NO. 10-16645

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA. Plaintiff-Appellee, v. STATE OF ARIZONA; AND JANICE K. BREWER, GOVERNOR OF THE STATE OF ARIZONA, IN HER OFFICIAL CAPACITY, Defendant-Appellants.	Appeal from the United States District Court for the District of Arizona Hon. Susan R. Bolton No. 2:10-cv-01453-NVW

BRIEF IN SUPPORT OF AFFIRMANCE OF THE DISTRICT COURT'S PRELIMINARY INJUNCTION ORDER AND IN SUPPORT OF APPELLEE ON BEHALF OF *AMICI CURIAE* LEAGUE OF UNITED LATIN AMERICAN CITIZENS, THE NATIONAL COALITION LATINO CLERGY AND CHRISTIAN LEADERS, CHICANOS POR LA CAUSA, INC., MAGDALENA SCHWARTZ, JOSE DAVID SANDOVAL, DAVID SALGADO

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A. STATEMENT OF IDENTITY AND INTERESTS OF THE AMICI CURIAE

Counsel for the Appellants and Appellee have informed counsel for the amici parties that Appellants and Appellee consent to the filing of this brief.

LULAC is the largest and oldest Hispanic civil rights organization in the United States with chapters and members located throughout the country including in Arizona. LULAC's primary goals include the promotion and protection of the legal, political, social, and cultural interests of Latino people living in the United States.

The National Coalition of Latino Clergy and Christian Leaders ("CONLAMIC") is a non-profit organization. Its membership includes over 300 Arizona Pastors who represent their congregants, including thousands of immigrants residing in Arizona

Incorporated in 1969, Chicanos Por La Causa, Inc. ("CPLC") is a nonprofit organization headquartered in Phoenix and is the largest Hispanic community development corporation in Arizona. CPLC has more than 800 employees, has offices in 11 counties in Arizona, and annually renders services to more than 125,000 people throughout Arizona in the areas of economic development, housing, social welfare, and education. CPLC operates three high schools and twelve "Head Start" centers in Arizona.

LULAC, CONLAMIC, and CPLC have a strong interest in this case inasmuch as hundreds or thousands of their clients or members whose *presence* in the United States is authorized under federal law face unconstitutional detention and arrest under the terms of S.B. 1070 because they do not possess evidence of lawful *status* or "registration" as contemplated by S.B. 1070. Members or clients

of LULAC, CONLAMIC, and CPLC also face unconstitutional detentions and arrest under S.B. 1070 because Arizona's training materials relating to the formation of reasonable suspicion to detain or probable cause to arrest persons suspected of being deportable are vague, ambiguous, and invite erroneous detentions and arrests and racial profiling.

Magdalena Schwartz is a resident of Mesa, Arizona. She is a citizen and national of Chile who has been residing in the United States for over twenty years. She is a respondent in removal proceedings initiated by the former Immigration and Naturalization Service (INS) before the Executive Board of Immigration review (EOIR). These proceedings have been pending for approximately twenty years. She has been released on her own recognizance during the pendency of the removal proceedings. She has not been required to register with the DHS pursuant to 8 U.S.C. § 1302 and has not done so. She therefore does not have in her possession proof of registration under 8 U.S.C. § 1302. She has not been issued any documentary evidence by the DHS or DOJ showing that she is authorized to be present n the United States. Magdalena Schwartz is not in federal custody and therefore faces interrogation, detention, arrest, or prosecution under SB 1070 despite the fact that her *presence* is authorized by federal law pending the outcome of her administrative removal proceedings.

Jose David Sandoval is a resident of Phoenix, Arizona, and a national and

citizen of El Salvador. Sandoval applied to an Immigration Judge of the Executive Office for Immigration Review (EOIR) of the Department of Justice (DOJ) for political asylum pursuant to 8 U.S.C. § 1158. His application was denied on or about March 19, 2008. However, in February 2010 this Court reversed his removal order and remanded for further proceedings before the EOIR pursuant to the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005. While his presence is known to the federal authorities, Sandoval has not been required by the DHS to "register" pursuant to 8 U.S.C. § 1302, and has not done so. He does not possess any documentary evidence issued by the DHS showing that he has "registered" pursuant to § 1302, or that his presence is authorized. Sandoval is not in federal custody and therefore faces interrogation, detention, arrest, or prosecution under SB 1070 despite the fact that his *presence* is authorized by federal law pending the outcome of his removal proceedings.

