



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

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May 3, 2010

Congressional Research Service

7-5700

www.crs.gov

R41221

Summary

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

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

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

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

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On April 23, 2010, Arizona enacted legislation (commonly referred to as S.B. 1070) designed to discourage and deter the entry or presence of aliens who lack lawful status under federal immigration laws.¹ Characterized by proponents and opponents alike as potentially sweeping in effect, the measure generally requires state and local law enforcement officials to facilitate the detection of unauthorized aliens in their daily enforcement activities. Any lawful Arizona resident may bring suit to challenge a state or local policy that restricts enforcement of federal immigration law. Among its other provisions, the measure also establishes criminal penalties under state law, in addition to those already imposed under federal law, for alien smuggling offenses and failure to carry or complete alien registration documents. Further, it makes it a crime under Arizona law for an unauthorized alien to apply for or perform work in the state, either as an employee or an independent contractor.

The enactment of S.B. 1070 sparked significant legal and policy debate. Supporters argue that federal enforcement of immigration law has not adequately deterred the migration of unauthorized aliens into Arizona, and that state action is both necessary and appropriate to combat the negative effects of unauthorized immigration. Opponents argue, among other things, that S.B. 1070 will be expensive and disruptive, will be susceptible to uneven application, and can undermine community policing by discouraging cooperation with state and local law enforcement. In part to respond to some of these concerns, the Arizona State Legislature modified S.B. 1070 on April 30, 2010, through the approval of H.B. 2162. This report discusses the major provisions of S.B.1070, as modified by H.B. 2162, and the legal and constitutional considerations possibly implicated by their implementation. The report focuses primarily on those provisions that require state enforcement of federal immigration law and impose criminal penalties for immigration-related conduct, and discusses preemption issues that might be raised by these measures.

I. Background

The foreign born population of the United States has grown rapidly from the 1980s onward. A significant component of this population, an estimated 30% in 2008,² resides in the United States without legal authorization, either as a result of fraudulent or surreptitious entry or of overstaying nonimmigrant visas that had allowed temporary presence in the country. In 1986, approximately 3 million unauthorized aliens resided in the United States. By 2006, the estimated number of unauthorized aliens had more than tripled.³

As the population of unauthorized aliens grew, several impacted states sued the federal government to recover the costs of benefits and services they were required to provide unauthorized aliens because of the alleged failure of the federal government to enforce immigration law adequately. These lawsuits failed.⁴ Meanwhile, many jurisdictions throughout

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

² Jeffrey S. Passel & D'Vera Cohn, Pew Hispanic Center, *A Portrait of Unauthorized Immigrants in the United States*, at 3 (Apr. 14, 2009).

³ CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem.

⁴ *E.g.*, *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997); *Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994).

the country have sought to deter the presence of unauthorized aliens and reduce attendant costs through a variety of enforcement measures of their own.⁵

As a legal matter, states have inherent “police powers” to promote and regulate safety, health, welfare, and economic activity within their respective jurisdictions. These powers are limited by the rights owed to individuals under the Constitution, but state police powers also can be affected by assertions and delegations of federal authority. Assertions and delegations of federal authority change over time, and when they do, state powers can be concomitantly restricted or expanded. Beginning in the 1970s, federal legislation on aliens more frequently regulated the incidents of daily life of noncitizens, lawful and unlawful. Prime examples include rules on noncitizen access to public benefits and programs, and sanctions against employers who hire unauthorized workers. To some degree, new federal restrictions crowded out concurrent state regulation. At the same time, however, the push by Congress to regulate the stay of aliens in the United States more comprehensively also included, particularly in two statutes enacted in 1996,⁶ increased authority for the states to mirror federal benefit restrictions and cooperate with immigration enforcement generally.

Laws like Arizona’s S.B. 1070, even as modified by H.B. 2162, appear to test the legal limits of a trend toward greater state involvement. Nevertheless, not all jurisdictions have reacted similarly in responding to the influx of unauthorized aliens and the perception of growing state and local authority to react to it. At the one end of the spectrum, some jurisdictions (occasionally referred to as “sanctuary cities”) have been unwilling to assist the federal government in enforcing measures that distinguish between legal and non-legal residents of the community, and in some cases have actively opposed providing assistance to federal enforcement efforts.⁷ Moving toward the middle of the spectrum, some states and localities communicate with federal immigration enforcement officers under limited circumstances (e.g., after arresting an unauthorized alien for a criminal offense), but for various reasons do not take a more active role in deterring illegal immigration.

At the other end of the spectrum are jurisdictions, like Arizona, that have actively sought to deter the presence of unlawfully present aliens within their territory. Some of these jurisdictions have assisted federal authorities in apprehending and detaining unauthorized aliens, including under written agreements with federal immigration authorities made under § 287(g) of the Immigration and Nationality Act (INA).⁸ More controversially, some states and localities have considered, and

⁵ According to one commentator, a total of 1,562 bills on illegal immigration were introduced in the fifty state legislatures in 2007, 240 of which were enacted into law. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMM. L.R. 459 (2008).

⁶ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, Division C; Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), P.L. 104-193.

⁷ The federal government has taken steps to eliminate sanctuary policies. Pursuant to PRWORA § 434 and IIRIRA § 642, states and localities may not limit their governmental entities or officers from maintaining records regarding a person’s immigration status, or bar the exchange of such information with any federal, state, or local entity. For further discussion, see CRS Report RS22773, “*Sanctuary Cities*”: *Legal Issues*, by Yule Kim and Michael John Garcia.

⁸ 8 U.S.C. § 1101, *et seq.* INA § 287(g) authorizes the Secretary of Homeland Security to enter

a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined ... to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

8 U.S.C. § 1357(g)(1). INA § 287(g)(10) further provides that this section does not require the existence of such an (continued...)

in a few cases enacted, measures intended to deter the presence of aliens who are in the United States without legal authorization, including by limiting access to housing, employment, or municipal services.⁹

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

The stated purpose of S.B. 1070, as modified by H.B. 2162, is to discourage and deter the unlawful entry and presence of aliens in Arizona.¹⁰ Towards this end, it directs state and local law enforcement officers and agencies, when making a lawful stop, detention, or arrest pursuant to the enforcement of a state or local law, to make a reasonable attempt whenever practicable to determine the person's immigration status, if there is reasonable suspicion to believe the person is an alien who is unlawfully present in the country.¹¹ A person is presumed not to be an unlawfully present alien if he can provide specified documentation, such as an Arizona driver's license, to a law enforcement officer or agency. An attempt to determine status need not be made if it would hinder or obstruct an investigation.¹² The immigration status of a person who is arrested must be determined before the person is released.¹³ In implementing these provisions, law enforcement officials "may not consider race, color, or national origin" except to the extent permitted by the U.S. or Arizona Constitution.¹⁴ Before being modified by H.B. 2162, S.B. 1070 called for an inquiry into status whenever reasonable suspicion arose during the course of any "lawful contact,"¹⁵ a term that appeared to encompass a far wider range of interactions than the modified provision does.

S.B. 1070 mandates that the U.S. Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP) be notified when an unlawfully present alien who has been convicted of a crime is released from prison or has been assessed a monetary penalty.¹⁶ Furthermore, the bill authorizes state and local law enforcement officials to transport unlawfully present aliens in their custody to a federal facility.¹⁷ S.B. 1070 also authorizes officers to make an arrest without a warrant if they have probable cause to believe the person to be arrested has committed any public offense that makes the person removable from the United States.¹⁸

(...continued)

agreement in order for a state or local entity to "cooperate with ... [federal immigration authorities] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10).

⁹ See generally CRS Report RL34345, *State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments*, by Yule Kim, Jody Feder, and Alison M. Smith.

¹⁰ S.B. 1070, § 1.

¹¹ *Id.*, § 2, as amended by H.B. 2162, § 3.

¹² S.B. 1070, § 2.

¹³ *Id.*

¹⁴ *Id.*, as amended by H.B. 2162, § 3. Prior to amendment by H.B. 2162, the act provided that race, color, or national origin could not be the "sole factor" for determining reasonable suspicion, except to the extent authorized by the U.S. or Arizona Constitution.

¹⁵ S.B. 1070, § 2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*, § 6. For purposes of Arizona law, a "public offense" includes any offense punishable by fine or imprisonment (continued...)

S.B. 1070 prohibits restricting state and local officials or agencies from sending, receiving, exchanging, or maintaining information relating to the immigration status of an individual for the purpose of determining eligibility for public services or benefits, verifying domicile or residence, or determining whether a person is in compliance with federal alien registration laws.¹⁹ Any legal resident of Arizona may bring suit to challenge any state or local policy that restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law.²⁰ Prior to being modified by H.B. 2162, S.B. 1070 had authorized residents to bring suits to challenge state and local practices, as well.

