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EAGLE VERSUS PHOENIX: A TALE OF FEDERALISM

A CRITICAL ANALYSIS OF THE RECENT OPINION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA REGARDING ARIZONA'S IMMIGRATION REFORM BILL, ITS IMPLICATIONS FOR SOUTH CAROLINA'S IMMIGRATION REFORM BILL, AND RECOMMENDATIONS FOR HOW SOUTH CAROLINA CAN IMPROVE THE LANGUAGE OF ITS BILL TO INCREASE THE LIKELIHOOD THAT IT WILL PASS CONSTITUTIONAL MUSTER

*Samuel L. Johnson**

INTRODUCTION

On July 28, 2010, the battle between the federal government and Arizona over immigration enforcement finally came to a head, albeit a temporary one, when United States District Court Judge Susan R. Bolton¹ issued an order granting in part and denying in part the United States' Motion for Preliminary Injunction, thereby enjoining Arizona from enforcing key parts of the "Support Our Law Enforcement and Safe Neighborhoods Act," Senate Bill 1070, 2010 Arizona Session Laws, Chapter 113, as amended by House Bill 2162, 2010 Arizona Session Laws, Chapter 211.²

Amidst the escalation of human smuggling and other illegal crossings into the United States along the United States-Mexican

* The author gratefully acknowledges, and dedicates this article to, Jan M. Baker, Legal Writing Instructor at the University of South Carolina School of Law, for her diligent editing, invaluable criticism, and tireless support.

¹ This author will refer to Judge Bolton as "the District Court" or "the Court" throughout.

² *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (order granting in part and denying in part preliminary injunction). Though House Bill 2162 is the modified version of Senate Bill 1070, this author will, like the District Court, refer to them collectively as "S.B. 1070," "the Act," or "the Arizona Act," unless this author specifically refers to House Bill 2162.

border;³ increased kidnappings in Arizona;⁴ the nearby Mexican drug war with all of the violence associated with it;⁵ fears of terrorist infiltration at the U.S.-Mexican border;⁶ the continuing woes of the U.S. economy; and the federal government's widely-perceived lack of progress in the area of immigration enforcement,⁷ Arizona Governor Janice K. Brewer signed into law S.B. 1070, the most stringent state immigration law in the U.S., on April 23, 2010.⁸ Arizona's legislature had passed similar immigration bills in recent years, but each were vetoed by then-Governor Janet Napolitano, who incidentally is the current Secretary of Homeland Security in the Obama Administration.⁹ Here, however, Governor Brewer not only signed S.B. 1070 into law, but she also signed H.B. 2162, which amended S.B. 1070, seven days later, on April 30, 2010.¹⁰

S.B. 1070 soon led to a number of lawsuits against Arizona.¹¹ However, the following discussion will only address the lawsuit filed

³ In 2008, an estimated 500,000 illegal immigrants lived in Arizona alone. Alan Silverleib, *Arizona Governor Signs Changes Into [sic] Immigration Law*, CNN, May 1, 2010, <http://www.cnn.com/2010/POLITICS/04/30/arizona.immigration.law.changes/index.html>. In 2008, an estimated 500,000 illegal immigrants lived in Arizona alone. Indeed, this number is five times the number of illegal immigrants present in Arizona in 1990. Elliot Spagat, *Other Border States Shun Arizona's Immigration Law*, MSNBC (May 13, 2010), <http://www.msnbc.msn.com/id/37116159>.

⁴ Spagat, *supra* note 3b.

⁵ Randal C. Archibold, *On Border Violence, Truth Pales Compared to Ideas*, NEW YORK TIMES, June 20, 2010, at A 18, http://www.nytimes.com/2010/06/20/us/20crime.html?_r=1.

⁶ See *Iraqi Terrorists Caught Along Mexican Border: American Intelligence Chief Confirms 'People are Alive' as a Result of Capture*, WORLDNETDAILY (Aug. 23, 2007), <http://www.wnd.com/?pageId=43177>.

⁷ Dan Nowicki, *Arizona Immigration Law Ripples Through History*, U.S. Politics, ARIZONA REPUBLIC (July 25, 2010), <http://www.azcentral.com/arizonarepublic/news/articles/2010/07/25/20100725immigration-law-historypolitics.html>.

⁸ Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, NEW YORK TIMES, Apr. 24, 2010, at A 1, <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>. It is worth noting that last year alone, a record 222 laws and 131 resolutions among 48 states were passed addressing immigration. *Id.*

⁹ *Id.*

¹⁰ Silverleib, *supra* note 3a.

¹¹ The following litigants, in addition to the federal government, have brought suit against Arizona: David Salgado, Roberto Javier Frisancho (his case was dismissed by the District Court on August 24, 2010), Martin Escobar (his case was

by the United States Department of Justice, and, specifically, the Court's consideration of its motion for preliminary injunction. On July 6, 2010, the United States filed a complaint challenging the constitutionality of S.B. 1070 and filed a motion for preliminary injunction to enjoin Arizona from enforcing S.B. 1070 until the Court could determine the Act's constitutionality.¹² The United States' principal arguments in this case were that: (1) the power to regulate immigration is vested solely in the federal government, (2) that Arizona's immigration law was preempted by federal immigration law pursuant to the Supremacy Clause under Article VI of the United States Constitution, and (3) that Arizona usurped the federal government's authority, thereby disrupting the federal government's balance of objectives and priorities relating to immigration enforcement.¹³ The District Court agreed with the federal government in several important respects and accordingly issued a preliminary injunction order by granting, in part, the Motion for Preliminary Injunction.¹⁴

This article will proceed as follows: Part I focuses on each part of the District Court's opinion and, following a discussion of each provision of Arizona's immigration bill, discusses how any parallel provision in South Carolina's pending immigration reform bill would likely fare under similar constitutional scrutiny. The analysis begins by discussing some parts of the District Court's opinion in which it employed solid analysis to arrive at reasonable conclusions. The article then asserts, in more detail, that parts of the District Court's opinion

also dismissed by the District Court, on August 31, 2010), the city of Tucson (it joined Martin Escobar's case as plaintiffs; and its case is still pending at the time of this writing, even though Escobar's case was dismissed), the National Coalition of Latino Clergy and Christian Leaders (the case is pending at the time of this writing), the League of United Latin American Citizens (the case is still pending), and a class composed of ten individuals and fourteen labor, religious, and civil rights organizations, such as the ACLU, NAACP, Mexican American Legal Defense and Educational Fund (MALDEF), and the National Day Laborer Organizing Network (NDLON) (this case is still pending). Elise Foley, *Making Sense of the Arizona SB 1070 Lawsuits*, WASHINGTON INDEPENDENT (September 3, 2010), <http://washingtonindependent.com/96646/making-sense-of-the-arizona-sb-1070-lawsuits>; see also Alex DiBranco, *ACLU Files Lawsuit Against Arizona SB 1070*, CHANGE.ORG (May 17, 2010), http://immigration.change.org/blog/view/aclu_files_lawsuit_against_arizona_sb_1070.

¹² *United States v. Arizona*, 703 F. Supp. 2d at 990.

¹³ *Id.* at 990-91. See also Elise Foley, *Justice Department Sues Arizona Over Immigration Law*, WASHINGTON INDEPENDENT (July 6, 2010), <http://washingtonindependent.com/90949/justice-department-sues-arizona-over-immigration-law>.

¹⁴ *United States v. Arizona*, 703 F. Supp. 2d. 990.

arrive at either a reasonable conclusion through questionable analysis or at troublesome conclusions through questionable analysis. Part I concludes by arguing that some parts of the District Court's opinion arrive at a troublesome conclusion through solid analysis. Finally, Part II suggests how South Carolina might alter the language of its bill to improve its chances of success against constitutional challenges.

I. DISCUSSION OF THE PRELIMINARY INJUNCTION ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

As the District Court correctly pointed out in its preliminary injunction order, S.B. 1070 could not be entirely enjoined because it contained a severability clause that stated that the invalidity of any one provision would not affect the applicability of separable, valid provisions.¹⁵ The Court also set forth the standard of review for a preliminary injunction: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."¹⁶ The Court, therefore, separated those provisions of S.B. 1070 on which the federal government would likely be unable to demonstrate federal preemption on the merits, and thus would not be enjoined, from those provisions of S.B. 1070 on which the federal government would likely be able on the merits to demonstrate federal preemption, and thus would be enjoined.¹⁷ This article asserts that although the Court reached many reasonable conclusions in determining those provisions that should be enjoined and those that should not be, it also reached some troublesome conclusions in making these determinations. Likewise, the analyses that the Court employed to reach its conclusions were largely sound, but were also questionable at times.

A. THE DISTRICT COURT'S REASONABLE CONCLUSIONS BASED ON SOLID ANALYSIS

Because the accuracy of the District Court's conclusions and analysis pertaining to the following provisions is not disputed by this

¹⁵ *Id.* at 986 (citing S.B. 1070 § 12(A) (2010)).

¹⁶ *Id.* at 991 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24-25, 129 S. Ct. 365, 374 (2008) (citations omitted)).

¹⁷ *Id.* at 986-87.

author, less discussion will be conducted in this Section. However, because some of the analysis is based on Arizona and Ninth Circuit jurisprudence, support will be given to this analysis, where applicable, using South Carolina and Fourth Circuit jurisprudence, to demonstrate that similar conclusions would likely be reached if the parallel provisions found in South Carolina's immigration bill were challenged in the United States District Court for the District of South Carolina.

1. THE SEVERABILITY CLAUSE – SECTION 12(A) OF S.B. 1070

The District Court correctly declined to enjoin the entire immigration bill because of the severability clause found in S.B. 1070 § 12(A). Arizona state law principles control severability analysis, and Arizona courts may only strike down an entire statute as unconstitutional if the unconstitutional parts cannot be severed from the constitutional parts.¹⁸ The courts must look at the legislative intent and give effect to the severability clause if parts of the statute are valid and enforceable apart from, and independent of, the unconstitutional parts.¹⁹ The Court wisely found that the Arizona legislature had intended to preserve the constitutional provisions of the Act via the severability clause and that independent, severable constitutional provisions existed in the Act.²⁰ Therefore, the District Court correctly concluded that the entire Act should not be enjoined and that the constitutionality of each provision would have to be assessed individually.²¹

Similar to the Arizona Act, South Carolina's pending immigration reform bill, H.B. 4919, contains a severability clause.²²

¹⁸ *Id.* at 992 (citing *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 886 (9th Cir. 2008); *State v. Ramsey*, 831 P.2d 408, 413 (Ariz. Ct. App. 1992)).

¹⁹ *Id.* at 992-93 (citing *Selective Life Ins. Co. v. Equitable Life Assurance Soc'y of the U.S.*, 422 P.2d 710, 715 (Ariz. 1967)).

²⁰ *Id.* at 993 (citing S.B. 1070 § 12(A)).

²¹ *Id.*

²² H. 4919 § 5, 2010 Gen. Assem., 118th Sess. (S.C. 2010). Henceforth, I will refer to the S.C. immigration reform bill as "the S.C. Bill." The S.C. Bill was introduced on April 29, 2010. It has not been passed by the S.C. General Assembly, but it is expected to be considered for passage during the 119th (2011-2012) legislative session. Section 5 of this Bill states the following: "If any Section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act" This language is similar to, but more specific than, Arizona's S.B. 1070 § 12(A), which states the following: "If a provision of this act or its application to any person or circumstance is held invalid, the

South Carolina, like Arizona, has held that severability of a statute is a question of state law.²³ Also like Arizona, South Carolina has recognized that a statute may be constitutional in part while being unconstitutional in part; the court will enforce the constitutional part if it is independent of the unconstitutional part.²⁴ Therefore, any court assessing the constitutionality of the S.C. Bill would have to respect its severability clause, as the Arizona District Court did with S.B. 1070, and assess the constitutionality of each individual provision.

2. HUMAN SMUGGLING STATUTE – SECTION 4 OF S.B. 1070: AMENDMENT TO A.R.S. § 13-2319

The District Court correctly found that the United States was unlikely to succeed in claiming that federal law preempted S.B. 1070 § 4. The District Court reasoned that the United States did not specifically challenge the minor change made to the preexisting statute,²⁵ and the preexisting statute itself did not warrant an injunction.²⁶ This author agrees completely and will not offer any comments as to the S.C. Bill because South Carolina is not a border State and therefore did not have to address human smuggling in its immigration reform bill.

3. EMPLOYMENT OF ILLEGAL ALIENS – SECTION 5 OF S.B. 1070: A.R.S. § 13-2928(C)

The District Court appropriately found that the United States would likely succeed with its claim that S.B. 1070 § 5: A.R.S. § 13-2928(C) conflicted with a comprehensive federal scheme and should thus be preempted.²⁷ A.R.S. § 13-2928(C) states that “[i]t is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a

invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.”

²³ *South Carolina Tax Comm’n v. United Oil Marketers, Inc.*, 306 S.C. 384, 388, 412 S.E.2d 402, 404 (1991) (citing *Fairway Ford, Inc. v. Timmons*, 281 S.C. 57, 314 S.E.2d 322 (1984)).

²⁴ *Knotts v. S.C. Dept. of Natural Res.*, 348 S.C. 1, 9-10, 558 S.E.2d 511, 515 (2002).

²⁵ *United States v. Arizona*, 703 F. Supp. 2d at 989.

²⁶ *Id.* at 1000.

²⁷ *Id.* at 1002.

public place or perform work as an employee or independent contractor in this State.”²⁸ The Court correctly pointed out that “States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.”²⁹ But the Court also noted that in preemption cases where Congress has legislated in areas traditionally controlled by the States, a presumption against preemption by the federal government can be overcome by the “clear manifest purpose of Congress” to supersede the “police powers of the State.”³⁰ The Court further noted that when there is an “extant action” by Congress, there can arise “an inference of pre-emption [sic] in an unregulated segment of an otherwise regulated field.”³¹

The District Court properly concluded that Congress created a comprehensive federal scheme that regulated the area of employment dealing with immigration status verification when it passed the Immigration Reform and Control Act (IRCA).³² Under the IRCA, Congress established penalties for employers who directly, or indirectly through contractors or subcontractors, and knowingly hire, continue to employ, or refer for employment unauthorized aliens.³³ The IRCA has also established a mandatory employment verification system.³⁴ The District Court also correctly observed that Congress did not seek to specifically punish the act of working without authorization because it

²⁸ A.R.S. § 13-2928(C) (2010).

²⁹ *United States v. Arizona*, 703 F. Supp. 2d. at 1000 (quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976)).

³⁰ *Id.* (citing *Wyeth v. Levine*, ---U.S., ---, ---, 129 S. Ct. 1187, 1194-95 (2009)).

