is eligible to work, and

(ii) the employee or prospective employee is claiming the identity of another individual.

(B) Using of counterfeit-resistant documents

If the system requires that a document be presented to or examined by an employer, the document must be in a form which is resistant to counterfeiting and tampering.

(C) Limited use of system

Any personal information utilized by the system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien.

(D) Privacy of information

The system must protect the privacy and security of personal information and identifiers utilized in the system.

(E) Limited denial of verification

A verification that an employee or prospective employee is eligible to be employed in the United States may not be withheld or revoked under the system for any reason other than that the employee or prospective employee is an unauthorized alien.

(F) Limited use for law enforcement purposes

The system may not be used for law enforcement purposes, other than for enforcement of this chapter or sections 1001, 1028, 1546, and 1621 of Title 18.

(G) Restriction on use of new documents

If the system requires individuals to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral, then such document may not be required to be presented for any purpose other than under this chapter (or enforcement of sections 1001, 1028, 1546, and 1621 of Title 18) nor to be carried on one's person.

(3) Notice to Congress before implementing changes

(A) In general

The President may not implement any change under paragraph (1) unless at least--

(i) 60 days,

(ii) one year, in the case of a major change described in subparagraph (D)(iii), or

(iii) two years, in the case of a major change described in clause (i) or (ii) of subparagraph (D), before the date of implementation of the change, the President has prepared and transmitted to the Committee on the Judiciary of the House of Representatives and to the Committee on the Judiciary of the Senate a written report setting forth the proposed change. If the President proposes to make any change regarding social security account number cards, the President shall transmit to the Committee on Ways and Means of the House of Representatives and to the Committee on Finance of the Senate a written report setting forth the proposed change. The President promptly shall cause to have printed in the Federal Register the substance of any major change (described in subparagraph (D)) proposed and reported to Congress.

(B) Contents of report

In any report under subparagraph (A) the President shall include recommendations for the establishment of civil and criminal sanctions for unauthorized use or disclosure of the information or identifiers contained in such system.

(C) Congressional review of major changes

(i) Hearings and review

The Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of any major change described in subparagraph (D), shall hold hearings respecting the feasibility and desirability of implementing such a change, and, within the two year period before implementation, shall report to their respective Houses findings on whether or not such a change should be implemented.

(ii) Congressional action

No major change may be implemented unless the Congress specifically provides, in an appropriations or other Act, for funds for implementation of the change.

(D) Major changes defined

As used in this paragraph, the term "major change" means a change which would--

(i) require an individual to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral,

(ii) provide for a telephone verification system under which an employer, recruiter, or referrer must transmit to a Federal official information concerning the immigration status of prospective employees and the official transmits to the person, and the person must record, a verification code, or

(iii) require any change in any card used for accounting purposes under the Social Security Act [42 U.S.C.A. § 301 et seq.], including any change requiring that the only social security account number cards which may be presented in order to comply with subsection (b)(1)(C)(i) of this section are such cards as are in a counterfeit-resistant form consistent with the second sentence of section 205(c)(2)(D) of the Social Security Act [42 U.S.C.A. § 405(c)(2)(D)].

(E) General revenue funding of social security card changes

Any costs incurred in developing and implementing any change described in subparagraph (D)(iii) for purposes of this subsection shall not be paid for out of any trust fund established under the Social Security Act [42 U.S.C.A. § 301 et seq.].

(4) Demonstration projects

(A) Authority

The President may undertake demonstration projects (consistent with paragraph (2)) of different changes in the requirements of subsection (b) of this section. No such project may extend over a period of longer than five years.

(B) Reports on projects

The President shall report to the Congress on the results of demonstration projects conducted under this paragraph.

(e) Compliance

(1) Complaints and investigations

The Attorney General shall establish procedures--

(A) for individuals and entities to file written, signed complaints respecting potential violations of subsection (a) or (g)(1) of this section,

(B) for the investigation of those complaints which, on their face, have a substantial probability of validity,

(C) for the investigation of such other violations of subsection (a) or (g)(1) of this section as the Attorney General determines to be appropriate, and

(D) for the designation in the Service of a unit which has, as its primary duty, the prosecution of cases of violations of subsection (a) or (g)(1) of this section under this subsection.

(2) Authority in investigations

In conducting investigations and hearings under this subsection--

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated,

(B) administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing, and

(C) immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the filing of a complaint in a case under paragraph (2).

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(3) Hearing

(A) In general

Before imposing an order described in paragraph (4), (5), or (6) against a person or entity under this subsection for a violation of subsection (a) or (g)(1) of this section, the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing

Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of Title 5. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of orders

If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity named in the complaint has violated subsection (a) or (g)(1) of this section, the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (4), (5), or (6).