David Salgado is a native-born citizen of the United States of America of Mexican in ancestry and race. He resides in Maricopa County, Arizona and is employed as a full-time Patrol Officer for the Police Department of the City of Phoenix. He is certified to act as a law enforcement officer in the State of Arizona by the Peace Officer Standards and Training Board of the State of Arizona. He is required to implement S.B. 1070 despite its likely unconstitutionality as determined by the United States District Court for the District of Arizona in this

case.[1]

This proposed amici brief does not seek to address the broad domestic and foreign policy arguments made by the United States, but rather principally focuses on the ways in which S.B. 1070 and Arizona's training materials are inconsistent with the federal Immigration and Nationality Act ("INA") and federal policies thereunder, and are likely to result in the detention and arrest of persons who are not removable under the INA or whose *presence* is authorized under federal law or policy, even if they do not possess lawful status. There are likely tens of thousands of immigrants in Arizona who are *known to the federal authorities*, and who the federal authorities are not seeking to detain or arrest because they are in an immigration "pipeline" for a visa or some other form of relief from removal.

B. CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* LULAC, CONLAMIC and Chicanos for la Causa state that they are nonprofit corporations. They do not have parent corporations, no publicly held

[1] LULAC, Magdalena Schwartz and Jose David Sandoval are plaintiffs in a related matter, *LULAC, et al. v. State of Arizona, et al.*, Case No. 2:10-cv-1453-PHX-SRB, currently pending before the United States District Court, District of Arizona. David Salgado and CPLC are plaintiffs in a related matter, *Salgado, et al. v. Brewer, et al*., Case No. 2:10-cv-951-SRB, currently pending before the United States District Court, District of Arizona. CONLAMIC Arizona is a plaintiff in a related action, *National Coalition of Latino Clergy and Christian Leaders, et al. v. State of Arizona*, Case No. 2:10-cv-943-SRB, currently pending before the District Court of Arizona.

company owns any part of them, and no publicly held company has a financial interest in the outcome of this appeal.

C. ARGUMENT

Because of the perceived "inability" or "unwillingness" of the United States Department of Homeland Security ("DHS") to adequately control "illegal immigration,"[2] the State of Arizona enacted the "Support Our Law Enforcement and Safe Neighborhoods Act," as amended ("S.B. 1070" or the "Act"). Appellants' Opening Brief ("Appellants' Bf.") at 1.[3] The State of Arizona and Governor Janice K. Brewer ("Appellants" or "Arizona") opine that rather than welcome this "much-needed assistance," *id*., the United States ("Appellee" or "United States") sued Arizona raising a facial challenge to S.B. 1070 principally on preemption grounds.

The United States posits that S.B. 1070 makes "attrition through enforcement the public policy of all state and local government agencies in

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[2] In fact, S.B. 1070 is not at all defensible on the ground that the federal government has failed to regulate international borders. In November 2005, the Department of Homeland Security launched the Secure Border Initiative (SBI), a multiyear, multibillion-dollar program to secure U.S. borders and reduce unauthorized immigration. For fiscal years 2006 through 2009, the SBI program alone received $3.6 billion in appropriated funds. United States General Accounting Office, *Secure Border Initiative Fence Construction Costs* (January 29, 2009). Not surprisingly, border apprehensions are at a three-decade low. *See, e.g*., Office of Immigration Statistics, U.S. Department of Homeland Security, *Fact Sheet: Apprehensions by the U.S. Border Patrol: 2005-2008* (June 2009).

[3] S.B. 1070 as used herein refers to S.B. 1070 as amended by H.B. 2162.

Arizona," regardless of federal immigration policy or enforcement priorities. S.B. 1070, § 1. Appellee's Brief at 3.[4]

The district court ruled that the United States is likely to succeed on the merits of its challenges to four provisions of S.B. 1070: Sections 2 (establishing a regime of nondiscretionary questioning of persons based on "reasonable suspicion" about their immigration status), 3 (making alleged violation of the federal registration laws a state crime), 5 (establishing a "new crime for working without authorization"), and 6 (authorizing state and local officers to arrest an immigrant without a warrant if there is probable cause that the person "committed any public offense that makes the person removable from the United States").

