Stephen W. Manning (Application for admission *pro hac vice* forthcoming)
IMMIGRANT LAW GROUP, PC
P.O. Box 40103
Portland, OR 97240
Telephone: (503) 241-0035
Facsimile: (503) 241-7733
smanning@ilgrp.com

Vikram K. Badrinath (SBA No. 016360)
VIKRAM BADRINATH, P.C.
100 North Stone Avenue, Ste. 302
Tucson, Arizona 85701-1514
Telephone: (520) 620-6000
Facsimile: (520) 620-6797
vbadrinath@aol.com

Attorneys for Amicus Curiae
American Immigration Lawyers Association
Additional Co-Counsel on Next Page

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Friendly House; et al,

Plaintiffs,

v.

Michael B. Whiting; et al.,

Defendants.

Civil No. 10-CV-01061-MEA

MEMORANDUM BRIEF OF AMICUS AMERICAN IMMIGRATION LAWYERS ASSOCIATION SUPPORTING A PRELIMINARY INJUNCTION

Russell R. Abrutyn (Application for admission *pro hac vice* forthcoming)
MARSHAL E. HYMAN & ASSOCIATES_
3250 West Big Beaver, Suite 529
Troy, MI 48084
Telephone: (248) 643-0642, ext. 15_
Facsimile: (248) 643-0798 Fax
rabrutyn@marshallhyman.com

Maria E. Andrade (Application for admission *pro hac vice* forthcoming)
ANDRADE LAW OFFICE, INC.
Of Counsel to The Huntley Law Firm
815 W. Washington St.
PO Box 2109
Boise, Idaho 83701
Telephone: (208) 472-5690 x 233
Facsimile: (208) 388-0234
mandrade@huntleylaw.com

Cynthia A. Aziz (Application for admission *pro hac vice* forthcoming)
AZIZ LAW FIRM
1804 East Boulevard
Charlotte, NC 28203
telephone: (704) 347-1808
facsimile: (704) 347-1887
cynthia@azizimmigrationlaw.com

Deborah S. Smith (Admitted *pro hac vice* forthcoming)
LAW OFFICE OF DEBORAH S. SMITH
7 West Sixth Avenue, Suite 4M
Helena, MT 59601
Telephone: (406) 457-5345
Facsimile: (406) 457-5346
deb@debsmithlaw.com

Introduction

Taking effect on July 29, 2010, the bill commonly referred to as Arizona Senate Bill 1070, seeks to identify and punish "illegal immigrants." The Arizona statute is premised on the idea that Arizona law enforcement can catch illegal immigrants by dint of their being illegal and thereafter force their deportation because the federal government is not doing it.

"Illegal immigrant" is not a cognizable status under federal immigration law and Arizona's proxies that illegal immigrants are identifiable by their unlawful presence or through their commission of a removable offense is based on several fundamental misconceptions about federal immigration law—both in theory and in practice. Amicus, the American Immigration Lawyers Association, writes to correct the myths that form the basis of the Arizona statute and to demonstrate that, when placed in context of federal immigration law, the Arizona system is unworkable. There is no argument from AILA that our current immigration system functions smoothly. *See* AILA Position Paper, Comprehensive Immigration Reform, AILA InfoNet Doc. No. 08052257, 1-2 (May 22, 2008), <http://www.aila.org/ content/default.aspx?docid=25501> (explaining that "[o]ur current immigration system is badly broken and in dire need of a top-to-bottom overhaul."). It is, however, a federal system that requires a federal solution. *See, e.g.*, AILA Votes to Boycott Arizona After Signing of Anti-Immigrant Law, AILA InfoNet Doc. No. 10042331, (Apr. 23, 2010), <http://www.aila.org/content/default.aspx?docid =31831> (quoting AILA's president, "If Arizonans are serious about ending illegal immigration, they should be the first in line at the United States Capitol to urge Congress to the do the right thing and pass comprehensive immigration reform.") The Arizona statute should be enjoined.

Statement of Interest of Amicus,
American Immigration Lawyers Association

AILA is a national association with approximately 12,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of these appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the United States Citizenship and Immigration Services and the Executive Office for Immigration Review as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

Argument

The Arizona statute requires police "where *reasonable suspicion* exists that the person is an *alien* who is *unlawfully present* in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person." Arizona Senate Bill 1070, Section 2, as amended by Arizona HB 2162, Section 3, adding new § 11-1051(B) A.R.S. (emphasis added). Detention is required until the immigration status of the person is verified. *Id.* The statute provides that an officer may make a warrantless arrest if he or she has probable cause to believe that an individual has "committed any public offense that makes the person *removable* from the United States." Arizona Senate Bill 1070, Section 6, adding new § 13-3883(A)(5) A.R.S. (emphasis added). The emphasis on using

unlawful presence and removable offenses as the law enforcement tool is unworkable. The purpose of the statute is equally misguided.

