RESTRICTIONIST STATES REBUKED: HOW *ARIZONA V. UNITED STATES* REINS IN STATES ON IMMIGRATION

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I. INTRODUCTION

The Supreme Court of the United States' highly anticipated ruling in *Arizona v. United States* reaffirmed the states' limited ability to take immigration matters into their own hands. The case came to the Court after civil rights groups and the federal government challenged the State of Arizona's omnibus legislation, passed in 2010, which intended to make life incredibly difficult for unauthorized immigrants within the state's boundaries. In this Article we examine how and why the *Arizona* case made it to the Supreme Court, the legal theories that underlie challenges to Arizona's omnibus law, and what the Court's decision means for states considering legislation aimed at controlling various aspects of the daily lives of unauthorized immigrants and reducing their numbers by making life in those states inhospitable. As has become remarkably clear, after the Supreme Court's decision in *Arizona v. United States*, the states' role in enforcing federal immigration law is exceedingly circumscribed.

In Part II, we briefly review the history of state proposals to take on immigration enforcement. In particular, we examine Arizona's Senate Bill ("S.B.") 1070, an omnibus law that attempts to create a state-level immigration enforcement system that mirrors the federal immigration enforcement system, and Alabama's House Bill ("H.B.") 56, which took the S.B. 1070 framework and added a number of unique provisions that attempt to further restrict the ability of undocumented immigrants to live and work in the state. S.B. 1070, H.B. 56, and other "copycat" laws

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all have one common and explicit aim: "attrition through enforcement"—a scheme intended to make living and employment conditions so inhospitable to unauthorized immigrants as to encourage their departure from the state. We also examine the federal government's response to state-level immigration enforcement legislation and to the participation of state and local governments in the enforcement of immigration law generally.

Part III delves into the legal framework that has developed to analyze failed state efforts to legislate on immigration. We review the legal arguments against state and local enforcement, with a focus on the preemption theories that restrict the states' role in the area of immigration. We consider the legislative and administrative backdrop for the concept that the states have some role to play in the area of immigration and discuss the judicial interpretations of that backdrop. That Section focuses on the litigation surrounding Arizona's S.B. 1070, tracing the decisions of the district court and appellate court. We also discuss the decision of the Supreme Court in *Arizona v. United States*, the Court's most recent decision concerning the states' role in immigration enforcement, and examine what this decision says about the limits of that role. We conclude this Part by examining post-*Arizona* progeny litigation in light of the *Arizona* decision, focusing in on the way lower courts have incorporated the reasoning of *Arizona* into the analysis of the constitutionality of copycat laws in other states.

In Part IV, we briefly discuss the various reasons, both economic and policy-focused, that counsel states against participating in even the decidedly limited role they may be left with in federal immigration enforcement. In particular, we focus on the impact and costs of such laws as observed in Arizona, Alabama, and other states with laws aimed at immigrant residents.

In Part V, we argue for a more inclusive approach to the integration of immigrant residents into local communities and offer sample policies that have been implemented by other states and localities with the aim of building trust among all community members.

Part VI concludes.

II. THE POLITICS OF STATE ENFORCEMENT OF IMMIGRATION LAW

On April 23, 2010, Arizona State Governor Jan Brewer signed into law S.B. 1070.[1] Billed as the "Support Our Law Enforcement and Safe Neighborhoods Act," S.B. 1070 was Arizona's attempt to decrease the border state's undocumented immigrant population through state-created penalties and state-mandated enforcement of immigration law.[2] Governor Brewer, in her signing statement, declared that S.B. 1070 would be "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. The crisis caused by illegal immigration and Arizona's porous border."[3]

Arizona's actions followed a long line of state attempts to deal with the issue of immigration on a local level. State level legislation aimed at combating the alleged effects of undocumented immigrant populations has been proposed for decades. Perhaps the first ever state-level immigration enforcement bill was California's Proposition 187, a ballot proposition marketed to voters as the "Save Our State" initiative.[4] Proposition 187 included provisions that created a state-run citizenship screening system and prohibited undocumented immigrants from accessing various state benefits, including public education, health care, and other social services.[5] The initiative was heavily supported by then-Governor Pete Wilson, who used the issue of undocumented immigration and its purported costs to the state to effectively campaign for reelection.[6] The initiative was

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1. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf.

2. *Id.* ("The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona.").

3. Press Release, Office of the Governor, Statement by Governor Jan Brewer on Senate Bill 1070 (Apr. 23, 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf.

4. Univ. Cal. Davis, *Prop. 187 Approved in California*, MIGRATION NEWS, Dec. 1994, http://migration.ucdavis.edu/mn/more.php?id=492_0_2_0.

5. *Id.*

6. Daniel Hernandez, *The Return of Wilson, Prop. 187*, L.A. TIMES, Sept. 5, 2003, *available at* http://articles.latimes.com/2003/sep/05/local/me-wilson5; *see also* Jimmyhoofalv, *Pete Wilson Ad on Prop. 187*, YOUTUBE (July 20, 2010), http://www.youtube.com/watch?v=VZI7Q2pduUI (demonstrating Pete Wilson's support for Prop. 187 in his 1994 election campaign).

ultimately approved by fifty-nine percent of California voters in 1994.[7]

Before the initiative could take effect, however, a number of civil rights organizations sued the state, and a federal district court judge entered a preliminary injunction against the law.[8] In 1997, the same federal district court struck down the majority of Proposition 187 as unconstitutional, holding that "California is powerless to enact its own legislative scheme to regulate immigration. It is likewise powerless to enact its own legislative scheme to regulate alien access to public benefits."[9] Proponents of the initiative appealed to the Ninth Circuit Court of Appeals, but the appeal was not pursued by the State after the election of Democratic Governor Gray Davis.[10] Thus, the issue of the state's authority to legislate in areas that touch upon immigration never reached the Supreme Court and would not for another fifteen years. In the meantime, pressure was mounting for federal action on the issue of immigration, in particular reform of the immigration system for the nation's growing population of undocumented immigrants—an issue Congress had not tackled since the mid-1980s.

In 1986, during President Ronald Reagan's second term in office, Congress passed the Immigration Reform and Control Act ("IRCA").[11] IRCA had two central components: 1) it enacted civil and criminal penalties for knowingly hiring and recruiting unauthorized immigrants; and 2) it legalized certain seasonal agricultural workers, along with other unauthorized immigrants who had entered the United States before January 1, 1982.[12] Approximately three million individuals applied for legalization

7. Philip Martin, *Proposition 187 in California*, 29 INT'L MIGRATION REV. 255, 255 (1995).

8. League of United Latin Am. Citizens v. Wilson (*LULAC*), 908 F. Supp. 755, 787 (C.D. Cal. 1995).

9. League of United Latin Am. Citizens v. Wilson (*LULAC II*), 997 F. Supp. 1244, 1261 (C.D. Cal. 1997).

10. Patrick J. McDonnell, *David Won't Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999, *available at* http://articles.latimes.com/1999/jul/29/news/mn-60700.

11. Pub. L. No. 99-603, 100 Stat. 3359 (1986); Muzaffar Chishti et al., *At Its 25th Anniversary, IRCA's Legacy Lives On*, MIGRATION INFO. SOURCE (Nov. 16, 2011), http://www.migrationinformation.org/USFocus/display.cfm?ID=861.

