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The Arizona Immigration Law: What It Actually Does, and Why It Is Constitutional

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Abstract: *America has arrived at a dangerous, unprecedented moment: an Administration is attacking a state that is simply trying to help the federal government restore the rule of law. In addition to partisan mischaracterizations of S.B. 1070, observes Professor Kris Kobach, the Eric Holder Justice Department launched an unprecedented and unwarranted lawsuit that has shattered the balance between the federal government and the states, as well as the balance between executive and congressional power, through its distortion of preemption doctrine. A federal district judge has already embraced the Justice Department's argument without any evident awareness of how the argument breaches constitutional boundaries. Consequently, concludes Kobach, America's only hope is that the appellate courts will realize just what is at stake, and uphold S.B. 1070 on constitutional grounds.*

Talking Points

- Few laws have been so grossly mischaracterized for political reasons as Arizona's new immigration enforcement law, S.B. 1070.
- Ample Supreme Court and federal appellate court precedents support the constitutionality of SB 1070.
- S.B. 1070 is in full accord with federal immigration law and complements federal enforcement.
- The Obama Administration's unwarranted lawsuit against Arizona is an attempt to usurp Congress's power under the Constitution to preempt state laws and set immigration policy.

Arizona's S.B. 1070[1] began as a commonsense law to improve immigration law enforcement and facilitate cooperation between federal, state, and local law enforcement officers, but the uproar that followed has become a case study in liberal dissembling and executive overreach. Few laws have been so grossly mischaracterized by so many leaders on the Left. From President Barack Obama on down, partisans rushed to the microphone to hyperventilate about an impending police state in Arizona. Then the Eric Holder Justice Department launched an unprecedented and unwarranted lawsuit that has shattered the balance between the federal government and the

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states, as well as the balance between executive and congressional power. Both the criticism and the lawsuit are without basis.

Mischaracterizations of S.B. 1070

The criticism from the Left was based upon three fundamental misrepresentations of what S.B. 1070 actually does.

First, and most outrageously, critics incorrectly claimed that the law would promote racial profiling. Rep. Raul Grijalva (D–AZ) made this claim, along with Rep. Luis Gutierrez (D–IL), Del. Eleanor Holmes-Norton (D–DC), and others. More surprising, however, was the commentary from the country's top attorney. Attorney General Eric Holder sternly warned the nation on *Meet the Press* that the law "has the possibility of leading to racial profiling." A few days later on April 13, 2010, when pressed about his comments in a House of Representatives committee hearing, Holder admitted that he had not read the law.

If he had, he would have seen that S.B. 1070 *expressly prohibits* racial profiling. In four different sections, the law reiterates that a law enforcement official, "may not consider race, color, or national origin" in making any stops or determining an alien's immigration status.

So if a police officer was engaged in racial profiling, his conduct would violate S.B. 1070, virtually ensuring that any prosecution under the law would fail. Most state and federal statutes do not include such special protection in the text of the statute; S.B. 1070 goes to extraordinary lengths to protect against racial profiling. In addition to the express protections written into the act, all of the normal Fourth and Fourteenth Amendment protections against racial profiling would also continue to apply.

Second, critics declared that the law would require aliens to carry documentation that they were not otherwise required to carry. President Obama asserted, "Now, suddenly, if you don't have your papers…you're gonna be harassed." The President's choice of the word "suddenly" was a curious one. Since 1940, it has been a federal crime for aliens to fail to keep certain registration documents on their person or to fail to register with the federal government. The Arizona law merely prohibits aliens from violating these federal statutes (8 U.S.C. §§ 1304(a) or 1306(e)), adding a layer of state penalty to what was already a crime under federal law.

For legal permanent resident aliens, the relevant document is a green card; for a short-term visitor from a visa-waiver country (one of 36 countries whose citizens may visit the United States for up to 90 days without a visa) the relevant document is an I-94 registration receipt, placed in their passport at the port of entry. The consequences of violating the Arizona law are the same as the consequences of violating the federal law: a fine of up to $100 and/or imprisonment of up to 30 days. Any American who has travelled abroad knows that just about every country in the world imposes similar documentation requirements on U.S. citizens. It is hardly unfair or unusual to enforce America's own laws in this area.