(A)(1) First, there are no identifiable characteristics of unlawful presence that will allow the law to be enforced in a constitutional manner and the term "unlawfully present" as used in the Arizona law conflicts with the federal meaning of "unlawful presence." The Arizona law fails to provide any definition of the critical terms "reasonable suspicion," "unlawfully present," or "alien." The Arizona law's reliance on a statutory list of documents that provide a presumption against unlawful presence, are too meager and incomplete under federal law to provide much meaning to the term either.

The Arizona law is premised on the idea that officers can easily identify alienage in a police contact. This is an erroneous premise. U.S. citizenship is not a characteristic apparent to the eye because it is a *legal* determination. U.S. citizens are not required to carry proof of their citizenship while inside of the United States. Therefore, it is unlikely that in a routine encounter with law enforcement a U.S. citizen will possess a birth certificate, U.S. passport, naturalization certificate, or certificate of citizenship that would demonstrate citizenship.

Alienage determinations are complex because they are inherently *legal* rather than factual determinations. Congress has constitutional power over nationality law which determines whether a foreign-born person is a U.S. citizen and "[c]itizenship law is probably the area of law where statutes remain relevant the longest, because even the most ancient and long-repealed statutes can still apply in a current case." Robert Mautino, *Acquisition of Citizenship*, Immigration Briefings (April 1990). Similarly, U.S. treaties and international covenants – which can change over time – are often decisive as to a person's

citizenship status. *See, e.g., Sabangan v. Powell,* 375 F. 3d 818 (9th Cir. 2004) (person born in Commonwealth of Northern Mariana Islands (CNMI) after January 9, 1978 is a U.S. citizen by virtue of covenant between U.S. and CNMI).

Birth in the United States certainly is a clear indicator that a person is not an alien. *See* U.S. Const. amend. XIV, § 1. But foreign-birth is *not* a certain indicator of alienage. Acquisition of citizenship at birth depends on numerous factors, such as the parents' respective citizenship[1]; the duration and timing of their residence in the United States[2]; their marital status at the time of the individual's birth[3]; the year in which the person was born[4]; the place where the person was born[5], and in some situations, even the date on which a child born out of wedlock was legitimated[6] – none of which can be ascertained or observed by police in any contact or that could give rise, constitutionally, to any suspicion of alienage. *See generally*, 8 U.S.C. § 1401(c) - (h) (establishing conditions under which children born in-wedlock outside of the United States acquire U.S. citizenship at birth) and § 1409 (establishing conditions under which children born out-of-wedlock outside of the United States acquire U.S. citizenship at birth).

Anyone can assert that she is a United States citizen, and a law enforcement officer may be hard-pressed to identify a legitimate reason why such an assertion is untrue. Race, ethnic appearance, and language are not reliable indicators of alienage. *See, e.g., United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (*en banc*) ("The likelihood that in an area in which the majority – or even a substantial part – of the population is

[1] 8 U.S.C. § 1401(c) – (e), (g) – (h)
[2] 8 U.S.C. § 1401(d) – (e), (g) – (h)
[3] 8 U.S.C. § 1409
[4] 8 U.S.C. § 1401 (h)
[5] 8 U.S.C. § 1401(c) – (e), (g) – (h)
[6] 8 U.S.C. § 1409

Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus."), *cert. denied*, 531 U.S. 889 (2000); *United States v. Manzo-Jurado*, 457 F.3d 928, 932 (9th Cir. 2006) (ruling that individuals' appearance as a Hispanic work crew, inability to speak English, proximity to the border, and unsuspicious behavior did not establish reasonable suspicion of illegal presence).