³¹ *Id.* at 1001. (quoting *P.R. Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988)).

³² *Id.* at 1002.

³³ *Id.* at 1001 (citing 8 U.S.C. § 1324a(a)(1)-(2), (4), (e)(4) (2010)).

³⁴ *Id.* at 1001. The federal government’s mandatory employment verification system requires all employees to complete a Form I-9, the Employment Eligibility Verification Form, and present to the employer the forms of identification specified in 8 U.S.C. § 1324a(b)(1)(B), or (C) and (D) (2010). 8 U.S.C. § 1324a(b)(1)(A)(i), (ii). The federal government, through the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA), also provides an Internet-based system called “E-Verify” to employers at no charge. Department of Homeland Security, *E-Verify*, http://www.dhs.gov/files/programs/gc_1185221678150.shtm (last visited August 10, 2010). As of September 8, 2009, all employers with federal contracts or subcontracts must use E-Verify, but it is otherwise optional for employers. *Id.* The E-Verify system compares the information provided on a Form I-9 with more than 455 million records in the SSA’s database and more than 80 million in Homeland Security immigration databases. *Id.*

expressly limited the use of information on the Form I-9, including the attestation of the employee that he or she is authorized to work in the U.S., to enforcement of “this chapter [8 U.S.C. § 1324] and Sections 1001, 1028, 1546, and 1621 of Title 18” of the U.S. Criminal Code, none of which create a crime for working without authorization.³⁵ Thus, Congress took “extant actions” to regulate in the area of employment of unauthorized aliens by sanctioning employers and, in a limited fashion, penalizing employees.³⁶ Because Congress chose to list a number of penalties for unauthorized alien employees associated with their employment but not for the act of working without authorization, it can be inferred that the federal government chose not to penalize that act, and thus it preempted Arizona from making that act a crime.³⁷

Although the District Court was correct in its conclusion that Arizona’s criminalization of the act of working without authorization was likely unconstitutional, it is worth reiterating that employers in the States are still required to obtain and maintain employment verification forms and associated documentation,³⁸ employers are free to send the federal government requests for the immigration status of their employees through E-verify at no cost to them,³⁹ and unauthorized

³⁵ *United States v. Arizona*, 703 F. Supp. 2d. at 1001 (citing 8 U.S.C. § 1324a(b)(2), (5) (2010)). See also 18 U.S.C. §§ 1001(a) (making it a federal crime to, in any matter within the jurisdiction of the federal government, (1) falsify, conceal, or cover up any material fact; (2) knowingly make or use a materially false, fictitious, or fraudulent statement; or (3) make or use any false writing or document); 1028(a) (making it a federal crime to, in any matter within the jurisdiction of the federal government, knowingly make, use, or transfer a false or stolen identification document, an identification document belonging to another person, or any implement or feature for use in creating a false identification document); 1546 (making it a federal crime to, in any matter within the jurisdiction of the federal government, (a) forge or falsify an immigration document; or (b) use a false identification document, a document not properly issued to the user, or a false attestation); 1621 (making it a federal crime to, in any matter within the jurisdiction of the federal government, commit perjury by knowingly make a false statement after taking an oath to tell the truth during a proceeding or on any document signed under penalty of perjury).

³⁶ *United States v. Arizona*, 703 F. Supp. 2d. at 1001-02.

³⁷ *Id.* at 1002.

³⁸ Form I-9, *supra* note 34b.

³⁹ E-verify, *supra* note 34c. It is worth noting that after December 31, 2007, Arizona began requiring E-Verify and, in Section 8 of S.B. 1070: Amendment to A.R.S. § 23-214, requires employers to “keep a record of the verification for the duration of the employee’s employment or at least three

employees are subject to civil and criminal penalties associated with their applications for employment.⁴⁰ States are also allowed to pass laws forbidding employers to hire unauthorized aliens, as affirmed by the United States Supreme Court in *De Canas v. Bica*, which upheld California's law prohibiting the knowing employment by California employers of unauthorized aliens.⁴¹ In that case, the Court concluded that the Immigration and Nationality Act (INA) allowed "room for state legislation," and California's legislation did not "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in passing the Act.⁴² Arizona's ban on knowingly or intentionally employing unauthorized aliens is covered by Section 7 of S.B. 1070 and Section 8 of S.B. 1070, respectively, but neither provision was included in the federal government's complaint.⁴³

Section 3(C) of the S.C. Bill is identical to Section 13-2928(C) of the Arizona Act.⁴⁴ Although there appears to be no case on point in the Fourth Circuit, a challenge to Section 3(C) of the S.C. Bill in the U.S. District Court for the District of South Carolina would likely have the same outcome as the challenge to Section 13-2928(C) because the reasoning employed by the Arizona District Court was sound. By the same token, South Carolina's employment regulations mandating verification of the immigration status of all employees by employers would likely be upheld, for the same reasons discussed in the immediately preceding paragraph.⁴⁵

years, whichever is longer." This Section was not challenged by the federal government in its complaint.

⁴⁰ See 8 U.S.C. § 1324a(b)(2) (2010).

⁴¹ *De Canas*, 424 U.S. at 356.

⁴² *Id.* at 363 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁴³ *United States v. Arizona*, 703 F. Supp. 2d at 986. The only amendments in Sections 7 and 8 are for the creation for employers of an affirmative defense of entrapment. See S.B. 1070, Section 7: Amendment to A.R.S. § 23-212 and S.B. 1070, Section 8: Amendment to A.R.S. § 23-214.

⁴⁴ Compare S.C. Bill, *supra* note 22a, at § 3(C) with A.R.S. § 13-2928(C), *supra* note 28.

⁴⁵ S.C. Code Ann. § 41-8-30 (2010) mandates that no private employer shall "knowingly or intentionally employ an unauthorized alien." Under § 41-8-20(B)-(C), as of July 1, 2010, South Carolina requires all businesses not only to complete and maintain the federal Form I-9, but must also, within five business days after employing a new employee, either: 1. Verify the employee's status using E-Verify; or 2. Verify that the employee has a valid S.C. driver's license or valid ID card from the DMV, or that they are eligible to obtain either, or that they possess either a valid driver's license or valid ID card

4. TRANSPORTATION, CONCEALING, HARBORING, OR
SHIELDING OF ILLEGAL ALIENS, OR ENCOURAGING OR
INDUCING THEM TO COME TO OR LIVE IN ARIZONA –
SECTION 5 OF S.B. 1070: A.R.S. § 13-2929

The District Court divided its discussion into two parts according to the two grounds upon which the United States argued the unconstitutionality of A.R.S. § 13-2929: (A) the provision was preempted as an impermissible regulation of immigration; and (B) it violated the dormant Commerce Clause.

a. Regulation of Immigration

The District Court, through solid analysis, reasonably concluded that the United States would be unlikely to succeed in its claim that Section 5 of S.B. 1070: A.R.S. § 13-2929 was an impermissible attempt to regulate immigration or that the provision violated the dormant Commerce Clause.⁴⁶ The provision states that it is illegal “for a person who is in violation of a criminal offense to: 1. transport or move or attempt to transport or move an alien in [Arizona], in furtherance of the [alien’s unlawful] presence in the United States...; 2. conceal, harbor, or shield... an alien from detection in [Arizona]...; [and] 3. encourage or induce an alien to come to or [live in Arizona]....”⁴⁷ The violator must knowingly or recklessly disregard the fact that the alien has illegally entered or remains in the U.S.⁴⁸

The District Court properly pointed out that regulation of immigration is “essentially a determination [by the federal government] of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”⁴⁹ The Court also correctly noted that “the fact that aliens are the subject of a

from another State with as strict requirements as S.C. The penalties or sanctions for violations of the statute by employers is set forth in §§41-8-50 to -70. It is worth noting that these provisions are already law and that South Carolina’s H. 4919 bill does not contain any proposed amendments to these provisions.

⁴⁶ *United States v. Arizona*, 703 F. Supp. 2d. at 1004.

⁴⁷ A.R.S. § 13-2929(A)(1)-(3) (2010) (alteration in original) (citation omitted).

⁴⁸ *Id.*

⁴⁹ *United States v. Arizona*, 703 F. Supp. 2d. at 1003 (quoting *De Canas*, 424 U.S. at 355).

state statute does not render it a regulation of immigration.”⁵⁰ The federal government argued first that A.R.S. § 13-2929 was an impermissible regulation of immigration because “to the extent Section 5 is not a restriction on interstate movement, it is necessarily a restriction on unlawful entry into the United States.”⁵¹ However, the Court simply, but accurately, found that A.R.S. § 13-2929 did not “attempt to regulate who should or should not be admitted into the United States,” and it did not “regulate the conditions under which legal entrants may remain in the United States.”⁵²

The Court noted that the United States argued in a footnote that because A.R.S. § 13-2929 did not contain an exemption “for certain religious groups for contact with volunteer ministers and missionaries,” and 8 U.S.C. § 1324(a)(1)(C), part of the federal alien smuggling statute, did contain such an exemption, A.R.S. § 13-2929 directly conflicted with the federal statute.⁵³ However, the Court rejected this argument because the Arizona statute was narrower than the federal version, requiring that the violator of the statute “already be in violation of a criminal offense.”⁵⁴ Because the federal government presented a facial challenge to the statute, it would have had to demonstrate that no circumstances could exist “under which the Act would be valid,” which the government was unable to do.⁵⁵ And, because the statute was challenged facially, the Court could not go beyond the statute to find an imaginary conflict between the two statutes.⁵⁶

South Carolina Code Annotated § 16-9-460, which is not amended by the S.C. Bill, is very similar to A.R.S. § 13-2929. Section 16-9-460 does contain significant differences, but it, too, would likely pass constitutional muster. First, South Carolina makes the acts referred to in A.R.S. § 13-2929, such as knowingly or recklessly

⁵⁰ *Id.* (quoting *De Canas*, 424 U.S. at 355).

⁵¹ *Id.* (citing Plaintiff’s Motion for Preliminary Injunction at 45).

⁵² *Id.* at 1003.

⁵³ *Id.* at 1002 n.18 (citing Plaintiff’s Motion for Preliminary Injunction at 46 n.40).

⁵⁴ *Id.* (citing A.R.S. § 13-2929). It is interesting that the Court followed this narrow-statute rationale with respect to A.R.S. § 13-2929 but failed to even mention it with respect to the first sentence of Section 2(B) of S.B. 1070: A.R.S. § 1051(B), which would require a violator to be in violation of some other state or local offense before the violator’s immigration status would be checked. *See infra* pp. 37-38.

⁵⁵ *United States v. Arizona*, 703 F. Supp. 2d. at 1002 n.18 (citing *United States v. Salerno*, 481 U.S. 739, 745).

⁵⁶ *Id.* (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50).

concealing or harboring an illegal alien, a felony, not a class 1 misdemeanor.⁵⁷ A second difference between the two statutes is that South Carolina's version has a stiffer fine for violations: up to \$5,000.00 and/or up to 5 years in prison, as opposed to Arizona's fine of at least \$1,000.00 (per person if ten or more illegal aliens are involved) and no prison time.⁵⁸ Probably the most important difference between the two, however, is that South Carolina's statute makes the specified acts unlawful, regardless of whether the offender was in violation of a criminal offense at the time the offender violated the statute.⁵⁹ Therefore, the South Carolina statute would not be narrower than the federal version, and would thus seemingly fail to avoid a facial challenge by the federal government, according to the Court's analysis.⁶⁰ However, whereas the South Carolina statute is broader than its federal counterpart, the South Carolina statute, unlike the Arizona statute, contains the exception found in the federal statute for religious groups engaged in certain conduct, and in no way conflicts with the federal statute.⁶¹ Thus, the South Carolina version of the alien transportation, concealing, harboring, and shielding statute would likely pass constitutional muster.⁶²

⁵⁷ Compare S.C. Code Ann. § 16-9-460(B) with H.B. 2162: A.R.S. § 13-2929(F).

⁵⁸ Compare S.C. Code Ann. § 16-9-460(C) with H.B. 2162: A.R.S. § 13-2929(F).

⁵⁹ Compare S.C. Code Ann. § 16-9-460(A)-(B) with H.B. 2162: A.R.S. § 13-2929(F).

⁶⁰ *United States v. Arizona*, 703 F. Supp. 2d. at 1002 n.18.

⁶¹ Compare S.C. Code Ann. § 16-9-460(E)-(F) with 8 U.S.C. § 1324(a)(1)(C).

⁶² It is worth noting that this S.C. bill also does not contain the language used by Arizona in H.B. 2162, Section 3: A.R.S. § 11-1051(E), Section 4: A.R.S. § 13-1509(B), and Section 6: A.R.S. § 13-2928(D), specifically "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," and that the alien's immigration status may be determined by the U.S. Immigration and Customs Enforcement or U.S. Customs and Border Protection pursuant to 8 U.S.C. § 1373(c) (note: this language was not in S.B. 1070, Section 5: A.R.S. § 13-2929, either, but was later added by H.B. 2162). However, S.C.'s H.4919, Sect. 2: S.C. Code Ann. § 16-9-470(B) and S.B. 1070, Section 3: A.R.S. § 13-509(B) do contain this language, although S.B. 1070 originally used the word "shall" instead of "may." The importance of this change, and the constitutional problem arising from it, will be discussed *infra* Part I(B)(1). The United States did not challenge this Section, and thus the Court did not address it; but, the government may challenge it in the future

b. The Dormant Commerce Clause

The District Court employed sound analysis to arrive at a reasonable conclusion when it rejected the United States' argument that Arizona "'offend[ed] the [d]ormant Commerce Clause by restricting the interstate movement of aliens.'"⁶³ The Court correctly pointed out that Congress has the sole power to regulate interstate commerce.⁶⁴ According to the doctrine of "dormant Commerce Clause," one of the Commerce Clause's features is that it "denies the States the power [to] unjustifiably...discriminate against or burden the interstate flow of articles of commerce."⁶⁵

The Court also correctly stated the two-part analysis requirement for the dormant Commerce Clause. The first part of the analysis requires a determination of whether the dormant Commerce Clause applies; and, the Court correctly noted that the dormant Commerce Clause applies when States pass regulatory laws for an activity that have a "substantial effect" on interstate commerce, "such that Congress could regulate the activity."⁶⁶ The Court then accurately stated the second part of the dormant Commerce Clause analysis – when "a state statute implicates the dormant Commerce Clause," the Court must determine "'whether [the statute] discriminates on its face against interstate commerce.'"⁶⁷ In this context, "discrimination" refers to treating in-state economic interests beneficially while treating out-of-state interests detrimentally.⁶⁸ If the statute is nondiscriminatory, it only violates the dormant Commerce Clause if it imposes a "clearly

against S.C. if it does not make the change, which is why this author will discuss it.

