

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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The United States of America,	)	
	)	
Plaintiff,	)	
	)	<b>CV10-1413-PHX-SRB</b>
	)	Phoenix, Arizona
vs.	)	July 22, 2010
The State of Arizona; and	)	1:28 p.m.
Janice K. Brewer, Governor	)	
of the State of Arizona, in	)	
her Official Capacity,	)	
	)	
Defendants.	)	

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**BEFORE: THE HONORABLE SUSAN R. BOLTON, JUDGE**

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

**PRELIMINARY INJUNCTION HEARING**

Official Court Reporter:  
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Sandra Day O'Connor U.S. Courthouse, Suite 312  
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Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

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P R O C E E D I N G S

(Called to the order of court at 1:28 p.m.)

THE COURT: Good morning, ladies and gentlemen.  
Please sit down.

THE CLERK: Civil case 10-1413. *United States of America v. State of Arizona and others.* Time set for preliminary injunction hearing.

Counsel, please announce your presence for the record.

MR. KNEEDLER: Edwin Kneedler for the United States.

MS. CHILAKAMARRI: Varu Chilakamarri for the United States.

THE COURT: Louder, please.

MS. CHILAKAMARRI: Varu Chilakamarri for the United States.

THE COURT: Thank you.

MR. WILKENFELD: Josh Wilkenfeld for the United States.

MR. GOLDBERG: Arthur Goldberg for the United States.

MS. RAMIREZ: Monica Ramirez for the United States.

MR. ORRICK: William Orrick for the United States.

MR. DELERY: Stuart Delery for the United States.

MR. BURKE: Dennis Burke for the United States.

THE COURT: Good afternoon, Mr. Burke.

Mr. Bouma?

1           MR. BOUMA: Your Honor, John Bouma for Governor  
2 Brewer and for the State. Next, I would like to announce the  
3 presence of Governor Brewer.

4           THE COURT: Good afternoon, Governor. Welcome.

5           GOVERNOR JANICE BREWER: Thank you, Your Honor.

6           MR. KANEFIELD: Joseph Kanefield for Governor Brewer  
7 and the State of Arizona.

8           THE COURT: Unlike the other two cases, in this case  
9 I did not send out an order allocating time since there's only  
10 one motion to be heard today. But in keeping with the amount  
11 of time that has been allocated in the other two cases that we  
12 heard, each side can have a maximum of one hour of argument  
13 time. Please do not feel compelled, however, to use an entire  
14 hour of argument time.

15           So this is the motion of the United States. Who will  
16 be arguing for the United States?

17           MR. KNEEDLER: I will, Your Honor.

18           THE COURT: And could you tell me your name again,  
19 please, sir?

20           MR. KNEEDLER: My name is Edwin Kneedler from the  
21 Department of Justice.

22           THE COURT: Thank you, sir. You may proceed.

23           Did you want me to keep track of your time and let  
24 you know at a certain point when you have a certain amount of  
25 time?

1 MR. KNEEDLER: That would be fine. I would like to  
2 reserve at least 15 minutes for rebuttal.

3 THE COURT: Okay. I'll tell you when you've hit 45  
4 minutes.

5 MR. KNEEDLER: Okay. Thank you.

6 If I may begin with what I understand to be Your  
7 Honor's desire to know which specific sections of the Act are  
8 being challenged or are being sought to be enjoined here, I  
9 would like to just run through that to be clear.

10 The United States challenges Sections 1, 2, 3, and 6.

11 As to Section 4 of the Act, that made one amendment  
12 to a preexisting Section 2319 on transportation. We  
13 challenged that in our Complaint. We are not today seeking a  
14 preliminary injunction against the enforcement of Section  
15 2319.

16 We do have concerns that were explained in our  
17 Complaint and in our brief, but our prayer for relief here  
18 sought a preliminary injunction as to SB 1070 which just made  
19 a minor amendment, and we are not pressing a P.I. against  
20 Section 4 -- excuse me, against 2319 at this time.

21 As I will --

22 THE COURT: You just eliminated my whole first area  
23 of questioning.

24 MR. KNEEDLER: Well, I don't want to take it  
25 completely off the table, because for reasons similar to those

1 with the transportation provision in Section 5, we have  
2 concerns about it, but also in the way it may tie into  
3 Section 2, which I will explain in terms of its  
4 administration. But in terms of specifically seeking an  
5 injunction against Section 4, we are not seeking that right  
6 now.

7 And with respect to Section 5, the employment  
8 provision in Section 5, there are actually three employment  
9 provisions in the part -- the first part of Section 5. We are  
10 not challenging two of those, paragraphs A and B, because they  
11 do not turn on alienage for immigration status or past  
12 immigration conduct. Those are the ones that have to do with  
13 soliciting workers in a way that would stop traffic or seeking  
14 to obtain employment in a way that would stop traffic.

15 Those are immigration neutral and don't have  
16 immigration consequences, so our employment challenge is only  
17 to the one with respect to criminal sanctions for soliciting  
18 work or for working in the state.

19 Now, before I go through the particular sections of  
20 the Act that we are challenging here, I did want to state  
21 generally the principles that we think control the decision in  
22 this case. And in describing these principles, I think I  
23 would like to distinguish between our challenge to the  
24 employment provision in Section 5 and the rest of the Act.

25 The rest of the Act, the provisions we are

1 challenging we believe are a direct challenge or a direct  
2 effort by the State to participate in the enforcement of  
3 immigration law or to make immigration policy directly and we  
4 think that those provisions are preempted because the states  
5 are not permitted to participate in immigration.

6 We treat the employment provision somewhat  
7 differently, because as the Supreme Court said in the *DeCanas*  
8 decision, not every state statute that may have some effect on  
9 an alien in the state should be deemed to be a regulation of  
10 immigration that is taken off the table for the states as a  
11 constitutional matter.

12 And so the employment provision, we believe it is  
13 preempted, but not because it is a regulation of immigration  
14 as such, but because it is preempted by the particular  
15 provisions of IRCA enacted by Congress in 1986.

16 So what I'm going to start off here with is a  
17 statement of the general principles regulating or governing  
18 the regulation of immigration which pertain to the other  
19 provisions of the Act that we are challenging and I will come  
20 to Section 5's employment provisions later in the argument.

21 Now, as the Supreme Court said in the *DeCanas*  
22 decision, the regulation of immigration is unquestionably  
23 exclusively a federal power. And that is largely so because  
24 it is integrally related to the nation's foreign relations.  
25 After all, the subject of immigration law is the presence in

1 the United States or whether people can come to the United  
2 States who are nationals of another nation; and reciprocally,  
3 we have United States' citizens and nationals traveling in  
4 other countries and we are concerned about their treatment  
5 there.

6 And so the framers of our constitution -- and the  
7 Supreme Court has recognized this on numerous occasions; one  
8 of the primary reasons for the adoption of the constitution  
9 was to vest in the national government and not the individual  
10 states the authority over all aspects of foreign relations;  
11 and here, that includes immigration.

12 The framers were very concerned that one member of  
13 the Union could embroil the entire Union in a controversy with  
14 other nations and therefore, it was important for the nation  
15 to speak with one voice. And the Court has made that very  
16 point, specifically with respect to immigration in the  
17 *Zadvydas* case. The Supreme Court said that it is important  
18 for the nation to speak with one voice in immigration matters.

19 Regulation of immigration vested exclusively in the  
20 national government has two aspects; one is Congress'  
21 enactment of the laws that govern immigration or the Senate  
22 and Presidents making the treaties that may govern  
23 immigration; and then the execution of whatever laws Congress  
24 enacted which are vested in the Executive Branch.

25 In this instance the regulation of immigration is

1 primarily regulated by the comprehensive statute Congress  
2 enacted in 1952, and as amended on numerous times since then,  
3 the Immigration and Nationality Act, which in turn vests a  
4 broad range of responsibilities in the Department of Homeland  
5 Security with its various functions; and the Department of  
6 Justice for criminal prosecutions and adjudications and  
7 removals; and the State Department with its consulate  
8 functions and its international dealings and negotiations and  
9 diplomatic correspondence dealing with matters that touch upon  
10 immigration, among the broad range of international affairs  
11 that the State Department is charged with doing.

12           Within that framework, that overall statutory  
13 framework, there are numerous policies, sometimes competing  
14 policies, that these various federal departments have to  
15 administer. There is, of course, the -- this is a nation of  
16 immigrants. There is a policy of welcoming immigrants coming  
17 to this country. There's a policy of welcoming visitors.  
18 There's a policy of promoting trade and business people coming  
19 into the country. And again, this is very tied up with the  
20 reciprocal interests of the United States.

21           There are humanitarian concerns in terms of  
22 protection of refugees or people who come here even without  
23 permission initially who seek protection. And there, of  
24 course, are, as particularly relevant here today, the question  
25 of what to do when someone has come to the United States or

1 remains in the United States beyond or in time or contrary to  
2 the provisions that Congress and the implementing measures  
3 have allowed, in other words the enforcement measures.

4 And enforcement itself carries a broad variety of  
5 possibilities. There is criminal prosecution under the  
6 federal act for many violations of the Act. There is the  
7 possibility of removal. There is the possibility of  
8 discretionary relief from removal. There is the possibility  
9 to adjust one's status.

10 The manner in which these various responsibilities  
11 are exercised throughout the Executive Branch, Congress well  
12 understood, would be subject to the judgment and discretion of  
13 the particular -- whoever the particular responsible actor was  
14 at that particular time.

