No. 10-16645

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF ARIZONA, et al.,

Defendants-Appellants.

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

AMICUS CURIAE BRIEF SUBMITTED BY THE CITY OF TUCSON IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The City of Tucson is a municipal corporation which is not required to file a disclosure statement pursuant to Federal Rules of Appellate Procedure ("FRAP") Rule 26.1.

COMPLIANCE WITH FRAP RULE 29(a)

Pursuant to FRAP Rule 29(a), the City of Tucson has the consent of all parties to file this amicus curiae brief.

STATEMENT OF INTEREST

The City of Tucson ("Tucson" or the "City") is a municipal corporation in the state of Arizona. It submits this *amicus curiae* brief in support of Appellee United States of America, because it will be substantially and severely impacted by Senate Bill ("SB") 1070 if this Court reverses the District Court's preliminary injunction of certain sections of that act.[1]

Tucson is the second largest city in the state of Arizona. As with all cities in Arizona, it is currently experiencing severe budget problems due to the loss of revenues during the recession. Tucson has already been forced to impose lay offs and mandatory furlough days for its employees during the last fiscal year and this year. As a result, Tucson has been forced to carefully prioritize its allocation of resources, particularly those used for law enforcement.

The sections of SB 1070 that have been preliminarily enjoined will mandate new duties and new priorities which will significantly reduce the resources available for those public safety issues the City has identified as its priorities including investigating homicides, home invasions, armed robberies, sexual assaults and other serious threats to the community.[2] The Tucson Police Department is already down 119 officers from its authorized strength and expects

[1] All references to SB 1070 are to SB 1070 as amended by HB 2162.

[2] *See* Declaration of Roberto Villaseñor, Chief, Tucson Police Department, Exhibit 9 to Plaintiff United States of America's Motion for Preliminary Injunction (Dkt. 6-9) attached as Appendix 1, paragraphs 8 (hereafter "Villaseñor, App. 1, ¶ ").

to be down by 200 officers by the end of the year due to reduced City revenues. The remaining officers cannot now undertake the maximum enforcement of immigration laws as mandated by SB 1070.[3]

One of the provisions of Section 2 of SB 1070 that has been preliminarily enjoined would require the City's law enforcement to set aside these priorities and to fully investigate every potential case involving an unlawful alien, regardless of how minor the initial contact with the police or code enforcement officers may have been.

Another of the provisions of Section 2 would require that Tucson determine from the federal authorities the immigration status of any person who is arrested before that person is released. Arizona law provides the City with the option when a person is arrested for a minor offense to either detain the person in jail or to cite and release the person subject to a later court proceeding. A.R.S. §13-3903.

In 2009, Tucson used this cite-and-release provision for 36,821 people. ER16. If the District Court's order is reversed, Tucson will have to either detain the thousands of people who would otherwise be released at significant increased cost or reduce its law enforcement due to the potential increased cost. Detention of the 36,821 cite-and-release arrests in 2009 would have taken 36,000 staff hours,

[3] Id. See also City of Tucson cross claim in *Escobar v. Brewer*, et. al., No. CV 10-249-TUC-SRB, Dkt. 9, ¶52-54.

the equivalent of 18 full time officers for a year. Each person incarcerated costs the City $200.38 for the first day and $82.03 per day thereafter.[4]

Tucson will also suffer substantial economic harm if the preliminary injunction is reversed. Tucson is located in Pima County and is approximately 60 miles from the international border with Mexico. Mexican tourists, 99% of whom come from the adjacent Mexican state of Sonora, add about $1 billion dollars to the Tucson economy.[5] If the mandate to check the immigration status of every one who is stopped or detained established in Section 2 of SB 1070 goes into effect, there will inevitably be a severe impact on this important sector of the local economy.

About 40% of the residents of Tucson are of Mexican or Latin American heritage or nationality and many businesses cater to this portion of the community. SB 1070 will inevitably require many of these residents to demonstrate their lawful citizenship. This not only imposes an undue and unconstitutional burden on these residents, it also creates distrust of the police department that will severely hamper the police department's ability to carry out its public safety functions with this

[4] Villaseñor, App. 1, ¶7.

