

S.B. 1070:
THE UNCONSTITUTIONAL AND INEFFICIENT LAW
THAT MAY JUST FIX IMMIGRATION†

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The immigration issue is as old as America itself. One of the Founders' primary complaints against King George was that he restricted immigration.¹ This complaint carried such weight that it was one of the grievances listed in the Declaration of Independence.² Because of the Founders' apparent open-border mentality, the Constitution only mentions two immigration powers, and delegates them both to Congress. First, Congress was given the power to restrict human trafficking, better known to history as "slavery," after 1808.³ Congress was also given exclusive power to provide "an uniform Rule of Naturalization."⁴ James Madison explained in Federalist Paper Number 42 that Congress was given this power to establish uniform "rights of citizenship" and "privileges of residence,"⁵ and therefore prevent the states from setting different standards for citizenship.

Although the Constitution is relatively silent on the question of immigration, it does not follow that the federal government is not primarily responsible for regulating immigration. Indeed, the federal government has possessed virtually exclusive power to regulate

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¹ DAVID SKILLEN BOGEN, PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 6 (2003).

² THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776) ("He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.").

³ U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

⁴ U.S. CONST. art. I, § 8, cl. 4.

⁵ THE FEDERALIST NO. 42, at 236–37 (James Madison) (E. H. Scott ed., 1898).

immigration for more than one hundred years.⁶ The Supreme Court has held that the federal government has a plenary power to regulate immigration that derives from Congress' power to regulate interstate commerce,⁷ the President's power over foreign affairs,⁸ and the inherent sovereignty of the federal government.⁹

Congress has exercised this plenary power by creating a complex and dysfunctional web of laws that lies beyond the power of most people to comprehend—even lawyers. Immigration law is so complicated that an Immigration and Naturalization Service spokesperson stated on the record that “[i]mmigration law is a mystery and a mastery of obfuscation.”¹⁰ Federal judges have been even less complimentary of the statutory mess that Congress has created. For example, one federal judge stated,

We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.¹¹

President George W. Bush was also troubled by the condition of our immigration system. In his book *Decision Points*, President Bush noted that one of his greatest regrets was that he did not attempt to fix the immigration system before trying to fix Social Security.¹² He believes that had he reordered his priorities, he would have been able to fix the broken immigration system.¹³ President Bush achieved no such victory, however, and the problem now looms larger than ever.

Indeed, this complex web of laws has created an utterly broken and dysfunctional immigration system that has harmed our national economy, our national cohesiveness, and our national security in general. We have a continuing crisis on our hands, one that successive

⁶ In the nation's early days, states regulated immigration. See E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 396 (1981).

⁷ *E.g.*, *Head Money Cases*, 112 U.S. 580, 600 (1884) (“Congress [has] the power to pass a law regulating immigration as a part of commerce of this country with foreign nations . . .”).

⁸ See, *e.g.*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893)).

⁹ See, *e.g.*, *Fong Yue Ting*, 149 U.S. at 711.

¹⁰ Nurith C. Aizenman, *Maryland Family Ensnared in Immigration Maze; After Changes in the Law, Couple Faces Deportation*, WASH. POST, Apr. 24, 2001, at B1. The Immigration and Naturalization Service (“INS”) was subsequently restructured into the Department of Homeland Security. See Department of Homeland Security Act of 2002, 6 U.S.C. § 271(a)(5)(b) (2006).

¹¹ *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977).

¹² GEORGE W. BUSH, *DECISION POINTS* 305–06 (2010).

¹³ *Id.*

presidencies and congresses have been unable to resolve. With rising violence on our southern border, millions of undocumented immigrants located throughout the United States, massive lawbreaking, and Congress' inability—or unwillingness—to provide the legal fixes and resources necessary to solve the problem, the states suffering the most have naturally decided to exercise their role as laboratories of democracy and attempted to step in where Congress has failed.