12. Muzaffar Chishti et al., *At Its 25th Anniversary, IRCA's Legacy Lives On*, MIGRATION INFO. SOURCE (Nov. 16, 2011), http://www.migrationinformation.org/USFocus/display.cfm?ID=861.

under IRCA, and nearly 2.7 million were ultimately granted lawful status.[13]

IRCA was Congress's first and last successful attempt to reform the nation's immigration system through a major overhaul that included a legalization component. By establishing civil and criminal penalties for knowingly hiring unauthorized immigrants, Congress hoped to decrease further unauthorized migration under the theory that low prospects for employment would deter immigrants from seeking jobs in the United States.[14] IRCA, however, did not take into account the challenges associated with the future flow of both authorized and undocumented immigrants to the United States. Nor did IRCA account for employers who depended heavily on an immigrant workforce, and who simply incorporated the penalties for hiring undocumented labor into their bottom line as a cost of doing business. IRCA's penalties against employers that hired undocumented workers also established a new precedent and focus on enforcement as a principal pillar of the nation's immigration policy.[15] Despite IRCA's attempt to solve the challenges associated with the nation's immigration system, many states continued to experience an influx of both authorized and undocumented immigrants.[16] Together with shrinking state budgets and federal mandates to provide certain social services, the states grew increasingly frustrated. State attempts to resolve these challenges, including

13. NANCY RYTINA, OFFICE OF POLICY AND PLANNING, STATISTICS DIV., U.S. IMMIGRATION AND NATURALIZATION SERV., IIRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001, at 3 (2002), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf. In contrast, eleven million undocumented individuals are estimated to currently reside in the United States. MICHAEL HOEFER, NANCY RYTINA & BRYAN BAKER, OFFICE OF IMMIGRATION STAT., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1 (2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

14. U.S. CITIZENSHIP AND IMMIGRATION SERVS., HANDBOOK FOR EMPLOYERS: INSTRUCTIONS FOR COMPLETING FORM I-9, at 1 (Rev. June 1, 2011), http://www.uscis.gov/files/form/m-274.pdf.

15. Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION INFO. SOURCE (Sept. 1, 2005), http://www.migrationinformation.org/usfocus/display.cfm?ID=332.

16. *See, e.g.*, Letter from Janet Napolitano, Governor, Ariz., to Jim Weiers, Speaker of the House, Ariz. House of Representatives (July 2, 2007), *available at* http://www.azsos.gov/public_services/Chapter_Laws/2007/48th_Legislature_1st_Regular_Session/CH_279.pdf.

California's Proposition 187, were the direct result of this frustration.

In part a response to increasing backlash from the states, in 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[17] IIRIRA effectively made more individuals deportable by expanding the list of "aggravated felonies" that would be considered deportable offenses, including any offense for which a sentence of one year could be imposed, even if the sentence was never imposed.[18] The Act also created new three- and ten-year bars to reentry for unauthorized immigrants who accumulate more than 180 days to a year, or more than one year, of unlawful presence in the country.[19] Importantly, IIRIRA also created what are known as 287(g) agreements, discussed in more detail *infra*, which permit the Secretary of Homeland Security to enter into agreements with state and local law enforcement agencies, giving state and local officers certain delegated and monitored responsibilities for enforcing immigration law.[20]

Shortly thereafter, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") of 1996.[21] Provisions in PRWORA attempted to relieve the burden on states by allowing them to exclude certain immigrants from accessing various state benefits programs.[22] PRWORA further instituted a five-year waiting period for authorized immigrants to access major federal means-tested public benefits programs, including Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, and food stamps.[23] PRWORA also required states to affirmatively pass

17. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). Six months before IIRIRA, Congress also passed the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, known as AEDPA. AEDPA instituted mandatory detention of noncitizens convicted of a wide variety of criminal offenses, expedited deportation of noncitizens with criminal convictions, and limited judicial review of such cases.

18. 8 U.S.C. § 1227(a)(2)(A)(iii) (2010).

19. *Id.* § 1182(a)(9)(B)(i).

20. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Feb. 17, 2013).

21. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

22. *See, e.g.*, 42 U.S.C. § 1320b-7 (2008).

23. ROBIN K. COHEN, PRINCIPAL ANALYST, CONN. GEN. ASSEMB., OFFICE OF LEGISLATIVE RESEARCH REPORT, PRWORA'S IMMIGRANT PROVISIONS, 2007-R-0705 (Dec. 13, 2007), *available at* http://www.cga.ct.gov/2007/rpt/2007-R-0705.htm.

legislation if they intended to provide a state or local benefit to their unauthorized immigrant residents.[24]

Though Congress has moved to quell some of the state uproar through legislation that had profoundly detrimental effects on the rights of immigrants, legislation that would grant lawful status and eventual citizenship to unauthorized immigrants has faltered. While multiple comprehensive immigration reform proposals have been submitted within the last decade, political pressure against any form of "legalization" and general gridlock on the issue have prevented Congress from moving forward in a decisive manner.[25] In 2005, members of Congress introduced a comprehensive immigration reform bill. Known as the McCain-Kennedy bill, for its principal authors, the proposal would have established a pathway to citizenship for certain unauthorized immigrants who met a number of eligibility requirements, including, among others, paying a fine and back taxes, learning English, and passing a criminal background check.[26] Yet, despite massive demonstrations by immigrant communities across the nation in 2006 and 2007, as well as increasing political pressure from state governments, Congress was unable to pass any immigration legislation that would regularize the status of unauthorized immigrants living in the United States.[27]

In 2010, after indications that a comprehensive immigration reform bill was not a viable option, the House passed a version of the Development, Relief, and Education for Minors ("DREAM") Act.[28] The DREAM Act, first introduced in Congress in 2001, would legalize the status of certain immigrant youth brought to the United States at an early age, provided that they completed a certain number of years of college or military

24. 8 U.S.C. § 1621(d) (1998).

25. *See, e.g.*, Sheryl Gay Stolberg, *After Immigration Protests, Goal Remains Elusive*, N.Y. TIMES, May 3, 2006, *available at* http://www.nytimes.com/2006/05/03/us/03assess.html?_r=0; Allan Chernoff, *Thousands of Immigration Marchers Rally Across U.S.*, CNN (May 2, 2007), http://www.cnn.com/2007/US/05/01/immigration.protests/index.html.

26. Editorial, *Enter McCain-Kennedy*, WASH. POST, May 14, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/05/13/AR2005051301483.html.

27. Stolberg, *supra* note 25.

28. H.R. 6497, 111th Cong. (2010); *see also* NAT'L IMMIGRATION LAW CTR., JUST THE FACTS: FIVE THINGS YOU SHOULD KNOW ABOUT THE DREAM ACT (2010), *available at* http://v2011.nilc.org/immlawpolicy/dream/DREAM-justfacts-2010-11-23.pdf.

service.[29] Despite its passage in the House in 2010, the DREAM Act failed to acquire the sixty votes needed for cloture in the Senate and was therefore never taken up for an up-or-down vote before the full chamber.[30] Since this last attempt in 2010 to pass some form of legalization of certain unauthorized immigrants, members of Congress have proposed various bills, but none have passed.[31]

States—claiming to be filling in a gap created by what they characterize as federal inaction on immigration reform—took matters into their own hands. In 2010, state legislators introduced approximately 1,400 bills and resolutions relating to immigrants in forty-six states.[32] In 2011, this number increased to 1,607 introduced bills and resolutions relating to immigrants in all fifty states and Puerto Rico.[33] Despite the large numbers of bills aimed at immigrants, relatively few have managed to garner enough support to be enacted. For example, of those bills and resolutions introduced by state legislators in 2011, only 318 were passed and fifteen were vetoed.[34] Arizona's success in passing its omnibus bill in 2010, however, propelled five other states—Alabama, Georgia, Indiana, South Carolina, and Utah—to successfully pass omnibus legislation aimed at immigrants.[35] These bills were modeled on Arizona's S.B. 1070, and supported by organizations like the Federation for American Immigration Reform[36] and its legislative arm, the Immigration Reform Law Institute,[37] an organization that created templates for state legislation that served as the basis for

29. NAT'L IMMIGRATION LAW CTR., JUST THE FACTS: FIVE THINGS YOU SHOULD KNOW ABOUT THE DREAM ACT (2010), *available at* http://v2011.nilc.org/immlawpolicy/dream/DREAM-justfacts-2010-11-23.pdf.

30. Naftali Bendavid, *Dream Act Fails in Senate*, WALL ST. J., Dec. 19, 2010, *available at* http://online.wsj.com/article/SB10001424052748704368004576027570843930428.html.

31. *Id.*

32. BROOKE MEYER ET AL., NAT'L CONFERENCE OF STATE LEGISLATURES, 2011 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES 1 (Jan. 1–Dec. 7, 2011), *available at* http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx.

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* Dustin Carnevale, *AZ SB 1070: Necessary, Practical, Lawful*, FED'N FOR AM. IMMIGRATION REFORM (Apr. 8, 2010), http://www.fairus.org/opinion/az-sb-1070-necessary-practical-lawful?A=SearchResult&SearchID=3590018&ObjectID=5123320&ObjectType=35.

