



# Arizona v. United States: A Limited Role for States in Immigration Enforcement

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## Summary

On June 25, 2012, the Supreme Court issued its much-anticipated decision in *Arizona v. United States*, ruling that some aspects of an Arizona statute intended to deter unlawfully present aliens from remaining in the state were preempted by federal law, but also holding that Arizona police were not facially preempted from running immigration status checks on persons stopped for state or local offenses. In reaching these conclusions, the Supreme Court made clear that opportunities for states to take independent action in the field of immigration enforcement are more constrained than some had previously believed.

In recent years, several states and localities have adopted measures intended to deter the presence of unauthorized aliens within their jurisdiction. An Arizona measure enacted in 2010, commonly referred to as S.B. 1070, arguably represents the vanguard of these attempts to test the legal limits of greater state involvement in immigration enforcement. The major provisions of S.B. 1070 can be divided into two categories: (1) those provisions seeking to bolster direct enforcement of federal immigration law by Arizona law enforcement, including through the identification and apprehension of unlawfully present aliens; and (2) those provisions that criminalize conduct which may facilitate the presence of unauthorized aliens within the state.

Before S.B. 1070 was scheduled to go into effect, the Department of Justice (DOJ) brought suit to preliminarily enjoin many (but not all) of S.B. 1070's provisions, arguing that they were likely preempted by federal immigration law and therefore unenforceable under the Supremacy Clause. The district court granted the DOJ's motion to preliminarily enjoin four of the Arizona law's provisions, and the injunction was upheld by the U.S. Court of Appeals for the Ninth Circuit. The Supreme Court thereafter granted certiorari to review the case.

The eight Justices who decided the case (Justice Kagan recused herself) were asked only to consider whether the four enjoined provisions of S.B. 1070 were facially preempted by federal law. They did not consider other constitutional challenges to the validity of the Arizona law, including claims that enforcement of S.B. 1070 could lead to impermissible racial profiling. A majority of the Court found that the Arizona measure's criminal sanctions for alien registration violations and upon unauthorized aliens who seek employment in the state were preempted by federal law. The Court also ruled invalid a provision authorizing the warrantless arrest of aliens who have criminal offenses that constitute grounds for removal under federal immigration law. However, the sitting Justices unanimously agreed that federal law did not facially preempt a provision which requires Arizona police whenever practicable, to investigate the immigration status of persons reasonably suspected of being unlawfully present when such persons are stopped, detained, or arrested pursuant to the enforcement of state or local law—at least so long as the investigation does not extend these persons' detention by state or local law enforcement.

In ruling that three provisions of S.B. 1070 were facially preempted, and suggesting that a fourth provision could be susceptible to as-applied challenges, the Court clarified that opportunities for independent state action in the field of immigration enforcement are limited. In particular, the Court's decision would suggest that mirroring federal law when imposing criminal penalties upon conduct that could facilitate the presence of unauthorized aliens within a jurisdiction does not suffice to avoid preemption. Similarly, while finding that measures requiring or authorizing immigration status checks by state and local officers are not facially preempted, the Court suggested that the application of such measures could lead to new constitutional challenges.

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## Introduction

On June 25, 2012, the Supreme Court issued its much-anticipated decision in *Arizona v. United States*, ruling that some aspects of an Arizona statute intended to deter unlawfully present aliens from remaining in the state were preempted by federal law, but also holding that Arizona police were not facially preempted from running immigration status checks on persons stopped for state or local offenses.<sup>1</sup> In reaching these conclusions, the Supreme Court made clear that opportunities for states to take independent action in the field of immigration enforcement are more constrained than some had previously believed.<sup>2</sup>

In recent years, several state and local governments have adopted measures intended to deter the presence of unauthorized aliens within their jurisdiction. The nature of these measures has varied considerably. In some instances, jurisdictions have sought to enter cooperative agreements with federal immigration authorities, under which state or local officers are delegated authority to perform specific immigration enforcement functions. In other instances, state and local governments have acted independently to deter unauthorized immigration. Some states and localities, for example, have sought to limit unlawfully present aliens' access to housing and municipal services.<sup>3</sup> Some have authorized or required the suspension or termination of the licenses of businesses that knowingly or intentionally hire unauthorized aliens, and have also required that employers within their jurisdiction use the federal government's E-Verify database to check certain employees' work authorization.<sup>4</sup> Others have imposed criminal sanctions, separate and apart from any imposed under federal law, for activities believed to promote unauthorized immigration. Still others have adopted laws or policies intended to facilitate the identification and apprehension of unlawfully present aliens by state and local law enforcement—even in the absence of a cooperative agreement with federal authorities—so that they may be transferred to the custody of federal immigration officers.

An Arizona measure enacted in 2010, commonly referred to as S.B. 1070,<sup>5</sup> arguably represents the vanguard of recent attempts to test the legal limits of greater state involvement in immigration enforcement. Potentially sweeping in effect, S.B. 1070 declared Arizona's intent to establish a state-wide policy of "attrition through enforcement."<sup>6</sup> Among other things, S.B. 1070 required

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<sup>1</sup> *Arizona v. United States*, 132 S. Ct. 2492 (2012).

<sup>2</sup> See *infra* notes 65 and 83 and accompanying text.

<sup>3</sup> See generally CRS Report RL34345, *State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments*, by Kate M. Manuel, Jody Feder, and Alison M. Smith.

<sup>4</sup> See generally *id.*; CRS Report R41991, *State and Local Restrictions on Employing Unauthorized Aliens*, by Kate M. Manuel.

<sup>5</sup> S.B. 1070, as amended by H.B. 2162, available at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF> (last accessed: August 1, 2012). Shortly after passage of S.B. 1070, Arizona amended the measure through the enactment of H.B. 2162, which narrowed the scope or lessened the penalties associated with certain provisions of S.B. 1070. For example, as originally adopted, S.B. 1070 would have required Arizona law enforcement to investigate the immigration status of any individual with whom they have "lawful contact," upon reasonable suspicion of unlawful presence, a requirement that could plausibly have been interpreted to call for an unprecedented level of state immigration enforcement as part of routine policing. H.B. 2162, however, has limited this investigative authority to situations where the suspected unlawfully present alien is stopped, detained, or arrested for a state or local offense. H.B. 2162 also reduced the criminal penalties imposed by S.B. 1070 for federal alien registration violations.

<sup>6</sup> "Attrition through enforcement" has been described by some observers as an approach to deter unlawful migration (continued...)

state and local law enforcement to facilitate the detection of unauthorized aliens in their daily enforcement activities. The measure also established criminal penalties under state law, in addition to those already imposed under federal law, for alien smuggling offenses and failure to carry or complete federal alien registration documents. Further, it made it a crime under Arizona law for an unauthorized alien to apply for or perform work in the state, either as an employee or an independent contractor.

Before S.B. 1070, as amended, was scheduled to go into effect, the Department of Justice (DOJ) brought suit in federal district court seeking to preliminarily enjoin many (but not all) of the provisions of the Arizona measure, arguing that they were likely preempted by federal immigration law and therefore unenforceable under the Supremacy Clause.<sup>7</sup> The district court granted the DOJ's motion to preliminarily enjoin four of the Arizona law's provisions (though it did not enjoin all the provisions of S.B. 1070 that had been challenged by the DOJ, including a provision modifying a preexisting Arizona statute which penalizes alien smuggling).<sup>8</sup> A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") upheld the injunction, unanimously with respect to certain provisions, but splitting 2-1 on others.<sup>9</sup> Arizona petitioned the Supreme Court to hear an appeal of the panel's decision and, on December 12, 2011, the Court granted certiorari.<sup>10</sup>

This report discusses the Supreme Court's ruling in *Arizona v. United States*, and considers the implications that the decision may have for immigration enforcement activity by states and localities. The *Arizona* ruling and its implications are also discussed, in a more truncated form, in a series of posts of the CRS Legal Sidebar.<sup>11</sup> For discussion of lower court litigation on S.B. 1070, see CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by Kate M. Manuel, Michael John Garcia, and Larry M. Eig.

