

No. 10-16645

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA

*Plaintiff-Appellee,*

v.

STATE OF ARIZONA, and Janice K. BREWER, Governor of the State of  
Arizona, in her in her official capacity,

*Defendants-Appellants.*

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

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AMICUS BRIEF OF THE  
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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	)	States District Court for
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<i>Plaintiffs-Appellee,</i>	)	Arizona
	)	
vs.	)	
	)	
STATE OF ARIZONA; and Janice K.	)	No.: <b>No. 10-16645</b>
BREWER, Governor of the State of	)	Date: <b>09/30/10</b>
Arizona, in her official capacity.	)	
	)	D.C. No.: <b>CIV-10-1061-SRB</b>
<i>Defendants-Appellants.</i>	)	
	)	
_____	)	

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**BRIEF OF AMICUS CURIAE**  
**AMERICAN IMMIGRATION LAWYERS ASSOCIATION**

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**II. INTRODUCTION**

**NOW COMES**, *Amicus Curiae*, the American Immigration Lawyers Association (“AILA”), pursuant to Rules 29(c), 35 and 40, Fed.R.App.P., Circuit Rule 35-1, in support of the appellee, United States of America, and the decision issued by the U.S. district court for the district of Arizona issued on July 28, 2010.

**A. Statement of Amicus Curiae**

As described in the accompanying motion, *Amicus Curiae*, the AMERICAN IMMIGRATION LAWYERS ASSOCIATION (“AILA”) is a national

organization comprised of more than eight thousand (8,000) immigration lawyers and law school professors who practice and teach in the field of immigration law. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, naturalization; to promote reforms in the laws; to facilitate the administration of justice; and to elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration, nationality and naturalization matters.

AILA is committed to fair and humane administration of United States immigration laws and respect for the civil and constitutional rights of all persons. Many of AILA's constituent lawyer-members represent foreign nationals who will be significantly affected by this case. Thus, *amicus curiae* has a direct interest in this matter.

Finally, *Amicus* expresses no position as to the merits of the individual claims; *amicus'* interest lies rather with the legal issues involved.

### **III. SUMMARY OF THE CASE**

Effective July 29, 2010, Arizona Senate Bill 1070 ("SB1070"), seeks to identify and punish "illegal immigrants." SB1070 is premised upon the idea that Arizona law enforcement can catch illegal immigrants by virtue of their "illegal" status and force

their deportation because of *alleged* federal government inaction. However, "illegal immigrant" is not a cognizable status under federal immigration law and Arizona's proxies that illegal immigrants are identifiable by their unlawful presence or through commission of a removable offense is based on fundamental misconceptions about federal immigration law - both in theory and in practice. *Amicus*, the American Immigration Lawyers Association ("AILA"), writes to correct myths that underlie SB1070 and to demonstrate that, when placed in context of federal immigration law, various sections of SB1070 are unworkable.

The United States of America filed suit in the U.S. district court for the district of Arizona, and *simultaneously* moved for a preliminary injunction, to enjoin the state of Arizona from enforcing the law. After review memoranda filed by the parties, numerous *Amici* briefs, and after hearing oral argument, the district court preliminarily enjoined Arizona from enforcing sections 2(B), 3, 5(C), and 6 of the Act.

The state of Arizona timely filed this appeal to the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit").

#### **IV. ARGUMENT**

SB1070 requires police "where *reasonable suspicion* exists that the person is an *alien* who is *unlawfully present* in the United States, [to make] a reasonable attempt shall, when practicable, to

determine the immigration status of the person.” SB1070, Section 2, as amended by Arizona HB 2162, Section 3, adding new Arizona Revised Statute (“A.R.S.”) § 11-1051(B) (emphasis added). Detention is required until the immigration status of the person is verified. *Id.* The statute provides that an officer may make a warrantless arrest if he or she has probable cause to believe that an individual has “committed any public offense that makes the person *removable* from the United States.” SB1070, Section 6, adding new A.R.S. § 13-3883(A)(5). (emphasis added). The emphasis on using unlawful presence and removable offenses as the law enforcement tool is unworkable. The purpose of the statute is equally misguided.

