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No. 10-16645

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff- Appellee,

v.

STATE OF ARIZONA
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR DISTRICT OF ARIZONA

# MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE BY THE COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION, IMMIGRANT RIGHTS, AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN) IN SUPPORT OF AFFIRMANCE

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USA v. State of Arizona, et al Doc. 136

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Pursuant to Rule 29 of the Federal Rules of Civil Procedure, the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) moves for leave to file the attached Amicus Curiae Brief in support of the Appellee United States and affirming the district court that is attached as Exhibit A. BAMN is interested in this case because it is a national organization formed in 1995 to fight against attacks on the immigrant communities of this Nation.

BAMN was initially formed to oppose the decision by the University of California Regents' decision to ban affirmative action in the UC system. BAMN secured the reversal of the Regents' ban in 2001, led the pro-affirmative-action intervention by students in *Grutter v. Bollinger*, and organized the national movement that culminated in a 50,000-person March on Washington on the day *Grutter* was argued in the Supreme Court.

BAMN has filed legal challenges to Michigan's Proposal 2 pending in the Sixth Circuit and to California's Proposition 209 pending in the United States District Court for the Northern District of California. It led the fight to keep Ward Connerly's anti-affirmative action petition off the Arizona ballot in 2008.

BAMN has successfully led the student walkouts throughout the State of California that led to the actual observance of Cesar Chavez day as a holiday in the public schools, led a statewide campaign to secure approval of the California

Dream Act, led a campaign to make University of California at Berkeley and Los Angeles sanctuary campuses, been part of marches and campaigns for driver's licenses for undocumented residents, and marches and campaigns against police brutality against Latino/a, black and other citizens and residents.

BAMN is a national organization fighting racism and the attack on immigrant rights It seeks leave to file this Amicus brief in support of the Appellee United States and in support of the undocumented and other Latino/a residents and citizens of Arizona who will be victimized by Senate Bill 1040 if it is ever allowed to go into effect.

BAMN asserts that it has made arguments in the proposed amicus brief that the appellee has not made.

By the Amicus BAMN's attorneys,
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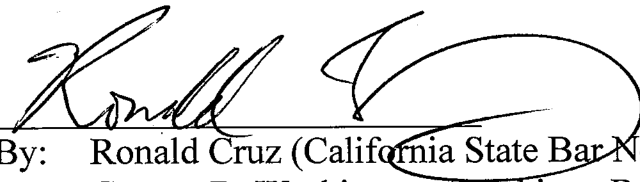

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Dated: September 30, 2010

**No. 10-16645**

I

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FOR THE NINTH CIRCUIT**

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**UNITED STATES OF AMERICA,**
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**STATE OF ARIZONA**
**Defendants-Appellants.**

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**ON APPEAL FROM THE UNITED STATES
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**BRIEF FOR THE AMICUS
COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION, IMMIGRANT RIGHTS, AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN) IN SUPPORT OF AFFIRMANCE**

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## STATEMENT OF INTEREST

The Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) is interested in this case because it is a national organization formed in 1995 to fight against racism including attacks on the immigrant communities of this Nation.

BAMN was initially formed to oppose the decision by the University of California Regents' decision to ban affirmative action in the UC system. BAMN secured the reversal of the Regents' ban in 2001, led the pro-affirmative-action intervention by students in *Grutter v. Bollinger*, and organized the national movement that culminated in a 50,000-person March on Washington on the day *Grutter* was argued in the Supreme Court.

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licenses for undocumented residents, and marches and campaigns against police brutality against Latino/a, black and other citizens and residents.

BAMN is a national organization fighting racism and the attack on immigrant rights. It seeks leave to file this Amicus brief in support of the Appellee United States and in support of the undocumented and other Latino/a residents and citizens of Arizona who will be victimized by Senate Bill 1070 if it is ever allowed to go into effect.

BAMN asserts that it has made arguments in the proposed amicus brief that the appellee has not made.

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### Cases

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*Yick Wo v. Hopkins,* 118 U.S. 356 (1886) 15,23

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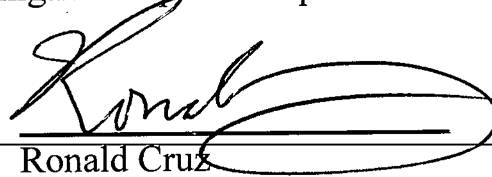
8 U.S.C. § 1357(g) 7,12

S.B. 1070 *passim*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure, counsel for the amicus Coalition to Defend Affirmative Action, Integration and Immigrant Rights and to Fight for Equality by Any Means Necessary (BAMN) certifies that no party to this appeal is a subsidiary or affiliate of a publicly-owned corporation and no publicly-owned corporation that is not a party to this appeal has a financial interest in the outcome. The amicus is a Michigan non-profit corporation.