## The Court's Decision in *Arizona*

Arguments at the Supreme Court centered on four major provisions of the Arizona statute, which can be divided into two categories: (1) those provisions seeking to bolster direct enforcement of federal immigration law by Arizona law enforcement, including through the identification and apprehension of unlawfully present aliens; and (2) those provisions that criminalize conduct

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(...continued)

and encourage the compelled or voluntary exit of unlawfully present aliens through the "steady, across-the-board enforcement of our immigration laws." CRS Report R41207, *Unauthorized Aliens in the United States*, by Andorra Bruno, at 12 (quoting Mark Krikorian, *Attrition by Enforcement Is the Best Course of Action*, SPARTANBURG (S.C.) HERALD-JOURNAL (September 30, 2007)).

<sup>7</sup> U.S. CONST., art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.").

<sup>8</sup> *United States v. Arizona*, 703 F. Supp. 2d 980, 987 (D. Ariz. 2010).

<sup>9</sup> 641 F.3d 339 (9<sup>th</sup> Cir. 2011).

<sup>10</sup> *Arizona v. United States*, 132 S. Ct. 845 (December 12, 2011). Justice Kagan recused herself.

<sup>11</sup> See, e.g., CRS Report WSLG90, *Supreme Court Rules in Arizona v. United States: Limited Opportunities for Independent Immigration Enforcement Activity by the States*, by Michael John Garcia; CRS Report WSLG96, *Arizona v. United States: Some Immediate Takeaways*, by Michael John Garcia; and CRS Report WSLG97, *Many Unanswered Questions after Supreme Court's Arizona Decision*, by Kate M. Manuel.

which may facilitate the presence of unauthorized aliens within the state. The eight Justices who decided the case (Justice Kagan had recused herself) were asked only to consider whether the four enjoined provisions of S.B. 1070 were facially preempted by federal law (that is, whether the provisions necessarily conflicted with or frustrated federal immigration policy). The Court did not consider whether specific interpretations or applications could be preempted once in place. The Court also did not consider the validity of other provisions of S.B. 1070 that were not preliminarily enjoined as a result of the DOJ's preemption challenge (though some of these provisions are the subject of ongoing litigation).<sup>12</sup> Nor did it consider other constitutional challenges to the validity of the Arizona law, including claims that enforcement of S.B. 1070 would lead to impermissible racial profiling.<sup>13</sup>

Justice Kennedy wrote the majority opinion (joined by Chief Justice Roberts and Justices Breyer, Ginsburg, and Sotomayor) for the Court, finding that three of the four provisions at issue were facially preempted. Justice Alito dissented in part, agreeing that S.B. 1070's alien registration provision was facially preempted, but not the other challenged provisions. In separate opinions, Justices Scalia and Thomas would have upheld all of the challenged provisions of the Arizona law. Both viewed the states as having broad sovereign authority to act against unauthorized immigration, and claimed that this authority (at least as exercised under S.B. 1070) had not been encumbered by federal law.

## Immigration Regulation and Preemption

Before analyzing the individual provisions of S.B. 1070, the Court briefly addressed the federal legal framework governing immigration, as well as the potentially preemptive effect this framework may have upon state and local activity.

The Supremacy Clause of the Constitution establishes that federal law, treaties, and the Constitution itself are “the supreme Law of the Land.”<sup>14</sup> Accordingly, one essential aspect of the federal structure of government is that states can be precluded from taking actions that are otherwise within their authority if federal law is thereby thwarted. The Court noted prior jurisprudence had established that an act of Congress may preempt state or local action in a given

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<sup>12</sup> See, e.g., *Valle del Sol v. Whiting*, No. CV 10-1061-PHX-SRB (D. Ariz., September 9, 2012) (in proceedings following Supreme Court's ruling in *Arizona*, finding that S.B. 1070 provision criminalizing the transport and harboring of unlawfully present aliens was field and conflict preempted); *Friendly House v. Whiting*, No. CV 10-1061-PHX-SRB, 2012 U.S. Dist. LEXIS 30023 (February 29, 2012) (granting the plaintiffs' motion to preliminarily enjoin those provisions of S.B. 1070 prohibiting motorists from impeding traffic in order to hire day laborers because the plaintiffs were likely to succeed on the merits of their claim that these provisions violate the First Amendment). Previously, in its decision on the government's challenge to S.B. 1070, the district court had indicated its view in dicta that a recent Ninth Circuit decision in the case of *Comite de Jornaleros v. City of Redondo Beach* “foreclose[d] a challenge to [this provision of S.B. 1070] on First Amendment grounds.” *Arizona*, 703 F. Supp. 2d at 1000 n.16. However, after the district court's decision, the Ninth Circuit agreed to an *en banc* rehearing of *Redondo Beach*, which ultimately resulted in a decision finding that the ordinance in question was not narrowly tailored because it regulated significantly more speech than was necessary to achieve the city's purpose of improving traffic flow and safety at two major intersections, and the city could have achieved these goals through less restrictive measures, such as enforcement of existing traffic laws and regulations. See 657 F.3d 936, 947-51 (9<sup>th</sup> Cir. 2011). In light of this decision, enforcement of the day labor provisions of S.B. 1070 was enjoined.

<sup>13</sup> The plaintiffs in *Friendly House*, among others, have alleged impermissible racial profiling. See, e.g., *Friendly House v. Whiting*, No. CV 10-1061, Complaint for Declaratory and Injunctive Relief (filed D. Az., May 17, 2010), at ¶¶ 149-63.

<sup>14</sup> U.S. CONST., art. VI, cl. 2.

area in any one of three ways: (1) the statute expressly indicates its preemptive intent (express preemption); (2) Congress intended to wholly occupy the regulatory field, thereby implicitly precluding supplemental action by a state or local government in that area (field preemption); or (3) state or local action conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption).<sup>15</sup>

Against this legal backdrop, Justice Kennedy's majority opinion emphasized the federal government's "broad, undoubted power over the subject of immigration and the status of aliens," a power based in part upon the federal government's authority to establish rules of naturalization, as well as "its inherent power as sovereign to control and conduct relations with foreign nations."<sup>16</sup> Federal authority to establish the immigration policy of the nation is "well-settled," according to the majority, and Congress has established an "extensive and complex" system regulating immigration and alien status, including with respect to aliens who are removable (deportable) on account of being present in the country in violation of federal immigration law. Moreover, the Court characterized the system established by Congress as affording considerable discretion to the executive branch in setting immigration enforcement priorities, including deciding whether "it makes sense to pursue removal" of a particular alien who is believed to be unlawfully present.<sup>17</sup>

While the majority opinion acknowledged the "importance of immigration policy" to the states, and in particular those, like Arizona, which "bear[] many of the consequences of unlawful immigration,"<sup>18</sup> it nonetheless viewed state and local laws to be permissible only to the extent that they are not "in conflict or at cross-purposes" with the immigration framework created by the national government.

In contrast, writing in partial dissent, Justice Scalia disputed the majority's characterization of the allocation of federal and state authority on matters of immigration. Justice Scalia argued that states have authority to regulate immigration matters, at least in certain instances where state involvement neither conflicts with federal regulation nor is expressly prohibited by a valid federal law. Justice Scalia characterized state authority to act in the field of immigration as being pursuant to a state's inherent power, as a sovereign entity, "to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress."<sup>19</sup> State measures which target aliens who are present in the United States in violation of federal immigration law, according to Justice Scalia, constitute valid exercises of state authority which have not been displaced by federal law.

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<sup>15</sup> *Arizona*, 132 S. Ct. at 2500-01 (citing, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

<sup>16</sup> *Arizona*, 132 S. Ct. at 2498.

<sup>17</sup> *Id.* at 2499.

<sup>18</sup> *Id.* at 2500.

<sup>19</sup> *Arizona*, 132 S. Ct. at 2510 (Scalia, J., concurring in part and dissenting in part). In support of the notion that states may regulate immigration (at least when such regulation touches upon persons within their jurisdiction), Justice Scalia noted state regulation of immigration in the early days of the Republic through the latter part of the Nineteenth Century, a period when federal regulation of immigration was far more limited in scope.

## State Alien Registration Requirements

The Court next turned to Section 3 of S.B. 1070, which made it a misdemeanor under Arizona law to fail to comply with federal requirements that aliens complete and carry registration documents. The Court held that Section 3 was preempted, as Congress intended to occupy the regulatory field when it established rules for alien registration.