15 And the Supreme Court en masse made the point that,  
16 and I quote:

17 "Flexibility and the adaptation of the congressional  
18 policy to infinitely variable conditions constitutes the  
19 essence of the program."

20 So as a general matter, of course, when Congress  
21 vests authority in an executive agency, it expects that to be  
22 done with the usual attributes of prosecutorial discretion,  
23 enforcement discretion, and the Court was making the point  
24 that was all the more so in the area of immigration because of  
25 the effect on foreign relations.

1           And just to take one piece of it that is relevant  
2 here, ICE, Immigrations and Customs Enforcement, because of  
3 limited resources and the need to focus its attention where  
4 immigration enforcement is most acute, has adopted a series of  
5 priorities in terms of where they are focusing their  
6 enforcement efforts. And it's primarily directed at national  
7 security issues, terrorists, that sort of thing, crime,  
8 especially violent crime and drug crimes, and also recent  
9 border crossings in order to maintain the security of the  
10 border, and also in fugitives or absconders, protecting the  
11 integrity of the immigration process.

12           These are not absolute, but in terms of allocating  
13 its resources, this is what ICE has done. And, of course,  
14 Customs and Border Patrol has its own responsibilities. In  
15 carrying out those responsibilities, historically there has  
16 been great cooperation among -- between the states and the  
17 federal government with the states and local officials  
18 assisting the United States in the enforcement of the  
19 immigration laws and that has gone on for many years I think  
20 with the understanding -- and I think it has to be  
21 unquestioned -- that the ultimate responsibility for enforcing  
22 belongs to the United States, both because the constitution  
23 vests enforcement of immigration laws in the United States and  
24 because the Immigration Nationality Act carries that into  
25 effect by vesting those powers in the federal government.

1           Now, and frankly, in an unprecedented and dramatic  
2 change, the State of Arizona has changed that cooperative  
3 relationship in the enactment of SB 1070. What the State has  
4 done here -- and this is set out in Section 1 of the Bill as a  
5 prelude to the rest of the Act -- is to adopt through the  
6 State of Arizona its own immigration policy, "public policy,"  
7 as the statute says, intending its various subsequent  
8 provisions to operate together to carry out or effectuate this  
9 policy and the policy is one of attrition through enforcement.

10           And the Act specifically -- Section 1 of the Act  
11 specifically refers to being aimed at the entry and remaining  
12 in the United States being illegal, which is the targeted act  
13 expressly in Section 1 to people coming into the United States  
14 unlawfully.

15           THE COURT: Well, why can't Arizona be as  
16 inhospitable as they wish to people who have entered or  
17 remained in the United States illegally?

18           MR. KNEEDLER: Well, it is not for one of our states  
19 to be inhospitable in the way that the statute does.

20           Now, of course, "inhospitable" in terms of one's  
21 reaction or one's view is one thing, but to put that policy  
22 into law in a manner that interacts with the exclusive federal  
23 control over immigration is our concern.

24           And we urge the Court to enter a preliminary  
25 injunction here to prevent irreparable injury that I will

1 explain later, but this Act intrudes the State into an area of  
2 exclusive federal concern and it interferes with the executive  
3 administration --

4 THE COURT: How can I enjoin a purpose?

5 I mean, you ask me to enjoin Section 1. One just is  
6 a statement of purpose, but an injunction usually enjoins  
7 action.

8 MR. KNEEDLER: Well, and our principal submission, of  
9 course, is the operative provisions or what the Court should  
10 enjoin, but I don't think the Court can ignore Section 1. It  
11 is there to be --

12 THE COURT: Well, I can't ignore Section 1 in  
13 connection with interpreting what Sections 2 through 12 are  
14 about.

15 But Section 1 says what it says. And the United  
16 States might not like that it says what it says, but why would  
17 I say, "Arizona, you can't say this"?

18 MR. KNEEDLER: Right. And if one reads it as simply  
19 a declaration of a point of view, then obviously you are  
20 correct. But I think it's there to infuse what the thrust of  
21 the rest of the Act to insist upon a -- to remind people  
22 operating under the state statute that there is a public  
23 policy, and this is the language of Section 1, that there is a  
24 public policy for attrition by enforcement.

25 But I don't want to -- I don't want to suggest that

1 our position depends upon the Court's enjoining Section 1 or  
2 finding that it must disagree with the State's ability to  
3 state its view on the subject.

4 Our principal point as to Section 1 is that it is  
5 intended to add additional impetus to what follows.

6 In discussing what follows, I would like to start by  
7 focusing on Section 3, which I think in some ways is the most  
8 dramatic undertaking by the State in this statute. And the  
9 core provision of Section 3 says that:

10 In addition to any violation of federal law, a person  
11 is guilty of willful failure to complete or carry an alien  
12 registration document if the person is in violation of the  
13 federal provisions that require applying for a registration  
14 within 30 days of coming into the United States or carrying  
15 such a card when that is necessary.

16 In our view, that provision is preempted under all  
17 three principle theories of preemption that could be invoked  
18 in this context. In the first place, it is a direct intrusion  
19 into immigration matters and immigration enforcement.

20 Secondly, as the Supreme Court recognized in *Hines*,  
21 Congress has occupied the field of alien registration.

22 And third, in any event, the existence of state  
23 criminal sanctions for failure to register as required by  
24 federal law conflicts with federal law. It interferes with  
25 the enforcement discretion of the federal agencies charged

1 with administering those provisions in the immigration laws  
2 more generally and stands as an obstacle toward their  
3 fulfillment.

4 I would like to explain why that is true for each of  
5 those --

6 THE COURT: I think it would be a more productive use  
7 of our time to talk about sections other than 3.

8 MR. KNEEDLER: Well, I --

9 THE COURT: I have a full grasp of Section 3 and the  
10 preemption issues with respect to 3. I find the questions  
11 much more difficult that relate to Sections 2, 5, and 6.

12 MR. KNEEDLER: All right. If I could make several  
13 points that I was going to make about Section 3, because I  
14 think they in turn -- they in turn inform the way one thinks  
15 about Section 2, with the Court's indulgence, if I could for  
16 just a minute?

17 THE COURT: It's your hour.

18 MR. KNEEDLER: Okay. I guess the points I wanted to  
19 make are primarily about enforcement discretion. I have  
20 already made my point about the constitutional investment of  
21 state authority here. And the State is not asserting -- in  
22 fact, unlike in *Hines* -- any independent interest in  
23 registration, because it doesn't have a state registration.  
24 And it's comprehensive.

25 But the point I wanted to make about enforcement

1 discretion as illustrated by this provision but I think  
2 infuses it, and that is, particularly this Court -- or the  
3 Supreme Court's decision in the *Buckman* case was a situation  
4 in which there was no independent state interest in enforcing  
5 the relationship, the regulatory relationship between the  
6 United States and the people it regulates under federal law.

7 The Court said that that is not an area of  
8 traditional state regulation, that that is an area reserved to  
9 the states primarily. And if the State is trying to phrase  
10 its laws in a way that regulates that relationship or  
11 regulates the subject matter of that relationship is not a  
12 presumption against preemption.

13 And the other thing the Court made which is  
14 instructive throughout the provisions of this Act that we are  
15 challenging is that not only is it not an area of traditional  
16 state regulation, but the very vesting of discretion in the  
17 executive agency carried with it an understanding that the  
18 states could not interfere with that discretion.

19 In *Buckman*, as in responding to any immigration law  
20 violations that might be triggered by the application of  
21 Section 2 of this Act, for example, the federal government has  
22 a wide variety of possible sanctions that could be taken.

23 It could bring criminal charges under the  
24 registration provisions or under illegal entry, a variety of  
25 things. It could provide for removal. It could grant

1 discretionary relief. So in this statute, even more than in  
2 the *Buckman* case, Congress has vested the federal agency  
3 responsibility for enforcing this with those particular  
4 responsibilities and the State cannot add to those  
5 responsibilities.

6 So what has been offered in justification for the  
7 State's entry into this area as a general matter is that the  
8 State can assist in the enforcement of federal immigration  
9 law. That doesn't mean that the State can make its own  
10 immigration law or have its own enforceable policy. It's a  
11 matter of assistance.

12 And I think that it's worth thinking about what this  
13 assistance really amounts to or where it comes from. And that  
14 is -- what a state is exercising in a situation such as this  
15 is not independent enforcement of its own law. It's assisting  
16 another sovereign -- in this case the United States -- in the  
17 same way the State of Arizona might assist a sister state in  
18 the enforcement of its law, or might assist an Indian tribe or  
19 an Indian tribe might assist the federal government in the  
20 enforcement of its law.

21 Or here the State of Arizona is assisting the United  
22 States in the enforcement of its federal immigration law. I  
23 think it would be universally understood when you have that  
24 sort of assistance that it's the person whose -- the entity  
25 whose substantive law is at issue who is taking the lead. And

1 the other is -- the other states or local officers who are  
2 assisting in that are taking their guidance from the entity  
3 being assisted, the person with the substantive law -- in this  
4 case the INA -- is at issue.