S.B. 1070 also criminalizes under state law some activities currently proscribed by the federal immigration laws. For example, if a person violates 8 U.S.C. §§ 1304(e) or 1306(a),²¹ he will also be guilty of the state crime of “willful failure to complete or carry an alien registration document.”²² Modifications by H.B. 2162 eliminated the penalty structure under S.B. 1070 for alien registration violations, which would have made these offenses felonies under certain circumstances, and substituted a provision making all violations misdemeanors.²³

S.B. 1070 also adds a new criminal statute prohibiting alien smuggling-related activities when committed by a person who is in violation of another criminal offense. This statute imposes criminal penalties upon the transport of an alien within the state in furtherance of the illegal presence of the alien in the United States, when done with knowledge or in reckless disregard of the alien’s unauthorized status in the country.²⁴ Harboring an alien or encouraging an alien to come to or reside in Arizona with knowledge or in reckless disregard of the fact that the alien’s presence is a violation of law is also prohibited.²⁵ Vehicles used in the commission of an offense under the new smuggling statute are subject to mandatory immobilization or impoundment.

S.B. 1070 makes it an Arizona crime for an unlawful alien to apply for or solicit work in the state, or to work as an employee or an independent contractor in the state.²⁶ Separately, it is unlawful for an occupant of a motor vehicle that is stopped on a roadway to pick up and hire, or attempt to hire, passengers for work at a different location, if the motor vehicle blocks or impedes the normal movement of traffic.²⁷ S.B. 1070 also makes it unlawful for a person to enter the motor vehicle in such circumstances, in order to be hired by the vehicle’s occupant.²⁸

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under the laws and regulations of Arizona or a political subdivision thereof, as well as an offense under the laws of another state, if such conduct would have been punishable under Arizona law if it had occurred within the state. ARIZ. REV. STAT. § 13-105.

¹⁹ S.B. 1070, § 2.

²⁰ *Id.*, § 2, as amended by H.B. 2162, § 3.

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

²² S.B. 1070, § 3.

²³ *Id.*, as amended by H.B. 2162, § 4.

²⁴ S.B. 1070, § 5.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

III. Overview of Preemption

The Supremacy Clause of the Constitution establishes that federal law, treaties, and the Constitution itself are “the supreme Law of the Land.”²⁹ Thus, one essential aspect of our federal structure of government is that states can be precluded from taking actions that are otherwise within their authority if federal law is thereby thwarted. “States cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.”³⁰ An act of Congress may preempt state or local action in a given area in any one of three ways: (1) the statute expressly states preemptive intent (express preemption); (2) a court concludes that Congress intended to occupy the regulatory field,³¹ thereby implicitly precluding state or local action in that area (field preemption); or (3) state or local action directly conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption).³² The delineation between these categories, particularly between field and conflict preemption, is not rigid.³³

The power to set rules for which aliens may enter and remain in the United States is undoubtedly federal, and the breadth and detail of regulation Congress has established in the Immigration and Nationality Act of 1952 (INA), as amended,³⁴ precludes substantive state regulation concerning which noncitizens may enter or remain. Nevertheless, the Supreme Court has never held that “every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised.”³⁵ In the 1976 case of *DeCanas v. Bica*, the Supreme Court held that state regulation of matters within their jurisdictions that were only tangentially related to immigration would, “absent congressional action[,] ... not be an invalid state incursion on federal power.”³⁶ The Court further indicated that field preemption claims against state action that did not conflict with federal law could only be justified when the “complete ouster of state power ... was the clear and manifest purpose of Congress.”³⁷ Still, the *DeCanas* Court recognized that, even in situations where federal immigration law “contemplates some room for state legislation,” a state measure might nonetheless be unenforceable on conflict

²⁹ U.S. CONST. art. VI, cl. 2.

³⁰ *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) (internal citations omitted).

³¹ Congressional intent to “occupy the field” to the exclusion of state law can be inferred when “[1] the pervasiveness of the federal regulation precludes supplementation by the States, [2] where the federal interest in the field is sufficiently dominant, or [3] where the object sought to be obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (internal quotations omitted).

³² See, e.g., *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000); *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248-249 (1984); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm’n*, 461 U.S. 190, 203-204 (1983).

³³ See *English*, 462 U.S. at 79 n.5 (“By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation.”); *Crosby*, 530 U.S. at 373 n.6.

³⁴ 8 U.S.C. § 1101, et seq.

³⁵ *DeCanas v. Bica*, 424 U.S. 351, 355 (1976). Indeed, during the nineteenth century, when federal regulation of immigration was far more limited in scope, state legislation limiting the rights and privileges of certain categories of aliens was common. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993). Many of these restrictions would now be preempted by federal immigration law.

³⁶ *DeCanas*, 424 U.S. at 356.

³⁷ *Id.* at 357.

preemption grounds if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA.”³⁸

A separate but somewhat related legal issue concerns the authority of states and localities to directly enforce provisions of the INA, including by investigating and making arrests for criminal and civil violations of federal immigration law. As a general matter, it appears well established that states have at least implicit authority to make arrests for violations of federal law, unless the nature or purpose of the federal regulatory scheme precludes state action.³⁹ Historically, the authority for state and local law enforcement officials to enforce immigration law has been construed to be limited to certain criminal provisions of the INA.⁴⁰ By contrast, the enforcement of the civil provisions, including the apprehension and removal of deportable aliens, has been viewed as a federal responsibility, with states and localities preempted from playing more than an incidental supporting role, except to the extent specifically authorized by federal law.⁴¹

For the first several decades following the INA’s enactment, the prevailing assumption had been that the INA’s deportation provisions constituted a pervasive and preemptive regulatory scheme under which state and local enforcement was preempted.⁴² Then in the 1980s and 1990s, some jurisdictions that were heavily impacted by immigration grew more insistent in characterizing federal enforcement of federal immigration law as inadequate. In part to address these concerns, Congress included authority in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)⁴³ for the Attorney General to enter into cooperative agreements with states and localities under which trained state and local law enforcement officers can, under federal supervision and subject to federal direction, perform certain functions relative to the investigation, apprehension, or detention of unlawful aliens to the extent permitted by state or local law. The enacted version of this measure was significantly narrower than some of those considered (a House-passed version, for example, would have authorized agreements permitting states to carry out all deportation functions, including prosecution, adjudication and physical removal⁴⁴), but all of the proposals that were seriously considered seem to have reflected a perception that, absent a cooperative agreement with federal authorities, states and localities

³⁸ *Id.* at 363 (internal quotations omitted). *See also Crosby*, 530 U.S. at 373 (2000)(quoting *Hines*, 312 U.S. at 67). *DeCanas* upheld a California statute that imposed sanctions on employers who hired unlawful aliens if that employment adversely affected lawful workers. When Congress added federal employer sanctions to the INA in 1986, it expressly preempted state or local laws that sanctioned employers (other than through licensing or similar laws) for hiring unauthorized workers. INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2).

³⁹ *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)(“The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”); *Gonzales v. City of Peoria*, 722 F.2d 468, 473 (9th Cir. 1983) (“The general rule is that local police are not precluded from enforcing federal statutes.”), *overruled on other grounds, Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

⁴⁰ *Gonzalez*, 722 F.2d at 474-75 (9th Cir. 1983). *See also* Dept. of Justice, Office of Legal Counsel, *Assistance by State and Local Police in Apprehending Illegal Aliens*, 20 Op. O.L.C. 26, 1996 WL 33101191 at *4-6 (Feb. 5, 1996) [hereinafter “1996 OLC Opinion”]; Jeff Lewis, et al., *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 BENDER’S IMMIGRATION BULLETIN No. 15, at 944 (Aug. 1, 2002).

⁴¹ For further discussion, see CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Lisa M. Seghetti, Karma Ester, and Michael John Garcia, at 5-11.

⁴² *Gonzalez*, 722 F.2d at 474-75. *See also* 1996 OLC Opinion, *supra* footnote 40, 1996 WL 33101191, at *13-16; Lewis, *supra* footnote 40, at 944.

⁴³ P.L. 104-208, Div. C, § 133, adding INA § 287(g), 8 U.S.C. § 1357(g).

⁴⁴ H.R. 2202, § 133 (104th Cong., 2nd Sess.) (House-passed version).

would play at most a secondary and supportive role in the enforcement of the civil provisions of the INA.