The Court’s analysis largely turned on application of its decision in the 1941 case of *Hines v. Davidowitz*, where the Court had found that a Pennsylvania statute requiring aliens to register with the state was preempted by the Federal Alien Registration Act of 1940.<sup>20</sup> While recognizing that the current federal registration requirements were different from those at issue in *Hines*, the majority nonetheless viewed these requirements as remaining “comprehensive” since they provide a “full set of standards governing alien registration, including the punishment for noncompliance.”<sup>21</sup> Thus, it concluded that the federal government had “occupied the field of alien registration,”<sup>22</sup> preempting any further state regulation, including that—like Section 3 of S.B. 1070—which largely adopts federal standards.

In reaching this conclusion, the majority expressly rejected Arizona’s argument that Section 3 shared the same aim and standards as federal law on the grounds that this argument “ignores the basic premise of field preemption.”<sup>23</sup> The majority also noted that, were Section 3 upheld, there could be situations where states pursued criminal charges against persons whom the federal government had declined to prosecute,<sup>24</sup> and that the penalties for violations of the alien registration requirements under Arizona law differed slightly from those under federal law.<sup>25</sup>

While dissenting from other aspects of the majority’s decision, Justice Alito agreed that Section 3 was preempted in light of the Court’s prior decision in *Hines*, which he viewed as foreclosing “Arizona’s attempt here to impose additional, state-law penalties for violations” of the federal registration scheme.<sup>26</sup>

In separate dissents, Justices Scalia and Thomas argued that *Hines* only applied when states adopted alien registration requirements distinct from those of the federal government, and not to state measures which mirror federal law. Justice Scalia, in particular, disagreed with the majority’s reading of *Hines* as being decided on field preemption grounds. Rather, he

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<sup>20</sup> *Hines v. Davidowitz*, 312 U.S. 52 (1941).

<sup>21</sup> *Arizona*, 132 S. Ct. at 2502. In particular, the majority viewed the federal registration requirements as “comprehensive” because they address (1) the time frames within which aliens must register (8 U.S.C. §1302(a)); (2) what information aliens must provide and keep up to date (8 U.S.C. §§1304(a), 1305(a)); (3) proof of registration (8 U.S.C. §1304(e)); and (4) penalties for willful failure to register (8 U.S.C. §1306(a)).

<sup>22</sup> *Arizona*, 132 S. Ct. at 2502 (citing *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) and *Pennsylvania v. Nelson*, 350 U.S. 497 (1954)).

<sup>23</sup> *Arizona*, 132 S. Ct. at 2502 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), in support of the proposition that “[f]ield preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards”).

<sup>24</sup> *Arizona*, 132 S. Ct. at 2503. The majority further noted that it found Arizona’s argument “unpersuasive on its own terms,” because “[p]ermitt[ing] the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted.” *Id.* at 2502.

<sup>25</sup> *Id.* at 2503. Specifically, the majority noted that, while aliens may be punished for failure to carry registration documents by a term of probation under federal law, Arizona law ruled out probation as a possible sentence.

<sup>26</sup> *Id.* at 2525 (Alito, J., concurring in part and dissenting in part).

characterized *Hines* as finding that states are preempted from adopting alien registration rules that differ from federal requirements.<sup>27</sup> Justice Scalia also differentiated the instant case from other cases where states were found to be precluded from criminalizing violations of federal law, by arguing that the federal alien registration system is not of “uniquely federal interest,” and that the state’s reliance on the federal registration system in other contexts constitutes an “adequate basis” for making this a violation of state law.<sup>28</sup> Justice Thomas similarly took the view that Section 3 did not entail “additional requirements” of the sort prohibited by *Hines*.<sup>29</sup> He further rearticulated his general view that preemption analysis should be an “inquiry into whether the ordinary meanings of state and federal law conflict,”<sup>30</sup> and found no such conflicts here, where Arizona sought to enforce federal standards.

## State Penalties upon Unauthorized Aliens Who Seek or Obtain Employment

The Court then considered Section 5(c) of S.B. 1070, which imposed criminal penalties upon unauthorized aliens who seek or obtain employment within Arizona. The majority found that this provision is facially preempted because it upsets the balance that Congress struck when it enacted the Immigration Reform and Control Act (IRCA) of 1986.<sup>31</sup> IRCA imposed criminal sanctions upon certain *employers* of unauthorized aliens, but not upon unauthorized aliens who seek or perform work as *employees* (although such aliens may be subject to removal or ineligible to have their status adjusted to that of a lawful permanent resident).

Prior to the enactment of IRCA, federal law provided no such sanctions for employers of unauthorized aliens, and the Supreme Court had noted the absence of federal regulation in this field when rejecting a preemption challenge to a California law that prohibited the knowing employment of unauthorized aliens in its 1976 decision in *DeCanas v. Bica*.<sup>32</sup> In so doing, the *DeCanas* Court recognized states’ “broad authority under their police powers to regulate the employment relationship to protect workers within the State,” and indicated that it would “not presume” that Congress intended to oust state authority to regulate this relationship absent a demonstration that doing so was the “clear and manifest purpose of Congress.”<sup>33</sup> The *DeCanas* Court found such a demonstration lacking, given the absence of federal regulation regarding the employment of aliens.

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<sup>27</sup> *Id.* at 2518 (Scalia, J., concurring in part and dissenting in part) (“[Section] 3 does not establish additional or auxiliary registration requirements. It merely makes a violation of state law the *very same* failure to register and failure to carry evidence of registration that are violations of federal law. *Hines* does not prevent the State from relying on the federal registration system as ‘an available aid in the enforcement of a number of statutes of the state applicable to aliens whose constitutional validity has not been questioned.’”) (emphasis in original).

<sup>28</sup> *Id.* (noting that “[s]tates, private entities, and individuals” all rely on the federal registration system for various purposes). In particular, Justice Scalia noted an Arizona law that prohibits unauthorized aliens from collecting unemployment benefits, the enforcement of which he viewed as giving Arizona “an interest in knowing ‘the number and whereabouts of aliens within the state’ and in having ‘a means of their identification.’” *Id.*

<sup>29</sup> *Id.* at 2523 (Thomas, J., concurring in part and dissenting in part).

<sup>30</sup> *Id.* at 2522 (quoting *Wyeth v. Levine*, 555 U.S. 555, 588 (2009) (Thomas, J., concurring)).

<sup>31</sup> See P.L. 99-603, 100 Stat. 3359 (November 6, 1986) (codified, as amended, at 8 U.S.C. §§1324a-1324b).

<sup>32</sup> 424 U.S. 351 (1976).

<sup>33</sup> *Id.* at 357.

The majority in *Arizona*, in contrast, noted that federal law now is “substantially different” from the regime prevailing when *DeCanas* was decided, since IRCA imposes penalties on employers of unauthorized aliens.<sup>34</sup> The majority also viewed the legislative history of IRCA as reflecting a deliberate choice by Congress not to impose criminal penalties upon unauthorized aliens who seek or perform work,<sup>35</sup> and IRCA’s express preemption of state and local sanctions (other than through licensing or similar laws) upon those who employ unauthorized aliens, coupled with its silence as to sanctions for unauthorized employees, as supporting an inference of preemption.<sup>36</sup> Here, the Court particularly noted that conflicts “in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy,”<sup>37</sup> thereby rejecting Arizona’s argument that Section 5(c) serves the same purpose as federal law by deterring employment of unauthorized aliens.<sup>38</sup>

Justices Scalia, Thomas, and Alito each dissented on the grounds that regulation of employment is within states’ traditional police powers, and IRCA does not expressly preempt state penalties for unauthorized aliens who seek or obtain employment. Justice Scalia, in particular, emphasized that Congress’s choice not to impose criminal penalties upon unauthorized aliens at the federal level “is not the same as a deliberate choice to prohibit the States from imposing criminal penalties.”<sup>39</sup> Justice Alito similarly disagreed with the inference of preemptive intent that the majority drew from the absence of criminal penalties in federal law for unauthorized aliens who seek or perform work.<sup>40</sup> In addition, he faulted the majority for giving “short shrift” to the presumption against preemption in areas traditionally regulated by the states, such as the employment relationship,<sup>41</sup> and would have upheld Section 5(c) under the precedent of *DeCanas*.<sup>42</sup>

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<sup>34</sup> *Arizona*, 132 S. Ct. at 2504. In particular, the majority noted that, while IRCA constituted a comprehensive federal scheme for the regulation of alien employment, it neither imposed criminal sanctions on unauthorized alien employees nor permitted the use of information submitted in the process of determining eligibility for work authorization for any purpose other than prosecution under specified federal statutes. *Id.* (citing 8 U.S.C. §1324a). These prohibitions upon the use of employment eligibility verification forms had previously factored in Justice Sotomayor’s dissenting opinion in *Chamber of Commerce v. Whiting*, wherein she suggested that another Arizona law sanctioning employers of unauthorized aliens was expressly preempted by IRCA. *See* 131 S. Ct. 1968, 2001 (2011) (Sotomayor, J., dissenting).