Traditionally, the states have played a strong role in regulating non-citizens who reside within their borders. For example, they often enact statutes that regulate employment or benefits for non-citizens.¹⁴ The pre-emption doctrine¹⁵ and Supremacy Clause jurisprudence¹⁶ teach us, however, that when the states do regulate on matters relating to immigration, they cannot do so in a manner that conflicts with or undermines federal law and policy.¹⁷ While states are free to complement federal government laws and policies, and in some cases are required to provide support to federal efforts, they can never undermine them.¹⁸

So what, then, is a state like Arizona to do? Many contend that Arizona is merely trying to help the federal government do its job. This is not the case. A prime example of this was illustrated by an interesting segment on the *Larry King Live* television show. One night, talk show host Larry King had two Arizona sheriffs on the show.¹⁹ Both sheriffs completely agreed on the facts of the situation in Arizona, yet one sheriff opposed Senate Bill (“S.B.”) 1070,²⁰ and the other sheriff was in favor of it.²¹ How could this be? The sheriffs' answers revealed that the sheriffs did not think that Arizona's law would complement federal efforts to enforce immigration laws, but rather would force the federal government

¹⁴ See, e.g., ARIZ. REV. STAT. ANN. § 23-212 (2011) (making it illegal for employers to hire illegal aliens); CAL. HEALTH & SAFETY CODE § 130 (Supp. West 2010) (prohibiting illegal aliens from receiving publicly funded health care); GA. CODE ANN. § 50-36-1 (2011) (making it illegal for illegal aliens to receive government benefits).

¹⁵ See, e.g., *Felder v. Casey*, 487 U.S. 131, 138 (1988) (“Under the Supremacy Clause of the Federal Constitution, ‘[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,’ for ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’” (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)) (alteration in original)).

¹⁶ See U.S. CONST. art. VI, cl. 2.

¹⁷ See *De Canas v. Bica*, 424 U.S. 351, 358 n.6 (1976) (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948)).

¹⁸ See *id.* at 357.

¹⁹ *Larry King Live* (CNN television broadcast July 28, 2010).

²⁰ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

²¹ *Larry King Live*, *supra* note 19.

to behave differently.²² Their assessments of the law turned on their perception that federal authorities were meeting each sheriff's needs for federal cooperation.²³

The first sheriff did not approve of the bill because it would "overwhelm the system" by requiring Arizona to subject all illegal immigrants to its criminal justice system.²⁴ He argued that under Arizona law prior to the passage of S.B. 1070, an arresting officer would hand over illegal immigration suspects to Immigration and Customs Enforcement ("ICE").²⁵ S.B. 1070, he argued, would require Arizona to deal with the suspect in the state system first, and thereby clog up the state criminal justice system.²⁶ Because the suspect ultimately would still be turned over to ICE, S.B. 1070 would needlessly drain Arizona's scarce resources.²⁷ In this sheriff's jurisdiction, there was no shortage of ICE agents.²⁸

The second sheriff argued that he needed the law in his jurisdiction, and agreed with the other sheriff's assessment of how it would work.²⁹ He approved of the law because it would now require the federal government to deal with all apprehended illegal immigrants, whereas before, the federal government seemingly had the option of declining to take certain unauthorized immigrants into custody.³⁰ In his jurisdiction, ICE was not likely to respond to him when he called for them to pick up unauthorized immigrants, and he perceived that the law would force them to do so.³¹

The debate between the sheriffs illustrates precisely what S.B. 1070 is going to do: It will force the federal government to expend its resources in Arizona and to remove Arizona's four hundred thousand illegal immigrants—at the expense of its enforcement efforts in other states.³²

While many would claim that result as a victory, it is exactly what makes S.B. 1070 unconstitutional. Arizona's law explicitly contradicts the federal priorities in immigration enforcement laid out by Congress and the executive branch. S.B. 1070 states that its purpose is to create

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See id.*

²⁸ *See id.*

²⁹ *Id.*

³⁰ *See id.*

³¹ *See id.*

³² *See* Krissah Thompson, *Case Spotlights Tension on Mexican Border*, WASH. POST, Feb. 6, 2011, at A3.

“attrition through enforcement,” meaning *enforcement of every single immigration law*.³³ The strategy of the federal government, however, is *enforcement prioritization*.³⁴ The federal government’s priority is to use ICE’s limited resources to deport the “worst of the worst”³⁵—not every illegal immigrant in Arizona.