But a restrictive view of a state and local role in the enforcement of immigration law may be changing. In 2002, the Office of Legal Counsel (OLC) within the Department of Justice issued a memorandum which concluded that “federal law did not preempt state police from arresting aliens on the basis of civil deportability,” and it withdrew the advice of a 1996 OLC opinion which had suggested otherwise.⁴⁵ Additionally, a series of cases decided by the Tenth Circuit variously drew no distinction between the criminal and civil provisions of the INA in relation to state and local enforcement authority, or alluded to the “implicit authority” or the “general investigatory authority” of the states to engage in civil immigration enforcement.⁴⁶

State Enforcement of Immigration Law Under Section 2 of S.B. 1070

S.B. 1070 is premised on “a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona.”⁴⁷ To this end, the state intends to adopt “attrition through enforcement” as state policy.⁴⁸ “Attrition through enforcement” has been described by some observers as an approach to deter unlawful migration and encourage the compelled or voluntary exit of unlawfully present aliens through the “steady, across-the-board enforcement of our immigration laws.”⁴⁹ The approach most often is associated with more vigorous and efficient implementation of employer sanctions, improved recordkeeping and more secure documents, and other measures to make current law more effective. It also can imply better cooperation between the states and federal immigration authorities, and the adoption of state and local laws that discourage the presence of unauthorized aliens.⁵⁰

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

⁴⁵ Dept. of Justice, Office of Legal Counsel, *Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations*, at 8 (Apr. 3, 2002) [hereinafter “2002 OLC Opinion”]. Initially, the Department of Justice did not make the 2002 OLC opinion publicly available. Several immigration and public interest groups sought disclosure under the Freedom of Information Act. See *Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350 (2nd Cir. 2005). As a result of this litigation, the DOJ was required to release a redacted version of the opinion, which can be viewed at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf> or http://www.fairus.org/site/DocServer/OLC_Opinion_2002.pdf?docID=1041. See also 1996 OLC Opinion, *supra* footnote 40, 1996 WL 33101191, at *16 (“we conclude that state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability”).

⁴⁶ *United States v. Santana-Garcia*, 264 F.3d 1188 (10th Cir. 2001); *United States v. Vasquez-Alvarez*, 176 F. 3d 1294 (10th Cir. 1999); *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984). See generally CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Lisa M. Seghetti, Karma Ester, and Michael John Garcia, at 5-11.

⁴⁷ S.B. 1070, § 1.

⁴⁸ *Id.*

⁴⁹ CRS Report R41207, *Unauthorized Aliens in the United States*, by Andorra Bruno, at 12 (quoting Mark Krikorian, *Attrition by Enforcement is the Best Course of Action*, SPARTANBURG (S.C.) HERALD-JOURNAL (Sept. 30, 2007)).

⁵⁰ *Id.* at 12-13.

status, or bar the exchange of such information with any federal, state, or local entity. In addition to imposing obligations upon states and localities to refrain from restricting their agencies and officers from communicating with federal authorities regarding immigration matters, IIRIRA § 642 also imposed an obligation upon federal immigration authorities to respond to immigration-related inquiries from states and localities. Specifically, IIRIRA § 642(c) requires federal immigration authorities:

to respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.⁵¹

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

Other provisions of S.B. 1070 contemplate state and local law enforcement actively participating in the detection of unauthorized aliens in the course of their regular duties. Especially prior to its modification by H.B. 2162, section 2 of S.B. 1070 arguably appeared to authorize intensive, daily involvement in immigration law enforcement by state and local officers beyond established precedents. As originally enacted, section 2 provided that whenever a law enforcement officer had "lawful contact" with a person and reasonable suspicion existed that the person was an unlawfully present alien, the officer was required, where practicable, to determine the person's immigration status. Case law in the Tenth Circuit has supported the authority of police to inquire into immigration status in certain circumstances incidental to otherwise authorized enforcement of criminal law, violations of state traffic laws, and similar offenses.⁵² Inquiring into status pursuant

⁵¹ 8 U.S.C. § 1373(c).

⁵² The Tenth Circuit has upheld inquiries and arrests by state law enforcement officers related to suspected immigration law violations, without appearing to distinguish between violations which are civil or criminal in nature. *See, e.g., Santana-Garcia*, 264 F.3d at 1194 (state law enforcement officers have "implicit authority" within their respective jurisdictions to investigate and make arrests for violations of immigration law, even without express authorization from the state); *Vasquez-Alvarez*, 176 F.3d at 1295 (INA provision authorizing state officials to arrest and detain unlawfully present aliens who had previously been deported on criminal grounds, but only upon confirmation of aliens' illegal status with federal authorities, "does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration law"); *Salinas-Calderon*, 728 F.2d at 1301 n. 2 ("A state trooper has general investigatory authority to inquire into possible immigration violations"). For additional discussion of these opinions, see CRS Report RL32270, *Enforcing Immigration Law: The* (continued...)

to “lawful contact” perhaps could have been read as sufficiently circumscribed to fit within this line of cases (though its reception by the Ninth Circuit, where Arizona rests, might have been less certain⁵³). However, “lawful contact” also appeared susceptible to an interpretation that covered any manner of casual interaction between the police and the public that was “lawful.” H.B. 2162 modified this provision to limit immigration status inquiries to situations where a law enforcement agency or officer made a “lawful stop, detention, or arrest” for a violation of state or local law.⁵⁴ In addition, S.B. 1070, as modified, also establishes that persons arrested by state or local law enforcement shall have their immigration status verified with federal authorities prior to their release.⁵⁵ Federal immigration authorities also shall be notified when an unauthorized alien is released from prison or has been assessed a monetary penalty, and local law enforcement officials may transport unauthorized aliens in their custody to a federal facility.⁵⁶

Many of the above-described activities are the kind often contemplated in cooperative agreements between the Department of Homeland Security and state or local law enforcement authorities. In 1996, Congress authorized the Attorney General (now the Secretary of Homeland Security) to enter into formal agreements with state or local entities that permit those entities to play a direct role in the enforcement of federal immigration law. Agreements entered pursuant to INA § 287(g) (commonly referred to as “287(g) agreements”) enable specially trained state or local officers to perform specific functions relative to the investigation, apprehension, or detention of aliens, during a predetermined timeframe and under federal supervision. For example, the Department of Homeland Security has entered 287(g) agreements with several jurisdictions to allow correctional officers and other jail personnel to question persons who are being detained for crimes about their immigration status and begin paperwork for transferring suspected removable aliens to federal custody upon their release. Some other agreements authorize a limited number of highly trained personnel to more broadly engage in field enforcement under direct supervision of federal immigration agents.⁵⁷ There are several 287(g) agreements in place between federal immigration authorities and Arizona state, city, and county law enforcement agencies, permitting designated officers to perform specified functions under federal supervision.⁵⁸

(...continued)

Role of State and Local Law Enforcement, by Lisa M. Seghetti, Karma Ester, and Michael John Garcia, at 8-11.

⁵³ See, e.g., *Gonzalez*, 722 F.2d at 476 (“[A]n intent to preclude local enforcement may be inferred where the system of federal regulation is so pervasive that no opportunity for state activity remains. We assume that the civil provisions of the [INA] regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”).

⁵⁴ H.B. 2162, § 3. Arizona law contains a few criminal offenses in which unauthorized immigration status is an element of the offense (e.g., smuggling unauthorized aliens, failing to comply with federal requirements for alien registration). Accordingly, an Arizona law enforcement officer’s suspicion that a person is an unauthorized alien might be a relevant factor when assessing whether there is reasonable suspicion to stop the person for a suspected violation of state law. However, neither federal nor state law makes it a criminal offense for an alien to be unlawfully present in the United States. The fact that an officer has reasonable suspicion to believe that an alien is unlawfully present might not alone provide sufficient grounds to reasonably suspect that he has committed a criminal offense. See *infra* text accompanying footnote 96 (describing other requirements besides unauthorized status that are necessary for an alien to be criminally liable under federal alien registration law).

⁵⁵ S.B. 1070, § 2.

⁵⁶ *Id.*

⁵⁷ See CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Lisa M. Seghetti, Karma Ester, and Michael John Garcia, at 14-18.

⁵⁸ See U.S. Immigration and Customs Enforcement, Office of State and Local Coordination, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, at http://www.ice.gov/pi/news/factsheets/section287_g.htm#top (discussing 287(g) program and providing links to copies of agreements in force).

S.B. 1070 does not purport to be based on a delegation of federal immigration enforcement authority under INA § 287(g). Instead, its legal foundation appears premised on the belief that states generally possess inherent power to enforce federal laws, and that federal immigration law does not preempt the kind of enforcement activities contemplated by S.B. 1070. This position appears to be based on similar legal reasoning as that found in the 2002 OLC opinion and the Tenth Circuit cases mentioned above.⁵⁹

To the extent that the performance of immigration enforcement functions by Arizona officials is not done pursuant to a 287(g) agreement, arguments may be raised that states and localities are preempted from engaging in such functions. In particular, some might argue that, to the extent that the INA contemplates state and local participation in the enforcement of immigration law, such participation must be through a cooperative agreement under INA § 287(g). INA § 287(g) expressly authorizes federal immigration authorities to enter agreements with states or localities, under which designated officers who are trained and supervised by federal authorities may “perform a function of an immigration officer in relation to the investigation, apprehension or detention of aliens.”⁶⁰ It could be argued that, in the absence of an applicable 287(g) agreement, federal law is intended to preempt states and localities from engaging in such actions.