<sup>35</sup> *Arizona*, 132 S. Ct. at 2504.

<sup>36</sup> *Id.* at 2505 (“Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action.”) (quoting *Puerto Rico Dep’t of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988)) (emphasis in original).

<sup>37</sup> *Id.* at 2504 (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971)).

<sup>38</sup> *See Arizona v. United States*, No. 11-182, Brief for the Petitioners (filed February 6, 2012), at 53 (asserting that Section 5 “mirrors federal objectives”).

<sup>39</sup> *Arizona*, 132 S. Ct. at 2519 (Scalia, J., concurring in part and dissenting in part). Justice Scalia also viewed IRCA’s express preemption of state and local laws imposing sanctions (other than through licensing or similar laws) upon persons who employ unauthorized aliens as “impl[ying] the lack of pre-emption for other laws, including laws punishing ‘those who seek or accept employment.’” *Id.* The majority, in contrast, viewed Congress’s silence as to sanctions for employees, coupled with its express preemption of certain sanctions on employers, as evidencing Congress’s intent to preempt the former. *See supra* note 36 and accompanying text.

<sup>40</sup> *Arizona*, 132 S. Ct. at 2531 (Alito, J., concurring in part and dissenting in part) (“The Court infers from Congress’ decision not to impose federal criminal penalties that Congress intended to pre-empt state criminal penalties. But given that the express pre-emption provision covers only state and local laws regulating employers, one could just as well infer that Congress did not intend to pre-empt state or local laws aimed at alien employees who unlawfully seek or obtain work.”).

<sup>41</sup> *Id.* at 2530.

<sup>42</sup> *Id.* at 2531. Justice Alito also viewed the Court’s 2011 decision in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, which found that federal law did not preempt an Arizona law authorizing the revocation of the licenses of (continued...)

## **Warrantless Arrests of Aliens Removable for Criminal Activity**

A five-Justice majority also ruled that Section 6 of S.B. 1070, which authorized the warrantless arrest of aliens who have committed certain criminal offenses that constitute grounds for removal under federal law, is facially preempted. Writing for the majority, Justice Kennedy found that Section 6 would grant Arizona police broader authority to arrest aliens on the basis of removability than federal law grants to immigration officials.<sup>43</sup> The majority also deemed it significant that the arrest authority conferred on Arizona police could be “exercised without any input” from federal authorities, which would “allow the State to achieve its own immigration policy” and potentially lead to unnecessary harassment of certain aliens who were unlikely to be removed by federal authorities.<sup>44</sup>

More broadly, the majority recognized that federal law permits state police to perform the functions of immigration officers only in “limited circumstances,” such as pursuant to the terms of a “formal agreement[.]” with federal immigration authorities or in certain other situations specifically authorized by federal statute.<sup>45</sup> While acknowledging that federal law permits states to “cooperate” with federal authorities in the identification, apprehension, and detention of removable aliens (even in the absence of a written agreement), the majority stated that “no coherent understanding of the term [cooperate]” would permit state officers to make the “unilateral decision” to arrest aliens for removal in the absence of the approval or instruction of federal immigration authorities.<sup>46</sup> The majority also found that by authorizing state officers to decide whether an alien should be detained for being removable, Section 6 would “violate the principle that the removal process is entrusted to the discretion of the Federal government.”<sup>47</sup>

Justices Scalia, Thomas, and Alito each dissented from the majority’s ruling, and would have recognized that state and local police are generally not precluded from assisting in the enforcement of federal immigration law.<sup>48</sup> Justice Scalia, in particular, would also have affirmed the authority of states, as sovereigns, to have their “own immigration policy,” so long as it does not conflict with federal law,<sup>49</sup> and suggested that limitations on the arrest authority of federal

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businesses which the state found had knowingly hired unauthorized aliens, as supporting this conclusion. *Arizona*, 132 S. Ct. at 2531.

<sup>43</sup> *Id.* at 2506.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* The majority’s reference to “formal agreements” is to agreements authorized by Section 287(g) of the Immigration and Nationality Act (INA). See 8 U.S.C. §1357(g). The Court also cited other statutory authorities, including (1) 8 U.S.C. §1103(a)(10) (authority to perform immigration enforcement functions in the event of an “imminent mass influx of aliens off the coast of the United States”); 8 U.S.C. §1252c (authority to arrest previously removed criminal aliens after consultation with federal authorities); and 8 U.S.C. §1324(c) (authority to make arrests for bringing in and harboring certain aliens).

<sup>46</sup> *Arizona*, 132 S. Ct. at 2507. The majority did note that there is “some ambiguity” as to what constitutes “cooperation” under federal law, potentially leaving the door open to future challenges as to whether particular activities constitute cooperation.

<sup>47</sup> *Id.* at 2506. The majority further emphasized that such decisions “touch” on foreign relations, and must be made with “one voice.” *Id.* at 2507.

<sup>48</sup> Justice Thomas, for example, noted that states, as sovereigns, “have inherent authority to conduct arrests for violations of federal law, unless and until Congress removes that authority.” *Id.* at 2523 (Thomas, J., concurring in part and dissenting in part).

<sup>49</sup> *Id.* at 2516-17 (Scalia, J., concurring in part and dissenting in part).

officers should have no bearing on the authority that a state may grant to its officers.<sup>50</sup> Justice Alito was of the opinion that Section 6 added “little to the authority that Arizona officers already possess,” and would involve circumstances that rarely arise.<sup>51</sup>

## Immigration Status Determinations by State Police

Finally, the sitting Justices unanimously agreed that federal immigration law does not facially preempt Section 2(b) of S.B. 1070, which required Arizona police, whenever practicable, to investigate the immigration status of persons reasonably suspected of being unlawfully present when such persons are stopped, detained, or arrested pursuant to the enforcement of state or local law. S.B. 1070 prescribes that status verifications are to be made through communications with federal immigration authorities,<sup>52</sup> and the controlling five-Justice opinion emphasized that federal law encourages the sharing of immigration status information among federal, state, and local authorities even in the absence of a formal agreement between them.<sup>53</sup> In so doing, the controlling opinion expressly rejected the federal government’s argument that, by requiring state and local officers to verify the immigration status of those stopped, arrested or detained, Section 2(b) “interferes with the federal immigration scheme” since it precludes officers from taking federal priorities into account when making inquiries.<sup>54</sup> Specifically, the federal government had asserted that, while individual state and local officers may, in their discretion, inquire into persons’ immigration status, requiring them to make such inquiries “stands as an obstacle to ... the full effectuation of the enforcement judgment and discretion Congress has vested in the Executive Branch.”<sup>55</sup> However, the Court found this attempt to distinguish between discretionary inquiries and inquiries required under state or local law unpersuasive in light of Congress’s consistent encouragement of the sharing of information regarding immigration violations.<sup>56</sup>

The controlling opinion further noted that several “limits” were built into Section 2(b) that could serve to constrain its application,<sup>57</sup> and emphasized that the Court’s ruling was based on the belief

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<sup>50</sup> Justice Scalia also emphasized that the case arose from a pre-enforcement challenge to the Arizona law, and that there was no reason to assume Arizona officials would “ignore federal immigration policy (unless it be the questionable policy of not wanting to identify illegal aliens who have committed offenses that make them removable).” *Id.* at 2516.

<sup>51</sup> *Id.* at 2532 (Alito, J., concurring in part and dissenting in part). Justice Alito also suggested that a state officer who persisted in making arrests that the officer knew were unwanted by federal authorities would not be “cooperating” for purposes of federal law. *Id.* at 2533.