The citizenship question is further obscured because some individuals may not possess any documentation establishing their U.S. citizenship (because none is required), and some U.S. citizens may not even know that they are U.S. citizens. Foreign-birth is not dispositive on the question of alienage and it is an inappropriate factor for Arizona police to utilize. For example, a foreign-born child automatically derives United States citizenship if a parent naturalizes before the child reaches the age of 18, and certain other conditions are met. *See* 8 U.S.C. § 1431(a). Yet that individual may possess no certificate of citizenship or United States passport as evidence of his status, and indeed may not realize that he is a U.S. citizen. *See, e.g., United States v. Smith-Baltiher*, 424 F.3d 913, 920-21 (9th Cir. 2005) (rejecting government's claim in an illegal reentry case that an individual could not assert derivative citizenship status because, *inter alia*, he did not have a certificate of citizenship). Likewise, an individual may acquire U.S. citizenship through birth abroad to a United States citizen parent, and may not know that she is a U.S. citizen or may not possess citizenship documentation. *See* 8 U.S.C. §§ 1401 and 1409 (setting out the various conditions under which individuals may acquire United States citizenship at birth). *See also* 8 U.S.C. § 1431(b) (setting out the conditions under which adopted children from abroad acquire United States citizenship automatically).

(A)(2) The Arizona law's reliance on "unlawfully present" as an actionable event cannot be lawfully implemented because it lacks discernable meaning and conflicts with the federal immigration statute. *Compare* Arizona Senate Bill 1070, *with* 8 U.S.C. § 1182(a)(9)(B)–(C) . Federal immigration law provides no general definition of the terms "unlawfully present" or "unlawful presence." The term "unlawful presence" in federal immigration law is partly defined by statute and partly left to the immigration agencies to define. *See* Donald Neufeld, Lori Scialabba, and Pearl Chang, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I)* (May 6, 2009), http://www.uscis.gov/files/nativedocuments/revision_redesign_AFM.PDF. The Arizona statute's use of the term does not align with the federal design. Under federal law, unlawful presence is an inadmissibility ground that Congress intended to apply in limited circumstances. *See* 8 U.S.C. § 1182(a)(9)(B) and (C). The unlawful presence grounds of inadmissibility apply only to certain aliens who were unlawfully present in the United States for more than 180 days, and who depart, or are ordered removed from the United States and then again seek admission to the United States. 8 U.S.C. § 1182(a)(9)(C).

Notably, federal immigration law expressly exempts certain individuals from the unlawful presence scheme including children under the age of 18; certain asylum applicants; beneficiaries protected under the family unity program established by § 301 of the Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990), and set out in 8 C.F.R. §§ 236.10–236.18; and certain victims of domestic abuse and human trafficking. Unlawful presence may also be tolled for up to 120 days for individuals who file nonfrivolous applications for a change or extension of status and who meet certain other

conditions. 8 U.S.C. § 1182(a)(9)(B)(iv). Arizona's use of the same term without definition is particularly unhelpful.

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

(A)(3) Section 2 of SB 1070, as amended, provides a list of documents that demonstrate "lawful presence". *See* SB 1070, § 2, as amended; Arizona Revised Statute ("A.R.S.") § 1-502. This list is inadequate to give meaning to "unlawful presence" and it is inadequate when measured against the federal rules. The lack of any one of these documents does not mean an individual lacks authorized immigration status, or is deportable even if his or her status has expired or has been revoked. There are many examples of such situations. A lawful permanent resident with an expired or old "green card" remains a lawful permanent resident, and is not deportable. *See, e.g.*, 8 U.S.C. § 1227 (listing classes of deportable aliens, and not including a ground for permanent residents without a valid green card); *see also* 72 Fed. Reg. 46922 (8/22/07)(proposed rule, not promulgated, providing an application process for replacing certain old alien registration cards, and terminating the validity of the old cards, but not terminating the lawful status of permanent residents who possess the old cards), and USCIS Press Release of December 13, 2007 ("This proposed rule in no way affects the current validity of these permanent

resident cards. Permanent residents who possess these cards may continue to use them as proof of permanent residency when traveling, when seeking employment, and at any time such proof is required."), *available at* http://www.uscis.gov/files/pressrelease/I551Update_13dec07.pdf. People who immediately qualify to adjust status to become lawful permanent residents, but who have not yet done so, are generally not deportable. *See generally* 8 C.F.R. § 1245.2 (providing for immigration judge jurisdiction over adjustment of status applications in removal proceedings). Asylum applicants, or individuals with non-frivolous claims for asylum that are not yet filed, cannot be deported until and unless their claims are adjudicated and a final administrative removal order exists. 8 U.S.C. §§ 1158 (establishing bases for asylum and procedures), 1187(b) (providing for review of asylum claims for people admitted to the United States through the Visa Waiver Program), 1225 (providing for review of asylum claims to applicants for admission to the United States), and 1231 (establishing removal procedures for people with final administrative removal orders). People who qualify for cancellation of removal or temporary protected status are not deportable. 8 U.S.C. § 1229b (cancellation of removal), and § 1254a (temporary protected status). Even people with final removal orders may not be deported, for example, if they qualify for certain relief due to the risk of persecution in their home country, or if the government is unable to effectuate deportation or declines to enforce deportation for humanitarian reasons. 8 U.S.C. § 1231(b)(3) (withholding of removal) and § 1231(a)(7) (allowing employment authorization for certain aliens with final removal orders).