A potential difficulty with this argument is language in INA § 287(g) that contemplates state or local cooperation with federal immigration authorities even in the absence of a formal agreement. Specifically, INA § 287(g)(10) plainly states that:

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.⁶¹

One issue that a reviewing court may consider in assessing a preemption challenge against S.B. 1070 is whether “cooperation” requires states and localities to consult and coordinate their immigration enforcement efforts with federal authorities, or whether “cooperation” may also be interpreted to permit states and localities to independently enact measures that are consistent with, and arguably further, federal policies related to the detection and removal of unauthorized aliens.

Even presuming that the immigration enforcement activities contemplated by S.B. 1070 are not facially preempted by federal immigration law, issues might nonetheless be raised with respect to the act’s implementation.⁶² For example, section 2 of the Arizona law requires an arrested

⁵⁹ See *supra* text accompanying footnote 52; 2002 OLC Opinion, *supra* footnote 45, at 2-4.

⁶⁰ INA § 287(g)(1), 8 U.S.C. § 1357(g)(1).

⁶¹ INA § 287(g)(10), 8 U.S.C. § 1357(g)(10).

⁶² A separate provision of S.B. 1070, which authorizes warrantless arrests based on probable cause that a person has committed a “public offense” making him removable, may also be controversial depending upon its application. Under the INA, certain misdemeanor state convictions may be grounds for deportation. See *infra* text accompanying footnote 86; CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Yule Kim and Michael John Garcia. Because Arizona law defines a “public offense” to include misdemeanors and offenses of laws of other states, application of this provision could raise legal issues. There may be little precedent for warrantless arrests for out-of- (continued...)

person's immigration status to be verified with federal authorities before he is released. This provision may raise both preemption and due process concerns if it is interpreted to require the continued detention of a person awaiting status verification, even after all other legal grounds for detaining the person have been extinguished.⁶³

Issues might also be raised with respect to the provision authorizing any legal resident of Arizona to file suit to challenge any policy of a state or local government entity that "limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law."⁶⁴ This authority might be seen as helping to ensure that state and local agencies comply with all applicable federal immigration statutes, and that these entities do not impede the federal government's ability to carry out its immigration enforcement activities (e.g., by restricting their employees from sharing of immigration information with federal authorities).⁶⁵ Alternatively, it might plausibly be interpreted more expansively to allow suits challenging whether Arizona officials are actively enforcing federal immigration law to the fullest extent possible.

In sum, immigration enforcement provisions contained in S.B. 1070 that might, individually or collectively, be interpreted as cooperative facilitation of federal enforcement practices might also be open to interpretation as encouraging an independent state enforcement effort that is preempted under federal law.

Criminalization of Immigration-Related Conduct

Provisions of S.B. 1070 criminalizing immigration-related conduct also may be subject to preemption challenges. Those provisions of S.B. 1070 addressing issues that have traditionally been subject to state regulation and upon which federal law remains silent seem least susceptible to legal challenge. More serious preemption concerns may be raised by provisions that criminalize matters already regulated by federal immigration law. Of this latter category, the most serious preemption arguments likely exist where state law attempts to reach past traditional police powers to regulate matters closely related to the entry and removal of aliens from the United States, and the conditions of their lawful presence within the country. State laws addressing such matters appear most susceptible to preemption challenges, as federal law is arguably intended to wholly occupy this field.

(...continued)

state misdemeanors (or for in-state misdemeanors not committed in an officer's presence) with an apparent expectation that the arrestee will be detained and deported.

⁶³ Although federal law requires immigration authorities to respond to any inquiry by a federal, state, or local agency seeking to verify a person's immigration status, it does not require such a response to be prompt. *See* 8 U.S.C. § 1373(c). There may be instances where immigration authorities cannot immediately provide requested verification or status information.

⁶⁴ S.B. 1070, § 2, as amended by H.B. 2162, § 3.

⁶⁵ Indeed, H.B. 2162 amended the original language of S.B. 1070 to specify that a person could bring suit against those government entities that were in violation of PRWORA and IIRIRA provisions which bar states and localities from implementing policies which restrict communication with federal authorities regarding immigration matters. H.B. 2162, § 3.

Criminalizing the Hiring of Persons Picked Up Along Roadways

Section 5 of S.B. 1070 makes it a misdemeanor offense under Arizona law for an occupant of a motor vehicle stopped on the roadway to attempt to hire or hire and pick up passengers for work at a different location, if the motor vehicle blocks or impedes the normal movement of traffic. The law also imposes a misdemeanor penalty upon those persons who enter a stopped motor vehicle to be hired and transported to work at a different location, if the vehicle blocks or impedes the normal traffic flow. Although these provisions cover conduct that often facilitates the employment of unauthorized aliens, the provisions criminalize conduct without regard to the participants' citizenship or immigration status.⁶⁶

It is well established that not every state law which tangentially touches upon immigration matters is preempted.⁶⁷ Further, courts have stated that when a state acts pursuant to its historic police powers, there is a presumption against preemption of the state law, unless federal law evidences a "clear and manifest purpose" to supersede state action.⁶⁸ The regulation of the hiring of persons along busy roadways appears well within a state's traditional powers, and federal law is silent on this matter. Accordingly, it does not appear that this provision facially poses a serious preemption issue, though it is possible that preemption issues could be raised in its application (e.g., if the law was only applied when law enforcement suspected that the prospective employee was an unauthorized alien).

Occasionally, local laws barring solicitation of employment along public streets have been stricken by the courts as violating the First Amendment.⁶⁹ The underlying legal theory is that streets are important public forums where the government can impose only narrowly tailored restrictions on speech to serve significant government interests. The requirement in S.B. 1070 that premises a violation on the blocking or impeding of normal traffic may make the provision less vulnerable to First Amendment attack, but the state might nevertheless eventually bear a burden of showing that there are alternative public places for soliciting employment and that other activity that can impede traffic (e.g., solicitation of charitable contributions) is similarly regulated.

Criminalizing Alien Smuggling Activities

More significant preemption arguments might be raised against the provisions of S.B. 1070 imposing criminal penalties upon alien smuggling activities. Under INA § 274, the federal government has criminalized various activities relating to the transportation of unauthorized aliens into or within the United States, as well as the harboring of such aliens in the country, or

⁶⁶ S.B. 1070, § 5 also makes it a misdemeanor for an unlawfully present alien to knowingly apply for work, solicit work in a public place, or perform work as an employee or independent contractor in Arizona. This provision is discussed elsewhere in this report.

⁶⁷ *DeCanas*, 424 U.S. at 355. *See also* *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755 (C.D.Cal., 1995)(striking down portions of state measure that sought to deter unauthorized migration through various state enforcement activities, but upholding portion criminalizing the making or use of false documents to conceal the "true citizenship or resident status" of a person, because state had a legitimate interest in "criminalizing conduct that is dishonest and deceptive").

⁶⁸ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978)(quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, (1947)). *But see* *United States v. Locke*, 529 U.S. 89, 108 (2000) ("an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence").

⁶⁹ *E.g.*, *Comite de Jornaleros v. City of Redondo Beach*, 475 F. Supp. 2d 952 (C.D. Cal. 2006).

encouraging or inducing such aliens to come to or reside in the United States.⁷⁰ For criminal liability to attach, the offender must generally act with knowledge or in reckless disregard of the alien's unlawful status.

Even prior to the enactment of S.B. 1070, Arizona law already imposed criminal penalties for certain activities that are likely also subject to criminal penalty under INA § 274. Arizona's "human smuggling" statute, which was enacted in 2005, generally makes it a felony under state law for any person, for profit or commercial purpose, to transport or procure transportation for an unauthorized alien, when the offender knows or has reason to know the person's unauthorized status.⁷¹ S.B. 1070 makes a minor amendment to this statute that does not affect its substantive scope. More significantly, section 5 of the S.B. 1070 adds a separate criminal offense under state law for any person, "who is in violation of a criminal offense," to transport or harbor unauthorized aliens, or encourage or induce such aliens to come to or reside in the state, when such activities are done in knowing or reckless disregard of the alien's unauthorized status.⁷² The purpose of the phrase "who is in violation of a criminal offense" is unclear. The offenses described in section 5 of S.B. 1070 would almost always constitute criminal offenses under INA § 274, meaning that any offense under section 5 would presumably be committed by a person "who [was also] in violation of a criminal offense" under the federal alien smuggling statute. On the other hand, the phrase "who is in violation of a criminal offense" could be interpreted in a more limited manner to only permit persons to be prosecuted under the new Arizona law for smuggling-related activities when they were also engaged in criminal conduct not described under the state statute.

