

(UN)REASONABLE SUSPICION: RACIAL PROFILING IN IMMIGRATION ENFORCEMENT AFTER *ARIZONA V.* *UNITED STATES*

KRISTINA M. CAMPBELL†

INTRODUCTION

On June 25, 2012, the Supreme Court of the United States issued its landmark decision in *Arizona v. United States*,¹ striking down three of the four provisions of Arizona's notorious Senate Bill ("S.B.") 1070² challenged by the United States Department of Justice as preempted by federal immigration law. Despite agreeing with the government that the majority of Arizona's attempt to regulate immigration at the state level through S.B. 1070 was impermissible, the Supreme Court let stand the most controversial section of the law, Section 2(B)—the so-called "show me your papers" provision.³ Under Section 2(B), state and local law enforcement officials in Arizona are required to check the immigration status of persons whom they have "reasonable suspicion" to believe are undocumented.⁴ It is the meaning of "reasonable suspicion" in the context of immigration enforcement—and how state and local law enforcement will apply this requirement—that has given rise to concerns of racial profiling once the law goes into effect.

This article examines the "reasonable suspicion" requirement of S.B. 1070's Section 2(B), and argues that enforcement of this provision will give rise to stops, detentions, and arrests based on constitutionally impermissible factors such as race, color, and ethnicity that will ultimately stymie the efforts of

† Assistant Professor and Director, Immigration and Human Rights Clinic, University of the District of Columbia David A. Clarke School of Law. Thank you to the editors of the *Wake Forest Journal of Law & Policy* for the opportunity to participate in this symposium.

1. *Arizona v. United States*, 132 S. Ct. 2492 (2012).
2. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
3. *Arizona*, 132 S. Ct. at 2507–10.
4. *Id.* at 2507.

Arizona and other jurisdictions to enact state-level immigration enforcement laws. Part I discusses the enactment of S.B. 1070 in 2010, and the decisions by lower federal courts enjoining major provisions of the law. Part II analyzes the Supreme Court's decision in *Arizona v. United States* striking down the majority of S.B. 1070 as preempted by federal immigration law. Part III discusses Section 2(B) and the "reasonable suspicion" standard that permits state and local law enforcement to inquire as to the immigration status of persons they believe may be undocumented. The article concludes with Part IV, which argues that Section 2(B) will ultimately be deemed unconstitutional due to the inability to enforce it in a manner that does not impermissibly rely on racial profiling, and that its demise will lead to more state reliance on cooperative immigration enforcement with federal authorities and bring about the end of attempts to pass state-level immigration enforcement regulations.

I. "A COMPELLING INTEREST IN THE COOPERATIVE ENFORCEMENT OF IMMIGRATION LAWS": S.B. 1070 IN THE LOWER COURTS

Arizona Senate Bill 1070, colloquially known as S.B. 1070,⁵ was passed by the Arizona State Legislature and signed by Arizona Governor Janice K. Brewer in April 2010.⁶ The law—whose stated purpose is "to discourage and deter the unlawful . . . presence of aliens and economic activity by persons unlawfully present in the United States"⁷—quickly gained national and international attention, because of its stated intent to "make attrition through enforcement the public policy of all state and local government agencies in Arizona."⁸ Prior to S.B. 1070 becoming law, the Arizona legislature had passed several piecemeal laws attempting to regulate noncitizens at the state level.⁹ However, at the time S.B.

5. The official name of S.B. 1070 is the "Support Our Law Enforcement and Safe Neighborhoods Act." Nathan Thornburgh, *Arizona Gears Up for a Protracted Immigration Fight*, TIME MAG., Apr. 26, 2010, <http://www.time.com/time/nation/article/0,8599,1984432,00.html>.

6. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>.

7. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

8. *Id.*

9. Most notably, Arizona passed its own state-level employer sanctions law, the Legal Arizona Workers' Act ("LAWA"), ARIZ. REV. STAT. ANN. § 23-212 (2008), which took effect

1070 was enacted, neither Arizona nor any other state had attempted to comprehensively regulate immigration in the manner authorized by S.B. 1070. Arizona's passage of S.B. 1070, and the law's widespread support from Arizona constituents,¹⁰ emboldened other state legislatures to introduce copycat laws regulating immigration at the state level.¹¹ By the end of 2011, five additional states had passed laws authorizing the regulation of immigration at the state level.¹²

The ensuing controversy over the power of sovereign states to regulate immigration resulted in a flurry of litigation challenging the various laws as preempted by federal law, brought by the United States Department of Justice.¹³ The issue reached the Supreme Court of the United States when *Arizona v. United States*, the Department of Justice's challenge to S.B. 1070, was decided on June 25, 2012.¹⁴ Although the Court held that three of the four challenged provisions of S.B. 1070 were indeed preempted by federal law, the Court allowed the most controversial provision of the law—Section 2(B), the “show me your papers” provision—to stand.¹⁵ The decision by the Supreme Court came after S.B. 1070 was enjoined by United States District Judge Susan R. Bolton in July 2010, which was affirmed by the United States Court of Appeals for the Ninth Circuit in April 2011.¹⁶ Although not wholly affirmed by the Supreme Court, those decisions remain instructive on the constitutional deficiencies of S.B. 1070, and shed light on the potential as-applied challenges to

on January 1, 2008. In 2010, the Supreme Court of the United States, in a 5–3 decision, held that LAWA was not preempted by federal immigration law and allowed it to stand. *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1970 (2011).

10. A poll conducted in April 2012 reflects that more than two-thirds of Arizonans (sixty-eight percent) approve of S.B. 1070. Scott Clement, *Arizona Immigration Law Persistently Popular*, WASH. POST BEHIND THE NUMBERS BLOG (Apr. 25, 2012, 11:20 AM), http://www.washingtonpost.com/blogs/behind-the-numbers/post/arizona-immigration-law-persistently-popular/2012/04/25/gIQAaiugT_blog.html.

11. By the end of 2011, thirty-six state legislatures had introduced legislation inspired by the passage of S.B. 1070 in Arizona. A. Elena Lacayo, *The Wrong Approach: State Anti-Immigration Legislation in 2011*, NAT'L COUNCIL OF LA RAZA (2012), at 5.

12. *Id.* at 6. In addition to Arizona, the states that approved immigration regulations are Alabama, Georgia, Indiana, South Carolina, and Utah.

13. *Id.* app. B at 29–32 (discussing the litigation against state immigration regulations through 2011).

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

15. *Id.* at 2496.

16. *See infra* Section II.

