

# Arizona's Immigration Laws: Where Do We Go From Here?

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On April 23, 2010, the governor of Arizona, Janice K. Brewer, signed the Support Our Law Enforcement and Safe Neighborhoods Act, Arizona Revised Statute § 11-1051(B) (S. 1070) into law. The bill sparked a firestorm of media attention and a flurry of lawsuits. It also reignited the debate, stalled by the country's economic downturn, about the federal immigration system.

## Senate Bill 1070

S. 1070 constructs a web of immigration policies designed to accomplish Arizona's goal of "attrition through enforcement." Among its many provisions, not all of which will be discussed in this article, S. 1070, § 2 requires law enforcement officers to complete immigration status checks during any lawful stop, detention, or arrest where reasonable suspicion exists that the person is unlawfully present in the United States. The law further requires law enforcement officers to verify the immigration status of all persons who are arrested prior to their release from custody. Section 3 imposes state criminal penalties on legal immigrants for failure to carry their immigration documents with them at all times or failure to comply with federal alien registration laws. Section 5 makes it a criminal offense "for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state."

On July 28, 2010, the day before S. 1070 was set to take effect, Judge Susan R. Bolton, U.S. District Court for the District of Arizona, issued a preliminary injunction blocking some of the more controversial aspects of S. 1070 from going into effect. *United States v. Arizona*, No. CV 10-1413-PHX-SRB, 2010 U.S. Dist. LEXIS 75558, \*5-6 (D. Ariz. July 28, 2010). (The Ninth Circuit will hear oral arguments on the state of Arizona's appeal of Judge Bolton's opinion during the first week of November 2010.) Specifically, Judge Bolton blocked the following portions of S. 1070:

- the portion of § 2 that requires officers to determine the immigration status of persons stopped, detained, or arrested;
- all of § 3, which imposes state criminal penalties on legal immigrants for failure to carry alien registration papers; and

- the portion of § 5 that imposes criminal penalties on immigrants who solicit work without lawful authorization.

*Id.* at \*10-11. Judge Bolton did not block, among other provisions, the portion of § 2 that prohibits Arizona officials, agencies, and political subdivisions from limiting the enforcement of federal immigration laws and also authorizes private citizens to file suit to enforce that provision. She also allowed the portions of S. 1070 that amended and added additional criminal penalties under Arizona's current human smuggling and employer sanctions laws to take effect. *Id.* at \*8-10.

## Patchwork Immigration Policies

The United States argued before Judge Bolton that "[t]he Constitution and federal law do not permit the development of a patchwork of state and local immigration policies throughout the country." Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support Thereof, *United States v. Arizona*, 2010 U.S. Dist. LEXIS 75558 at \*1 (D. Ariz. July 28, 2010). The United States recognized that states may adopt regulations that have an indirect or incidental effect on aliens but emphasized that "a state may *not* establish its own immigration policy or enforce state laws in a manner that interferes with federal immigration law." *Id.*

Judge Bolton's limited preliminary injunction is far from a victory for the United States on the issue of patchwork state and local immigration policies. Of marked significance was Bolton's refusal to enjoin the overall policy statement contained in S. 1070 making "attrition through enforcement" the public policy of the state and local government agencies of Arizona. Judge Bolton held that the court could not "enjoin a purpose." *Arizona*, 2010 U.S. Dist. LEXIS 75558 at \*27. That purpose, however, has the effect of pushing immigrants out of Arizona—into other states more often than not—rather than into the immigrants' home countries. Furthermore, the effective portions of S. 1070, coupled with Arizona's prior enactments related to immigration, subject all immigrants, whether they are in the country lawfully or otherwise, to intense scrutiny in Arizona. The result is a disparate treatment of immigrants inside and outside the state of Arizona that conflicts with

the federal policy of “not treating aliens as a thing apart.” *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941).

Other states are jumping onboard Arizona’s freight train. At least five other states have pending legislation that mirrors parts of S. 1070. South Carolina’s S. 1446, Pennsylvania’s H.R. 2479, Minnesota’s H.R. 3830, Rhode Island’s H.R. 8142, and Michigan’s S. 1388 all would require law enforcement officers to verify the immigration status of a person during a lawful stop, detention, or arrest if there is reasonable suspicion that the person is unlawfully present in the United States. With the exception of South Carolina’s proposed legislation, all the proposed state bills would also impose criminal penalties on immigrants for failure to carry their immigration documents with them at all times. Multiple other states are at various stages in considering legislation similar to Arizona’s S. 1070. Many of these states have put legislative action on hold in anticipation of the outcome of legal challenges to Arizona’s law. If more states pass legislation dealing with immigration, the disconnect between federal and state enforcement of immigration laws will increase, causing confusion and injustice to aliens—both those who are here legally and those who are not.