Amici's argument focuses on the ways in which S.B. 1070 is inconsistent with the INA, and is likely to result in the detention and arrest of persons who are not removable under the INA or who the federal authorities would not detain or arrest because they are in an immigration "pipeline" for a visa or some other form of relief from removal. In essence, *even though they may not possess lawful status, their presence is authorized by federal law or practice.*

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[4] The United States argues that the Arizona law interferes with the federal government's exclusive authority to establish the Nation's immigration policy and priorities, unduly burdens lawfully present aliens, and interferes with the federal government's foreign policy prerogatives. *See generally* Appellee's Brief at 27-59.

S.B. 1070 training materials developed and distributed to Arizona law enforcement agencies to implement S.B. 1070 heighten the conflicts between federal laws on the one hand, and Arizona law on the other hand, by *inter alia* failing to adequately recognize that numerous categories of immigrants who did not enter the United States lawfully nevertheless are eligible for legalization of status, and by permitting law enforcement officers to rely upon vague and ill-defined factors such as a person's "dress," "difficulty communicating in English," "demeanor," and "claim of not knowing others … at [the] same location," as providing justification for a detention based on suspected undocumented status. *See Support Law Enforcement and Safe Neighborhoods Act Training Course*, Arizona Peace Officer Standards and Training Board, at http://www.azpost.state.az.us/SB1070infocenter.htm, accessed on September 30, 2010 ("Support Law Enforcement and Safe Neighborhoods Act Training Course")*.*[5]

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[5] *Amici* request that this Court take judicial notice of Arizona's training materials. *United States v. Camp*, 723 F.2d 741, 744 (9th Cir. 1984). ("Federal Rule of Evidence 201(f) provides that 'judicial notice may be taken at any stage of the proceeding.' Under Rule 201(f), an appellate court can properly take judicial notice of any matter which the trial court could have so noticed, if the opposing party is given an opportunity to be heard, upon timely request, pursuant to Rule 201(e). 10 MOORE'S FEDERAL PRACTICE ¶ 201.60 at II-43 (1982)."). A Court may take judicial notice of municipal materials that are available via the internet. "EMPI's registration with the California Secretary of State [as evidenced on the Secretary of State's website] is an official public record and its contents are not reasonably in

Accordingly, Arizona's S.B. 1070 is void and the district court's preliminary injunction should be affirmed.

I. DEFENDANTS' DETAINING, ARRESTING, OR PROSECUTING SUSPECTED UNDOCUMENTED IMMIGRANTS CONFLICTS WITH FEDERAL LAWS AND POLICIES

Defendants' detaining and arresting suspected undocumented migrants, and prosecuting those who failed to register with the federal authorities or carry their alien registration receipt or who encourage undocumented migrants to enter Arizona is preempted because these state actions conflict with federal law and policy by permitting the detention and arrest of and criminalizing individuals who, despite having entered the United States without authorization, or having overstayed visas, nevertheless may have authorized presence under federal law.[6]

The Immigration and Nationality Act includes detailed provisions regulating all of the matters--interrogations, detentions, arrests and prosecutions for immigration-status reasons--implicated directly and indirectly in S.B. 1070. *See,*

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dispute; it is therefore appropriately the subject of judicial notice under FRE 201(b)(2)." *Piazza v. EMPI*, Inc., 2008 U.S. Dist. LEXIS 28136 at *10 (E.D. Cal. Feb. 28, 2008), citing *Association of Irritated Residents v. Fred Schakel Dairy*, 460 F. Supp. 2d 1185, 1189-90 (E.D. Cal. 2006).