Section 2(B) that are certain to come in the wake of the Court's decision as the law begins to be enforced in late 2012.¹⁷

A. *Arizona v. United States—United States District Court for the District of Arizona*

Following the enactment of S.B. 1070 in late April 2010, a flurry of litigation by individuals and civil rights groups were filed in the United States District Court for the District of Arizona.¹⁸ While the various lawsuits alleged different causes of action, the common thread running through them was the claim that the law as a whole—and Section 2(B) in particular—discriminated against people of color and legalized the racial profiling of Latinos and other ethnic and racial minorities.¹⁹ Due to their similarity, the majority of these lawsuits were consolidated into one cause of action.²⁰

However, none of the lawsuits filed by individuals and civil rights groups alleged that Arizona's attempt to regulate immigration at the state level was preempted by federal law under the Supremacy Clause of the United States Constitution.²¹ While the preemption doctrine had previously been invoked by civil rights groups to invalidate state regulations of immigration, the Supreme Court's decision in the previous term in *Chamber of Commerce of United States of America v. Whiting*²²—which challenged Arizona's state law sanctioning the unauthorized employment of aliens, the Legal Arizona Workers Act²³—cast significant doubt on

17. In September 2012, District Judge Susan R. Bolton denied a request to issue a new injunction preventing Section 2(B) of S.B. 1070 from going into effect. Michael Kiefer, *SB 1070 Ruling: Judge Paves Way for Immigration-Status Checks*, ARIZ. REPUBLIC, Sept. 5, 2012, <http://www.azcentral.com/news/politics/articles/20120824sb-1070-ruling-immigration-status-checks.html>.

18. See *Arizona SB 1070, Legal Challenges and Economic Realities*, LEGAL ACTION CENTER, <http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/arizona-legal-challenges> (last visited Feb. 21, 2013).

19. *Id.*

20. *Id.*

21. *Id.*; U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”).

22. *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011).

23. ARIZ. REV. STAT. ANN. § 23-211 et. seq. (2007). In a 5–3 decision, the Supreme Court held that the LAWA was not preempted by federal law despite the existence of the

the limits of the state power to regulate immigration and the extent to which federal law occupies the field.²⁴

Despite the Court's decision in *Whiting*, on July 6, 2010, the United States Department of Justice filed suit against the State of Arizona, seeking an injunction preventing S.B. 1070 from taking effect and alleging that the law was unconstitutional because it was preempted by federal law.²⁵ On the eve of the law's implementation, United States District Judge Susan R. Bolton issued a preliminary injunction preventing the majority of the law from going into effect as scheduled.²⁶ In her decision granting the injunction, Judge Bolton's analysis of Section 2(B) hinged on her interpretation of the meaning of its second sentence: "Any person who is arrested shall have the person's immigration status determined before the person is released."²⁷ The State of Arizona argued that detention of aliens was only mandatory under Section 2(B) if reasonable suspicion exists that an individual does not have lawful immigration status, and that reading the statute to apply to anyone arrested would be overly broad.²⁸

However, Judge Bolton stated in her decision that "[t]he [c]ourt cannot interpret this provision as Arizona suggests" because "[b]efore the passage of H.B. 2162, the first sentence of Section 2(B) of the original S.B. 1070 began, 'For any lawful contact' rather than 'For any lawful stop, detention or arrest.'"²⁹ She went on to explain:

It is not a logical interpretation of the Arizona Legislature's intent to state that it originally intended the first two sentences of Section 2(B) to be read as dependent on one another. As initially written, the first sentence of Section 2(B) did not

federal employer sanctions law under the Immigration Reform and Control Act (IRCA). See *Whiting*, 131 S. Ct. at 1970.

24. *Whiting*, 131 S. Ct. at 1971–72.

25. See Complaint at 1 *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10–1413–PHX–SRB); Jerry Markon & Michael D. Shear, *Justice Department Sues Arizona Over Immigration Law*, WASH. POST, July 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/06/AR2010070601928.html>.

26. See *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'g in part, rev'g in part* 132 S. Ct. 2492 (2012).

27. *Id.* at 993.

28. *Id.* at 993–94.

29. *Id.* at 994.

contain the word “arrest,” such that the second sentence could be read as modifying or explicating the first sentence. . . . As a result of this conclusion, the [c]ourt reads the second sentence of Section 2(B) independently from the first sentence. The [c]ourt also concludes that the list of forms of identification that could provide a presumption that a person is not an unlawfully present alien applies only to the first sentence of Section 2(B) because the second sentence makes no mention of unlawful presence: the second sentence states plainly that “[a]ny person who is arrested” must have his or her immigration status determined before release.³⁰

Judge Bolton then addressed the government’s argument that Section 2(B) is preempted because

[the] mandatory determination of immigration status for all arrestees “conflicts with federal law because it necessarily imposes substantial burdens on lawful immigrants in a way that frustrates the concern of Congress for nationally-uniform rules governing the treatment of aliens throughout the country—rules designed to ensure ‘our traditional policy of not treating aliens as a thing apart.’”³¹

She concluded:

Requiring Arizona law enforcement officials and agencies to determine the immigration status of every person who is arrested burdens lawfully-present aliens because their liberty will be restricted while their status is checked. . . . Under Section 2(B) of S.B. 1070, all arrestees will be required to prove their immigration status to the satisfaction of state authorities, thus increasing the intrusion of police presence into the lives of legally-present

30. *Id.*

31. *Id.*

aliens (and even United States citizens), who will necessarily be swept up by this requirement.³²

Therefore, Judge Bolton held that “the United States has demonstrated that it is likely to succeed on its claim that the mandatory immigration verification upon arrest requirement contained in Section 2(B) of S.B. 1070 is preempted by federal law” because it “is likely to burden legally-present aliens, in contravention of the Supreme Court’s directive . . . that aliens not be subject to ‘the possibility of inquisitorial practices and police surveillance.’”³³ She reached the same conclusion regarding the first sentence of Section 2(B) requiring Arizona law enforcement to determine the immigration status of individuals during lawful stops, detentions, and arrests, thus enjoining the provision entirely as likely preempted by federal law.³⁴

B. Review and Affirmance by the United States Court of Appeals for the Ninth Circuit

Following Judge Bolton’s decision enjoining the majority of S.B. 1070, the State of Arizona appealed to the United States Court of Appeals for the Ninth Circuit.³⁵ The three-judge panel heard oral argument on November 1, 2010 and issued its decision affirming the district court’s preliminary injunction on April 11, 2011.³⁶ In a 2–1 opinion, with Circuit Judge Paez writing for the majority, the court upheld Judge Bolton’s issuance of a preliminary injunction in its entirety.³⁷ Regarding Section 2(B), the court stated:

32. *Id.* at 995. Judge Bolton also stated in a footnote that “[t]he Court is also cognizant of the potentially serious Fourth Amendment problems with the inevitable increase in length of detention while immigration status is determined, as raised by the plaintiffs in *Friendly House, et al. v. Whiting, et al.*” *Id.* at 995 n.6.