(B) Second, enforcement of the § 6 of SB 1070 is impractical because whether an offense makes a non-citizen removable is often not clear and often takes years of litigation

to determine. *See e.g., Carachuri-Rosendo v. Holder*, 09-60, 2010 WL 2346552 (U.S. June 14, 2010); A.R.S. § 13-3883(A)(5). The criminal offenses that may render a person removable are defined by federal law where state labels familiar to peace officers are irrelevant. *Id.* Whether an offense makes a noncitizen removable depends upon a complicated analysis of noncitizen's personal history, criminal history and immigration history, a legal analysis of the elements of the offense, the record of conviction, the facts of the offense, the potential sentence, the sentence imposed, the noncitizen's immigration and criminal history, and the immigration history of the noncitizen's family. *Id.* None of these factors are amenable to police officer probable cause inquiries. It is a *legal* determination, not a factual determination. This legal determination "can often be simply too complex for a state or local law enforcement officer acting without a warrant to make promptly and accurately." Cooper Declaration at 6, ¶ 11.

There is ambiguity in the contours of federal immigration law on the question of what state law offenses might make an individual removable. Under federal immigration law an individual might be removable for having been convicted of a crime involving moral turpitude ("CIMT"), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) and 1227(a)(2)(A)(i) and (ii); an aggravated felony, 8 U.S.C. §§ and 1227(a)(2)(A)(iii) (listing more than 21 different types of aggravated felonies); a controlled substance offense, 8 U.S.C. §§ 1182(a)(2)(A)(i)(II) and (a)(2)(C) and 1227(a)(2)(C); a firearms offense, 8 U.S.C. § 1227(a)(2)(C); a prostitution-related offense, 8 U.S.C. § 1182(a)(2)(D); or a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment, 8 U.S.C. § 1227(a)(2)(E)(i). Most criminal grounds of removability are addressed in 8 U.S.C. §§ 1101(a)(43), 1182, and 1227.

The deep level of analysis to determine whether a state law offense triggers removal consequences underscores the impracticability of the Arizona law. There is no universal "list" of crimes; indeed, it is almost always a case-by-case analysis. The first step in this process is the traditional categorical analysis of the elements of the statute. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007). At this step, the adjudicator must determine whether there is a realistic probability that the statute reaches conduct that does or does not trigger a ground of removability. *Id.* at 193. If the statute enumerates some violations which trigger removability and others that do not, the adjudicator can examine the limited record of conviction, including the indictment, the judgment of conviction, jury instructions, signed plea statements, and the plea colloquy, to determine whether the non-citizen was convicted under the portion of the statute that would trigger removability. *Matter of Silva-Trevino*, 24 I. & N. Dec. 687, 697 (Att'y Gen. 2008).

For example, a state law offense may be considered to involve moral turpitude if it is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Silva-Trevino*, 24 I. & N. Dec. at 705 (internal citations and quotations omitted). As applied to common state law offenses, such as driving under the influence, this standard has provided little or no clarity and there are often inconsistent results reached by adjudicators with respect to Arizona law. *Compare Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (multiple DUIs is not a CIMT) *with Matter of Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 1999) (aggravated DUI is a CIMT). The Ninth Circuit later rejected the Board's CIMT finding in *Lopez-Meza*. *See Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003). Similarly, assault offenses may and may not involve moral turpitude. *Compare Matter of Solon*, 24 I. & N. Dec. 239 (BIA 2007)