Ronald Cruz
Attorney for Amicus BAMN

Date: September 30, 2010.

## INTRODUCTION

In *Plyler v. Doe,* the United States Supreme Court held that the Fourteenth Amendment prohibited Texas from excluding the children of undocumented immigrants from its public schools. The Court warned against creating a "shadow population," a "permanent caste of undocumented resident aliens… denied the benefits that our society makes available to citizens and lawful residents." *Plyler v. Doe,* 457 US 202, 218-19 (1982). It declared that, "by denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." *Id.* at 223.

In the 28 years since the landmark decision in *Plyler*, the millions of children who might have been excluded from schools if Texas had not been restrained have made enormous contributions to the progress of the Nation. In their overwhelming majority, they, their children and their children's children have become productive citizens.

They are part of the millions who began the Great Migration from Mexico and Central America a hundred years ago, who came to and through Texas, New Mexico, Arizona and California. These immigrants lacked the papers given to those predominantly-European immigrants who came through places like Ellis

Island. But for much of that century, papers were not needed because the southern border was not much more than a line on a map.

Especially in periods of economic distress, like those in *Plyler* and those today, the absence of papers created severe hardships for many Mexican and Central American immigrants. But it did not stop them from coming, from raising their children here, and from eventually becoming part of the American nation, of which many became legal citizens.

Arizona's SB 1070 proclaims a radically different policy. Asserting a barely concealed supposed state right to proclaim its own immigration policy, Section 1 of SB 1070 declares that Arizona will follow a policy of "attrition through enforcement." SB 1070 has created a regime of interrogations, stops, arrests, and imprisonment that aims not simply at reinforcing a permanent caste with second-class rights, but that explicitly aims at forcing a half million undocumented Mexican immigrants and their children to leave Arizona rather than face the wrath of its laws.

If SB 1070 were enacted in one state alone, it would be of enormous importance. But many states are threatening to follow Arizona. The importance of this case has therefore grown exponentially.

The district court and the United States have demonstrated that five specific provisions of SB 1070 are unlawful because the state has no authority to decree its

own immigration policies. But SB 1070 is actually far worse and far more unlawful than the United States has alleged. BAMN sets forth below why this law is even worse than the government says it is. This Court should base its decision upholding and expanding the injunction on the soundest possible legal grounds so that no person on American soil will ever again have to face the draconian regime and unlawful purpose that are embodied in Arizona's new law.

## STATEMENT OF FACTS

### I. Basic facts about the undocumented immigrants targeted by SB 1070.

We begin with a statement not of the facts regarding the application of this law, because those have not yet happened, but of the commonly-accepted facts about undocumented immigrants, about Arizona, and about the history and expressed purpose of SB 1070.

By the best estimates available, there are about eleven million undocumented residents in the United States, including 1.5 million children under 18. To this number must be added another four million children who are American citizens because they were born to these undocumented immigrants while they resided in the United States. Approximately 50 percent of these undocumented workers have been in the United States for ten years; approximately 10 percent have been here for more than 20 years. Ninety percent of the undocumented men

and 70 percent of undocumented women actively participate in the US labor force. In the nation as a whole, about 60 percent of undocumented immigrants come from Mexico.[1]

Arizona's population, which is estimated to be about a half million, differs somewhat from the national average. About ninety percent come from Mexico; a large, but unknown, share of the remaining ten percent comes from Central America. The percentage of children among the undocumented residents is also higher than the national average, and there are proportionately more minor children than in the nation as a whole who are American citizens by virtue of being born in this country. [2]

In recent decades, Arizona has been one of the nation's fastest-growing states, both demographically and economically. Between 1980 and 2008, its population more than doubled from 2.7 million to 6.5 million, growing from the 29th-largest to the 14th-largest state in the Union. In this span, Arizona's Latina/o population more than quadrupled from nearly 441,000 (16 percent) to almost 2

[1] Jeffrey S. Passel and D'Vera Cohn, "A Portrait of Unauthorized Immigrants in the United States," Pew Hispanic Center, April 14, 2009, at ii, 4, available at http://pewhispanic.org/reports/report.php?ReportID=107 (hereafter, "Portrait"); Jeffrey Passel and D'Vera Cohn, U.S. Unauthorized Immigration Flows are Down Sharply Since Mid-Decade," Pew Hispanic Center, Sept. 1, 2010, at iv, available at http://pewhispanic.org/reports/report.php?ReportID=126 (hereafter "US Unauthorized Immigration Flows").