**A. Section 2, SB 1070, conflicts with and is inapposite to Congress’ express intent as expressed by the existing legislative scheme.**

**(A) (1).** It is well-settled that Congress has *exclusive*, plenary power over immigration matters. See U.S. Const. art. I, § 8, cl. 4 (naturalization); U.S. Const. art. I, § 8, cl. 3 (foreign commerce). Because immigration deals with foreign commerce and political matters, it is an area which exclusively relegated to Congress. Moreover, the “[p]ower to regulate immigration is unquestionably exclusively a federal power.” *De Canas v. Bica*, 424 U.S. 351, 354 (1976). Section 2, SB1070, conflicts with Congress’ own legislative scheme regulating immigration.

First, there are no *apparent* identifiable characteristics of "unlawful presence" that allow the law to be enforced in a constitutional manner. The term "unlawfully present" as used in SB1070 conflicts with the federal meaning of "unlawful presence." SB1070 fails to provide any definition of the critical terms "reasonable suspicion," "unlawfully present," or "alien." Moreover, SB1070's reliance on a statutory list of documents which purport to provide a presumption against unlawful presence, is misplaced insofar as the list is incomplete and inadequate when compared to federal immigration law.

SB1070 is premised on the idea that police officers can easily identify alienage in an ordinary, police contact. This is an erroneous premise. U.S. citizenship is not a characteristic apparent to the eye or dependent upon a person's *appearance* insofar as it is a *legal* determination. U.S. citizens are not required to carry proof of their citizenship while inside of the United States. Therefore, it is unlikely that in a routine encounter with law enforcement a U.S. citizen will possess a birth certificate, U.S. passport, naturalization certificate, or certificate of citizenship demonstrating citizenship.

Moreover, alienage determinations are complex because they are *inherently legal* rather than factual determinations. Congress has constitutional power over nationality law which determines whether a foreign-born person is a U.S. citizen and "[c]itizenship law is

probably the area of law where statutes remain relevant the longest, because even the most ancient and long-repealed statutes can still apply in a current case." Mautino, *Acquisition of Citizenship*, Immigration Briefings (April 1990). Similarly, U.S. treaties and international covenants - which change over time - are often dispositive as to a person's citizenship status. See, e.g., *Sabangan v. Powell*, 375 F. 3d 818 (9th Cir. 2004) (person born in Commonwealth of Northern Mariana Islands (CNMI) after January 9, 1978 is a U.S. citizen by virtue of covenant between U.S. and CNMI).

Birth in the United States certainly is a clear indicator that a person is not an alien. See U.S. Const. amend. XIV, § 1. But foreign-birth is not a certain indicator of alienage. Acquisition of citizenship at birth depends on numerous factors, such as the parents' respective citizenship (8 U.S.C. § 1401(c)-(e), (g)-(h)); the duration and timing of their residence in the United States (§ 1401(d)-(e), (g)-(h)); their marital status at the time of the individual's birth (§ 1409); the year in which the person was born (§ 1401(h)); the place where the person was born (§ 1401(c)-(e), (g)-(h)); and in some situations, even the date on which a child born out of wedlock was legitimated (§ 1409) - none of which can be ascertained or observed by police in any contact or that could give rise, constitutionally, to any suspicion of alienage. See generally, 8 U.S.C. § 1401(c)-(h) (establishing conditions under

which children born in-wedlock outside of the United States acquire U.S. citizenship at birth) and § 1409 (establishing conditions under which children born out-of-wedlock outside of the United States acquire U.S. citizenship at birth). Hence, persons born outside of the United States, may still be U.S. citizens. *Id.*

Anyone can assert U.S. citizenship, and a law enforcement officer may be hard-pressed to identify a legitimate reason why such an assertion is untrue. Race, ethnic appearance, and language are not reliable indicators of alienage. *See, e.g., United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (*en banc*) ("The likelihood that in an area in which the majority - or even a substantial part - of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus."), *cert. denied*, 531 U.S. 889 (2000); *United States v. Manzo-Jurado*, 457 F.3d 928, 932 (9th Cir. 2006) (ruling that individuals' appearance as a Hispanic work crew, inability to speak English, proximity to the border, and unsuspecting behavior did not establish reasonable suspicion of illegal presence).