5 When you have the relationship between the United  
6 States and its state, that custom, I might say, in terms of  
7 who will take the lead, the person with the substantive law,  
8 is, of course, dictated by the Supremacy Clause. The United  
9 States, in enforcing federal law, is responsible for enforcing  
10 it, setting priorities --

11 THE COURT: Could you give me a concrete example of  
12 what you're talking about in SB 1070?

13 MR. KNEEDLER: Yes.

14 THE COURT: Rather than just talking about it as  
15 general principles?

16 MR. KNEEDLER: Well, our principal objection to --  
17 well, it's obviously the point about Section 3, but in Section  
18 2, our principal objection to Section 2 is its mandatory  
19 nature. It establishes in Section 2(B) a mandatory  
20 requirement that the -- whenever there's a stop, that the  
21 person's immigration status shall be checked or when there's  
22 an arrest, it shall be checked.

23 That is backed up by paragraph A of Section 2 which  
24 is -- frankly, it goes beyond simply immigration status  
25 checks. It says that -- it requires state and local officers

1 to enforce federal law or prohibits them from adopting a  
2 policy that would not enforce federal law to the fullest  
3 extent, and of course, that's reenforced by the private right  
4 of action later in the statute.

5 THE COURT: Well, let's just take part of B, the part  
6 that says everybody that's arrested shall have their  
7 immigration status checked.

8 How is there a preemption issue? I mean, I  
9 understand there may be other issues related to that, but the  
10 United States is arguing preemption.

11 MR. KNEEDLER: Yes.

12 THE COURT: Where's the preemption if everybody who  
13 is arrested for some crime has their immigration status  
14 checked? So that if it turns out that they're illegal and  
15 they have been deported before, we can let ICE know.

16 MR. KNEEDLER: Well, the problem comes from an  
17 interference with the -- or the intrusion upon the overall  
18 discretionary operation of the enforcement. And as I  
19 mentioned earlier --

20 THE COURT: Well, can't ICE just say, "Okay. I know  
21 that person is here illegally, but you know, never been  
22 deported. We don't want them. When you're done with them,  
23 you can release them. No hold."

24 MR. KNEEDLER: But the problems actually start before  
25 that though. They start with the initial stop. And if I

1 could just bring in Section 4, and indeed, Section 3, because  
2 this is the way it ties into Section 2. Something has been  
3 made here of the fact that there has to be a lawful stop  
4 before the immigration status check is -- requirement is  
5 triggered.

6 And there just has to be a lawful stop, but nothing  
7 says that that lawful stop can't be for a perceived violation  
8 of Section 3, or frankly, Section 4 of the Act, or 2319 which  
9 governs self-smuggling. So if an officer had reason to  
10 believe that there was an alien in a car, he might conclude  
11 that there is a reasonable suspicion of a violation of that  
12 provision, which is essentially --

13 THE COURT: Well, there could first be a stop, but  
14 there could just be an arrest. People get arrested all the  
15 time and they don't have to be stopped, questioned, and then  
16 arrested. They are arrests that happen as the first thing.

17 MR. KNEEDLER: Right.

18 THE COURT: So somebody gets arrested, hauled down to  
19 jail, why shouldn't their immigration status be checked? If  
20 it turns out that person is someone that fits the priorities  
21 of ICE, shouldn't ICE get to know about it?

22 MR. KNEEDLER: Yes. Well, I mean, there are two  
23 basic categories or scenarios of arrests. If someone is  
24 brought to the jail and booked, then it's a routine part of  
25 the booking process at that stage for checks to be done with

1 NCIC and now with the Secure Communities Program there is an  
2 automatic check. And I think the papers say that 90 percent  
3 of the population of Arizona is covered by Secure Communities,  
4 so there's an automatic check.

5 There is a separate concern though if an arrest  
6 occurs in the field. There are several declarations that we  
7 have attached to our papers that are addressing the situation  
8 of the citation and release, where under Section 2(B), as we  
9 read it, there is really no flexibility there. It says that  
10 the status shall be determined.

11 THE COURT: That's how I read it too, but the State  
12 is trying to convince me to read it a different way.

13 MR. KNEEDLER: Well, it doesn't read that way to us  
14 and it doesn't have any provision about reasonable suspicion.  
15 It doesn't have anything about practicability. It doesn't  
16 have anything about duration of the time.

17 THE COURT: I know. And that's why I said that might  
18 implicate arguments that other parties are making, but how  
19 does it implicate preemption?

20 MR. KNEEDLER: Well, what it does -- and this comes  
21 back to the mandatory aspect of it, because if -- what the  
22 State has done is to say we want our officers, when they are  
23 performing something related to immigration, they have to do  
24 this. They may be able to have a little flexibility as a  
25 matter of state law if there is a higher priority or something

1 like that, but the one thing they can't consider is the  
2 priorities established by ICE under federal law because it is  
3 one-directional as a matter of state law. And again, if I  
4 could come back to --

5 THE COURT: But it's just an inquiry of the Law  
6 Enforcement Service Center unless there's someone who has been  
7 designated in their community or in their force to make the  
8 immigration status check.

9 And there's a statute that seems to make it mandatory  
10 that the Law Enforcement Service Center of ICE respond to all  
11 inquiries by state and local police agencies.

12 MR. KNEEDLER: No. There is a statutory  
13 responsibility to respond. The problem comes with respect to  
14 the rigid requirement to ask. And this will lead -- and if  
15 this was extended throughout the nation, if every state  
16 adopted something like this, there would be a huge surge of  
17 requests to the LESC.

18 The LESC has to balance competing considerations when  
19 it gets requests like this coming in. It has to balance its  
20 concern about --

21 THE COURT: But the response to that that the State  
22 has made is that I should be looking at the statute that says  
23 it's mandatory that you respond and not be looking at the  
24 declaration that says you're just going to overwhelm us with  
25 calls and that's going to interfere with our priority.

1           Can't they prioritize their calls? I mean, can they  
2 really say -- can you really say this is preempted because  
3 you're going to make too many phone calls and that's going to  
4 interfere with us being able to give the quality of response  
5 that we want to make to things that are high priority?

6           MR. KNEEDLER: Yes. And our declarations do project  
7 that by the people on behalf of the people --

8           THE COURT: They do. But I'm asking you the legal  
9 question. If Congress mandated that ICE respond to all state  
10 and local law enforcement, can you really say there's a  
11 preemption issue when a state takes action that's going to  
12 greatly increase the number of inquiries --

13          MR. KNEEDLER: Yes, because --

14          THE COURT: -- because it's going to be burdensome on  
15 the executive agency?

16          MR. KNEEDLER: Yes. And we think so. And the  
17 problem is not just -- I mean, and it is a substantial burden  
18 and would be an even more substantial burden if every state  
19 adopted a similar policy.

20          THE COURT: I don't doubt factually that's true. But  
21 I'm asking you legally, can you just say, "Well, you know,  
22 it's going to be too much."

23          MR. KNEEDLER: Well, and our objection --

24          THE COURT: Can't you just say, "I'll get back to you  
25 tomorrow on these, they're low priority"?

1           MR. KNEEDLER: Well, no, because if the LESC is  
2 confronted with a dilemma, it may have cases that are of a  
3 higher priority in terms of ICE's own enforcement  
4 responsibilities and its setting of its responsibilities, and  
5 then it may get an inquiry about a roadside stop.

6           In order to respond promptly to that, they might have  
7 to put that ahead in the queue. It's not -- the way these  
8 things are coded, it's not always apparent what is something  
9 of time urgency, such as that, so that the LESC will be  
10 confronted with having to balance that.

11           And if we get, for example, a great influx of like  
12 the roadside stops or -- I mean, Section 2 covers any offense,  
13 any civil offense, criminal offense, even violations of  
14 Section 4 or Section 3 of this Act.

15           If there is a huge influx of those more minor  
16 offenses that don't mesh with ICE's priorities, then there  
17 will be a real dilemma for ICE.

18           But again, the problem -- our problem comes not from  
19 the fact that state officers will check with ICE. This is  
20 something that is encouraged. The problem comes from the  
21 State mandating the manner in which state officers will assist  
22 in the administration of federal law. And the State's  
23 authority to arrest matches the State's inherent -- matches  
24 together the State's inherent authority to assist other  
25 sovereigns and the federal government's responsibility to

1 enforce the laws it's responsible for enforcing.

2 So in that respect its responsibility is derivative  
3 of that of the United States. There is this backlog of --

4 THE COURT: You're really losing me as it relates to  
5 the specifics of Section 2, and specifically subsection (B) of  
6 1051, because in that section the enforcement is the  
7 enforcement of a violation of some state statute or ordinance  
8 that resulted in a stop, a detention, or perhaps an arrest,  
9 not a federal offense for which there might be different  
10 priorities.

11 MR. KNEEDLER: But the check with immigration is a  
12 check about a federal violation. The stop, to be sure, is for  
13 a violation of state law, but the check would --

14 THE COURT: And you're encouraging police to call  
15 about immigration status.

16 MR. KNEEDLER: Right. And so our position is that  
17 the State has to be in a posture of cooperation so that its --  
18 that its officers are in a position to check with ICE when  
19 ordinary law enforcement opportunities would suggest. Every  
20 day on the ground there's cooperation and communication  
21 between ICE and state and local law enforcement officers.  
22 They know it's a --

23 THE COURT: So it's a federal preemption issue for  
24 the State of Arizona to try to affect the amount of discretion  
25 that police officers have because clearly, this does affect

1 discretion.