[5] http://www.eller.arizona.edu/docs/press/2009/05/TucsonCitizen_Mexican_shoppers_add_one_billion_to_Tucson_economy_May12_2009.pdf. *See also*: Mexican Visitors to Arizona, Arizona Office of Tourism, Dec. 2008, available at http://www.azot.gov/documents/Final_Mexican_Visitors_to_AZ_2007_08_report.pdf.

community.[6] The cost to Tucson will be the "[u]nderreporting of crime and the increased victimization of immigrants [that will] negatively impact public safety.[7]

Tucson will be subject to lawsuits over the enforcement of immigration laws if the preliminary injunction is reversed. Tucson has already been sued over the enforcement of SB 1070, *Escobar v. Brewer, et. al.*, No. CV 10-249-TUC-SRB. While that case has been dismissed by the District Court on standing issues and is on appeal, the plaintiff Tucson police officer has made it clear that he does not believe he can implement SB 1070 consistent with the constitution and is ready to pursue that matter in court.

Tucson will also be subject to lawsuits by those individuals that believe they know better than Tucson how the city should enforce federal immigration laws. Tucson has already received a public records request on behalf of State Sen. Russell Pearce, the author of SB 1070, stating that he is "particularly concerned that [the provisions of SB 1070 not subject to the preliminary injunction] have not been fully implemented by the Tucson Police Department ("TPD")." The letter specifically notes that the City may be fined up to $5,000 per day if it is "limiting" the enforcement of federal immigration law. [8]

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[6] Villaseñor, App 1.
[7] "The 287(g) program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities" University of North Carolina, Feb. 2010, available at http://isa.unc.edu/migration/287g_report_final.pdf
[8] The letter from Judicial Watch dated September 3, 2010, is attached as Appendix 2.

At present, Senator Pearce has only focused on the provisions regarding the sending, receiving and exchange of information with federal immigration authorities since those are not subject to the District Court's preliminary injunction. If that preliminary injunction is reversed, however, Sen. Pearce or others may threaten lawsuits and $5,000 per day fines if Tucson simply states that it will follow the same priorities as the federal government – limiting investigation and apprehension of unlawful aliens to cases involving serious crimes and threats to public safety.

SB 1070 mandates as state policy the maximum enforcement of immigration laws against undocumented aliens in order to force them to leave the state. Tucson, as a political subdivision of the state, must follow that policy which will put it in conflict with federal policies. Tucson does not have the resources for such an effort and, as determined by the District Court, there is no legal basis for the State of Arizona to mandate it to do so. The City thus has an interest in the affirmance of the District Court's preliminary injunction.

The Mayor and Council of the City of Tucson have authorized the filing of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

This case tests the fundamental ability of the federal government to maintain control over immigration. The historical development of the now well recognized

paramount federal interest in immigration regulation is more fully set forth in the *amici curiae* brief filed by the cities of Flagstaff, Tolleson, San Luis and Somerton which is filed concurrently with this brief. The City of Tucson's brief focuses on the direct challenge to the federal system posed by SB 1070.

The essence of federal immigration law and policy is the careful balancing of various internal and foreign interests that weigh in favor of more or less enforcement of immigration controls. SB 1070 expressly states that it establishes a distinct and conflicting state immigration policy that eschews balance and focuses the state and all its local governments on the maximum enforcement of immigration laws to compel the exclusion of unlawful aliens. In doing so, the state law usurps federal authority and is preempted under the Supremacy clause.

ARGUMENT

A. COMPREHENSIVE FEDERAL LAW AND POLICIES PROVIDE FOR FEDERAL CONTROL OF ENFORCEMENT.

Federal immigration enforcement over the last two decades has evolved into a comprehensive set of programs to coordinate all aspects of enforcement by local agencies. Federal laws regulate the terms and conditions for immigration, the entry of immigrants, transportation, harboring, and employment of unlawful immigrants, cooperation with state and local agencies and numerous other areas in extensive detail. Those laws are supplemented with enforcement policies of the

Immigration and Custom Enforcement ("ICE") agency of the Department of Justice. Once the federal government has established a comprehensive regulatory format for an area, particularly an area such as immigration where the federal interest is paramount, the state cannot legislate to either complement or conflict with federal policy. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, (U.S., 2002); *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-374, (2000); *U.S. v. Locke*, 529 U.S. 89, 108-109 (U.S., 2000).