The citizenship question is further obscured because some individuals may not possess any documentation establishing their U.S. citizenship (because none is required). Foreign-birth is not dispositive on the question of alienage and it is an inappropriate

factor for Arizona police to utilize. For example, a foreign-born child *automatically derives* U.S. citizenship if a parent naturalizes before the child reaches the age of 18, and certain other conditions are met. See 8 U.S.C. § 1431(a). Yet, that individual may not possess a certificate of citizenship, a U.S. passport, or other document as evidence of his status. Indeed, he may not realize he is, in fact, a U.S. citizen. See, e.g., *United States v. Smith-Baltiher*, 424 F.3d 913, 920-21 (9th Cir. 2005) (rejecting government's claim in an illegal reentry case that an individual could not assert derivative citizenship status because, *inter alia*, he did not have a certificate of citizenship). Likewise, an individual may automatically acquire U.S. citizenship through birth abroad to a U.S. citizen parent, and may not know that he is a U.S. citizen or may not possess citizenship documentation. See 8 U.S.C. §§ 1401, 1409 (setting out various conditions whereupon individuals may acquire U.S. citizenship at birth). See also 8 U.S.C. § 1431(b) (setting forth conditions whereupon adopted alien children acquire U.S. citizenship automatically).

**(A) (2).** SB1070's reliance on "unlawfully present" as an actionable event cannot be lawfully implemented because it lacks discernable meaning and conflicts with the federal immigration statute. Compare Arizona SB1070, with 8 U.S.C. §§ 1182(a)(9)(B)-(C). Federal immigration law provides no general

definition of the terms "unlawfully present" or "unlawful presence." The term "unlawful presence" in federal immigration law is partly defined by statute and partly left to the immigration agencies to define. See Donald Neufeld, Lori Scialabba, and Pearl Chang, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I)* (May 6, 2009) available at [http://www.uscis.gov/files/nativedocuments/revision\\_redesign\\_AFM.PDF](http://www.uscis.gov/files/nativedocuments/revision_redesign_AFM.PDF). SB1070's use of the term is misaligned with the federal design. Under federal law, unlawful presence is an inadmissibility ground that Congress intended to apply in limited circumstances. See 8 U.S.C. §§ 1182(a)(9)(B), (C). The unlawful presence grounds of inadmissibility apply only to certain aliens who were unlawfully present in the United States for more than 180 days, and who depart, or are ordered removed from the United States and, then again seek admission to the United States. 8 U.S.C. §§ 1182(a)(9)(B), (C).

Significantly, federal immigration law expressly exempts certain individuals from the unlawful presence scheme including children under the age of 18; certain asylum applicants; beneficiaries protected under the family unity program established by § 301 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), and set out in 8 C.F.R. §§ 236.10-236.18; and certain victims of domestic abuse and human trafficking. Unlawful

presence may also be tolled for individuals who file nonfrivolous applications for a change or extension of status and who meet certain other conditions. 8 U.S.C. § 1182(a)(9)(B)(iv). Arizona's use of the same term without definition is particularly problematic and unhelpful.

"Unlawful presence" is not synonymous with "illegal immigrant" or even "unlawful immigration status." Indeed, the latter two terms are nowhere defined or found within the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq.* As an actionable event under Arizona law, there is simply no unbiased means of implementing the term "unlawful presence," because as a *legal* status there are no observable characteristics of "unlawful presence," or readily available means by which a police officer could discern "unlawful presence" in any stop, detention, or investigative encounter.

**(A) (3).** Section 2, SB1070, as amended, provides a list of documents that *purportedly* demonstrate "lawful presence." See SB1070, § 2, as amended; A.R.S. § 1-502. This list is inadequate to give meaning to "unlawful presence" when measured against the federal rules. The failure to possess any of these documents does not signify a person lacks authorized immigration status, or is deportable even if his status has expired or has been revoked. There are many examples of such situations.

A lawful permanent resident with an expired or old "green card" remains a lawful permanent resident, and is not deportable. See, e.g., 8 U.S.C. § 1227 (listing classes of deportable aliens, and not including a ground for permanent residents without a valid green card); see also 72 Fed. Reg. 46922 (Aug. 22, 2007) (proposed rule, not promulgated, providing an application process for replacing certain old alien registration cards, and terminating the validity of the old cards, but not terminating the lawful status of permanent residents who possess the old cards), and USCIS Press Release of December 13, 2007 ("This proposed rule in no way affects the current validity of these permanent resident cards. Permanent residents who possess these cards may continue to use them as proof of permanent residency when traveling, when seeking employment, and at any time such proof is required."), available at [http://www.uscis.gov/files/pressrelease/I551Update\\_13dec07.pdf](http://www.uscis.gov/files/pressrelease/I551Update_13dec07.pdf). Noncitizens who immediately qualify to adjust status to become lawful permanent residents, but who have not yet done so, are generally not deportable. See generally 8 C.F.R. § 1245.2 (providing immigration judges with jurisdiction over adjustment of status applications in removal proceedings).