33. *Id.* at 996.

34. *Id.* at 996–98.

35. See Craig Harris et al., *Arizona Will File Expedited Appeal to Lift SB 1070 Ruling*, ARIZ. REPUBLIC, July 29, 2010, <http://www.azcentral.com/arizonarepublic/news/articles/2010/07/29/20100729arizona-immigration-law-appeal-filed.html>.

36. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011); see also Marc Lacey, *Injunction on Arizona Upheld: Appeals Court Rules in Immigration Case*, N.Y. TIMES, Apr. 12, 2011, at A12.

37. *United States v. Arizona*, 641 F.3d 339 (Bea, J., dissenting).

Section 2(B) sidesteps Congress' scheme for permitting the states to assist the federal government with immigration enforcement. Through Section 2(B), Arizona has enacted a mandatory and systematic scheme that conflicts with Congress' explicit requirement that in the "[p]erformance of immigration officer functions by State officers and employees," such officers "shall be subject to the direction and supervision of the Attorney General." Section 2(B) therefore interferes with Congress' scheme because Arizona has assumed a role in directing its officers how to enforce the INA. We are not aware of any INA provision demonstrating that Congress intended to permit states to usurp the Attorney General's role in directing state enforcement of federal immigration laws.³⁸

After a review of relevant preemption doctrine precedent, the court determined that "Section 2(B)'s interference with Congressionally-granted Executive discretion weighs in favor of preemption."³⁹ The court used strong language repudiating the provision, stating that "Section 2(B)'s 'unyielding' mandatory directives to Arizona law enforcement officers 'undermine[] the President's intended statutory authority' to establish immigration enforcement priorities and strategies. . . . Through Section 2(B), Arizona has attempted to hijack a discretionary role that Congress delegated to the Executive."⁴⁰ The court also held that, "[i]n addition to Section 2(B) standing as an obstacle to Congress' statutorily expressed intent, the record unmistakably demonstrates that S.B. 1070 has had a deleterious effect on the United States' foreign relations."⁴¹ Thus, the court ruled that "the United States has met its burden to show that there is likely no set of circumstances under which S.B. 1070 Section 2(B) would be valid, and it is likely to succeed on the merits of its challenge," and that

38. *Id.* at 350 (citations omitted).

39. *Id.* at 352.

40. *Id.*

41. *Id.*

as such, “[t]he district court did not abuse its discretion by concluding the same.”⁴²

II. ARIZONA V. UNITED STATES

Following the Ninth Circuit’s affirmance of the District Court’s injunction of the major provisions of S.B. 1070, the State of Arizona filed a Petition for a Writ of Certiorari with the Supreme Court of the United States on August 10, 2011.⁴³ The Petition was granted on December 12, 2011, with the Court agreeing to review the constitutionality of Section 2(B), Section 3, Section 5(C), and Section 6.⁴⁴ The case was argued on April 25, 2012, and on June 25, 2012, in a 5–3 decision, Justice Anthony Kennedy delivered the opinion of the Court, striking down Sections 3, 5(C), and 6 as preempted by federal law, while permitting Section 2(B) to stand.⁴⁵ The Court’s decision is instructive not only for its analysis of the preemption doctrine, but also for Justice Kennedy’s thorough discussion of the history of the federal government’s regulation of immigration and its “broad, undoubted power over the subject of immigration and the status of aliens.”⁴⁶

A. A Historical Look at the Federal Power to Regulate Immigration

Justice Kennedy’s opinion—which was joined by Chief Justice John Roberts and Justices Breyer, Ginsberg, and Sotomayor—begins with a comprehensive look at the historical roots of the federal government’s power to regulate immigration.⁴⁷ The root of the federal power to regulate immigration is contained in Article I, Section 8, Clause 4 of the United States Constitution, which vests the government with the

42. *Id.* at 354.

43. *Arizona v. United States*, 641 F.3d 339 (9th Cir. 2011), *petition for cert. filed*, 2011 WL 3562633 (U.S. Aug. 8, 2011) (No. 11–182).

44. *Arizona v. United States*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11–182).

45. *Arizona v. United States*, 132 S. Ct. 2492, 2492, 2510 (2012). Only eight of the nine justices took part in the decision, as Justice Elena Kagan recused herself from participation in the case. *Id.*

46. *Id.* at 2494.

47. *Id.* at 2498–2501.

power to “establish an uniform Rule of Naturalization.”⁴⁸ Justice Kennedy explained that the power to regulate immigration is part of the federal government’s “inherent power as sovereign to control and conduct relations with foreign nations,”⁴⁹ and that immigration policy affects “trade, investment, tourism, and diplomatic relations . . . as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.”⁵⁰ As part of this sovereign power, the Supreme Court has affirmed that “[i]t is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.”⁵¹

Noting that “[f]ederal governance of immigration and alien status is extensive and complex,”⁵² the opinion discusses Congress’s comprehensive regulation of the admission and removal of aliens through the Immigration and Nationality Act (“INA”).⁵³ The opinion also discusses how the federal government’s “[d]iscretion in the enforcement of immigration law embraces immediate human concerns,” noting that “[t]he equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service.”⁵⁴ With this historical framework, as well as an acknowledgment that immigration policy is of great import to the States and that “Arizona bears many of the consequences of unlawful immigration,”⁵⁵ Justice Kennedy set the stage for the Court’s analysis of “whether, under preemption principles, federal law permits Arizona to implement the state-law provisions in dispute.”⁵⁶

48. U.S. CONST. art. I, § 8, cl. 4.

49. *Arizona*, 132 S. Ct. at 2498.

50. *Id.*

51. *Id.*

52. *Id.* at 2499.

53. *See, e.g., id.* (“Congress has specified categories of aliens who may not be admitted to the United States.”) (citing 8 U.S.C. § 1182 (2006)).

54. *Id.*

55. *Id.* at 2500.

