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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Friendly House, *et al.,*	)	CV-10-01061-PHX-SRB
	)	
Plaintiffs,	)	**LODGED: PROPOSED BRIEF OF STATE SEN. RUSSELL PEARCE, U.S. REPS DAN BURTON, TRENT FRANKS, SAM GRAVES, WALLY HERGER, DUNCAN HUNTER, STEVE KING, DOUG LAMBORN, CYNTHIA LUMMIS, TOM McCLINTOCK, GARY MILLER, JERRY MORAN, SUE MYRICK, TED POE, DENNY REHBERG, PHIL ROE, DANA ROHRABACHER, MIKE SIMPSON, and LAMAR SMITH, WASHINGTON LEGAL FOUND, ALLIED EDUCATIONAL FOUND., NATIONAL BORDER PATROL COUNCIL, AMERICAN IMMIGRATION CONTROL FOUND., and CONCERNED CITIZENS & FRIENDS OF ILLEGAL IMMIGRATION LAW ENFORCEMENT AS AMICI CURIAE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**
v.	)	
Michael B. Whiting, Apache County Attorney, in his official capacity, *et al.,*	)	
Defendants,	)	
and	)	
Janice K. Brewer, Governor of the State of Arizona, in her official capacity, and the State of Arizona,	)	
Intervenor-Defendants.	)	

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UNITED STATES DISTRICT COURT
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Friendly House, *et al.,*	)	CV-10-01061-PHX-SRB
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Plaintiffs,	)	**BRIEF OF ARIZONA STATE SEN. RUSSELL PEARCE, U.S. REPS DAN BURTON, TRENT FRANKS, SAM GRAVES, WALLY HERGER, DUNCAN HUNTER, STEVE KING, DOUG LAMBORN, CYNTHIA LUMMIS, TOM McCLINTOCK, GARY MILLER, JERRY MORAN, SUE MYRICK, TED POE, DENNY REHBERG, PHIL ROE, DANA ROHRABACHER, MIKE SIMPSON, and LAMAR SMITH, WASHINGTON LEGAL FOUND., ALLIED EDUCATIONAL FOUND., NATIONAL BORDER PATROL COUNCIL, AMERICAN IMMIGRATION CONTROL FOUND., and CONCERNED CITIZENS & FRIENDS OF ILLEGAL IMMIGRATION LAW ENFORCEMENT AS AMICI CURIAE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**
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INTERESTS OF AMICI CURIAE

A list of the *amici curiae* and their specific interests is set forth in the motion for leave to file this brief. While *amici* agree with Defendants that Plaintiffs have not shown a likelihood of success on the merits, this brief focuses on Plaintiffs' claim that SB 1070 conflicts with, and thus is impliedly preempted by, federal immigration policy. Contrary to Plaintiffs' claim, SB 1070 is designed to assist with implementation of the immigration policies established by Congress, and nothing in the legislation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

STATEMENT OF THE CASE

This case is a facial challenge to Arizona Senate Bill 1070, 49th Leg., 2nd Reg. Sess., Ch. 113 (Az. 2010), as amended by Arizona House Bill 2162, 49th Leg., 2nd Reg. Sess., Ch. 211 (Az. 2010) ("SB 1070"). The legislation is a multi-faceted effort to assist federal authorities in implementing several well-established federal policies: removing illegal aliens from the U.S. and eliminating incentives that cause many such aliens to seek to remain here. Plaintiffs have moved to enjoin enforcement of SB 1070 even before it is scheduled to take effect on July 29, 2010. Surprisingly, the motion does not attempt to demonstrate that each of the numerous provisions of SB 1070 conflicts with (and thus is preempted by) federal immigration policy. Rather, Plaintiffs request the Court to enjoin the entire statute based on their discussion of only a portion of those provisions.