[2] "Hispanics and Arizona's New Immigration Law," Pew Hispanic Center, April 29, 2010, at 5, 21, available at http://pewresearch.org/pubs/1579/arizona-immigration-law-fact-sheet-hispanic-population-opinion-discrimination

million (30 percent).[3] In 2006, about 37 percent of Arizona's Latina/o residents had been born in another country.[4] Of those, 79.7 percent were not citizens and only 23.4 percent reported that they spoke English "very well."[5]

As in the entire Southwest, earlier generations of Mexican and other Latina/o immigrants built the railroads, dug the mines, and tended the crops that laid the foundations for the Arizona of today. In more recent years, the Arizona Chamber of Commerce has attributed the state's remarkable growth to its Mexican immigrants:

> It's no accident that Arizona and Greater Phoenix have been among the fastest-growing economies in the nation for nearly two decades. A rapidly growing immigrant population fueled the runaway construction boom, as Arizona was seen as a prime spot for elderly people to retire, a boom that drove the state's broad-based economic expansion, an expansion that created jobs for Americans and immigrants alike."[6]

[3] Saenz, Rogelio, "Latinos, Whites, and the Shifting Demography of Arizona". Population Reference Bureau. The data used in this report come from the following sources: Frank Hobbs and Nicole Stoops, *Demographic Trends in the 20th Century, Census 2000 Special Reports, Series CENSR-4* (Washington, DC: U.S. Census Bureau, 2002); and the 1980 5% Public Use Microdata Sample (PUMS), 1990 5% PUMS, 2000 5% PUMS, and 2008 ACS Sample, downloaded from Steven Ruggles et al., *Integrated Public Use Microdata Series: Version 5.0* (Minneapolis: University of Minnesota, 2010), accessed at http://usa.ipums.org/usa/index.shtml, on July 21, 2010.

[4] Pew Hispanic Center "Arizona: Population and Labor Force Characteristics, 2000-2006", p. 3.

[5] Ibid.

[6] "Arizona needs a stable, legal workforce," *The Arizona Republic,* April 1, 2008.

In 2006, amidst this tremendous population growth, Arizona's unemployment rate stood at only 3.3 percent.[7]

The undocumented immigrants have generally filled the hardest, low-paying jobs in Arizona. In its notoriously hot summers, where temperatures regularly climb to 110 degrees, there were 106,000 foreign-born Latina/o, documented and undocumented, construction workers in 2006--which was over 43 percent of the state's total of 245,000 construction workers.[8] In 2009, it is estimated that undocumented immigrants constituted 7.5 percent of Arizona's labor force, with many sectors of the economy having far larger shares of undocumented immigrants.[9]

II. The events leading to the adoption of SB 1070.

As Arizona's Latina/o and undocumented population grew—and especially after economic conditions began to worsen—the most conservative political leaders in Arizona began winning elections by sponsoring laws that imposed new hardships on Arizona's undocumented workers.

This Court is familiar with many of those laws. In 2004, Arizona denied all public assistance to undocumented workers and required all public officials to

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[7] "Arizona squeeze on immigration angers business," *Wall Street Journal,* December 14, 2007.
[8] Pew Hispanic Center, "Arizona: Population and Labor Force Characteristics, 2000-2006", p. 27.
[9] Pew Hispanic Center, "U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade," p. 9.

report to immigration authorities any undocumented resident who applied for such assistance. In 2007, its voters passed a referendum requiring all employers to use the E-verify system before hiring workers—a system that Congress had not mandated. That law is now being challenged in the Supreme Court. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir.2009), *cert. granted*, 130 S. Ct. 3498 (2010).

In Maricopa County—by far the largest county in Arizona, with a population exceeding that of 24 states—Sheriff Joseph Arpaio has launched waves of sweeps, arrests, and incarcerations of undocumented immigrants. In January 2007, the United States Department of Justice signed an agreement with Maricopa County under Section 287(g) of the Immigration and Nationality Act. 8 U.S.C. s. 1357(g). The agreement authorized allowed the Sheriff's deputies to enforce, under the supervision of the Justice Department, the federal immigration laws. Maricopa County became the first local agency with the power to make immigration arrests on the street and to turn those arrested over to Immigration and Customs Enforcement (ICE).