[6] The Immigration and Nationality Act (INA) prescribes numerous classes of aliens subject to removal: *inter alia*, those who overstay nonimmigrant visas, commit a crime, fail to comply with immigration-related reporting requirements, and enter without inspection. *See* 8 U.S.C. § 1227. S.B. 1070 clumsily singles out one of the classes of removable aliens—those who have entered without inspection—for arrest and prosecution.

e.g., 8 U.S.C. §§ 1101, *et seq*. (whether a non-citizen is authorized to enter or remain in the United States is determined purely by federal law); 8 U.S.C. § 1325 (criminal and civil penalties for immigrants who enter the United States at a time or place other than that prescribed by immigration officers); 8 U.S.C. § 1326 (prohibiting reentry by deported aliens); 8 U.S.C. § 1327 (prohibiting assisting an immigrant to enter the United States who is inadmissible for health reasons); 8 U.S.C. § 1328, (prohibiting the bringing of an immigrant to the United States for an "immoral purpose"); 8 U.S.C. § 1182(a)(6)(A) (waiving the inadmissibility of certain immigrants who are the survivors of domestic violence); 8 U.S.C. §§ 1322-23 (regulating which immigrants may be transported); 8 U.S.C. §§ 1321 and 1324(a)(1)(A)(i) (regulating where immigrants can be transported); 8 U.S.C. § 1324(a)(1)(A)(ii) (penalties for the "transportation, or movement or attempt[] to transport or move"); §§ 1324(a)(1)(A)(iii) and 1324(a)(1)(A)(iv) (how immigrants can be transported);[7] 8 U.S.C. § 1221 (requiring owners of commercial vessels to provide information about their passengers, including immigration status); 8 U.S.C. § 1182(d)(5)(A) (DHS has authority to permit certain immigrants to temporarily enter the United States for "urgent humanitarian reasons" or "significant public benefit"); 8 U.S.C. § 1254a (granting "temporary protected

[7] H.R. Rep. No. 99-682 at 66 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5670 (purpose of this statute is to prohibit the "transport[ation] [of] an undocumented alien to any place in the United States")

status" to certain immigrants from certain countries experiencing armed conflict, natural disaster, or another extraordinary circumstance); 8 U.S.C. §§ 1229b (allowing DHS and DOJ to cancel the removal proceedings of certain long-term residents); 8 U.S.C. § 1255 (allowing DHS and DOJ to adjust the status of certain unauthorized immigrants with qualifying U.S. family members or job offers); 8 U.S.C. § 1158 (granting certain unauthorized immigrants the right to apply for asylum based upon a reasonable fear of persecution if returned to their home country); 8 C.F.R. § 274a.12(c)(14) (granting certain unauthorized immigrants the right to apply for employment authorization while applications for relief are pending); 8 U.S.C. §§ 1201(b), 1301-1306 and 8 C.F.R. Part 264.a (comprehensive scheme for registration to monitor the presence and movement of immigrants);[8] 8 U.S.C. §§ 1225, 1227, 1228, 1229, 1229c, 1231 (setting forth grounds for the initiation of proceedings against immigrants suspected of being removable from the United States). Literally thousands of published precedent administrative and judicial decisions interpret these statutes and regulations to

[8] Congress has established specific requirements regarding which aliens must register, 8 U.S.C. §§ 1201, 1301, when they must register, 8 U.S.C. § 1302, the requirements of the registration forms, 8 U.S.C. § 1303, the confidentiality of registration information, 8 U.S.C. § 1304, the penalties for willfully failing to register, 8 U.S.C. § 1306(a), 18 U.S.C. § 3571, 8 C.F.R. Part 264, and penalties for failing to carry proof of registration. 8 U.S.C. § 1304(e); 18 U.S.C. § 3571. This comprehensive federal scheme allows no room for state's to act to supplement or enhance the federal system.

create a complex web of federal policy that is nowhere reflected in either S.B. 1070 or its training materials.

To supplement this comprehensive scheme for federal enforcement of immigration policy, Congress has also established a scheme of laws setting forth precisely how and when federal and local authorities may cooperate in the enforcement of federal immigration policy. *See, e.g.*, 8 U.S.C. § 1103(a)(10) (authorizing DHS to empower state or local law enforcement with immigration enforcement authority when an "actual or imminent mass influx of aliens . . . presents urgent circumstances"); 8 U.S.C. § 1357(g) (1)–(9) (authorizing DHS to enter into agreements with local law enforcement agencies for training and supervised and well-defined immigration related functions); 8 U.S.C. § 1373(a)-(b); 8 U.S.C. § 1252c (permitting local law enforcement officers to arrest immigrants unlawfully present following felony convictions and removal).[9]

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[9] The INA clearly permits local law enforcement authorities to conduct arrests for violations of certain federal laws. INA Section 274, which establishes a number of criminal immigration offenses, states:

> No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and *all other officers* whose duty it is to enforce criminal laws.