Other noncitizens in unique situations are not "unlawfully present" despite their lack of documentation. Asylum applicants, or individuals with non-frivolous claims for asylum that are not yet filed, cannot be deported until and unless their claims are

adjudicated and a final administrative removal order exists. 8 U.S.C. §§ 1158 (establishing bases for asylum and procedures), 1187(b) (providing for review of asylum claims for people admitted to the United States through the Visa Waiver Program), 1225 (providing for review of asylum claims to applicants for admission to the United States), and 1231 (establishing removal procedures for people with final administrative removal orders). Noncitizens who qualify for cancellation of removal or temporary protected status are not deportable. 8 U.S.C. § 1229b (cancellation of removal), and § 1254a (temporary protected status). Even noncitizens with final removal orders may not be deported, for example, if they qualify for certain relief due to the risk of persecution in their home country, or if the government is unable to effectuate deportation or declines to enforce deportation for humanitarian reasons. 8 U.S.C. § 1231(b)(3) (withholding of removal) and § 1231(a)(7) (allowing employment authorization for certain aliens with final removal orders). Section 2, SB1070, is ignorant to these realities.

**B. Section 6, SB 1070, attempts to create a "mirrored" scheme of immigration enforcement for which State officials have no expertise, and which the field of immigration law is substantially complex requiring special trained immigration judges.**

Section 6, SB10780 expands the circumstances under which Arizona law enforcement officers may make a warrantless arrest by amending the state criminal laws. Section 6 permits the arrest of any individual an officer has probable cause to believe "has committed any public offense that makes the person removable from the United States." Moreover, the amended criminal statute has no requirement that an officer act in coordination with the DHS to *confirm* removability. See Ariz. Rev. Stat. § 13-3883; Compare with 8 U.S.C. § 1252c (requiring coordination with DHS).

Enforcement of Section 6, SB1070 is impractical because whether an offense makes a noncitizen removable is often not clear and often takes years of complex litigation to determine. See e.g., *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); A.R.S. § 13-3883(A)(5). The criminal offenses that may render a person removable are defined by federal law where state labels familiar to peace officers are irrelevant. *Id.* Whether an offense makes a noncitizen removable depends upon a complicated analysis of noncitizen's personal history, criminal and immigration history, a legal analysis of the elements of the offense, the record of conviction, the facts of the offense, the potential sentence, the sentence imposed, and even the immigration history of the noncitizen's family. *Id.*

None of these factors are amenable to police officer probable cause inquiries. It is a *legal* determination, not a factual

determination. This legal determination “can often be simply too complex for a state or local law enforcement officer acting without a warrant to make promptly and accurately.” See Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support, Declaration of Bo Cooper (Doc. No. 235-3) at 6, ¶ 11.

There is ambiguity in the contours of federal immigration law on the question of what state law offenses might make an individual removable. Under federal immigration law an individual might be removable for having been convicted of a crime involving moral turpitude (“CIMT”), an “aggravated felony” (listing more than 21 different types of aggravated felonies), a controlled substance offense, a firearms offense, a prostitution-related offense, or a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment. See 8 U.S.C. § 1227(a)(2).

The depth of analysis required to determine whether a state law offense triggers removal consequences underscores the impracticability of SB1070. There is no universal “list” of crimes; indeed, it is always a case-by-case analysis. The first step in this process is the traditional categorical analysis of the elements of the statute. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007). The adjudicator must determine whether there is a “realistic probability” that the statute reaches conduct that does or does not trigger a ground of removability. *Id.* at 193. If the statute enumerates some violations which trigger removability and

others that do not, the adjudicator may examine the limited “record of conviction,” including the indictment, the judgment of conviction, jury instructions, signed plea statements, and the plea colloquy, to determine whether the non-citizen was convicted under the portion of the statute that would trigger removability. *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 697 (Att’y Gen. 2008). A police officer is unlikely to have the necessary legal expertise to quickly determine if an alien is removable, or have documents readily available for inspection during any investigative encounter for the same.