In sum, Arizona has established criminal penalties under state law, pursuant to the 2005 "human smuggling" statute and the new offense created under section 5 of S.B. 1070, for similar conduct to that which is prohibited under the federal alien smuggling statute.⁷³ Because Arizona's alien smuggling laws operate in an area where the federal government exercises authority via INA § 274 and other immigration statutes, arguments may be raised that these laws are preempted. Federal law does not expressly preempt state or local measures criminalizing activities related to alien smuggling (though a provision of the federal alien smuggling statute impliedly authorizes states and localities to make arrests for violations of the statute⁷⁴). Presumably then, any

⁷⁰ 8 U.S.C. § 1324. *See also* CRS Report RL34501, *Alien Smuggling: Recent Legislative Developments*, by Yule Kim and Michael John Garcia.

⁷¹ ARIZ. REV. STAT. § 13-2319 (2009). Although the federal alien smuggling statute also criminalizes the transport of unauthorized aliens, for liability to attach transport must be done in furtherance of an alien's unlawful presence, whereas the Arizona statute requires that the transport be done with knowledge or in reckless disregard of the alien's unlawful status and for profit or a commercial purpose. The new smuggling offense added by S.B. 1070 more closely mirrors the language of the federal statute concerning when criminal liability for alien transport attaches. Arizona is not the only state that criminalizes alien smuggling activities. *See* 21 OKL. ST. ANN. § 446 (2009).

⁷² S.B. 1070, § 5.

⁷³ It should be noted that although smuggling offenses under Arizona law closely resemble offenses under the federal alien smuggling statute, the substantive scope of these offenses is not wholly identical. Notably as well, Arizona state and federal district courts have interpreted the state's preexisting human smuggling statute to cover persons who conspire to smuggle *themselves* into the United States. *See* *State v. Barragan-Sierra*, 219 Ariz. 276, 196 P.3d 879 (Ariz. App. Div. 1, 2008). *See also* *We Are America/Somos America, Coalition of Arizona v. Maricopa County Bd. of Sup'rs*, 594 F.Supp.2d 1104 (D. Ariz. 2009) (rejecting field preemption challenge raised by persons charged under Arizona law with conspiring to smuggle themselves).

⁷⁴ INA § 274(c), 8 U.S.C. § 1324(c) ("No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.").

preemption challenge against the smuggling provisions of S.B. 1070 (or Arizona's preexisting "human smuggling" statute) would be based on arguments that federal alien smuggling restrictions occupy the regulatory field and preclude enforcement of similar state laws, or upon arguments that the Arizona smuggling statute directly conflicts with or otherwise frustrates the purposes of federal immigration law and policy.

The historic police power of states generally permits them to define and punish criminal activities occurring within their territory.⁷⁵ Arizona's criminalization of smuggling activities occurring within its jurisdiction has been held by reviewing courts to fall within the scope of its traditional police powers,⁷⁶ and a presumption may exist that Congress's imposition of criminal penalties upon alien smuggling was not intended to preclude states from enacting and imposing measures consistent with federal law.⁷⁷ On the other hand, courts have recognized that a presumption against preemption *does not* exist in cases where a state "regulates in an area where there has been a history of significant federal presence."⁷⁸ Given that federal regulation of alien smuggling has been both long-standing and pervasive in scope,⁷⁹ it could be argued that there is no presumption against preemption of Arizona's alien smuggling laws.⁸⁰

Even assuming that Arizona's laws concerning alien smuggling are not entitled to a presumption against preemption given the degree of federal activity in this area, the measures might nonetheless be deemed valid if they are consistent with pertinent federal laws and objectives.⁸¹ Thus far, state and federal courts that have considered challenges to Arizona's 2005 human smuggling statute have rejected field preemption arguments against the statute's enforcement.⁸² In 2009, the U.S. District Court for Arizona upheld the statute against a field preemption challenge in the case of *We Are America/Somos America, Coalition of Arizona v. Maricopa County Board of Supervisors*. The plaintiffs in the case, who had been charged with conspiracy to violate the Arizona statute, argued that the statute was unenforceable on field preemption grounds, as it

⁷⁵ See *e.g.*, *Abbate v. United States*, 359 U.S. 187, 195 (1959) ("States under our federal system have the principal responsibility for defining and prosecuting crimes.").

⁷⁶ See, *e.g.*, *State v. Flores*, 218 Ariz. 407, 412-413, 188 P.3d 706, 711-712 (Ariz. App. Div. 1, 2008) (finding that "Arizona's human smuggling law furthers the legitimate state interest of attempting to curb 'the culture of lawlessness' that has arisen around this activity by a classic exercise of its police power"); *Barragan-Sierra*, 196 P.3d at 890 (holding that Arizona's human smuggling statute was a valid exercise of its police powers). Cf. *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (recognizing that "States have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal").

⁷⁷ See *DeCanas*, 424 U.S. at 357 ("[W]e will not presume that Congress, in enacting the INA, intended to oust state authority to regulate ... [employment of unauthorized aliens] in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was 'the clear and manifest purpose of Congress' would justify that conclusion.").

⁷⁸ *Locke*, 529 U.S. at 108.

⁷⁹ Statutory proscriptions against the illegal importation of aliens into the United States can be found as far back as 1875. Act of March 3, 1875, 18 Stat. 477, §§ 2-4. The modern alien smuggling statute predates the INA, and courts have interpreted it to broadly cover many forms of assistance provided to unauthorized aliens. See generally CRS Report RL34501, *Alien Smuggling: Recent Legislative Developments*, by Yule Kim and Michael John Garcia.

⁸⁰ See *Maricopa County Bd. of Sup'rs*, 594 F.Supp.2d at 1111 (appearing to find that a presumption against preemption did not exist with respect to Arizona's "human smuggling" statute, but nonetheless holding that the statute was not preempted by federal law).

⁸¹ See *DeCanas*, 424 U.S. at 357.

⁸² *Maricopa County Bd. of Sup'rs*, 594 F.Supp.2d at 1114; *Barragan-Sierra*, 219 Ariz. at 287-288; *Flores*, 218 Ariz. at 412-413.

impermissibly duplicated federal immigration law in object and effect.⁸³ The district court noted that the plaintiffs did not argue that the Arizona statute was in disharmony with the INA, but only that it was duplicative. The court rejected the plaintiffs' field preemption challenge, finding that plaintiffs had failed to demonstrate, "either based upon the language or the legislative history of the INA, that 'Congress intended to preclude harmonious state regulation touching on the smuggling of illegal aliens....'"⁸⁴ The district court's ruling is currently on appeal with the Ninth Circuit. If the ruling is upheld, it would not appear likely that those provisions of S.B. 1070 establishing additional alien smuggling offenses under Arizona law would be susceptible to a field preemption challenge solely because they mirrored federal laws penalizing alien smuggling.

It is possible that Arizona's criminalization of alien smuggling might nonetheless be subject to preemption challenges on other grounds. For example, even state laws that are duplicative of federal law may be subject to challenge on preemption grounds if they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸⁵ It could be argued, for example, that when Congress established criminal penalties for alien smuggling, it did so under the expectation that offenders would not also be subject to additional criminal penalties under state law. Potential tension may arise between federal and state policies if the federal government declined to prosecute alien smuggling conduct that was subsequently prosecuted by Arizona. Such tension might be particularly significant when the federal government declines to prosecute a non-citizen for an alien smuggling offense, with the intention of permitting the alien's continued presence in the United States, only for the alien to be convicted of the offense in state court. Not only might a state conviction make the alien deportable, but it might also disqualify him from being eligible for many legal forms of relief from deportation (e.g., asylum or temporary protected status).⁸⁶

Although this argument already has been raised in at least one of the legal challenges to Arizona's "human smuggling" statute,⁸⁷ thus far the reviewing courts have concluded that the punishment of alien smuggling activities is consistent with federal objectives to deter that activity.⁸⁸ Nonetheless, it is uncertain whether other courts would reach similar conclusions,⁸⁹ as the degree

⁸³ *Maricopa County Bd. of Sup'rs*, 594 F.Supp.2d at 1111.

⁸⁴ *Id.* at 1112 (quoting *Barragan-Sierra*, 196 P.3d at 890).

⁸⁵ *Crosby*, 530 U.S. at 373 (2000) (quoting *Hines*, 312 U.S. at 67).

