

New Federal Initiatives Project

**The Federal Government Responds to Arizona's
Enforcement of Federal Immigration Law**

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The Federal Government Responds to Arizona's Enforcement of Federal Immigration Law

The Federal Government Rebuffs Arizona's Attempt to Expand State Enforcement of Federal Immigration Law:

In recent years, as immigration has become a seemingly intractable political issue in the United States Congress, state and local legislatures have shown increasing interest in passing immigration legislation of their own.¹ State and local enforcement of American immigration laws is thought to be helpful to federal authorities that lack the resources to enforce U.S. immigration laws fully by themselves. The Federal Government has traditionally sought assistance from states in enforcing immigration laws where states do so voluntarily and subject to federal direction and control, but some believe that federal programs that allow state participation in immigration enforcement do not go far enough. In 2010, Arizona's Senate Bill 1070 became the most widely publicized attempt by a State to expand its involvement in enforcement of federal immigration laws. SB 1070 makes certain violations of federal law into Arizona state crimes, thereby allowing unauthorized immigrants who enter Arizona to be charged with state crimes and prosecuted by the State of Arizona as well as the Federal Government. At the urging of the U.S. Department of Justice, however, a United States District Court judge partially enjoined enforcement of SB 1070 in July 2010, and the preliminary injunction remains in place at this writing. Arizona has appealed the court's decision, but the issue of how far States may go in regulating immigration is expected to remain unresolved for several more years.

Background:

On April 23, 2010, Arizona Governor Jan Brewer signed into law the Support Our Law Enforcement and Safe Neighborhoods Act, which had been introduced originally as Arizona Senate Bill 1070.² SB 1070 was a very broad measure that, *inter alia*, made it an Arizona state misdemeanor for a foreigner to be present in Arizona in violation of federal alien registration laws.³ The law was scheduled to go into effect on July 29, 2010, but the United States sued to enjoin enforcement of parts of the law.⁴ A day before the law was due to take effect, the U.S. District Court in Arizona partially enjoined the law's enforcement by issuing a preliminary injunction against the most controversial provisions in the law.⁵

The federal lawsuit highlights one of the more interesting aspects of today's highly charged immigration enforcement debate: While the states and the Federal Government often work together cooperatively to enforce U.S. immigration laws, such efforts have only earned federal approval if they are directed and managed by the Federal Government so as to complement federal policies and priorities. In 1996, for example, Congress created a formal Federal program for voluntary state immigration enforcement by enacting Section 287(g) of the Immigration & Nationality Act;⁶ under Section 287(g) programs, states may enter into agreements with the Federal Government to allow state and local law enforcement officials to enforce federal immigration laws. But the Federal Government—through the Department of Homeland Security—sets priorities for 287(g) immigration enforcement and has overall control of the program.

Arizona's law goes beyond the regulatory framework created by Congress in INA §287(g). Rather than following the lead of the Federal Government by focusing on particular federal immigration enforcement priorities, Arizona's law mandates enforcement of federal immigration laws against people who are stopped, arrested, or detained by Arizona law enforcement officials, if there is "reasonable suspicion . . . that the person is an alien and is unlawfully present in the United States."⁷ Through this broad enforcement effort, Arizona seeks to implement a doctrine called "attrition through enforcement,"⁸ whereby, through strict state enforcement of federal immigration laws, Arizona hopes to cause unauthorized immigrants to leave Arizona and go elsewhere, thereby causing "attrition" in the state's population of an estimated half million unauthorized immigrants. "Attrition by enforcement," however, is not the official policy of the Federal Government, which apparently prefers to pursue a policy of targeting immigration offenders based on the danger to the community and the seriousness of their immigration offenses.⁹

Because Hispanics are thought to comprise the majority of unauthorized immigrants in Arizona,¹⁰ opponents of the Arizona law have argued that the law will encourage racial profiling of Hispanics. Opponents also argue that the complexity of federal immigration law will cause state and local officials to make mistakes and harm U.S. citizens and legal residents.¹¹ Finally, some question the assumption that increased efforts by the state to target unauthorized immigrants will reduce the overall crime rate in Arizona. In the debate over the law, some Arizona law enforcement officials had differing views on whether the law would reduce crime, with some fearing that some crime victims in the community would stop reporting crimes to police for fear that such a report would trigger an investigation into their immigration status.¹²

Supporters of the law say that the law does not target anyone solely on the basis of race, that the law will cause unauthorized immigrants to leave Arizona and go elsewhere, that the law will reduce crime in Arizona, and that the law is necessary to protect Arizonans, because the Federal Government has failed to provide sufficient security along Arizona's border with Mexico.¹³