For example, a state law offense may be considered a CIMT if it is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Silva-Trevino*, 24 I. & N. Dec. at 705 (internal citations and quotations omitted). As applied to common state law offenses, such as driving under the influence, this standard has provided little or no clarity and there are often inconsistent results reached by adjudicators with respect to Arizona law. Compare *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (multiple DUIs is not a CIMT) with *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 1999) (aggravated DUI is a CIMT). The Ninth Circuit later rejected the Board’s CIMT finding in *Lopez-Meza*. See *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003). Similarly, assault offenses may and may not involve

moral turpitude. *Compare Matter of Solon*, 24 I. & N. Dec. 239 (BIA 2007) (New York's third degree assault offense involves moral turpitude) *with Matter of Sejas*, 24 I. & N. Dec. 236 (BIA 2007) (Virginia's domestic assault and battery statute does not involve moral turpitude).

Not only does federal immigration law include distinct definitions for removable offenses that bear no particular resemblance to state offenses, federal law also incorporates provisions of other federal statutes unfamiliar to local police. Some assault offenses may be removable offenses if they are aggravated felony "crimes of violence" or if they are "crimes of domestic violence" as defined in 18 U.S.C. § 16, 8 U.S.C. §§ 1101(a)(43)(F), and 1227(a)(2)(E) (referencing 18 U.S.C. § 16 for definitions of these terms). In addition, as in the CIMT context, crimes of violence are not obvious in every case. Some convictions for assault and battery are crimes of violence and others are not. *Compare Matter of Sanudo*, 23 I. & N. Dec. 968, 973-75 (BIA 2006) (California domestic battery is not a crime of violence) *with Matter of Martin*, 24 I. & N. Dec. 491 (BIA 2002) (Connecticut third degree assault is a crime of violence). Even the concept of a "drug trafficking crime" is a hazard of legal analysis. See *Carachuri-Rosendo*, 130 S. Ct. 2581 (characterizing the immigration definition of a drug trafficking crime as a "maze of statutory cross-references"). Facts or the actual conduct of an individual -

the stock and trade of police work - is not truly relevant in determining removability because it is almost always a *legal* determination. Even in cases where facts matter, they matter only *after* conviction and only when contained in the criminal record of proceedings. See *Nijhawan v. Holder*, 29 S. Ct. 2294, 2300-01 (2009).

Section 6 is problematic because it permits a warrantless arrest if the peace officer has probable cause to believe that an individual has "committed" a removable offense. Under federal law, removability is usually determined *after* a conviction, not when committed. For most offenses to qualify as "removable" offenses, there must first be a conviction. For example, all of the offenses in 8 U.S.C. § 1227(a)(2), including aggravated felonies and firearms offenses, require a conviction. If there is *no* conviction, there is *no* removable offense. Even for removal grounds that do not require a conviction, such as those listed in 8 U.S.C. § 1182(a)(2), it would be premature to decide whether a noncitizen is removable until the conclusion of the underlying criminal proceeding. This is because a dismissal of a criminal charge or a conviction to a reduced charge is generally dispositive of whether the noncitizen is removable. See *Matter of Arreguin de Rodriguez*, 21 I. & N. Dec. 38 (BIA 1995).

Like the legal nature of the offense, an individual's personal history is not readily ascertainable by a police officer in a

probable cause inquiry and would require analysis of records and information beyond the reach of most police officers. Whether a noncitizen is "admitted" to the U.S. is also relevant to the removability inquiry. Congress enacted specific policy determinations that "aggravated felony," crimes of domestic violence, and firearm convictions predating a noncitizen's admission are not removable offenses. Compare 8 U.S.C. § 1182(a)(2) (not including these offenses as grounds of inadmissibility) with § 1227(a)(2) (listing offenses as grounds to remove alien who has been "admitted").

Whether a particular crime involving moral turpitude will trigger removal depends on whether the non-citizen was "admitted" or is considered to be seeking admission. A single conviction for a crime involving moral turpitude with a maximum sentence of one (1) year or less, and which results in a term of imprisonment of six (6) months or less, will *not* result in a non-citizen's removability if he entered the U.S. without inspection or is seeking admission. 8 U.S.C. § 1182(a)(2)(A)(ii)(II); cf. 8 U.S.C. § 1227(a)(2)(A)(i). Removal liability will *not* attach if a conviction for a crime involving moral turpitude occurs more than five (5) years after a noncitizen's admission. 8 U.S.C. § 1227(a)(2)(A)(i)(I).

The technical, code-driven state of immigration law is difficult to overstate. "With only a small degree of hyperbole,

the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.' A lawyer is often the only person who could thread the labyrinth." *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988). In the complex enforcement system devised by Congress, multiple agencies and the federal courts share responsibility for making legal and discretionary determinations concerning a noncitizen's removability.

