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Defending Arizona

Its statute will withstand the inevitable—and already begun—challenges in court

BY KRIS W. KOBACH

A LAW that basically makes a few small, carefully considered changes in police procedure, Arizona's S.B. 1070, has inspired a vastly disproportionate response. Few laws have ever been so grossly mischaracterized by so many leaders on the left. From President Obama on down, they rushed to the microphone after it was enacted to hyperventilate about an impending police state in Arizona. Excitable bloggers invoked Jim Crow, apartheid, and the Nuremberg laws of Nazi Germany.

Their charges are completely false. Most stem from misunderstandings, perhaps willful and perhaps merely ignorant, of what the law is about and how it works. The false charges have been numerous, but the three most common are the following.

First, and most outrageously, critics incorrectly claim that the law would promote racial profiling. Rep. Raul Grijalva (D., Ariz.) said this, along with Rep. Luis Gutierrez (D., Ill.), Delegate Eleanor Holmes Norton (D., D.C.), and the rest of the race-baiting caucus in Congress. But since so many members of Congress don't bother to read bills anymore, their error was hardly unexpected. More surprising was the commentary from the country's top lawyer. Attorney General Eric Holder sternly

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warned the nation on *Meet the Press* that the law "has the possibility of leading to racial profiling." A few days later, when pressed about his comments in a House of Representatives committee hearing, Holder admitted that he hadn't actually read the law. Another S.B. 1070 opponent, secretary of homeland security Janet Napolitano, says she has not read the law either.

If they had read it, Holder and Napolitano 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. With this language, S.B. 1070 goes to extraordinary lengths to protect against racial profiling; most state and federal statutes do not include such special protection in their text. In addition, all the normal Fourth and Fourteenth Amendment protections against racial profiling will continue to apply.

Second, critics have declared that the law will require aliens to carry documentation that they weren't otherwise required to possess. President Obama claimed, "Now, suddenly, if you don't have your papers . . . you're going to be harassed." The president would do well to familiarize himself with current federal immigration laws. Since 1940, it has been a federal crime for aliens not to keep certain registration documents on their person or not to register with the federal government. The Arizona law prohibits aliens from violating these federal statutes (8 U.S.C. §§ 1304(a) and 1306(e)). In other words, the Arizona law simply adds a layer of state penalty to what was already a crime under federal law.

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For legal permanent resident aliens, the relevant document is a green card. For short-term visitors 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, which is 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 for up to 30 days. Any American who has traveled 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 our own laws on the subject.

There's nothing new about police officers' taking illegal aliens into custody, in Arizona or elsewhere. The documentation provisions of S.B. 1070 simply give Arizona law enforcement one more option in how to deal with them. Previously, when officers encountered illegal aliens in the course of their normal duties enforcing other laws, they could turn them over to ICE (Immigration and Customs Enforcement) for handling under federal procedures, or else make a case under Arizona's human-smuggling statute. Now S.B. 1070 offers a third course of action: Illegal aliens without documentation can be jailed under state law even if human-smuggling provisions do not apply. If a local police department prefers to turn all illegal aliens that it encounters over to ICE, it can certainly continue to do so.

Third, critics have claimed that the law requires police officers to stop people in order to question them about their immigration status. Here too, President Obama misrepresented the law. Offering the example of a Hispanic family going to an ice-cream parlor, Obama said a police officer might walk up to the father and start interrogating him about his immigration documents. But Section 2 of S.B. 1070 stipulates that in order for its provisions 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."

The original wording made reference to "lawful contact"; this was revised to "lawful stop, detention, or arrest" to make clear that officers could not stop someone simply on suspicion and ask for his papers. So in President Obama's example, S.B. 1070 might come into play if the person came running out of the ice-cream shop with a gun in one hand and a bagful of money in the other (and then only if race-neutral indicators that the person was an illegal alien came to light). But an officer could not demand identification without the initial lawbreaking that justified the stop.

THE law operates in straightforward fashion. If a 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 800 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 a police officer pulls over a minivan for speeding. He discovers that 16 people are crammed into the van and the seats have been removed. Neither the driver nor any of the passengers have any identification documents. The driver is acting evasively, and the vehicle is traveling 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 officers in Arizona were already regularly contacting ICE before S.B. 1070 was enacted. Critics of the law evidently think police officers should turn a blind eye to any violations of federal immigration law that they come across. The Arizona legislature and the people of Arizona felt otherwise.

In sum, the law does not make any radical changes. Rather, it gives Arizona police officers a few additional tools to use when they come into contact with illegal aliens during their normal law-enforcement duties. It also ensures that local cooperation with ICE will occur more regularly. Other provisions that have received less media hype prohibit Arizona cities from restricting enforcement of immigration laws (for example, by preventing their officers from contacting ICE), and make it a misdemeanor for an alien who lacks work authorization to solicit work in a public place.