8 U.S.C. § 1324(c) (emphasis added). No such authority exists for local police to detain or arrest suspected undocumented immigrants for purely administrative removal proceedings, as SB 1070 generally requires.

Indeed, since the INA was enacted in 1952, the law has expressly authorized state enforcement of certain of its criminal provisions, but generally not of its civil provisions, as S.B. 1070 does. Considering both the uniquely federal nature of immigration regulation and the exhaustive scope of regulation in the INA, DOJ has historically understood that the absence of express authorization is tantamount to a prohibition on civil enforcement by the states.

In 1978, for example, DOJ said that "local police should refrain from detaining any person not suspected of a crime, solely on the ground that they may be deportable aliens." *Local Police Involvement in the Enforcement of Immigration Law*, 1 TEX. HISP. J.L. & POL'Y 9, 36 (1994) (quoting Att'y Gen. Bell, Dep't of Justice Press Release, Jun. 23, 1978).

In short, Congress has enacted and the federal Government implements extensive regulations and controls regarding the entry, terms of stay, employment, transportation, and detention of immigrants, leaving no room for inconsistent local regulation in these crucial areas which impact on national domestic and foreign policies.

Federal law provides numerous and often complex avenues by which an unauthorized entrant or person who has overstayed a visa may remain lawfully in the United States. *See generally Plyler v. Doe*, *supra*, 427 U.S. at 226 (noting inherent difficulty of knowing whether school children whose presence here may

conflict with federal law will win permission to reside in the United States indefinitely). These remedies are not adequately realized in S.B. 1070.

Persons fearing persecution in their home countries, for example, are entitled to apply for political asylum notwithstanding their having entered without inspection or overstayed a non-immigrant visa. 8 U.S.C. § 1158. While their applications for asylum are being adjudicated, asylum applicants' *presence* is authorized even if they do not yet have any lawful status. *See, e.g.* 8 C.F.R. § 208.5(a) (2009) ("Except as provided in paragraph (c) of this section, such alien shall not be excluded deported, or removed before a decision is rendered on his or her asylum application."). No regulation or policy requires asylum applicants to register pursuant to 8 U.S.C. § 1302, or carry an alien registration card. Indeed, hundreds or thousands of asylum applicants in Arizona may possess no document issued by the federal authorities showing that they have lawful status, or for that matter that their presence is authorized.[10] Nevertheless, under federal law and

[10] Asylum applicants may apply for temporary employment although a decision may take months to be issued. Employment authorization is issued in the discretion of the DHS. 8 U.S.C. § 1158(d)(2) ("An applicant for asylum is not entitled to employment authorization, but such authorization may be provided by the Attorney General. An applicant who is not otherwise eligible fro employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.").

policy, such immigrants may not be removed from the United States until their asylum applications have been fully and finally adjudicated.

Pursuant to 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p), and 8 C.F.R. § 214.14, certain crime victims and their close family members are entitled to apply for lawful status as "U" nonimmigrants despite an initial unlawful entry or overstaying a non-immigrant visa. Three years after being issued U visas, such crime victims and their close family members are eligible for lawful permanent residence. While a U visa applicant and his or her immediate family members may not have lawful status, or possess a "registration card," their presence is authorized under federal law and policy. Indeed, the United States may even stay execution of final orders of removal for U visa applicants while their applications are adjudicated. *See* Memorandum from Peter S. Vicent (September 25, 2009) ("The Secretary of Homeland Security and her delegates have discretion to grant a stay of an administrative final order of removal under section 241(c)(2) of the Immigration and Nationality Act (INA) to an alien with a pending petition for a U visa if the alien establishes prima facie eligibility for the benefit. *See* INA § 237(d)"). No federal regulation or policy requires U visa applicants to "register" pursuant to 8

In short, asylum applicants may go for many months or years without possessing employment authorization or other evidence that their presence is authorized under federal law.