37. *See ILRI Collaborates on Important Supreme Court Briefs in SB 1070 Case*, IMMIGRATION REFORM LAW INST. (2011), http://www.irli.org/node/48.

S.B. 1070 and its progeny.[38] The ultimate goal of such legislation was "attrition through enforcement"—the idea that making living and working conditions unbearable for undocumented immigrants would drive them out of the state and, ultimately, out of the country.[39]

S.B. 1070, for example, includes provisions that create a state crime for failing to carry federal alien registration documents, require law enforcement to attempt to determine the immigration status of an individual involved in a lawful stop (dubbed the "show me your papers" provision by opponents), create state penalties for the harboring and transporting of unauthorized immigrants, make it a state crime for an unauthorized immigrant to solicit employment, and authorize the warrantless arrest of immigrants who are believed to have committed a removable offense.[40] But the law was not without controversy, and those opposed to the law charged early on that it was motivated by racial animus and that it would increase racial profiling of Latinos, both citizens and noncitizens, as well as of other people of color.[41] Governor Brewer felt compelled to respond to this criticism in her signing statement of S.B. 1070, stating that she would "NOT tolerate racial discrimination or racial profiling in Arizona" and that law enforcement "must enforce the law evenly, and without regard to skin color, accent, or social status."[42]

The State of Alabama modeled its omnibus immigration law on Arizona's S.B. 1070. Passed in 2011, Alabama's H.B. 56

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38. *Id.* Kris Kobach, the current Secretary of State for Kansas, serves as Of Counsel for IRLI and has been called the author of H.B. 56. *See, e.g.*, George Talbot, *Kris Kobach, The Kansas Lawyer Behind Alabama's Immigration Law*, ALA. LIVE BLOG (Oct. 26, 2011, 9:05 AM), http://blog.al.com/live/2011/10/kris_kobach_the_kansas_lawyer_1.html.

39. PRATHEEPAN GULASEKARAM & KARTHICK RAMAKRISHNAN, AM. CONST. SOC'Y, RESTRICTIVE STATE AND LOCAL IMMIGRATION LAWS: SOLUTIONS IN SEARCH OF PROBLEMS 13 (2012), *available at* http://www.acslaw.org/sites/ default/files/Gulasekaram_and_Ramakrishnan__Restrictive_State_and_Local_Immigration_Laws_1.pdf ("The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona.").

40. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf.

41. *See, e.g.*, *Arizona's SB 1070*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/arizonas-sb-1070 (last visited Feb. 17, 2013).

42. Press Release, Office of the Governor, Statement by Governor Jan Brewer on Senate Bill 1070 (Apr. 23, 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf.

included a similar "show me your papers" provision, and criminalized the harboring and transporting of unauthorized immigrants and the failure to carry federal registration documents.[43] H.B. 56, however, included additional provisions intended to make life for undocumented immigrants in Alabama virtually impossible. H.B. 56 included the following among its many provisions: Section 27 made contracts between a person and an unauthorized immigrant unenforceable in the Alabama courts; Section 30 instituted a criminal felony penalty on unauthorized immigrants who engaged in "business interactions" with the State of Alabama (initially interpreted as including, for example, seeking utility services); and Section 28 required K-12 school administrators to verify the immigration status of all children and their parents upon enrollment.[44]

By the end of 2011, the Department of Justice had pursued legal action against Arizona and other states that had passed laws that purport to regulate immigration—Alabama, South Carolina, and Utah.[45] In addition, the Department of Justice has actively pursued cases against individual sheriffs and other local law enforcement officers whom the federal government alleges to have exercised their authority in an unconstitutional and discriminatory manner and has suspended existing 287(g)

43. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. No. 56, 2011 Ala. Acts 535, *available at* http://arc-sos.state.al.us/PAC/SOSACPDF.001/A0008649.pdf.

44. *Id.* H.B. 56 was subsequently amended by H.B. 658. H.B. No. 658, 2012 Ala. Acts 491, *available at* http://arc-sos.state.al.us/PAC/SOSACPDF.001/A0009507.pdf; *see also* Seth Hoy, *Alabama Governor Signs Bill That Makes State's Immigration Law Even Worse*, IMMIGRATION IMPACT (May 21, 2012), http://www.immigrationimpact.com/2012/05/21/alabama-governor-signs-bill-that-makes-states-immigration-law-even-worse.

45. *See Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law*, U.S. DEP'T OF JUSTICE (July 6, 2010), http://www.justice.gov/opa/pr/2010/July/10-opa-776.html; *Department of Justice Challenges Alabama Immigration Law*, U.S. DEP'T OF JUSTICE (Aug. 1, 2011), http://www.justice.gov/opa/pr/2011/August/11-ag-993.html; *Department of Justice Challenges South Carolina's Immigration Law*, U.S. DEP'T OF JUSTICE (Oct. 31, 2011), http://www.justice.gov/opa/pr/2011/October/11-ag-1429.html; *Department of Justice Challenges Utah's Immigration Law*, U.S. DEP'T OF JUSTICE (Nov. 22, 2011), http://www.justice.gov/opa/pr/2011/November/11-ag-1526.html. The federal government did not, however, sue Georgia and Indiana, both of which have passed legislation with provisions similar to those in S.B. 1070. *See Department of Justice Challenges Utah's Immigration Law*, U.S. DEP'T OF JUSTICE (Nov. 22, 2011), http://www.justice.gov/opa/pr/2011/November/11-ag-1526.html ("The department continues to review immigration-related laws that were passed in Indiana and Georgia. Courts have enjoined key parts of the Arizona, Alabama, Georgia and Indiana state laws and temporarily restrained enforcement of Utah's law.").

agreements in those jurisdictions.[46] Thus, the federal government has taken a strong stand against state attempts to enforce immigration law outside the bounds circumscribed by federal law.[47]

Given Congress's inability to pass comprehensive immigration reform legislation during the last few decades, it is not surprising that states have attempted to exercise some authority over the field of immigration. But what constitutional authority do states have under our federal system? We turn to this question in the next Part.

III. LEGAL FRAMEWORK

A. Preemption

States attempting to enforce their laws against immigrant residents must contend with well-established rules governing the roles of both the federal government and the states in establishing immigration policy. The courts have consistently interpreted the

46. *See, e.g.*, Fernanda Santos & Charlie Savage, *Lawsuit Says Sheriff Discriminated Against Latinos*, N.Y. TIMES (May 10, 2012), http://www.nytimes.com/2012/05/11/us/justice-department-sues-arizona-sheriff-joe-arpaio.html?_r=0; Ann Blythe, *U.S. Justice Department Sues Alamance County Sheriff, Accusing Him of Discriminating Against Latinos*, NEWSOBSERVER.COM (Dec. 20, 2012), http://www.newsobserver.com/2012/12/20/2557060/us-justice-department-sues-alamance.html.

47. Yet the federal government has also encouraged and, in some cases, required, state and local participation in immigration enforcement. For example, the Department of Homeland Security (DHS) launched a new immigration enforcement program in 2008 under the Bush administration called the "Secure Communities" program. Pursuant to the program, biometric information taken by state and local jails upon booking arrestees is now shared with DHS for checks against immigration databases. *See Overview of Key ICE ACCESS Programs*, NAT'L IMMIGRATION LAW CTR. (Nov. 2009), http://www.nilc.org/ice-access-2009-11-05.html. The program was initially billed as a voluntary partnership between federal immigration authorities and state and local law enforcement, requiring the consent of state authorities through a written agreement before any jurisdictions within the state could participate. *See* HOMELAND SEC. ADVISORY COUNCIL, TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 13 (Sept. 2011), *available at* http://www.nilc.org/document.html?id=235 (noting that, initially, participation required the signing of a Memorandum of Agreement, which included a termination and modification clause). However, when some states made the affirmative decision not to participate or to exercise the termination clauses in the written agreements, DHS announced that participation was in fact mandatory and that states lacked the authority to decline participation. Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1346 (2012).

states' role in this arena as foreclosed.[48] And the Supreme Court has uniformly held that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."[49] Thus, any attempt by a state to regulate immigration—that is, to determine who should and should not be admitted into the country or jurisdiction, and the conditions under which that person should remain—is preempted by federal law. The Supreme Court, however, has been quick to clarify that it "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised."[50] This distinction between state laws that attempt to regulate immigration (or that have such an effect), and laws that are aimed at immigrants but have a "purely speculative and indirect impact on immigration,"[51] is at the heart of the controversy over what states can and cannot do in this realm.