⁶³ *United States v. Arizona*, 703 F. Supp. 2d. at 1003 (quoting Plaintiff's Motion for Preliminary Injunction at 45).

⁶⁴ *Id.* (citing U.S. Const. art. I, § 8, cls. 1, 3).

⁶⁵ *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994) (alteration in original).

⁶⁶ *United States v. Arizona*, 703 F. Supp. 2d. at 1003 (quoting Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown, 567 F.3d 521, 524 (9th Cir. 2009)) (internal quotation marks and citation omitted). Note that the District Court cited to 567 F.3d 525 for the *Brown* citation, but this was an error. The quotation is located on page 524, as indicated above.

⁶⁷ *Id.* (quoting *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007)).

⁶⁸ *Id.*

excessive" burden on interstate commerce "in relation to the putative local benefits."⁶⁹

The Court prudently determined that the United States failed to show how Arizona's provisions under A.R.S. § 13-2929 substantially affected interstate commerce, i.e. how it implicated the dormant Commerce Clause, given that those provisions merely prohibited the same conduct prohibited by federal law and did not restrict, limit, or otherwise regulate immigration.⁷⁰ The Court also wisely found that A.R.S. § 13-2929 was nondiscriminatory because it did not distinguish between "in-state and out-of-state economic interests" or benefit the in-state interests at the expense of the out-of-state interests. Rather, the putative local benefit of public safety far outweighed the burden, if any, to interstate commerce.⁷¹

South Carolina Code Annotated § 16-9-460, South Carolina's version of A.R.S. § 13-2929, would likely pass the same constitutional muster under the District Court's dormant Clause analysis. The Fourth Circuit Court of Appeals, in *Brown v. Hovatter*, set forth a two-tier dormant Commerce Clause analysis, which was essentially the same analysis used in the Arizona District Court's opinion.⁷² In the first tier, a court must look at "whether the state law discriminates against interstate commerce."⁷³ If the state law is discriminatory, then it is "virtually *per se* invalid," unless the discrimination is "demonstrably justified by a factor unrelated to economic protectionism."⁷⁴ In the absence of discrimination, a court must then move to the second tier and determine whether the state law "unjustifiably . . . burden[s] the interstate flow of articles of commerce."⁷⁵ To make this determination, a court must employ the *Pike* test, under which the state law will only be overturned if the "burden imposed on [interstate] commerce is

⁶⁹ *Id.* (quoting *United Haulers*, 550 U.S. at 346) (internal quotation marks and citation omitted).

⁷⁰ *Id.* at 1003.

⁷¹ *Id.* at 1004. It is worth noting here that the United States also challenged Section 10 of S.B. 1070 because it was based on the state law violations contained in Sections 4 and 5. However, because the Court found that Sections 4 and 5 would likely not be preempted, it drew the same conclusion as to Section 10. *Id.* at n.20.

⁷² 561 F.3d 357, 363 (4th Cir. 2009).

⁷³ *Id.*

⁷⁴ *Id.* (quoting *Dep't of Revenue v. Davis*, 553 U.S. 328, 338, 128 S.Ct. 1801, 1808 (2008)) (internal quotation marks and citation omitted).

⁷⁵ *Id.* (quoting *Or. Waste*, 511 U.S. at 98).

clearly excessive in relation to the putative local benefits.”⁷⁶ Because the dormant Commerce Clause analysis employed by a South Carolina district court would essentially be the same as that employed by the Arizona District Court, South Carolina Code Annotated § 16-9-460 would likely be upheld as constitutional under the dormant Commerce Clause.

5. WARRANTLESS ARRESTS BASED ON PROBABLE CAUSE
OF COMMISSION OF A PUBLIC OFFENSE MAKING SUSPECT
REMOVEABLE FROM THE UNITED STATES – SECTION 6 OF
S.B. 1070: AMENDMENT TO A.R.S. § 13-3883(A)

The District Court applied sound analysis to arrive at the correct conclusion that the amendment to A.R.S. § 13-3883(A), found in Section 6 of S.B. 1070, would likely be preempted by federal law.⁷⁷ This amendment allows a law enforcement officer to make a warrantless arrest if that officer has probable cause to believe that the person arrested has committed “any public offense that makes the person removable from the United States.”⁷⁸ Arizona law defines “public offense” as:

conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state in which it occurred or by any law, regulation or ordinance of a political subdivision of that state and, if the act occurred in a state other than this state, it would be so punishable under the laws, regulations or ordinances of this state or of a political subdivision of this state if the act had occurred in this state.⁷⁹

The Court noted that both Arizona and the United States intimated that §13-3883(A)(5) allows for “the warrantless arrest of a person where

⁷⁶ *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)) (alteration in original)(internal quotation marks omitted). The exact language of the *Pike* test is as follows: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” 397 U.S. at 142.

⁷⁷ *United States v. Arizona*, 703 F. Supp. 2d. at 1006.

⁷⁸ A.R.S. § 3883(A)(5) (2010).

⁷⁹ *Id.* § 13-105(26).

there is probable cause to believe the person *committed a crime in another state* that would be considered a crime if it had been committed in Arizona and that would subject the person to removal from the United States.”⁸⁰ The Court logically and correctly inferred from this interpretation that Arizona state police officers would have to know out-of-state laws and their relationship to Arizona’s law.⁸¹ The Court then convincingly asserted that the determination of an alien’s removability based on the alien’s commission of a public offense was a complex one⁸² that state law enforcement officers were unable to make⁸³ and that could only be made by “immigration court judges and federal appeals court judges.”⁸⁴ The Court further noted that some federal officials can “change the immigration consequences of the commission of a public offense and cancel or suspend the removal of an alien.”⁸⁵ The Court rejected Arizona’s argument that its officers

⁸⁰ *United States v. Arizona*, 703 F. Supp. 2d. at 1005 (citing Plaintiff’s Motion for Preliminary Injunction at 32-33; Hearing Transcript 46-48). The Court speculated as to what the Arizona Legislature may have intended, specifically that police could make a warrantless arrest of an alien “*previously convicted of a crime in Arizona but never referred to DHS for potential removal proceedings.*” *Id.* The Court’s speculative interpretation is irrelevant and, to this author, contradictory to the plain meaning of the statutory provision as enacted.

⁸¹ *Id.*

⁸² *Id.* at 1005-06 (citing *Padilla v. Kentucky*, ---U.S., ----, ----, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring) (internal quotations and citations omitted)).

⁸³ *Id.* at 1006 (citing Plaintiff’s Motion for Preliminary Injunction, Exhibit 8, Declaration of Tony Estrada, Sheriff of Santa Cruz Cnty. ¶¶ 8-9, Exhibit 9, Declaration of Roberto Villaseñor, Chief of Police, Tucson Police Dep’t ¶ 6).

⁸⁴ *Id.* at 1005-1006.

⁸⁵ *Id.* at 1005 (citing as examples 8 U.S.C. §§ 1229b(a) (gives the U.S. Attorney General the ability to cancel removal or adjust the status of an alien); 1253(a)(3) (court may suspend the sentence of, and release, an alien)). For an illustration of the complexity of alien removability, and how judicial determinations of removability based on the commission of public offenses and the Attorney General’s ability to cancel removal can intersect, i.e. for an illustration that ties notes 81-84 together, see *Lopez v. Gonzales*, 549 U.S. 47 (2006) (holding that the underlying conduct of a state conviction must be punishable as a federal felony in order for the crime committed by an alien to be considered an “aggravated felony” for the purpose of preventing the U.S. Attorney General from being able to cancel removal under 8 U.S.C. § 1229b(a)(3)); see also *Carachuri-Rosendo v. Holder*, --- U.S. ----, ----, 130 S. Ct. 2577 (2010) (holding that where the state conviction is for a misdemeanor drug offense that has not been enhanced by a prior conviction, it is not treated

could contact the Department of Homeland Security (DHS) to determine aliens' immigration statuses under A.R.S. § 11-1051, because the provision does not make it mandatory for police to contact DHS regarding *removability*, and it was unclear whether the Law Enforcement Support Center (LESC)⁸⁶ would be able to tell officers whether the public offense committed by the alien made the alien removable.⁸⁷

The District Court's analysis was sound.⁸⁸ A.R.S. § 13-3883(A)(5) would allow Arizona state law enforcement to act as law enforcement of other states, as federal immigration and customs agents, and even as federal judges. Thus, this provision would give Arizona police far too much discretion. The S.C. Bill would, under § 23-3-1300, give South Carolina law enforcement similar powers.⁸⁹ Although the S.C. Bill would not allow law enforcement to make warrantless arrests of aliens who they had probable cause to believe had committed "public offenses," they would still be allowed to make warrantless

as a felony conviction under the Controlled Substances Act, 18 U.S.C. § 924(c)(2), for purposes of an "aggravated felony" under § 1229b(a)(3)).

⁸⁶ LESC is a continually-operating national support center administered by U.S. Immigration and Customs Enforcement (ICE), which is an agency under DHS. LESC responds to inquiries from state and local law enforcement about aliens that officers encounter during their enforcement duties. LESC also responds to inquiries from federal and state correctional and court systems concerning aliens in their custody. U.S. Immigration and Customs Enforcement, *Law Enforcement Support Center*, <http://www.ice.gov/lesc/> (last visited Nov. 16, 2010).

⁸⁷ *United States v. Arizona*, 703 F. Supp. 2d. at 1006 n.21.

⁸⁸ Though the Court's analysis of *this provision* was sound, the Court may have erred in *not* enjoining A.R.S. § 11-1051(D), which deals with transportation by state officers of aliens to in state and out-of-state federal facilities. The problem with this provision is that state officers arguably need the authorization from the Attorney General of the United States, not from a judge, to transport aliens to facilities that are outside of that State's lines. According to 8 U.S.C. § 1357(g)(1) (2010), notwithstanding 31 U.S.C. § 1342, only those officers of States or political subdivisions who are "*determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers)*", may carry out such function[s] . . ." and only pursuant to a written agreement to that effect between the Attorney General and those States or subdivisions (emphasis added). This would also invalidate South Carolina's proposed S.C. CODE ANN. § 23-3-1300(B), which is nearly identical to A.R.S. § 11-1051(D). See *infra* note 91b.

⁸⁹ See S.C. Bill, *supra* note 22a, at Section 1: § 23-3-1300(A).

arrests of persons who law enforcement had probable cause to believe “ha[d] committed an offense which [made] the person removable from the United States.”⁹⁰

This part of § 23-3-1300(A) would likely be preempted by federal law for most of the reasons provided in the District Court’s analysis,⁹¹ and because state law enforcement cannot perform the functions of federal immigration and customs agents without authorization from the Attorney General of the United States.⁹² Indeed, the Fourth Circuit Court of Appeals, in *United States v. Sosa-Carabantes*, acknowledged that 8 U.S.C. § 1357(g) established a program that “permit[ted] [U.S. Immigration and Customs Enforcement] to deputize local law enforcement officers to perform immigration enforcement activities pursuant to a written agreement” and that these deputized local enforcement agents were subject to the

⁹⁰ *Id.* The only difference between this provision in the S.C. Bill and its S.B. 1070 counterpart is that S.C. law enforcement would not be able to go so far as to make a warrantless arrest of someone who they had probable cause to believe committed a crime in another state that would be a crime if committed in South Carolina, and that would make them removable from the United States. However, the S.C. Bill would still require S.C. law enforcement to decide whether acts committed in South Carolina were removable offenses.

⁹¹ The only part of the Court’s analysis that would not apply to the S.C. provision would be the inability of one State’s law enforcement officers to know the laws of other States (S.C.’s provision does not contain the “public offenses” Section, so this part of the analysis is inapplicable). Also, the reason why only part of § 23-3-1300(A) would be preempted is because H. 4919 has a severability clause in Section 5.

⁹² See 31 U.S.C. § 1342 (2010) (stating that officers or employees of the federal government cannot accept voluntary services [from officers of States or political subdivisions] for the federal government or “employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property,” which does not include “ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property”); see also 8 U.S.C. § 1357(g)(1), *supra* note 88c; see also *id.* § 1357(g)(2) (requiring that the agreement between the Attorney General and States or subdivisions “contain a written certification that the officers or employees performing the function under the agreement . . . received adequate training regarding the enforcement of relevant Federal immigration laws” and that those officers or employees “ha[d] knowledge of, and adhere[d] to, Federal law relating to the[ir] function [under the agreement]”) (emphasis added); see also *id.* § 1357(g)(3) (mandating that all officers or employees of a State or political subdivision functioning under § 1357 be “subject to the direction and supervision of the Attorney General”) (emphasis added).

supervision of the Attorney General of the United States.⁹³ Under the § 23-3-1300(A) scheme, no deputizing would be required because S.C. law enforcement agents would be dual agents by default. However, because this part of § 23-3-1300(A) would directly conflict with Congress's purpose in regulating this area, it will likely be preempted by federal law.⁹⁴

*B. THE DISTRICT COURT'S REASONABLE CONCLUSION BASED
ON QUESTIONABLE ANALYSIS*

Section 3 of S.B. 1070: A.R.S. § 13-1509 created a state immigration registration scheme identical to that of the federal government. The only difference was in the penalty imposed: Arizona's penalty was less severe than that imposed by the federal government. The Court discussed whether this difference in penalties for violation of the immigration registration statutes would prove to be an obstacle to the federal registration scheme. This author agrees with the Court's conclusion that it would pose such an obstacle but disagrees, at least in part, with how the Court arrived at its conclusion.

**1. WILLFUL FAILURE TO COMPLETE OR CARRY AN ALIEN
REGISTRATION DOCUMENT IF THE PERSON IS IN
VIOLATION OF 8 [U.S.C. §§] 1304(e) OR 1306(a) – SECTION 3 OF
S.B. 1070: A.R.S. § 13-1509**

Section 3 provides that “a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 [U.S.C. §§] 1304(e) or 1306(a).”⁹⁵ “Violation of this section is a class 1 misdemeanor” and carries a maximum fine of \$100 and a maximum of 20 days in jail for a first offense.⁹⁶ A subsequent

⁹³ 561 F.3d 256, 257 (4th Cir. 2009).

⁹⁴ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁹⁵ A.R.S. § 13-1509(A). Though 8 U.S.C. §§ 1304(e) and 1306(a) will be discussed later, a brief introduction to them is in order here. 8 U.S.C. § 1304(e) (2010) requires all aliens, eighteen years and older, to carry in their personal possession an alien registration certificate or alien registration receipt card; and the statute imposes penalties for a violation thereof. 8 U.S.C. § 1306(a) (2010) makes it a misdemeanor for an alien who is required to apply for registration and be fingerprinted to willfully fail or refuse to so apply or be fingerprinted; and the statute imposes penalties for a violation thereof.