2 MR. KNEEDLER: And that is our principal objection to  
3 it. We are not trying to say that there should not be  
4 cooperative communications between ICE and state and local law  
5 enforcement. I want to come back to the word "cooperation"  
6 because it's embodied in the statute.

7 In 1996 when Congress enacted the --

8 THE COURT: Are we talking about the INA or are we  
9 talking about 11-1051?

10 MR. KNEEDLER: No. We're talking about the INA.

11 THE COURT: Okay.

12 MR. KNEEDLER: Congress enacted a provision for  
13 cooperative agreements between the Secretary -- now the  
14 Secretary of DHS and the state and local governments. And  
15 those cooperative agreements require that state and local  
16 officers, according to 287(g) agreements, operate under the  
17 direct supervision of ICE officers, and now under the current  
18 agreements they must follow ICE priorities in terms of  
19 carrying out those functions.

20 There is a residual clause that says nothing in the  
21 authorization for these intergovernmental agreements shall be  
22 deemed to require such an agreement in order for its state to  
23 cooperate with or to communicate with the federal government.

24 "Cooperation" means it's a two-way street, that the  
25 federal government, in the enforcement of the immigration

1 laws, the federal government has the lead and that the people  
2 who are assisting it should be responsive and be able to,  
3 uninhibited by a state mandate, to have this sort of  
4 discretion themselves to interact with the federal government  
5 in the way the federal government does.

6 What the State has done is put between the federal  
7 government and the states this mandate that is different from  
8 the one that the federal government might -- or different from  
9 the priorities that the federal government might have at any  
10 particular point in time.

11 So the question is not just the burden on ICE at the  
12 LESC -- although we think that that's important -- it's that  
13 the State has adopted its own immigration enforcement policy  
14 and they have used the -- taken advantage of or used the  
15 opportunity of the stops to impose a mandate to check on  
16 immigration status for minor stops, minor situations that  
17 would not otherwise call to mind in the law enforcement  
18 officer's mind that this is a situation that might call for an  
19 immigration response as opposed to a -- as opposed to just  
20 state law enforcement.

21 In fact, when someone is stopped and the police  
22 officer can put into the system, the NCIC, and find out  
23 whether somebody has a criminal history, at that point in time  
24 that's a person who might leap out as being somebody for whom  
25 ICE might be particularly interested.

1           But this law requires that by virtue of the  
2           occurrence of a state stop, that the State will use that  
3           occasion as a -- to leap into a mandatory immigration  
4           enforcement policy. And that is not --

5           THE COURT: Well, how does it become an immigration  
6           enforcement policy? It's an immigration status check. And  
7           then can't ICE use their discretion to do whatever they want  
8           to do, which could be nothing?

9           MR. KNEEDLER: Well, two responses to that. It seems  
10          to me that this enforcement provision had two possible  
11          outcomes in mind. One was, I think, the enforcement of  
12          Section 3, which we think is fundamentally flawed anyway.  
13          That would have been a way for there to be -- to do an  
14          immigration status check and do a state prosecution and we  
15          think the State simply has no authority to have a state  
16          prosecution.

17          THE COURT: I know, but let's stick with 2.

18          MR. KNEEDLER: Right. So the other alternative would  
19          be to either go forward with the state prosecution or removal  
20          proceedings.

21          THE COURT: Well, Arizona can't remove anybody and  
22          they don't purport to claim they can.

23          MR. KNEEDLER: No. And I understand that. But in  
24          deciding who should be -- who should be removed or who should  
25          be put into the removal system, one would expect if the State

1 is simply assisting the federal government, it would be  
2 responsive to state enforcement concerns.

3 And I should also say that the mandatory nature of  
4 this program raises broader concerns in terms of who may be  
5 stopped.

6 The combination of all these provisions together, and  
7 I think particularly Section 2, has caused, as we say in our  
8 papers, significant concern about the -- in the government's  
9 foreign relations, in terms of a state having a policy that  
10 deviates from the federal government's policy.

11 And it appears to raise concerns that were identified  
12 in *Hines* of the potential for inquisitorial stoppings of  
13 people that are not -- that don't stem from a federal  
14 government decision to decide who will be questioned and who  
15 won't be questioned in a particular case. They stem from,  
16 instead, a state point of view as to what policy shall be  
17 taken in the State of Arizona.

18 And that -- it may in some respects seem like not a  
19 big deal, but in fact, it is a big deal. Because if one state  
20 is adopting an enforcement policy that is grinding an  
21 attrition through enforcement, when that is not the policy of  
22 our states and it's implemented through this mandatory stop  
23 provision, it creates very much the same concern that was  
24 present in the *Hines* case in terms of mandatory checking and  
25 that sort of thing.

1           Of course, as we also point out in our papers, there  
2 is the language in Section 3 that Your Honor mentioned in  
3 terms of arrests, but there are also people who can be stopped  
4 who may not have the right papers and that's not just a, you  
5 know, a due process or equal protection claim. That's sort of  
6 a concern about the way people lawfully present in the country  
7 or even U.S. citizens might be treated.

8           It's also a federal concern for preemption purposes  
9 in the administration of the INA, because the federal  
10 government is responsible for enforcing the INA, but taking  
11 into account these competing considerations. And there could  
12 be people who could be stopped who don't have documentation or  
13 they are awaiting discretionary relief or they are intending  
14 to apply for discretionary relief or if they were removed --  
15 or if they were put in proceedings, they might get relief.

16           And this Section 2 is not tailored to take account of  
17 any of those considerations. It is basically checking on a  
18 person's status at all costs, without taking into  
19 consideration what those costs are, not just in Arizona, but  
20 for the nation as a whole in terms of how this sort of  
21 stopping of people and checks of people and delays that will  
22 accompany that if people are -- if there are not immediate  
23 responses from the LESC -- the way in which people would be  
24 treated.

25           If I could move on to the employment issue --

1 THE COURT: Please.

2 MR. KNEEDLER: -- for the moment.

3 Under the employment provision it's our position that  
4 Congress, when it enacted IRCA in 1986, made a deliberate  
5 choice to comprehensively regulate the employment of persons  
6 not authorized to work in the United States by imposing  
7 sanctions on employers.

8 There is an express preemption provision in there  
9 that has a narrow exception for enforcement through  
10 sanctioning, but it's well -- but Congress decided not to  
11 impose sanctions on --

12 THE COURT: But they also decided not to say anything  
13 in their express preemption provision to tell us clearly that  
14 they were, in fact, preempting employee sanctions.

15 MR. KNEEDLER: Well, it's well accepted in the  
16 Supreme Court's decision in *Plyler* and *Buckman* that the  
17 existence of an express preemption provision does not oust  
18 implied.

19 THE COURT: No, but it would have been nice if they  
20 had been more clear.

21 MR. KNEEDLER: Well, but they made a deliberate  
22 choice not to impose sanctions on employees at all themselves.

23 THE COURT: But that doesn't necessarily mean that it  
24 precludes or preempts states, because we also have the *DeCanas*  
25 case and the recent Ninth Circuit opinion in the -- I want to

1 call it the "Employer Sanctions" case, but I'm trying to call  
2 it the right name -- the Legal Arizona Workers Act case that  
3 talks about how there are presumptions against preemption in  
4 cases that involve the traditional interests of the state and  
5 specifically refer to the regulation of employment as a  
6 traditional interest of state regulation and state concern.

7 And how do I balance that presumption against  
8 preemption against the more general proposition that if  
9 Congress acted in one area, I should infer that that was a  
10 deliberate decision not to act in another area?

11 MR. KNEEDLER: I don't think you have to infer. The  
12 legislative history that was discussed in the Ninth Circuit's  
13 decision in the -- I'm drawing a blank on the name of the case  
14 at the moment -- that considered whether you could have --  
15 conditions for release could be -- I'll get you the name.

16 THE COURT: I know what case you're talking about.

17 MR. KNEEDLER: I'm just drawing a blank. I'm sorry.  
18 -- canvassed that legislative history and said there  
19 was quite a deliberate choice on the part of Congress not to  
20 impose criminal sanctions on an individual employee.

21 And this, I think, is a piece of one of the other  
22 points we've made about --

23 THE COURT: Well, when you say that's the legislative  
24 history, it's not like official legislative history where  
25 there's an agreement that that's what the intention was.

1           Isn't it quoting different elected representatives as  
2 to what their view of it was?

3           MR. KNEEDLER: It is, but I believe one of them was  
4 Chairman Rodino, if I'm not mistaken, who was the Chairman of  
5 the Committee.

6           THE COURT: And that may very well have been his  
7 intention. I guess I don't give a lot of credence to  
8 legislative history that is the statement of one person,  
9 regardless of what their position is.

10          MR. KNEEDLER: My only point was that I don't think  
11 you need to infer; that is, how much weight you want to attach  
12 as to that but I think there are other significant clues in  
13 the Act.

14          For the one thing, the exception that allows states  
15 to regulate for employers does not allow criminal sanctions.  
16 It allows enforcement through licensing, licensing sanctions.

17          Given the Act's solicitude for broader humanitarian  
18 values of not -- this is what they were saying in 1986 -- of  
19 not imposing harsh sanctions on individuals, Congress has  
20 never criminalized mere presence in the United States, for  
21 example, which is one of our concerns that runs through a  
22 number of these provisions that Arizona is trying to go after  
23 the mere presence with a criminal enforcement regime.

