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16 UNITED STATES DISTRICT COURT
17 DISTRICT OF ARIZONA

18 Friendly House, *et al.*,) CV-10-01061-PHX-SRB
19)
20 Plaintiffs,) **LODGED: PROPOSED BRIEF OF STATE SEN.**
21) **RUSSELL PEARCE, U.S. REPS DAN BURTON,**
22 v.) **TRENT FRANKS, SAM GRAVES, WALLY**
23) **HERGER, DUNCAN HUNTER, STEVE KING,**
24) **DOUG LAMBORN, CYNTHIA LUMMIS, TOM**
25) **McCLINTOCK, GARY MILLER, JERRY**
26) **MORAN, SUE MYRICK, TED POE,**
27) **DENNY REHBERG, PHIL ROE, DANA**
28) **ROHRABACHER, MIKE SIMPSON, and**
29) **LAMAR SMITH, WASHINGTON LEGAL**
30) **FOUND, ALLIED EDUCATIONAL FOUND.,**
31) **NATIONAL BORDER PATROL COUNCIL,**
32) **AMERICAN IMMIGRATION CONTROL**
33) **FOUND., and CONCERNED CITIZENS**
34) **& FRIENDS OF ILLEGAL IMMIGRATION**
35) **LAW ENFORCEMENT AS AMICI CURIAE**
36) **IN OPPOSITION TO PLAINTIFFS' MOTION**
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)	HERGER, DUNCAN HUNTER, STEVE KING,
21 Michael B. Whiting, Apache)	DOUG LAMBORN, CYNTHIA LUMMIS, TOM
22 County Attorney, in his official)	McCLINTOCK, GARY MILLER, JERRY
23 capacity, <i>et al.</i> ,)	MORAN, SUE MYRICK, TED POE,
)	DENNY REHBERG, PHIL ROE, DANA
24 Defendants,)	ROHRABACHER, MIKE SIMPSON, and
)	LAMAR SMITH, WASHINGTON LEGAL
25 and)	FOUND., ALLIED EDUCATIONAL FOUND.,
)	NATIONAL BORDER PATROL COUNCIL,
26 Janice K. Brewer, Governor of)	AMERICAN IMMIGRATION CONTROL
the State of Arizona, in her)	FOUND., and CONCERNED CITIZENS
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of Arizona,)	LAW ENFORCEMENT AS AMICI CURIAE
)	IN OPPOSITION TO PLAINTIFFS' MOTION
<u>Intervenor-Defendants.</u>)	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

1 that might arise – between federal immigration law and SB 1070 – following implemen-
2 tation of the Arizona statute. If such conflicts do, in fact, arise, Plaintiffs will have an
3 opportunity to bring an as-applied challenge to SB 1070. In the meantime, a facial chal-
4 lenge to the statute is premature in the absence of evidence that the law is unconstitutional
5 in *all* of its applications. Moreover, because the Arizona legislature provided that each
6 provision of SB 1070 is severable, no provision may be enjoined unless Plaintiffs can
7 demonstrate, among other things, that the specific provision is preempted by federal law.
8
9 There is no basis in law for Plaintiffs’ request for an injunction against the entire statute
10 based on their claims that some of the statute’s provisions are preempted.
11

12 The lawsuit filed last week by the federal government indicates that President
13 Obama’s administration objects to some provisions of SB 1070. But even if (contrary to
14 the evidence) Plaintiffs possessed standing to object to SB 1070, the Executive Branch’s
15 objections would not provide an adequate basis for the preliminary injunction sought by
16 Plaintiffs. First, the preemption analysis must focus primarily on whether SB 1070 con-
17 flicts with federal immigration policy established through statutes adopted by Congress,
18 and Plaintiffs cannot point to any such conflicts. Indeed, the Arizona legislature has gone
19 to great lengths to ensure that officials charged with enforcing SB 1070 will, at all stages
20 of enforcement, look to federal officials to determine the immigration status of aliens
21 potentially subject to the provisions of SB 1070. Moreover, conflict between Arizona
22 enforcement personnel and federal immigration officials is not a realistic possibility
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1 because Arizona personnel have no means of forcing any federal official to expend
2 significant resources on immigration matters they bring to his/her attention. Arizona is
3 offering to assist federal enforcement by handing over custody of aliens determined by
4 the federal government to be in this country without authorization. But nothing forces the
5 federal government to accept custody; if it declines to do so, the aliens will be released.
6

7 **ARGUMENT**

8 **I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF** 9 **SUCCESS ON THE MERITS OF THEIR PREEMPTION CLAIMS**

10 Plaintiffs are not entitled to a preliminary injunction in the absence of a showing
11 that they are likely to succeed on the merits of their claims. *Winter v. Natural Resources*
12 *Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008). They have failed to demonstrate such
13 a likelihood with respect to their preemption claims.
14