⁹⁶ A.R.S. § 13-1509(H).

offense carries up to 30 days in jail.⁹⁷ In either case, the violator must pay jail costs.⁹⁸ Also, except under specified circumstances, Section 3 eliminates violators' eligibility for "suspension of sentence, probation, pardon, commutation of sentence, or release from confinement on any basis"⁹⁹ The Court accurately summed up Section 3 as making violations of federal immigration registration laws state crimes subject to state penalties.¹⁰⁰ The United States opposed Section 3 by arguing, among other reasons, that "it interfere[s] with comprehensive federal alien registration law."¹⁰¹ Arizona contended that "it neither conflict[ed] with federal law nor regulat[ed] in a federally occupied field."¹⁰²

The District Court correctly quoted the U.S. Supreme Court in *Hines* as saying, "the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation[;] . . . whatever power a state may have is subordinate to supreme national law."¹⁰³ It also correctly quoted the Court in *Hines* as saying that the Federal Alien Registration Act's purpose was to "make a harmonious whole" and that it "provided a standard for alien registration in a single integrated and all-embracing system."¹⁰⁴ However, the District Court also chose a more curious quote from the *Hines* Court:

[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, *inconsistently* with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.¹⁰⁵

Though the District Court recognized that the INA is not "so comprehensive that it leaves no room for state action that impacts

⁹⁷ *Id.*

⁹⁸ *Id.* § 13-1509(E).

⁹⁹ *Id.* § 13-1509(D).

¹⁰⁰ *United States v. Arizona*, 703 F. Supp. 2d. at 998.

¹⁰¹ *Id.* (citing Plaintiff's Motion for Preliminary Injunction at 34-39).

¹⁰² *Id.* (citing Defendant's Response to Plaintiff's Motion for Preliminary Injunction at 21-22.)

¹⁰³ *Id.* (quoting *Hines*, 312 U.S. at 68) (alteration in original).

¹⁰⁴ *Id.* at 999 (quoting *Hines*, 312 U.S. at 72, 74).

¹⁰⁵ *Id.* at 998-999 (quoting *Hines*, 312 U.S. at 66-67).

aliens,”¹⁰⁶ it again referred to the *Hines* Court’s determination that the whole alien registration scheme forbids states to enact laws that conflict with or complement the federal law.¹⁰⁷

The only problem with the Court’s analysis is that it fails to explain how Arizona’s law, which mirrors the federal law in terms of its registration requirements, is *inconsistent* with Congress’s purpose.¹⁰⁸ The *Hines* Court defined the purpose of the Alien Registration Act as follows: “to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance”¹⁰⁹ Unlike *Hines*, this case involved identical state and local registration requirements. The state and federal law each contained a criminal offense for willful failure or refusal to apply for registration and to submit to fingerprinting, and a separate offense for failure to carry an alien registration certificate or receipt.¹¹⁰ The only difference between the state and federal law in this case is in their penalty provisions. It is difficult to see how Congress’ purpose would be undermined when the registration requirements are the same; the national registration system would still be uniform. The real question then becomes whether the difference in penalties constitutes inconsistency with Congress’s purpose under the INA per the *Hines* Court’s opinion.

Under 8 U.S.C. § 1306(a), willful failure or refusal to apply for registration and be fingerprinted when that application and fingerprinting are required is a misdemeanor, punishable by a fine of no more than \$1,000.00, imprisonment for no more than six months, or both.¹¹¹ Under 8 U.S.C. § 1304(e), failure of an alien eighteen years or older to carry an alien registration certificate or alien registration receipt is a misdemeanor, punishable by a fine of no more than \$100.00, imprisonment for no more than thirty days, or both for each conviction.¹¹² Section 3 lists these two violations in one subsection, (A); and, under subsection (H), each is a class 1 misdemeanor, punishable by a fine of no more than \$100.00, and no more than twenty

¹⁰⁶ *Id.* at 999 (citing *De Canas*, 424 U.S. at 358).

¹⁰⁷ *Id.* (citing *Hines*, 312 U.S. at 66-67).

¹⁰⁸ *See Hines*, 312 U.S. at 66-67.

¹⁰⁹ *Id.* at 74.

¹¹⁰ *Compare id.* at 60-61 with *United States v. Arizona*, 703 F. Supp. 2d. at 998 (citing A.R.S. § 13-1509(A), (H)).

¹¹¹ 8 U.S.C. § 1306(a) (2010).

¹¹² *Id.* § 1304(e) (2010).

days in jail for a first offense and no more than thirty days in jail for subsequent offenses.¹¹³

Because the registration requirements are the same as the federal ones, and Arizona's penalties would come into play only after adjudication, targeting and harassment of law-abiding aliens by police would not be an issue. And, looking at the District Court's analysis, it remains to be seen how Arizona's different penalty alone, which is actually more lenient than that under the federal statutes, would frustrate Congress's purpose of "provid[ing] a standard for alien registration in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens."¹¹⁴ Further, the lesser penalty imposed by the Arizona statute seems to be consistent with Congress' legislative intent in approving the Alien Registration Act, for the *Hines* Court, in a footnote, cited comments from a congressman, who indicated that the [Alien Registration Act] passed because "the punishment [was] not too great" and "some of the harshness and . . . severity of the original bill ha[d] been eliminated."¹¹⁵ Thus, the District Court's analysis seems to have some holes. Then again, the Supreme Court has not yet dealt squarely with this precise issue (identical state and federal regulations, only with differing penalties) in the context of immigration registration.¹¹⁶

A more appropriate quote from *Hines* that the District Court could have used in its analysis would have been the following:

[T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.¹¹⁷

This quotation explains why the regulation of aliens is an area of immigration law that Congress has set aside for itself. The quotation also clearly says that "the act of Congress" (which would include the

¹¹³ S.B. 1070, Section 3: A.R.S. § 13-1509(A), (H).

¹¹⁴ *Hines*, 312 U.S. at 74.

¹¹⁵ *Id.* at n.37 (quoting CONG. REC., June 22, 1940, pp. 13468-9).

¹¹⁶ The *Hines* case did involve state law penalties that were different from, and even less severe than, the federal penalty. However, the difference in severity between the respective penalties was not addressed by the Court.

¹¹⁷ *Hines*, 312 U.S. at 66 (internal quotation marks omitted).

penalty provisions) trumps “the law of the state” (which would likewise include the penalty provisions).

The District Court could also have found that Congress’ purpose, which the Supreme Court said was to create a uniform registration system “*in order to obtain the information deemed to be desirable in connection with aliens*,”¹¹⁸ was reflected in the more severe punishment for willfully failing or refusing to register and be fingerprinted, as opposed to not carrying the alien registration certificate or receipt (emphasis added).¹¹⁹ Here, Arizona made the punishment the same for both offenses,¹²⁰ thereby eliminating the distinction between the two offenses in terms of penalty and removing the heightened penalty (and its deterrent effect) for violation of the application-and-fingerprinting requirement. Because Arizona removed the heightened penalty for violation of the application-and-fingerprinting requirement, which serves a greater role in achieving Congress’s ultimate purpose (to collect information on aliens), Section 3(A), (H) is inconsistent with Congress’ purpose and frustrates Congress’s regulatory scheme. Thus, Section 3(A), (H) will likely be preempted.¹²¹

The District Court could have focused its criticism on the fact that Section 3(B) used the word “may” instead of “shall” in reference to determination of immigration status by “(1) [a] law enforcement officer who is authorized by the federal government to verify or ascertain an

¹¹⁸ *Id.* at 74.

¹¹⁹ It is worth noting that this disparity in punishment between the two offenses, at least under 8 U.S.C. §§ 1304 (e), 1306(a), did not exist at the time of *Hines* because failure to carry the registration receipt or certificate was not a federal criminal offense at the time, although Pennsylvania’s law did include it as a separate, lesser charge. *See id.* at 60-61.

¹²⁰ *See supra* note 113.

¹²¹ Because the District Court did not discuss subsection (D) (in H.B. 2162), and because it would not serve as a basis for preemption, this author will not discuss it in depth but will only mention that it makes no sense. It purports to make a convicted violator of Section 3 ineligible “for suspension of sentence, probation, pardon, commutation of sentence, or release from confinement,” except under specific circumstances, “until the sentence imposed by the court has been served or the person is eligible for release pursuant to” another specified provision of law. The part of this provision that is particularly troubling is the inclusion of the phrase “until the sentence imposed . . . has been served,” because the person cannot be eligible for suspension of sentence, probation, etc. if the sentence has already been served. Thus, this phrase should never have been included in the provision. This same strange provision is included as subsection (C) in South Carolina’s proposed S.C. Code Ann. § 16-9-470 (2010).

alien's immigration status [; or] (2) [t]he United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 [U.S.C. §] 1373(c)."¹²² The significance of this permissive language is that it would allow others not mentioned in (1) or (2), such as state law enforcement unauthorized by the U.S. Attorney General to determine a person's immigration status. State law enforcement agencies or officials, however, do not have the authority to make a determination of a person's immigration status and can only make requests of DHS to ascertain or verify a person's immigration status.¹²³ Otherwise, state law enforcement officials would become dual agents by default, possessing inherent power to serve the roles of federal immigration officers by making final determinations of who is lawfully in the United States, while also serving their concurrent role of state law enforcement. Thus, state law enforcement would have too much discretion, which was the same problem created by A.R.S. § 13-3883(A)(5), as discussed *supra* Section (A)(5). Therefore, the District Court could have used this position as grounds for its correct conclusion that Section 3 would likely be preempted.

South Carolina's parallel provision is the proposed South Carolina Code Annotated § 16-9-470.¹²⁴ This provision has a greater chance of being preempted by federal law because it is drafted more poorly than Arizona's Section 3. Not only does § 16-9-470 contain the same "may" permissive language as Arizona's Section 3(B), discussed in the preceding paragraph, but it also contains far harsher penalties than those imposed by Arizona and potentially the federal government. Specifically, subsection (D)(1) imposes, in addition to jail costs, "*not less than* five hundred dollars" for a first offense; and subsection (D)(2) imposes "*not less than* one thousand dollars" for subsequent offenses.¹²⁵ Because § 16-9-470, like Section 3(B)(H), fails to set separate fines for the offenses of willful failure or refusal to register and failure to carry an alien registration certificate or receipt, the fine for a violation for failure to carry an alien registration certificate or receipt would far exceed Congress's maximum fine of \$100.¹²⁶ And with either of these offenses, the penalty under South Carolina's law could soar to unknown heights because of the key phrase "not less

¹²² A.R.S. § 13-1509(B) (2010). It is worth noting that "shall" was in the original language of S.B. 1070, but was later changed in H.B. 2162.

¹²³ See *supra* note 92; see also 8 U.S.C. § 1373 (2010).

¹²⁴ S.C. Bill, *supra* note 22a, at Section 2: S.C. Code Ann. § 16-9-470 (2010).

¹²⁵ *Id.* § 16-9-470(D)(1), (2).

¹²⁶ Compare *id.* with 8 U.S.C. §§ 1304(e), 1306(a).

than,” which this author interprets as “at least.”¹²⁷ In addition, § 16-9-470 contains subsection (G), under which a violation of the provision would be a misdemeanor, but would become a felony if committed in connection with other various state law crimes.¹²⁸ Thus, § 16-9-470 will likely be preempted by federal law because state law enforcement “may” make immigration status determinations and check for alien registration compliance under this provision, without any limitations or restrictions on how to decide who to check,¹²⁹ which could lead to racial profiling and harassment of law-abiding aliens,¹³⁰ and could provide a possible backdoor for police to search for drugs, chemicals, weapons, etc. on alien suspects without having to have even reasonable suspicion of criminal activity.

*C. THE DISTRICT COURT’S TROUBLESOME CONCLUSIONS
BASED ON QUESTIONABLE ANALYSIS*

Section 2(B) of S.B. 1070: A.R.S. § 11-1051(B) is amongst the most controversial of S.B. 1070 and, unsurprisingly, the District Court’s analysis concerning this provision is equally controversial. This author disagrees with the District Court’s opinion as pertaining to this provision, both in terms of the conclusion reached by the Court and most of the analysis employed by the Court to arrive at this conclusion.

¹²⁷ See *supra* note 22a, at (D)(1),(2).

¹²⁸ *Id.* § 16-9-470(G)(1), (2). It is worth noting that the language of subsection (G) mirrors the language that was originally in S.B. 1070 but later removed by H.B. 2162. Compare *id.* with S.B. 1070, Section 3: § 13-1509(G)(1), (2).

¹²⁹ See *supra* note 22a, at § 16-9-470(A)-(B).

¹³⁰ See *Hines*, 312 U.S. at 74.

1. DETERMINATION OF IMMIGRATION STATUS OF SUSPECT
PURSUANT TO A LAWFUL STOP, DETENTION, OR ARREST,
BASED UPON REASONABLE SUSPICION OF UNLAWFUL
PRESENCE IN THE UNITED STATES; MANDATORY
IMMIGRATION STATUS DETERMINATION FOLLOWING AN
ARREST – SECTION 2(B) OF S.B. 1070: A.R.S. § 11-1051(B)

Section 2(B) of S.B. 1070 states the following:

For any lawful stop, detention or arrest made by [an Arizona] law enforcement official or . . . law enforcement agency . . . in the enforcement of any other law or ordinance of a county, city or town of this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released.¹³¹

The provision also provides as follows:

A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following: (1) [a] valid Arizona driver [sic] license[;] (2) [a] valid Arizona nonoperating identification license[;] (3) [a] valid tribal enrollment card or other form of tribal identification[;] [or] [i]f the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.¹³²

The District Court divided its analysis of this provision into two sections, one section analyzing the second sentence of the provision and the other section analyzing the first sentence of the provision. The following discussion will progress accordingly.

¹³¹ A.R.S. § 11-1051(B) (2010). This author will refer to A.R.S. § 11-1051(B) and S.B. 1070, Section 2(B) interchangeably.

