



MALDEF

Mexican American Legal Defense and Educational Fund

April 16, 2010

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The Honorable Jan Brewer
Governor of Arizona
1700 West Washington
Phoenix, Arizona 85007

Re: SB 1070 – Legal Deficiencies

Chicago

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Dear Governor Brewer:

I write concerning SB 1070, a misguided effort at state immigration regulation and enforcement. Because this Bill poses a significant threat to the general welfare and fundamental freedoms of the people of Arizona, I strongly urge you to veto SB 1070.

San Antonio

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SB 1070 undermines public safety by deterring public cooperation with law enforcement authorities and diverting scarce resources away from combating serious and violent crime. Law enforcement experts, including the Arizona Association of Chiefs of Police and the Major Cities Chiefs Association, widely oppose the types of measures proposed by SB 1070 for these same reasons. The Major Cities Chiefs Association has declared that these laws create a “divide between the local police and immigrant groups . . . result[ing] in increased crime.”

Washington, D.C.

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Rather than create safe neighborhoods, if enacted, SB 1070 will severely hinder law enforcement authorities. People in Arizona, regardless of legal status, may forgo reporting or testifying to a crime to prevent immigration-related interrogation, discriminatory treatment, and arrest. Further, the Bill appears to encourage racial profiling against citizens and legal residents, further undermining law enforcement. Accordingly, SB 1070 will severely cripple law enforcement’s ability to effectively maintain public safety.

SB 1070 has significant legal flaws that implicate numerous Constitutional guarantees. First, the U.S. Constitution grants Congress the exclusive power “[t]o establish [a] uniform Rule of Naturalization” and “[t]o regulate Commerce with foreign Nations.” U.S. Const., Art. I, § 8, cl. 4 and cl. 3. Therefore, state laws that attempt to regulate immigration are Constitutionally preempted. Second, state enactments that attempt to regulate in the realm of immigration may be implicitly preempted because Congress has created a comprehensive immigration scheme through the Immigration and Nationality Act and its many modifications and amendments. Third, particular sections of the bill also raise serious legal concerns under the Fourth and Fourteenth Amendments of our Constitution.

Advancing Latino Civil Rights for over 40 Years

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If enacted, SB 1070 would create a constitutionally impermissible state immigration regulation scheme. The Arizona legislature's stated purpose in enacting the Bill is "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." SB 1070, § 1. However, the power to regulate immigration is "unquestionably exclusively a federal power," and any attempt by the State to regulate the presence of immigrants within Arizona is an unconstitutional usurpation of that power. *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976); *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000); *United States v. Locke*, 529 U.S. 89, 115 (2000). The courts have consistently struck state and local laws such as SB 1070 that attempt to regulate immigration because these statutes are preempted by federal law. *See, e.g., LULAC v. Wilson* 908 F. Supp. 755 (C.D. Cal. 1995); *LULAC v. Wilson* 997 F.Supp. 1244 (C.D. Cal. 1997).

A number of the Bill's sweeping provisions require or permit public officials to investigate and determine individuals' immigration status. These provisions regulate immigration and are impermissible intrusions on Congress' exclusive, Constitutional powers. *See Id.* Section 2, for example, requires that all law enforcement officials and employees of every State agency determine the immigration status of any individual "reasonably suspected" of being unlawfully present upon "lawful contact." This broad legal mandate would be constitutionally preempted because its sole aim is to regulate immigration, and it undermines the "preeminent role of the Federal Government with respect to the regulation of [immigrants] within our borders." *Toll v. Moreno*, 458 U.S. 1, 10 (1982). Because this section fails to provide "explicit standards" to prevent enforcement "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application", it could also violate the Fourteenth Amendment's guarantees of due process and equal protection. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Federal courts have determined that states cannot create a comprehensive scheme to detect and report the presence of undocumented immigrants. *LULAC v. Wilson*, 908 F. Supp. 755, 769-71 (C.D. Cal. 1995). Here, the Bill violates this federal directive because it requires that state public officials attempt to determine immigration status when a person seeks a public service. *See id.* In addition, Section 2 of the Bill may also be unlawfully overbroad because it applies to public programs and services where "benefits are not contingent on [immigration] status." *See* Department of Justice Notice of Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of PRWORA, 62 FR 61347, 1997 WL 709276 (Nov. 17, 1997); *LULAC v. Wilson*, 997 F. Supp. 1244, 1254 (C.D. Cal. 1997).

Section 6 of SB 1070 also triggers Constitutional preemption because its objective is to regulate immigration. That section would provide law enforcement officers with authority to arrest a person without a warrant if the officer has probable cause to believe that the "person has committed any public offense that makes the person removable from the United States." However, absent a formal agreement with the federal government, states are prohibited from enforcing civil violations of federal immigration law, a function exclusively reserved for federal authorities. *See Gonzales v. City of Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983). Further, federal courts have explained that whether a person is "removable" based on a "public offense" is a complex federal legal determination that state officers are neither authorized, nor qualified, to make. *Lozano*, 496 F. Supp.2d at 531-33.

Section 6 also allows for warrantless arrests, which raises serious concerns under the Constitution's Fourth Amendment. *Carroll v. United States*, 267 U.S. 132, 157 (1925). Indeed, Section 6 may also conflict with federal immigration law governing warrantless arrests. 8 U.S.C. §1357(a). Therefore, Section 6 may impermissibly intrude upon and conflict with the comprehensive body of immigration law established by Congress. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

Other provisions throughout the Bill similarly encroach on and conflict with federal immigration law. It is well-settled that Congress has fully occupied the field of immigration regulation through the Immigration and Nationality Act ("INA"), and that states are preempted from legislating within this sphere. *See* INA, Title 8, § 1101, et seq.; *LULAC*, 908 F. Supp. at 775; *Gonzales*, 722 F.2d 468 (9th Cir. 1983); *Chicanos por la Causa, Inc. v. Napolitano*, 558 F.3d 856, 982 (9th Cir. 2009).

Sections 3 and 5, for example, create state criminal liability for conduct already regulated by the INA. The former makes it a state offense to violate federal immigration law requirements regarding registration and carrying registration documents, and the latter criminalizes transporting, moving, concealing, harboring, and shielding undocumented immigrants. However, the United States Congress has already set forth the scope, sanctions and penalties for such conduct. *See* 8 U.S.C. §§ 1304(e), 1306(a), 1324(a)(1).


The courts have consistently struck down similar regulations because preemption "conflict is imminent whenever two separate remedies are brought to bear on the same activity," and "[e]ach additional [state] statute incrementally diminishes [federal] control over enforcement of the [federal law] and thus further detracts from the integrated scheme of regulation created by Congress." *Wisconsin Dep't of Indus. v. Gould*, 475 U.S. 282, 286, 288-89 (1986).

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Here, provisions of the Bill that require that state immigration determinations be "verified" by federal immigration authorities could strain the federal system and would interfere with federal immigration enforcement priorities. *Garret v. City of Escondido*, 465 F. Supp.2d 1043, 1057 (S.D. Cal. 2006). *See also Crosby*, 530 U.S. at 373.

In closing, MALDEF urges you to veto SB 1070 if it passes both legislative houses because it is dangerous public policy and is likely illegal. Because of SB 1070's severe legal flaws and its effect on fundamental rights, costly legal action is an inevitable outcome of enacting such a proposal.

Regards,

A handwritten signature in black ink that reads "Thomas A. Saenz". The signature is written in a cursive, flowing style.

Thomas A. Saenz
President and General Counsel

TAS:gl