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

Not only does federal immigration law include distinct definitions for removable offenses that bear no particular resemblance to state offenses, federal law also incorporates provisions of other federal statutes unfamiliar to local police. Some assault offenses may be removable offenses if they are aggravated felony "crimes of violence" or if they are "crimes of domestic violence" as defined in 18 U.S.C. § 16, 8 U.S.C. §§ 1101(a)(43)(F), and 1227(a)(2)(E) (referencing 18 U.S.C. § 16 for definitions of these terms). In addition, as in the CIMT context, crimes of violence are not obvious in every case. Some convictions for assault and battery are crimes of violence and others are not. *Compare Matter of Sanudo*, 23 I. & N. Dec. 968, 973-75 (BIA 2006) (California domestic battery is not a crime of violence) *with Matter of Martin*, 24 I. & N. Dec. 491 (BIA 2002) (Connecticut third degree assault is a crime of violence). Even the concept of a drug trafficking crime is a hazard of legal analysis. *See Carachuri-Rosendo*, No. 09-60, slip op. at 2 (characterizing the immigration definition of a drug trafficking crime as a "maze of statutory cross-references").

Facts or the actual conduct of an individual – the stock and trade of police work – is not truly relevant in determining removability because it is almost always a *legal* determination. Even in cases where facts matter, they matter only *after* conviction and only when contained in the criminal record of proceedings. *See Nijhawan v. Holder*, 557 U.S. ----, 129 S. Ct. 2294, 2300-01 (2009).

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

Like the legal nature of the offense, an individual's personal history is not readily ascertainable by a police officer in a probable cause inquiry and would require analysis of records and information beyond the reach of most police officers. Whether a non-citizen is "admitted" to the U.S. is relevant to the removability inquiry. The removal grounds in 8 U.S.C. § 1227(a)(2) only apply to convictions occurring after a non-citizen's "admission." An "admission" is a term-of-art with a specific legal meaning. 8 U.S.C. § 1101(a)(13)(C). Congress enacted specific policy determinations that aggravated felony, crimes of domestic violence, and firearm convictions predating a non-citizen's admission are not removable offenses. *Compare* 8 U.S.C. § 1182(a)(2) (not including these offenses as grounds of inadmissibility) *with* § 1227(a)(2) (listing offenses as grounds to remove alien who has been "admitted").

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

The technical, code-driven state of immigration law is difficult to overstate. In many instances, whether an offense is considered removable depends upon the sentence imposed and certain convictions do not render a non-citizen inadmissible if the sentence is less than six months. 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Crimes of violence and theft offenses are not aggravated felonies unless the resulting term of imprisonment is at least one year. 8 U.S.C. §§ 1101(a)(43)(F), (G). Other grounds of removability require convictions under specific sections of law. 8 U.S.C. § 1227(a)(3)(B).

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

Holder, 594 F.3d 1124 (9th Cir. 2010) (indecent exposure not a CIMT, proceedings pending for seven years).

(C) Attrition through enforcement – so says the opening section of SB 1070 – is now the policy of Arizona. *See* SB 1070, § 1. The Arizona law pre-supposes that the federal government needs additional help from Arizona to detect immigration violators or that the federal government has abandoned its enforcement efforts altogether. *See* Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, NY Times, April 24, 2010, at A1 (quoting the Arizona governor explaining that the bill "represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix."). Both suppositions are wrong. The Arizona law is, in fact, at cross-purposes with the enforcement efforts of the federal government and its implementation will be disruptive.

In its fullest form, attrition through enforcement is about creating a climate of fear and squeezing people until they cannot take it anymore so that they "self-deport". *See* Kristi Keck, *Will others follow Arizona's lead on immigration?* April 21, 2010, CNN, http://www.cnn.com/2010/POLITICS/04/21/arizona.immigration.bill/index.html. It is a misguided policy. *See* Jeffrey Kaye, *Re-Living Our Immigrant Past: From Hazelton to Arizona and Back Again*, Immigration Policy Center (Immigration Perspectives Series) May 2010 *available at* http://www.immigrationpolicy.org (explaining from a historical view the failure of similar policies). Importantly, here, attrition through enforcement as it is embodied in the Arizona law will actually frustrate enforcement of federal immigration law.

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

The Criminal Alien Program (CAP) screens local, state and federal jails to identify non-citizens. Once identified, the federal government generally lodges a "detainer" or hold on that individual so that when local jurisdiction ends, the federal government is notified. *See* 8 U.S.C. § 1357(d) and 8 C.F.R. § 287.7 (providing for immigration detainers on certain aliens in federal, state, or local custody). This program is responsible for the largest number of non-citizen apprehensions. *See* Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas,* Immigration Policy Center (Special Reports) February 2010 at 6 *available at* http://www.immigrationpolicy.org.