Where state regulation impedes the implementation of the objective of federal laws, the state will be preempted. This may be analyzed as implied preemption based either upon the federal government "occupying the field" and thus excluding state regulation or as the state regulation constituting an obstacle to the consistent enforcement of federal law. Preemption will also arise where there are direct conflicts between state and federal law. Each of these theories applies to this case and each is not necessarily mutually exclusive of the others. Ultimately, the central question is whether the state may act at all in an area where Congress has created a comprehensive and balanced prosecution and adjudicatory system without undermining Congress' careful approach. *Lozano v. City of Hazelton*, --- F.3d ---, 2010 WL 3504538, 32-34, 35 (3rd Cir., Sept. 9, 2010).

Federal immigration law emphasizes two fundamental policies - the necessity of prioritizing enforcement of the law against those who pose the greatest danger to the public and the necessity of protecting civil rights and civil liberties of aliens, immigrants and citizens. To accomplish these policies, Congress has established comprehensive programs for cooperation with local law enforcement. Congress has further directed the Secretary of Homeland Security to prioritize enforcement against aliens with serious criminal records. Brief for Appellee, pg. 11-12.

In carrying out this Congressional mandate, ICE has established the Office of State and Local Coordination which provides 14 distinct options under its Agreements of Cooperation in Communities to Enhance Safety and Security ("ACCESS") program.[9] Under ACCESS, ICE agents meet with communities requesting assistance to assess local needs and draft appropriate plans that address both the local community's priorities and those of the federal government.

The importance of federal control over the extent of local participation and cooperation is particularly evident in the 287(g) agreements.[10] Under 287(g) agreements, local "officers are authorized to question aliens as to their immigration status and removability, serve warrants for immigration violations, and issue

[9] The listing of the programs is available at http://www.ice.gov/oslc/iceaccess.htm.

[10] These agreements were authorized by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIR") of 1996 as amendments to Section 287 of the Immigration and Nationality Act ("INA"). Pub. L. 104-208, Sec. 133, Sept. 30, 1996, now codified as 8 U.S.C. §1357(g).

immigration detainers for state and local detention facilities to hold aliens for a short time after completing their sentence.", i.e. directly carry out the enforcement of immigration laws.[11]

This delegation of direct immigration enforcement authority to local law enforcement remains subject to federal training and supervision. By statute, this authority is delegated only by written agreements. The agreements require local agencies to adhere to federal law in their immigration enforcement actions, including the protection of civil rights and civil liberties. 8 U.S.C. §1357(g).

Even within this structure, the federal government has found it difficult to maintain Congressional priorities. A 2009 General Accounting Office report on the use of the agreements by 29 state and local agencies found that four of the agencies were using the delegated federal authority "to process people for minor crimes, such as speeding, contrary to the objective of the program." [12] Over 20% of the persons apprehended by local law enforcement were not initially detained by ICE and 15% of those who were detained were subsequently released. *Id.* The report states that "if all the participating agencies sought assistance to remove aliens for such minor offenses [such as carrying an open container of alcohol], ICE

[11] Department of Homeland Security, Office of Inspector General, The Performance of 287(g) Agreements, OIG-10-63 ["OIG Report], pg. 3.
[12] GAO-09-109, pg. 1, available at http://www.gao.gov/new.items/d09109.pdf.

would not have detention space to detain all of the aliens referred to them." *Id.*, pg. 4.