After complaints against racial profiling and arrests of Latina/os for the most minor offense in numerous departments operating under Section 287(g) agreements, ICE issued a new standardized memorandum of agreement (MOA) that set enforcement priorities as removing immigrants who had been convicted of

serious offenses, who posed a threat to public safety, or had who had already been ordered removed by the immigration courts.[10] In September 2009, after widespread condemnation of Arpaio and his sweeps and mass arrests of Latina/os,[11] ICE cancelled the Maricopa County Sheriffs' authority to make street arrests under Section 287(g). Arpaio was defiant:

> I don't need the feds to do my crime suppression to opt to arrest illegals. I can do it without the federal authority, and I'm going to continue to do it. It makes no difference. It helps us. Because I don't have to do all the paperwork for the feds, number one. And number two, I won't be under their umbrella, their guidance. So I will operate the same way, nothing is going to change... [I]n these crime suppression [sweeps] we arrest anybody that violates the law. If we find during the arrests that there are illegals, we arrest them. Now the only difference [is] we're going to take 'em down to ICE. I hope they accept them, if they don't, I'll bring 'em myself to the border... They want to use me to get rid of this 287 agreement across the country... I will do another crime suppression very soon to show Washington and everybody else I'm not changing, I will not be intimidated by Congress, by alleged racial profiling investigations by the Justice Department, by all these demonstrators, these politicians, all trying to keep me from doing my job, so nothing will change. Stay tuned.[12]

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[10] Links to the MOAs for all active 287(g) programs can be found at ICE, *Delegation of Immigration Authority*, http://www.ice.gov/pi/news/factsheets/section287_g.htm.

[11] Since June 2008, the U.S. Department of Justice has been investigating allegations of civil-rights violations for racial profiling by the Maricopa County Sheriff's Office. On September 2, 2010, the U.S. Justice Department sued Arpaio for refusing to comply with requests for documents, jail tours, and interviews that the Justice Department had been requesting for 17 months. *Arizona Republic,* "Sheriff Joe Arpaio sued by Justice Department in civil-rights probe", Sept. 3, 2010.

[12] *Phoenix New Times*, "Joe Arpaio Defiant on 287(g), Vows 'Nothing Will Change,' Threatens to Deport Mexicans Himself" Oct. 5, 2009.

Shortly after Arpaio announced his defiance of Congress and the Justice Department, Arizona State Senator Russell Pearce, a former Maricopa County deputy and a long-time Arpaio ally, introduced Senate Bill 1070. On almost a straight party line vote, the Legislature passed it and, on April 23, 2010, Governor Janice Brewer signed it into law. Sheriff Arpaio then announced that he was opening tent cities to house the prisoners expected under SB 1070, proudly proclaiming that the temperature inside the tents would reach 135 degrees in the summer. He also issued press releases announcing that he was studying the possibility of arming "volunteer posses" to enforce SB 1070.[13]

National and Arizona civil rights organizations filed actions challenging SB 1070 well before July 29, 2010, when it was to go into effect. After some delay, the United States filed an action alleging that SB 1070 was invalid in its totality because the state had no right to promulgate its own immigration policies.

On July 28, 2010, the district court granted the United States' motion for a preliminary injunction. It refused to strike down the whole law, but it did restrain implementing the five most draconian provisions:

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http://blogs.phoenixnewtimes.com/bastard/2009/10/joe_arpaio_defiant_re_287g_and.php

[13] "Tent City Celebrates 17th Anniversary," Press release, Maricopa County Sheriff, July 20, 2010, and "Sheriff Arpaio in Planning Stages for Armed Volunteer Posse Illegal Immigration Enforcement Unit," Press release, September 15, 2010, both available at www.mcso.org.

- Section 2's requirement that state or local police making any lawful stop must investigate the person's immigration status if they have "reasonable suspicion" that the individual is in the United States unlawfully

- Section 2's further requirement that if an individual is arrested for any violation, including unpaid parking tickets, the state or local police must detain the individual until it can be verified that he or she is authorized to be in the United States.

- Section 3's creation of a state misdemeanor for any non-citizen who has not registered with the Department of Homeland Security (DHS) or who does not have on his person the appropriate federal registration documents.

- Section 5's creation of a state misdemeanor for an undocumented immigrant who applies for, solicits, or performs work.

- Section 6's requirement that state or local police officers arrest someone if they have probable cause to believe that the individual committed a public offense making him or her "removable" from the United States.

The district court did not enjoin Section 5's amendment to a preexisting statute barring the harboring or concealing of an undocumented immigrant and the United States had not specifically challenged provisions making it a crime to block or impede traffic by an undocumented immigrant entering a stopped motor vehicle car for transport to work or for a driver of any citizenship status to block traffic in order to obtain workers.