15 **A. Severability.** Generally speaking, when confronting a constitutional flaw in a
16 statute, federal courts are instructed to “try to limit the solution to the problem.” *Ayotte v.*
17 *Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2005). The Supreme
18 Court has instructed that it “prefer[s], for example, to enjoin only the unconstitutional
19 applications of a statute while leaving other applications in force . . . or to sever its
20 problematic portions while leaving the remainder intact.” *Id.* (internal citations omitted).
21 Accordingly, “the normal rule is that partial, rather than facial invalidation is the required
22 course, such that a statute may . . . be declared invalid to the extent that it reaches too far,
23 but otherwise left intact.” *Id.*
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1 Plaintiffs’ motion abandons that measured approach. It asks the Court to enjoin
2 SB 1070 in its entirety based on alleged constitutional infirmities in discrete provisions of
3 the statute. It does so despite the Arizona legislature’s clear statement that the provisions
4 of SB 1070 are entirely severable. *See* SB 1070, § 12(A) (invalidity of one provision
5 “does not affect other provisions or applications of the act”). The preliminary injunction
6 motion fails to raise constitutional objections to numerous provisions of SB 1070. *See,*
7 *e.g.*, § 2 (unchallenged provisions include provisions barring local governments from
8 restricting enforcement of federal immigration law, requiring notification of ICE officials
9 when an illegal alien is about to be released from State custody, and requiring the free
10 exchange of information regarding immigration status). Particularly in light of Plaintiffs’
11 failure to raise challenges to every provision of SB 1070, their request for a blanket
12 injunction is without merit. While *amici* do not believe that Plaintiffs have established a
13 likelihood of success with respect to any of their challenges, any relief should be limited
14 to a preliminary injunction against those specific statutory provisions that the Court
15 deems constitutionally infirm.

20 **B. Facial Challenges.** A plaintiff is entitled to pursue facial invalidation of a
21 statute only “by establishing that no set of circumstances exists under which the [statute]
22 would be valid, *i.e.*, that the law is unconstitutional in all of its applications.” *Washington*
23 *State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). Plaintiffs
24 are raising just such a facial challenge and seek to prevent SB 1070 from ever taking
25
26

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

7
8
9 The Supreme Court has cautioned that facial challenges are inappropriate when
10 based on predictions regarding constitutional infirmities that *might* arise if a law is
11 allowed to go into effect. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 168 (2007)
12 (rejecting facial challenge to statute and stating, “It is neither our obligation nor within
13 our traditional institutional role to resolve questions of constitutionality with respect to
14 each potential situation that might develop.”). Rather, the proper approach is to allow a
15 statute to take effect and then entertain as-applied challenges, which “are the basic
16 building blocks of constitutional adjudication.” *Id.* By awaiting as-applied challenges,
17 federal courts permit state officials an opportunity “to construe the law in the context of
18 actual disputes” or “to accord the law a limiting construction to avoid constitutional
19 questions.” *Washington State Grange*, 552 U.S. at 450. “Exercising judicial restraint in a
20 facial challenge frees the Court not only from unnecessary pronouncement on
21 constitutional issues, but also from premature interpretations of statutes in areas where
22 their constitutional application might be cloudy.” *Id.* Given the considerable uncertainty
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1 regarding precisely how SB 1070 will be applied and how it might affect federal
2 immigration enforcement efforts, Plaintiffs have failed to establish likelihood of success
3 in their facial challenge to the statute.
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5 **C. State “Regulation of Immigration.”** The power to regulate immigration “is
6 unquestionably exclusively a federal power,” *De Canas v. Bica*, 424 U.S. 351, 354
7 (1976), and thus States may not exercise such regulatory authority. Plaintiffs’ assertion
8 that Arizona’s adoption of SB 1070 constitutes an exercise of such authority is frivolous.
9 *De Canas* explains that a State enactment amounts to a preempted “regulation of
10 immigration” only when it seeks to determine “who should or should not be admitted into
11 the country, and the conditions under which a legal entrant may remain.” *Id.* at 355. SB
12 1070 makes no such determinations. Arizona does not seek to control admissions or
13 removals, or even to make determinations regarding the immigration status of aliens;
14 rather, in all instances, it looks to federal officials to determine whether aliens within the
15 State’s custody are legally present in the United States. *See, e.g.*, SB 1070, § 2.
16 Plaintiff’s “field preemption” argument is similarly unavailing. Given the large role that
17 federal statutes assign to States in the enforcement of immigration law, it cannot plausibly
18 be asserted that the federal government “occupies the field” and therefore impliedly
19 preempts any State efforts to provide enforcement assistance.
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24 **D. Federal Law Encourages State Assistance with Enforcement.** Plaintiffs’
25 assertion that Arizona’s efforts to assist with immigration law enforcement conflicts with
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1 the “comprehensive” federal immigration scheme, Pl. Br. 15-24, runs headlong into the
2 numerous federal statutes that actively encourage such assistance. *See, e.g.*, 8 U.S.C.
3 §§ 1103(a), 1252c, 1357(g), 1373(a)-(c), & 1644; 42 U.S.C. § 611a (requiring a State
4 receiving certain federal grants to report to ICE *at least* four times annually the names and
5 addresses of those known to the State to be unlawfully in the United States). Although
6 the Obama Administration may not be enthusiastic about Arizona’s efforts to increase its
7 immigration assistance, Congress has repeatedly adopted statutes expressing enthusiasm,
8 and the Constitution assigns to Congress primary responsibility for establishing
9 immigration rules. U.S. Const., Art. I, § 8, cl. 4.