The Supremacy Clause of the United States Constitution makes the Constitution, federal statutes, and United States treaties "the supreme Law of the Land."[52] Thus, any state law or provision of a state's constitution in conflict with federal law must yield to the federal law. There are various theories of preemption. Preemption can be either express—Congress can explicitly indicate that an area of federal law trumps any state attempt at intervention—or implied—federal action in an area of law leaves no room for state action.[53] Furthermore, courts have identified two types of implied preemption: field preemption and conflict preemption.[54] Field preemption occurs when Congress has occupied the entire field in a particular area of law, to the

48. *See* Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941) ("[T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.' And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.") (citations omitted).

49. De Canas v. Bica, 424 U.S. 351, 354 (1976); *Hines*, 312 U.S. at 66–67.

50. *De Canas*, 424 U.S. at 355.

51. *Id.*

52. U.S. CONST. art. VI, cl. 2.

53. *E.g.*, English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990).

54. *E.g.*, *id.*

exclusion of the states. The federal government can occupy a field by establishing a comprehensive scheme to regulate in an area of law, effectively implying that federal law in that area of law is exclusive. Meanwhile, the theory of conflict preemption limits the ability of states to pass laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[55] The friction arising from conflicting state and federal statutes may be explicit from the language of the federal statute or implicit in the structure and purpose of the federal law.

Even when the state statute virtually mirrors the federal law and is designed to achieve similar goals, the state law can be conflict preempted when its methods for achieving those goals interfere with the federal scheme for achieving its goals.[56] Because the Immigration and Nationality Act ("INA") contains few express preemption clauses, the bulk of analysis on whether a state's action on immigration is preempted principally proceeds under an implied preemption theory. Immigration is one such area of law where the courts have consistently held that the federal government's role is virtually exclusive.[57] A principal reason for the federal government's exclusive role in determining immigration policy is the implications of such policy on relationships with foreign nations.[58] Congress and the courts have emphasized the importance of speaking with one voice in foreign relations,[59] and it is not difficult to see why fifty different immigration policies espoused by fifty different states would be an unwieldy proposition. In *Hines v. Davidowitz*, for example, the Supreme Court stated that "[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government,"[60] and thus held that states could not effect the "[l]egal imposition of

55. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

56. *See, e.g.*, *id.* (holding that a Pennsylvania law was conflict preempted by a federal law even though the basic subject of the state and federal laws were identical).

57. *See generally* McDonnell, *supra* note 10 (explaining that courts view immigration legislation as an exclusively federal domain).

58. *See, e.g.*, Shaughnessy v. United States *ex. rel.* Mezei, 345 U.S. 206, 210 (1953).

59. *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

60. *Hines*, 312 U.S. at 64.

distinct, unusual and extraordinary burdens and obligations upon [noncitizens]" or those believed to be noncitizens.[61]

Yet, the courts have found areas where the states' traditional powers have been exercised lawfully even though they might have some effect on immigrant residents. For example, in *De Canas v. Bica*, the Supreme Court held that California's state law providing that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers" was not preempted by federal law as an improper state regulation of immigration law.[62] The Court reasoned that the regulation of employment is an area over which the states have traditionally held police power, and the state statute had only an indirect impact on immigration.[63]

The role of the states in immigration enforcement, however, is a different story. The enforcement of immigration laws, whether carried out by the federal government or by the states, clearly does not have a "purely speculative and indirect impact on immigration." Enforcement is a principal mechanism by which the immigration system is regulated. According to those challenging S.B. 1070 and other states' laws, federal law describes only four situations wherein state and local officials can participate in the enforcement of immigration law. First, state and local officials may enter into agreements with the federal government, called 287(g) agreements after the section of the INA that authorizes them, to allow state and local officers to perform limited civil enforcement functions after training and under federal monitoring.[64] Second, under 8 U.S.C. § 1103(a)(10), the U.S. Attorney General may authorize state and local officers to enforce civil immigration laws upon certification of "an actual or imminent mass influx of aliens."[65] Third, 8 U.S.C. § 1324(c) authorizes state and local officers to make *arrests* for the *federal*

61. *Id.* at 65–66.

62. De Canas v. Bica, 424 U.S. 351, 352 (1976) (quoting CAL. LAB. CODE § 2805(a) (West 1971) (repealed 1988)); *id.* at 356.

63. *Id.* at 356–57. The *De Canas* ruling preceded IRCA's establishment of a comprehensive federal regulatory scheme over the employment of unauthorized immigrants and, thus, no longer applies.

64. Immigration and Nationality Act § 8 U.S.C. § 1357(g)(1) (2006).

65. 8 U.S.C. § 1103(a)(10) (2006). The Attorney General has never exercised this delegation of authority.

immigration crimes of transporting, smuggling, or harboring unauthorized immigrants, but it does not provide authority to states to prosecute such crimes.[66] And fourth, 8 U.S.C. § 1252c, discussed in further detail *infra*, allows state and local officers to arrest and detain a previously deported noncitizen felon for illegal reentry into the United States but only after confirming the individual's immigration status with the federal government.[67] Any state-law attempt to enforce immigration law outside of these four situations is preempted.

Despite this rubric of preemption, Arizona and other states asserted litigation arguments based on the doctrine of concurrent enforcement.[68] This doctrine stands for the proposition that states have the authority to concurrently regulate activity also regulated by federal law so long as the "state enforcement activities do not impair federal regulatory interests . . . ."[69] Just as states are able to arrest and prosecute individuals for violations of state drug laws despite the existence of federal drug laws regulating the same behavior, so the argument goes, they should be able to enforce state-equivalents to the federal immigration laws. These states also argued that requiring their officers to verify the immigration status of individuals who had been lawfully stopped was also permissible under the state's authority to concurrently enforce federal law and fell under the meaning of "cooperation" encouraged by the INA.[70]

Language regarding the state's cooperation with federal immigration officials appears in a section of the INA entitled, "Performance of immigration officer functions by State officers and employees."[71] In general, Section 1357 provides for formal written agreements between the Department of Homeland Security and state or local law enforcement officials, pursuant to which certain state or local police are trained and authorized to

66. *Id.* § 1324(c) (2006).

67. *Id.* § 1252c(a) (2006).

68. *See* Reply Brief for Petitioners, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 1332574; Brief for Michigan et al. as Amici Curiae Supporting Petitioners, Arizona v. United States, 132 S. Ct. 2492 (2012), (No. 11-182), 2012 WL 523350.

69. Gonzalez v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds by* Hodgers-Durgin v. De la Vina, 199 F.3d 1037 (9th Cir. 1999) (internal citations omitted).

70. Brief for Michigan et al. as Amici Curiae Supporting Petitioners at 14, Arizona v. United States, 132 S. Ct. 2492 (2012), (No. 11-182), 2012 WL 523350.

71. 8 U.S.C. 1357(g) (2006).

enforce federal immigration laws.[72] However, subpart (g)(10) of the section notes that no formal agreement is necessary for state and local officers "to cooperate with the [Department of Homeland Security] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."[73] Arizona and other states have pointed to Section 1357(g)(10)(b) to argue that the "show me your papers" provisions of their laws, for example, are simply a form of "cooperation" with the federal government's immigration enforcement scheme.[74] It is precisely the meaning of this term, "cooperate," which stands at the center of the controversy over the authority of state and local officers to participate in immigration enforcement. In the next Section, we examine the origin of this controversy and the lead up to its ultimate resolution by the Supreme Court.

B. Federal Guidance on the States' Role in Immigration

In advance of the litigation against Arizona and other states, guidance from the federal government about the authority and role of state and local officers to enforce federal immigration laws had proved confusing. Although the INA sets out those instances where state and local authorities can cooperate with federal immigration authorities, it does little to define what cooperation actually means. A number of administrative agencies have moved to fill this gap through their own legal analysis and guidance.

In 1996, the Office of Legal Counsel, a subdivision of the United States Department of Justice, issued a memorandum interpreting then-recently enacted 8 U.S.C. § 1252c, which read, in part:

> Notwithstanding any other provision of law, to the extent permitted by relevant State and local law,

72. *See id.* § 1357(g)(1)–(9). Written agreements are often called "287(g)" agreements, referring to the section of the Immigration and Nationality Act in which the provision appears. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Feb. 17, 2013), for a complete and current list of all 287(g) Agreements.