As set forth below, BAMN fully supports the district court's opinion striking down five of the most draconian provisions of SB 1070. For the reasons set forth below, however, BAMN asserts that this Court should restrain enforcement of the specific provisions and the entire statute because it is based on an assertion of

"state's rights" that is identical to the claims that segregationists made a generation ago, because it is an explicit attempt to use state power to force a half million Mexican and Central American immigrants to flee the state, and because its key provisions are even more draconian and unlawful than the district court or the United States have stated.

This Court should sustain the injunction on the broadest and soundest grounds possible because a half million Mexican and Central American immigrants should not be faced with the choice of fleeing the state rather than face the wrath of the unlawful crusade that has been launched against them.

## ARGUMENT

### I. SB 1070 IS AN UNLAWFUL ASSERTION OF "STATES' RIGHTS" IN AN AREA AND FOR A PURPOSE THAT VIOLATES THE CONSTITUTION OF THE UNITED STATES.

#### A. SB 1070 as a whole is an unlawful assertion of a non-existent "state right" to promulgate its own immigration policy because state officials are dissatisfied with federal immigration policies.

The United States Constitution specifically grants Congress the power to establish a "uniform rule of naturalization" and to "regulate commerce with foreign nations," and it grants the President the power to conduct the Nation's foreign relations, including those aspects of foreign relations related to the treatment of non-citizens in this country and of American citizens abroad. Const, art 1, sec 8, cl

3-4; art 2, sec 2. For over two centuries, the Supreme Court has held that those provisions grant the federal government *exclusive* authority to determine "who should and should not be admitted into the country and the conditions under which a legal entrant may remain." *De Canas v. Bica*, 424 U.S. 351, 354 (1976).

Section 1 of SB 1070 pays lip service to the United States Constitution by asserting that Arizona has a "compelling interest in the *cooperative enforcement of federal immigration laws*." S.B. 1070, § 1 (emphasis added). Arizona's Brief expands on this theme by asserting that the state is attempting to "aid" the federal government and that its assistance should be "welcomed" rather than rejected (Ariz. Br, at 1).

But these assertions are ridiculous. The United States has made clear that it does not want the "cooperation" that SB 1070 supposedly offers. Under the Supremacy Clause, Arizona has no right to force the federal government to accept "cooperation" that the federal government has rejected.

Indeed, the whole claim of cooperation ignores reality altogether. As set forth in the Statement of Facts, Congress has authorized the Attorney General to sign 287(g) agreements with local police agencies to enforce aspects of federal immigration law. But Congress insisted that the federal government supervise the state officers to assure that they carried out federal, not state priorities. 8 USC § 1357(g).

In 2007, Immigration and Customs Enforcement (ICE) signed a cooperation agreement with Arizona's most prominent law enforcement agency—the Maricopa County Sheriff's Office. But in October 2009, ICE the portion of Section 287(g) authorizing street arrests because the Sheriff's Office had failed to follow federal policies. Sheriff Arpaio then defiantly announced that he would soon conduct another immigration sweep and proclaimed that he would "not be intimidated by Congress, [or] by alleged profiling investigations by the Justice Department." See supra, at 6.

Arizona State Senator Russell Pearce proposed and the Arizona Legislature enacted SB 1070 to give Sheriff Arpaio and others a state statute to justify continuation of the same policies that the federal government had rejected as inconsistent with federal law. Sheriff Arpaio, like Bull Connor in Birmingham, could again decide what the immigration policies would be in Maricopa County.

Governor Brewer said as much when she signed the law. SB 1070, she declared, was a "tool" that Arizona could use to "solve a crisis we did not create and the federal government has refused to fix... the crisis caused by illegal immigration and Arizona's porous border."[14]

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[14] Governor Janice Brewer, "Statement by Governor Brewer on SB 1070", can be found at: http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf

These are fierce and defiant assertions of "state's rights." If Arizona's officials believe the federal government's policy is not "tough" enough, then Arizona will "fix" the problem. If Mexico and the nations of Latin America file diplomatic protests over "armed volunteer posses" hunting immigrants in the desert, Arizona's Secretary of State will handle those protests. If California and New Mexico object that SB 1070 is affecting their economy and their citizens when they travel through Arizona, those objections can also be ignored because the sovereign state of Arizona has spoken.

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In an attempt to defend this law, Arizona cites isolated phrases from federal statutes authorizing cooperation in the sharing of information and assistance on particular arrests (Arizona Brief, at 27). But the real precedent supporting Arizona's assertion of power is not statutory phrases torn from their context, but "authorities" like the 1956 "Southern Manifesto" of Southern congressmen in response to *Brown v. Board of Education*.