SUMMARY OF ARGUMENT

Plaintiffs' preemption claims are based largely on speculation regarding conflicts

that might arise – between federal immigration law and SB 1070 – following implementation of the Arizona statute. If such conflicts do, in fact, arise, Plaintiffs will have an opportunity to bring an as-applied challenge to SB 1070. In the meantime, a facial challenge to the statute is premature in the absence of evidence that the law is unconstitutional in *all* of its applications. Moreover, because the Arizona legislature provided that each provision of SB 1070 is severable, no provision may be enjoined unless Plaintiffs can demonstrate, among other things, that the specific provision is preempted by federal law. There is no basis in law for Plaintiffs' request for an injunction against the entire statute based on their claims that some of the statute's provisions are preempted.

The lawsuit filed last week by the federal government indicates that President Obama's administration objects to some provisions of SB 1070. But even if (contrary to the evidence) Plaintiffs possessed standing to object to SB 1070, the Executive Branch's objections would not provide an adequate basis for the preliminary injunction sought by Plaintiffs. First, the preemption analysis must focus primarily on whether SB 1070 conflicts with federal immigration policy established through statutes adopted by Congress, and Plaintiffs cannot point to any such conflicts. Indeed, the Arizona legislature has gone to great lengths to ensure that officials charged with enforcing SB 1070 will, at all stages of enforcement, look to federal officials to determine the immigration status of aliens potentially subject to the provisions of SB 1070. Moreover, conflict between Arizona enforcement personnel and federal immigration officials is not a realistic possibility

because Arizona personnel have no means of forcing any federal official to expend significant resources on immigration matters they bring to his/her attention. Arizona is offering to assist federal enforcement by handing over custody of aliens determined by the federal government to be in this country without authorization. But nothing forces the federal government to accept custody; if it declines to do so, the aliens will be released.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR PREEMPTION CLAIMS

Plaintiffs are not entitled to a preliminary injunction in the absence of a showing that they are likely to succeed on the merits of their claims. *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008). They have failed to demonstrate such a likelihood with respect to their preemption claims.

A. Severability. Generally speaking, when confronting a constitutional flaw in a statute, federal courts are instructed to "try to limit the solution to the problem." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2005). The Supreme Court has instructed that it "prefer[s], for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . or to sever its problematic portions while leaving the remainder intact." *Id.* (internal citations omitted). Accordingly, "the normal rule is that partial, rather than facial invalidation is the required course, such that a statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Id*.

Plaintiffs' motion abandons that measured approach. It asks the Court to enjoin SB 1070 in its entirety based on alleged constitutional infirmities in discrete provisions of the statute. It does so despite the Arizona legislature's clear statement that the provisions of SB 1070 are entirely severable. *See* SB 1070, § 12(A) (invalidity of one provision "does not affect other provisions or applications of the act"). The preliminary injunction motion fails to raise constitutional objections to numerous provisions of SB 1070. *See, e.g.,* § 2 (unchallenged provisions include provisions barring local governments from restricting enforcement of federal immigration law, requiring notification of ICE officials when an illegal alien is about to be released from State custody, and requiring the free exchange of information regarding immigration status). Particularly in light of Plaintiffs' failure to raise challenges to every provision of SB 1070, their request for a blanket injunction is without merit. While *amici* do not believe that Plaintiffs have established a likelihood of success with respect to any of their challenges, any relief should be limited to a preliminary injunction against those specific statutory provisions that the Court deems constitutionally infirm.

B. Facial Challenges. A plaintiff is entitled to pursue facial invalidation of a statute only "by establishing that no set of circumstances exists under which the [statute] would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). Plaintiffs are raising just such a facial challenge and seek to prevent SB 1070 from ever taking

effect. They contend that SB 1070 is preempted because it irreconcilably conflicts with federal immigration law. Yet, to support their conflict claim, they rely primarily on predictions as to how SB 1070 might adversely affect the ability of federal officials to implement federal immigration. *See, e.g.,* Pl. Br. 24 ("SB 1070 will unilaterally impose burdens on federal resources, which will be taken up responding to queries, arrests, and attempted transfers from Arizona police.").

