Exhibit A

Brief

No. 10-16645

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The United States of America, **Plaintiff-Appellee,** **v.** **The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her official capacity,** **Defendants-Appellants.**	**D.C. CASE #** **CV 10-1413-PHX-SRB**

AMICUS CURIAE BRIEF OF SHERIFF ARPAIO

MARICOPA COUNTY
OFFICE OF SPECIAL LITIGATION SERVICES

THOMAS P. LIDDY
No. 019384
MARIA R. BRANDON
No. 004249
Senior Litigation Attorneys
MCAO Firm No. 00032007
Security Center Building
234 North Central Avenue, Suite 4400
Phoenix, Arizona 85004
Telephone: (602) 372-3860
Facsimile: (602) 506-1416
Attorneys for Amicus Curiae
Joseph M. Arpaio

Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Jurisdictional Statement

This is an appeal from an Order granting, in part, the Motion for Preliminary Injunction filed by the Plaintiff-Appellee, the United States, issuing a preliminary injunction enjoining the enforcement of the portion of Section 2 creating A.R.S. § 11-1051(B); Section 3 creating A.R.S. § 11-1509; the portion of section 5 creating A.R.S. § 13-2928(C); and Section 6 creating A.R.S. § 13-3883(A)(5). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Issue Presented for Review

Whether the District Court erred when it found that the United States was likely to succeed on the merits and imposed a preliminary injunction enjoining the State of Arizona and law enforcement personnel from the several counties from enforcing some of the laws created or amended by SB 1070?

Statement of the Case

This is an appeal, brought by Defendant State of Arizona and Janice K. Brewer, Governor of the State of Arizona, of a ruling granting, in part, a Motion for Preliminary Injunction filed by Plaintiff, the United States.

Plaintiff sought to enjoin Sections 1-6 of the "Support Our Law Enforcement and Safe Neighborhoods Act," as amended ("SB 1070") on the grounds that these sections allegedly violate the Supremacy Clause of the United States Constitution

and that Section 5 also violates the Commerce Clause.

The United States District Court granted Plaintiff's motion, in part, and issued a partial preliminary injunction enjoining the enforcement of the portions of Section 2 creating A.R.S. § 11-1051(B), Section 3 creating A.R.S. § 11-1509, the portion of section 5 creating A.R.S. § 13-2928(C), and Section 6 creating A.R.S. § 13-3883(A)(5).

Summary

Plaintiff-Appellee takes the position that the "Support Our Law Enforcement and Safe Neighborhoods Act" ("SB 1070") is unconstitutional in its entirety, that the United States is likely to prevail on the merits of the litigation and, therefore, that the partial preliminary injunction enjoining the enforcement of the portions of Section 2, creating A.R.S. §11-1051(B); Section 3, creating A.R.S. § 11-1509; the portion of Section 5, creating A.R.S. § 13-2928(C); and Section 6, creating A.R.S. § 13-3883(A)(5), should be upheld. The Plaintiff-Appellee took the position in the District Court that the Court should enjoin the remainder of SB 1070.

Sheriff Arpaio takes the position that SB1070 is constitutional in its entirety and that the United States is not likely to prevail on the merits of the litigation and the partial preliminary injunction should be reversed. SB 1070 does not conflict with federal immigration law as enacted by the United States Congress and signed

into law by the president. When analyzing SB 1070 for the purpose of determining whether to apply the preemption doctrine, the Court must examine the federal immigration laws as enacted by the Congress, and not the enforcement policies or political priorities of any particular chief executive. A "hypothetical conflict" is not sufficient to successfully establish conflict preemption. Plaintiff-Appellee has failed to meet its burden.

Argument

SB 1070 is not preempted by the Supremacy Clause

The United States must demonstrate that the challenged provisions of SB 1070 (1) purport to regulate immigration; (2) legislate in a federally-occupied field; or (3) conflict with federal law in order to successfully establish its claim for implied preemption, *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009), *cert. granted*, 130 S.Ct. 3498, 78 USLW 3065 (June 28, 2010). State laws are preempted if it appears that Congress "intended to occupy the entire field, leaving no room for the operation of state law." Even if that is not so, [courts] infer preemption ... if compliance with both state and federal law would be impossible, or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Kobar ex rel Kobar v. Novartis Corp.*, 378 F.Supp.2d 1166, 1169 (D.Ariz.,2005) (quoting *Keams v.*

Tempe Technical Inst., 39 F.3d 222, 225 (9th Cir.1994) (quoting *California v. ARC Am. Corp.,* 490 U.S. 93, 100-01, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989)). A "hypothetical conflict is not a sufficient basis for preemption." *Incalza v. Fendi North American, Inc.,* 479 F.3d 1005, 1010 (9th Cir. 2007) (quoting *Total T.V. v. Palmer Communications, Inc.*, 69 F.3d 298, 304 (9th Cir. 1995). When analyzing SB 1070 for the purpose of determining whether to apply the preemption doctrine, the Court must examine the federal immigration laws as enacted by the Congress, and not the enforcement policies or political priorities of any particular chief executive. Plaintiff-Appellee has failed to meet its burden.

Moreover, Plaintiff-Appellee's argument that this Arizona law conflicts with federal law in seeking to regulate the field of immigration law enforcement which Congress has plainly intended to occupy is undercut by the argument that Section 3 creates a misdemeanor for not carrying certain immigration papers based on an arcane federal immigration provision. Simply put, federal *policy* seems to conflict of late with federal statutes, or rather Congress' laws may be considered "arcane" by some in the Executive Branch.