¹³² *Id.*

a. Mandatory Immigration Status Determination upon Arrest

The Court began its analysis by comparing the language used in the original text of S.B. 1070 with the amended text in H.B. 2162. The Court correctly noted that the original S.B. 1070, Section 2(B) text began with “For any lawful contact” but was changed in H.B. 2162, Section 3(B) to read “For any lawful stop, detention or arrest.”¹³³ The Court also correctly stated that in both provisions, the second sentence was the same: “Any person who is arrested shall have the person’s immigration status determined before the person is released.”¹³⁴ However, the Court then proceeded to interpret the lack of change in the second sentence as legislative intent to keep the first two sentences independent of one another and to keep the second sentence’s meaning the same.¹³⁵

Arizona conceded that in both S.B. 1070 and H.B. 2162, the language of Section 2(B) was poorly drafted.¹³⁶ However, the logical interpretation, or plain meaning, of Section 2(B) is that the phrase “any person who is arrested,” referred to in the second sentence, should mean any person who is arrested *under that subsection*, which would be those arrests made “in the enforcement of any other law or ordinance of a county, city or town of [Arizona]” where there also existed reasonable suspicion that the suspect was an “alien and . . . unlawfully present in the United States.”¹³⁷ The Court’s logic was that the first sentence in the original S.B. 1070 did not contain the word “arrest,” so the first two sentences were independent.¹³⁸ The Court furthered this logic by reasoning that since the Legislature did not change the second sentence and only changed the first sentence from “any lawful contact” to “any lawful stop, detention or arrest,” the Legislature clearly did not intend to change the meaning of the second sentence.¹³⁹ What the Court failed to consider, however, was that one of the reasons why the Legislature may have changed “any lawful contact” to a phrase that included the word “arrest,” and why it further elaborated in the first sentence on the type of arrest, i.e. one that was for a pre-existing lawful purpose but that also gave the officer

¹³³ Compare S.B. 1070, Section 2(B) with H.B. 2162, Section 3(B).

¹³⁴ *Id.*

¹³⁵ *United States v. Arizona*, 703 F. Supp. 2d. at 994.

¹³⁶ *Id.* at n.5 (citing Defendant’s Response to Plaintiff’s Motion for Preliminary Injunction at 10.)

¹³⁷ H.B. 2162, Section 3(B).

¹³⁸ *United States v. Arizona*, 703 F. Supp. 2d. at 994.

¹³⁹ *Id.*

reasonable suspicion that they were illegal aliens, is that the Legislature was more clearly joining the first and second sentence by elaborating in the first sentence on what it meant by “arrest” in the second sentence.

Thus, contrary to the Court’s logic, the Legislature’s change of “lawful contact” to “lawful stop, detention or arrest” actually ties the first two sentences together by linking “arrest” in the first sentence with “arrest” in the second sentence. And, because the nature of the arrest was also elaborated on in the other change made to the first sentence, it made it unnecessary to define “arrest” in the second sentence. What the Court failed to mention was that the phrase “in the enforcement of any other law or ordinance of a county, city or town of this state” was also not in S.B. 1070 but was added by H.B. 2162,¹⁴⁰ likely as a clarification that the arrests referred to were not being made because the person was an alien unlawfully present in the United States but that the suspicion of their unlawful presence was in addition to some pre-existing lawful reason for arresting the suspect, i.e. for a violation of a local or state crime. As Arizona argued to the Court, “[T]he Arizona Legislature could not have intended to compel Arizona’s law enforcement officers to determine and verify the immigration status of *every single person* arrested – even for United States citizens and when there is absolutely no reason to believe the person is unlawfully present in the country.”¹⁴¹ This is why Section 2(B) further reduced the class of arrestees whose immigration status would be checked by placing after the arrestee-status-verification clause the clause creating the presumption of lawful presence in the United States based on one the four specified forms of identification.¹⁴²

Because the Court proceeded to read the second sentence of Section 2(B) independently from the first sentence, its analysis that followed was also questionable. For instance, the Court reasoned that the forms of identification that would create a presumption of lawful presence in the United States would only apply to the first sentence because only the first sentence mentioned “unlawful presence,” and because any person arrested would have to have their immigration status checked before being released; so it would not matter whether the arrestee produced any of the four forms of identification.¹⁴³ As the

¹⁴⁰ *Supra* note 133.

¹⁴¹ *United States v. Arizona*, 703 F. Supp. 2d. at 994 (quoting Defendant’s Response to Plaintiff’s Motion for Preliminary Injunction at 10.)

¹⁴² See S.B. 1070(2)(B) (as amended by H.B. 2162, Section 3(B)).

¹⁴³ *United States v. Arizona*, 703 F. Supp. 2d. at 994.

Court put it, “[a] presumption against unlawful presence would not dispose of the requirement that immigration status be checked”¹⁴⁴

The problem with this reasoning, in addition to its basis on a flawed presumption as to the independence of the first two sentences, is that the reasoning ignores the fact that the lawful presence presumption clause is part of the same subsection as the arrestee immigration verification clause (second sentence) and the lawful stop, detention or arrest clause (first sentence). The reasoning also ignores the fact that the lawful presence presumption clause does not immediately follow the first sentence. Had the Legislature intended the lawful presence presumption clause to modify only the first sentence, then it surely would have included it immediately afterwards and likely in a separate clause. Even if, *arguendo*, the Court was correct, that the first two sentences are independent and the lawful presence presumption clause only applies to the first sentence of Section 2(B), the presumption would still apply to arrests because the first sentence covers persons subject to “any lawful stop, detention, or *arrest*” (emphasis added).¹⁴⁵ The fundamental problem with the Court’s logic is that it failed to add up the changes made by the Legislature in H.B. 2162 and view those changes together with the preexisting text.

The flawed foundation of the Court’s analysis also caused it to accept the United States’ position that requisite determination of immigration status for all arrestees “conflicts with the federal law because it necessarily imposes substantial burdens on *lawful* immigrants in a way that frustrates the concern of Congress for nationally-uniform rules governing the treatment of aliens throughout the country – rules designed to ensure ‘our traditional policy of not treating aliens as a thing apart’” (emphasis added).¹⁴⁶ The Court also pointed out that Congress “manifested a purpose to [regulate immigration] in such a way as to protect the personal liberties of *law-abiding* aliens through one uniform national . . . system[] and to leave them free from the possibility of inquisitorial practices and police surveillance” (emphasis added).¹⁴⁷ The District Court therefore concluded that if Arizona law enforcement had to determine the

¹⁴⁴ *Id.*

¹⁴⁵ See *supra* note 137. It is worth noting that this author focuses only on “arrest” in the first sentence and not “stop” and “detention” because the focus here is to demonstrate the connection between the first and second sentence, which is through “arrest.”

¹⁴⁶ *United States v. Arizona*, 703 F. Supp. 2d. at 994 (quoting Plaintiff’s Motion for Preliminary Injunction at 26 (quoting *Hines*, 312 U.S. at 73)).

¹⁴⁷ *Id.* (quoting *Hines*, 312 U.S. at 74).

immigration status of every person arrested, it would “burden[] *lawfully-present* aliens because their liberty will be restricted while their status is checked[,]” and “detention time for this category of arrestee will certainly be extended during an immigration status verification” (emphasis added).¹⁴⁸ According to the Court, Section 2(B) of S.B. 1070 would require all arrestees to “prove their immigration status to the satisfaction of state authorities, thus increasing the intrusion of police presence into the lives of *legally-present* aliens (and even United States citizens), who will necessarily be swept up by this requirement” (emphasis added).¹⁴⁹

A number of problems exist with the Court’s analysis here. First, the Court (and the United States) misapplied the Supreme Court’s opinion in *Hines*. The *Hines* Court determined that Congress’ purpose in passing the Alien Registration Act of 1940 was to create a “uniform national registration system” that would “protect the personal liberties of *law-abiding* aliens” and free them from being harassed by the police through continuous “inquisitorial practices” and “surveillance” (emphasis added).¹⁵⁰ Congress was clearly concerned that law-abiding aliens would be targeted and harassed by law enforcement based on their status as aliens. The *Hines* Court echoed this concern in its comment that “opposition to laws permitting invasion of the personal liberties of *law-abiding* individuals, or singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country” (emphasis added).¹⁵¹

The District Court in this case very subtly and craftily changed a key word in the Supreme Court’s *Hines* opinion – “law-abiding” – and replaced it with the word “legally-present.”¹⁵² The United States used the word “lawful” to describe immigrants that they claimed would be “substantial[ly] burden[ed]” by Section 2(B),¹⁵³ which is a bit vague but still more accurate than the District Court’s word choice. Although

¹⁴⁸ *Id.* at 995.

¹⁴⁹ *Id.*

¹⁵⁰ *Hines*, 312 U.S. at 74.

¹⁵¹ *Id.* at 70.

¹⁵² Compare *Hines*, 312 U.S. at 74 with *United States v. Arizona*, 703 F. Supp. 2d. at 995. It is worth noting that that the District Court used “law-abiding” only one time in its opinion – when it quoted the Supreme Court in *Hines* on page 15 of its opinion. Throughout the rest of its opinion, the District Court continued to use its own phrase “legally present” as a substitute for the Supreme Court’s word choice.

¹⁵³ *United States v. Arizona*, 703 F. Supp. 2d. at 994 (quoting Plaintiff’s Motion for Preliminary Injunction at 26).

seemingly trivial at first blush, there is a tremendous difference between the word “law-abiding” and “legally-present.” An alien can be legally-present in the United States, and thus be law-abiding in that limited respect, while at the same time that alien can be engaged in criminal activity and thus not be law-abiding. Also, though being unlawfully present in the United States is not itself a crime, an alien who is not legally present in the United States cannot, by definition, be law-abiding because the alien would necessarily have had to unlawfully reenter the United States after deportation, unlawfully enter the United States, or violate the law in some other fashion in order to become unlawfully present in the United States.¹⁵⁴ Again, the Supreme Court’s concern was over police targeting *law-abiding* aliens based on their status as aliens.¹⁵⁵ Section 2(B) does not target law-abiding aliens. Indeed, the second sentence of Section 2(B) would only come into play after the person has been lawfully arrested (i.e. based on probable cause) for violation of “a law or ordinance of a county, city, or town of [Arizona].”¹⁵⁶ Thus, those persons who would fall under Section 2(B) would not be “law-abiding.” If, after an alien who police have probable cause to believe committed a state or local law violation is arrested (for not being law-abiding), and the alien cannot thereafter produce one of the four forms of identification listed in Section 2(B), law enforcement, if they reasonably suspect the arrested alien is not “legally present,” would then have the alien’s immigration status verified by the federal government pursuant to 8 U.S.C. § 1373(c) in order to determine the extent of the alien’s “un-law-abiding” activity.¹⁵⁷ The fact that the alien may be reasonably suspected of not being “legally present” cannot serve as a basis for an arrest under Section 2(B) and is only ancillary to the arrest.¹⁵⁸

The District Court then turned to the United States’ next argument, that Section 2(B) would lead to such an increased number of requests to the federal government for immigration status determination that it would “impermissibly shift the allocation of federal resources

¹⁵⁴ See 8 U.S.C. §1326 (making reentry into the United States after deportation a crime, of which unlawful presence is an element); § 1325 (making unlawful entry into the United States a crime). The District even acknowledges these crimes in a footnote. See *United States v. Arizona*, 703 F. Supp. 2d. at 988 n.3.

¹⁵⁵ *Hines*, 312 U.S. at 70, 74.

¹⁵⁶ *Supra* note 137.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

away from federal priorities.”¹⁵⁹ The Court, in a feeble attempt to support its agreement with the United States’ argument, proceeded to misapply *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 351 (2001), in which the Supreme Court held part of a state law was partially preempted because it would have given applicants to the FDA an incentive to “submit a deluge of information that the [FDA] neither want[ed] nor need[ed], resulting in additional burdens on the FDA’s evaluation of an application.”¹⁶⁰ The District Court misapplied this case because the Supreme Court’s concern was not so much that the FDA would be burdened with a lot of information, such as could result from an increased number of applicants, but rather, with a lot of *unnecessary* information (in this case, existing applicants sending more information than usual to insure that their disclosures would be sufficient in state court).¹⁶¹ The “additional burdens” on the FDA would have resulted from having to sift through the superfluous information that it “neither want[ed] nor need[ed].”¹⁶² In this case, one cannot assume that Arizona law enforcement officers or agencies would send the federal government more information than necessary to perform the immigration status verification requests; and, unless they did, *Buckman* would not apply.¹⁶³

¹⁵⁹ *United States v. Arizona*, 703 F. Supp. 2d. at 995 (quoting Plaintiff’s Motion for Preliminary Injunction at 30).

¹⁶⁰ *Id.* (quoting *Buckman*, 531 U.S. at 351).

¹⁶¹ *See Buckman*, 531 U.S. at 351.

¹⁶² *See id.*

¹⁶³ The only other cases the District Court cited were *North Dakota v. United States*, 495 U.S. 423, 458-59 (1990) (Brennan, J., concurring in plurality opinion in part and dissenting in part) and *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006). In *North Dakota*, Brennan did voice concern that the burden of state regulation on the federal government would increase if more states followed suit. 495 U.S. at 458-59. However, it will always be the case that the burden on the federal government will increase any time a state adopts regulations involving the federal government. It is for Congress, not the Supreme Court, to decide when that burden would be too great. *See id.* at 444. And Congress has thus far chosen not to limit the States’ abilities to send immigration status verification requests to DHS. As Justice Stevens, who spoke for the plurality in *North Dakota v. United States*, pointed out, “It would be both an unwise and an unwarranted extension of the intergovernmental immunity doctrine for this Court to hold that the burdens associated with [state regulations]-no matter how trivial they may prove to be-are sufficient to make them unconstitutional.” *Id.* The District Court also cited *Garrett v. City of Escondido*, 465 F. Supp. 2d at 1057, which, though it appears to support the Court’s opinion, is not a very persuasive source; it does not even have binding authority over the Arizona District Court. The fact that

The District Court did correctly point out that the Department of Homeland Security (DHS) has established the Law Enforcement Support Center (LESC), which is administered by U.S. Immigration and Customs Enforcement (ICE) and “serves as the national enforcement operations center that promptly provides immigration status and identity information to local, state, and federal law enforcement agencies regarding aliens suspected of, arrested for, or convicted of criminal activity.”¹⁶⁴ The Court also correctly pointed out that LESCE expends part of its resources on national security objectives and handling requests from other government departments.¹⁶⁵ The Court then argued that Section 2(B) would cause an increase in immigration status requests that would force the federal government to divert resources from its other “responsibilities and priorities,” implicitly referring to the aforementioned expenditures for assistance to other federal departments.¹⁶⁶

The problem with the Court’s analysis, in addition to its flawed belief that all persons arrested would have their immigration status checked, is that the Court fails to recognize that Congress has given the States the privilege to make requests to the federal government regarding the immigration status of individuals. Though the Court acknowledged 8 U.S.C. § 1373(c), which creates an obligation for the Department of Homeland Security to provide citizenship or immigration status information to any federal, state, or local agency requesting a verification or ascertainment of citizenship for individuals lawfully within the agency’s jurisdiction,¹⁶⁷ the Court failed to mention 8 U.S.C. § 1873(a), which states the following:

Notwithstanding any other provision of Federal, State, or local law, a *Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from [Department of Homeland Security] information regarding the*

the Arizona District Court had to look to a District Court in California for authority on this issue is telling.