<sup>52</sup> S.B. 1070, as amended by H.B. 2162, *supra* note 5, at §2(e) (“In the implementation of this section, an alien’s immigration status may be determined by ... a law enforcement officer who is authorized by the federal government to verify or ascertain an alien’s immigration status [or] the United States Immigration and Customs Enforcement [ICE] or the United States Customs and Border Protection pursuant to 8 United States Code Section 1373(c).”).

<sup>53</sup> *Arizona*, 132 S. Ct. at 2508. Among other things, the Court noted the E-Verify database and its 2011 decision in *Whiting* as evidencing that Congress has “encouraged the sharing of information about possible immigration violations.”

<sup>54</sup> *Id.*

<sup>55</sup> *Arizona v. United States*, No. 11-182, Brief for the United States, at 50 (March 2012), *available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/03/11-182bsUnitedStates.pdf> (internal punctuation omitted). Because the federal government conceded that state and local officers had discretion, at least on a case-by-case basis, to inquire into immigration status during stops, Justice Scalia, in particular, would have found that there was no need for further review of Section 2(b). *Id.* at 2515 (Scalia, J., concurring in part and dissenting in part). Justice Alito similarly emphasized that Section 2(b) “adds nothing to the authority that Arizona law enforcement officers, like officers in all other States, already possess under federal law.” *Id.* at 2525 (Alito, J., concurring in part and dissenting in part).

<sup>56</sup> *Arizona*, 132 S. Ct. at 2508.

<sup>57</sup> *Id.* at 2507-08. Specifically, (1) detainees are presumed *not* to be aliens unlawfully present if they provide a valid (continued...)

that Section 2(b) could be interpreted in manner that was consistent with federal immigration law (and the Court’s reasoning with respect to Section 6)—particularly if an immigration status check by Arizona police was completed in the course of an authorized, lawful detention for a state offense or after a suspect was released from custody.<sup>58</sup> However, the Court left the door open for future challenges to the provision depending upon how it is interpreted and applied (e.g., if Arizona police delayed the release of persons in their custody “for no reason other than to verify their immigration status”).<sup>59</sup> The Court also left open the question of whether reasonable suspicion of illegal entry or another immigration crime would constitute a legitimate basis for prolonging detention, or whether this, too, may be preempted by federal immigration law.<sup>60</sup>

## Implications of *Arizona* Decision

While the full implications of the Supreme Court’s decision in *Arizona v. United States* are yet to be determined, it seems clear that the ruling will have profound implications for state activity in the field of immigration. In recent years, several states and localities have attempted to play a greater role in the area of immigration enforcement, in many cases due to perceptions that the federal government had not taken adequate steps to deter the presence of unauthorized immigrants within their jurisdiction. In ruling that three provisions of Arizona’s S.B. 1070 were facially preempted by federal immigration law, and suggesting that a fourth provision could be susceptible to as-applied challenges, the Supreme Court clarified that the opportunities for states to take independent action in the field of immigration enforcement are more constrained than some had previously believed. In particular, the Court suggested that some types of state action to deter unauthorized immigration may be impliedly preempted by federal law, even though the state sanctions target conduct already proscribed by federal statute. Further, while the Court found that measures requiring or authorizing immigration status checks by state and local police are not facially preempted, the Court’s decision suggests that such measures could be vulnerable to as-applied challenges, particularly if these status checks unreasonably prolong the detention of persons in state or local custody.

The *Arizona* decision specially addresses only particular types of state and local action to deter unauthorized immigration. Some measures that have recently been adopted by states—such as requirements that schools determine whether enrolling students are either unlawfully present themselves or the children of unauthorized aliens, or measures barring unlawfully present aliens from entering into certain transactions with government agencies—were not directly at issue in

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Arizona driver’s license or similar identification; (2) officers “may not consider race, color or national origin ... except to the extent permitted by the United States [and] Arizona Constitution[s];” and (3) S.B. 1070 requires that its provisions be implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of U.S. citizens.

<sup>58</sup> *Id.* at 2509. While acknowledging concerns that Section 2(b) could potentially result in state officers delaying the release of some persons for no reason other than to verify their immigration status, the controlling opinion emphasized that Section 2(b) “could be read to avoid these concerns,” and indicated that, “without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume [Section 2(b)] will be construed in a way that creates a conflict with federal law.” *Id.* at 2509-10.

<sup>59</sup> *Id.* at 2510. The majority opinion also suggested that delaying the release of persons to check their immigration status could disrupt the federal framework by putting state officers in the position of holding aliens for possible unlawful presence without federal direction and supervision. *Id.* at 2509.

<sup>60</sup> *Id.* at 2509.

the *Arizona* decision,<sup>61</sup> and may not raise identical legal issues. For example, a key question that courts reviewing these measures have been asked to consider is whether they violate affected persons' constitutional guarantee of equal protection, an issue which the Supreme Court did not assess in its review of S.B. 1070.<sup>62</sup> Moreover, reviewing courts have had to consider whether these state measures are compatible with federal laws that were not at issue in the *Arizona* case.<sup>63</sup> Accordingly, the *Arizona* ruling may not provide definitive guidance to courts considering the permissibility of state immigration laws which differ significantly from S.B. 1070.

On the other hand, it is possible that certain aspects of the *Arizona* ruling may, at least indirectly, inform subsequent litigation concerning a broad range of immigration-related measures by the states.<sup>64</sup> The *Arizona* Court's discussion of federal supremacy in establishing immigration policy, and its recognition that Congress has afforded the executive branch a good deal of discretion in its implementation of federal immigration law, may be pertinent whenever a court reviews state measures that are not wholly consistent with federal immigration enforcement priorities.

## Facial Challenges to State and Local Measures

The Court's opinion in *Arizona* suggests that measures which impose criminal penalties under state law for violations of federal immigration law may be vulnerable to facial challenges on preemption grounds, even when state sanctions mirror those found in federal law. Some commentators had previously suggested that such measures were unlikely to be found preempted if Congress had not expressly barred complementary state legislation and the relevant state sanctions closely tracked those imposed by federal law.<sup>65</sup> However, in rejecting S.B. 1070's alien registration requirements, which largely tracked those of the federal government,<sup>66</sup> the Supreme Court emphasized the impermissibility of any state or local activity in fields where the federal government has comprehensively regulated:

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<sup>61</sup> See, e.g., Beason-Hammon Alabama Taxpayer and Citizen Protection Act, No. 2011-535, at §§28 & 30, available at <http://www.ago.state.al.us/Page-Immigration>.

<sup>62</sup> See Hispanic Interest Coalition of Alabama v. Governor of Alabama, No. 11-14535; 11-14675, 2012 U.S. App. LEXIS 17544, at \*21-\*38 (11<sup>th</sup> Cir., August 20, 2012).

<sup>63</sup> See United States v. Alabama, Nos. 11-14532; 11-14674, 2012 U.S. App. LEXIS 17516, at \*63-\*75 (11<sup>th</sup> Cir., August 20, 2012) (considering whether provisions of an Alabama statute were consistent with the REAL ID Act of 2005 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

<sup>64</sup> See, e.g., *Arizona*, 132 S. Ct. at 2499 ("A principal feature of the removal system is the broad discretion exercised by immigration officers."); *id.* at 2506 ("[Section 6 of S.B. 1070] violates the principle that the removal process is entrusted to the discretion of the Federal Government.").

<sup>65</sup> See, e.g., Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.R. 459 (2008) (suggesting that state and local measures could avoid being found to be preempted so long as they (1) did not create any new categories of aliens not recognized by federal law; (2) used terms consistent with federal law; and (3) did not attempt to authorize state or local officials to independently determine an alien's immigration status).

<sup>66</sup> A majority of the *Arizona* Court viewed S.B. 1070 as diverging from federal law in its penalties for violations of the federal alien registration requirements. See *Arizona*, 132 S. Ct. at 2503 (noting inconsistency between Section 3 of S.B. 1070 and federal law in that, "[u]nder federal law, the failure to carry registration papers is a misdemeanor that may be punished by a fine, imprisonment, or a term of probation. . . . State law, by contrast, rules out probation as a possible sentence (and also eliminates the possibility of a pardon.)"). Nonetheless, the majority's ruling that Arizona's alien registration requirements were impermissible was largely based on the premise that the federal government had wholly occupied the regulatory field.

