

Derailment of a State Immigration Reform Train?: Limited Provisions of Arizona SB 1070 Enjoined July 28, 2010

By Kathleen Campbell Walker¹

Today, Judge Susan Bolton of the United States (U.S.) District Court in Arizona issued an historic preliminary injunction in favor of the U.S. concerning the implementation of Arizona Senate Bill 1070 (S.B. 1070) as amended by Arizona House Bill 2162 regarding immigration enforcement. The Court refused to enjoin S.B. 1070 in its entirety due to law's severability clause regarding provisions deemed to be invalid.

S.B. 1070 was set to become effective on July 29. Judge Bolton held that the enforcement of portions of S.B. 1070 would be likely to cause irreparable harm to the interests of the U.S. sufficient to warrant injunctive relief. The judge noted that, "Even though Arizona's interests may be consistent with those of the federal government, it is not in the public interest for Arizona to enforce preempted laws."

The injunction applies to the following provisions of S.B. 1070 found likely to succeed on the merits of being preempted under federal law:

1. Section 2 (ARS 11-1051) – requiring a law enforcement officer to make a reasonable attempt to determine the immigration status of a person stopped, detained, or arrested if the officer has a reasonable suspicion that the person is unlawfully present in the U.S., and requiring verification of the immigration status of any person arrested prior to release.

The Court noted that this law would have required any person who is arrested to have their immigration status determined before release. "...Requiring Arizona law enforcement officials and agencies to determine the immigration status of every person who is arrested burdens lawfully-present aliens because their liberty will be restricted while their status is checked."

2. Section 3 (ARS 13-1509) – creating a crime for the knowing failure to apply for or to fail to carry alienage registration papers under sections 266 and 264 of the Immigration and Nationality Act, as amended, respectively.

The Court agreed that the federal government has long rejected a system by which "aliens' papers are routinely demanded and checked....The Court finds that this requirement imposes an unacceptable burden on lawfully-present aliens."

3. Portion of Section 5 (ARS 13-2928(C)) – creating a crime for an unauthorized foreign national to solicit, apply, or perform work.

The Court found that with the provisions of the Immigration Reform and Control Act and other provisions in Title 8 of the U.S. Code concerning limits on the use of attestation forms and the civil penalties included for document fraud as well as the robust sanctions

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for employers who hire, continue to employ, or refer unauthorized workers, Congress had comprehensively regulated in the “field of employment of unauthorized aliens.”

4. Section 6 (ARS 13-3883) – authorizing the warrantless arrest of a person when there is probable cause to believe the person has committed a “public offense” that makes the person removable from the U.S. under federal immigration law.

The Court indicated that, “Considering the substantial complexity in determining whether a particular public offense makes an alien removable from the United States and the fact that this determination is ultimately made by federal judges, there is a substantial likelihood that officers will wrongfully arrest legal resident aliens” under this provision.

The Court did not enjoin the provisions of S.B. 1070 creating a new crime for stopping a motor vehicle to pick up day laborers and for day laborers entering vehicles if it impedes the normal movement of traffic. In addition, the Court did not enjoin provisions allowing legal residents in Arizona to sue any state official, agency, or political subdivision for adopting a policy of restricting the enforcement of federal immigration laws to less than the full extent allowed by federal law. It is important to note that the Court did not enjoin any provisions of SB 1070, which the U.S. did not make any argument to preliminarily enjoin.

Governor Brewer of Arizona has already indicated that the State of Arizona will file an expedited appeal of the injunction before the 9th Circuit Court of Appeals. In the meantime, there is a temporary bump in the road for the full impact of SB 1070 to be witnessed. In addition, whether this ruling will cause any reduction in the filing of any copycat laws remains to be seen. Judge Bolton, however, clearly recognized the validity of the federal preemption as to immigration laws.

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