The immigration laws are not just about enforcement. Equally important are the goals of keeping families together, protecting noncitizens from persecution in their home countries, and giving deserving noncitizens a second chance. See, e.g., *Matter of Lashkevich*, 12 I. & N. Dec. 22, 26 (BIA 1966) ("The plain congressional purpose in providing preferential status for entry of immigrants closely related to American citizens was to facilitate and foster the maintenance of families, such as here involved"). Section 6 interferes with this delicate balance by competing with the nation's immigration laws, and prevents the Congressionally-charged agencies from balancing those goals and the reality that not every noncitizen can or should be removed.

The police officer confronted with a noncitizen who may have committed a removable offense will have to consult with the agencies with the most expertise in the removal process. The process starts with U.S. Immigration and Customs Enforcement ("ICE"), which is responsible for initiating removal proceedings if

it believes that a noncitizen is amenable to removal proceedings. ICE can exercise prosecutorial discretion in this decision-making process and chose *not* to remove an alien. ICE does not make the final determination, so its advice to the police officer can only be characterized as a "preliminary" opinion.

Next, Immigration Judges ("IJ") make findings of fact and decide whether a noncitizen is removable and, if so, is eligible for relief from removal. Immigration Courts received 391,829 new matters during the 2009 fiscal year; it is unreasonable to expect that it can efficiently and effectively respond to every inquiry about whether a noncitizen is removable. See <http://www.justice.gov/eoir/statspub/fy09syb.pdf> at page B2 (last visited September 21, 2010). Of the cases decided during the 2009 fiscal year, nearly 20 percent resulted in decisions favorable to the noncitizen. *Id.* at page D2. It would be improper for a judge to comment on the removability of a potential litigant before hearing both sides of the matter. It would also be impractical given the crushing workload facing Ijs. In Arizona, removal proceedings take an average of 346 days to complete, with even longer delays for noncitizens not in state prison. See [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (last visited September 21, 2010).

Both the noncitizen and ICE have the right to appeal an unfavorable IJ decision. The process moves to the administrative

appellate court, the Board of Immigration Appeals ("BIA") and then on to the federal courts. In many instances, whether an offense triggers potential removability depends upon the sentence imposed; for example, certain convictions do not render a non-citizen inadmissible if the sentence is less than six (6) months. See 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Crimes of violence and theft offenses are not aggravated felonies unless the resulting term of imprisonment is at least one (1) year. 8 U.S.C. §§ 1101(a)(43)(F), (G). Other grounds of removability require convictions under specific sections of law. 8 U.S.C. § 1227(a)(3)(B).

The complexity of the law to be applied in the hyper-technical field of immigration law is demonstrated by the explosion in federal court litigation on immigration questions. In fiscal year 2009, circuit courts received 8,890 new petitions for review challenging BIA decisions. U.S. Courts, Judicial Business, 9 (2009) available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/front/MarJudBus2009.pdf>. By the time the circuit court renders a decision, the entire removal process could take four or more years. See *Alvarez-Reynaga v. Holder*, 596 F.3d 534 (9th Cir. 2010) (conviction for receipt of stolen property is not a CIMT, proceedings pending for four years); *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010) (indecent exposure not a CIMT, proceedings pending for seven years). For the 2009 calendar year, the Circuit Courts

of Appeals reversed the BIA in about 11 percent of the time, including slightly more than 17 percent in the Ninth Circuit. See <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202010/vol4no1.pdf> at page 4 (last visited September 21, 2010). A police officer cannot form probable cause as to the immigration consequences of criminal conduct until the completion of judicial review.

A police officer, especially one untrained in the ever-changing intricacies of this complex field, will simply lack the relevant facts to make a probable cause determination. The determination of removability is a lengthy, complex process involving the noncitizen's immigration history, criminal history, family history, and other positive equities. See e.g., *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978) (discussing numerous factors to be considered in weighing whether an alien is ultimately removed).