Where Congress occupies an entire field ... even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.<sup>67</sup>

The Court in *Arizona* found that regulation of alien registration requirements was such a field because Congress “provided a full set of standards governing alien registration, including the punishment for noncompliance.”<sup>68</sup> The Court’s decision suggests that, where the provisions of federal law are deemed to be comprehensive by a reviewing court, state and local measures could be found to be preempted even if they parallel the provisions of federal law and are motivated by similar objectives.

The August 2012 decisions by the U.S. Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”) regarding Alabama and Georgia immigration laws enacted after S.B. 1070 would appear to reflect this understanding of the scope of the *Arizona* decision. There, the Eleventh Circuit found that provisions common to both the Alabama and Georgia laws, which imposed criminal penalties for the transport or harboring of unlawfully present aliens within the states’ jurisdiction, were likely preempted. The Eleventh Circuit concluded that federal laws concerning alien smuggling provided a “comprehensive framework” penalizing this conduct, and that this framework precluded states from imposing their own criminal sanctions upon such activity.<sup>69</sup>

On September 9, 2012, the federal district court for Arizona issued an order in litigation brought by private parties against S.B. 1070.<sup>70</sup> These parties raised many of the same arguments that the DOJ had brought in its separate lawsuit against Arizona, but also raised additional preemption and other constitutional challenges. The district court rejected the plaintiffs’ request for a preliminary injunction of S.B. 1070’s immigration status check requirements, finding that the Supreme Court’s ruling in *Arizona* foreclosed any further pre-enforcement challenges to the provision. However, the court enjoined the enforcement of the provision of S.B. 1070 which makes it unlawful for a person who is in violation of a criminal offense to transport or harbor unlawfully present aliens within Arizona. Although the district court had previously rejected a preemption challenge made by the United States against this provision, it adopted the reasoning that the Eleventh Circuit had employed with respect to analogous provisions enacted by Alabama and Georgia, and found that the Arizona law was field and conflict preempted.

It remains to be seen, however, whether other reviewing courts will reach similar conclusions regarding state laws penalizing the harboring or transport of unlawfully present aliens, or the degree to which other state activities intended to deter unlawful immigration will be subject to field preemption challenges. Indeed, while striking down portions of the Georgia and Alabama

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<sup>67</sup> *Id.* at 2502.

<sup>68</sup> *Id.*

<sup>69</sup> *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, No. 1:11-cv-01804-TWT, 2012 U.S. App. LEXIS 17514, at \*24-\*36 (11<sup>th</sup> Cir., August 20, 2012); *Alabama*, 2012 U.S. App. LEXIS 17516, at \*27-\*38. Both of these decisions concerned review of preliminary injunctions issued by lower courts. A motion for a preliminary injunction is granted when, *inter alia*, the plaintiff has shown likelihood of success on the merits and would suffer irreparable harm if the injunction is not granted. *See, e.g., Winter v. NRDC, Inc.*, 555 U.S. 7 (2008). However, a likelihood of irreparable harm can generally be easily shown where “an alleged constitutional infringement” is involved. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9<sup>th</sup> Cir. 1997). *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (stating that a federal court may enjoin “state officers who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution”) (internal citations omitted).

<sup>70</sup> *Valle del Sol v. Whiting*, No. CV 10-1061-PHX-SRB (D. Ariz., September 9, 2012).

laws on preemption grounds, the Eleventh Circuit found other aspects to be permissible. For example, the appellate court ruled against a facial preemption challenge to an Alabama law which imposed sanctions upon an unauthorized alien who applies for a drivers' license, after concluding that federal law "giv[es] room for the states to adopt different policies concerning this subject."<sup>71</sup>

## Balancing Objectives and Executive Discretion

The Court's decision in *Arizona* could also signal greater consideration of congressional "balancing" of competing objectives in assessing preemption than was evidenced in the Court's 2011 decision in *Chamber of Commerce v. Whiting*.<sup>72</sup> There, in upholding another Arizona law, which authorized or required the suspension or termination of the licenses of businesses that knowingly or intentionally hired unauthorized aliens, the majority largely based the ruling on a textual analysis of IRCA. While IRCA contains a provision expressly preempting certain kinds of state sanctions on employers of unauthorized aliens, it expressly excludes licensing measures from the list of preempted sanctions.<sup>73</sup> In contrast, the majority in *Arizona*, in finding that federal law preempted states from imposing criminal sanctions upon unauthorized aliens who seek employment, looked beyond the text of IRCA (which is silent on the permissibility of such sanctions), and focused heavily upon IRCA's legislative history.<sup>74</sup> The Court concluded that S.B. 1070's sanctions against unauthorized alien employees were inconsistent with the framework Congress had established:

The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. A commission established by Congress to study immigration policy and to make recommendations concluded these penalties would be 'unnecessary and unworkable.' Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA. But Congress rejected them. In the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives.<sup>75</sup>

The different approaches taken in *Whiting* and *Arizona* could, in part, be due to the nature of the challenged provisions. The *Whiting* Court construed IRCA's text as expressly permitting states to revoke the licenses of businesses that hired aliens who were unauthorized to work under federal law. On the other hand, IRCA's text is silent on whether states may impose sanctions upon unauthorized alien workers. In any event, the *Arizona* ruling suggests that certain immigration-

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<sup>71</sup> *Alabama*, 2012 U.S. App. LEXIS 17516, at \*70-\*71.

<sup>72</sup> 131 S. Ct. 1968, 1983-85 (2011).

<sup>73</sup> INA §274A(h)(2), 8 U.S.C. §1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

<sup>74</sup> *Compare* 131 S. Ct. at 1983 (taking the petitioners' argument, which the Court ultimately rejected, to be that "the law is preempted because it upsets the balance that Congress sought to strike when enacting IRCA. In the Chamber's view, IRCA reflects Congress's careful balancing of several policy considerations—detering unauthorized alien employment, avoiding burdens on employers, protecting employee privacy, and guarding against employment discrimination. According to the Chamber, the harshness of Arizona's law "exert[s] an extraneous pull on the scheme established by Congress" that impermissibly upsets that balance.") *with id.* at 1990 (Breyer, J., dissenting) (characterizing the Arizona measure as "seriously threaten[ing]" the balance between these policy considerations struck by Congress).

<sup>75</sup> *Arizona*, 132 S. Ct. at 2504 (internal citations omitted).

related measures adopted by states might be susceptible to preemption challenge if they are “inconsistent with federal policy and objectives,”<sup>76</sup> even if they focus on matters not specifically addressed by federal law.<sup>77</sup>

When assessing whether Congress has impliedly preempted state immigration activity in a particular area, a reviewing court will likely consider the comprehensiveness of federal regulation of such matters. In striking down Arizona’s alien registration requirements and its sanctions upon unauthorized aliens seeking employment, the Supreme Court emphasized the comprehensive nature of federal regulation in these areas. In contrast, in refusing to preliminarily enjoin Alabama’s sanctions against unlawfully present aliens who attempt to obtain drivers’ licenses with the state, the Eleventh Circuit emphasized that the federal government had not comprehensively regulated the issuance of drivers’ licenses to unlawfully present aliens, “giving room for the states to adopt different policies concerning this subject.”<sup>78</sup>

The *Arizona* decision’s treatment of the executive branch’s discretion in enforcing federal immigration law may also have implications for the review of state and local immigration measures intended to bolster enforcement of federal immigration laws.<sup>79</sup> The majority in *Arizona* repeatedly emphasized the broad discretion that immigration officers have in determining which unauthorized aliens may remain within the United States.<sup>80</sup> The *Arizona* Court did not hold that state and local measures are preempted whenever they are inconsistent with the executive branch’s current enforcement priorities. However, its reasoning as to why certain provisions of S.B. 1070 were preempted was based, in part, upon concern that state and federal enforcement priorities would not necessarily be consistent.