Ironically, politically correct activists on the Left have insisted for years that the U.S. use the term "undocumented" when referring to illegal aliens. Now, when a state takes seriously the documentation requirements of federal law, these activists become apoplectic. As for U.S. citizens, the law does not require them to carry any identification whatsoever.

Third, critics claimed that the new law requires police officers to stop people in order to question them about their immigration statuses. That is not true, yet here too President Obama misrepresented the law. Offering the example of a Hispanic family going to an ice cream parlor, Obama suggested that a police officer could just walk up and start interrogating the family about their immigration documents. But Section 2 of S.B. 1070 stipulates that in order for its requirements to apply, a law enforcement officer must first make a "lawful stop, detention, or arrest…in the enforcement of any other law or ordinance of a county, city or town or this state." In other words, the person must be suspected of committing a

1. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 23, 2010) (as modified by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 30, 2010)) ("S.B. 1070"); A.R.S. § 11-1051.

predicate offense, apart from any possible immigration violation.

So President Obama's example might come into play if a family member came running out of the ice cream shop with a gun in one hand and a bagful of money in the other, and if the police officer developed independent reasonable suspicion (based on race-neutral factors) that the person was an illegal alien. Then, and only then, could the law enforcement official question the family member about his immigration status.

The law operates in a perfectly reasonable fashion. If the police officer, during a detention to investigate another offense, develops reasonable suspicion that the subject is an illegal alien, then the officer must take specific steps to verify or dispel that reasonable suspicion. And, contrary to the claims of critics, "reasonable suspicion" is a well-defined concept. Over the past four decades, the courts have issued more than eight hundred opinions defining those two words in the context of immigration violations.

The most common situation in which S.B. 1070 will come into play is during a traffic stop. Suppose that a police officer pulls over a minivan for speeding—the predicate offense. He discovers that sixteen people are crammed into the van and the seats have been removed. Neither the driver nor any of the passengers has any identification documents. The driver is acting evasively, and the vehicle is travelling on a known human smuggling corridor. Courts have held that those four factors can give an officer reasonable suspicion to believe that the occupants are aliens unlawfully present in the United States.

At that point, S.B. 1070 kicks in and requires the police officer "when practicable, to determine the immigration status of the person" by verifying it with the federal government. ICE maintains a 24/7 hotline for exactly that purpose. Indeed, many police departments in Arizona were already regularly contacting ICE before S.B. 1070 was enacted. The law simply requires all law enforcement agencies in the state to behave in the same way, no longer turning a blind eye to violations of federal immigration law that their officers come across during their routine duties.

In sum, S.B. 1070 takes a few measured steps to give Arizona police officers additional tools in their toolbox for when they come into contact with illegal aliens during their normal law-enforcement duties. It ensures that local cooperation with ICE occurs more regularly.

Other provisions that have received less media hype prohibit Arizona cities from implementing sanctuary policies that prevent their officers from contacting ICE, and make it a misdemeanor for an alien who lacks work authorization to solicit work in a public place.

The Lawsuit by the Holder Justice Department

S.B. 1070 was drafted with the full expectation that the ACLU would sue the State of Arizona. After all, the ACLU has a well-funded "immigrant rights division" that exists to defeat the enforcement of immigration laws whenever and wherever possible. ACLU lawsuits against cities or states that try to strengthen the enforcement of immigration laws are nothing new: Hazleton, Pennsylvania; Valley Park, Missouri; Farmers Branch, Texas; and Fremont, Nebraska, have all faced the ACLU in court, so it was expected that the same legal briefs would find their way to Arizona.