Examining the numbers makes this point even clearer. Congress has given the Executive Branch the resources to detain and deport only about four hundred thousand immigrants per year,³⁶ which is approximately the entire unauthorized population of Arizona.³⁷ With such a limited budget, ICE cannot send every immigration agent to Arizona simply because Arizona demands it. Those limited detentions and deportations are supposed to be reserved for the most serious criminals, regardless of whether some contend that the executive branch has failed in the area of immigration enforcement.³⁸

Moreover, Congress has never given the Department of Homeland Security the resources to deport all the unauthorized aliens in the country. By conservative estimates, it would cost about \$80 billion to deport every unauthorized alien in the United States.³⁹ That is more

³³ See S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

³⁴ Memorandum from John Morton, Assistant Sec’y of U.S. Immigration & Customs Enforcement, to All ICE Employees (June 30, 2010) (noting that because of ICE’s limited resources, “ICE must prioritize the use of its enforcement personnel, detention space, and removal resources” and reserve its “highest immigration enforcement priority” for those aliens “who pose a danger to national security or a risk to public safety”); see also Press Release, Dep’t of Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009), available at http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm (designating that immigration enforcement should focus on “improving public safety by removing criminal aliens who are a threat to local communities”).

³⁵ Anna Griffin, *Just Whose Job Is It To Enforce Immigration?*, OREGONIAN, Oct. 2, 2010, available at 2010 WLNR 19604909.

³⁶ Jerry Markon, *Calls for His Resignation Just Part of the Territory; John Morton Leads U.S. Immigration and Customs Enforcement*, WASH. POST, July 19, 2010, at A13. ICE has a deportation budget of approximately \$2.55 billion. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET: ICE FISCAL YEAR 2010 ENACTED BUDGET (2009) [hereinafter FACT SHEET]. It costs approximately \$6000 to deport an illegal immigrant. Stephanie Czekalinski, *Deported Illegal Immigrants Return Repeatedly*, COLUMBUS DISPATCH, Dec. 27, 2010, at A1.

³⁷ PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 14 (2011).

³⁸ See, e.g., Susan Carroll, *Secure Communities: Southeast Texas Leads U.S. in Ousting ‘Criminal Aliens[.]’ Obama Officials Say Figures Show Their Border Efforts Are Paying off[.] Immigrant: Critics Say Program Too Broad*, HOUS. CHRON., Oct. 7, 2010, at B1.

³⁹ Brian Bennett, *GOP Senators Inquire into Cost of Mass Deportations[.] Letter to DHS Alleges Patchy Immigration Law Enforcement*, CHI. TRIB., Oct. 31, 2010, at C29.

than thirty times the current budget for immigration enforcement.⁴⁰ By enacting S.B. 1070, Arizona has claimed a right to all of these resources—ahead of states like California, New York, and Texas.

Furthermore, immigration law enforcement is one area in which Congress has already created a mechanism for states to cooperate and work with the federal government. Other criminal law issues are often addressed separately by the states and the federal government. For example, drunk driving is a serious and pervasive problem nationwide, but enforcement of drunk driving laws is nonetheless generally left to the states⁴¹ (with the exception of mandating a drinking age through the use of federal highway funds⁴²), as is speeding.⁴³ Enforcement of federal tax laws is an example of an area that is left solely to the federal government.⁴⁴

Immigration, however, is one issue in which there is cooperation between states and the federal government—despite the federal government’s plenary immigration power. In fact, cooperation is abundant. “Cooperation” as Arizona desires in S.B. 1070 is undesirable, however, because Congress has *already* created a statutory scheme for such cooperation. Congress enacted Section 287(g) of the Immigration and Nationality Act, which lays out an explicit procedure by which states can enforce immigration laws—subject to the priorities and control of the federal government.⁴⁵ What Arizona has done, however, is extend itself far beyond Congress’ authorization in Section 287(g). Rather than having Arizona enact its own legislation and attempt to “help” through mechanisms such as S.B. 1070, the federal government would prefer that the state of Arizona use the existing 287(g) procedures and assist the federal government using the mechanism prescribed by Congress.

⁴⁰ ICE has a deportation budget of approximately \$2.55 billion. FACT SHEET, *supra* note 36.

⁴¹ See ALASKA STAT. § 28.35.030 (2011); ARIZ. REV. STAT. ANN. § 28-1381 (2011); CONN. GEN. STAT. § 14-227a (2011).

⁴² 23 U.S.C. § 158 (2006).

⁴³ See ALASKA STAT. §§ 19.10.070, 28.35.410 (2011); ARIZ. REV. STAT. ANN. § 28-701 (2011); CONN. GEN. STAT. § 14-219 (2011).