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<sup>76</sup> *Id.*

<sup>77</sup> For example, prior to the *Arizona* ruling, several courts granted either permanent or preliminary injunctions against state and local measures barring unlawfully present aliens from renting or occupying private dwellings. Although federal immigration law does not speak directly on such matters, reviewing courts have generally held that such sanctions are inconsistent with the framework established by federal immigration law. *See, e.g.,* Lozano v. City of Hazleton, 620 F.3d 170 (3<sup>rd</sup> Cir. 2010), *vacated and remanded on other grounds*, Hazleton v. Lozano, 2011 U.S. LEXIS 4259 (June 6, 2011); Keller v. City of Fremont, 2012 U.S. Dist. LEXIS 20908 (D. Neb. February 20, 2012); Villas at Parkside Partners v. City of Farmers Branch, Texas, 701 F. Supp. 2d 835, 860 (N.D. Tex. 2010); Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006).

<sup>78</sup> *Alabama*, 2012 U.S. App. LEXIS 17516, at \*71-72. The circuit court suggested that the Alabama law, which makes it a felony punishable by up to ten years’ imprisonment for an unlawfully present alien to seek a driver’s license, may well have been a kind of penalty that Congress deemed inappropriate. However, the court went on to say that the DOJ, in challenging the provision as inconsistent with federal law, “has not drawn our attention to any legislative history to demonstrate this. As a result, for now, is only ‘a hypothetical or potential conflict,’ which is insufficient to establish preemption.” *Id.* at \*73.

<sup>79</sup> Although beyond the scope of this report, the *Arizona* Court’s characterization of federal immigration law as affording significant enforcement discretion to the executive branch might have implications for legal challenges to certain immigration enforcement policies. *See* Crane v. Napolitano, No. 3:12-CV-03247-O, Complaint (N.D. Tex., filed August 23, 2012) (challenging announced DHS policy to exercise prosecutorial discretion regarding the removal of certain unlawfully present aliens who came to the United States as children).

<sup>80</sup> *See, e.g., Arizona*, 132 S. Ct. at 2499 (“A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal. Discretion in the enforcement of immigration law embraces immediate human concerns. ... Some discretionary decisions [also] involve policy choices that bear on this Nation’s international relations. ... The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation’s foreign policy with respect to these and other realities.”) (internal citations omitted).

The Eleventh Circuit relied upon similar reasoning when ruling that an Alabama statute barring the harboring or transport of unlawfully present aliens was likely preempted. While the Alabama law covered similar conduct as the federal alien smuggling statute, the circuit court expressed concern over potential disharmony between the enforcement priorities of state and federal authorities.<sup>81</sup>

## States' "Inherent Authority" to Enforce Federal Immigration Law

Aspects of the *Arizona* Court's ruling could be construed as an implicit rejection of certain arguments regarding states' "inherent authority" to enforce federal immigration law. The degree to which states may enforce federal immigration law, absent an express delegation of authority by the federal government, has been the subject of considerable debate. For several decades, the prevailing view appeared to have been that state and local law enforcement were not preempted from making arrests for criminal violations of federal immigration law, but were generally precluded from stopping or detaining aliens on the grounds that they could potentially be subject to removal from the United States.<sup>82</sup> More recently, however, a number of scholars and reviewing courts,<sup>83</sup> as well as the DOJ's Office of Legal Counsel in a 2002 memorandum,<sup>84</sup> have taken the position that states have authority, as sovereign entities, to make arrests for violations of federal immigration law, including on the basis of removability, and that federal law should not be construed to preempt states from exercising such authority.

Although the controlling opinion in *Arizona* did not expressly address the concept of "inherent authority,"<sup>85</sup> it recognized that the sweep of federal immigration law left room for state and local

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<sup>81</sup> *Alabama*, 2012 U.S. App. LEXIS 17516, at \*34 ("Furthermore, Section 13 undermines the intent of Congress to confer discretion on the Executive Branch in matters concerning immigration. As we explained [elsewhere], '[b]y confining the prosecution of federal immigration crimes to federal court, Congress limited the power to pursue those cases to the appropriate United States Attorney. As officers of the Executive Branch, U.S. Attorneys for the most part exercise their discretion in a manner consistent with the established enforcement priorities of the Administration they serve.' Even though Section 13 contemplates consistency with the text of 8 U.S.C. §1324, its enforcement is noticeably 'not conditioned on respect for the federal concerns or the priorities that Congress has explicitly granted executive agencies the authority to establish.' Section 13, at the very least, is in tension with federal law.") (internal citations omitted).

<sup>82</sup> See, e.g., *Gonzales v. City of Peoria*, 722 F.2d 468 (9<sup>th</sup> Cir. 1983) (recognizing state authority to arrest persons for criminal violations of federal immigration law, but assuming that states were preempted from arresting persons solely on the basis of deportability), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9<sup>th</sup> Cir. 1999); Dep't of Justice, Office of Legal Counsel, Assistance by State and Local Police in Apprehending Illegal Aliens, 1996 OLC LEXIS 76 (claiming that states lacked recognized legal authority to make arrests for civil violations of federal immigration law).

<sup>83</sup> See, e.g., *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10<sup>th</sup> Cir. 1999) (recognizing the "general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration law"); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005).

<sup>84</sup> Dep't of Justice, Office of Legal Counsel, Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations, at 8 (April 3, 2002). For further discussion of this opinion, see CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

<sup>85</sup> In contrast, two of the three opinions that dissented, in part, used the term. See *Arizona*, 132 S. Ct. at 2523 (Thomas, J., concurring in part and dissenting in part) ("States, as sovereigns, have inherent authority to conduct arrests for violations of federal law, unless and until Congress removes that authority."); *id.* at 2532 (Alito, J., concurring in part and dissenting in part) ("Therefore, given the premise, which I understand both the United States and the Court to accept, that state and local officers do have inherent authority to make arrests in aid of federal law, we must ask whether Congress has done anything to curtail or pre-empt that authority in this particular case.").

law enforcement personnel to “perform the functions of an immigration officer” only in “limited circumstances” specified by federal law.<sup>86</sup> In particular, the Supreme Court held that states are generally preempted from arresting and detaining persons for suspected immigration status violations, except when acting pursuant to (1) a written agreement with federal immigration authorities conferring such authority (i.e., an agreement under INA Section 287(g)); (2) some other specific federal statutory authorization; or (3) pursuant to a “request, approval, or instruction from the Federal Government.”<sup>87</sup> The scope of activities permitted under the third category seems likely to be the subject of continued debate.

It is important to note that the *Arizona* Court’s discussion of states’ limited authority to enforce federal immigration law was in reference to arrests for immigration status violations, which are non-criminal in nature. The Court did not opine as to whether state law enforcement officials are also precluded from making arrests for *criminal* violations for federal immigration law. As previously mentioned, reviewing courts have generally recognized that state and local police are not preempted from making such arrests. Still, the *Arizona* Court appeared to leave the door open to a possible preemption challenge in the event that a person is arrested or detained by state authorities based on “reasonable suspicion of illegal entry or another immigration crime.”<sup>88</sup>

## As-Applied Challenges to Immigration Status Checks

While the *Arizona* decision seems to indicate that state laws authorizing immigration status checks by state and local officers are not facially preempted by federal immigration law, the ruling left the door open for possible as-applied challenges. Notably, a majority of the *Arizona* Court appeared to take the view that, while state police may ask the federal government about the immigration status of stopped individuals, this inquiry may not serve as a basis for detaining a person beyond the period necessary to resolve the non-immigration-related matters that initially justified the person’s stop or detention.<sup>89</sup>

The Court also expressly left open the possibility of “other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.”<sup>90</sup> Subsequently, the Eleventh Circuit applied similar logic when considering preemption challenges to state laws establishing immigration status check requirements similar to those at issue in *Arizona*.<sup>91</sup>

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<sup>86</sup> *Arizona*, 132 S. Ct. at 2506.

<sup>87</sup> *Id.* at 2506-2507. For example, certain arrests by state and local officers for civil violations (such as unlawful presence) that are *not* expressly authorized by federal law might still be upheld on the grounds that they resulted from the informal “cooperation” with federal immigration authorities contemplated by Section 287(g)(10) of the INA. *See* INA §287(g)(10); 8 U.S.C. §1357(g)(10) (“Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”).

<sup>88</sup> *Arizona*, 132 S. Ct. at 2509.

<sup>89</sup> *Id.*

<sup>90</sup> *Arizona*, 132 S. Ct. at 2497.