73. 8 U.S.C. § 1357(g)(10)(B) (2006); *see also supra* Part III.A.

74. Arizona v. United States, 132 S. Ct. 2492 (2012).

> State and local law enforcement officials are authorized to arrest and detain an individual who—
>
> (1) is an alien illegally present in the United States; and
>
> (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction,
>
> but 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 such 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.[75]

This raised questions about the extent to which state and local officers could enforce civil provisions of the INA.[76] The memorandum's ultimate conclusion was that "State and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to criminal violation . . . ."[77] State and local officers could assist the federal government by arresting and detaining unauthorized immigrants only if they had been previously deported after having been convicted of a felony. And, importantly, state and local officers could do so only after confirming that information with federal officials.

On April 3, 2002, the Office of Legal Counsel issued a memorandum on behalf of the Attorney General entitled "Non-preemption of the authority of state and local law enforcement

75. 8 U.S.C. § 1252c (1996).

76. It is important to note that the majority of federal immigration violations are civil, rather than criminal, in nature. See Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11 "Pale of Law"*, 29 N.C. J. INT'L L. & COM. REG. 639 (2004), for a discussion on the nature of immigration infractions.

77. Assistance by State & Local Police in Apprehending Illegal Aliens, 20 Op. O.L.C. 26 at 1 (1996).

officials to arrest aliens for immigration violations."[78] This memorandum was a direct response to the 1996 memorandum and attempted to answer whether, "in the absence of any affirmative authorization under federal law, States have inherent power (subject to federal preemption) to make arrests for violation of federal law."[79] The 2002 memorandum questioned the legal authority relied upon by the 1996 memorandum and ultimately concluded that there is a presumption against preemption of state arrest authority for violations of federal law, including civil immigration law, and that "federal law did not preempt state police from arresting aliens on the basis of civil deportability."[80] This conclusion effectively rescinded the 1996 memorandum but noted that the question it attempted to answer "[did] *not* involve an attempt by States to enact *state* laws . . . that arguably conflict with federal law or intrude into a field that is reserved to Congress or that federal law has occupied."[81] Lingering controversy between the contrary conclusions of the 1996 and 2002 memoranda, however, remained.

In 2012, in direct response to the omnibus laws passed by Arizona, Alabama, and other states—state laws that arguably conflicted with federal law and intruded into a field occupied by federal law—the Department of Homeland Security issued a memorandum entitled, "Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters."[82] The guidance set out the limitations under which state and local authorities could assist in the identification, apprehension, detention, and removal of noncitizens, and provided a non-exhaustive list of examples of permissible cooperation with the federal government, as well as examples of state and local actions that would infringe on federal authority to enforce the immigration laws. Importantly, the 2012 guidance

78. Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice, Non-Preemption to the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations to the Attorney General (Apr. 3, 2002), http://www.aclu.org/FilesPDFs/ACF27DA.pdf.

79. *Id.* at 2.

80. *Id.* at 8.

81. *Id.* at 7.

82. U.S. DEP'T OF HOMELAND SEC., GUIDANCE ON STATE AND LOCAL GOVERNMENTS' ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS (2011), *available at* http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf.

defined the term "cooperation" found in subsection 1357(g)(10)(B) as

> [T]he rendering of assistance by state and local officers to federal officials, in the latter officials' enforcement of the INA, in a manner that maintains the ability to conform to the policies and priorities of DHS and that ensures that individual state and local officers are at all times in a position to be—and, when requested, are in fact—*responsive to the direction and guidance of federal officials* charged with implementing and enforcing the immigration laws.[83]

While the 2012 guidance did not settle the controversy between the 1996 and 2002 Office of Legal Counsel memoranda, it provided much-needed clarification about the interaction between the federal government and state and local authorities on the enforcement of federal immigration law.

As discussed in further detail *infra* Section E, the *Arizona* decision effectively extinguished any controversy between the Office of Legal Counsel's memoranda. *Arizona* clarifies that states do not have inherent authority to enforce civil immigration laws, leaving such enforcement to the federal government instead. But this conclusion was reached only after Arizona and five other states—Alabama, Georgia, Indiana, South Carolina, and Utah—passed omnibus legislation with provisions that attempt to enforce both civil and criminal penalties in the INA through state and local law enforcement.

C. State and Local Authority: The Alleged Circuit Split

Leading up to the decision on Arizona's "show me your papers" provision, some states, such as Utah, argued the existence of a circuit split over the degree of authority local police enjoy in enforcing federal immigration laws. In defense of its own "show me your papers" provision, the state of Utah relied heavily upon a Tenth Circuit case, *United States v. Vasquez-Alvarez*, which, the state argued, established that state and local law enforcement officers

83. *Id.* at 8 (emphasis added).

have inherent authority to investigate individuals for violations of federal immigration laws.[84] In *Vasquez-Alvarez*, the Defendant, convicted of felony reentry, challenged his arrest by a local police officer on the basis that the federal statute authorizing arrest for the federal criminal violation of reentry (8 U.S.C. § 1252c) required that the officer obtain confirmation of the individual's status from federal immigration authorities before arrest, which was absent in his case.[85] Importantly, the local law enforcement officer in *Vasquez-Alvarez* acted only after receiving a request from a federal immigration officer to arrest Vasquez-Alvarez if he came across him in the future.[86] Vasquez-Alvarez argued that this fell short of the requirements of Section 1252c.[87]

The Tenth Circuit Court of Appeals disagreed and found that Vasquez-Alvarez's arrest was not preempted, grounding its decision in another federal statute addressing state and local authority to enforce federal immigration laws—8 U.S.C. § 1357 (see discussion *supra* Section III.A. on § 1357(g)(10) and "cooperation").[88] According to the State of Utah, in finding the arrest of Vasquez-Alvarez lawful, the Tenth Circuit had simultaneously recognized the principle that the state enjoys inherent and general authority to arrest for federal violations, whether criminal or civil.[89] In fact, this was far too vast a reading of the holding, as was later solidified in the Supreme Court's *Arizona* decision (see discussion *infra* Section III.E.). As the plaintiffs in the Utah litigation argued, the officer in *Vasquez-Alvarez* was acting at the request of a federal immigration officer in performing the

84. *See* United States v. Vasquez-Alvarez, 176 F.3d 1294, 1295 (10th Cir. 1999).

85. INS Special Agent Valentine suspected that the Defendant in *Vasquez-Alvarez* was an unauthorized immigrant, and asked the state law enforcement officer to arrest him if he came upon him in the future. Following the Defendant's arrest, Valentine confirmed that the Defendant was in the United States after having been deported. But this, argued the Defendant, fell short of the confirmation required by Section 1252c. *Id.* at 1295–96.

86. *Id.* at 1295.

87. *Id.*

88. *Id.* at 1300.

89. The distinction between civil and criminal violations is significant because federal immigration laws explicitly permit state and local law enforcement officers to arrest for certain criminal violations of immigration law. *See, e.g.*, 8 U.S.C. § 1324(c) (2005) (authorizing state and local law enforcement officers to arrest for the federal crime of harboring or transporting an unauthorized immigrant). However, the majority of immigration violations are civil in nature, and the authority of state and local officials to enforce the civil provisions was a matter of great disagreement until the Supreme Court's *Arizona* decision. *See* discussion *supra* Section III.B.

arrest—the quintessential example of "cooperation."[90] Far from establishing that state and local officers have general authority to investigate and conduct arrests for violations of immigration law, *Vasquez-Alvarez* recognized the rather narrow proposition that such an arrest was not preempted when accomplished at the explicit request of a federal immigration agent.[91] Nevertheless, in defending its "show me your papers" provision, Utah pointed to *Vasquez-Alvarez* to argue that the state has carte blanche authority to enforce immigration laws.[92] Although Utah's position is still pending resolution in district court, the Supreme Court's subsequent decision in *Arizona v. United States* casts doubt on its validity.