Moreover, the district court correctly enjoined Section 6 in its entirety because there is no provision which can be enforced in a constitutional manner. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Although defendants claim that section 6 can be implemented in a constitutional manner, pointing to 8 U.S.C. § 1252c which permits the arrest and detention of an alien who has been previously convicted of a felony offense and been deported from the United States, that section *specifically* requires such

arrest and detention "only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual" and only for the limited purpose and "period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States." Section 6 does not have any restriction upon the State's ability to arrest and detain, and thus is in direct conflict with 8 U.S.C. § 1252c. Additionally, only the federal government is authorized to reinstate a prior removal order pursuant to 8 U.S.C. § 1231(a)(5). See e.g., *Morales-Izquierdo v. Gonzales*, 423 F.3d 1118 (9th Cir. 2005). Hence, the district court's decision was correct to enjoin section 6, SB 1070, in its entirety.

Additionally, while there exists a presumption that Arizona law enforcement officers will "act in obedience to [their] duty," the United States has rebutted this presumption when the statute the officer is tasked with obeying is unconstitutional on its face and cannot be implemented or enforced in a permissible manner. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 446 (1935) ("Every public officer is presumed to act in obedience to his duty, until the contrary is shown . . ."); *United States v. Booker*, 543 U.S. 220, 279-80 (2005).

**C. Concurrent enforcement of the immigration laws is disfavored insofar as Congressional intent has created a single-scheme of Federal enforcement which is already operating and in place.**

Attrition through enforcement - so says the opening section of SB1070 - is now the policy of Arizona. See SB1070, § 1. The Arizona law pre-supposes that the federal government needs additional help from Arizona to detect immigration violators or that the federal government has abandoned its enforcement efforts altogether. See Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, NY Times, April 24, 2010, at A1 (quoting the Arizona governor explaining that the bill "represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix."). Proponents also submit that the Arizona law "mirrors" federal law. Both suppositions are wrong. The Arizona law is, in fact, at cross-purposes with the enforcement efforts of the federal government and its implementation will be disruptive.

In its fullest form, attrition through enforcement is about creating a climate of fear and squeezing individuals until they "self-deport". See Kristi Keck, *Will others follow Arizona's lead on immigration?* Apr. 21, 2010, CNN, <http://www.cnn.com/2010/POLITICS/04/21/arizona.immigration.bill/index.html>. It is a misguided policy. See Jeffrey Kaye, *Re-Living*

*Our Immigrant Past: From Hazelton to Arizona and Back Again*, Immigration Policy Center (Immigration Perspectives Series) May 2010 available at <http://www.immigrationpolicy.org> (explaining from a historical view the failure of similar policies). Importantly, here, attrition through enforcement, as embodied in SB1070, will actually *frustrate* enforcement of federal immigration law.

First, the federal government *is* active in its enforcement of immigration laws based on its own priorities viewed at a national, regional, and state level. For example, the federal government has created a series of initiatives called the "ICE ACCESS Programs" which are intended to provide tools for use by the federal government and localities in enforcing immigration law. The federal government has focused its efforts under three (3) particular programs: the Criminal Alien Program, the Secure Communities Program, and the § 287(g) program. See U.S. Immigration and Customs Enforcement, *Programs: Office of State and Local Enforcement*, available at <http://www.ice.gov/oslc/iceaccess.htm> (last visited June 15, 2010).

The Criminal Alien Program ("CAP") screens local, state and federal jails to identify noncitizens. Once identified, the federal government generally lodges a "detainer" or hold on that individual so that when local jurisdiction ends, the federal government is notified. See 8 U.S.C. § 1357(d) and 8 C.F.R. § 287.7 (providing for immigration detainers on certain aliens in federal, state, or

local custody). This program is responsible for the largest number of noncitizen apprehensions. See Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, Immigration Policy Center (Special Reports) February 2010 at 6 available at <http://www.immigrationpolicy.org>. The § 287(g) program, authorized by § 287(g) of the Act, 8 U.S.C. § 1357(g), permits the federal government to delegate authority to enforce immigration laws to state and local law enforcement agencies. 8 U.S.C. § 1357(g). The terms of the agreements vary, as do the breadth of the authority delegated to the state and local law enforcement agencies. Importantly, every actor under this regime is under the “direction and supervision of the Attorney General.” 8 U.S.C. § 1357(g)(2). As of April 2010, the federal government has “§ 287(g)-agreements” with 67 law enforcement agencies in 24 states. See Immigration Policy Center, *Local Enforcement of Immigration Laws Through the 287(g) Program*, April 2, 2010 (Just The Facts Series) available at <http://www.immigrationpolicy.org>. Thus, when a state wishes to engage in immigration enforcement under the § 287(g) program, it must do so under the “direction and supervision” of federal officials implementing federal goals and priorities.