A subsequent report by the Office of Inspector General reached similar conclusions. The 287(g) agreements were able to increase immigration enforcement by delegating immigration enforcement to local agencies, but ICE had to do more to "ensure that its 287(g) efforts achieve a balance among immigration enforcement, local public safety priorities, and civil liberties."[13]

As with the earlier report, this report found the 287(g) agreements were not effective in focusing enforcement on federal priorities. Only 9% of the aliens apprehended by local agencies were in the top priority classification. "These results do not show that 287(g) resources have been focused on aliens who pose the greatest risk to the public." *Id.*, pg. 9. The problem with local agencies failing to follow federal priorities was also confirmed by the North Carolina study which found that 87% of the aliens booked through the program were booked for misdemeanors while only 13% were booked for felonies.[14]

Both reports found that civil rights and civil liberties had not been consistently included and monitored in the 287(g) programs. The OIG report specifically noted one jurisdiction that "is subject of (1) an ongoing racial profiling

[13] The Performance of 287(g) Agreements, OIG-10-63 ["OIG Report], pg. 7, available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf.
[14] "The 287(g) program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities" University of North Carolina, Feb. 2010, available at http://isa.unc.edu/migration/287g_report_final.pdf

lawsuit related to 287(g) program activities; (2) a lawsuit alleging physical abuse of a detained alien; and (3) A DOJ investigation into alleged discriminatory police practices, unconstitutional searches and seizures and national origin discrimination." *Id.*, pg. 23. To address this, the Report recommends that ICE incorporate a civil rights and civil liberties review into the approval process. *Id.* pg. 24.[15]

This latter description applies to the Maricopa County Sheriff's Department.[16] The 287(g) agreement with the MCSO was not renewed by the federal government, thus withdrawing the authority to directly enforce immigration laws. The authority to terminate the agreements is the critical feature of the 287(g) program – if a local agency does not conform to federal priorities then the federal government can end the delegated federal authority.

SB 1070 makes this meaningless. But for the District Court's preliminary injunction, local agencies in Arizona would have the state authority to directly enforce federal immigration laws. There would be no need for a 287(g) agreement, no need for federal training and no need for federal supervision. And there would be no reason to be restricted to federal enforcement priorities and policies.

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[15] *See also* Fn. 13.

[16] *See Ortega Melendres v. Arpaio*, 598 F.Supp.2d 1025 (D. Ariz., 2009) and "Sheriff Joe Arpaio may lose some immigrant authority," Arizona Republic, Oct. 3, 2009, available at http://www.azcentral.com/arizonarepublic/news/articles/2009/10/03/20091003arpaio-ice1003.html

B. SB 1070 DESTROYS THE BALANCED ENFORCEMENT ESTABLISHED BY FEDERAL IMMIGRATION LAW.

In adopting SB 1070 (the "Act"), the State of Arizona has stated that its intent is to regulate which immigrants are allowed to stay in the State by forcing the attrition of immigrants it determines to be unlawfully present through enforcement of new state criminal codes. SB 1070, §1. The Act compels investigation of immigration status by local law enforcement. It creates new state criminal immigration offenses such as seeking of employment by an unlawful alien, failing to comply with immigration registration requirements or committing offenses that are removable under immigration law.

The new statutory sections, while minimally cloaked in a chimera of state law, implement the State's immigration policy of forcing unlawful aliens to leave the state by compelling local law enforcement agencies to enforce federal immigration law to the fullest extent permitted by federal law. The Act then provides any state resident with the legal tool to follow up and make sure immigration law is enforced to the maximum extent. The Act was openly promoted as the "toughest immigration law" in the country. It was meant to do what its supporters say the federal government is not doing – control illegal immigration – and thus to change federal immigration enforcement.

By enacting SB 1070, the State attempts to usurp the authority to determine immigration enforcement from the exclusive plenary power of the federal

government. *Chy Lung v. Freeman*, 92 U.S. 275 (1875); *Truax v. Raich*, 239 U.S. 33, 42, 36 S.Ct. 7, 11 (1915) ("The authority to control immigration-to admit or exclude aliens is vested solely in the Federal government."); *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399 (1941), *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 933 (1976).

In contrast to Arizona's single minded mandate of maximum enforcement, Congress has carefully designed regulations that balance between various competing interests. As the Third Circuit has explained with respect to the federal provisions regulating employment of aliens:

> "Congress went to great lengths in enacting IRCA to achieve a careful balance among it competing policy objectives of effectively deterring employment of unauthorized aliens, minimizing the resulting burden on employers, and protecting authorized aliens and citizens perceived as 'foreign' from discrimination." *Lozano,* supra. at 32.