The Supreme Court has cautioned that facial challenges are inappropriate when based on predictions regarding constitutional infirmities that *might* arise if a law is allowed to go into effect. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (rejecting facial challenge to statute and stating, "It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop."). Rather, the proper approach is to allow a statute to take effect and then entertain as-applied challenges, which "are the basic building blocks of constitutional adjudication." *Id.* By awaiting as-applied challenges, federal courts permit state officials an opportunity "to construe the law in the context of actual disputes" or "to accord the law a limiting construction to avoid constitutional questions." *Washington State Grange,* 552 U.S. at 450. "Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *Id.* Given the considerable uncertainty

regarding precisely how SB 1070 will be applied and how it might affect federal immigration enforcement efforts, Plaintiffs have failed to establish likelihood of success in their facial challenge to the statute.

C. State "Regulation of Immigration." The power to regulate immigration "is unquestionably exclusively a federal power," *De Canas v. Bica*, 424 U.S. 351, 354 (1976), and thus States may not exercise such regulatory authority. Plaintiffs' assertion that Arizona's adoption of SB 1070 constitutes an exercise of such authority is frivolous. *De Canas* explains that a State enactment amounts to a preempted "regulation of immigration" only when it seeks to determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355. SB 1070 makes no such determinations. Arizona does not seek to control admissions or removals, or even to make determinations regarding the immigration status of aliens; rather, in all instances, it looks to federal officials to determine whether aliens within the State's custody are legally present in the United States. *See, e.g.,* SB 1070, § 2. Plaintiff's "field preemption" argument is similarly unavailing. Given the large role that federal statutes assign to States in the enforcement of immigration law, it cannot plausibly be asserted that the federal government "occupies the field" and therefore impliedly preempts any State efforts to provide enforcement assistance.

D. Federal Law Encourages State Assistance with Enforcement. Plaintiffs' assertion that Arizona's efforts to assist with immigration law enforcement conflicts with

the "comprehensive" federal immigration scheme, Pl. Br. 15-24, runs headlong into the numerous federal statutes that actively encourage such assistance. *See, e.g.,* 8 U.S.C. §§ 1103(a), 1252c, 1357(g), 1373(a)-(c), & 1644; 42 U.S.C. § 611a (requiring a State receiving certain federal grants to report to ICE *at least* four times annually the names and addresses of those known to the State to be unlawfully in the United States). Although the Obama Administration may not be enthusiastic about Arizona's efforts to increase its immigration assistance, Congress has repeatedly adopted statutes expressing enthusiasm, and the Constitution assigns to Congress primary responsibility for establishing immigration rules. U.S. Const., Art. I, § 8, cl. 4.

Plaintiffs cite 8 U.S.C. § 1357(g) as evidence that SB 1070 conflicts with federal law. Section 1357(g) authorizes the Department of Homeland Security to enter into agreements with local law enforcement agencies, pursuant to which DHS deputizes local officials (following training) to perform the functions of immigration officers. Plaintiffs argue that §§ 2 and 6 of SB 1070 conflict with the policies underlying § 1357(g) because §§ 2 and 6 authorize Arizona police officials to perform an even wider range of enforcement functions without any requirement that they undergo § 1357(g) training. That argument misconstrues § 1357(g). The functions that DHS may (under § 1357(g)) deputize local officials to perform – for example, take a suspected illegal alien into custody for processing, make an initial determination of deportability, and prepare documents necessary to remove the alien – are not functions authorized by SB 1070.

Similarly misplaced is Plaintiffs' criticism of the arrest powers granted by § 6 of SB 1070 to Arizona law enforcement authorities. Section 6 amends A.R.S. § 13-3883(A) to authorize the arrest of anyone who "has committed any public offense that makes the person removable from the United States." Plaintiffs misinterpret § 6 when they assert that it "approve[s] enforcement of civil [federal immigration] provisions that lead to removability." Pl. Br. 22. Rather, § 6 quite clearly is limited to a grant of authority to arrest an individual who the officer has probable cause to believe has committed an enumerated (federal or state) criminal offense.[1] Even prior to adoption of SB 1070, Arizona law enforcement officials possessed authority to make warrantless arrests based on probable cause to believe that the individual violated *either* state criminal law *or* federal criminal law – including federal immigration law. *Gonzales v. Peoria,* 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999); 8 U.S.C. § 1324(c). Thus, § 6 of SB 1070 did little, if anything, to increase the arrest authority of Arizona law enforcement personnel – making it a particularly inappropriate target of Plaintiffs' preemption claims.