<sup>91</sup> *See, e.g., Hispanic Interest Coalition*, 2012 U.S. App. LEXIS 17544, at \*10 n.3 (“*Arizona* instructs that a facial challenge is premature insofar as the statute could be construed not to require unlawful detention.”); *Alabama*, 2012 U.S. App. LEXIS 17516, at \*50 (“*Arizona* instructs us that a pre-enforcement challenge to the possibility of detention ... is inappropriate, and we therefore reject the preemption arguments at this time.”).

One argument that has been raised in a legal challenge brought by private groups against S.B. 1070 is that the required immigration status checks may lead to constitutionally impermissible racial profiling.<sup>92</sup> The federal government did not assert racial profiling in its challenge to S.B. 1070, although it reportedly left open that possibility when it filed suit.<sup>93</sup> Arizona, on the other hand, has taken steps to prevent racial profiling in the implementation of S.B. 1070. For example, S.B. 1070 expressly provides that officers may not consider an individual's race, color, or national origin in determining whether there is reasonable suspicion to believe the person is an unlawfully present alien, "except to the extent permitted by the United States or Arizona Constitution."<sup>94</sup> In addition, on the same day she signed S.B. 1070 into law, Arizona Governor Jan Brewer issued an executive order requiring state law enforcement officers to undergo training that would "provide clear guidance ... regarding what constitutes reasonable suspicion, and ... make clear that an individual's race, color or national origin alone cannot be grounds for reasonable suspicion."<sup>95</sup>

Whether it is constitutionally permissible to consider race, ethnicity, or national origin when determining whether to inquire into a person's immigration status may depend upon a number of factors. On several occasions, courts have decided cases involving law enforcement authorities stopping persons for suspected immigration violations on account of those persons' suspected Mexican ancestry. Supreme Court jurisprudence holds that race or ethnicity cannot be the sole factor giving rise to a law enforcement stop for a suspected immigration violation, but that at least in cases near the U.S.-Mexican border, stops may be partially based on the suspect's apparent racial or ethnic background.<sup>96</sup> Nevertheless, the Court has suggested that a different conclusion might be reached if stops based partially on Mexican ancestry occur in places farther removed from the U.S.-Mexican border.<sup>97</sup> For its part, the Ninth Circuit (the circuit in which Arizona is located) ruled in a 2000 *en banc* decision that the Border Patrol could not take Hispanic origin into account when making stops in Southern California, concluding that in areas "in which the majority—or even a substantial part—of the population is Hispanic," as was the case in Southern California, the probability that any given Hispanic person "is an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus."<sup>98</sup> This ruling may preclude Arizona law enforcement, at least in areas with similar demographics as Southern California, from using Hispanic origin as a factor in assessing whether there is "reasonable suspicion" for believing that a stopped individual is an unlawfully present alien.

While immigration status checks by state and local officers could potentially raise preemption concerns if they result in prolonged detention beyond that contemplated by federal law, they might be susceptible to Fourth Amendment challenges as well. The Fourth Amendment prohibits

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<sup>92</sup> See, e.g., *Friendly House v. Whiting*, Complaint, *supra* note 13.

<sup>93</sup> See, e.g., Holder: Race Still in Play for SB 1070 Lawsuit, *ColorLines News for Action*, July 12, 2010, available at [http://colorlines.com/archives/2010/07/holder\\_race\\_could\\_still\\_come\\_up\\_in\\_sb\\_1070\\_suit.html](http://colorlines.com/archives/2010/07/holder_race_could_still_come_up_in_sb_1070_suit.html).

<sup>94</sup> S.B. 1070, as amended by H.B. 2162, *supra* note 5, at §2(b).

<sup>95</sup> Arizona State Executive Order 2010-09, Establishing Law Enforcement Training for Immigration Laws, April 23, 2010, available at [http://www.azgovernor.gov/dms/upload/EO\\_201009.pdf](http://www.azgovernor.gov/dms/upload/EO_201009.pdf).

<sup>96</sup> Compare *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (ruling unconstitutional a roving stop of a vehicle by the Border Patrol near the U.S.-Mexican border, when the stop was based solely on the vehicle occupant's apparent Mexican ancestry) with *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (permitting the stopping of persons at fixed inspection checkpoints near the Mexican border when such stops were partially based on race).

<sup>97</sup> *Martinez-Fuerte*, 428 U.S. at 563, n.17.

<sup>98</sup> *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9<sup>th</sup> Cir. 2000).

“unreasonable searches and seizures,”<sup>99</sup> and some commentators have expressed concern that checks of persons’ immigration status could result in suspects being held for longer than they would otherwise have been held for the state or local offense for which they were stopped. Under Supreme Court precedents, such prolonged detentions could potentially be found to be unreasonable.<sup>100</sup> The DOJ did not challenge S.B. 1070 on Fourth Amendment grounds, and in its arguments to the Supreme Court, Arizona averred that any status checks would conform with the requirements of the Fourth Amendment.<sup>101</sup> A majority of the Court found it significant that there were “limits ... built into the state provision” that would protect the “civil rights of all persons” when finding that this provision of S.B. 1070 was not facially preempted.<sup>102</sup> However, the majority also indicated that “[d]etaining individuals solely to verify their immigration status would raise constitutional concerns,” as well as “disrupt the federal framework.”<sup>103</sup> The Court further noted that the extent of delay permissible in an attempt to verify a person’s immigration status could depend upon the circumstances, with shorter delays permissible in cases where persons are stopped for minor offenses than in cases where they are arrested and held for more serious offenses.<sup>104</sup>

## Conclusion

While the full implications of the Supreme Court’s decision in *Arizona v. United States* are yet to be determined, it seems clear that the ruling will have profound implications for state activity in the field of immigration. In recent years, several states and localities have attempted to play a greater role in the area of immigration enforcement, in many cases due to perceptions that the federal government had not taken adequate steps to deter the presence of unauthorized immigrants within their jurisdictions. In ruling that three provisions of Arizona’s S.B. 1070 were facially preempted by federal immigration law (while leaving the door open to future challenges to the sole provision that was upheld), the Supreme Court made clear that the opportunities for states to take independent action in the field of immigration enforcement are more constrained than some had earlier believed.

The Court’s consideration of S.B. 1070 turned almost entirely upon its relationship to federal law. It did not find that Arizona was *per se* precluded from engaging in the activities authorized under S.B. 1070; rather, the Court’s analysis turned on whether such activities conflicted with or otherwise impeded the objectives of federal immigration law. If Congress disagrees with the Court’s decision, it may amend federal law to reflect its preferences regarding the role that states

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<sup>99</sup> U.S. Const. amend. IV.

<sup>100</sup> See, e.g., *Arizona v. Johnson*, 555 U.S. 323 (2009) (noting that while “most traffic stops resemble, in duration and atmosphere the kind of brief detention authorized in *Terry*,” stops that exceed this duration can raise issues). In *Terry v. Ohio*, the Supreme Court held that a “stop and frisk” procedure was constitutionally permissible so long as the stop was lawful (i.e., the officer reasonably suspects that the person apprehended is committing or has committed a criminal offense), and the officer reasonably suspects that the person is armed and dangerous. See 392 U.S. 1 (1968).

<sup>101</sup> Transcript of Oral Argument, at 7-14, available at [http://azstarnet.com/online/pdf/transcript-supreme-court-oral-arguments-on-sb/pdf\\_c1c255e0-8f00-11e1-8c10-0019bb2963f4.html](http://azstarnet.com/online/pdf/transcript-supreme-court-oral-arguments-on-sb/pdf_c1c255e0-8f00-11e1-8c10-0019bb2963f4.html).

<sup>102</sup> 132 S. Ct. at 2507.

<sup>103</sup> *Id.* at 2509.

<sup>104</sup> *Id.*

and localities may play in immigration enforcement, including by expressly authorizing (or barring) state laws like S.B. 1070.<sup>105</sup>

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<sup>105</sup> For example, some Members of the 112<sup>th</sup> Congress have introduced legislation which would purport to recognize that state and local officers have “inherent authority” to enforce federal immigration law. *See e.g.*, Clear Law Enforcement for Criminal Alien Removal Act of 2011, H.R. 100. Conversely, proposals have been introduced that would establish that state and local officers may only enforce federal immigration law pursuant to a written agreement authorized under Section 287(g) of the INA. Comprehensive Immigration Reform Act of 2011, S. 1258.