56. *Id.*

B. Section 3: Alien Registration Documents

The first provision of S.B. 1070 addressed by the Court, Section 3, prohibited the “willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code § 1304(e) or 1306(a).”⁵⁷ Reasoning that Section 3 created “a state-law penalty for conduct proscribed by federal law,”⁵⁸ the Court held that because the INA already requires aliens to carry proof of registration,⁵⁹ Section 3 is preempted by federal law and is therefore an impermissible regulation of immigration by the State of Arizona.⁶⁰ The Court stated that:

Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted. . . . Were §3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.⁶¹

Thus, the Court determined that because, “with respect to the subject of alien registration, Congress intended to preclude States from ‘complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations,’”⁶² Section 3 conflicts with federal law and is field preempted.⁶³

C. Section 5(C): Employment of Aliens

The next provision of S.B. 1070 analyzed by the Court, Section 5(C), made it a crime under Arizona law for “an

57. ARIZ. REV. STAT. ANN. § 13-509(A) (2012).

58. *Arizona*, 132 S. Cl. at 2501.

59. *See* 8 U.S.C. § 1304(e) (2006) (“[E]very alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him. . . .”).

60. *Arizona*, 132 S. Cl. at 2502.

61. *Id.* at 2502–03.

62. *Id.* at 2503 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941)).

63. *Id.*

unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor.”⁶⁴ A violation of Section 5(C) was a misdemeanor, punishable by up to six months in jail and a \$2500 fine.⁶⁵ Stating, “[Section] 5(C) enacts a state criminal prohibition where no federal counterpart exists,”⁶⁶ the Court held that Section 5(C) is conflict preempted because its enforcement “would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens.”⁶⁷ The Court explained that:

Although §5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. . . . The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose. . . . Section 5(C) is preempted by federal law.⁶⁸

D. Section 6: Probable Cause Arrests of Aliens

Section 6 of S.B. 1070 stated that an Arizona state law enforcement officer “without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States.”⁶⁹ After providing an overview of the power of state law enforcement officials to arrest and detain individuals in removal proceedings,⁷⁰ the Court concluded that “Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has

64. ARIZ. REV. STAT. ANN. § 13-2928(C) (2011).

65. *Id.* § 13-2928(F); *Arizona*, 132 S. Ct. at 2503.

66. *Arizona*, 132 S. Ct. at 2502.

67. *Id.* at 2505.

68. *Id.*

69. ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2011).

70. *Arizona*, 132 S. Ct. at 2502.

given to trained federal immigration officers.”⁷¹ The Court reasoned that:

This state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case. This would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed. This is not the system Congress created.⁷²

Concluding that Section 6 “violates the principle that the removal process is entrusted to the discretion of the Federal Government,”⁷³ the Court held that it is preempted by federal law because it “creates an obstacle to the full purposes and objectives of Congress.”⁷⁴

E. Section 2(B): Reasonable Suspicion Arrests of Aliens

Finally, S.B. 1070’s Section 2(B) imposes on Arizona law enforcement officers the duty to make a “reasonable attempt . . . to determine the immigration status” of a person detained for a legitimate basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”⁷⁵ In addition to requiring state law enforcement to inquire about the immigration status of individuals for whom a law enforcement official determines such “reasonable suspicion” exists, Section 2(B) also requires that “[a]ny person who is arrested shall have the person’s immigration status determined before the person is released.”⁷⁶ The Court noted that, generally, the manner in which Arizona law enforcement officers determine the immigration status of persons in their custody is to contact

71. *Id.* at 2506.

72. *Id.*

73. *Id.*

74. *Id.* at 2507 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

75. ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

76. *Id.*

Immigration and Customs Enforcement (“ICE”),⁷⁷ and that “Congress has obligated ICE to respond to any request made by state officials for verification of a person’s citizenship or immigration status.”⁷⁸

After examining the cooperation between state law enforcement and federal immigration officials as required by Section 2(B), the Court held this provision of S.B. 1070 was not preempted by federal law.⁷⁹ The Court stated that:

However the law is interpreted, if §2(B) only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives.⁸⁰

The majority’s determination that Section 2(B) is not preempted unless it can be shown that it has “other consequences that are adverse to federal law and its objectives” is rooted in Justice Kennedy’s warning that “[t]he nature and timing of this case counsel caution in evaluating the validity of §2(B).”⁸¹ This is because:

The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that creates a conflict with federal law.⁸²

77. *Arizona*, 132 S. Ct. at 2507.

78. *Id.* at 2508.

79. *Id.* at 2510.

80. *Id.* at 2509.

81. *Id.* at 2510.

82. *Id.*

Thus, while leaving open the possibility of “other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect,”⁸³ Section 2(B) was allowed to stand by the Court due to this presumption against preemption.

F. Dissenting Opinion by Justice Antonin Scalia

While Justices Antonin Scalia, Samuel Alito, and Clarence Thomas all filed separate dissenting opinions in *Arizona v. United States*, it is Justice Scalia’s opinion that has garnered a great deal of attention for what many believe to be its inflammatory rhetoric.⁸⁴ Although Justice Scalia concurs in part with the majority opinion,⁸⁵ his view that “[a]s a sovereign, Arizona has the inherent power to exclude persons from its territory”⁸⁶ diverges sharply from Justice Kennedy’s discussion of federalism and immigration. Justice Scalia concludes that “after the adoption of the Constitution there was some doubt about the power of the Federal Government to control immigration, but no doubt about the power of the States to do so,”⁸⁷ and then conducts his own analysis of the challenged provisions of S.B. 1070.

In his discussion of Section 2(B), Justice Scalia states that:

Arizona is *entitled* to have “its own immigration policy”—including a more rigorous enforcement policy—so long as that does not conflict with federal law. The Court says, as though the point is utterly dispositive, that “it is not a crime for a removable alien to remain present in the United States[.]” . . . It is not a federal crime, to be sure. But there is no reason Arizona cannot make it a state crime for a removable alien (or any illegal

83. *Id.*

84. See, e.g., Jeffrey Tobin, *That’s Just Nino: Scalia’s Arizona Dissent*, THE NEW YORKER, June 26, 2012, <http://www.newyorker.com/online/blogs/comment/2012/06/antonin-scalia-dissent-immigration-arizona.html>.

85. *Arizona*, 132 S. Ct. at 2511–24. (Scalia, J., concurring in part and dissenting in part).

86. *Id.* at 2511 (Scalia, J., concurring in part and dissenting in part).