U.S.C. § 1302, or carry an alien registration card. Hundreds of U visa applicants in Arizona may possess no document issued by the federal authorities showing that their presence is authorized, and they certainly will not possess documentation showing that they have lawful status. While subject to detention and arrest by Arizona authorities under S.B. 1070, these U visa applicants are generally not subject to detention, arrest, or removal by the DHS while their applications are pending. *See, e.g.* Memorandum from Stuart Anderson (May 8, 2002), *Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* (noting that "Aliens who are identified as possibly eligible for U nonimmigrant status should not be removed from the United States until they have had an opportunity to apply for such status").

Under 8 U.S.C. §§ 1101(a)(15)(T), 1184(o), 1255(l) and 22 U.S.C. § 7102 survivors of human trafficking and their close family members are entitled to apply for lawful "T" nonimmigrant status, again, despite an initial unauthorized entry or overstaying a non-immigrant visa. Upon conclusion of the investigation or prosecution of the crimes committed against T nonimmigrants, or three years after they are issued T nonimmigrant status, trafficking survivors are eligible to apply for lawful permanent residence. 8 U.S.C. § 1255(l). No federal policy or regulation requires T Visa applicants to "register" pursuant to 8 U.S.C. § 1302, or carry an registration cards. Hundreds T visa applicants in Arizona may possess no

document issued by the federal authorities showing that they have lawful status or that their presence is authorized. While subject to detention and arrest by Arizona authorities under S.B. 1070, these T visa applicants are normally not subject to detention, arrest, or removal by the DHS while their applications are pending. In fact, even an immigrant under a final order of removal is not precluded from filing a petition for a T visa. 8 C.F.R. § 214.14(c)(1)(ii); *see also* Michael D. Cronin, Office of Programs, Immigration and Naturalization Service, *Victims of Trafficking and Violence Protection Act of 2000 Policy Memorandum # 2 – "T" and "U" Nonimmigrant visas 2* (Aug. 30, 2001) ("aliens who are identified as possible victims ... should not be removed from the United States until they have had the opportunity to avail themselves of the Victims of Trafficking and Violence Protection Act"). Federal policy has long been not to execute deportation orders against T or U visa applicants while their applications are being adjudicated.

8 U.S.C. §§ 1101(a)(27)(J) and 1255, provide abused, abandoned or neglected immigrant minors who enter without authorization the right to apply for lawful permanent residence. Pursuant to § 1101(a)(27)(J), an abused, abandoned, or neglected minor may petition to be classified as a "special immigrant juvenile" (SIJ). If such classification is granted, the minor may then apply under § 1255 to adjust his or her status to that of a lawful permanent resident. No federal policy or regulation requires SIJ applicants to "register" pursuant to 8 U.S.C. § 1302, or

carry an registration cards. Hundreds SIJ applicants in Arizona may possess no document issued by the federal authorities showing that their presence is authorized. While subject to detention and arrest by Arizona authorities under S.B. 1070, SIJ applicants, like applicants for many other immigration benefits, are normally not subject to detention, arrest, or removal by the DHS while their applications are pending. See Memorandum from John Morton to Peter S. Vincent and James Chaparro (August 20, 2010), Exhibit 1.

Arizona resident immigrants against whom ICE has initiated removal proceedings are clearly under federal law permitted release on bond. *See, e.g.* INA § 236(a) ("On a warrant … an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States … the [Secretary of Homeland Security] ... may release the alien on ... (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the [Secretary of Homeland Security]"; 8 C.F.R. § 1003.19(d) ("Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding"); *Kaptyug v. Clark*, 2010 U.S. Dist. LEXIS 51110 at *4 (W.D. Wash. Apr. 26, 2010) ("[N]on-criminal aliens who are detained under INA § 236(a) … are … entitled to a bond hearing and are … provided the opportunity to show that their detention is unnecessary

because they are not a danger to the community or a flight risk"). These immigrants released on bond are not required to "register," they do not possess proof of registration, and they likely do not possess documentation, other than their Notice to Appear in removal proceedings or perhaps bond release documents, showing that they have any lawful status or that their presence is authorized by federal law pending the entry of a final non-appealable order of removal.