Moreover, in contrast to the Tenth Circuit's holding in *Vasquez-Alvarez*, the Ninth Circuit has explicitly held that state and local law enforcement officers enjoy authority to arrest only for *criminal* violations of the federal immigration law.[93] In analyzing Arizona's S.B. 1070, the Ninth Circuit specifically noted that it was parting ways with the Tenth Circuit: "We recognize that our view conflicts with the Tenth Circuit's. . . . Subsection (g)(10) neither grants, nor assumes the preexistence of, inherent state authority to enforce civil immigration laws in the absence of federal supervision."[94] The Ninth Circuit further recognized that it was not alone in holding that states do not have inherent authority to enforce federal immigration laws; the Sixth Circuit had already so held.[95] Regardless of whether the circuits were actually split on whether state and local law enforcement officers have authority to arrest for civil immigration violations, as will be described further below, the Supreme Court has now spoken clearly that such authority does not exist.

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90. *Vasquez-Alvarez*, 176 F.3d at 1295–96; *see also* discussion *supra* Section III.A. on "cooperation."

91. *Vasquez-Alvarez*, 176 F.3d at 1300.

92. *Id.*

93. Gonzalez v. City of Peoria, 722 F.2d 468, 474–75 (9th Cir. 1983), *overruled on other grounds by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

94. United States v. Arizona, 641 F.3d 339, 363–65 (9th Cir. 2011), *overruled in part by* Arizona v. United States, 132 S. Ct. 2492 (2012).

95. *Id.* at 363 (discussing the Sixth Circuit's decision in United States v. Urrieta, 520 F.3d 569, 574 (6th Cir. 2008)).

D. Arizona District Court and Ninth Circuit Rulings: The States Have No Role

Just one day before Arizona's racial profiling law was to take effect, an Arizona district court found it preempted and issued an injunction barring its implementation.[96] In her July 28, 2010 ruling, Judge Susan Bolton enjoined the following sections: (1) Section 2(B), requiring that an officer make a reasonable attempt to determine the immigration status of all those stopped or detained whenever reasonable suspicion exists that the individual may be undocumented; (2) Section 3, creating a state crime for failure to apply for or carry alien registration documents; (3) portions of Section 5, making it a state crime for an undocumented individual to apply for or perform work; and (4) Section 6, authorizing the warrantless arrest of a person where there is probable cause to believe the person has committed a public offense that makes the person removable.[97]

In enjoining Arizona's "show me your papers" provision, Judge Susan Bolton relied on two arguments presented by the Department of Justice as to why Section 2(B) was preempted. First, she noted that by requiring Arizona police officers to check the immigration status of all those whom they stop or arrest, legal immigrants would undoubtedly be mistakenly identified and harassed, in contravention of well-settled preemption doctrine established in *Hines* (see discussion *supra*, Section A).[98] The Court further found that Arizona's "show me your papers" provision conflicted with federal law because "[f]ederal resources will be taxed and diverted from federal enforcement priorities as a result of the increase in requests for immigration status determination that will flow from Arizona."[99]

On April 11, 2011, a three-judge panel of the Ninth Circuit Court of Appeals upheld the district court's ban of Section 2(B).[100] The panel affirmed the district court's assessment that Arizona's racial profiling law was preempted because it encroached upon a field fully occupied by Congress and conflicted with federal law.[101]

96. United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010).

97. *See id.* at 996, 998–1000, 1002, 1004, 1006, 1008.

98. *Id.* at 996–97.

99. *Id.* at 998.

100. United States v. Arizona, 641 F.3d at 344.

101. *Id.* at 346.

In its decision, the Ninth Circuit recognized that a state law requiring state and local officers to investigate immigration status would allow the state to interfere with the federal government's authority to implement its own enforcement priorities, "turning Arizona officers into state-directed DHS agents."[102] The decision also recognized the profound effect this could have on the ability of United States to control its foreign relations.[103] Almost immediately, Arizona sought review of the Ninth Circuit's decision by the Supreme Court of the United States.

E. The Supreme Court Speaks: Arizona v. United States

Before the Supreme Court were four provisions of Arizona's S.B. 1070: (1) Section 3, making failure to comply with federal alien registration requirements a state crime; (2) Section 5(C), criminalizing undocumented individuals who solicit or engage in work; (3) Section 6, expanding police warrantless arrest authority where probable cause exists that the individual has committed a public offense making him removable; and (4) Section 2(B), requiring police to investigate the immigration status of any person lawfully stopped or arrested where the officer has reasonable suspicion that the person is undocumented.[104] The Supreme Court affirmed the lower court's injunction on all but the last provision—Section 2(B).[105] This section provides a brief summary of the Supreme Court's July 25, 2012, decision in *Arizona* and examines the limitations the Court enumerated in its decision to allow Section 2(B) to take effect.

The Court's analysis began by recognizing the "broad, undoubted power" of the federal government over the immigration laws.[106] The Court also noted that a "principal feature" of the immigration laws and the removal system is the broad discretion granted to and exercised by immigration officials.[107] In striking down Section 3 based on field and conflict preemption principles, the Court noted that "[w]here Congress occupies an entire field, as it has in the field of alien registration,

102. *Id.* at 351–52.

103. *Id.* at 352–53.

104. *See* Arizona v. United States, 132 S. Ct. 2492, 2497–98 (2012).

105. *Id.* at 2510.

106. *Id.* at 2498 (referencing Toll v. Moreno, 458 U.S. 1, 10 (1982)).

107. *See id.* at 2499.

even complementary state regulation is impermissible."[108] Identity of aims between the federal and state law provisions was also insufficient to avoid preemption concerns.[109] In fact, Arizona's Section 3 was not even complementary to the federal registration provision, which the Court found to be a further indicator that Arizona had exceeded its constitutional authority.[110]

In contrast to Section 3, which represented Arizona's attempt to create a state criminal provision modeled on a federal counterpart, Section 5(C) of S.B. 1070 attempted to enact a state criminal provision where no federal counterpart exists. Section 5(C) made it a misdemeanor for an undocumented individual to seek or perform work in Arizona.[111] The Court struck down Section 5(C) because it concluded that Congress, through IRCA, had created a comprehensive framework to combat the employment of individuals lacking work authorization and within this framework had made the explicit decision not to penalize employees.[112] Accordingly, the Court found Arizona's provision conflict preempted because it would "interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens."[113]

The Court sent an even stronger message about the very limited role of the states in immigration enforcement through its analysis of S.B. 1070's Section 6. If there was any disagreement between the circuits regarding the state's authority to enforce civil immigration provisions (see discussion *supra*), the Court's analysis of Arizona's warrantless arrest provision established a clear boundary. In finding the provision preempted, the Court noted that Section 6 attempted to "provide state officers even greater authority to arrest aliens . . . than Congress has given trained federal immigration officers" and found that this is not the system that Congress had allowed for.[114] The Court went further, finding that "[f]ederal law specifies limited circumstances in which state

108. *Id.* at 2502.

109. *Id.* at 2502–03.

110. *Id.* at 2503.

111. *Id.*

112. *Id.* at 2504 (finding that this conscious decision was clear from the omission of any employee sanctions within Congress's comprehensive framework and the legislative history of IRCA).

113. *Id.* at 2505.

114. *Id.* at 2506.

officers may perform the functions of an immigration officer[,]" (see discussion *supra* on these four limited circumstances) and Section 6 fell outside of these circumstances.[115] The Court also addressed head-on the state's argument that Section 6, and provisions like it, fell within the meaning of "cooperation" found in 1357(g)(10)(B):

> There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government.[116]

In so holding, the Court settled the question about whether states enjoy inherent authority to enforce the civil provisions of immigration law. It is clear that they do not.