24          But consistent with that, it would be understandable  
25 that Congress would not impose criminal sanctions on the

1 individual when it didn't even provide -- allow a state to  
2 impose criminal sanctions on the -- on the employer which, of  
3 course, is in much more, I think, in a position to know the  
4 law, to understand the consequences.

5 So Congress focused its response to this problem on  
6 the magnet, on the employers who are offering the positions.  
7 Congress -- there are criminal sanctions in the federal act  
8 that would be focused on the employee -- or the individual who  
9 submitted fraudulent documents to get employment, for example.

10 It focused on the violation of law that is separate  
11 from the --

12 THE COURT: A civil penalty, I believe, of a fine.

13 MR. KNEEDLER: But still, it's sanctions that are  
14 imposed on the individual that are -- that the state does not  
15 impose on employers. And there are other -- at the same time  
16 Congress enacted IRCA in 1986 it allowed adjustment of status  
17 of people who might have been working in the United States.

18 The basic theme of IRCA was not to go after the  
19 individuals, but to go after the employer.

20 I wanted to make one point about the transportation  
21 and smuggling provision. That smuggling provision applies to  
22 people smuggling in furtherance of a violation of the Act,  
23 coming into the United States or remaining in the United  
24 States in violation of law, or harboring and concealing in  
25 furtherance of that, or inducing someone to come into the

1 state in violation of the law. We think that --

2 THE COURT: Those three really do mirror the similar  
3 federal crimes.

4 MR. KNEEDLER: They do mirror, but the important  
5 point is that all of them have to do with crossing borders.  
6 And states do not have inherent authority to impose criminal  
7 sanctions --

8 THE COURT: Well, they don't have to do with crossing  
9 international borders.

10 MR. KNEEDLER: In furtherance of someone who has  
11 entered or remained in the United States -- come into or  
12 remained in the United States in violation of federal law,  
13 they have -- that is the international aspect of immigration  
14 that the --

15 THE COURT: Well, see, I don't understand your  
16 argument in that regard. There are -- pick a number --  
17 hundreds of thousands of individuals already here in Arizona  
18 who are here illegally. They either entered illegally or they  
19 entered legally and they didn't leave when they were supposed  
20 to and now they're here illegally.

21 Those people can, under the federal law, be harbored  
22 or transported to protect them or to further their illegal  
23 presence.

24 MR. KNEEDLER: Right, but it's up --

25 THE COURT: But it doesn't have anything to do with

1 when they came in or where they crossed. They could have been  
2 here forever.

3 MR. KNEEDLER: But it is an aspect of the regulation  
4 of immigration that criminal sanctions are attached under the  
5 federal statute precisely because someone has come into the  
6 country in violation of the law or they are remaining in the  
7 United States and their status is being -- their status in  
8 violation of federal law is being concealed in some way, or  
9 the third provision of the Arizona statute actually deals with  
10 coming into Arizona and not coming into the United States,  
11 which means it's a regulation of crossing state borders which  
12 under the Supreme Court's decision in *Edwards*, the states  
13 don't have the authority to do.

14 The regulation of smuggling, bringing somebody into  
15 the United States in violation of the laws governing  
16 immigration status and the right to come into the United  
17 States, is an aspect of the exclusive authority of the United  
18 States on immigration matters. And Congress --

19 THE COURT: But it's your premise that it has  
20 something to do with them coming into the United States. And  
21 this has to do with people that are already in the United  
22 States.

23 MR. KNEEDLER: Right. But it also says if they are  
24 remaining in the United States in violation of federal law and  
25 the United States -- the federal government has exclusive

1 authority to remove them.

2 THE COURT: Exactly. This doesn't remove them.  
3 What it does is it punishes the person that harbors or  
4 transports.

5 MR. KNEEDLER: Yes. But the harboring and  
6 transporting is of someone whose status is a matter of federal  
7 control. And so the regulation of smuggling or the handling  
8 of somebody whose presence, for example, is going to be a  
9 trigger for a crime is a matter of federal responsibility, not  
10 state.

11 And ultimately, the question is the person either  
12 came into the United States unlawfully or came in lawfully and  
13 stayed beyond the status. And if he should or shouldn't be  
14 here, that's a matter for the federal government to handle.  
15 And if there is harboring or transportation in order to evade  
16 that presence, that is primarily a federal responsibility.

17 THE COURT: But isn't it also a public safety and  
18 welfare situation?

19 I mean, here in Arizona we have on a daily basis  
20 dangerous situations involving transportation, involving  
21 harboring. I mean, you barely can go a day without reading  
22 about a location being found in some neighborhood in Phoenix  
23 where there are numerous people being harbored or shielded  
24 from detection in order to facilitate them moving someplace  
25 else, whether it's someplace else in Arizona or whether they

1 are hoping to go to Florida or California. Because they're  
2 crossing into Arizona, they may have been here for a day, they  
3 may have been here for a month, but they're here in our  
4 community in a dangerous situation because of the people that  
5 are harboring them, not because of the individuals who are  
6 illegally being harbored, but the harborers.

7 MR. KNEEDLER: In many of those situations there  
8 would be independent state laws that would apply to that sort  
9 of conduct. I mean, the Department of Justice, for example --

10 THE COURT: Like what? I mean, they may not be  
11 kidnapped --

12 MR. KNEEDLER: They can be often held --

13 THE COURT: Well, often they're not being held at all  
14 against their will. Many times they are and that makes it  
15 even worse, but often those people are there on their own  
16 volition and just simply waiting for the next transportation  
17 to wherever it is that they are destined or hope to be.

18 MR. KNEEDLER: And it's our submission that that is a  
19 federal responsibility and of course, there is a federal  
20 statute that governs the prosecutions. And in our submission,  
21 that is the right way to proceed.

22 THE COURT: But how does it interfere with  
23 immigration if there is a state statute that punishes the same  
24 conduct?

25 MR. KNEEDLER: Because the subject matter of the

1 conduct is itself immigration. The operative -- the elements  
2 of the offense are either it's in furtherance of coming in or  
3 remaining in the United States in violation of the Federal  
4 Immigration Code.

5 It's the same point really that I was making about  
6 Section 3 of the Act.

7 THE COURT: But the person who may be charged and  
8 convicted is very well possibly a U.S. citizen.

9 MR. KNEEDLER: That's true. But for example, if you  
10 had a conspiracy to violate a federal statute, that would be  
11 additional people to -- involved in the overall scheme. That  
12 would be a federal enforcement responsibility.

13 Of course, it could be a U.S. citizen, but the  
14 underlying offense, the transportation or the harboring has to  
15 do -- the element of the offense is an immigration status or  
16 past immigration conduct. And that's what makes it --

17 THE COURT: Of one of the victims.

18 MR. KNEEDLER: Yes. But how that -- how that should  
19 be handled is a matter of federal law.

20 THE COURT: But we're not handling the victim. We're  
21 handling the smuggler or the shielder or the transporter who  
22 is not by any means necessarily also someone who ICE  
23 regulates, because as I said before, they may very well be  
24 U.S. citizens.

25 MR. KNEEDLER: Well, they're not regulated in terms

1 of removal, but the person doing the transporting is certainly  
2 regulated by the federal criminal statute.

3 THE COURT: Well, there's lots of things that are  
4 regulated by federal criminal statutes that are also regulated  
5 by state criminal statutes. Just use drug crimes as an  
6 obvious example --

7 MR. KNEEDLER: That's certainly true, but the state  
8 has inherent authority over the subject of drugs. It does not  
9 have inherent authority over the subject of whether someone is  
10 coming to the United States and remains here in violation of  
11 federal law. It is that status that we think --

12 THE COURT: I was supposed to tell you seven minutes  
13 ago that you had ten minutes left, so -- or that you had 15  
14 minutes left, so...

15 MR. KNEEDLER: I will reserve the balance of my time.

16 THE COURT: Okay. Thank you.

17 MR. BOUMA: I guess we have some explanation as to  
18 why we have the many coyotes and aliens unlawfully here. The  
19 government just doesn't think a bunch of them ought to be  
20 prosecuted and they don't think the State should.

21 You know, Your Honor, I don't think there is any  
22 inconsistency between 1070 and the federal policies and  
23 priorities that are a problem. You know, the plaintiffs have  
24 been -- the plaintiff has been talking about taking all of the  
25 provisions together, trying to somehow suggest that we've got

1 some kind of regulation of immigration going on here.

2 We know, as you pointed out last week, the definition  
3 of "immigration" is quite narrow. And certainly, what Arizona  
4 has been doing doesn't fit within it.

5 There's been a few words said about foreign policy,  
6 more said in the brief, but you know, it's --

7 THE COURT: I understand that the issues of foreign  
8 policy inform the question of preemption.

9 MR. BOUMA: Well, you know, the argument that foreign  
10 policy brings preemption into play here is truly a remarkable  
11 position. There aren't any authorities in point on that.

12 The plaintiff hasn't cited any, but there are two  
13 authorities on point to the contrary that basically say that  
14 what we're doing is perfectly all right; and those are *DeCanas*  
15 and *Plyler*. So, you know, many foreign states -- state laws  
16 in many different areas have actual impact on foreign  
17 relations.

18 And we've gotten briefs about outrage. Well, outrage  
19 doesn't make the law, the law that's at issue or preempt it.  
20 1070 doesn't have anything to do with foreign nations at all.  
21 It doesn't single out any group from any specific nation. It  
22 doesn't have a direct effect on any foreign country and  
23 doesn't comment on any foreign country's or nation's internal  
24 policies or laws.