The southern congressmen declared their open defiance of federal attempts to enforce the *Brown* decision. They denounced federal "meddlers," vowed to uphold their "habits, traditions, and way of life," and declared that they, not the courts, were the final arbiters of what the Fourteenth Amendment required.[15]

[15] "The Southern Manifesto." From *Congressional Record*, 84th Congress Second Session. Vol. 102, part 4 (March 12, 1956). Washington, D.C.: Governmental Printing Office, 1956. 4459-4460.

Governor Brewer, supported by Senator Pearce, Sheriff Arpaio and others, has laid claim to Arizona's right to set Arizona's immigration policy in the same way that Governor George Wallace once laid claim to Alabama's "right" to set policies for its schools.

Governor Brewer, like Governor Wallace before her, insists that she has no hostility to any particular race. Indeed, SB 1070 repeatedly declares that there shall be no racial discrimination in the enforcement of the law. But *everyone knows* that this law is directed at a half million undocumented immigrants who are almost entirely of Mexican or Central American descent. Everyone knows that the only people stopped, questioned and detained under its provisions will be Latina/os. Indeed, a conscientious police officer, acting in the best of good faith, will so enforce the law because he, too, knows that almost the only people who are undocumented immigrants in Arizona are Latina/os.

The district court and, frankly, the United States have attempted to ignore the issue of race because the statute has not yet been applied. But over a hundred years ago, the Supreme Court struck down a statute was facially-neutral but discriminated against Chinese nationals. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In a case that was consolidated later into *Yick Wo,* a federal circuit court asserted: "Can a court be blind to what must be necessarily known to every intelligent person in the state?" *In re Wo Lee*, 26 F. 471 (Circuit Court, D. California 1886).

In light of the realities of Arizona's population, this Court cannot ignore the reality that the direct and collateral victims of SB 1070 will almost entirely be Latina/os.

The district court was absolutely correct in enjoining the implementation of the most draconian provisions of SB 1070 for the reasons that it gave. As the United States argued in the district court, however, the entire statute should be struck down because it is infused with the unlawful assertion of state's rights. As the United States has not argued, however, the law should also be struck down because it has an obvious and open racial target that the Court cannot ignore. SB 1070 declares that Arizona has launched a crusade to force a half million undocumented men, women and children—almost all of whom are of Mexican and Central American descent—to flee the State. Everyone, even the children who are citizens must leave.

If our history teaches us anything, this Court should quickly and emphatically strike down *every* aspect of SB 1070 because Arizona has no power to adopt it and because neither this Nation, nor any Nation, should ever again tolerate racially-targeted mass expulsions.

B. SB 1070's declared policy of "attrition through enforcement" is utterly inconsistent with the governing federal policy.

Section 1 of SB 1070 declares that the Act intends to "make attrition though enforcement the public policy of all state and local government agencies" in order

to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." S.B. 1070 § 1. Even where the specific provisions of SB 1070 parallel or incorporate federal policy, they are preempted because in Arizona's hands, these provisions are designed to further a policy that is *directly contrary to the policy* enacted by Congress and implemented by numerous administrations, including the Obama Administration.

In describing federal policy, the district court began its opinion by summarizing the relevant federal statutes. Briefly, federal law, with many exceptions, makes it a crime for a non-citizen to enter the country without authorization. The federal statutes further provide, again with many exceptions, that persons who are unlawfully present in the country or who fail to obtain or carry the necessary papers may be deported. Finally, again with important exceptions, the federal statutes provide that it is a crime for certain employers to knowingly employ persons who are unlawfully present in the country (Dist Ct Op, at 5-6).

The Brief of the United States rightly asserts that SB 1070 makes crimes of acts that are not crimes under federal law, including failing to obtain or carry immigration papers and applying for or performing work. The United States also rightly points out, that under international conventions, such acts are not normally

crimes but are enforced, if at all, through civil deportation proceedings (US Brief, at 32-34, 37-38).

With regard to deportation proceedings, the United States proclaims its vigor in enforcing these laws (US Brief, at 6-7). Those who have been deported do not dispute this assertion--although many would add the words cruel, brutal and inhumane. But leaving aside professions of "vigor," the United States tucks away in the corners of its Brief statements that reveal that it has not, and cannot, enforce the federal statutes against the 11 million people who are daily living in violation of those statutes. Put simply, undocumented workers are vital to the American economy. Deportations of 11 million people would not only destroy the economy directly but would cause massive political turmoil both in the United States and abroad. Indeed, the only governments that have been able to launch such mass expulsions are those that had already eliminated democratic rights for the entire population.