Congress specifically included equally weighted sanctions against those employers who discriminated against lawful aliens and citizens as an essential part of the bill. Id. SB 1070 has no such anti-discrimination provisions and no such balance.

In enacting employer sanctions in the IRCA, Congress also enacted equally weighted penalties for any discrimination against persons perceived as "foreign". These anti-discrimination provisions were essential to the bill. *Lozano, supra.*, pg. 33, 38. SB 1070 only contains penalties for undocumented aliens and those who

may ignore or assist them – it provides no penalty for any discrimination spawned by the Act.

Congress likewise has to balance the interests of foreign governments with national and local interests. SB 1070's failure to provide that balance has already led to a controversy in the address to Congress by the President of Mexico, as well as travel advisories to foreign citizens from Mexico and other countries.[17] It has created substantial opposition in the neighboring state of Sonora, Mexico, which has impacted foreign affairs and diminished tourism and business injuring Tucson's economy.[18]

Congress has also balanced the enforcement of immigration laws with fairness to undocumented aliens, many of whom have lived long and productive lives in this country. When the Immigration Reform and Control Act of 1986 was adopted, it included provisions for the legalization of undocumented agricultural workers. 8 U.S.C. § 1160, *U.S. v. Lopez-Velasquez*, 568 F.3d 1139, 1141 (9th Cir., 2009). On December 21, 2000, President Clinton signed The Legal Immigration and Family Equity Act of 2000 ("LIFE Act") into law which allowed certain

[17] *See also* the *amici* briefs filed by Latin American countries in *Friendly House, et. al. v. Whiting, et. al.*, 10-CV-01061-SRB, including Mexico, Dkt 299, Ecuador, Dkt 332, Argentina, Dkt 334, Bolivia, Dkt 362, Peru, Dkt 364, Columbia, Dkt 369, Guatemala, Dkt 371, Nicaragua, Dkt 373, Paraguay, Dkt 375 and El Salvador, Dkt 377. Amici briefs filed by Costa Rica, Dkt 403, and Chile, Dkt 421, were denied as untimely, Dkt 440.

[18] The Governor of Sonora canceled the June meeting of the Arizona-Mexico Commission which is held to bring business and political leaders together and foster cross border trade and relations. Arizona Daily Star, Apr. 27, 2010, available at http://azstarnet.com/news/local/border/article 44d8bc2e-523d-11df-a9b9-001cc4c03286.html.

persons to adjust their immigration status. [19] Most recently, Congress has been urged to consider legalizing the status of undocumented aliens in school or in the military who were brought to this country as babies or young children and have lived here their entire life.[20]

The stated policy and the practical effect of SB 1070 undermine these carefully balanced Congressional policies.

C. SB 1070 CONFLICTS, RATHER THAN COOPERATES, WITH FEDERAL LAW AND POLICY.

Contrary to the assertions of the State in its brief to this Court, SB 1070 does not simply "encourage" "cooperation" with the federal authorities. It mandates a specific state policy that is binding on all its political subdivisions to enforce immigration laws to the maximum extent permitted by federal law, regardless of the policies or interests of the federal government.

The State concedes this difference from federal law stating that "[t]he law is well settled that law enforcement officers *may* investigate potential violations of federal immigration law . . . Section 2(B) does no more than *require* the officers to investigate an individual's immigration status . . ." (Appellants' Opening Brief, pg. 26)(emphasis added).

[19] Pub. L. 106-554, December 21, 2000, 114 Stat 2763.
[20] http://www.immigrationpolicy.org/just-facts/dream-act-2010

The difference between Tucson's officers being allowed to assist the federal government to pursue its policies and being required to enforce the state policy is critical. The first lets Tucson adjust enforcement of immigration to target the most serious offenders in a manner compatible with its budget and federal priorities. The latter requires Tucson to enforce immigration laws without regard to its or the federal government's priorities and budgets.

i. SECTION 2(B) MANDATES INDISCRIMINATE ENFORCEMENT OF IMMIGRATION LAWS

Section 2(B) does exactly the opposite of what the federal government has been trying to achieve in federal enforcement. It promotes the indiscriminate apprehension of unlawful aliens in order to overwhelm federal facilities. It enacts state laws criminalizing immigration status rather than adhering to federal laws and creates laws that conflict with federal laws.