While Arizona faces many lawsuits as a result of enacting SB 1070, the most significant is the suit filed by the U.S. Government. In defending itself against the federal lawsuit, Arizona has argued that its law is a permissible attempt by Arizona to engage in concurrent enforcement of federal law because the Arizona law only criminalizes behavior that is already a crime under federal law.¹⁴ Also, as a result of modifications made to the law after its passage, Arizona's law does not allow race to be used as a sole criterion for checking someone's immigration status, but only as a criterion "when permitted by the United States or Arizona Constitution."¹⁵ Arizona has argued that past laws regarding state regulation of immigration have been upheld by the federal courts, and its new law is in keeping with this tradition of allowing state regulation of some aspects of immigration.¹⁶ Finally, Arizona has cited the failure of the United States to secure the Arizona border and the proliferation of "sanctuary" policies within Arizona as reasons why Arizona must take steps—such as SB 1070—to mitigate the "ever-escalating social, economic, and environmental costs caused by illegal immigration . . ."¹⁷

In seeking a preliminary injunction against the law, the Federal Government argued Congress has enacted a comprehensive regulatory framework over immigration matters, and the "Constitution and federal law do not permit the development of a patchwork of state and local

immigration policies throughout the country.”¹⁸ The government has indicated that through its law, Arizona seeks to divert precious federal immigration enforcement resources to Arizona and away from other states. The government has said that the Federal Government, not Arizona, must be able to decide its enforcement priorities. The government has also opined that immigration law is extremely complex, and by failing to recognize that complexity, Arizona’s law will inevitably harm U.S. citizens and foreigners who are lawfully present in the U.S. according to federal law; to give just one example, Arizona’s law requiring immigrants to carry documents fails to recognize that not all lawfully present immigrants are given documentary proof of their status by federal authorities, so that it is impossible for many legally present immigrants to satisfy Arizona’s registration requirements. Overall, say DOJ lawyers, Arizona’s law is clearly preempted by Congress’s enactment of a complex and pervasive web of immigration laws, some of which conflict with Arizona’s new mandates.

The U.S. District Court mostly sided with the Federal Government and granted a preliminary injunction against enforcement of the most controversial provisions of the Arizona law. The court left untouched the “purpose statement” and several sections of the law that had gone unchallenged by the Federal Government. Enjoined are the sections of the law that (1) require Arizona law enforcement officials to check the immigration status of persons whom they stop, detain, or arrest; (2) make it a crime to fail to apply for or carry alien registration papers; (3) make it a crime for an unauthorized alien to apply for or perform work; and (4) authorize warrantless arrests of persons who have committed crimes that make them removable from the United States. The court’s opinion provides a straightforward, preemption-based rationale for issuing a preliminary injunction, finding that if the Arizona law were to go into effect, the United States would suffer “irreparable harm” to its ability to enforce its overall immigration policies and achieve its immigration enforcement objectives.

Effect of the Government Lawsuit:

Key provisions of Arizona’s law have now been enjoined as a preliminary matter, but Arizona continues to face opposition to the enjoined law, not only from the Federal Government, but also in the form of boycotts, other lawsuits, and international condemnation. Hispanics—both legal and unauthorized—had been leaving the state for years, but this trend has accelerated.¹⁹ Proponents of the law have urged other states to enact similar legislation, but after the Federal Government filed suit against Arizona and obtained a preliminary injunction, other states that had considered similar legislation decided to await the ultimate outcome of the suit before taking further action. As of the date of this writing, no other state has followed Arizona’s example, although some plan to do so in the future and some proposed legislation is pending. Arizona has appealed the District Court’s decision to the Ninth Circuit Court of Appeals, which is expected to rule on the appeal later this year.

Looking Ahead:

United States immigration law is known to be extraordinarily complicated and difficult to enforce. The Department of Homeland Security, the federal agency primarily charged with enforcing this complex code, has generally lacked the full resources necessary to enforce federal law to the letter. To supplement its efforts, the department has long sought assistance from state

and local authorities—but only when the Federal Government has been able to direct and control those efforts. Given that Congress remains polarized and appears unwilling to enact immigration reform legislation or expand federal immigration enforcement resources much beyond their present level, it seems unlikely that federal efforts will resolve America’s immigration crisis in the near future. As Arizona seeks to enforce federal immigration laws more rigorously, and other states consider similar actions, the problem of unauthorized immigration continues to fester. Arizona’s action has highlighted the crisis for many Americans, but ultimately, final resolution of the conflict between the states and the Federal Government on state and local enactment of harsher immigration laws is likely to lie in the hands of the U.S. Supreme Court.

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¹ These attempts have included efforts to assist immigrants, as well as efforts to enforce federal immigration laws against unauthorized immigrants. For a general overview of such laws, as well as up-to-date information on the current status of state and local immigration-related legislation, see the National Council of State Legislatures, Immigrant Policy Project, at <http://www.ncsl.org/default.aspx?TabId=20881>.