The only provision of S.B. 1070 to survive the Supreme Court's review was Section 2(B), albeit narrowly. The Court upheld Section 2(B) on the basis of three express limitations built into the provision: (1) a presumption that the individual is lawfully present if he or she presents a valid Arizona driver's license or similar identification; (2) a prohibition on the use of "race, color, or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s]"; and (3) a requirement that Section 2(B) be "implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."[117] The Court found that it could not "at this stage and on this record"—that is, on a facial challenge seeking a preliminary injunction—find that "[Section 2(B),] in practice, [would] require state officers" to violate these provisions.[118] The Court rejected the federal government's argument that the mandatory nature of the status checks required by Section 2(B) presented an obstacle to the federal government's ability to enforce the immigration laws—or, put another way, that

115. *Id.*
116. *Id.* at 2507.
117. *Id.* at 2507–08.
118. *Id.* at 2497.

a "flood" of inquiries from Arizona would overwhelm the federal system and frustrate the government's ability to carry out its enforcement priorities.[119] It specifically noted that nothing in the system established by Congress suggested that it was inappropriate to communicate with Immigration and Customs Enforcement ("ICE"), and that, on the contrary, the federal immigration laws encourage such communications.[120]

Thus, the Supreme Court carved out a very narrow interpretation of Section 2(B) and the consequent authority it provides: Arizona may require its officers to make inquiries regarding the immigration status of individuals to the federal government, but its authority stops there. Importantly, the Court specifically noted that the State cannot detain individuals "for no reason other than to verify their immigration status" and that "[t]his would raise constitutional concerns."[121] In sum, once the verification has been requested, the state has no ability to control what the federal government does with this information and cannot continue to detain the individual while awaiting a response from federal immigration officials.

IV. WHAT'S LEFT POST-*ARIZONA*?

The *Arizona* decision strongly rebuked Arizona and the states that had followed Arizona's lead: Alabama, Georgia, Indiana, South Carolina, and Utah. Many of these other states had passed laws that included provisions virtually identical to the provisions of Arizona's law that were declared unconstitutional. For example, Alabama's and South Carolina's laws both contained provisions modeled on Arizona's Section 3, creating a state crime for failure to register or carry registration documents.[122] In both cases, courts considering these measures followed the ruling in *Arizona* and concluded that the state law provision was preempted.[123]

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119. *Id.* at 2508.

120. *Id.*

121. *Id.* at 2497.

122. *See* ALA. CODE § 31-13-10(a) (2011) (preempted by United States v. Arizona, 691 F.3d 1269 (11th Cir. 2012)); S.C. CODE ANN. § 16-17-750 (2012) (preempted by United States v. South Carolina, Nos. 2:11-2958, 2:11-2779, 2012 WL 5897321 (D.S.C. Nov. 15, 2012)).

123. *See* United States v. Alabama, 691 F.3d 1269, 1282 (11th Cir. 2012) (affirming district court's grant of a preliminary injunction against H.B. 56's alien registration

Even where the state law provision did not mirror a provision considered in *Arizona*, courts across the country have drawn comparisons between the Supreme Court's analysis of S.B. 1070 Sections 3 and 6 in finding that states are preempted from legislating in the area of immigration. There is unanimous agreement that where Congress has occupied the field, even complementary state legislation is preempted. For example, federal law contains an array of statutes criminalizing acts undertaken by undocumented individuals and those who assist them in coming to, or remaining in, the United States: 8 U.S.C. §§ 1323, 1324, and 1327.[124] These statutes constitute a comprehensive framework of regulation, much like the federal registration statute, which the Supreme Court has repeatedly held preempts state legislation.[125] In the wake of the Supreme Court's decision in *Arizona*, the Eleventh Circuit,[126] a district court in South Carolina,[127] and a district court in Arizona[128] all found that state law provisions criminalizing the harboring or transporting of undocumented individuals were preempted. In striking down Georgia's harboring and transporting provisions,[129] the Eleventh Circuit noted that the "Supreme Court's decision in *Arizona v. United States* provides an instructive analogy . . . . The Supreme Court dismissed the state's argument that its goal of concurrent enforcement was appropriate in a field occupied by federal regulation."[130] Thus, in order for a state law relating to immigration to survive preemption scrutiny, as a practical matter, there must be evidence that Congress will tolerate the interference

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provision in light of Supreme Court's decision in Arizona); United States v. South Carolina, Nos. 2:11-2958, 2:11-2779, 2012 WL 5897321 at *4 (D.S.C. Nov. 15, 2012).

124. *E.g.*, 8 U.S.C. § 1323 (2006); 8 U.S.C. § 1324 (2006); 8 U.S.C. § 1327 (2006).

125. *See Arizona*, 132 S. Ct. at 2502; Hines v. Davidowitz, 312 U.S. 52, 74 (1941).

126. *See* Georgia Latino Alliance for Human Rights v. Deal, 691 F.3d 1250, 1264 (11th Cir. 2012); United States v. Alabama, 691 F.3d 1269, 1285–88 (11th Cir. 2012).

127. United States v. South Carolina, Nos. 2:11-2958, 2:11-2779, 2012 WL 5897321, at *3–*4 (D.S.C. Nov. 15, 2012), *appeal docketed.*

128. Valle del Sol v. Whiting, No. CV 10-1061, 2012 U.S. Dist. LEXIS 172196 (D. Ariz. Sept. 5, 2012), *appeal docketed.*

129. Georgia's harboring and transporting provisions were permanently enjoined by the United States District Court for the Northern District of Georgia on March 20, 2013, making them the first of these state law provisions to be permanently stricken from the statutes. Permanent Injunction at 2, Georgia Latino Alliance for Human Rights v. Deal, No. 1-11-cv-1804-TWT (N.D. Ga. Mar. 20, 2013).

130. *Georgia Latino Alliance for Human Rights*, 691 F.3d at 1264.

inherent in the state activity, even if specific federal statutory authorization or approval is not required.

As described above, the Supreme Court's *Arizona* decision did identify a narrow instance where such evidence is present—the state-mandated immigration inquiries found in Section 2(B) and provisions like it. Thus, in the wake of *Arizona*, challenges to copycats of S.B. 1070's Section 2(B) have focused on the question of prolonged detention, and whether the state law provision purports to authorize or require the continued detention of the individual for no other reason than for immigration purposes.[131] For the most part, courts have been reluctant to find that the statutes on their face require officers to prolong the detention,[132] but at least one court has yet to rule on the issue.[133] The litigation on these provisions will necessarily move forward into the discovery stage, providing an opportunity for the plaintiffs in these cases to demonstrate that the "show me your papers" provisions are not being carried out in a manner consistent with the limitations outlined in *Arizona*.

V. A BETTER WAY FORWARD FOR STATES

Aside from the legal arguments demonstrating the very limited role that states can play in immigration enforcement, laws aimed at enacting a policy of "attrition through enforcement" are simply poor public policy. Not only are states severely restricted in the role they can play—essentially being limited to sending immigration status inquiries to the federal government—but attempts to play any role at all have demonstrably harmful impacts.[134] For example, these policies have a detrimental impact on public safety. Law enforcement leaders from across the country agree that policies requiring police to question individuals about their immigration status or report suspected undocumented individuals to federal authorities damage the trust between

131. Defendants' Response to Memoranda of Plaintiffs on Limited Remand at 5–8, Lowcountry Immigration Coalition v. Haley, No. 2:11-CV-02779 (D.S.C. Oct. 10, 2012).

132. *See, e.g.*, *Del Sol*, at *4–*5.

133. *See* Utah Coalition of La Raza v. Herbert, No. 11-0401 (D. Utah May 3, 2011).

134. NAT'L IMMIGRATION LAW CTR., RACIAL PROFILING AFTER HB 56: STORIES FROM THE ALABAMA HOTLINE (Aug. 2012), *available at* http://www.nilc.org/document.html?id=800 (detailing the many civil rights abuses and other harms resulting from Alabama's anti-immigrant law, H.B. 56).

immigrant communities and the police, trust which law enforcement agencies rely on for effective policing.[135] Moreover, anti-immigrant policies come at great financial costs to state and local budgets.[136] For example, a recent study of Colorado's S.B. 90, which requires police to report individuals suspected of being undocumented to federal authorities, found that the state spends a minimum of thirteen million dollars per year on enforcing the law.[137] In the case of Arizona, an Associated Press survey of seven police agencies in Arizona found that the agencies had spent a combined total of $640,000 just to train Arizona officers on enforcement of S.B. 1070 and of Section 2(B) in particular.[138] Rather than spending money defending preempted state anti-immigrant laws, states and local jurisdictions could and should be investing in policies that benefit the entire community.

Some jurisdictions are already moving in this direction. A study of over 25,000 cities across the United States from May 2006 to December 2011 found that ninety-three had proposed pro-immigrant ordinances (in comparison to 125 that proposed restrictive ordinances).[139] These ordinances take a variety of forms, including measures that limit cooperation with federal authorities on deportations,[140] policies that prohibit the inquiry about an individual's legal status by local officials,[141] and policies that bar

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135. *See, e.g.*, NAT'L IMMIGRATION LAW CTR., WHY POLICE CHIEFS OPPOSE ARIZONA'S SB 1070 (June 2010), *available at* http://www.nilc.org/document.html?id=110.