¹⁶⁴ *United States v. Arizona*, 703 F. Supp. 2d. at 995 (quoting Plaintiff’s Motion for Preliminary Injunction at 6-7(citing Palmatier Declaration ¶¶ 3-6).) David Palmatier is the Unit Chief of LESCE. See Palmatier Declaration ¶ 1.

¹⁶⁵ *United States v. Arizona*, 703 F. Supp. 2d. at 995 (citing Palmatier Declaration ¶ 4).

¹⁶⁶ *Id.* at 995-96.

¹⁶⁷ See 8 U.S.C. § 1373(c) (2010).

*citizenship or immigration status, lawful or unlawful,
of any individual* (emphasis added).¹⁶⁸

Arguably, under this provision, the District Court, a federal government entity, does not have the jurisdiction to prohibit, or even restrict, a state law enforcement officer or agency, i.e. a state officer or government entity, from sending immigration status requests to the LESC, which is under DHS. Moreover, as the Court recognized, DHS is required, under 8 U.S.C. 1373(c), to respond to federal, *state, and local* requests for immigration status verification. As for the issue of federal resource prioritization, even if Section 2(B) led to a significant increase in immigration status verification requests, Congress has not seen fit to limit the number of requests that state and local officials and entities can make. Furthermore, according to LESC, “[t]he number of requests for information sent to LESC increased from 4,000 in FY 1996 to 807,106 in FY 2008, to 1,133,130 in FY 2010[,]setting a new record for assistance to other law enforcement agencies.”¹⁶⁹ Thus, LESC is apparently well-equipped to handle substantial increases in information requests. And even if LESC had some difficulty responding to a large influx of requests caused by Section 2(B) and similar state laws across the country, 8 U.S.C. § 1373(c) only mandates that DHS respond to immigration verification requests; it does not set forth a deadline by which DHS must respond to these requests.¹⁷⁰ Thus, the federal government could still prioritize its responses according to its available resources at the time.¹⁷¹ Therefore, the District Court’s analysis is

¹⁶⁸ *Id.* § 1373(a). This language is repeated in (b)(1) of the same section. The statute refers to the Immigration and Naturalization Service (INS), but INS no longer exists. INS’s functions are now largely operated by three agencies under the Department of Homeland Security. ICE is one of those agencies and would be implicated here.

¹⁶⁹ *Supra* note 86. It is worth noting that Palmatier, in ¶ 15 of his Declaration, concluded that “Arizona’s new law will result in an increase in the number of U.S. citizens and lawful permanent residents being queried through the LESC, reducing our ability to provide timely responses to law enforcement on serious criminal aliens.” This statement, however, stands in stark contrast to what LESC proudly terms its “Significant Accomplishments” on its website. *Compare supra* note 86 with Palmatier Declaration ¶¶ 15-18.

¹⁷⁰ *See* 8 U.S.C. § 1373(c) (2010).

¹⁷¹ To support its contention that the provision would result in an increase in immigration status requests, the Court tried to draw a distinction between mandatory and discretionary immigration status verification by law enforcement officials. *United States v. Arizona*, 703 F. Supp. 2d. at 998 n.12 (citing Plaintiff’s Motion for Preliminary Injunction at 26; Defendant’s Response to Plaintiff’s Motion for Preliminary Injunction at 20.) This author does not contest the fact that the number of requests will likely increase under a

highly questionable, and the second sentence of Section 2(B) will likely not be preempted by federal law.

The proposed South Carolina Code Annotated § 23-3-1300(A) is South Carolina's version of Arizona's Section 2(B), with a hint of A.R.S. § 13-3883(A)(5).¹⁷² Although parts of the § 23-3-1300(A) are identical to Section 2(B), the South Carolina version does have some subtle differences. One such difference is that the first part of the second sentence of § 23-3-1300(A) is drafted more soundly than Arizona's Section 2(B) in that it begins by saying, "If *the person* is arrested for an alleged violation of state or local law" (emphasis added).¹⁷³ The importance of "the person" in this phrase is that it refers back to the individual discussed in the first sentence of the Section, i.e. a person with whom law enforcement came into "lawful contact" and who law enforcement reasonably suspects is "unlawfully present in the United States."¹⁷⁴ The second sentence then mentions that law enforcement may "arrest *the person* without a warrant" and "shall determine *the person's* immigration status before *the person* is released from custody" (emphasis added).¹⁷⁵ This re-usage of the phrase "the person" connects the second sentence to the first sentence, and more clearly than did Arizona's Section 2(B).¹⁷⁶ For the reasons stated by this author in the discussion of the second sentence of Section 2(B), this part of the provision would likely not be preempted by federal law.

Another difference between § 23-3-1300(A) and Section 2(B) is that § 23-3-1300(A) allows warrantless arrests based on probable cause that the suspect has committed a removable offense. However, for the reasons discussed in Part I(A)(5), this part of the provision would be preempted by federal law.¹⁷⁷ Also, though there is another difference between the South Carolina and Arizona provisions, located in the first

mandatory-where-applicable scheme. However, for the reasons discussed, this would likely not pose a problem for the federal government.

¹⁷² The "hint" of A.R.S. § 13-3883(A)(5) referred to is the ability of state law enforcement to make a warrantless arrest of a person who officers have probable cause to believe has committed an offense that makes them removable from the United States. See *supra* Part I(A)(5); see also S.C. Bill, Section 23-3-1300(A). Otherwise, the bill is almost identical to Arizona's Section 2(B). See S.C. Bill, Section 23-3-1300(A).

¹⁷³ See S.C. Bill, Section 23-3-1300(A).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Compare S.C. Bill, Section 23-3-1300(A) with S.B. 1070, Section 2(B).

¹⁷⁷ See *supra* Part I(A)(5).

sentence of § 23-3-1300(A), this author will discuss that difference in the next section separately because the District Court discussed the first sentence of Arizona's Section 2(B) separately.

b. Immigration Status Determination During Lawful Stops, Detentions, or Arrests

After its discussion of the second sentence of Section 2(B), the District Court turned its attention to the first sentence of that provision. The United States made almost the same arguments against the first sentence of Section 2(B) as it did in its argument against the second sentence. Essentially, the United States argued that this provision would impose a substantial burden on lawfully-present aliens, in violation of *Hines*, and would "impermissibly burden[] and redirect[] federal resources away from federally-established priorities."¹⁷⁸ Because the Court noted that the United States' arguments concerning the burden on federal resources was identical to those already discussed,¹⁷⁹ this author will likewise not discuss those arguments any further.

The United States also contended that Section 2(B) "necessarily places lawfully present aliens (and even U.S. citizens) in continual jeopardy of having to demonstrate their lawful status to non-federal officials."¹⁸⁰ The United States then claimed that a number of lawfully-present aliens "who will not have readily available documentation to demonstrate that fact," such as foreign visitors under the Visa Waiver Program, asylum applicants who have not yet received an adjudication, those with temporary protected status, those who have applied for U and T non-immigrant visas, or those who have petitioned for relief under the Violence Against Women Act.¹⁸¹

The United States further argued that the burden on lawfully-present aliens would be heightened because they could be stopped for "minor, non-criminal violations of state law, including jay walking, failing to have a dog on a leash, or riding a bicycle on the sidewalk;" and because they are aliens, police would be more likely to reasonably suspect them of being in the United States unlawfully; and that

¹⁷⁸ *United States v. Arizona*, 703 F. Supp. 2d. at 996 (citing Plaintiff's Motion for Preliminary Injunction at 26).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (quoting Plaintiff's Motion for Preliminary Injunction at 26).

¹⁸¹ *Id.* at 996-97 (quoting Plaintiff's Motion for Preliminary Injunction at 26-27).

reasonable suspicion would give law enforcement the authority to, “where practicable, check the immigration status” of those lawfully-present aliens.¹⁸² Finally, the United States curiously added that the burden on lawfully-present aliens would be enhanced because “other provisions in S.B. 1070 put pressure on law enforcement agencies and officials to enforce the immigration laws vigorously.”¹⁸³

The District Court agreed completely with the federal government. The Court cited the Supreme Court’s concerns in *Hines* over police harassment of “lawfully-present”¹⁸⁴ aliens through “the possibility of inquisitorial practices and police surveillance”¹⁸⁵ and over “the important federal responsibility to maintain international relationships, for the protection of American citizens abroad as well as to ensure uniform national foreign policy.”¹⁸⁶

This author will not discuss the portion of the first sentence that pertains to “arrests,” because it was discussed earlier.¹⁸⁷ However, many of the same arguments employed in Part I(C)(1)(a), or variations thereon, are applicable here. In its discussion of the first sentence of Section 2(B), the District Court extended its flawed analysis, first by continuing to misapply *Hines*, by continuing to refer to “lawfully-present” aliens rather than the “*law-abiding*” aliens the Supreme Court referred to,¹⁸⁸ which made it far more convenient for the Court to arrive at some of its conclusions. In order for a stop or detention to be “lawful,” an officer must have reasonable suspicion of a law violation.¹⁸⁹ Thus, Section 2(B) would not target *law-abiding* aliens or require “[their] papers [to] be routinely demanded and checked”¹⁹⁰ because it would require law enforcement to have reasonable suspicion of a violation of some “other law or ordinance of a county, city, or

¹⁸² *Id.* at 997 (citing Plaintiff’s Motion for Injunctive Relief at 28-29.)

¹⁸³ *Id.* (citing Plaintiff’s Motion for Injunctive Relief at 29.) Specifically, the United States was referring to Sections 2(A) and 2(H), “which, respectively, prohibit agencies from restricting the enforcement of immigration laws and create a private right of action for legal residents to sue agencies if they believe the laws are not being enforced aggressively enough.” *Id.* at n.10.

¹⁸⁴ This is the District Court’s wording, not the Supreme Court’s. The Supreme Court’s language, as discussed, was “*law-abiding*.”

¹⁸⁵ *United States v. Arizona*, 703 F. Supp. 2d. at 997 (quoting *Hines*, 312 U.S. at 74).

¹⁸⁶ *Id.* (citing *Hines*, 312 U.S. at 62-66).

¹⁸⁷ See *supra* Part I(C)(1)(a).

¹⁸⁸ See *supra* note 152.

¹⁸⁹ *United States v. Palos-Marquez*, 591 F.3d 1272, 1274 (9th Cir. 2010).

¹⁹⁰ *United States v. Arizona*, 703 F. Supp. 2d. at 997 (quoting Plaintiff’s Motion for Preliminary Injunction at 26).

town of [Arizona]" and then *additional* reasonable suspicion that the suspect is an alien or unlawfully present in the United States before law enforcement could even attempt to determine the suspect's immigration status. Even then, law enforcement would be required to make a "reasonable attempt" to make this determination "when practicable."¹⁹¹

It is also hardly fathomable how Section 2(B) would place *law-abiding* aliens and U.S. citizens in "continual jeopardy"¹⁹² of having to present identification to law enforcement. Unless the alien was *continually* engaged in behavior that gave rise to reasonable suspicion of law violations, that alien would not be in "*continual* jeopardy" of having to produce their identification to state law enforcement. Granted, some categories of aliens, which the United States mentioned, such as foreign visitors participating in the Visa Waiver Program, applicants for asylum whose cases have not yet been adjudicated, individuals with temporary protected status, U and T non-immigrant visa applicants, and petitioners for relief under the Violence Against Women Act, may not have ready access to documentation to demonstrate that they are lawfully present within the United States.¹⁹³ However, all of these groups of aliens would have their identification stored in a federal computer database (not necessarily the DHS database), and their identification could thus be ascertained using information that the aliens *could* readily provide to state law enforcement, such as their names, addresses, where they are from, and through which program they gained access to the United States.¹⁹⁴ For similar reasons, United States citizens who are stopped or detained and do not have ready access to identification should be able to provide law enforcement with enough information whereby law enforcement would be able to ascertain their identities as citizens. The likelihood of a citizen being unable to gain access to, or provide information that would gain access to, a form of identification would be so minimal that it does not rise to the level of concern. The Court may be correct that some legal residents will be "swept up by this requirement,"¹⁹⁵ but so

¹⁹¹ See *supra* note 137.

¹⁹² This hyperbole was used by the United States in an apparently-successful attempt to shock the conscious of the Court.

¹⁹³ *United States v. Arizona*, 703 F. Supp. 2d. at 996-97 (citing Plaintiff's Motion for Preliminary Injunction at 26-27).

¹⁹⁴ This author is advocating these alternative forms of verification only for those aliens in the categories cited by the Court. Other aliens would be without excuse for not carrying their registration certificates or receipts because they are required to do so under 8 U.S.C. § 1304(e).

¹⁹⁵ *United States v. Arizona*, 703 F. Supp. 2d. at 995.

are innocent drivers who are required to produce their driver's licenses at routine traffic stops.¹⁹⁶

According to *U.S. v. Christian*, law enforcement can lawfully ask for, or even demand, a suspect's identification where the officer has reasonable suspicion of criminal activity.¹⁹⁷ Also, "[a] brief [Terry] stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time" (emphasis added).¹⁹⁸ The Ninth Circuit Court of Appeals in *Christian* further noted that in one of its previous cases, "[b]ecause an officer had reasonable suspicion of criminal activity, [it had] held that his request for identification, questions about the suspect's prior contacts with law enforcement, and a check for outstanding warrants or previous arrests, were all within the scope of the officer's authority."¹⁹⁹ Because the first sentence of Section 2(B) would only allow law enforcement, during lawful stops or detentions, to determine immigration status as part of the identification process following reasonable suspicion of some other violation of state or local law²⁰⁰ and of the person's unlawful presence in the United States, it is constitutional.²⁰¹ Furthermore, the District Court's fear that lawfully-

¹⁹⁶ The Court mentions in a footnote that it is aware of the "potentially serious Fourth Amendment problems with the inevitable increase in length of detention while immigration status is determined," an argument that the United States has raised in a separate case: *Friendly House, et al. v. Whiting, et al.*, No. CV 10-1061-PHX-SRB. *Id.* at n.6. However, because the Court fails to discuss it at length, neither will this author. This author will mention, however, that though the length of detentions would inevitably increase, with the advent of high-speed computer systems, the 4th Amendment concerns about excessively lengthy detentions seem to be without merit.

¹⁹⁷ 356 F.3d 1103, 1106 (9th Cir. 2004).

¹⁹⁸ *Id.* (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)).

¹⁹⁹ *Id.* (citing *United States v. Osborn*, 203 F.3d 1176, 1179, 1182 (9th Cir. 2000)).

²⁰⁰ It is important to remember that "arrest" is not mentioned here but is included in the first sentence of Section 2(B). It is not mentioned because it was discussed separately in *supra* Part I(C)(1)(a). In the case of an arrest, the difference would be that law enforcement would need probable cause of unlawful activity, not just reasonable suspicion, in addition to reasonable suspicion of an alien's unlawful presence in the United States.