⁴⁴ See generally 26 U.S.C. § 6155 (2006).

⁴⁵ Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006).

Not all offers of “help” from states are welcomed by the federal government. Consider an example: No one would seriously contend that Arizona could pass a state law criminalizing federal income tax evasion and mandate that Arizona state police check every suspect they stop to see if he or she has filed a federal tax return or owes back taxes and subsequently demand that every IRS agent in the country be sent to Arizona to enforce this law. Although Arizona presumably would benefit from enhanced enforcement of the federal tax code, such a law would clearly be pre-empted. The IRS has limited resources and different priorities than the state of Arizona and must use those resources to respond to tax issues throughout the nation, not just in Arizona. By the same token, Arizona cannot enforce federal immigration law in a manner that dictates how the federal government uses its limited resources to accomplish its goals.

A practical reason also exists for why Arizona should not be permitted to enforce federal immigration law. As previously mentioned, immigration law is extremely complex.⁴⁶ Arizona’s law was not written by immigration law experts. In fact, Arizona’s law criminalizes behavior that Congress has not. For instance, it penalizes persons who do not have certain paperwork when such persons are not even given the specified papers by the federal government.⁴⁷ Arizona’s law also fails to recognize that it is not an easy matter to determine whether an individual is removable. Every year, the Department of Homeland Security, supposed experts on immigration law, accidentally deports American citizens and removes individuals who have legitimate legal status in the United States.⁴⁸ Such mistakes are not rare. As an immigration lawyer, I handled several cases in which American citizens believed they were illegal immigrants and several cases where illegal immigrants falsely believed they were United States citizens. This common confusion is a direct result of the extraordinarily complex and technical code that Congress created. If Arizona officials, who have not

⁴⁶ See *supra* notes 10–11 and accompanying text.

⁴⁷ Under Section 2.B of S.B. 1070, a person is presumed to be an unlawful alien if they cannot provide the necessary papers. See S.B. 1070, 49th Leg., 2d Reg. Sess. § 2.B (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)). Under federal law, however, certain groups of aliens, like those remaining in the United States for less than thirty days, are not required to register, and therefore would not even have papers. 8 U.S.C. § 1302 (2006); see also 8 U.S.C. §§ 1303, 1304 (2006); Renee C. Redman, *National Identification Cards: Powerful Tools for Defining and Identifying Who Belongs in the United States*, 71 ALB. L. REV. 907, 917 (2008) (noting that many citizens do not even have the required papers).

⁴⁸ Jacqueline Stevens, *Deporting American Citizens: ICE’s Mexican-izing of Mark Lyttle*, HUFFINGTON POST (Aug. 21, 2009, 12:15 PM), http://www.huffingtonpost.com/jacqueline-stevens-phd/deporting-american-citize_b_265187.html.

been trained thoroughly in immigration law begin enforcing the Arizona statute, the results could be disastrous.

As mentioned, states are permitted to help federal officials with immigration enforcement under the direction and control of the Executive Branch through Section 287(g) and through mechanisms like the Secure Communities Program.⁴⁹ Through these avenues, states can cooperate with immigration enforcement, but they cannot dictate the federal government's efforts by demanding absolute enforcement and criminalize immigration acts that are not criminal under federal law. S.B. 1070, however, attempts to do just that.

With this in mind, let us turn to the district court's opinion in the federal government's suit against Arizona. The opinion is a conservative and careful decision. The judge applied straightforward principles of pre-emption⁵⁰ and carefully found significant conflicts between the federal government's scheme as laid out by Congress and the statutory scheme set forth in S.B. 1070.⁵¹ Furthermore, the Ninth Circuit Court of Appeals is highly likely to rule against Arizona,⁵² despite the panel's less-than-liberal make-up; it consists of two conservative judges and one liberal judge.⁵³ The Ninth Circuit is familiar with the technical complexities of immigration law because it handles the most immigration cases in the country.⁵⁴ A reversal is not likely.