87. *Id.* at 2514 (Scalia, J., concurring in part and dissenting in part).

alien, for that matter) to remain present in Arizona.⁸⁸

Justice Scalia's belief that Arizona has a right—an entitlement—to criminalize the presence of undocumented immigrants in the State is indeed a radical interpretation of the state power to regulate immigration. Had that argument been accepted by a majority of the Court, it could have opened the door to different regulation of immigration in every single state, “including a more rigorous enforcement policy”⁸⁹ prompted by “[t]he Executive's policy choice of lax federal enforcement.”⁹⁰

Whether or not the Executive Branch is actually engaging in “lax federal enforcement” of immigration law and policy is certainly up for debate. However, it appears that Justice Scalia is not alone in his belief that “[t]he State has the sovereign power to protect its borders more rigorously if it wishes, absent any valid federal prohibition.”⁹¹ Given the rush by various states to pass S.B. 1070 copycat laws in 2010 and 2011, Arizona's complaint that it was required to create its own immigration enforcement scheme due to “willful blindness or deliberate inattention to the presence of removable aliens”⁹² in the state struck a chord with other jurisdictions, including those not traditionally seen as hotbeds of unauthorized migration or on the international border.⁹³

Ultimately, Justice Scalia's dissenting opinion was criticized not for his different understanding of the limits of State sovereignty to regulate immigration, but for what some commentators perceived to be his uncivil tone toward the Executive Branch.⁹⁴ For example, Justice Scalia's dissent attacks President Obama's Deferred Action for Childhood Arrivals program—which had been announced by the President and the Department of Homeland Security a mere ten days before the

88. *Id.* at 2516–17 (Scalia, J., concurring in part and dissenting in part) (citation omitted).

89. *Id.* (Scalia, J., concurring in part and dissenting in part).

90. *Id.* at 2517 (Scalia, J., concurring in part and dissenting in part).

91. *Id.* (Scalia, J., concurring in part and dissenting in part).

92. *Id.* (Scalia, J., concurring in part and dissenting in part).

93. *See* Lacayo, *supra* note 11, at 14–15 (discussing the passage of state immigration regulations by Alabama, Georgia, Indiana, South Carolina, and Utah).

94. *See Arizona*, 132 S. Ct. at 2511–24. (Scalia, J., concurring in part and dissenting in part).

Court delivered its opinion—as an example of the federal government’s inability (or outright refusal) to curb undocumented migration to the United States.⁹⁵ Justice Scalia goes on to lambast the other two branches of government, rhetorically asking “Must Arizona’s ability to protect its borders yield to the reality that Congress has provided inadequate funding for federal enforcement—or, even worse, to the Executive’s unwise targeting of that funding?”⁹⁶

Once again, whether Congress’s funding of immigration enforcement is “inadequate” or President Obama’s allocation of those funds “unwise” is a matter of great dispute.⁹⁷ But Justice Scalia’s characterization of Arizona’s decision to pass and enforce its own immigration laws as merely “enforcing applications of the Immigration Act that the President declines to enforce”⁹⁸ is at best an oversimplification of the immigration policy of the Obama Administration, and at worst a hyperbolic and self-serving half-truth.⁹⁹ It is this sort of inflammatory indictment of federal immigration policy, and the casting of Arizona as a heroic entity struggling to protect itself in the face of an apathetic and inattentive government,¹⁰⁰ that has increased concern over the forthcoming interpretation of Section 2(B)’s “reasonable

95. *Id.* at 2522 (Scalia, J., concurring in part and dissenting in part) (“Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so. Thousands of Arizona’s estimated 400,000 illegal immigrants—including not just children but men and women under 30—are now assured immunity from enforcement, and will be able to compete openly with Arizona citizens for employment.”).

96. *Id.* at 2521 (Scalia, J., concurring in part and dissenting in part).

97. In fiscal year 2012, the President’s budget appropriated 43.2 billion dollars to the Department of Homeland Security (DHS). See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, DEP’T OF HOMELAND SEC.: FED. BUDGET, FISCAL YEAR 2012, available at http://www.whitehouse.gov/omb/factsheet_department_homeland.

98. *Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part).

99. Again and again, Justice Scalia’s dissent accuses the Executive Branch of willfully failing to enforce federal immigration law. *Id.* (Scalia, J., concurring in part and dissenting in part) (“A Federal Government that does not want to enforce the immigration laws as written, and leaves the States’ borders unprotected against immigrants whom those laws would exclude. So the issue is a stark one. Are the sovereign States at the mercy of the Federal Executive’s refusal to enforce the Nation’s immigration laws?”).

100. See *supra* note 95, and accompanying text.

suspicion” provision and the looming fear that enforcement of the law will inevitably give way to racial profiling.¹⁰¹

III. SECTION 2(B): WHAT IS “REASONABLE SUSPICION” IN THE IMMIGRATION CONTEXT?

Although immigrants’ rights advocates were buoyed by the Supreme Court’s holding that three of the four provisions of S.B. 1070 it considered were preempted by federal law, there remains significant distress over the Court’s conclusion that Section 2(B) was not preempted and should be allowed to be enforced by the State of Arizona.¹⁰² The anxiety over the meaning of the term “reasonable suspicion” in Section 2(B) remains because the application of the reasonable suspicion standard—a fundamental canon of criminal law—to determine whether a person may be undocumented is muddled by significant precedent limiting the Fourth Amendment rights of aliens in the removal context, and whether or not those rights are also diminished under Section 2(B).

A. Fourth Amendment Rights in the Removal Context and the “Egregious Violation” Standard

There is a substantial body of law at both the administrative and federal court level holding that aliens have limited Fourth Amendment rights in removal proceedings. The Board of Immigration Appeals, several United States Circuit Courts of Appeals, and the Supreme Court of the United States have articulated the heightened standard of “egregiousness” in order to establish a Fourth Amendment violation in the removal context, due to the Supreme Court’s determination that “the exclusionary rule . . . does not apply in a deportation proceeding.”¹⁰³

101. See, e.g., Roberto Cintli Rodriguez, *Racial Profiling in Arizona: SB 1070 (2)(b) and Not to Be*, TRUTHOUT (June 19, 2012, 1:11PM), <http://www.truth-out.org/news/item/10071-arizonas-sb-1070-2b-and-not-to-be>.