⁸⁶ For example, the INA defines certain offenses as "aggravated felonies," whether committed in violation of federal or state law, including any offense described in the federal alien smuggling statute. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). Conviction for an "aggravated felony" is a ground for deportation and also makes an alien ineligible for most forms of relief from deportation. A conviction for an offense under Arizona's "human smuggling" statute would generally appear to fall under this definition. Although the new alien smuggling statute created by S.B. 1070 only imposes a misdemeanor penalty for a first-time offense, courts have recognized that certain misdemeanors fall under the INA's definition of "aggravated felony." See, e.g., *Biskupski v. Attorney General of U.S.*, 503 F.3d 274 (3rd Cir. 2007) (holding that misdemeanor offense of federal alien smuggling statute constituted an "aggravated felony" under the INA); *United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir.2002) (state misdemeanor battery conviction constituted "aggravated felony"). Misdemeanor offenses may sometimes have immigration consequences, even if they do not fall under the definition of "aggravated felony" used by the INA. See generally CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Yule Kim and Michael John Garcia.

⁸⁷ See *We Are America/Somos America, Coalition of Arizona v. Maricopa County Bd. of Sup'rs*, No. CIV 06-2816, 2007 WL 2775134, *6-7 (D. Ariz., Sept. 21, 2007) (court order in the *Maricopa County Bd. of Sup'rs* litigation recognizing that Arizona's human smuggling statute was consistent with federal immigration policy, and noting that federal government has discretion to mitigate some of the immigration consequences of a state conviction by exercising waiver authority over application of certain INA provisions).

⁸⁸ See *id.*; *Barragan-Sierra*, 196 P.3d at 890; *Flores*, 218 Ariz. at 412.

⁸⁹ For example, a few state and federal courts have considered preemption challenges to local ordinances that bar the (continued...)

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

Criminalizing Violations of Federal Alien Registration Requirements

Section 3 of S.B.1070 establishes criminal penalties under Arizona law for violations of federal requirements concerning alien registration. The INA generally prohibits a visa from being issued to any alien seeking admission to the United States until he has registered with immigration authorities.⁹⁰ Moreover, any unregistered alien present in the United States who is over the age of 14 must apply for alien registration with immigration authorities within 30 days of entry (aliens under 14 must apply for registration within 30 days of reaching their fourteenth birthday).⁹¹ Registration requirements are enforced in part by INA § 266(a), which makes it a misdemeanor offense, subject to imprisonment for up to six months and/or a fine, for an alien to willfully fail or refuse to file a registration form required under federal immigration law.⁹² Moreover, INA § 264(e) requires all registered aliens who are at least 18 years of age to carry with them and have in their personal possession “any certificate of alien registration or alien registration receipt card issued” to them.⁹³ Failure to comply with this requirement constitutes a misdemeanor, and is subject to imprisonment for not more than 30 days and/or a fine.⁹⁴ It should be noted that although an alien without legal authorization to be in the country is deportable under the INA, unlawful presence is not a crime under either federal or Arizona law.⁹⁵ Indeed, an alien who is

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harboring or renting of property to unauthorized aliens. These courts have generally either concluded that the ordinances are preempted by federal immigration laws, or have enjoined enforcement of the ordinances pending trial on account of the preemption concerns they raise. *See, e.g.,* *Lozano v. City of Hazleton*, 496 F. Supp.2d 477 (M.D. Pa. 2007) (finding that local prohibition on renting or leasing dwelling units to unauthorized aliens was preempted by federal law, in part because it affected aliens who had not yet been ordered removed, and whose immigration status could ultimately be adjusted by the federal government to permit their continued, legal presence); *Garrett v. City of Escondido, Order Granting Plaintiffs’ Application For Temporary Restraining Order*, 465 F.Supp.2d 1043 (S.D. Ca. 2006) (granting temporary restraining order against local ordinance imposing civil and criminal penalties upon persons renting property to unauthorized aliens, in part because serious field preemption concerns existed because of the federal alien smuggling statute). *See also* *State of New Hampshire v. Barros-Batistele*, Case. No. 05-CR-1474, 1475 (N.H. Dist. Ct. August 12, 2005) (lower state court ruling dismissing on field preemption grounds trespassing charges against an alien on account of his suspected unlawful entry in the United States, as the regime of “offenses, sanctions and penalties” established by the INA left no room for supplemental action by the states), available at http://www.courts.state.nh.us/district/criminal_trespass_decision.pdf.

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

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

⁹² 8 U.S.C. § 1306(a).

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

⁹⁴ 8 U.S.C. § 1304(e).

⁹⁵ The only situation where unlawful presence is itself a crime is when an alien is found in the country after having been formally removed or after voluntarily departing the country while a removal order was outstanding. INA § 276, 8 U.S.C. § 1326.

unlawfully present in the United States has not necessarily engaged in conduct that would make him criminally liable under alien registration laws.⁹⁶

Pursuant to S.B.1070, a person is subject to criminal penalty under Arizona state law if he is determined to be guilty of a violation of INA § 264(e) (failure to carry registration documents) or INA § 266(a) (willful failure to complete a registration document). In enforcing the statute, an alien's immigration status may be determined through verification with immigration authorities. Initially, S.B. 1070 made a first-time offense a misdemeanor subject to fine and imprisonment for up to six months, and subsequent offenses were felonies. If aggravating factors existed, offenses would have been subject to more significant felony penalties.⁹⁷ H.B. 2162 amended this provision to make all offenses misdemeanors, with available penalties being lesser than or equal to those imposed directly under federal law.⁹⁸

Even as amended, this provision may face legal challenge, as the courts have recognized alien registration to be an area where federal law is intended to operate exclusively, precluding additional regulation by the states. In the 1941 case of *Hines v. Davidowitz*, the Supreme Court ruled that a Pennsylvania statute requiring aliens to register with the state was preempted by the Federal Alien Registration Act of 1940.⁹⁹ Although the federal law did not expressly preempt state laws concerning alien registration, the Court held that the federal act was intended to preempt states from imposing their own alien registration requirements. Examining the legislative history of the federal law, the Court concluded that Congress had intended to establish "a single integrated and all-embracing system" for the registration of aliens. This system precluded the enforcement of state laws that "inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations" related to alien registry.¹⁰⁰

It might be difficult to reconcile the alien registration penalties imposed by S.B.1070 with the Supreme Court's ruling in *Hines*. One possible argument against a preemption challenge is the fact that the Arizona statute does not establish different requirements for alien registration than those employed by the federal government. Rather, the Arizona statute arguably seeks to bolster compliance with federal alien registration requirements by enabling violators of those requirements to be prosecuted under Arizona law. However, although state laws that mirror

⁹⁶ For example, a registered alien who overstayed his visa would not have committed a criminal offense (presuming he carried his registration with him at all times and notified immigration authorities of any change in his address), even though he was unlawfully present. Further, although all nonregistered aliens who are present in the country are required to register with the federal government, criminal liability generally only attaches if the alien *willfully* fails to apply for registration within 30 days of entry. Accordingly, an unauthorized alien present in the country less than 30 days, or who has been in the United States longer than 30 days but is unaware of alien registration requirements, would not be criminally liable. See *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1056-1057 (1984) (Brennan, J., dissenting) (describing some of the situations where an unauthorized alien would not have committed a criminal violation of alien registration laws). See also *Bryan v. United States*, 524 U.S. 184, 191 (1998) ("As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.") (internal quotations omitted).

⁹⁷ S.B. 1070, § 3.

⁹⁸ H.B. 2162, § 4.

⁹⁹ The requirements of the 1940 Act were largely incorporated into the INA. Although criminal penalties concerning failure to register were imposed by the 1940 Act, criminal penalties concerning failure to carry registration documents were added by the INA in 1952.

¹⁰⁰ *Hines*, 312 U.S. at 66-67.

federal requirements are generally deemed consistent with federal objectives, there are some areas where the courts have recognized that even supplementary state regulation is precluded.¹⁰¹ The *Hines* Court appeared to indicate that alien registration is one of those areas. When the federal government has “established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the statute is the supreme law of the land. No state can add to ... the force and effect of such ... statute....”¹⁰²

A reviewing court might interpret the Court’s ruling in *Hines* as precluding states from imposing additional criminal penalties upon federal alien registration violations, separate and apart from those already imposed under federal law. The Constitution’s protections against double jeopardy do not preclude prosecutions for the same acts or omissions by separate sovereigns.¹⁰³ Such prosecutions may not only result in additional criminal penalties for the alien, if convicted, but also have consequences upon an unauthorized alien’s ability to qualify for certain forms of relief from removal available to otherwise deportable aliens.¹⁰⁴ Although H.B. 2162 amended S.B. 1070 to reduce available penalties for state violations of alien registration requirements, so that they are now lesser or equal to those available under federal law, the imposition of *any* state penalty for violations of federal alien registration requirements might arguably be considered an “additional or auxiliary regulation” that has been preempted.