For both economic and political reasons, *every* administration, including the Obama Administration, has established priorities that target "criminals" and other "high priority" targets and that grant implicit or explicit waivers to the parents of small children, long-time residents, persons who now have, or may soon have, grounds for legal status, and a host of groups where there are "humanitarian" reasons to avoid arrests or deportation (See US Brief, at 48-50).

For partisan reasons, some place responsibility solely on President Obama for these policies. But these policies are not different from those of the Bush Administration or its predecessors. In fact, Congress has approved these policies for decades in the laws that it has enacted and the budgetary decisions it has made. For over two decades, politicians in both parties have lacked either the will or the desire to grant citizenship or to launch major deportations, but have instead settled for preserving a "shadow population," deprived of equality and subject to all forms of abuse—but nevertheless living as part of the United States.

With SB 1070, Arizona is codifying and implementing the fundamentally different policy of "attrition through enforcement."

This phrase "attrition through enforcement" is taken directly from Mark Krikorian, extremely conservative executive director of the Center for Immigration Studies. In a 2005 article, Krikorian proposed "an increase in conventional enforcement—arrests, prosecutions, deportations, asset seizures, etc.—with expanded use of verification of legal status at a variety of important points, to make it as *difficult and unpleasant as possible to live here illegally*."[16] (emphasis added) By doing this, there will be an increase in the number of "illegals" who

[16] Mark Krikorian, "Downsizing Illegal Immigration: A Strategy of Attrition through Enforcement," Center for Immigration Studies", May 2005. Available at http://www.cis.org/articles/2005/back605.html.

"give up and deport themselves" so that their number can be shrunk down to a "manageable nuisance [sic]."[17]

Calling millions of human beings a "manageable nuisance" makes clear how racist Mr. Krikorian and his policy actually are. But it is that policy—the policy of "attrition through enforcement"—that the Governor, Sheriff Arpaio, and the majority of the Arizona Legislature have now adopted.

Adding to the earlier anti-immigrant policies described above, SB 1070 now requires every police officer to stop, question, arrest, and detain undocumented immigrants under almost every conceivable situation. It then requires prosecutors to file charges and judges to sentence offenders, with Sheriff Arpaio standing ready with his tent cities, to make every incarceration as inhumane as is legally possible. The Sheriff even proposes arming "volunteer posses" to make sure that no undocumented worker escapes his grasp.

Arizona aims to force the federal government to deport as many residents as possible—and to jail those whom the federal government has decided it will not deport for "humanitarian" or other reasons. The sponsors of SB 1070, on the other hand, recognize no humanitarian exceptions. By their own words, they are engaged in a crusade to force a half million Mexican and Central American persons to leave Arizona—and to take their children with them.

[17] Ibid.

Federal immigration policies must be enacted by federal officials. Arizona has no right to unleash some officers and mandate others to carry out a cruel and dangerous policy that fundamentally contradicts the federal policy that Congress and the President have promulgated under the authority of the Constitution of the United States.

C. The district court properly found that five of SB 1070's specific provisions are utterly inconsistent with the governing federal policy.

The district court rightly found that the United States had a high probability of success on its challenges to the first sentence of Sections 2B (mandatory investigation of those "suspected" of unlawful presence in the US), the second sentence of Section 2B (ban on release of any person arrested for any offense until lawful presence verified), Section 3 (making it a state crime to be without federal papers), Section 5 (making it a crime for undocumented persons to work or to apply for work), and Section 6 (permitting arrests of individuals for whom probable cause exists they committed a crime that makes them removable).

BAMN adds three comments to the district court's and the United States' arguments demonstrating how unlawful these sections are.

First, Section 2B's mandatory interrogation of all "suspected" undocumented residents is an extraordinarily broad and undefined standard that will either allow or force officers to interrogate all persons of Latina/o descent who do not speak English, have an accent, appear unemployed, or who otherwise bear

whatever attributes an undocumented person is assumed to have. Even Governor Brewer could not state what criteria an officer should use to establish the requisite "reasonable suspicion" of unlawful status. Given Section 2B's provision authorizing a private right of action to force officers and departments to apply this statute—combined with non-citizens' inability to keep out illegally-obtained evidence in deportation proceedings and their practical inability to do so in state prosecutions under SB 1070—Section 2B is essentially a directive to interrogate with diabolical fervor all Latina/os stopped for any reason. As this provision changes every routine traffic stop into a potentially life-altering event, the dangers to residents—and officers—is obvious.