25 THE COURT: It seems to have gotten some people from

1 foreign countries upset with us though.

2 MR. BOUMA: I'm sorry?

3 THE COURT: It seems to have gotten some people from  
4 foreign countries upset with us. They won't come to  
5 conferences, that kind of thing.

6 MR. BOUMA: Well, that's not really foreign policy.  
7 They've probably been upset with us about everything we do  
8 anyway. Venezuela. Look at the countries, some of them that  
9 have joined in and are complaining. And then you also have in  
10 our brief the role of the President, the Secretary of Homeland  
11 Security or Attorney General and the Secretary of State and  
12 what role they have played in generating the hysteria about it  
13 rather than explaining to these people what our federal system  
14 is all about and that the states do have some kind of right to  
15 protect themselves within the framework, within the federal  
16 framework.

17 They didn't do that. The affidavit of Ambassador  
18 Otto Reich that we submitted is really worth reviewing. He  
19 can tell you a lot about that that might be of interest.

20 But the fact is that *DeCanas* and *Plyler* say that  
21 we're okay if we mirror federal objectives and if it furthers  
22 legitimate state goals. Those are the two cases on point.  
23 The federal government has not submitted any cases on point.

24 And so I would gather that you don't need to hear  
25 from me about some of those, so I will just -- some of the

1 individual items since you have heard already.

2 THE COURT: If you don't have anything new to say  
3 about it, I remember clearly what you said about it this  
4 morning and last Thursday, so...

5 MR. BOUMA: I anticipated you would.

6 At lunch I learned a couple of things. I went to the  
7 one affidavit -- the declaration, paragraph 15 to 23. And we  
8 were talking about -- I was saying I didn't know for sure  
9 about -- I knew aliens, even people with special  
10 circumstances, I thought they had numbers but I wouldn't tell  
11 you that for sure because I wasn't positive for sure.

12 Well, I checked with the affidavit that's in the file  
13 here, the State Department Foreign Service Officer that  
14 handles immigration adjudications, and he tells us that in  
15 special situations involving asylum or other related statuses,  
16 the people applying will get some documentation, that the  
17 government does generally know where they are at. That's how  
18 they communicate with them.

19 So the idea that somebody is in here just floating  
20 around the country that the government is really thinking  
21 about protecting that they have located to be here but they  
22 don't know where they are and they don't have a record of them  
23 and they don't have a number is belied by the affidavit.

24 The other thing I might say in that respect is the  
25 officer noted that when one individual who claims their status

1 when they have that situation, they either take their word for  
2 it, and that's not uncommon, or they call ICE to confirm, or  
3 they contact somebody helping the alien who's helping to  
4 obtain his -- or establish his special status. They have  
5 options and they use them.

6 So I didn't know if that would give you any comfort  
7 about Section 3. And with respect to Section 3, I would also  
8 note that *Hines* talks about the fact that they were  
9 determining who should be at -- I re-read the *Hines* law at  
10 lunch too.

11 And the Arizona court only is trying to reinforce the  
12 terms Congress determined were appropriate for aliens seeking  
13 to reside in our country. Section 3 applies only to persons  
14 who are unlawfully present. *Hines* refers to people who are  
15 lawfully present. And they have a lot of broad language in  
16 *Hines*, but in this particular -- I don't know that it applies  
17 to totally preempt the field.

18 As long as your Act is identical, you're dealing with  
19 in this instance in Arizona people who are in violation of  
20 federal law, people who have willfully failed to register.

21 So with respect to 2, counsel talked about the  
22 problem being the mandatory nature, that that was the problem  
23 that they -- if I can get the phrase. The principal objection  
24 to 2 is its mandatory nature.

25 Well, the mandatory nature is just what Congress was

1 hoping for. We haven't in the Congressional history and the  
2 language of both 1644 -- U.S.C. 1644 where it says Congress'  
3 stated purpose for enacting Section 1644 was "to give state  
4 and local officials the authority to communicate with ICE  
5 regarding the presence, whereabouts, or activities of illegal  
6 aliens" based on Congress' belief that "immigration, law  
7 enforcement is as high a priority as other aspects of federal  
8 law enforcement and that illegal aliens do not have the right  
9 to remain in the United States undetected and unapprehended."

10 And then you can go to 1373 where it says -- where  
11 Congress based its finding that the acquisition, maintenance,  
12 and exchange of immigrated -- immigration-related information  
13 by state and local agencies is consistent with and potentially  
14 of considerable assistance to the federal regulation of  
15 immigration and the achieving of the purposes and objectives  
16 of the INA.

17 Now, I guess you could put that in a shorter phrase  
18 by saying "You can't catch 'em if you don't know about them."

19 They don't want to know about them. That's what  
20 they're telling you. They don't want to know about them.  
21 They want you to leave the sanctuary cities in a situation  
22 where they can't tell their people to call, not because it's  
23 going to overflow them. Because there's a lot of people  
24 calling now, doing exactly what Section 2 tells them to do.

25 It's the people who are in the sanctuary cities and

1 jurisdictions who aren't. To say that's going to overflow  
2 them takes quite a stretch, particularly if we interpret  
3 Section 2 in a common sense manner.

4 He talked about mandatory stops. There's nothing in  
5 this statute about mandatory stops.

6 He talked about checking people's status at all  
7 costs. There's nothing in there like that.

8 To talk about that here, that's the problem with  
9 these facial challenges, standing around making up situations  
10 that might somehow happen.

11 Then he talks about, well, if each state has this  
12 policy, that's going to be terrible. Well, it seems to me if  
13 you read just what those two statutes say, that's what  
14 Congress wants; each state to have some policy. Maybe we'll  
15 catch some of these folks then. So that's all I have to say  
16 about 2.

17 I have covered 3. You've obviously got -- I don't  
18 think I have to say a whole lot else. I would like to just --  
19 unless there's some questions you have, Your Honor.

20 THE COURT: Do you have any new answers on 6?

21 That's the public offense for which someone is  
22 removeable.

23 MR. BOUMA: I think the answer -- I was wrong and you  
24 picked up on it when I talked about the fellow in San Salvador  
25 or El Salvador, but I think I was right when I talked about

1 the individual in Nevada. That's a public offense.

2 And if you call ICE and ICE says he's wanted in --  
3 you've got to pick him up first. You've got to have the usual  
4 reason to stop him or have a lawful stop, detention, or arrest  
5 and then you contact ICE.

6 And we keep saying "call ICE." But again, I would  
7 like to point out that a lot of this stuff is handled by the  
8 local officers. You can go right down to the Sheriff's  
9 Office. There's a whole bunch of them in Arizona. They  
10 handle it and they don't have to impose upon ICE.

11 But if you called ICE and they said, "Hold him. He's  
12 wanted for murder in Nevada." And you would you say -- I  
13 think you mentioned today probable cause. The fact is there  
14 is substantial law that you can pool -- law enforcement  
15 agencies can pool probable cause. So if they have probable  
16 cause for him in Nevada and ICE and you, between the three of  
17 them you have probable cause. You can hold them and that's  
18 what this statute is all about.

19 THE COURT: Or at least that's what the legislature  
20 hoped it was about.

21 It's the part about them being removeable that's  
22 difficult.

23 MR. BOUMA: They don't make that determination.

24 THE COURT: Neither does the Law Enforcement Service  
25 Center make that determination. That determination is made by

1 an immigration judge when somebody is in removal proceedings.

2 MR. BOUMA: Well --

3 THE COURT: And it's a complicated, much litigated --  
4 somebody suggested there was a list of crimes. And boy if  
5 there were, it would be a lot easier. But there isn't a list  
6 of crimes. There's a list of things that say "aggravated  
7 felony" and then we litigate which felonies are and which  
8 aren't.

9 There's things like crimes of moral turpitude. And I  
10 don't have to tell any lawyer that that's a hard one to know  
11 whether it is or it isn't.

12 Nobody from ICE, nobody from Arizona law enforcement  
13 can say, except in very limited circumstances like, say,  
14 murder, "Oh, that's a crime for which that person is  
15 removeable," because it's a complicated, complex,  
16 highly-litigated determination.

17 MR. BOUMA: Well, I would think under those  
18 circumstances with all these federal agents with all their  
19 special training that you have been hearing about that they  
20 ought to know then that they couldn't tell us to hold that  
21 person.

22 If they don't know -- if they don't know that he's  
23 removeable, then they wouldn't be telling us to hold that  
24 person. They're the ones telling us in that instance.

25 THE COURT: And 6 doesn't talk about calling up

1 anybody. It's just an amendment to a specific criminal  
2 statute that had previously had several provisions and adds  
3 one more provision for the circumstances of warrantless  
4 arrests. That's all it does. And, of course, AzPOST says it  
5 doesn't add anything at all.

6 So I guess we're back to where we were this morning  
7 on Section 6.

8 MR. BOUMA: I believe we are, Your Honor, you know --

9 THE COURT: But you got Section 4 back. That was on  
10 the table before we started and it's not anymore.

11 MR. BOUMA: You know, I take it you've -- would you  
12 prefer I just close?

13 THE COURT: As I said, unless you have something new  
14 that you want to say on Section 2 or 5, I think we've  
15 exhausted all the sections between your time this morning and  
16 now.