Arguments could also be raised that enforcement of a state statute imposing criminal penalties for violations of federal alien registration requirements would undermine the purposes behind the creation of the federal system. Congress established a federal system for alien registration because it perceived a need for “one uniform national ... system.”¹⁰⁵ One of the motivations for establishing a single federal system of alien registration, according to the *Hines* Court, was because Congress believed that additional state requirements could lead to harassment of “law-abiding aliens” and affect U.S. relations with the foreign states from which they came.¹⁰⁶ It could be argued that states might interpret and enforce federal registration requirements differently from both the federal government and each other, resulting in inconsistent interpretation and

¹⁰¹ *Locke*, 529 U.S. at 115 (“It is not always a sufficient answer to a claim of pre-emption to say that state rules supplement, or even mirror, federal requirements.”).

¹⁰² *Hines*, 312 U.S. at 62. *See also* *Pennsylvania v. Nelson*, 515 n.5 (discussing the *Hines* ruling and stating that “the coincidence between the state and federal laws in the ... case was so great that no real purpose was served by the state law”). Even if states are preempted from adding to the force of a federal criminal law through the imposition of additional state criminal penalties, it does not necessarily follow that a state would be preempted from arresting a person for a violation of that federal law, as the arrest would not add to the force and effect of the federal statute. *See* 2002 OLC Opinion, *supra* footnote 45, at 7-8 (distinguishing preemption issues raised when a state makes an arrest for a violation of federal law with those raised when a state enacts legislation that conflicts with or intrudes upon a field occupied by federal law). *Cf. Gonzales*, 722 F.2d at 474-475 (federal immigration law was not intended to preempt state authority to arrest persons for criminal offenses under the INA).

¹⁰³ *See Bartkus v. People of State of Ill.*, 359 U.S. 121 (1959); *United States v. Lanza*, 260 U.S. 377 (1922); *State v. Berry*, 133 Ariz. 264, 650 P.2d 1246 (Ariz. App., 1982) (finding that double jeopardy clauses of Arizona and U.S. Constitutions did not bar successive prosecutions under federal and Arizona law for same conduct). At one time, Arizona barred state convictions for acts or omissions which had previously been tried by either the federal government or another state, but this statutory prohibition appears to have been eliminated. ARIZ. REV. STAT. § 13-112 (1980). Other restrictions might nonetheless still apply.

¹⁰⁴ These consequences would have been more serious, and likely more susceptible to preemption challenge, under the originally enacted version of S.B. 1070. Prior to amendment by H.B. 2162, S.B. 1070 imposed in many cases significantly higher penalties for alien registration violations than those imposed for the same offenses under federal law. *See* S.B. 1070, § 3.

¹⁰⁵ *Hines*, 312 U.S. at 71.

¹⁰⁶ *Id.*

application of federal registration rules.¹⁰⁷ On the other hand, it could be argued that state laws like those of Arizona do not threaten the existence of a uniform national registration system because they apply federal standards rather than establishing their own, separate rules. It remains uncertain whether a reviewing court would interpret state statutes criminalizing violations of federal alien registration requirements as being harmonious with federal policy, or instead view them as “an obstacle to the accomplishment and execution of the full purposes and objectives” of the federal alien registration system.¹⁰⁸

It should be noted that, even if states are preempted from establishing “additional or auxiliary regulations” related to alien registry, this does not necessarily mean that they are preempted from enforcing federal alien registration requirements by arresting criminal offenders with the expectation of transferring them to federal law enforcement custody. As previously discussed, it seems well recognized that states have implied authority to make arrests for many criminal violations of the INA, so long as those constitutional requirements concerning the ability to stop, detain, or arrest persons are satisfied and such arrests are permissible under state law.¹⁰⁹ Arguably, this authority extends to making arrests for criminal violations of federal alien registration requirements.¹¹⁰ This issue has not been definitively resolved, however, and it is possible that there may be limitations upon a state’s ability to stop, detain, or arrest a person for a suspected criminal violation of federal alien registration requirements.¹¹¹

Criminalizing the Solicitation or Performance of Work by Unauthorized Aliens

Prior to the enactment of the Immigration Reform and Control Act of 1986 (IRCA, P.L. 99-603), federal immigration law did not comprehensively address the employment of unlawfully present aliens, and regulation of such matters was thought to primarily be an issue governed by state law. States were understood to have “broad authority” to regulate employment relationships within

¹⁰⁷ Issues of differing interpretation could potentially arise, for instance, with respect to the scope of the federal requirement that aliens carry a registration document or certificate that they were issued “at all times.” INA § 264(e), 8 U.S.C. § 1304(e). It is possible that some states would interpret this requirement to allow, for example, an alien to only have constructive possession of a required document, while other states might interpret this provision more strictly. See *Benitez-Mendez v. I.N.S.*, 760 F.2d 907 (9th Cir. 1983) (stating that alien would not be in violation of INA § 264(e) if he left papers in nearby car while he worked, because he would be in constructive personal possession of required documents).

¹⁰⁸ *DeCanas*, 424 U.S. at 363.

¹⁰⁹ See *supra* “III. Overview of Preemption,” at 6-7.

¹¹⁰ See 1996 OLC Opinion, *supra* footnote 40, 1996 WL 33101191, at *3 (“absent knowledge of an established federal policy of not prosecuting such offenses, state police may, in our opinion, legally detain alien suspects for disposition by federal agents when there is reasonable suspicion that the suspects have violated or are violating the two commonplace misdemeanor provisions of the INA, 8 U.S.C. § 1304(e) (lack of alien registration documents) or § 1325 (illegal entry), or other criminal provisions of the INA”); U.S. Attorney’s Criminal Resource Manual, § 1918, *Arrest of Illegal Aliens by State and Local Officers* (discussing state and local law enforcement officers’ ability to make arrests for criminal offenses of the INA, including for criminal violations of the INA’s alien registration requirements), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01918.htm.

¹¹¹ See 1996 OLC Opinion, *supra* footnote 40, 1996 WL 33101191, at *11 (interpreting Ninth Circuit’s ruling in *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216 (9th Cir. 1995), as suggesting that state authority to arrest an alien for a criminal violation of federal registration requirements may be legally suspect if there is reason to believe that the federal government will not prosecute the offender for the violation).

their territory to protect workers and state fiscal interests.¹¹² In *DeCanas v. Bica*, decided a decade prior to the passage of IRCA, the Supreme Court recognized that states were largely free to implement measures restricting the employment of unauthorized aliens within their territory, at least so long as such restrictions were focused “directly upon ... essentially local problems and [were] tailored to combat effectively the perceived evils.”¹¹³ The Court recognized that a state might have legitimate reasons for restricting the employment of unauthorized aliens, particularly in times of high unemployment, in order to protect the fiscal and economic interests of both the state and its lawfully residing labor force.¹¹⁴

With the enactment of IRCA, Congress amended the INA to establish a scheme to combat the employment of unauthorized aliens, and this system is now “central to the policy of immigration law.”¹¹⁵ The INA now generally prohibits the hiring, referring, recruiting for a fee, or continued employment of aliens lacking authorization to work in the United States.¹¹⁶ Violators may be subject to cease and desist orders, civil monetary penalties, and (in the case of serial offenders) criminal fines and/or imprisonment. In establishing this system, Congress also expressly preempted any state or local measure “imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”¹¹⁷

In recent years, some states and localities concerned with the employment of unauthorized aliens within their jurisdictions have attempted to supplement federal law with enforcement measures of their own, including by denying or revoking business licenses of entities who have hired unauthorized aliens. Many of these measures have been subject to legal challenge, with courts reaching conflicting rulings as to their permissibility.¹¹⁸ In 2007, Arizona enacted the Legal Arizona Workers Act, which authorized state courts to suspend or revoke the business licenses of entities found by state officials to have knowingly or intentionally hired aliens who were not authorized under federal law to work in the United States.¹¹⁹ Arizona also required employers within the state to confirm the employment eligibility of workers via the E-Verify program, a generally voluntary program operated by the Department of Homeland Security and the Social Security Administration that enables employers to verify an employee’s work eligibility. In 2009, the Ninth Circuit upheld the Arizona law, which had yet to be enforced, against a challenge that it

¹¹² *DeCanas*, 424 U.S. at 356.

¹¹³ *Id.* at 357.

¹¹⁴ The *DeCanas* Court described some of the reasons why a state might legitimately act to restrict the employment of unauthorized aliens:

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

Id.

¹¹⁵ *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002) (internal quotations omitted).

¹¹⁶ INA § 274A; 8 U.S.C. § 1324a.

¹¹⁷ INA § 274A(h)(2); 8 U.S.C. § 1324a.

¹¹⁸ For further discussion, see CRS Report RL34345, *State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments*, by Yule Kim, Jody Feder, and Alison M. Smith.