In addition to being unconstitutional, S.B. 1070 is also highly inefficient as it does not withstand a basic cost-benefit analysis. Arizonans should be grateful that the federal government has obtained

⁴⁹ The Secure Communities Program "enhances fingerprint-based biometric technology used by local law enforcement agencies during their booking process. This enhanced technology enables fingerprints submitted during the booking process to be checked against FBI criminal history records *and* DHS records, including immigration status, providing valuable information to accurately identify those in custody." But the Secure Communities Program "does not authorize local law enforcement to enforce immigration laws." U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: A MODERNIZED APPROACH TO IDENTIFYING AND REMOVING CRIMINAL ALIENS (2010).

⁵⁰ *United States v. Arizona*, 703 F. Supp. 2d 980, 991, 994-96, 998-1002, 1006-08 (D. Ariz. 2010).

⁵¹ *Id.* at 998-99, 1002, 1006.

⁵² As this Author predicted, the three-judge panel of the Ninth Circuit Court of Appeals ruled against Arizona on April 11, 2001, in a 3-0 decision in which one judge partially dissented from the majority's reasoning, but concurred in the result. *See United States v. Arizona*, No. 10-16645, 2011 U.S. App. LEXIS 7413, (9th Cir. Apr. 11, 2011) (affirming the district court's preliminary injunction enjoining certain provisions of S.B. 1070).

⁵³ The panel consists of conservative-bent Judges Carlos Bea and John Noonan and liberal-bent Judge Richard Paez. *See Maura Dolan, Immigration Law's Review Panel Named*, L.A. TIMES, Oct. 31, 2010, at A43.

⁵⁴ *See* JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 5-6 (2009).

an injunction to stop its implementation, because the cost to Arizona of enforcing S.B. 1070 may bankrupt the state and result in the use of state resources to go after minor immigration offenders, while native-born violent felons go unpunished. Arizona's S.B. 1070 mandates that state law enforcement officials focus on even minor immigration violations, while no such mandate exists for major crimes committed by U.S. citizens.⁵⁵ Ironically, many studies contend that undocumented immigrants commit fewer violent crimes than native-born citizens.⁵⁶ Indeed, most of the crimes committed in Arizona are carried out by people who can never be deported because they are United States citizens.

Charging four hundred thousand undocumented immigrants in Arizona with crimes, locking them up in Arizona prisons, providing them with food and medical care while they are in jail, and paying for all the lawsuits that will inevitably result is not cost efficient. Immigrant plaintiffs complaining of similar laws have already won lawsuits against local governments recently, and the attorneys' fee awards against these local governments have been substantial. In *Lozano v. City of Hazleton*, for example, the Third Circuit Court of Appeals held that ordinances regulating the employment and housing of unauthorized aliens were pre-empted by federal law.⁵⁷ Because the plaintiffs prevailed, the City faced a potential legal bill of \$2.4 million, and the City's insurance carrier had contested payment, arguing that the City must pay these attorneys' fees, not the insurance company.⁵⁸

Furthermore, it is inevitable that Arizona officials will make mistakes and commit unconstitutional racial profiling, which will subject Arizona to a large number of lawsuits. The federal government

⁵⁵ See IMMIGRATION POLICY CTR., THE IMPACT OF SB 1070: USURPING THE FEDERAL GOVERNMENT'S ABILITY TO SET ENFORCEMENT PRIORITIES (2010), available at <http://www.immigrationpolicy.org/just-facts/impact-sb-1070-usurping-federal-government%E2%80%99s-ability-set-enforcement-priorities>.

⁵⁶ See, e.g., IMMIGRATION POLICY CTR., IMMIGRANTS AND CRIME: ARE THEY CONNECTED? 1-2 (2007), available at <http://www.immigrationpolicy.org/sites/default/files/docs/Crime%20Fact%20Check%2012-12-07.pdf>; Kristin F. Butcher & Anne Morrison Piehl, Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation 2 (Nov. 2005), available at http://www.chicago.fed.org/digital_assets/publications/working_papers/2005/wp2005_19.pdf.

⁵⁷ 620 F.3d 170, 211 (3d Cir. 2010) (holding that the Illegal Immigration Relief Act Ordinance ("IIRAO") passed by the City of Hazleton, Pennsylvania, HAZLETON, PA., ORDINANCE 2006-18 (2006), which regulated the employment and provision of rental housing to unauthorized aliens, was pre-empted by the federal Immigration Reform and Control Act ("IRCA"), 8 U.S.C. § 1324 (2006), because the IIRAO furthered one of the objectives of IRCA "at the expense of the others").