² After passage, SB 1070 was almost immediately modified by Arizona House Bill 2162 after critics raised objections to some of the language in the original SB 1070 bill. For ease of reading, this article will refer to the final bill as “SB 1070,” although the final, enacted law consists of SB 1070 as well as the changes made by HB 2162.

³ SB 1070 also added state penalties for harboring and transporting illegal immigrants, employing illegal immigrants, and smuggling humans, among other things.

⁴ In its Complaint, the United States sought to enjoin Sections 1 through 6 of the Arizona law, leaving untouched the later Sections. See *United States v. Arizona*, Complaint, Case No. Case No. 10-CV-01413, at 24.

⁵ Order, *United States v. Arizona*, Case No. 10-CV-01413-SRB, July 28, 2010 (granting preliminary injunction against SB 1070).

⁶ Section 287(g) was enacted as part of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996, P. L. 104-208, §133.

⁷ See Arizona SB 1070 as amended by Arizona HB 2162, Section 2, available at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

⁸ See Arizona SB 1070 as amended by Arizona HB 2162, §1, Intent (“the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona”), available at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

⁹ See U.S. Immigration & Customs Enforcement, Updated Facts on ICE’s 287(g) Program, Apr. 12, 2010, available at http://www.ice.gov/pi/news/factsheets/section287_g-reform.htm.

¹⁰ Pew Hispanic Center, Hispanics and Arizona’s New Immigration Law, Apr. 29, 2010, available at <http://pewresearch.org/pubs/1579/arizona-immigration-law-fact-sheet-hispanic-population-opinion-discrimination>.

¹¹ Mistaken deportations of U.S. citizens have risen in recent years with the increased strict enforcement of U.S. immigration laws by federal authorities. See, e.g., Alex Perez & B.J. Lutz, “American Citizen Faced Deportation: Despite ID and Birth Certificate, Chicago Man Detained

for Three Days,” May 24, 2010, *available at* <http://www.nbcchicago.com/news/local-beat/eduardo-caraballo-puerto-rico-deportation-94795779.html>; Marisa Taylor, “US Citizen’s Near-Deportation Not A Rarity,” January 26, 2008, McClatchy News Service, *available at* <http://www.startribune.com/nation/14456137.html>.

¹² Randal C. Archibold, Arizona’s Effort to Bolster Local Immigration Authority Divides Law Enforcement, N.Y. Times, Apr. 21, 2010, *available at* <http://www.nytimes.com/2010/04/22/us/22immig.html>.

¹³ For the purpose statement in the law, *see* Arizona SB 1070 as amended by Arizona HB 2162, Section 1, *available at* <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>; *see also* Arizona Governors’ Office, Common Myths and Facts About Senate Bill 1070, *available at* <http://azgovernor.gov/documents/BorderSecurity/SB1070MythsandFacts.pdf>.

¹⁴ *See*

http://www.azgovernor.gov/dms/upload/PR_072010_USvAZDefendantsResponsePlaintiffMotionPI.pdf.

¹⁵ *See* SB 1070 as amended by HB 2162, §2 (amending Title 11, chapter 7, Arizona Revised Statutes, to add an Article 8), *available at* <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

¹⁶ *See, e.g., Gonzales v. City of Peoria (AZ)*, 722 F.2d 468 (9th Cir. 1983) (“nothing in federal law precluded...police from enforcing the criminal provisions of the Immigration and Naturalization Act.”).

¹⁷ United States v. Arizona, No. 10-CV-01413-PHX-SRB, Defendants’ Response to Plaintiff’s Motion for Preliminary Injunction, July 20, 2010, at 8.

¹⁸ United States of America v. Arizona, No. 10-CV-01413-NVW, July 6, 2010, Plaintiff’s Motion for Preliminary Injunction and Memorandum of Law In Support Thereof, at 1.

¹⁹ Randal C. Archibold, “Arizona Seeing Signs of Flight By Immigrants,” N.Y. Times, Feb. 12, 2008; Alan Gomez, “Hispanics Flee Arizona Ahead of Immigration Law, USA Today, June 9, 2010, *available at* http://www.usatoday.com/news/nation/2010-06-08-immigration_N.htm.

Related Links

Text of Arizona Senate Bill 1070 as modified by Arizona House Bill 2162, *available at* <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>

Order, United States v. Arizona, Case No. 10-CV-01413-SRB, *available at* <http://www.scribd.com/doc/34998325/U-S-v-Arizona-Order-on-Motion-for-Preliminary-Injunction-granting-preliminary-injunction-against-SB-1070>

RAND Center on Quality Policing, Jessica Saunders, Nelson Lim, & Don Prosnitz, Enforcing Immigration Law at the State and Local Level, 2010, *available at* http://www.rand.org/pubs/occasional_papers/2010/RAND_OP273.pdf