It is noteworthy that recently a memorandum created by the U.S. Citizenship and Immigration Services addressed to the Director, Alejandro N. Mayorkas, from Denis Vanison, Roxana Bacon, Debra Rogers and Donald Neufeld of the Office of

Chief Counsel has been published on the subject of "Administrative Alternatives to Comprehensive Immigration Reform." (Addendum, Exhibit 1) This Memorandum suggests that immigration reform may be handled by means other than Congress and raises a question as to exactly what constitutes the federal immigration law scheme. Federal immigration law appears to be a patchwork of conflicting agencies and branches of government with no clearly defined approach. Therefore, this patchwork should not preempt the field of immigration law and trump the clear public will of the State of Arizona's legislature, which is composed of the peoples' representatives, not appointed employees.

A. Section 1- State Legislature's Intent to Regulate Immigration is Not Preempted.

The federal government cannot preempt an "intention" of a state legislature and, therefore, the District court was correct in not preempting Section 1.

B. Sections 2, 3, and 6- State "Immigration Enforcement" is Not Preempted.

Section 2 of SB 1070 has twelve subsections. *See* A.R.S. § 11-1051(A)-(L). Plaintiff purports to challenge all of Section 2, but addresses only a portion thereof. Plaintiff asserts that Section 2 attempts to authorize local law enforcement officers with the power to determine the immigration status of any person who is arrested.

(C.R. 28 at 8, lines 19-22). This assertion is false. SB 1070 expressly calls for local law enforcement to notify the federal government and request a determination in compliance with federal law, "the person's immigration status shall be verified with the federal government pursuant to 8 U.S.C. § 1373(c)." S.B. 1070, Sec. 2(b). Plaintiff –Appellee places itself in the absurd position of claiming that SB 1070 conflicts with federal law because it mandates local law enforcement to act in compliance with federal law.

Section 3 of SB 1070 mirrors federal law: "In addition to any 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. §§ 1304(e) or 1306(a)." A.R.S. § 13-1509(A). Moreover, A.R.S. § 13-1509 mirrors federal law by imposing the same misdemeanor penalties as federal law for violations of 8 U.S.C. § 1304(e). S.B. 1070 expressly "does not apply to a person who maintains authorization from the federal government to remain in the United States." A.R.S. § 13-1509(F).

Section 6 of SB 1070 adds to the authority of law enforcement officers in Arizona under A.R.S. § 13-3883(A) to arrest a person without a warrant by authorizing such arrests when "the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person

removable from the United States." Section 6 does not authorize Arizona law enforcement officers, or any part of the state government, to determine whether any person is removable. That authority is expressly reserved for the federal government.

Perhaps the best demonstration of the fact that federal government has not preempted the field of immigration enforcement is the infamous signs posted by the federal government in Southern Arizona warning people to beware of the dangers of illegal immigrants in the desert and then instructing them to call "911" rather than approach the illegal immigrants themselves. A call to "911" is a call to local law enforcement. Thus, the federal government has admitted that they are relying on local law enforcement to enforce immigration laws.

C. INA Section 287 (g) Does Not Demonstrate that Congress Has Occupied the Field of Immigration Law Enforcement.

Section 287 (g) sets forth a scheme for cooperation and collectivism in its approach to immigration law enforcement, not preemption. Furthermore, if the United States were sincere about its concern for individual states and other political subdivisions creating their own quilt panels in a "patchwork" of immigration enforcement schemes, they would have contested the several "sanctuary cities" that flout federal immigration law each and every day. With

"sanctuary city" resolutions, municipalities openly flaunt their disagreement with federal immigration laws which require visitors and immigrants to obtain federal permission to enter the United States and to keep documentation of his or her legal status on his or her person. *See* 8 U.S.C. §§ 1252c(a), 1304(e), and 1357(g). *See also, San Francisco Admin. Order,* 12H Secs. 1-6.

D. Sections 5,7,9 State's New Crimes Re Immigrant Workers are Not Preempted.

Sections 5, 7, and 9 of SB 1070 set forth new crimes concerning immigrant workers. With regard to these new crimes, there is no federal preemption as the fields of employment, health, and safety have been traditional areas of state law. *See generally, City of San Jose v. Dep't of Health Serv.*, 66 Cal.App.4th 35, 77 Cal.Rptr.2d 609 (1998).

E. Section 10- State's New Crimes for Transportation and Harboring are Not Preempted.

The State's so-called new crimes for transportation and harboring of illegal immigrants do not involve illegal immigrants; they pertain to citizens and those with legal status. Therefore, these laws cannot be preempted unless the federal government is somehow seeking to establish that the states are no longer able to pass criminal laws of their choosing.

Conclusion

This Court should reverse the findings of the District Court that the United States is likely to prevail on some of its claims and lift the partial preliminary injunction enjoining the enforcement of the portions of Section 2 creating A.R.S. § 11-1051(B), Section 3 creating A.R.S. § 11-1509, the portion of Section 5 creating A.R.S. § 13-2928(C), and Section 6 creating A.R.S. § 13-3883(A)(5).

Certificate of Compliance

Pursuant to Fed.R.App.P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, I certify that this Amicus Curiae Brief is proportionately spaced, has a typeface of 14 points or more and contains 1761 words (according to the word count feature Microsoft Word, excluding the tables, the statement of related cases and this certificate.)

Dated this 26th day of August, 2010.

MARICOPA COUNTY
OFFICE OF SPECIAL LITIGATION SERVICES

/s/Thomas P. Liddy
THOMAS P. LIDDY
Senior Litigation Attorney

Certificate of Service

When all case participants are registered for the appellate CM/ECF System:

I hereby certify that on August 26, 2010, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Thomas P. Liddy
THOMAS P. LIDDY
Senior Litigation Attorney

****

When NOT all case participants are registered for the appellate CM/ECF System:

I hereby certify that on August 26, 2010, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

NONE.

/s/ Thomas P. Liddy
THOMAS P. LIDDY
Senior Litigation Attorney