17 MR. BOUMA: That's my feeling too.

18 I would just again, Your Honor, come back to the fact  
19 that here we have a situation where we're talking about a  
20 preliminary injunction and we're basing it on a facial  
21 challenge. And we've got a lot of "what ifs." We've talked  
22 about the likelihood of success.

23 And I think, hopefully, we have dealt appropriately  
24 with the plaintiff claiming harm in terms of overloading ICE.  
25 But it's now up to the Court to determine, consider the public

1 interests and the balance of equities. We have talked about  
2 Arizona's interest in enhancing and protecting its citizens.

3 You know, what we really get is the plaintiff over  
4 here telling us that we can't really do anything about the  
5 illegal alien problem, that that's not Arizona's problem.  
6 Just live with it. You've got to live with the status quo.  
7 That's our national policy.

8 You know, the status quo is simply unacceptable. You  
9 know, there was a quote about a law unenforced is no law at  
10 all. And that's what's happening here. There are a lot of  
11 laws that aren't enforced. And now we're pretty unhappy if  
12 someone wants to start enforcing some of them.

13 Even the President says the system's broken. We've  
14 had repeated pleas of governors from both parties that have  
15 basically gone unheeded.

16 You know, we could take any number of examples from  
17 our papers about the status quo, but as I mentioned before,  
18 the police officer -- the Phoenix police officer who was shot  
19 by an illegal alien who had been stopped three times who was  
20 wanted for attempted murder in El Salvador but they couldn't  
21 check him out because of the particular jurisdiction's  
22 sanctuary policy.

23 We have papers, a statement from a Mesa Police  
24 Detective who says that a hundred percent of the black  
25 heroin -- black tar heroin drug runners, which is the big

1 thing that's out in the neighborhoods is black tar heroin,  
2 drug runners arrested by his team in Mesa over the last three  
3 years were illegal aliens. They bring those people up.  
4 That's something -- the smuggling, some of the other things  
5 you've been talking about -- they bring them here and their  
6 job is to run drugs, deliver drugs for X number of times and  
7 then maybe they get by with that.

8 Your Honor, our citizens are in danger of using  
9 public lands. I have a picture that's in our --

10 THE COURT: I was wondering when that sign was going  
11 to come out because it's awful.

12 MR. BOUMA: Do you want to see that? I could have  
13 put it on the -- but I didn't, but I can tell you about it.  
14 It's a picture that's taken 30 miles --

15 THE COURT: I have seen it on TV. I think the  
16 Governor was standing under it.

17 MR. BOUMA: No, this is a different one.

18 THE COURT: A different one?

19 MR. BOUMA: I think. It's the same one? That's it.

20 Okay. This is a sign erected by the U.S. Bureau of  
21 Land Management 30 miles south of Phoenix and it says in big  
22 red letters:

23 "Danger. Public warning. Travel not recommended."

24 Then in smaller black letters some bullet points:

25 "Active drug and human smuggling area. Visitors may

1 encounter armed criminals and smuggling vehicles traveling at  
2 high rates of speed. Stay away from trash, clothing,  
3 backpacks, and abandoned vehicles. If you see suspicious  
4 activity, do not confront."

5 And this is really good.

6 "Move away and call 911."

7 Don't call us. Call your local authorities and hope  
8 some deputy sheriff comes out and can give you a hand.

9 So if that's the status quo, that is the status quo  
10 and they don't want us to do anything about it. That's wrong.

11 There's no possible way that an injunction can be in  
12 the public interests.

13 Thank you for your attention.

14 THE COURT: Thank you, Mr. Bouma. Mr. Kneedler?

15 MR. KNEEDLER: Several points I would like to make.  
16 One going back to Section 2 and then I would like to talk  
17 about irreparable injury and the balance of equities, because  
18 we think it's critical that the Court enter a preliminary  
19 injunction and maintain the status quo while the Court has  
20 adequate time to consider all of this.

21 Maybe it would be useful to illustrate the point I  
22 was making about the mandatory nature and take it out of the  
23 immigration context and put it into another context.

24 Let's take an example, the Federal Tax Code. Suppose  
25 the State adopted a policy of maximum enforcement of the

1 Federal Tax Code and it had a system of audits and  
2 investigations for its own purposes. And whenever it found  
3 reasonable suspicion that there was a violation of the Federal  
4 Tax Code, it would inquire, investigate that as much as  
5 possible as a mandatory duty. And if they didn't do it, they  
6 would be subject to a private cause of action for damages.

7 Or take another example. Take simple possession of  
8 drugs. Suppose you had a municipality or a state that did not  
9 criminalize drugs or couldn't, for example, which is the  
10 situation here in terms of criminalizing immigration  
11 violations, but adopted a policy of maximum enforcement of the  
12 federal drug laws.

13 So that whenever a local police officer had  
14 reasonable suspicion to believe that there was a violation of  
15 federal law, federal drug laws on simple possession, it would  
16 stop a car. It would inquire into what happened.

17 The collateral consequences of that for people who  
18 would be caught up in a mandatory state-initiated regime of  
19 enforcement of a federal statute are not just the State's  
20 concern. They are the consequences that would come from the  
21 mandatory state initiation of enforcement proceedings through  
22 investigations, through stops of people in the drug example  
23 that I used.

24 And there would be collateral consequences flowing  
25 from a federal statute that the federal government is

1 responsible for enforcing by virtue of the State's activity.

2 Those collateral consequences in this case are all  
3 the more concern because this statute can catch up people who  
4 are lawfully in the United States. It can catch up people who  
5 are unlawfully here but may have applications for  
6 discretionary relief pending. It may catch up U.S. citizens  
7 where there may be reasonable suspicion that somebody who is a  
8 U.S. citizen who might be unlawfully here.

9 So you have a state system that can have these  
10 collateral consequences. Those collateral consequences for  
11 the United States government and for the nation as a whole are  
12 precisely what is triggering the foreign relations  
13 consequences in this case because --

14 THE COURT: Well, let me ask the question I asked of  
15 Mr. Bouma.

16 How do I consider the foreign relations issue? I  
17 thought that was a factor for preemption and that's all.

18 MR. KNEEDLER: No. I think there are three ways in  
19 which it is relevant. It is relevant because the foreign  
20 relations aspect here illustrates why enforcement of the  
21 immigration laws is a national responsibility, so --

22 THE COURT: Well, nobody doubts that enforcement of  
23 the immigration laws is a national responsibility.

24 MR. KNEEDLER: But --

25 THE COURT: It begs the question here, because

1 "immigration" is defined pretty narrowly in terms of what the  
2 exclusive province of the federal government is.

3 MR. KNEEDLER: Right. But the exclusive province --  
4 what we do know is the exclusive province is criminal  
5 prosecution for violation of the immigration laws or removal.  
6 And these stops that the state is undertaking here are all in  
7 aid of the federal government's exclusive responsibility. The  
8 state has no free-standing right to enforce the federal  
9 immigration law, any more than it does the free-standing right  
10 to enforce in the sense of bringing prosecutions or  
11 appropriate proceedings to enforce the federal tax laws or the  
12 drug laws and the federal drug laws in the example that I  
13 applied.

14 So we are talking about an area of exclusive federal  
15 responsibility that the state is merely assisting in, or to  
16 use the words of 287(g)(10), "cooperating in." And in our  
17 view, because this is exclusive, there has to be a way for  
18 cooperation for it not to be mandatory. Because you have the  
19 private right of action here, which is really unprecedented  
20 that puts pressure on the way in which the federal act is  
21 enforced here, the way the state stops, the state arrests.

22 If they're not going to pursue a Section 3  
23 prosecution or some other prohibited state criminal  
24 prosecution, they're going -- it's all directed at removal or  
25 other remedies under the --

1 THE COURT: How is it directed at removal? I just --

2 MR. KNEEDLER: Because they're checking on  
3 immigration status.

4 THE COURT: Right. And --

5 MR. KNEEDLER: In aid of the federal government's  
6 enforcement of the laws. Just like in my drug example --

7 THE COURT: But how does it get to removal?

8 They check. The person might be removable. ICE  
9 might want to detain them. ICE may not want to. But the  
10 state never gets anywhere close to removing them.

11 MR. KNEEDLER: And again, it is the mandatory nature,  
12 using my example of the drug laws. The collateral  
13 consequences, if I could just carry this through, the  
14 collateral consequences of people caught up in the state  
15 mandated verification system, just like the state mandated  
16 stops for suspicion of the drug laws, that has consequences on  
17 people, as I said, people who may be lawfully here --

18 THE COURT: Well, let's ignore Section 3 for a while.

19 MR. KNEEDLER: No. I'm talking about Section 2. I'm  
20 talking about --

21 THE COURT: I know. And I don't see where it has  
22 anything to do with removal. It has to do clearly with the  
23 requirements in certain circumstances to check a person's  
24 immigration status. Their status is checked. The check comes  
25 out badly for that person. That's the end of the State's

1 involvement.

2 MR. KNEEDLER: The check is in aid of federal law  
3 enforcement, not some --

4 THE COURT: -- which Congress mandated that the  
5 federal authorities tell the state.

6 MR. KNEEDLER: Yes, but the concern comes prior to  
7 and ancillary -- when the person is stopped and the officer is  
8 saying, "I'm going to" -- the officer is being told by the  
9 state that he must, even in circumstances where he otherwise  
10 would not do a check because he knows that this is not a  
11 person who would fall within ICE's enforcement  
12 responsibilities, the state nonetheless requires that an  
13 immigration check be done and an immigration check can only be  
14 in aid of federal enforcement responsibilities.