Federal court rulings generally hold that enforcement of immigration laws and regulations is the sole responsibility of the federal government. For example, as recently as Sept. 9, 2010, the Third Circuit Court of Appeals unanimously agreed that two ordinances regulating immigration (employing unauthorized aliens and renting to unauthorized aliens) that were in effect in Hazelton, Pa., are preempted by the federal immigration scheme. *Lozano v. City of Hazelton* (No. 07-3531 (3d Cir. Sept. 9, 2010)).

The opinion’s conclusion on the employer provision, however, conflicts with the Ninth Circuit’s opinion in *Chamber of Commerce of the United States v. Candelaria*, 544 F.3d 976 (2010), which has been granted certiorari by the U.S. Supreme Court. *Candelaria* involves the Legal Arizona Workers Act, Ariz. Rev. Stat. Ann. § 23-211 et seq., that sanctions employers for knowingly or intentionally employing “unauthorized aliens.”

### Where Do We Go From Here?

To answer the question of where to go from here, it is important to understand the driving forces behind this surge in patchwork immigration policies. Both defenders and opponents of Arizona’s S. 1070 agree, to an extent, that the federal government’s failure to address immigration issues led to the introduction and passage of Arizona’s bill. After passing S. 1070, the Arizona State Senate issued a press release declaring the following: “Amid growing frustration that federal laws aren’t being enforced against illegal aliens and the crimes they commit, the Arizona Senate has passed a tough new bill sponsored by Senator Russell Pearce of Mesa.” News Release, Arizona State Senate, Arizona Leads the Way in Cracking Down on Illegal Immigration (April 20, 2010), available at [www.azleg.gov/FormatDocument.asp?inDoc=/press/Senate/49leg/2R/04%5F21%5F10%5F%5FSEN+%5FPEARCE%5FSB1070%5FPRESS%5FRELEASE%2E.DOC.htm](http://www.azleg.gov/FormatDocument.asp?inDoc=/press/Senate/49leg/2R/04%5F21%5F10%5F%5FSEN+%5FPEARCE%5FSB1070%5FPRESS%5FRELEASE%2E.DOC.htm) (last visited Sept. 17, 2010).

Similarly, upon signing S. 1070, Governor Brewer stated, “The bill I’m about to sign into law—S. 1070—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. ... [t]he crisis caused by illegal immigration and Arizona’s porous border.” Statement by Governor Jan Brewer (Aug. 23, 2010).

President Barack Obama, speaking at a naturalization ceremony for 24 active-duty service members in the White House Rose Garden, called for a federal overhaul of immigration laws in order to avoid having other states follow Arizona’s path. Randal Archibald, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES at A1 (April 24, 2010). On the surface, the solution seems clear: move forward with immigration reform at the federal level. Yet such a solution is far from simple, and recent efforts have failed to gain any traction. The ideological divide on how to approach immigration reform is an ever-widening chasm, and the extremes on both sides of the divide are polarizing.

On one side of the divide rests the zealous cry for border security. Arizona’s Sen. John McCain and Sen. Jon Kyl advocate “securing the border” before tackling any significant federal immigration reform. On April 19, 2010, both senators introduced their Ten-Point Border Security Action Plan, which aims to “combat illegal immigration, drug and alien smuggling, and violent activity along the southwest border.” Sen. Jon Kyl, Press Release, *McCain, Kyl Announce Border Security Plan* (April 19, 2010) available at [www.kyl.senate.gov/record.cfm?id=323944](http://www.kyl.senate.gov/record.cfm?id=323944) (last visited Sept. 17, 2010). The plan calls for, among other things, the immediate deployment of 3,000 National Guard troops along the border between Arizona and Mexico and the completion of 700 miles of fencing along Arizona’s border with Mexico. *Id.* Drug traffic, violence, and human smuggling are real along the Mexico-Arizona border.