However, the decision by the Holder Justice Department to sue Arizona was unexpected. Never before has the Justice Department sued a state that is attempting to facilitate greater cooperation with the federal government and whose statute mirrors federal law. Indeed, Justice Department suits against states are normally few and far between—reserved for highly unusual situations in which a state is openly defying federal law and Justice Department intervention is the only effective remedy.

But President Obama's Justice Department is different. Political calculations play a greater role than legal calculations in determining when litigation occurs. As Hillary Clinton revealed during an interview with the Ecuadorian press, President Obama directed the Justice Department to bring the suit. This fact, in and of itself, is disturbing. It had long been the practice among both Republican and Democrat Administrations to keep the White

House out of the decisions of whom to sue or whom to prosecute.

Perhaps the most notable thing about the Justice Department lawsuit was what it did *not* contain. For all of the hue and cry about racial profiling, there was no mention of it in the Justice Department complaint. The Department lawyers clearly realized that an Equal Protection challenge to a law that expressly prohibits racial profiling was a non-starter—especially when the challenge was a facial challenge to the law prior to its implementation.

The Justice Department's principal argument is that the law is unconstitutional through preemption—meaning that Congress has acted to prohibit the state of Arizona from passing S.B. 1070. It is certainly true that Congress may act to preempt the states in areas where the Constitution grants Congress plenary authority. But the chief problem here is that Congress has done no such thing. Congress has never enacted a statute that expressly bars states from assisting the federal government in the manner that S.B. 1070 does.

Without any express preemption on which to rely, the challengers had to resort to making a more difficult "implied pre-emption" argument. This is a claim that the law somehow conflicts with federal law and therefore interferes with the fulfillment of congressional objectives. However, the numerous judicial precedents supporting the Arizona law make this an uphill climb.

The U.S. Supreme Court has long recognized that states are permitted to enact statutes to discourage illegal immigration, without being pre-empted by federal law. In the landmark 1976 case of *De Canas v. Bica*,[2] the Supreme Court upheld a California law that prohibited employers from knowingly hiring unauthorized aliens. The Court rejected the preemption arguments against that law, finding that Congress had not prevented states from acting in the field. "Respondents…fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the [Immigration and Nationality Act] that Congress intended to preclude even harmonious state regulation touching on aliens in general…."[3] States and cities can enact laws discouraging illegal immigration and can assist the federal government in enforcing federal immigration laws in other ways, as long as their actions do not conflict with federal law.

The Supreme Court has also emphasized that it will be reluctant to conclude that such conflict exists. As Justice Kennedy explained in his concurring opinion in *Gade v. National Solid Wastes Management Association* in 1992, "A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law."[4]

In the case of S.B. 1070, the documentation provisions of the Arizona law penalize precisely the same conduct that is already penalized under federal immigration law: "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a)." Thus, no tension or conflict with federal law exists.

Because S.B. 1070 matches federal law so precisely, it is protected by the legal doctrine of "concurrent enforcement." As the Ninth Circuit, which covers Arizona, recognized in the case of *Gonzales v. Peoria*, "Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized."[5] Because S.B. 1070 proscribes precisely the same conduct that is prohibited by federal law, Arizona law and federal law are in perfect harmony. Conflict preemption cannot occur.

So if the documentation section of the Arizona law is not preempted, what about the section requiring police officers to contact the federal government when they develop reasonable suspicion that a person they are investigating for violating

2. De Canas v. Bica, 424 U.S. 351 (1976).
3. De Canas, 424 U.S. at 358.
4. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 93 (1992).
5. Gonzales v. Peoria, 722 F.2d 468, 474 (1983).

another law is an illegal alien? Here too, Arizona's law is on solid legal ground.