102. *Id.*

103. See *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

i. *INS v. Lopez-Mendoza*

In 1984, the Supreme Court of the United States held that, even in the case of a warrantless arrest, an alien cannot generally suppress evidence asserted to be procured in violation of the Fourth Amendment unless the alleged violations are so egregious as to transgress notions of fundamental fairness.¹⁰⁴ This is because removal proceedings are civil proceedings rather than criminal proceedings, and thus the Fourth Amendment right prohibiting unreasonable searches and seizures does not attach in the absence of “violations of . . . liberties that might . . . undermine the probative value of the evidence.”¹⁰⁵ The Court further reasoned that holding law enforcement officials liable through the initiation of a civil action was an adequate remedy, and that the exclusionary rule would not significantly or substantially deter the conduct of immigration officers.¹⁰⁶

However, the Supreme Court stated that “conclusions concerning the exclusionary rule’s value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.”¹⁰⁷ While this statement by the Court only contemplates constitutional violations by federal immigration officers, the increased enforcement of immigration law by state and local law enforcement officers gives rise to the possibility that the conduct of nonfederal officials may also provide cause for the Court to revisit the “egregiousness” standard for Fourth Amendment violations in removal proceedings that it announced nearly thirty years ago in *Lopez-Mendoza*.

To date, the Court has not used the egregiousness standard announced in *Lopez-Mendoza* to invoke the exclusionary rule in removal proceedings.¹⁰⁸ Nonetheless, the existence of the rule—along with the Court’s stated willingness to expand the rule if it can be shown that Fourth Amendment violations in the removal context are “widespread”—must be looked at closely in light of

104. *Id.* at 1050–51.

105. *Id.*

106. *Id.* at 1046.

107. *Id.* at 1050.

108. *See Oliva-Ramos v. U.S. Att’y Gen.*, 694 F.3d 259, 275 (3d Cir. 2012) (“The fact that the Court has not yet applied the rule in a deportation proceeding cannot undermine the fact that the Court has allowed for that possibility.”).

the impending enforcement of Section 2(B)'s "reasonable suspicion" standard.

ii. *Oliva-Ramos v. Attorney General*

A recent case that may be instructive regarding the egregious Fourth Amendment violation standard in the context of potential challenges to the enforcement of S.B. 1070 is the decision of the United States Court of Appeals for the Third Circuit in *Oliva-Ramos v. Attorney General*, which was decided on September 13, 2012.¹⁰⁹ Since it had not previously considered when conduct by ICE officials would trigger the exclusionary rule in removal proceedings, the court stated that "[w]e now take this opportunity to more precisely define the standard that should be used in determining whether unlawful conduct by governmental officers rises to the level of an 'egregious' violation of the Fourth Amendment."¹¹⁰

In analyzing the type of conduct in removal proceedings that can be considered "egregious," the Third Circuit provided a historical overview of the development of Fourth Amendment jurisprudence.¹¹¹ Noting that the egregiousness standard in the removal context requires something more than the ordinary Fourth Amendment test of "reasonableness,"¹¹² the court considered some of the approaches used by other Circuit Courts of Appeals to determine whether a Fourth Amendment violation is "egregious."¹¹³

After discussing the various tests employed by sister circuits, the court elected to adopt "with slight modification" the Second Circuit's approach, which held that "exclusion of evidence is appropriate under the rule of *Lopez-Mendoza* if record evidence established either (a) that an *egregious* violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute."¹¹⁴ In announcing its modification of the Second Circuit's test, the Court stated that:

109. *Id.*

110. *Id.* at 275–76.

111. *See id.* at 276.

112. *Id.*

113. *Id.*

114. *Id.* at 277 (emphasis added).

We therefore conclude that evidence will be the result of an egregious violation within the meaning of *Lopez-Mendoza*, if the record evidence established either (a) that a *constitutional* violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its unfairness—undermined the reliability of the evidence in dispute.¹¹⁵

This “slight modification” employed by the Third Circuit is not insignificant. By making a distinction between an “*egregious violation* that was fundamentally unfair” and a “*constitutional violation* that was fundamentally unfair,” the court eliminated what it considered to be “circular” logic employed by the Second Circuit in its analysis.¹¹⁶ This importance is underscored by the court’s discussion of the individualized, case-by-case analysis that must occur when determining whether a Fourth Amendment violation in the removal context rises to the level of “egregiousness”:

[T]here is no one-size-fits-all approach to determining whether a Fourth Amendment violation is egregious. Indeed, the exceptions announced in *Lopez-Mendoza* do not suggest or imply that any strict test-based approach is appropriate or warranted. Using this formulation of the rule as its guide, on remand, the BIA’s inquiry should include such factors as: whether Oliva-Ramos can establish intentional violations of the Fourth Amendment, whether the seizure itself was so gross or unreasonable in addition to being without a plausible legal ground, (e.g., when the initial illegal stop is particularly lengthy, there is an unnecessary and menacing show or use of force, etc.), whether improper seizures, illegal entry of homes, or arrests occurred under threats, coercion or physical abuse, the extent to which the agents reported to unreasonable shows of force, and

115. *Id.* at 278 (emphasis added).

116. *Id.*

finally, whether any seizures or arrests were based on race or perceived ethnicity. These factors are illustrative of the inquiry and not intended as an exhaustive list of factors that should always be considered, nor is any one factor necessarily determinative of the outcome in every case. Rather, the familiar totality of the circumstances must guide the inquiry and determine its outcome.¹¹⁷

The “totality of the circumstances” approach articulated by the Third Circuit sheds light on how the constitutionality of the “reasonable suspicion” provision of Section 2(B) may be applied in future legal challenges. Though the heightened standard of egregiousness in order to establish a Fourth Amendment violation in the removal context is daunting, the factors announced by the court that should be considered in determining whether the exclusionary rule applies are instructive and provide guidance as to the type of conduct by ICE officials that may render Section 2(B) unconstitutional as applied to certain individuals.

IV. RACIAL PROFILING IN ARIZONA AFTER THE ENFORCEMENT OF SECTION 2(B)

Since the introduction and passage of S.B. 1070, it has been labeled the “Show Me Your Papers Law” because of Section 2(B)’s requirement that anyone whom law enforcement believes to be an undocumented immigrant produce proof of their lawful immigration status or United States citizenship on demand.¹¹⁸ Defenders of S.B. 1070 in general, and Section 2(B) in particular, point to the fact that the statute contains a provision prohibiting racial profiling, which states that law enforcement “may not consider race, color, or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s].”¹¹⁹

117. *Id.* at 279.

118. *See, e.g., We Vow to Fight: SB 1070 At the Supreme Court*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/whats-stake-sb-1070-supreme-court-0> (last visited Apr. 8, 2013).

119. ARIZ. REV. STAT. ANN. §11-1051(B) (2012). The law also contains a provision that S.B. 1070 must 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.” *Id.* §11-1051(L).