The § 287(g) program, authorized by § 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g) permits the federal government to delegate authority to enforce immigration laws to state and local law enforcement agencies. 8 U.S.C. § 1357(g). The terms of the agreements vary, as do the breadth of the authority delegated to the state and local law enforcement agencies. Importantly, *every* actor under this regime is under the "direction and supervision of the Attorney General." 8 U.S.C. § 1357(g)(2). As of April 2010,

the federal government has § 287(g) agreements with 67 law enforcement agencies in 24 states. *See* Immigration Policy Center, *Local Enforcement of Immigration Laws Through the 287(g) Program*, April 2, 2010 (Just The Facts Series) *available at* http://www.immigrationpolicy.org. Thus, when a state wishes to engage in immigration enforcement under the § 287(g) program, it must do so under the supervision of federal officials implementing federal priorities.

The Secure Communities Program, implemented in 2008, uses biometric technology to identify non-citizens when arrested by local officials. See U.S. Immigration and Customs Enforcement, Programs: Office of State and Local Enforcement, April 13, 2010, *available at*: <http://www.ice.gov/oslc/iceaccess.htm>. This program is rapidly expanding and the current administration's goal is to make Secure Communities available to every law-enforcement agency by 2013. *Id.*

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

By no means is this an endorsement of the federal government's ICE ACCESS programs. AILA is highly critical of them and their implementation. *See, e.g,* AILA, *DHS Inspector General Report Exposes Abuses in State & Local Immigration Enforcement*, AILA InfoNet Doc. No. 10040238, April 1, 2010, *available at* http://www.aila.org/content/default.aspx?docid=31684 (calling for end of § 287(g)

program); Trevor Gardner & Aarti Kohli, *The Cap Effect: Racial Profiling in the ICE Criminal Alien Program*, August 2009, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity at the University of California, Berkley Law School (describing biased-based enforcement of Criminal Alien Program); Rights Working Group & ACLU, *The Persistence of Racial and Ethnic Profiling in the United States*, AILA InfoNet Doc. No. 09102169, August 2009 at 24-29, *available at* <http://www.aila.org/content/default.aspx?docid=30363> (describing racial profiling through § 287(g) programs and ICE ACCESS). If the federal government's own agents cannot fairly and constitutionally enforce immigration law, it is unlikely that untrained police will actively engage in wholly unbiased policies.

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

Conclusion

AILA, like many of the citizens of Arizona, is frustrated over the failure of the federal government to fix our broken immigration system. The Arizona law is an unworkable and

unlawful response to this frustration. It ought to be enjoined because it cannot be implemented in a fair and constitutional manner.

Submitted this 15th of June, 2010

/s/ Stephen W Manning

STEPHEN W MANNING

VIKRAM K BADRINATH
RUSSELL R ABRUTYN
MARIA E ANDRADE
CYNTHIA A AZIZ
DEBORAH S SMITH

Attorneys for Amicus,
American Immigration Lawyers Association

CERTIFICATE OF SERVICE

I, Stephen W Manning, certify that this memorandum of law in support of the Plaintiffs' motion for a preliminary injunction was filed and served using the court's CM/ECF system for all registered users and by regular mail to all parties listed in the attached service list.

/s/ Stephen W. Manning

_____
STEPHEN W MANNING
June 15, 2010

SERVICE LIST

Electronic Service Through CM/ECF:

Plaintiffs

Omar C. Jadwat
Lucas Guttentag
Tanaz Moghadam
ACLU Foundation
Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004

Thomas A. Saenz
Cynthia Valenzuela Dixon
Victor Viramontes
Gladys Limón
Nicholás Espíritu
MALDEF
634 S. Spring St., 11th Floor
Los Angeles, CA 90014

Linton Joaquin
Karen C. Tumlin
Nora A. Preciado
Melissa S. Keaney
Vivek Mittel
Ghazal Tajmiri
National Immigration Law Ctr
3435 Wilshire Blvd., Ste. 2850
Los Angeles, CA 90010

Daniel J. Pochoda
Anne Lai
ACLU Foundation of Arizona
77 E. Columbus St., Ste. 205
Phoenix, AZ 85012

Cecillia D. Wang
Harini P. Raghupathi
ACLU Foundation
Immigrants' Rights Project
39 Drumm St.
San Francisco, CA 94111

Nina Perales
Ivan Espinoza-Madrigal
MALDEF
110 Broadway St., Ste. 300
San Antonio, TX 78205