E. Diversion of Federal Resources. Plaintiffs assert that SB 1070 conflicts with

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[1] Federal law lists a broad range of serious criminal offenses (both federal and state) that render an alien subject to removal. *See, e.g.,* 8 U.S.C. § 1227(a)(2)(A)(iii) (providing that any alien convicted of an "aggravated felony" at any time after admission is subject to deportation). Contrary to Plaintiffs' assertion, arresting an individual for committing an "aggravated felony" is wholly unrelated to the subsequent initiation of removal proceedings if the individual is convicted and turns out to be an alien.

federal immigration policy because it will require federal officials to reallocate their limited resources in order to respond to what they anticipate will be a significant increase in requests for assistance generated by SB 1070. Pl. Br. 23-24. We note preliminarily that: (1) the law has not yet taken effect, so any assertions regarding significantly increased requests for assistance are purely speculative; (2) Arizona officials have for many years been sending numerous requests for assistance to federal officials,[2] so adoption of SB 1070 will not necessarily lead to an appreciable increase in requests; and (3) in adopting laws authorizing information inquiries, Congress quite clearly determined that responding to such inquiries is an important federal priority.

More importantly, Plaintiffs have failed to demonstrate how federal officials might be forced to divert resources away from immigration enforcement activities they deem more essential. Nothing in § 1373(c), for example, requires such a diversion. If increased § 1373(c) inquiries render ICE unable to respond immediately to all inquiries coming from Arizona pursuant to § 2 of SB 1070, it will be Arizona (not the federal government) that will have to deal with complications that ensue (*e.g.,* Arizona may be forced to release some suspected illegal aliens being held pursuant to § 2 until such time as it receives the delayed responses to its § 1373(c) inquiries). Similarly, federal officials are not required to accept custody of any of the illegal aliens delivered to them by Arizona

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[2] For example, Arizona officials have made widespread use of 8 U.S.C. § 1373(c), which obligates ICE to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the . . . immigration status of" an individual.

officials pursuant to § 2 and thus cannot be forced to incur the additional expenses that would be generated by additional removal proceedings. While *amici* cannot understand why federal officials acting in good faith would not want to accept aliens handed over to them by Arizona officials following a federal determination that the aliens are not lawfully present, nothing in SB 1070 requires them to do so.

F. Alien Registration Documents. Section 3 of SB 1070 makes it a misdemeanor for aliens not to carry a registration document. Plaintiffs' assertion that this provision conflicts with federal immigration law is without merit, given that it does no more than impose a penalty on aliens who fail to comply with *federal* registration requirements. The Supreme Court has repeatedly rejected preemption claims in analogous circumstances, even where the result of state enforcement proceedings may be to subject an individual to greater sanctions than would be available under the federal statute alone. *See, e.g., Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 448 (2005).

CONCLUSION

Amici respectfully request that the motion for a preliminary injunction be denied.

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Dated: July 14, 2010

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July, 2010, I electronically filed the brief of *amici curiae* Russell Pearce, et al., with the Clerk of the Court for the U.S. District Court for the District of Arizona, by using the CM/ECF system. I certify that all participants in the case are represented by counsel of record who are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ David T. Hardy
David T. Hardy

APPENDIX A

Members of the U.S. House of Representatives Who Have Joined This Brief

Honorable Dan Burton

Honorable Trent Franks

Honorable Sam Graves

Honorable Wally Herger

Honorable Duncan Hunter

Honorable Steve King

Honorable Doug Lamborn

Honorable Cynthia Lummis

Honorable Tom McClintock

Honorable Gary Miller

Honorable Jerry Moran

Honorable Sue Myrick

Honorable Ted Poe

Honorable Denny Rehberg

Honorable Phil Roe

Honorable Dana Rohrabacher

Honorable Mike Simpson

Honorable Lamar Smith