²⁰¹ It is worth noting that the Court, in its effort to show why the number of immigration verification requests would increase (because of mandatory determinations where practicable), actually admitted that many law enforcement officials are already allowed to verify immigration status based on reasonable suspicion. *United States v. Arizona*, 703 F. Supp. 2d. at 1006 n.12.

present (and presumably law-abiding) aliens who could not readily present documentation would be “potentially subject[ed] . . . to arrest or detention” is unfounded because, as the Court in *Christian* recognized, “failure to identify oneself cannot, on its own, justify an arrest.”²⁰² The Ninth Circuit Court of Appeals, in *Osborn*, similarly noted that “interrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.”²⁰³

The United States’ argument that the impact on lawfully-present aliens from Section 2(B)’s mandatory immigration status checks would be greatly enhanced because the provision would apply to minor, non-criminal state-law violations²⁰⁴ is without merit because only those reasonably suspected of breaking these laws and who are also suspected of being unlawfully present in the United States would be affected. Again, those who are *law-abiding*, or at least those who reasonably appear to be so, would not be affected.

As for the United States’ curious argument that the provision’s impact on lawfully-present aliens will also be greatly enhanced due to the pressure on law enforcement to enforce the immigration laws vigorously,²⁰⁵ with which the Court agreed, the simple response is that law enforcement is always expected to enforce all laws vigorously. While it is true that Sections 2(A) and 2(H), respectively, prohibit agencies from restricting the enforcement of immigration laws and create a private right of action against agencies for failure to enforce the immigration laws aggressively enough,²⁰⁶ it is ludicrous for the Court to imply that police would have no discretion in enforcing

The Court’s exact wording was “Many law enforcement officials already have the *discretion* to verify immigration status if they have reasonable suspicion, in the absence of S.B. 1070.” *Id.* Thus, the Court admitted that S.B. 1070 would not create a new power for law enforcement to verify immigration status based on reasonable suspicion; it would just make it mandatory where practicable instead of completely discretionary. It is also worth noting that the “where practicable” language of Section 2(B) would suggest that verification of the immigration status of suspects would still be at least somewhat discretionary during lawful stops, detentions, or arrests.

²⁰² *Christian*, 356 F.3d at 1106.

²⁰³ 203 F.3d at 1176, 1180 (quoting *INS v. Delgado*, 466 U.S. 210, 216 (1984)).

²⁰⁴ *United States v. Arizona*, 703 F. Supp. 2d. at 997 (citing Plaintiff’s Motion for Preliminary Injunction at 28).

²⁰⁵ *Id.* (citing Plaintiff’s Motion for Preliminary Injunction at 29).

²⁰⁶ See H.B. 2162, Section 3(A), (H).

Arizona's immigration laws.²⁰⁷ Also, police always face the possibility of being sued for misconduct for failing to enforce the law in a proper manner. Besides, if a legal resident brought an action under 2(H), he or she would have the burden of proving the alleged violation, which would seem rather difficult to do. Moreover, the police officer or agency would be awarded court costs and reasonable attorney's fees if they "prevail[] by an adjudication on the merits."²⁰⁸ Furthermore, even if a law enforcement officer lost the case, he or she would be indemnified by his or her agency as long as he or she acted in good faith in enforcing the immigration laws.²⁰⁹ Thus, law enforcement, at the very least, would likely not be under any greater pressure than they already are to enforce the laws vigorously. Even still, it was inappropriate for the Court to base part of its ruling on a hypothetical assumption that law enforcement would be under so much pressure to enforce S.B. 1070 that it would target all aliens and anyone appearing to be an alien and would harass them with immigration status checks, if for no other reason, to avoid a lawsuit.

The Court correctly pointed out that in *Hines*, the Supreme Court emphasized "federal responsibility to maintain international relationships, for the protection of American citizens abroad as well as to ensure uniform national foreign policy."²¹⁰ The District Court then reasoned that it would damage the United States' foreign policy and relationships with other nations if we subjected foreign visitors to the alleged burdens imposed by the first sentence of Section 2(B).²¹¹ However, it would hardly damage our foreign relations, assuming any nations even batted an eye, if news spread throughout the global community that one of our State's law enforcement officials asked a visiting alien for identification, let alone such a request being made under the circumstances under which Section 2(B) would be implicated.²¹² If anything, it would seem that the visiting alien's home nation would be somewhat ashamed and apologetic that one of its citizens was engaged in behavior that reasonably gave rise to a suspicion, if not probable cause, of lawless activity.

²⁰⁷ See *City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999) (noting that it "flies in the face of common sense" to interpret a statutory provision containing mandatory language in regards to enforcement of a law as meaning that police would have no discretion).

²⁰⁸ See H.B. 2162, Section 3(J).

²⁰⁹ See *id.* Section 3(K).

²¹⁰ *United States v. Arizona*, 703 F. Supp. 2d. at 997 (citing *Hines*, 312 U.S. at 62-66).

²¹¹ *Id.*

²¹² See *supra* note 137.

Finally, as mentioned *supra* Part I(C)(1)(a), Congress granted state and local government entities and officials (in addition to the federal government entities and officials) the unrestricted privilege of “*sending to, or receiving from the [Department of Homeland Security] information regarding the citizenship or immigration status, lawful or unlawful, of any individual*” (emphasis added).²¹³ Also, the federal government “shall respond” to inquiries from a state or local government agency “seeking to verify or ascertain the citizenship or immigration status of *any individual within the jurisdiction of the agency for any purpose authorized by law*, by providing the requested verification or status information” (emphasis added).²¹⁴ As mentioned, a stop or detention that is based on reasonable suspicion of unlawful activity, which is required for Section 2(B) to be implicated, is a *lawful* stop or detention, i.e. one that is conducted for a “purpose authorized by law.”²¹⁵ Furthermore, no authorization agreement with the Attorney General is necessary to “communicate with the Attorney General regarding the immigration status of any individual”²¹⁶ Clearly, the LESC has the same interpretation of the federal law because it states on its webpage that it “provides timely customs information and *immigration status and identity information* and real-time assistance to *local, state and federal law enforcement agencies on aliens suspected, arrested or convicted of criminal activity*” (emphasis added).²¹⁷ This shows that LESC also interprets the federal law as allowing state and local law enforcement agencies to send immigration status requests to DHS (specifically, LESC) for aliens who are only suspected of criminal activity, as indicated by the disjunctive “or.”²¹⁸

The United States will likely not succeed on its challenge to the first sentence of Section 2(B) because: the first sentence of Section 2(B), like the second sentence, would not impose an unacceptable burden on law-abiding aliens; the first sentence, like the second sentence of Section 2(B), would not impermissibly burden federal resources and priorities, for the same reasons given *supra* Part I(C)(1)(a); and because Congress has expressly authorized state and local government entities and officials to check the immigration status of those individuals lawfully within their jurisdiction for a lawful

²¹³ See *supra* note 168a; see also 8 U.S.C. § 1373(b)(1).

²¹⁴ 8 U.S.C. § 1373(c).

²¹⁵ See *supra* note 137; see also *Palos-Marquez*, 591 F.3d at 1274.

²¹⁶ 8 U.S.C. § 1357(g)(10)(A).

²¹⁷ *Supra* note 86.

²¹⁸ *Id.*

purpose. Thus, Section 2(B) in its entirety will likely not be preempted by federal law.

In contrast, the first sentence of the proposed South Carolina Code Annotated § 23-3-1300, South Carolina's version of Section 2(B), would likely be preempted by federal law. It adopted the language of the old S.B. 1070, Section 2(B) language by using the phrase "lawful contact."²¹⁹ The problem with this language is that "lawful contact" is broad and vague, going beyond "stops, detentions, and arrests," and would cover any sort of contact with persons, as long as it is not illegal.²²⁰ The only reasonable suspicion required would be that the suspect is an alien and unlawfully present in the United States.²²¹ The police would likely use the "lawful contact," which would require no reasonable suspicion of unlawful activity if it was not a stop or detention, and no probable cause if it was not an arrest, to obtain the specific and articulable facts²²² necessary to give rise to the reasonable suspicion that the person was an alien unlawfully present in the United States. Therefore, in situations where the police would lack reasonable suspicion of some other unlawful activity, the police would be able to do through the back door what they would not be able to do through the front door.

It is true that police officers do not need reasonable suspicion to initiate contact with a suspect as long as the suspect consents.²²³ If the suspect does not give consent or withdraws it, police would need to have at least reasonable suspicion, based on specific and articulable facts in light of the totality of the circumstances, of unlawful activity to detain the suspect further.²²⁴ If the suspect ignores or refuses to answer questions, this does not give rise to reasonable suspicion.²²⁵ However, given the close connection between race or ethnicity and immigration, and because § 23-3-1300 would not require reasonable suspicion based on specific and articulable facts of unlawful activity for police to contact suspects, it would be too easy for law enforcement to racially profile or target individuals based on their status as aliens, which *Hines* forbids.²²⁶ Thus, in the absence of at least reasonable suspicion of some other unlawful activity, even if the suspect consented to the

²¹⁹ See *supra* note 133.

²²⁰ See S.C. Bill, *supra* note 22a, at Section 1: § 23-3-1300(A).

²²¹ See *id.*

²²² See *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

²²³ *United States v. Wilson*, 953 F.2d. 116, 126 (4th Cir. 1991).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Hines*, 312 U.S. at 70, 74.

police's questioning, the initiation of the encounter would be tainted because it would have been motivated by racial profiling or targeting of the suspect based on their status as an alien. Moreover, even if police learned facts about a person being an illegal alien from other people, this would almost certainly have resulted from the police approaching these people and asking them questions to that effect; and the police would almost certainly have no basis for asking other people about a person's immigration status unless they had first targeted the person based on his or her race or status as an alien.²²⁷

It is arguable that a contact motivated by racial profiling or some other form of illegal discrimination could not be a "lawful" contact and would therefore be excluded from the statutory definition. Indeed, any implementation of this provision based solely on race, color, or national origin is forbidden under the same subsection.²²⁸ However, even if this "lawful contact" was not solely based on race, color, or national origin, and even if police did not target aliens based on their status as such, these facts would not save the provision from being vague – it fails to provide police with guidance as to when and under what circumstances contact can be made. Because the phrase "lawful contact" is left undefined, and would thus fail to curb police discretion, the provision would be impermissibly vague under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.²²⁹

D. THE DISTRICT COURT'S TROUBLESOME CONCLUSIONS BASED ON SOLID ANALYSIS

Because the Court reached some incorrect conclusions earlier in its opinion, it consequently reached incorrect conclusions as to the likelihood of irreparable harm, the balance of equities, and the public interest in regard to those earlier conclusions, notwithstanding the sound analysis that it employed in doing so.

²²⁷ A tip from an informant would give rise to reasonable suspicion. *See United States v. Perkins*, 363 F.3d 317 (4th Cir. 2004) (finding reasonable suspicion where the suspect fit the description of an informant's tip). However, it would be highly unlikely that police would receive a tip from a credible informant about a person's immigration status.

²²⁸ *See supra* note 22a, at Section 1(A).

²²⁹ *See Morales*, 527 U.S. 41 (holding that an anti-gang loitering ordinance did not sufficiently curb police discretion and was thus impermissibly vague in violation of the Due Process Clause of the 14th Amendment).

1. LIKELIHOOD OF IRREPARABLE HARM

The District Court correctly stated that courts of equity can only issue equitable relief when no other remedy at law exists and irreparable harm would likely result if relief was denied.²³⁰ The District Court then cited and quoted a number of cases supporting the notion that where a State's enforcement of a statute is unconstitutionally preempted by federal law and would undermine the federal government's implementation of its policies and objectives, it would likely result in irreparable harm, even if the state statute and federal law had largely the same goals.²³¹

This author agrees with this notion and the Court's analysis, but disagrees with the Court's conclusion that all of the provisions that it enjoined would result in irreparable harm to the United States. Specifically, Arizona's Section 2(B) would not result in irreparable harm to the federal government because it would likely not be preempted by federal law and would not inhibit or undermine the federal government's ability to enforce its immigration laws. The United States, which had the burden of proving the likelihood of irreparable harm,²³² simply failed to do so for the reasons stated *supra* Part I(C)(1)(a), (b). If the United States challenges South Carolina, it will likely be able to show irreparable harm resulting from the first sentence of §23-3-1300(A) for the reasons stated *supra* Part I(C)(1)(b); from the part of § 23-3-1300(A) that allows warrantless arrests based on probable cause to believe a suspect has committed a removable offense, for the reasons stated *supra* Part I(A)(5); and from §16-9-470 for the reasons stated *supra* Part I(B)(1).

2. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST

The District Court correctly stated that "allowing a state to enforce a state law in violation of the Supremacy Clause is neither

²³⁰ *United States v. Arizona*, 703 F. Supp. 2d. at 1006 (citing *Younger v. Harris*, 401 U.S. 37, 43-44 (1971); *Winter*, 129 S.Ct. at 374-75).

²³¹ *Id.* at 1006-07 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992); *Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 878 (N.D. Tex. 2008); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 & n.14 (2000)).

²³² *Id.* at 1006 (citing *Winter*, 129 S. Ct. at 374-75).

equitable nor in the public interest.”²³³ The Court also properly found that if the enforcement of a state statute “would likely burden legal resident aliens and interfere with federal policy,” then it should be preliminarily enjoined, so that the federal government could “continue to pursue federal priorities, which is inherently in the public interest, until a final judgment is reached in this case.”²³⁴

This author agrees with these principles but not with the Court’s conclusion that all of the provisions that it enjoined warranted an injunction for the sake of equity and the public interest. Similar to the points made in the discussion on irreparable harm, Arizona’s Section 2(B) would likely not interfere with federal policy or burden *law-abiding* resident aliens, and therefore would not require an equitable remedy for the federal government to continue to pursue its immigration policies in the public interest. The United States, which had the burden of showing that it was entitled to injunctive relief,²³⁵ simply failed to do so for the reasons stated *supra* Part I(C)(1)(a), (b). If the United States challenges South Carolina, it will likely be able to show that the public interest would be served by granting it injunctive relief from the first sentence of §23-3-1300(A) for the reasons stated *supra* Part I(C)(1)(b); from the part of § 23-3-1300(A) that allows warrantless arrests based on probable cause to believe a suspect has committed a removable offense, for the reasons stated *supra* Part I(A)(5); and from §16-9-470 for the reasons stated *supra* Part I(B)(1).