On the other side of the divide rests Emma Lazarus’ immortal plea engraved on the base of the Statue of Liberty: “Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tost to me, / I lift my lamp beside the golden door!” Thus, President Obama has urged comprehensive immigration reform despite concerns about border security. He has argued that “[t]he legal system is as broken as the border.” Stephanie Condon, *Obama Blasts GOP, Calls Ariz. Law ‘Ill Conceived,’* available at [www.cbsnews.com/8301-503544\\_162-20009402-503544.html](http://www.cbsnews.com/8301-503544_162-20009402-503544.html) (last visited Sept. 17, 2010). The President asserts that slow bureaucracy and the backlog of applicants must be addressed if the nation is to resolve its immigration issues. *Id.*

Lasting immigration reform, the nature of which will prevent further patchwork immigration policies like Arizona’s S. 1070, requires the federal government to confront the root cause of the nation’s immigration problems: unreasonable restrictions on the number of aliens allowed into the country. The voluminous demand for workers to perform entry-level tasks drives the huge number of aliens

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searches and seizures, Justice Powell concluded that several factors could be taken into account in deciding whether there was reasonable suspicion to stop a vehicle and question its occupants; this included, among other factors, the characteristics of the area, its proximity to the border, and recent illegal border crossings in the area. *Id.* at 885. When it came to the agent's statement that the occupants appeared to be of Mexican ancestry, Justice Powell wrote that this can be a "high enough" factor, "but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens." *Id.* at 886. In addition to race, the Court held that "mode of dress and haircut" and "their inability to speak English" were all relevant factors in establishing reasonable suspicion that the person is an illegal alien. *Id.*; see also *U.S. v. Ortiz*, 422 U.S. 891, 897 (1975).

More recently, however, the Ninth Circuit Court of Appeals has modified the Supreme Court's *Brignoni-Ponce* holding. In *United States v. Montero-Camargo*, 208 F.3d 1122, 1131 (9th Cir. 2000), the Ninth Circuit held that, in areas heavily populated by Hispanics, an individual's apparent Hispanic ethnicity is *not* a relevant factor in the reasonable suspicion calculus, because it is of little probative value; as such, a more particularized or individualized suspicion was required for an investigatory stop. In other words, race can never be used in developing reasonable suspicion in areas heavily populated by Hispanics because of its low probative value. Applying the *Montero-Camargo* decision to S. 1070, however, would produce bizarre results. For instance, in Tucson, Ariz., which has a large Hispanic population, race could never be a factor in developing reasonable suspicion. Yet in other cities in Arizona, like Scottsdale or Paradise Valley—both of which have a small Hispanic population—race could be a factor in determining reasonable suspicion. Ironically, this rule would have the unintended consequence of leading to racial profiling in those cities, because anyone whose skin is not white could be considered out of place and thus subject to more scrutiny than a person with white skin. The other question left unanswered under the *Montero-Camargo* rubric is: What is the magic number before a region or area is considered heavily populated by Hispanics and therefore its police officers are precluded from considering race when establishing the reasonable suspicion calculus? Whatever legal weight *Montero-Camargo* may have, its holding will likely influence the way courts will interpret S. 1070 and, obviously, affect how state prosecutors and police agencies will enforce the law.

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clamoring to enter the country. The paucity of visas available to entry-level workers encourages the workers to enter the United States without permission. Expanding the number of visas available to entry-level workers would allow the government to focus its efforts on identifying those who enter the country and to enforce the laws against criminals instead of well-intentioned aliens who are coming to strengthen America and provide help to their family abroad. **TFL**

## Removing the Language

Opponents of S. 1070—including the federal government—have raised many issues challenging the constitutionality of the law. As a consequence, it will be some time before we learn whether S. 1070 passes constitutional muster. The Supreme Court, however, has already decided that race can be a factor in developing reasonable suspicion to determine if the person is in the country illegally. Nonetheless, if Arizona lawmakers want to ensure that police can never take race into account in their reasonable suspicion calculus—at least legally—they can remove the clause in S. 1070 that says police can take race into account to the extent permitted by the U.S. Constitution. Practically speaking, however, there will always be encounters between police and civilians that are consensual. **TFL**



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## Endnotes

<sup>1</sup>On July 28, 2010, U.S. District Judge Susan Bolton ordered a preliminary injunction preventing several sections of S. 1070 from going into effect, which included section 2, the topic of this article. Arizona immediately appealed her order. The Ninth Circuit Court of Appeals will hear oral argument on Nov. 1, 2010.

<sup>2</sup>Arizona State Representative John Kavanagh wrote that the new language prevents racial profiling, because police officers are prohibited from considering "race, color, or national origin" in their reasonable suspicion calculus. See John Kavanagh, *Let's Set the Record Straight on New Law*, THE ARIZONA REPUBLIC (May 8, 2010), available at [www.azcentral.com/arizonarepublic/opinions/articles/2010/05/08/20100508kavanagh08.html](http://www.azcentral.com/arizonarepublic/opinions/articles/2010/05/08/20100508kavanagh08.html).

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