In spite of the law's narrow scope, Attorney General Holder has taken the extraordinarily unusual step of suggesting that the Justice Department will take action against the State of Arizona after it reviews the law. Presumably, the lawyers who conduct the review will actually read the text of S.B. 1070, and when they do, they will find precious little on which to base a legal challenge.

S.B. 1070 was drafted in the full expectation that the ACLU would sue, as indeed it has. In anticipation of a challenge, S.B. 1070 was designed to withstand any argument that the ACLU lawyers can throw at it—regardless of whether they happen to be working inside the Holder Justice Department or outside of it. Let's consider their available arguments one by one.

Opponents of the law have been raising a hue and cry about racial profiling, but that argument is a non-starter. Because the initial legal challenge was filed before the law was actually applied, the challenge is a "facial" one—asserting that S.B. 1070 is unconstitutional on its face. Consequently, the challengers are basing their claims on speculation: They hypothesize that police officers *might* act in bad faith and violate the express terms of S.B. 1070.

The Supreme Court has held that such speculation cannot serve to strike down a law as unconstitutional. In the 1987 case of *United States v. Salerno*, the Court made clear that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." Here, Arizona need only point out that if its police officers follow the clearly stated terms of S.B. 1070, no racial profiling will occur.

The ACLU's only remotely plausible argument is that the law is unconstitutional through preemption—meaning that legislation passed by Congress prohibits the State of Arizona from enforcing S.B. 1070. The problem here is that no such legislation exists. While controlling immigration is a job of the federal government, Congress has never enacted a statute that expressly bars states from assisting it in the manner contemplated by the Arizona statute. Without any express preemption to rely on, the challengers must resort to making a more difficult "implied preemption" argument. This is a claim that the Arizona law conflicts with federal law, and therefore interferes with the

fulfillment of congressional objectives. However, the numerous judicial precedents supporting the Arizona law will make this an uphill climb.

THE U.S. Supreme Court has long recognized that states can enact statutes to discourage illegal immigration without being preempted by federal law. In the landmark 1976 case of *De Canas v. Bica*, the Supreme Court upheld a California law that prohibited employers from knowingly hiring unauthorized aliens. The Court rejected preemption arguments, since “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 . . . state regulation touching on aliens in general.” 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 don’t conflict with federal law.

In the case of S.B. 1070, the ACLU will be hard-pressed to find any such conflict. Indeed, S.B. 1070 is a mirror image of federal law. 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

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.” 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. The purpose of the LESL is to assist law-enforcement agencies in determining whether persons they have contact with are illegal aliens. In fiscal year 2005, the LESL responded to a staggering 504,678 calls from state and local police. That’s an average of 1,383 calls per day. This high volume 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 does not create state and local arrest authority; it makes that existing authority more systematic and efficient.

The only argument the ACLU has left is the dubious claim that more vigorous enforcement of federal immigration laws in

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registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a).” 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 *Gonzales v. City of Peoria* (1983), “where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized.”

If the documentation section of the Arizona law isn’t preempted, what about the rest of the law—for example, the section requiring police officers to contact the federal government when they develop reasonable suspicion that a person they are investigating for violating 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 *Gonzales v. Peoria*, 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.” And in 2005 a unanimous Supreme Court in *Muehler v. Mena* recognized the authority of local police officers to inquire into the immigration status of individuals who have been lawfully detained.

Arizona will conflict with federal purposes, perhaps by compelling LESL personnel to respond to a much larger number of calls from Arizona. But the U.S. District Court for Arizona already rejected that line of thinking in *Arizona Contractors Association v. Napolitano* (2007), evaluating Arizona’s 2007 law that required all employers to use the E-Verify system to verify the work authorization of employees. According to the court, “the fact that the Act will result in additional inquiries to the federal government is consistent with federal law.” (In that case, Janet Napolitano, as governor of Arizona, defended the law; now, as homeland-security secretary, she opposes S.B. 1070.)

In summary, we’ve heard all these arguments before. Many of the people and organizations that are now declaring S.B. 1070 to be unconstitutional made the same claims regarding previous Arizona statutes: Arizona’s last three major laws concerning illegal immigration were all challenged in court—Proposition 200 in 2004, the Human Smuggling Act in 2005, and the Legal Arizona Workers Act in 2007. (I assisted in the defense of the last two.) In every case, the Arizona law in question was sustained. Most recently, in 2008 Arizona won an impressive victory in the Ninth Circuit when the Legal Arizona Workers Act was upheld against a preemption challenge. I expect that when the dust settles after S.B. 1070 is litigated, Arizona will still be undefeated in defense of its immigration laws.

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