15 THE COURT: So if they chose not to pursue federal  
16 enforcement, Immigration and Customs Enforcement, isn't that  
17 Immigration and Customs Enforcement's decision?

18 MR. KNEEDLER: Yes, it is. If I could -- perhaps  
19 another way to come at this is to illustrate the sort of state  
20 law that we think would be permissible and that the state in  
21 its brief identifies a number of state statutes that may be  
22 relevant.

23 They cite Colorado. Colorado has a statute that says  
24 no local government, et cetera, shall enact any ordinance or  
25 policy that limits or prohibits a peace officer, et cetera,

1 from communicating or cooperating with federal officials with  
2 regard to immigration status.

3 What that does is prohibits a local government from  
4 adopting a sanctuary policy that says we're going to not  
5 cooperate.

6 THE COURT: It says that somewhere in 1070 too. I  
7 can't remember where.

8 MR. KNEEDLER: Yes, but -- well, there's a  
9 prohibition against a policy that would limit enforcement to  
10 the full extent possible under federal law. That's very  
11 different from this.

12 THE COURT: Well, what's wrong with that? Why can't  
13 that be the policy of the State of Arizona --

14 MR. KNEEDLER: Because the --

15 THE COURT: -- that its law enforcement officers  
16 should enforce the immigration laws to the extent federal law  
17 permits them to do so?

18 MR. KNEEDLER: Well, again, the decision on the  
19 enforcement of the federal immigration laws is the federal  
20 government. The arrest or stopping in aid of federal  
21 enforcement, the states are permitted to do that, but they are  
22 only doing it because they are assisting the federal  
23 government. The State has no independent basis to.

24 THE COURT: But if there are police agencies that  
25 aren't doing that because they don't want to, because they're

1 sanctuary cities as Arizona alleges, can't Arizona change the  
2 law and say you can't not do this?

3 MR. KNEEDLER: Right. And that's precisely the  
4 example I was giving you from Colorado.

5 THE COURT: Right. And that's part of what 1070 is  
6 trying to do.

7 MR. KNEEDLER: 1070 goes way beyond that.

8 THE COURT: True.

9 MR. KNEEDLER: It goes beyond simply saying you can't  
10 inhibit state officials from cooperating with the federal  
11 government.

12 What 1070 does is it thrusts the State into  
13 enforcement measures that the federal government would not  
14 undertake according to its own responsibilities. But the  
15 consequence of this -- and I do want to turn for the moment to  
16 the irreparable injury -- what we have here is an  
17 unprecedented state statute, a package of Section 2 and the  
18 various criminal provisions and the employer sanctions -- an  
19 unprecedented package of enforcement measures to push or to  
20 adopt a state policy in the manner in which the federal  
21 government -- or the manner in which immigration laws should  
22 be enforced in explicit disagreement with the federal  
23 government that has exclusive responsibility for that.

24 That has in turn, and if this law goes into effect,  
25 will produce a number of problems that this Court should not

1 allow to happen until it has a chance to fully adjudicate the  
2 case. It would, as I say, put the State into the immigration  
3 enforcement policy. It would invite a patchwork of state  
4 laws.

5 If Arizona can do this, New Mexico can do something  
6 slightly different. Another state could do this. Another  
7 state could do that.

8 This is the reason why we have a national immigration  
9 policy in which ICE and other enforcement offices can allocate  
10 resources and balance different considerations in terms of  
11 humanitarian relief and all of those.

12 But beyond that, we have the problems with foreign  
13 policy. As the declarations set out by Deputy Secretary  
14 Steinberg explains, this is raising serious foreign policy  
15 questions. For example, the Mexican Senate has declined to  
16 consider an update of an agreement concerning disaster  
17 assistance totally unrelated to immigration because of that  
18 government's response to this measure.

19 There is the canceled meeting that was mentioned, the  
20 concerns about continued bilateral cooperation on border  
21 enforcement and border intelligence, which is critical to the  
22 ICE mission and to the people of Arizona and to the people of  
23 the nation as a whole.

24 These are very concrete harms. More generally, there  
25 is the concern about relationships not just with nations on

1 our borders, but other nations in the Americas, other nations  
2 that are members of international bodies in which the United  
3 States is an advocate for migration issues and human rights  
4 issues in which these concerns will be raised.

5 One of the themes that runs throughout this statute,  
6 Section 3, to be sure, but others, is basically an  
7 enforcement -- in some respects criminal enforcement -- but an  
8 enforcement against people, in particular criminal  
9 enforcement, on the basis of people's unlawful presence.

10 And it has long been a principle of the --

11 THE COURT: Well, only Section 3 does that.

12 MR. KNEEDLER: Well, Section 4 does it -- comes very  
13 close to it.

14 THE COURT: But we're not dealing with Section 4.

15 MR. KNEEDLER: But Section 2 --

16 THE COURT: Because Section 4 doesn't deal with it.  
17 The statute that was amended by Section 4 does.

18 MR. KNEEDLER: But Section 2 of the Act can be used  
19 to stop somebody for self-smuggling which Section 4 allows.

20 THE COURT: No. Section 4 doesn't allow that. The  
21 criminal statute that was passed four or five years ago allows  
22 that. Section 4 was just a tiny little amendment.

23 MR. KNEEDLER: I misspoke. I was using Section 4 as  
24 a reference to 2319.

25 And so these are very substantial foreign policy

1 concerns and they also trigger concerns for the reciprocal  
2 treatment of the United States citizens abroad. The point  
3 that *Hines* made when it was talking about the discussion of  
4 the concerns for the harassment or the interrogation of people  
5 under the registration system there -- and the Court  
6 specifically mentioned the concern about reciprocal treatment  
7 and the situation in which major problems have arisen because  
8 of one nation's concerns about how its citizens are being  
9 treated in another country and that can lead to retaliation --  
10 that is something that is in *Hines* itself and reciprocal  
11 treatment is something that Deputy Secretary Steinberg also  
12 averts to.

13 And if we go to the balance of equities here, we have  
14 presented here a series of irreparable harm, some of which are  
15 already quite acute in terms of foreign relations consequences  
16 of this Bill even before it goes into effect.

17 We have seen rather graphically in ways that we  
18 often -- when we're concerned about foreign policy  
19 implications, that they are often purely projections. There  
20 is nothing purely projection about here. We have concrete  
21 examples of the way in which the mere enactment of this  
22 statute and the concerns about it has given rise to  
23 significant interference with the interests of the United  
24 States on behalf of the entire nation, including the State of  
25 Arizona.

1           On the other side of that, the State of Arizona does  
2 not have substantial equities in enforcing federal immigration  
3 law in the manner of this statute and the package of  
4 provisions that it makes with its mandatory immigration status  
5 verification backed up by a private right of action which is  
6 quite extraordinary, geared to either federal -- or excuse me,  
7 state criminal statutes or trying to implement a disagreement  
8 with federal immigration policy.

9           It's unprecedented. We're not aware of any other  
10 situation in which the State has attempted to do that. And we  
11 do believe that before the Court allows a statute having those  
12 consequences for the nation as a whole and the necessary  
13 uniform administration of the Immigration and Nationality Act,  
14 that the Court should issue a preliminary injunction and  
15 maintain the status quo, maintain the status quo as best we  
16 can.

17           There is already some injury that has occurred, as I  
18 have mentioned, by the mere enactment of this statute and the  
19 consequences.

20           So we urge the Court to give very serious  
21 consideration to those foreign policy consequences. And the  
22 other thing to remember is those are not disconnected from the  
23 very merits of our case. Those foreign policy consequences  
24 are the very reason why the United States government has to be  
25 ultimately responsible for the way in which immigration laws

1 and policies are carried out and be the ones to be able to  
2 make those policies and not be able to have a state decide  
3 that state officers can only take into consideration state  
4 priorities when they are engaged in the initial steps of  
5 enforcement of the federal statute.

6 It would be deeply ironic if the federal  
7 government -- if the federal government's enforcement policies  
8 could not be given weight by state immigration -- or state law  
9 enforcement officers when all they are doing is beginning the  
10 steps into an immigration check for the enforcement of the  
11 federal statute.

12 So the consequences that have flowed from this are  
13 directly attributable, the irreparable injuries are directly  
14 attributable to the way in which the State has inserted itself  
15 through this package of provisions into the enforcement of the  
16 federal immigration laws.

17 THE COURT: Thank you very much, Mr. Kneedler.

18 And thank you very much, Counsel.

19 Governor, nice to see you.

20 Mr. Burke, nice to see you.

21 It's ordered taking this matter under advisement.

22 Court is in recess.

23 (Proceedings adjourned at 2:59 p.m.)

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C E R T I F I C A T E

I, ELIZABETH A. LEMKE, do hereby certify that I am  
duly appointed and qualified to act as Official Court Reporter  
for the United States District Court for the District of  
Arizona.

I FURTHER CERTIFY that the foregoing pages constitute  
a full, true, and accurate transcript of all of that portion  
of the proceedings contained herein, had in the above-entitled  
cause on the date specified therein, and that said transcript  
was prepared under my direction and control.

DATED at Phoenix, Arizona, this 23rd day of July,  
2010.

s/Elizabeth A. Lemke  
ELIZABETH A. LEMKE, RDR, CRR, CPE