The Fourth, Fifth, Eighth, Ninth, and Tenth Circuits of the U.S. Court of Appeals have all recognized the inherent authority of state and local officers to make immigration arrests. In the *Gonzales v. Peoria* case, the Ninth Circuit specifically held that local police could make such arrests. "The general rule is that local police are not precluded from enforcing federal statutes.… Federal and local enforcement have identical purposes—the prevention of the misdemeanor or felony of illegal entry."[6] Furthermore, in 2005 a unanimous Supreme Court in *Muehler v. Mena* recognized the authority of local police officers to inquire into the immigration statuses of individuals who have been lawfully detained.[7]

Moreover, since the *Gonzales v. Peoria* decision, Congress has taken numerous steps to promote, not discourage, assistance by state and local police in making immigration arrests. As the Tenth Circuit observed in the 1999 case of *United States v. Vasquez-Alvarez*, federal law "evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws."[8]

In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act, Congress wisely put in place a federal statutory requirement that federal officials *must respond* whenever a state or local police officer requests verification of an alien's immigration status (8 U.S.C. § 1373(c)).

Congress also began appropriating funds in 1994 for the Law Enforcement Support Center (LESC), which operates the 24/7 hotline for requests from local police. Based in Williston, Vermont, the purpose of the LESC is to assist law enforcement agencies in determining whether persons they have contact with are illegal aliens. In fiscal year 2005, the LESC responded to a staggering 504,678 calls from state and local police—an average of 1,383 calls per day.

The high volume of calls the LESC receives reflects the fact that police in all 50 states *are already arresting illegal aliens*, and in most cases transferring them to federal custody. S.B. 1070 did not create state and local arrest authority; it makes that existing authority more systematic and efficient.

The Usurpation of the Congressional Preemption Power

Unable to find any true conflict between federal statutes and S.B. 1070, the Holder Justice Department offered a truly dangerous argument: Even if Congress has not impliedly preempted the states, the executive branch has, by picking and choosing which federal laws it wishes to enforce.

Specifically, the Department argued that it does not wish to enforce the federal laws making it a crime for aliens to fail to carry immigration documents with them. The Department also argued that it might place a lower priority on enforcing immigration laws in Arizona than would the state and local law enforcement agencies of Arizona.

This troublesome argument is contrary to the Constitution and to centuries of preemption jurisprudence for two reasons. First, it makes a mockery of the President's obligation in Article II, Section 3 of the Constitution to "take care that the laws be faithfully executed." President Obama is not only saying that his Administration refuses to enforce the law, he is demanding that his abrogation of his constitutional duty should force the states to act accordingly.

Second, the Supreme Court has long recognized that only *Congress* can displace the states from the field through the constitutionally significant act of preemption. The Supremacy Clause of Article VI of the Constitution, from which the preemption power is derived, gives preemptive force only to the "Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made…under the Authority of the United States."

6. Gonzales, 722 F.2d at 474.
7. Muehler v. Mena, 544 U.S. 93, 98 (2005).
8. United States v. Vasquez-Alvarez, 176 F.3d 1294, 1300 (10th Cir.1999).

The executive branch cannot, by itself, preempt states from a field. To be sure, an executive regulation can have preemptive effect, but only if the regulation operates within the four corners of the act of Congress that authorized the regulation in the first place. Here, the Obama Administration is acting in a manner that is contrary to the intent of Congress, as spelled out in federal law. The Administration is claiming that its own refusal to enforce a federal statute should have the constitutionally significant impact of removing state authority—never mind the text of the Supremacy Clause or the Tenth Amendment.

The logical implications of this unprecedented argument by the Justice Department are ominous. If the courts agree with the Department's new spin on preemption doctrine, then Presidents may displace states from all sorts of policy-making areas by merely declaring their intentions to do so. Like so many other actions by the Obama Administration, this represents a breathtaking assertion of executive power at the expense of Congress. Unfortunately, the federal district judge who heard the case in Arizona swallowed the Department's argument, hook, line, and sinker, without any evident awareness of how the argument distorted preemption doctrine.

In conclusion, this country has arrived at a very dangerous point when an Administration attacks a state that is simply trying to help the federal government restore the rule of law. It is equally troubling when the Justice Department attempts to seize for the President the congressional power of preemption. America's only hope is that the appellate courts will realize just what is at stake, and uphold S.B. 1070 on constitutional grounds.

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