⁵⁸ See Terrie Morgan-Besecker, *Legal Bills May Sock Hazleton*, THE TIMES LEADER (May 8, 2009), http://www.timesleader.com/news/Legal_bills_may_sock_Hazleton_05-08-2009.html.

itself has had great difficulty avoiding charges of racial profiling in its own immigration enforcement efforts; a state is not likely to have better success. For instance, several Spanish-speaking American citizens from Denver, Colorado, were arrested by federal authorities on their way to an Amway convention in Omaha, Nebraska, when they stopped at a fast-food restaurant for breakfast.⁵⁹ A Spanish-speaking ICE officer heard them speaking in Spanish at the restaurant and concluded that they were engaged in a smuggling operation.⁶⁰ The government arrested everyone on the bus and is now being sued for false arrest and false imprisonment.⁶¹ This case provides an example of the difficulty the federal government has had with interior enforcement of immigration laws—and immigration law enforcement will prove to be no easier for Arizona.

Thus the unintended consequences of S.B. 1070—a clogged criminal justice system and various expensive civil lawsuits—could cost Arizona millions of dollars. An additional cost that Arizona may not have considered, however, is the cost of legal counsel, which must be provided to persons prosecuted under S.B. 1070. Under the recent U.S. Supreme Court decision *Padilla v. Kentucky*, every non-citizen arrested under S.B. 1070 will be entitled to receive expert advice as to the immigration consequences of his or her arrest.⁶² This requirement will provide employment to hundreds of immigration lawyers—at the expense of the Arizona state government.

Congress has not criminalized the act of being present in the United States unlawfully,⁶³ because if it did, the federal government would be forced to fund numerous additional Article III judges, prosecutors, and defense lawyers. Turning the ten to twenty million unlawful immigrants in the country⁶⁴ into criminals overnight would be extraordinarily

⁵⁹ Press Release, Am. Civil Liberties Union, ACLU Files Legal Claim Against ICE on Behalf of U.S. Citizens Arrested in Unwarranted Immigration Roundup (Nov. 15, 2010), available at <http://www.aclu.org/immigrants-rights/aclu-files-legal-claim-against-ice-behalf-united-states-citizens-arrested-unwarrant>.

⁶⁰ *Id.*

⁶¹ *Id.* The suit also includes battery as one of its claims. *Id.* Thirty-six of the forty-two passengers on the bus were in the United States illegally. Felisa Cardona, *Two Americans File Claim over Questioning by ICE Agent*, DENVER POST, Nov. 16, 2010, http://www.denverpost.com/news/ci_16623614.

⁶² See 130 S. Ct. 1473, 1486 (2010) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

⁶³ See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.”) (citing *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893)).

⁶⁴ Michael Matza, *Philadelphia Rally Decries Arizona Immigrant Crackdown*, PHILA. INQUIRER, May 27, 2010, at B7.

expensive. Currently, most immigration cases are handled administratively with limited due process⁶⁵—including the absence of a right to a defense lawyer at government expense in deportation proceedings.⁶⁶ This is a far more cost-effective system that allows for a maximum number of deportations. Indeed, the Obama administration is about to set the record for the most deportations in a single year.⁶⁷

S.B. 1070 proponents argue that the bill helps the federal government. It is a more accurate statement to say that it would serve as a ball and chain on the federal government. Under straightforward principles of pre-emption, S.B. 1070 is unlawful. I predict that the Supreme Court will ultimately uphold the injunction against it. This may lead to the only salutary effect of S.B. 1070—forcing Congress to do its job. If one thing is clear from this immigration mess, blame should be laid at the feet of Congress. It has enacted a complex scheme that is unclear (at best) to most people who read it—including lawyers and federal judges. Congress has failed to provide the resources necessary to enforce this complex scheme, which has forced states like Arizona to seek to provide unconstitutional and inefficient “help.”

⁶⁵ See AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE §§ 1:5.2, 8:1 (4th ed. 2010).

⁶⁶ *Trench v. INS*, 783 F.2d 181, 183 (10th Cir. 1986). *But see* 8 U.S.C. § 1362 (2006) (“In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.”).

⁶⁷ Shankar Vedantam, *DREAM Act Defeat Reveals Failed Strategy*, WASH. POST, Dec. 19, 2010, at A3.