While such proclamations certainly do not ensure that the law will be enforced in a nondiscriminatory, race-neutral manner, the Supreme Court noted that “it would be inappropriate to assume §2(B) will be construed in a way that creates a conflict with federal law.”¹²⁰

However, despite these alleged safeguards written into the text of the statute, the fact remains that the threat of racial profiling in the enforcement of S.B. 1070 is a real concern among people of color in the State of Arizona.¹²¹ The passage of S.B. 1070 was the culmination of years of attempts by the Arizona Legislature to pass state laws regulating immigrants.¹²² At the same time, civil rights groups and the United States Department of Justice have already brought suit against the State of Arizona and the Sheriff of Maricopa County, Arizona, alleging racial profiling against Latinos both before and after the passage of S.B. 1070.¹²³ The outcome of these cases will undoubtedly shape the impact and legacy of S.B. 1070 now that the Supreme Court has upheld the facial constitutionality of the law.

A. Ortega-Melendres v. Arpaio

In 2008, a coalition of civil rights groups filed a class action lawsuit against the Sheriff of Maricopa County, Joe Arpaio, for a pattern and practice of racial profiling Latinos subject to his jurisdiction.¹²⁴ The complaint, which was filed in the United States District Court for the District of Arizona and initially assigned to District Judge Mary H. Murguia,¹²⁵ was brought on behalf of five

120. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

121. See, e.g., Jorge Rivas, *Civil Rights Groups Worry as SB 1070 Goes into Effect*, COLORLINES (Sept. 19, 2012, 12:51 PM), http://www.colorlines.com/archives/2012/09/civil_rights_groups_concerned_as_sb_1070_show_me_your_papers_goes_into_effect.html.

122. For an overview of the build-up to S.B. 1070, see Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1 (2011).

123. See *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 969 (D. Ariz. 2011).

124. See *id.* The author acted as counsel for Plaintiffs in this lawsuit until 2009 in her previous capacity as a Staff Attorney for the Mexican American Legal Defense and Educational Fund (“MALDEF”) in Los Angeles, California.

125. Judge Murguia recused herself from the *Ortega-Melendres* case in July 2009 due to a challenge by Sheriff Arpaio regarding the Judge's impartiality based on the fact that she is of Latina descent. Counsel for Sheriff Arpaio also argued that Judge Murguia should be removed from hearing the case because her identical twin sister, Janet Murguia, is the leader of the National Council of La Raza (“NCLR”), a national Latino civil rights

United States citizens or lawfully present aliens of Latino descent who had been stopped, questioned, searched, or detained on suspicion by law enforcement that they were unlawfully present in the United States.¹²⁶ The complaint alleges that in each instance, the Maricopa County Sheriff's deputies who inquired into the immigration status of the plaintiffs did not have any basis for making such an inquiry other than their imputed Latino race or ethnicity, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article II, Section 8 of the Arizona Constitution, and Title VI of the Civil Rights Act of 1964.¹²⁷

On December 23, 2011, United States District Judge Murray Snow granted partial injunctive relief and certified the racial profiling class action lawsuit against Maricopa County Sheriff Joe Arpaio, defining the class broadly as “[a]ll Latino persons who, since January 2007, have been or will be in the future, stopped, detained, questioned or searched by MCSO agents while driving or sitting in a vehicle on a public roadway or parking area in Maricopa County, Arizona.”¹²⁸ The District Court's injunction on behalf of the named plaintiffs prohibits the MCSO from detaining persons based solely on the “reasonable suspicion” that they may be undocumented.¹²⁹ In challenging the injunction, the MCSO argued that Arizona's state human smuggling statute, Arizona Revised Statute § 13-2319, provides law enforcement with the requisite reasonable suspicion to make inquiries regarding the immigration status of individuals detained pursuant to a legal traffic stop.¹³⁰

The Ninth Circuit Court of Appeals rejected the MCSO's argument and, in affirming the injunction in September 2012, stated that:

organization. While strongly rebuking any suggestion that her ability to decide the case in a fair and unbiased manner was compromised, Judge Murguia nonetheless recused herself from the case in order to avoid the appearance of impropriety, no matter how slight. *See Ortega-Melendres v. Arpaio*, No. CV-07-2513-PHX-MHM, 2009 WL 2132693 (D. Ariz. July 15, 2009).

126. *Ortega-Melendres*, 836 F. Supp. 2d at 969-70.

127. *Id.*

128. *Id.* at 992.

129. *Id.*

130. *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012).

We first conclude that the Plaintiffs were likely to succeed on their claim that without more, the Fourth Amendment does not permit a stop or detention based solely on unlawful presence. . . . We have long made clear that, unlike illegal entry, mere unauthorized presence in the United States is not a crime. . . . Here, the district court enjoined the Defendants from detaining individuals based solely on reasonable suspicion or knowledge that a person was unlawfully present in the United States. . . . Unlawful presence is not criminal. Nor does illegal presence, without more, give rise to reasonable suspicion of violation of Arizona’s human smuggling statute . . . We therefore conclude that the Plaintiffs were likely to succeed on the merits of the Fourth Amendment argument that the Defendants may not detain individuals solely because of unlawful presence.¹³¹

This analysis by the Ninth Circuit of what constitutes sufficient “reasonable suspicion” under the Fourth Amendment may shed some light on the eventual constitutionality of Section 2(B) as applied and whether or not enforcement of the law will encourage impermissible racial profiling. As of this writing, the case remains pending in the district court.

B. Friendly House v. Whiting

Although the Supreme Court of the United States ultimately ruled on the federal government’s lawsuit against S.B. 1070 in *Arizona v. United States*, the first case to raise a preemption challenge to the law was filed by a coalition of civil rights groups in May 2010.¹³² The lawsuit, *Friendly House v. Whiting*, made many of the same preemption arguments that the Department of Justice made in its suit.¹³³ However, once the Department of Justice filed its own challenge to S.B. 1070, a decision on the merits of *Friendly*

131. *Id.* at 1000.

132. See Complaint, *Friendly House v. Whiting*, 846 F. Supp. 2d 1053 (D. Ariz. 2012) (No. CV-10-1061-PHX-SRB), 2010 WL 2019492.