12 Plaintiffs cite 8 U.S.C. § 1357(g) as evidence that SB 1070 conflicts with federal
13 law. Section 1357(g) authorizes the Department of Homeland Security to enter into
14 agreements with local law enforcement agencies, pursuant to which DHS deputizes local
15 officials (following training) to perform the functions of immigration officers. Plaintiffs
16 argue that §§ 2 and 6 of SB 1070 conflict with the policies underlying § 1357(g) because
17 §§ 2 and 6 authorize Arizona police officials to perform an even wider range of enforce-
18 ment functions without any requirement that they undergo § 1357(g) training. That
19 argument misconstrues § 1357(g). The functions that DHS may (under § 1357(g))
20 deputize local officials to perform – for example, take a suspected illegal alien into
21 custody for processing, make an initial determination of deportability, and prepare
22 documents necessary to remove the alien – are not functions authorized by SB 1070.
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1 Similarly misplaced is Plaintiffs’ criticism of the arrest powers granted by § 6 of
2 SB 1070 to Arizona law enforcement authorities. Section 6 amends A.R.S. § 13-3883(A)
3 to authorize the arrest of anyone who “has committed any public offense that makes the
4 person removable from the United States.” Plaintiffs misinterpret § 6 when they assert
5 that it “approve[s] enforcement of civil [federal immigration] provisions that lead to
6 removability.” Pl. Br. 22. Rather, § 6 quite clearly is limited to a grant of authority to
7 arrest an individual who the officer has probable cause to believe has committed an
8 enumerated (federal or state) criminal offense.¹ Even prior to adoption of SB 1070,
9 Arizona law enforcement officials possessed authority to make warrantless arrests based
10 on probable cause to believe that the individual violated *either* state criminal law *or*
11 federal criminal law – including federal immigration law. *Gonzales v. Peoria*, 722 F.2d
12 468 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. De La Vina*, 199
13 F.3d 1037 (9th Cir. 1999); 8 U.S.C. § 1324(c). Thus, § 6 of SB 1070 did little, if
14 anything, to increase the arrest authority of Arizona law enforcement personnel – making
15 it a particularly inappropriate target of Plaintiffs’ preemption claims.
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20 **E. Diversion of Federal Resources.** Plaintiffs assert that SB 1070 conflicts with
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23 ¹ Federal law lists a broad range of serious criminal offenses (both federal and
24 state) that render an alien subject to removal. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii)
25 (providing that any alien convicted of an “aggravated felony” at any time after admission
26 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.

1 federal immigration policy because it will require federal officials to reallocate their
2 limited resources in order to respond to what they anticipate will be a significant increase
3 in requests for assistance generated by SB 1070. Pl. Br. 23-24. We note preliminarily
4 that: (1) the law has not yet taken effect, so any assertions regarding significantly
5 increased requests for assistance are purely speculative; (2) Arizona officials have for
6 many years been sending numerous requests for assistance to federal officials,² so
7 adoption of SB 1070 will not necessarily lead to an appreciable increase in requests; and
8 (3) in adopting laws authorizing information inquiries, Congress quite clearly determined
9 that responding to such inquiries is an important federal priority.
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12 More importantly, Plaintiffs have failed to demonstrate how federal officials might
13 be forced to divert resources away from immigration enforcement activities they deem
14 more essential. Nothing in § 1373(c), for example, requires such a diversion. If increased
15 § 1373(c) inquiries render ICE unable to respond immediately to all inquiries coming
16 from Arizona pursuant to § 2 of SB 1070, it will be Arizona (not the federal government)
17 that will have to deal with complications that ensue (*e.g.*, Arizona may be forced to
18 release some suspected illegal aliens being held pursuant to § 2 until such time as it
19 receives the delayed responses to its § 1373(c) inquiries). Similarly, federal officials are
20 not required to accept custody of any of the illegal aliens delivered to them by Arizona
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25 ² For example, Arizona officials have made widespread use of 8 U.S.C. § 1373(c),
26 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.

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

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

17 CONCLUSION

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

19
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25 Dated: July 14, 2010

Counsel for *Amici Curiae*

1 **CERTIFICATE OF SERVICE**

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

1 APPENDIX A

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

3
4 Honorable Dan Burton

5 Honorable Trent Franks

6 Honorable Sam Graves

7 Honorable Wally Herger

8
9 Honorable Duncan Hunter

10 Honorable Steve King

11 Honorable Doug Lamborn

12 Honorable Cynthia Lummis

13
14 Honorable Tom McClintock

15 Honorable Gary Miller

16 Honorable Jerry Moran

17 Honorable Sue Myrick

18
19 Honorable Ted Poe

20 Honorable Denny Rehberg

21 Honorable Phil Roe

22 Honorable Dana Rohrabacher

23
24 Honorable Mike Simpson

25 Honorable Lamar Smith

26