The Secure Communities Program, implemented in 2008, uses biometric technology to identify noncitizens when arrested by local officials. See U.S. Immigration and Customs Enforcement, *Programs:*

*Office of State and Local Enforcement*, April 13, 2010, available at <<http://www.ice.gov/oslc/iceaccess.htm>>. This program is rapidly expanding and the current administration's goal is to make Secure Communities available to every law-enforcement agency by 2013. *Id.*

There are numerous other federal mechanisms at work on the enforcement side of immigration law such as the E-Verify program (information available at <http://www.uscis.gov/> under "News"), the Social Security No-Match program (see, e.g., 74 Fed. Reg. 51447 (October 7, 2009) (amending the final "No-Match" rule)), and the tracking of foreign students through the Student and Exchange Visitor Program (information available at <http://www.ice.gov/sevis/index.htm>)

By no means is this an endorsement of the federal government's ICE ACCESS programs. AILA is highly critical of them and their implementation. See, e.g., AILA, *DHS Inspector General Report Exposes Abuses in State & Local Immigration Enforcement*, AILA InfoNet Doc. No. 10040238, April 1, 2010, available at <http://www.aila.org/content/default.aspx?docid=31684> (calling for end of § 287(g) program); Trevor Gardner & Aarti Kohli, *The Cap Effect: Racial Profiling in the ICE Criminal Alien Program*, August 2009, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity at the University of California, Berkley Law School (describing biased-based enforcement of Criminal Alien Program); Rights Working Group & ACLU, *The Persistence of Racial and Ethnic*

*Profiling in the United States*, AILA InfoNet Doc. No. 09102169, August 2009 at 24-29, available at <<http://www.aila.org/content/default.aspx?docid=30363>> (describing racial profiling through § 287(g) programs and ICE ACCESS). However, these programs are evidence that the federal government is active in the enforcement of federal objections. If the federal government's own agents cannot fairly and constitutionally enforce immigration law, it is unlikely that untrained police will actively engage in wholly unbiased policies.

Second, the difficulty inherent in policing immigration law cannot - by its nature - be implemented in a sound manner under SB1070. Arizona in similar form has tried this approach before with no good results. For instance in Maricopa County, Sheriff Joseph M. Arpaio heavily focuses on immigration violators. See Immigration Policy Center, *Q&A Guide to Arizona's New Immigration Law: What You Need to Know About the New Law and How It Can Impact Your State*, June 2010 at 8 (Special Report series) available at <http://www.immigrationpolicy.org>. The end result is that Sheriff Arpaio has diverted his department's resources to immigration enforcement, response times to 911 calls have increased, arrest rates have dropped, and thousands of felony warrants have not been served. *Id.*

Simply put, the premise that Arizona law "mirrors" federal law and thus, concurrent legislation is permissible or even warranted,

is erroneous. The Arizona law permits self-regulation of federal immigration priorities by the state itself, without, the "direction and supervision" of the federal government. Because, Congress has plenary power over immigration, the state law oversteps its bounds.

**V. CONCLUSION**

For the foregoing reasons, the decision of the district court should be affirmed. AILA, like many of Arizonans, is frustrated over the failure of the federal government to fix our broken immigration system. However, the Arizona law presents an unworkable and unlawful response to this frustration. It ought be enjoined as it cannot be implemented in a fair and constitutional manner.

Respectfully submitted,

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**VI. STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28-2.6(a), undersigned counsel for *Amicus* knows of no other Circuit case which has been designated as related to the instant case, or which presents the same or similar legal issues raised in this case in the same factual or legal context.

**VII. CERTIFICATE OF COMPLIANCE**

Pursuant to Circuit Rule 32(a)(7)(B), (C), Counsel for Petitioner states as follows:

I, do, hereby certify that the preceding brief on behalf of Petitioner complies with the type-volume limitation inasmuch as it is

\_\_\_\_\_ Proportionately spaced in the font of Times New Roman, has a typeface of fourteen (14) points or more, does not exceed fifteen (15) pages, and contains \_\_\_\_\_ words, or is

  X   Monospaced, has 10.5 or less characters per inch;

  X   Contains no more than 7,000 words or

  X   Contains no more than 6,50 lines of text.

  X   Contains 5,841 words and 638 lines of text.

I, Vikram K. Badrinath, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed at Tucson, Arizona on September 30, 2010.

Respectfully submitted,

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