133. *Id.*

House was stayed in order to allow the courts to first address the claims made by the United States government against Arizona.¹³⁴

Following the Supreme Court's decision upholding the constitutionality of Section 2(B), the civil rights coalition once again sought an injunction preventing the law from going into effect.¹³⁵ However, in light of the Supreme Court's clear language regarding the presumption against preemption, Judge Bolton rejected the arguments made by the plaintiffs in *Friendly House* in support of an injunction and allowed enforcement of the law to begin as scheduled.¹³⁶ Pledging to continue to fight against Section 2(B), and to mitigate the pernicious effects of racial profiling on the residents of Arizona who may be subject to the questionable application of the "reasonable suspicion" provision, civil rights and immigrants' rights groups in Arizona have organized to document any abuses by law enforcement that may serve as a challenge to the constitutionality of S.B. 1070 as applied to people of color.¹³⁷

The federal government has been criticized for failing to bring a challenge to S.B. 1070 based on the potentially unconstitutional racial profiling that the law almost certainly invites.¹³⁸ Indeed, given the Supreme Court's decision in *Whiting* and the mixed results of preemption challenges to other state and local immigration regulations,¹³⁹ the Department of Justice's narrow legal strategy did not ensure a victory. And, while the Supreme Court's decision striking down the majority of S.B. 1070

134. As Dean Kevin R. Johnson noted, "the argument that a state law is preempted by federal law is most powerfully made by the national government itself when it asserts that a state is intruding on *its* power to regulate immigration. Conversely, the force of the argument is correspondingly weaker when made by groups not representing the U.S. government." Kevin R. Johnson, *A Case Study of Color-Blind Rhetoric: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, J. FOR SOC. JUST. 5, 18 (2011).

135. See Michael Kiefer et al., *Police Can Start Enforcing Ariz. Immigration Law, Judge Rules*, ARIZ. REPUBLIC, Sept. 18, 2012, <http://www.azcentral.com/arizonarepublic/news/articles/2012/09/18/20120918arizona-immigration-law-police-can-start-enforcing-judge-rules.html>.

136. *Id.*

137. See *id.*; Rivas, *supra* note 121.

138. See Lucas Guttentag, *Arizona's Immigration Law Violates Civil Rights. Why Didn't Anyone Mention That at the Supreme Court*, NEW REPUBLIC, May 14, 2012, <http://www.tnr.com/article/politics/103188/sb1070-arizona-immigration-civil-rights-federalism>.

139. See Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 29-30 (2007).

was a clear victory for the federal government, it is bittersweet due to the survival of its most controversial provision. Now that Section 2(B) is the only major provision of S.B. 1070 left standing, the scope and effect of the racial profiling that results from the law's enforcement remains to be seen as the litigation in the *Friendly House* case goes forward.¹⁴⁰

C. State and Local Immigration Regulations After S.B. 1070

Prior to the Supreme Court's decision striking down the majority of S.B. 1070, several other states passed their own laws attempting to regulate immigration at the sub-federal level.¹⁴¹ Given the Court's clear rejection of the State of Arizona's "mirror image" theory of immigration regulation,¹⁴² it seems likely that the majority of these laws will suffer the same fate as S.B. 1070 and be struck down as preempted by federal law. However, even if these laws—or portions of those laws similar to Arizona's Section 2(B)—are allowed to stand under the preemption doctrine, the fact remains that such laws calling for increased cooperation between state and federal law enforcement in immigration enforcement are likely to give rise to increased litigation, due to the danger that comes with the application of the term "reasonable suspicion" to determine the lawful presence of aliens in the United States.

The "reasonable suspicion" language in Section 2(B) is constitutionally suspect because its enforcement will give rise to stops, detentions, and arrests based on impermissible factors such as race, color, and ethnicity. Because of this inherent defect, the inclusion of "reasonable suspicion" provisions into state immigration laws will ultimately stymie the efforts of Arizona and other jurisdictions to enact such regulations. The inability to enforce "reasonable suspicion" immigration enforcement laws in a manner that does not impermissibly rely on racial profiling will

140. As of July 24, 2012, the District Court of Arizona certified two classes in *Friendly House*: Class B as "all persons who are or will be deterred from soliciting work in a public forum" because of S.B. 1070 and Class C as "all persons who are or will be deterred from living, associating, worshipping, or travelling with immigrants in Arizona" because of S.B. 1070's Section 5. Order at 13, *Friendly House v. Whiting*, 846 F. Supp. 2d 1053 (D. Ariz. 2012) (No. CV 10-1061-PHX-SRB). However, the final outcome of the case is pending as of this writing.

141. See Part I, *supra* text accompanying note 11.

142. See David A. Martin, *Reading Arizona*, 98 VA. L. REV. IN BRIEF 41, 42 (2012).

cause such laws to be struck down on the equal protection and due process challenges that are currently pending against Arizona's Section 2(B).¹⁴³ In the end, I believe that the demise of these provisions will lead to more state reliance on cooperative immigration enforcement with federal authorities and bring about the end of attempts to pass state-level immigration enforcement regulations.

CONCLUSION

Justice Kennedy's closing words in *Arizona v. United States* remind us of what was really at stake in that case:

Immigration policy shapes the destiny of the Nation. . . . The 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. The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.¹⁴⁴

Justice Kennedy's statement that the conversation about immigration law and policy requires a "thoughtful, rational civic discourse" implicitly acknowledges that, in recent years, the debate over the regulation of undocumented immigrants in the United States has become increasingly contentious. While solidifying the federal government's supremacy in immigration-related matters, the Court's decision gives no guidance about how

143. See *supra* text accompanying note 140.

144. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

to address the “elephant in the room”¹⁴⁵—racial profiling in immigration enforcement.

Whether the constitutionality of Section 2(B) will ultimately be reconsidered by the high Court is unclear, but, in the interim, the specter of legalized racial profiling remains in its wake. With the possibility of comprehensive immigration reform at the federal level a reality for the first time in years,¹⁴⁶ perhaps Congress will take action to ensure that those subject to the enforcement of our immigration laws and policies are afforded the same due process guarantees that are enjoyed in every other realm of the law. As Justice Kennedy reminds us, with Congress’s plenary power to regulate immigration comes the responsibility to do so in a way that reflects our appreciation of the contributions that immigrants have made and continue to make to the United States. In the end, perhaps one of the unexpected legacies of S.B. 1070 will be action on the part of Congress to ensure that racial profiling in immigration enforcement will—at last—no longer be tolerated at either the state or federal levels.

145. See Guttentag, *supra* note 138.

146. See, e.g., Lisa Lambert, *Obama Seeks Comprehensive Immigration Reform in Early 2013*, REUTERS, Nov. 14, 2012, <http://www.reuters.com/article/2012/11/14/usa-obama-immigration-idUSL1E8MEHCB20121114>.