136. *See Bad for Business: How Anti-Immigration Legislation Drains Budgets and Damages States' Economies*, IMMIGRATION POLICY CTR. (last updated June 4, 2012), http://www.immigrationpolicy.org/just-facts/bad-business-how-anti-immigration-legislation-drains-budgets-and-damages-states%E2%80%99-economies; Philip E. Wolgin & Maria Kelley, *Your State Can't Afford It: The Fiscal Impacts of States' Anti-Immigrant Legislation*, CTR. FOR AM. PROGRESS (July 5, 2011), http://www.americanprogress.org/issues/immigration/report/2011/07/05/9952/your-state-cant-afford-it.

137. COLORADO FISCAL INST., MISPLACED PRIORITIES: SB90 & THE COSTS TO LOCAL COMMUNITIES 1 (Dec. 1, 2012), *available at* http://www.coloradoimmigrant.org/downloads/CO%20FISCAL%20INSTITUTE%20SB%2090%20REPORT%20DECEMBER%202012.pdf.

138. Jacques Billeaud, *SB 1070 Training Costs $640,000: Police Agencies Teach Enforcement of Law's Questioning Provision*, THE ARIZ. REPUBLIC (Oct. 28, 2012), http://www.azcentral.com/arizonarepublic/local/articles/20121028sb-trainingcosts.html.

139. GULASEKARAM & RAMAKRISHNAN, *supra* note 39, at 14 ("[I]nterested policy actors present pre-made solutions to politically receptive jurisdictions, regardless of the underlying demographic pressures in those jurisdictions.").

140. *See, e.g.*, SANTA CLARA POLICY RESOLUTION 2011-504 (Oct. 18, 2011), *available at* http://www.altopolimigra.com/wp-content/uploads/2011/12/SC-signed.pdf.

141. LOS ANGELES POLICE DEPARTMENT SPECIAL ORDER 40 (1979), *available at* http://www.lapdonline.org/home/pdf_view/44798.

the use of public funds to enforce immigration laws.[142] For example, California recently considered a proposal that would limit when state and local jails are allowed to detain individuals for purely immigration purposes.[143] The TRUST Act, as it was called, sought to restore trust between California law enforcement and immigrant communities by ensuring that contact with police for nonviolent offenses like a simple traffic violation would not result in immigration detention and deportation.[144] The measure passed both houses with bipartisan support in 2012 but was vetoed by Democratic Governor Jerry Brown.[145] The TRUST Act has been reintroduced in 2013,[146] and four other states—Connecticut, Florida, Massachusetts, and Washington—are joining California in seeking to limit the circumstances under which local jails hold individuals for immigration.[147]

Significant momentum has also been building behind state efforts to expand access to state identification cards and driver's licenses. At the start of 2013, only three states offered residents a driver's license or state identification card regardless of immigration status.[148] The 2013 legislative session has seen at least seventeen states considering proposals to expand access to driver's licenses regardless of immigration status, and, to-date, one such measure has been signed into law.[149] This represents a significant

142. COOK COUNTY ORDINANCE 11-0-73 (Sept. 7, 2011), *available at* http://www.altopolimigra.com/wpcontent/uploads/2011/12/CookCountyDetainers.pdf.

143. A.B. 1081, 1st Sess. (Cal. 2011), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1051-1100/ab_1081_bill_20120829_enrolled.html.

144. Contact with state or local law enforcement can often result in deportation for an undocumented immigrant because of federal immigration programs, like the Secure Communities Program, that result in automatic sharing of information for all individuals booked in state or local jails. For more information about Secure Communities and the problems associated with its operation, see IMMIGRATION AND POLICY CENTER, THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS (Nov. 29, 2011), *available at* http://www.immigrationpolicy.org/special-reports/secure-communities-program-unanswered-questions-and-continuing-concerns.

145. Elise Foley, *TRUST Act Vetoed: California Gov. Jerry Brown Calls Limits on Immigration Enforcement 'Flawed'*, THE HUFFINGTON POST (Oct. 1, 2012), http://www.huffingtonpost.com/2012/10/01/trust-act-veto-jerry-brown_n_1928444.html.

146. Assembly Bill 4 (Ammiano 2013).

147. *Another Try for Immigrant Bill*, CALCOASTNEWS.COM (Dec. 3, 2012), http://www.calcoastnews.com/2012/12/another-try-for-immigrant-bill.

148. Those states include New Mexico, Washington and Utah. In the case of Utah, individuals who cannot prove lawful status are eligible for a "driving privilege" card that is distinguishable from a driver's license by the fact that it cannot be used to prove identity.

149. Those states include California, Colorado, Connecticut, the District of Columbia, Kentucky, Iowa, Florida, Maryland, Massachusetts, Nevada, New York, North Carolina,

shift away from state action that discriminatorily and punitively targets immigrants, towards state action that recognizes that our communities are strongest when the dignity and rights of *all* community members are recognized and respected.

But more can be done to advance pro-immigrant measures at the state and local level. A recent study by the American Constitution Society analyzing data related to anti-immigrant and pro-immigrant measures at the state and local level concluded that the pro-immigrant efforts had something to learn from restrictionist strategies.[150] Namely, restrictive proposals often feature local sponsors partnered with national groups or individuals, and model legislation that is replicated across jurisdictions, whereas pro-immigrant organizations are driven mostly by local sponsorship with little to no coordination amongst jurisdictions.[151] Pro-immigrant forces should heed the lessons learned by their counterparts in other states and coordinate their efforts for maximum success.

VI. CONCLUSION

Driven by frustration over federal inaction and the perceived ill effects of unauthorized immigration, states like Arizona and Alabama attempted to wrest control over the nation's immigration laws by passing omnibus immigration laws. The sole and often express intent of these laws was to create a policy of "attrition through enforcement"—to drive the undocumented immigrant population out of the state by criminalizing everyday activities necessary for basic survival. Their efforts were resoundingly rebuffed by the Supreme Court's decision in *Arizona v. United States*, which carved out a very narrow role for states to play in the enforcement of federal immigration laws. According to the clear terms of *Arizona*, states may elect to have their officers seek to verify the immigration status of individuals, but they can do no more. Thus, state attempts to create criminal penalties for violation of federal immigration laws—even when they mirror their federal counterpart—are preempted. And state attempts to

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Oregon, Ohio, Rhode Island, Texas and Vermont. Illinois signed its bill into law on January 27, 2013. *See* Senate Bill 957 (Cullerton 2013).

150. GULASEKARAM & RAMAKRISHNAN, *supra* note 39, at 17–18.

151. *Id.* at 14.

permit law enforcement officers to do more than seek to verify an individual's immigration status—for example, by allowing officers to detain or arrest individuals solely for immigration purposes—are similarly unconstitutional.

There is an exceedingly narrow path for states to pursue if they are determined to follow in the footsteps of Arizona and others states that have attempted to legislate on immigration. Yet, sound public and economic policy counsel against this decision. And recent efforts to renew the debate on federal immigration reform at the national stage have tempered, to a large extent, state appetites for wading in on the issue through state-level legislation.[152] Ultimately, as the Court reminds us, "[t]he history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here."[153] The states must develop forward-thinking solutions for the challenges—and take advantage of the opportunities—that will arise from integrating new Americans into the fabric of the nation. Only with reasoned discourse and collective purpose will the states be able to speak on a topic as nation-defining as immigration with one voice—as the United States.

152. Amanda Peterson Beadle, "Immigration Policy in the States: A Roundup," *available at* http://www.immigrationimpact.com/2013/03/01/immigration-policy-in-the-states-a-roundup. In fact, many state governors who had formerly led the crackdown against immigrants in their states have since toned down their rhetoric and softened their positions on the issue. *See* Bender and Selway, Bloomberg, "Immigration Shift by Republicans Silences Crackdown Governors," *available at* http://www.bloomberg.com/news/2013-02-25/immigration-shift-by-republicans-silences-crackdown-governors.html.

153. Arizona v. United States, 132 S. Ct. 2492, 2511 (2012).