(4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations

With respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection--

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of--

(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity--

(i) to comply with the requirements of subsection (b) of this section (or subsection (d) of this section if applicable) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and

(ii) to take such other remedial action as is appropriate.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(5) Order for civil money penalty for paperwork violations

With respect to a violation of subsection (a)(1)(B) of this section, the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the

violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

(6) Order for prohibited indemnity bonds

With respect to a violation of subsection (g)(1) of this section, the order under this subsection may provide for the remedy described in subsection (g)(2) of this section.

(7) Administrative appellate review

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless either (A) within 30 days, an official delegated by regulation to exercise review authority over the decision and order modifies or vacates the decision and order, or (B) within 30 days of the date of such a modification or vacation (or within 60 days of the date of decision and order of an administrative law judge if not so modified or vacated) the decision and order is referred to the Attorney General pursuant to regulations, in which case the decision and order of the Attorney General shall become the final agency decision and order under this subsection. The Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.

(8) Judicial review

A person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(9) Enforcement of orders

If a person or entity fails to comply with a final order issued under this subsection against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(f) Criminal penalties and injunctions for pattern or practice violations

(1) Criminal penalty

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) Enjoining of pattern or practice violations

Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a) of this section, the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

(g) Prohibition of indemnity bonds

(1) Prohibition

It is unlawful for a person or other entity, in the hiring, recruiting, or referring for employment of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring, recruiting, or referring of the individual.

(2) Civil penalty

Any person or entity which is determined, after notice and opportunity for an administrative hearing under subsection (e) of this section, to have violated paragraph (1) shall be subject to a civil penalty of $1,000 for each violation and to an administrative order requiring the return of any amounts received in violation of such paragraph to the employee or, if the employee cannot be located, to the general fund of the Treasury.

(h) Miscellaneous provisions

(1) Documentation

In providing documentation or endorsement of authorization of aliens (other than aliens lawfully admitted for permanent residence) authorized to be employed in the United States, the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be conspicuously stated on the documentation or endorsement.

(2) Preemption

The provisions of this section preempt any State or local law 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.

(3) Definition of unauthorized alien

As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

8 U.S.C. § 1357. Powers of immigration officers and employees

(a) Powers without warrant

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant--

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States; and

(5) to make arrests--

(A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or

(B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony,

if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

Under regulations prescribed by the Attorney General, an officer or employee of the Service may carry a firearm and may execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States. The authority to make arrests under paragraph (5)(B) shall only be effective on and after the date on which the Attorney General publishes final regulations which (i) prescribe the categories of officers and employees of the Service who may use force (including deadly force) and the circumstances under which such force may be used, (ii) establish standards with respect to enforcement activities of the Service, (iii) require that any officer or employee of the Service is not authorized to make arrests under paragraph (5)(B) unless the officer or employee has received certification as having completed a training program which covers such arrests and standards described in clause (ii), and (iv) establish an expedited, internal review process for violations of such standards, which process is consistent with standard agency procedure regarding confidentiality of matters related to internal investigations.

(b) Administration of oath; taking of evidence

Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service; and any person to whom such oath has been administered, (or who has executed an unsworn declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28) under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear (or subscribe under penalty of perjury as permitted

under section 1746 of Title 28) to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621 of Title 18.

(c) Search without warrant

Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this chapter which would be disclosed by such search.

(d) Detainer of aliens for violation of controlled substances laws

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)--

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,

the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

(e) Restriction on warrantless entry in case of outdoor agricultural operations

Notwithstanding any other provision of this section other than paragraph (3) of subsection (a) of this section, an officer or employee of the Service may not enter without the consent of the owner (or agent thereof) or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the

purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States.

(f) Fingerprinting and photographing of certain aliens

(1) Under regulations of the Attorney General, the Commissioner shall provide for the fingerprinting and photographing of each alien 14 years of age or older against whom a proceeding is commenced under section 1229a of this title.

(2) Such fingerprints and photographs shall be made available to Federal, State, and local law enforcement agencies, upon request.

(g) Performance of immigration officer functions by State officers and employees

(1) Notwithstanding section 1342 of Title 31, the Attorney General may enter into 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 by the Attorney General 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.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.

(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.

(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.

(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5 (relating to compensation for injury) and sections 2671 through 2680 of Title 28 (relating to tort claims).

(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

(h) Protecting abused juveniles[3]

An alien described in section 1101(a)(27)(J) of this title who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under section 1101(a)(27)(J)(iii)(I) of this title.

[3] Editorially supplied.

8 U.S.C. § 1373. Communication between Government agencies and the Immigration and Naturalization Service

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall 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.