¹¹⁹ Ariz. H.B. 2745 (2008). Further information regarding the act, as amended, is available at <http://www.azag.gov/LegalAZWorkersAct/>.

was facially preempted by the INA and other federal measures.¹²⁰ A petition for review has been filed with the Supreme Court, and the Court has invited the U.S. Solicitor General to submit a brief expressing the views of the executive branch regarding the issues raised by the case.¹²¹

Section 5 of S.B. 1070 establishes new measures to deter the employment of unauthorized aliens within Arizona. Most significantly,¹²² S.B. 1070 makes it a misdemeanor offense for an unlawfully present alien, lacking authorization to work in the United States, “to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.”¹²³ The approach taken by S.B. 1070 to deter the employment of unauthorized aliens is markedly different from that established under IRCA, potentially raising preemption concerns.

On its face, Arizona’s imposition of criminal penalties upon unlawfully present aliens who seek employment in the state does not appear to be expressly preempted by the INA. The regime established by the INA to deter the employment of unauthorized aliens imposes sanctions upon *employers*, rather than alien employees (though aliens may be subject to penalty if they use fraudulent documents to circumvent work eligibility requirements¹²⁴). While the INA, as amended by IRCA, contains a provision expressly preempting states and localities from imposing criminal or civil penalties upon *employers* of unauthorized aliens, this provision does not expressly preempt state sanctions against unauthorized alien *employees*.

An examination of the legislative history behind the enactment of IRCA suggests its focus upon employers was intentional. Although there appears to have been some consideration given to the possibility of penalizing unauthorized aliens who sought employment in the United States, Congress did not pursue this option. Describing the legislative history and purposes of IRCA in 1990, the Ninth Circuit stated that in establishing a federal regime to deter the employment of unauthorized aliens, “Congress quite clearly was willing to deter illegal immigration by making jobs less available to illegal aliens but not by incarcerating or fining aliens who succeeded in obtaining work.”¹²⁵ Although the INA was amended in 1990 to establish civil penalties for

¹²⁰ *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009). The court cautioned, however, that “If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision.” *Id.* at 980.

¹²¹ *Chamber of Commerce of U.S. v. Candelaria*, 130 S.Ct. 534 (2009).

¹²² Section 5 of S.B. 1070 also makes minor modifications to the Legal Arizona Workers Act, though these amendments do not seem to immediately raise any significant issues. It also imposes penalties upon the roadside hiring of laborers. The legal implications of these penalties are discussed *supra*, “Criminalizing the Hiring of Persons Picked Up Along Roadways,” at 12.

¹²³ S.B. 1070, § 5.

¹²⁴ INA § 274C, 8 U.S.C. § 1324c.

¹²⁵ *National Center for Immigrants’ Rights, Inc. v. I.N.S.*, 913 F.2d 135 (9th Cir. 1990) *rev’d on other grounds*, 502 U.S. 183 (1991) (“While Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*, it ultimately rejected all such proposals.... Instead, it deliberately adopted sanctions with respect to the employer only.... Although some continued to argue for restraints against the employee, the approach of controlling employment through *employer* not *employee* sanctions was adjudged by Congress to provide the only realistic and appropriate solution.”). *See also, e.g.*, House Jud. Comm., H.Rept. 99-682 (1986)(I), at 48 (“Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.... Now, as in the past, the Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.”).

immigration-related document fraud, including the presentation of fraudulent documents to demonstrate work eligibility,¹²⁶ the federal regime does not impose any penalties against aliens solely on account of working or seeking employment in the United States.

Although federal law does not expressly preempt state laws that impose criminal penalties upon unauthorized aliens who work or seek employment, it could be argued that it impliedly does so. In establishing a comprehensive scheme to deter employment of unauthorized aliens, Congress consciously chose to target *employers* for sanction rather than unauthorized aliens themselves. A state's imposition of criminal penalties upon alien *employees* might be deemed inconsistent with federal policy. A court's assessment of a preemption challenge against the Arizona measure may depend on how broadly it considers the field that Congress intended to occupy when enacting IRCA.

IV. Racial Profiling Issues

In the 1968 case of *Terry v. Ohio*, the Supreme Court held that the Fourth Amendment permits a law enforcement officer to stop and briefly detain a person when the officer reasonably suspects that the person has committed a crime.¹²⁷ Reasonable suspicion may not be based on a mere hunch, but instead upon "specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience."¹²⁸ Section 2 of S.B. 1070, as amended by H.B. 2162, generally requires that in the context of a lawful stop, detention or arrest by state and local law enforcement pursuant to the enforcement of a state or local law, law enforcement must determine the person's immigration status, if practicable, when "reasonable suspicion exists that the person is an alien ... who is unlawfully present in the United States."¹²⁹ Some have expressed concern that this provision may lead to the harassment of certain racial and ethnic groups by Arizona law enforcement. The Arizona statute does not expressly prohibit law enforcement from relying, at least in part, upon an individual's racial or ethnic background when assessing whether to pursue an inquiry into the person's immigration status; instead, as amended by H.B. 2162, it provides that law enforcement may not consider the race, color, or national origin of an individual when determining whether there is reasonable suspicion to believe the person is an unlawfully present alien, "except to the extent permitted by the United States or Arizona Constitution."¹³⁰

At least partially to address concerns that enforcement of S.B. 1070 would lead to constitutionally impermissible "racial profiling," Arizona Governor Jan Brewer issued an executive order on the same day she signed the bill into law, which requires law enforcement officers to undergo training concerning the implementation of S.B. 1070. Among other things, such training is intended to "provide clear guidance to law enforcement officials regarding what constitutes reasonable

¹²⁶ INA § 274C, 8 U.S.C. § 1324c.

¹²⁷ 392 U.S. 1 (1968).

¹²⁸ *Id.* at 27.

¹²⁹ The act does not require a determination to be made when "the determination may hinder or obstruct an investigation." Further, a person is presumed not to be an unlawfully present alien if he can provide specified documentation. S.B. 1070, § 2.

¹³⁰ H.B. 2162, § 3. Prior to amendment, S.B. 1070 provided that race, color, or national origin could not be the "sole factor" considered in determining whether there was reasonable suspicion to believe a person was an unauthorized alien, except to the extent permitted by the U.S. or Arizona Constitutions. S.B. 1070, § 2.

suspicion, and shall make clear that an individual's race, color or national origin alone cannot be grounds for reasonable suspicion to believe any law has been violated."¹³¹

Whether or not it is constitutionally permissible for race, ethnicity, or national origin to be considered as a factor by Arizonan authorities when determining whether to inquire into a person's immigration status may depend upon a number of considerations. On several occasions, courts have decided cases involving law enforcement authorities stopping persons for suspected immigration violations on account of those persons' suspected Mexican ancestry. Supreme Court jurisprudence holds that race or ethnicity cannot be the sole factor giving rise to a law enforcement stop for suspected immigration violations, but that at least in cases near the U.S.-Mexican border, stops may be partially based on race.¹³² Nevertheless, the Court has suggested that a different conclusion might be reached if stops based partially on Mexican ancestry occur in places farther removed from the U.S.-Mexican border.¹³³

In 2000, the Ninth Circuit, sitting *en banc*, ruled that the Border Patrol could not take into account Hispanic origin when making stops in Southern California, concluding that in areas "in which the majority—or even a substantial part—of the population is Hispanic," as was the case in Southern California, the probability that any given Hispanic person "is an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus."¹³⁴ This ruling would seem to preclude Arizona law enforcement from using Hispanic origin as a factor in the "reasonable suspicion" test in areas with similar demographics as Southern California.

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

V. Conclusion

In recent decades, Congress has increasingly focused federal immigration policy on the daily incidents of alien residency. Concomitantly, Congress has enlarged the opportunities for states to become involved in enforcing immigration law. S.B. 1070 is in the vanguard of testing the legal limits of these increased opportunities, though H.B. 2162 modified some of its more legally ambitious efforts. To a large extent, the legal fate of Arizona's attempts to supplement federal immigration enforcement efforts may depend on how its individual provisions are implemented. Until then, it may be difficult to determine whether Arizona's assertion of concurrent authority to affect unauthorized immigration is regarded as complementing federal efforts or as being

¹³¹ Arizona State Executive Order 2010-09, Establishing Law Enforcement Training for Immigration Laws, Apr. 23, 2010, available at http://www.azgovernor.gov/dms/upload/EO_201009.pdf.

¹³² Compare *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (ruling unconstitutional a roving stop of a vehicle by the Border Patrol near the U.S.-Mexican border, when the stop was based solely on the vehicle occupant's apparent Mexican ancestry) with *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (permitting the stopping of persons at fixed inspection checkpoints near the Mexican border when such stops were partially based on race).

¹³³ *Martinez-Fuerte*, 428 U.S. at 563, n.17.

¹³⁴ *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000).

counterproductive to them. At least some other states and localities that see themselves as heavily impacted by unauthorized immigration likely will join Arizona on any new ground that S.B. 1070 establishes. And this potential for diverse and possibly fragmented immigration enforcement doubtless will be among the many issues considered by the courts as legal challenges to S.B. 1070 proceed.

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