II. PROPOSED CHANGES TO SOUTH CAROLINA’S PENDING IMMIGRATION STATUTE: H. 4919

The following amendments should be made to South Carolina’s pending immigration statute, H. 4919, in order to remediate controversial language and to help the statute succeed against any constitutional challenges:

²³³ *Id.* at 1007 (citing *Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009)).

²³⁴ *Id.* (citing *Am. Trucking Ass’n, Inc. v. City of L.A.*, 559 F.3d 1046, 1059-60 (9th Cir. 2009)).

²³⁵ *Id.* at 1007 (citing *Winter*, 129 S.Ct. at 374).

*A. SECTION 1. CHAPTER 3, TITLE 23 OF THE 1976 CODE IS
AMENDED BY ADDING:*

“Section 23-3-1300 (A) ~~Notwithstanding another provision of law, when a lawful contact is~~²³⁶ For any lawful contact, stop, detention, or arrest²³⁷ made by a law enforcement official or a law enforcement agency of this State or a law enforcement agency of a county, city, town, or other political subdivision of this State in the enforcement of any other law or ordinance of a county, city, or town of this State where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. ~~If the person is arrested for an alleged violation of state or local law or the officer has probable cause to believe the person to be arrested has committed an offense which makes the person removable from the United States, the law enforcement officer may arrest the person without a warrant, and the law enforcement officer or agency shall determine the person’s immigration status before the person is released from custody. The person’s immigration status must be verified with the federal government pursuant to 8 U.S.C. Section 1373(c). A law enforcement official or agency of this State or a county, municipality, or other political subdivision of this State may not solely consider race, color, or national origin in implementing the requirements of this section except to the extent permitted by the United States or South Carolina Constitution. A~~²³⁸ However, a person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

- (1) a valid South Carolina driver’s license;
- (2) a valid South Carolina identification card;
- (3) a valid tribal enrollment card or other form of tribal identification; or
- (4) if the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state, or local government issued identification.

²³⁶ The black-lined text contains those portions from the original H. 4919 language that this author has either omitted or relocated within the text.

²³⁷ The underlined portions of the text are this author’s proposed changes to the original H. 4919 language.

²³⁸ The entire portion pertaining to removable offenses is omitted for the reasons discussed *supra* Part I(A)(5), at 17-18.

If the person suspected of being unlawfully present in the United States presents any of these four forms of identification to the law enforcement officer during a lawful stop, detention, or arrest, in the enforcement of any other law or ordinance of a county, city, or town of this State, that suspected person will be presumed to not be an alien who is unlawfully present in the United States and the suspected person's immigration status shall not be verified, unless the law enforcement officer or agency has clear and convincing evidence to rebut the presumption of the suspected person's legal presence in the United States, in which case the suspected person's immigration status must be verified with the federal government pursuant to 8 United States Code Section 1373(c). If any of these four forms of identification are not presented by the suspected person to the law enforcement officer during a lawful stop, detention, or arrest, in the enforcement of any other law or ordinance of a county, city, or town of this State, a reasonable attempt must be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Following a lawful arrest in the enforcement of any other law or ordinance of a county, city, or town of this State, if the suspected person was unable produce one of the aforementioned four forms of identification, and law enforcement was unable to determine the immigration status of the suspected person, that person's immigration status must be verified with the federal government pursuant to 8 United States Code Section 1373(c) before the person is released from custody.²³⁹ A law enforcement official or agency of this State or a county, municipality, or other political subdivision of this State may not solely consider race, color, or national origin in implementing the requirements of this section except to the extent permitted by the United States or South Carolina Constitution.

(B) If an alien who is unlawfully present in the United States is convicted of a violation of State or local law, on discharge from imprisonment or on the assessment of any monetary obligation that is imposed, the United States Immigration and Customs Enforcement or

²³⁹ The reasons for these changes are discussed *supra* Part I(A)(5), at 17-18; (C)(1)(a), (b), at 35-36, 45-47. The new language is a combination of the original language, Arizona's language, and this author's language, and is meant to provide more specificity and clarity in order to combat racial profiling and curb state law enforcement's discretion.

the United States Customs and Border Protection shall be immediately notified pursuant to 8 U.S.C. Section 1373(c).²⁴⁰

(C) Notwithstanding another provision of law, a law enforcement agency may securely transport an alien who ~~the agency has received verification, according to verification from the federal government pursuant to 8 U.S.C. § 1373(c),~~ is unlawfully present in the United States and who is in the agency's custody to a federal facility in this State or to another point of transfer into federal custody that is outside the jurisdiction of the law enforcement agency. ~~A law enforcement agency shall obtain judicial authorization. A law enforcement agency shall obtain authorization from the Attorney General of the United States pursuant to 8 U.S.C. § 1357(g)(1)~~ before securely transporting an alien who is unlawfully present in the United States to a point of transfer that is outside of this State.²⁴¹

(D) In the implementation of this section, an alien's immigration status shall be determined by:

(1) a law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status; or

(2) the United States Immigration and Customs Enforcement and the United States Customs and Border Protection pursuant to 8 U.S.C. Section 1373(c).²⁴²

(E) Except as provided by federal law, officials or agencies of this State and counties, municipalities, and other political subdivisions of this State may not be prohibited or in any way be restricted from sending, receiving, or maintaining information relating to the immigration status, lawful or unlawful, of any individual or exchanging that information with another federal, state, or local governmental entity for the following official purposes:

(1) determining eligibility for any public benefit, service, or license provided by any federal, state, local or other political subdivision of this State;

²⁴⁰ This language is taken from A.R.S. § 11-1051(C). No similar language is found in the H. 4919. It is included here because it promotes cooperation with the federal authorities while preserving the right of States to punish offenders of state or local law.

²⁴¹ See *supra* note 88. The language is added to this provision to prevent future challenges to S.C. Code Ann. § 23-3-1300(B).

²⁴² The reason for these changes is discussed *supra* Part I(A)(5), at 17-18.

(2) verifying any claim of residence or domicile if determination of residence or domicile is required under the laws of this State or a judicial order issued pursuant to a civil or criminal proceeding in this State;

(3) if the person is an alien, determining whether the person is in compliance with the federal registration laws prescribed by Title II, Chapter 7 of the Federal Immigration and Nationality Act; or

(4) pursuant to 8 U.S.C. Section 1373 and 8 U.S.C. Section 1644.

(F) This section does not implement, authorize, or establish and may not be construed to implement, authorize, or establish the REAL ID act of 2005 (P.L. 109-13, division B; 119 Stat. 302), including the use of a radio frequency identification chip.

(G) A person who is a legal resident of this State may bring an action in circuit court to challenge any official or agency of this State or a county, municipality, or other political subdivision of this State that adopts or implements a policy or practice that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law. If there is a judicial finding that an entity has violated this section, the court shall order that the entity pay a civil penalty of not less than one thousand dollars and not more than five thousand dollars for each day that the policy has remained in effect after the filing of an action pursuant to this subsection.

(H) The court may award court costs and reasonable attorney fees to a person or official or agency of this State or a county, municipality, or other political subdivision of this State that prevails by an adjudication on the merits in a proceeding brought pursuant to this section.

(I) Except in relation to matters in which the officer is adjudged to have acted in bad faith, a law enforcement officer is indemnified by the law enforcement officer's agency against reasonable costs and expenses, including attorney's fees, incurred by the officer in connection with any action, suit, or proceeding brought pursuant to this section in which the officer may be a defendant by reason of the officer being or having been a member of the law enforcement agency.

(J) This section must be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."

*B. SECTION 2. ARTICLE 5, CHAPTER 9, TITLE 16 OF THE 1976
CODE IS AMENDED BY ADDING:*

“Section 16-9-470 (A) In addition to a violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. Section 1304(e) ~~or 1306(a)~~ 1306(a) or 1304(e), respectively.

(B) In the enforcement of this section, an alien’s immigration status ~~may~~ shall be determined by:

(1) a law enforcement officer who is authorized by the federal government to verify or ascertain an alien’s immigration status; or

(2) the United States Immigration and Customs Enforcement or the United States Customs and Border Protection pursuant to 8 U.S.C. Section 1373(c).

(C) A person who is sentenced pursuant to this section is not eligible for suspension of sentence, probation, pardon, commutation of sentence, or release from confinement ~~on any basis until the sentence imposed by the court has been served or the person is eligible for release pursuant to another provision of law until the person is eligible for release pursuant to another provision of law.~~²⁴³

(D) ~~In addition to another penalty prescribed by law, the court shall order the person to pay jail costs and an additional assessment in the following amounts:~~

(1) ~~not less than five hundred dollars for a first offense violation; and~~

(2) ~~not less than one thousand dollars for a second or subsequent offense pursuant to this section.~~

(D) Notwithstanding another provision of law, a law enforcement agency may securely transport an alien who, according to verification from the federal government pursuant to 8 U.S.C. § 1373(c), is unlawfully present in the United States and who is in the agency’s custody to a federal facility in this State or to another point of transfer into federal custody that is outside the jurisdiction of the law enforcement agency. A law enforcement agency shall obtain authorization from the Attorney General of the United States pursuant to 8 U.S.C. § 1357(g)(1) before securely transporting an alien who is

²⁴³ This language is added to clarify S.C. Code Ann. § 16-9-470, which otherwise would make little, if any, sense. The prior language is discussed *supra* note 121.

unlawfully present in the United States to a point of transfer that is outside of this State.²⁴⁴

(E) Any alien who willfully violates 8 U.S.C. Section 1306(a) shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$1,000 or be imprisoned not more than six months, or both. Any alien who willfully violates 8 U.S.C. Section 1304(e) shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed \$100 or be imprisoned not more than thirty days, or both.²⁴⁵

(F) In addition to these penalties or another penalty prescribed by law, the court shall order the person to pay jail costs.²⁴⁶

(G) This section does not apply to a person who maintains authorization from the federal government to remain in the United States.

~~(E) This section does not apply to a person who maintains authorization from the federal government to remain in the United States.~~

(H) Any record that relates to the immigration status of a person is admissible in any court without further foundation or testimony from a custodian of records if the record is certified as authentic by the government agency that is responsible for maintaining the record.

~~(F) Any record that relates to the immigration status of a person is admissible in any court without further foundation or testimony from a custodian of records if the record is certified as authentic by the government agency that is responsible for maintaining the record.~~

~~(G) A violation of this section is a misdemeanor, except that a violation of this section is:~~

~~(1) a Class E felony if the person violates this section while in possession of any of the following:~~

²⁴⁴ The reason for this provision is discussed *supra* notes 88 and 238. The reason why this provision is inserted a second time is because it not only fits well in its original location in Section 1(C), but also relates closely to the other provisions of Section 2.

²⁴⁵ Subsection (E) contains the exact penalty imposed by the federal statutes, 8 U.S.C. §§ 1304(e) and 1306(a). The reason for this new language is discussed *supra* Part I(B)(1), at 24-25.

²⁴⁶ Subsection (F) was not in the South Carolina bill, but is taken from A.R.S. § 13-1509(E).

- ~~(a) a controlled substance as defined in Section 44-53-110;~~
- ~~(b) precursor chemicals that are used in the manufacturing of methamphetamine in violation of Section 44-53-375;~~
- ~~(c) a firearm as provided in Section 16-23-530 or other deadly weapon; or~~
- ~~(d) property that is used for the purpose of committing an act of terrorism or a violation of Article 7, Chapter 23, Title 16.~~
- ~~(2) a Class D felony if the person either:~~
 - ~~(a) is convicted of a second or subsequent violation of this section; or~~
 - ~~(b) within sixty months before the violation, has been removed from the United States pursuant to 8 U.S.C. Section 1229(a) or has accepted a voluntary removal from the United States pursuant to 8 U.S.C. 1229(e)."~~

*C. SECTION 3. ARTICLE 5, CHAPTER 9, TITLE 16 OF THE 1976
CODE IS AMENDED BY ADDING:*

"Section 16-9-480 (A) It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway, or highway to attempt to hire or hire and pick up passengers for work at a different location ~~if the motor vehicle blocks or impedes the normal movement of traffic.~~²⁴⁷

(B) It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway, or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location ~~if the motor vehicle blocks or impedes the normal movement of traffic.~~

~~(C) It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for~~

²⁴⁷ "[I]f the motor vehicle blocks or impedes the normal movement of traffic" is omitted. This language would be too difficult to enforce. If no other drivers were coming, then a person would still be able to stop in a road to pick up a worker. Also, it would require a police officer to be right there to determine that a car was coming at the time the violator stopped in the road to pick up the worker; a car could be coming in either direction right after the person picked up the worker and began driving away, in which case the driver would no longer be "blocking or impeding the normal movement of traffic." Besides, most pickups would take place on the side of the road anyway, which would not "block or impede the normal movement of traffic."

~~work, solicit work in a public place, or perform work as an employee or independent contractor in this State.~~

~~(D) — A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for not more than thirty days.~~

~~(E) — For the purposes of this section, the term:~~

~~(1) — ‘Solicit’ means verbal or nonverbal communication by a gesture or a nod that would indicate to a reasonable person that a person is willing to be employed.~~

~~(2) — ‘Unauthorized alien’ means an alien who does not have the legal right or authorization pursuant to federal law to work in the United States as described in 8 U.S.C. 1324(a)(h)(3).”~~

D. SECTION 4

“The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.”

E. SECTION 5

“If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.”

F. SECTION 6

“This act takes effect upon approval by the Governor.”

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III. CONCLUSION

The United States District Court for the District of Arizona correctly denied the United States’ motion for preliminary injunction as to Senate Bill 1070 (as amended by House Bill 2162), Sections 1, 2(A) and (C)-(L), 4, the parts of 5 enacting A.R.S. §§ 13-2929, -2928(A) and (B), and 7-13. The District Court also correctly granted the United States’ motion for preliminary injunction as to the part of Section 5 enacting A.R.S. 13-2928(C), and Section 6 enacting A.R.S. § 13-3883(A)(5). Also, the Court, notwithstanding its weak analysis, properly enjoined Section 3 enacting A.R.S. § 13-1509. However, the Court erred in preliminarily enjoining Section 2(B) enacting A.R.S. § 11-1051(B). The Court also may have erred in failing to enjoin Section 2(D) enacting A.R.S. § 11-1051(D). These rulings by the District Court have no binding authority on South Carolina, but they may serve as an indicator of the constitutional challenges that South Carolina’s pending immigration reform bill, House Bill 4919, may face, specifically as to most of Section 1(A) enacting S.C. Code Ann. §§ 23-3-1300(A), Section 1(B) enacting S.C. Code Ann. § 23-3-1300(B), and Section 2 enacting S.C. Code Ann. § 16-9-470. Therefore, it is the hope of this author that the South Carolina Legislature will adopt at least some, if not all, all of the proposed amendments stated herein or otherwise make the necessary changes to its bill.