Section 3's authorization of state arrests for failure to maintain federal papers is, if anything, more draconian. With almost no exceptions, it bans suspended sentences, probation, pardons, commutations, and early releases. S.B. 1070, sec. 3D. With a twenty-day sentence for a first offense, thirty days for each subsequent offense, S.B. 1070, sec. 3H, and data banks on those who have been arrested, it authorizes repeated arrests and incarcerations of particular undocumented residents until they leave.

Finally, Section 5's imposition of criminal sanctions on undocumented persons who apply for or perform work is cruel in the extreme in addition to being inconsistent with the Congressional refusal to make looking for work or working a

crime. It is, in effect, an attempt to starve undocumented workers and their children so that they will leave.

## II. SB 1070 VIOLATES THE FOURTEENTH AMENDMENT BY LEGALIZING RACIAL DISCRIMINATION AND CREATING CONDITIONS FOR LATINA/OS IN ARIZONA SIMILAR TO CONDITIONS FOR BLACK PEOPLE IN THE OLD JIM CROW SOUTH.

The preceding sections document conditions that many outside Arizona will find unimaginable: police sweeps, mandatory questioning of anyone suspected of being undocumented, prosecutions for failing to carry papers, incarceration for attempting to find work, tent cities in the desert, armed posses of "volunteers," state employees forced to be informants for ICE, open declarations of an intent to force a half million people and their children to flee the state, fabrications about headless bodies supposedly found in the desert, and Governors and Sheriffs who declare that the President and the Congress cannot tell them how to enforce the law in "their" state.

But we have unfortunately seen it all before: in the Jim Crow regime condemned by *Brown*, the exclusion of children from the public schools condemned in *Plyler*, and the attempt to drive Chinese immigrants out of San Francisco condemned in *Yick Wo*.

SB 1070 first victims are the undocumented residents of Arizona and their children. Its next victims are the Latina/o residents of Arizona and travelers from other states, from Latin America, and from other countries who "look like" they are undocumented immigrants.

But if these methods can be used against the undocumented and against Latina/os, they can be used against black and Native American residents and then against other minorities, whites who refuse to go along, and anyone else who is out of favor with those who now rule. Indeed, Sheriff Arpaio's celebrated attempts to investigate and prosecute county officials, judges, editors and reporters are part and parcel who disagree with them have always been a part of such a regime. Mississippi was a closed society for everyone, not just its black citizens.

In the 1950s and 1960s, this Nation was rocked by the attempt to end the Jim Crow system and its consequences. In 2006, the Nation was rocked by the largest demonstrations in its history, directed against a bill that was not as repressive as this one. The Nation should not be put through these events again.

This Court should strike down SB 1070 in its entirety because it violates the Fourteenth Amendment, articles I and II of the Constitution of 1787, and every democratic principle in the Nation's history.

**CONCLUSION**

For the reasons stated, the amicus Coalition to Defend Affirmative Action, Integration, Immigrant Rights and to Fight for Equality by Any Means Necessary (BAMN) urges this Court to affirm district court and to broaden its holding by enjoining the enforcement of all aspects of SB 1070.

By the Amicus BAMN's attorneys,
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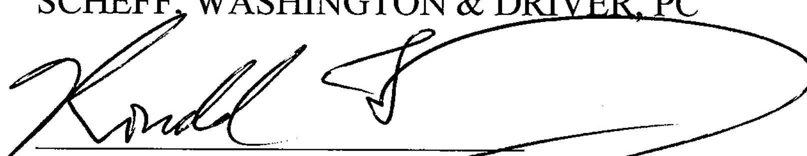

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit 32-1, that the attached Amicus Brief on Behalf of BAMN is proportionally spaced, has a type face of 14 points or more and, pursuant to the word-count feature of the word processing program used to prepare this brief, contains 5,689 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

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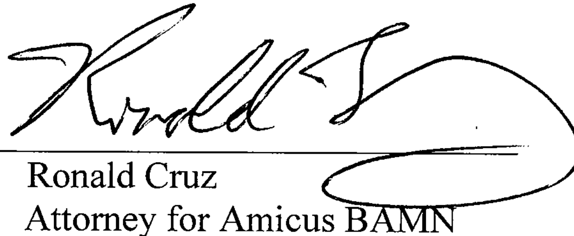

By: ______________________

Ronald Cruz
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Dated: September 30, 2010

## CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2010, I served two copies of a Motion for Leave to File a Brief Amicus Curiae in Support of the Appellee and a proposed Brief Amicus Curiae in Support of the Appellee on behalf of the Coalition to Defend Affirmative Action, Integration, Immigrant Rights, and Fight for Equality By Any Means Necessary (BAMN) on the following parties by United States mail postage prepaid:

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