Julie A. Su
Ronald Lee
Yungsuhn Park
Connie Choi
Carmina Ocampo
Asian Pacific American Legal Center
1145 Wilshire Blvd., Ste. 200
Los Angeles, CA 90017

Chris Newman
Lisa Kung
National Day Labor Organizing Network
675 S. Park View St., Ste. B
Los Angeles, CA 90057

Daniel R. Ortega, Jr.
Roush McCracken Guerrero Miller & Ortega
1112 E. Washington St.
Phoenix, AZ 85034-1010

Laura D. Blackburne
NAACP
4805 Mt. Hope Dr.
Baltimore, MD 21215

Bradley S. Phillips
Paul J. Watford
Joseph J. Ybarra
Elisabeth J. Neubauer
Munger Tolles & Olson LLP
355 S. Grand Ave., 35th Floor
Los Angeles, CA 90071-1560

Susan Traub Boyd
Yuval Miller
Munger Tolles & Olson LLP
560 Mission St., 27th Floor
San Francisco, CA 94105-2907

Defendants

Joseph David Young
Snell & Wilmer LLP
1 Arizona Ctr
400 E Van Buren
Phoenix, AZ 85004

Jean E. Wilcox
Coconino County Attorneys Office
110 E. Cherry St.
Flagstaff, AZ 86001

June Ava Florescue
Gila County Attorneys Office
1400 E Ash St
Globe, AZ 85501

Michael William McCarthy
Greenlee County Attorney
P.O. Box 1717
Clifton, AZ 85533

Robert Glenn Buckelew
R Glenn Buckelew Attorney at Law
2864 Sweetwater Ave

Lake Havasu City, AZ 86406

Anne Cecile Longo
MCAO Division of County Counsel
222 N. Central Ave., Ste. 1100
Phoenix, AZ 85004-2926

Bruce P. White
Maricopa County Attorney's Office
222 N. Central Ave., Ste 1100
Phoenix, AZ 85004

Lance B. Payette
Deputy County Attorney
Navajo County Attorney's Office
P.O. Box 668
Holbrook, AZ 86025-0668

Daniel S. Jurkowitz
Pima County Attorneys Office
32 N. Stone Ave., Ste. 2100
Tucson, AZ 85701

Joe A. Albo, Jr.
Chris Myrl Roll
Pinal County Attorneys Office
P.O. Box 887
Florence, AZ 85232

Sean Aloysius Bodkin
Law Office of Sean Bodkin
4620 E Via Dona Rd
Cave Creek, AZ 85331

Jack Hamilton Fields
Yavapai County Attorneys Office
255 E. Gurley St., 3rd Floor
Prescott, AZ 86301

George Jacob Romero
Yuma County Attorneys Office
250 W. 2nd St.
Yuma, AZ 85364

Thomas P. Liddy
Maria R Brandon

Maricopa County
Office of Special Litigation Services
234 N. Central Ave., Ste 4400
Phoenix, AZ 85004

Intervenors

Mary R. O'Grady, Solicitor General
Christopher A. Munns, Asst. Attorney General
Isaiah Fields, Asst. Attorney General
Steven A. LaMar, Asst. Attorney General
Office of the Attorney General
1275 W. Washington St.
Phoenix, AZ 85007-2997

John J. Bouma
Robert A. Henry
Joseph G. Adams
Snell & Wilmer LLP
One Arizona Center
400 E. Van Buren
Phoenix, AZ 85004-0001

Joseph A. Kanefield
Office of Governor Janice K. Brewer
1700 W. Washington St., 9th Floor
Phoenix, AZ 85007

Service by first-class United States mail, postage prepaid:

Edward G. Rheinheimer
Cochise County Attorney
150 Quality Hill Road, 2nd Floor
Bisbee, AZ 85603

Kenny Angle
Graham County Attorney
800 West Main Street
Safford, AZ 85546

Matthew J. Smith
Mohave County Attorney
315 North 4th Street
Kingman, AZ 86401

Larry A. Dever
c/o Legal Liaison
Cochise County Sheriff
205 North Judd Drive
Bisbee, AZ 85603

Preston Allred
c/o Legal Liaison
Graham County Sheriff
523 10th Avenue
Safford, AZ 85546

Tom Sheahan
c/o Legal Liaison
Mohave County Sheriff
600 W. Beale Street
Kingman, AZ 86402