Under the law prior to SB 1070, Tucson could choose from the ACCESS federal/state programs to obtain the level of cooperation in enforcement that fit its public safety priorities, its resources and its communities. When Tucson officers determine that a person may be an unlawful alien, they can contact CBP officers. That discretionary decision can be based upon the individual circumstances, the City's law enforcement priorities and the officer's understanding of the federal priorities and interest in the case. The federal officers in turn can, based upon the severity of the law enforcement contact and

background of the individual, decide whether to request the person be detained. If there simply isn't a response in a reasonable time, the Tucson officers can release the person and forward the information to CBP.

That discretion to tailor immigration enforcement to the City's priorities and resources and those of the federal government is overridden by SB 1070. Section 2 of SB 1070 enacted A.R.S. §11-1051 which created a new mandate for Arizona law enforcement – the investigation of any suspected unlawful alien "where practicable" except where doing so may hinder an investigation.

The mandate to investigate any suspected unlawful alien creates the obligation both to question and pursue the matter and, if it turns out the person is an unlawful alien, to arrest. This obligation applies in all cases, whether a violent felony involving danger to the public or a misdemeanor such as a college kid drinking alcohol, someone speeding or someone involved in a minor fight. The Act's mandate is to pursue anyone who may be an illegal alien regardless of the overall danger to the community.

Section 2(B) further states that any person who is arrested must have his immigration status verified by federal officials before his release. This provision applies regardless of whether there is any basis for suspicion that a person is an alien or in the country unlawfully. Read in the context of the intent of

the Act and its other provisions, this is plainly directed at immigration enforcement within a targeted population - persons who are arrested. This contravenes established Fourth Amendment law and further intrudes upon and conflicts with federal enforcement policies.

The City of Tucson used the state procedure to cite and release persons who are arrested for 36,821 persons during fiscal year 2009. ER 16. This is more than half of the total number of individuals identified for removal by ICE by all 287(g) officers throughout the country in 2009.[21] ICE simply cannot manage an increase that large from one city, let alone every jurisdiction in the State.

ii. The District Court correctly construed the mandatory verification requirement.

The Appellants argue that this sentence of Section 2(B) should be construed to include the provisions for investigation of immigration status where there is reasonable suspicion a person is an unlawful alien and the presumption of proper status on the showing of certain documentation. Appellants' Opening Brief, pg. 39-42. In doing so, Appellants ignore the first rule of statutory construction under Arizona law:

> "[W]here the language is plain and unambiguous, courts generally must follow the text as written. If the language is clear and unambiguous, we need not resort to other methods of

[21] OIG Report, Table 2, page 6.

> statutory construction. We will give effect to each word or phrase and apply the usual and commonly understood meaning unless the legislature clearly intended a different meaning. Unless clear indication of legislative intent to the contrary exists, we will not construe the words of a statute to mean something other than what they plainly state." *Industrial Com'n of Arizona v. Old Republic Ins. Co.*, 219 P.3d 285, 287 - 288 (Ariz.App. Div. 1,2009) (internal quotations and citations omitted).

See also Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985). ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.")

Appellants further argue that to require the verification of the immigration status of everyone who all persons arrested, even including those "U.S. citizens who never had, and never will have, an 'immigration status' – would yield absurd results." Appellants' Opening Brief, pg. 41. Yet at the same time, Appellants acknowledge that Arizona law enforcement is currently required to determine the citizenship of *all* arrestees who are incarcerated. See A.R.S. §13-3906(A). Id., pg. 41, fn 22. It is hardly absurd that the inquiry into the citizenship of all persons incarcerated would be extended to all persons arrested and to include verification by federal immigration authorities.[22]

[22] Sen. Pearce states in his motion to intervene that he, unlike the Appellants, is willing to defend this provision. Dkt 22. His brief, however, does not do so. Dkt 22. Under the private cause of action in SB 1070, there will be ample opportunity for Sen. Pearce and others to assert in state court that this sentence means exactly what it says.

The City is bound by Arizona and federal law to comply with the plain, unambiguous meaning of the second sentence of Section 2(B). Thus, if this Court reverses the District Court's preliminary injunction, Tucson will have to either begin detaining thousands of persons who would have been released or not arrest them in the first place. The former will be a crippling blow to the City's finances and ability to fund public safety and the latter a crippling blow to law enforcement.

D. APPELLANTS' PROFFERED "SANCTUARY CITY" RATIONALE FOR SB 1070 IS WITHOUT MERIT

Appellants argue that a principal reason for enacting SB 1070 is to eliminate sanctuary city policies, Appellants' Opening Brief, pg. 12, and that the mandatory requirement for immigration investigations in Section 2(B) is necessary to eliminate the possibility that law enforcement officers may fear to contact federal authorities due to past sanctuary city policies. Appellants' Opening Brief, pg. 30-32. Appellants' reference to sanctuary cities is rhetorical, not substantive.

With perverse logic, Appellants initiate their discussion of "sanctuary cities" by referring to a case that establishes that federal law prohibits them. *City of New York v. United States*, 179 F.3d 26 (2nd Cir., 1999) Appellants Opening Brief, pg. 7. See also 8 U.S.C. §1644. Since federal law already prohibits "sanctuary cities", there is no need for separate state legislation – and if there is any such city in Arizona, federal law preempts such policies.

Appellants also present no evidence of "sanctuary cities" in Arizona. At the trial court level, Appellants submitted declarations to the effect that Mesa and Phoenix once had sanctuary policies, but according to these same declarations, such policies were terminated by the respective cities.[23] The other declarations produced by Appellants describe ongoing cooperation between local law enforcement and federal immigration authorities.[24] The Villaseñor declaration filed by the United States says that the Tucson Police Department likewise cooperates in the apprehension of undocumented aliens.[25] The only reference in any declaration to an officer's fear because of past policies is the declarant's inadmissible assertion that some unspecified officers felt that way.[26]

The fallacy of the Appellants' "sanctuary city" argument is that it assumes that cities would increase enforcement of federal immigration laws if they only had the legal authority to do so. The real obstacle to such enforcement is the limited resources of every governmental entity, including the federal government, not any lack of will or legal authority.

Curiously, the Appellants steer clear from the purpose stated in Section 1 of SB 1070 which is to force the attrition of illegal aliens from the state. That is the purpose the cities must follow and the state courts must enforce. That is a purpose

[23] ER 122-25 (Gafvert/Mesa), ER 126-31 (Glover/Mesa), ER 109-114 (Marino/Phoenix).
[24] ER 253-56 (Kirkham/Nogales), ER 132-137 (Vasquez/Gila River).
[25] Villaseñor, App1, ¶4
[26] ER 114.

that is patently a matter of immigration and is not within any traditional state jurisdiction.

CONCLUSION

SB 1070 threatened to place Tucson in a position where is could not comply with state law, federal law and the constitution at the same time and where is would be subject to fines for simply following federal enforcement policies. It also threatened to severely disrupt the budgeting and provision of fundamental public safety services to the community while sowing distrust and discrimination. The District Court's preliminary injunction has deferred that fate for the present. This Court should affirm that decision for the future.

DATED this 30th day of September, 2010.

MICHAEL G. RANKIN
City Attorney

By: */s/ Michael W. L. McCrory*
Michael W.L. McCrory
Principal Assistant City Attorney

STATEMENT OF RELATED CASES

Counsel for *Amiciae Curiae* is unaware of any related cases as Ninth Circuit Rule 28-2.6 defines them.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I hereby certify that the foregoing brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1. The brief was prepared in Times New Roman 14-point font and contains 4,531 words, which is less than one half of the word count for the Brief for Appellee.

/s/ *Michelle Gensman*
Michelle Gensman

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk for the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on September 30, 2010. Participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Michelle Gensman*
Michelle Gensman