Immigrants in removal proceedings and released on bond may apply for a range of benefits to avoid the entry of a final order of removal. *See, e.g*. INA § 240A(a), Cancellation of Removal for Permanent Residents ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien--(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony"); § INA 240A(b), Cancellation of Removal for Certain Non-Permanent Residents ("The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-- (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (B) has been a person of good moral character during such

period; (C) has not been convicted of [certain defined] offense[s] …; and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence"); INA § 212(i), Immigrants inadmissible for fraud or willful misrepresentation of material fact ("(1) The Attorney General may … waive [the applicant's inadmissibility for fraud] … in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established [that a determination of inadmissibility] … would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child"); INA § 249, Registry, ("A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application … establishes that he (a) entered the United States prior to January 1, 1972; (b) has had his residence in the United States continuously since such entry; (c) is a person of good moral character; and (d) is not ineligible to citizenship and is not deportable under section 237(a)(4)(B)"); INA § 244, Temporary Protected Status, ("(a) In the case of an alien who is a

national of a foreign state designated under subsection (b) … and who meets the requirements of subsection (c), the Attorney General, in accordance with this section-- (A) may grant the alien temporary protected status in the United States and shall not remove the alien from the United States during the period in which such status is in effect"); INA § 237(a)(1)(E)(iii) (humanitarian waiver of deportability to assure family unity).

These immigrants are not required to formally "register" under 8 U.S.C. § 1302, they do not possess proof of registration, they do not possess proof of lawful residence, and they likely do not even possess documentation, other than their Notice to Appear in removal proceedings, showing that their presence is authorized by federal law pending the entry of a final non-appealable order of removal.

Nevertheless, in each of these cases, the immigrant's *continuing presence* is authorized by federal law. SB 1070 and its training materials fail to appreciate this important aspect of federal immigration law: An immigrant's *presence* may well be authorized regardless of lawful entry or having overstayed a visa, but without the issuance of written evidence of that authorization. Federal law generally bars a persons removal from the United States pending the final outcome of administrative removal proceedings and judicial appeals. *See, e.g.* 8 C.F.R. § 1241.31 ("an order of deportation … made by the immigration judge in proceedings under 8 CFR part 1240 shall become final upon dismissal of an appeal

by the Board of Immigration Appeals, [or] upon waiver of appeal , or upon expiration of the time allotted for an appeal when no appeal is taken"); 8 C.F.R. § 1241.33 ("Except in the exercise of discretion by the district director, and for such reasons as are set forth in § 1212.5(b) of this chapter, *once an order of deportation becomes final, an alien shall be taken into custody and the order shall be executed*" [emphasis supplied]); *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162-1163 (9th Cir. 2005) ("[F]ailing to afford petitioner an evidentiary hearing on his serious allegations of having been unlawfully stopped and expelled from the United States, aborting his pending immigration proceedings and the relief available to him at the time, violated his right to due process of law"). Indeed, the federal authorities generally do not even initiate removal proceedings against persons who may be eligible for relief from deportation under one of many federal statutes or policies. Nevertheless, very few of these immigrants, or those against whom a Notice to Appear has issued, are likely to possess a formal document from the DHS authorizing their presence in the United States. As the United States concedes: "There are numerous categories of individuals who will be lawfully present but who will not have readily available documentation to demonstrate that fact." *U.S. v. Arizona*, Motion for Prelim. Injunction, p. 27.

Though by no means exhaustive, the above examples serve to illustrate that Arizona's detaining, arresting or prosecuting unauthorized entrants based solely on

their assumed undocumented status, or "removable" status based on an ill-defined "public offense," actually conflicts with federal law.[11] Indeed, by securing criminal convictions against otherwise eligible crime victims, trafficking survivors, abused youth, close relatives of U.S. citizens and lawful permanent residents, and those similarly situated, defendants not only criminalize persons whom federal law may in fact welcome, they also cloud such immigrants' eligibility for the very immigration benefits Congress has said they deserve. *See*, *e.g.* 8 U.S.C. § 1182(a)(2) and 8 U.S.C. § 1227(a)(2) (criminal grounds of inadmissibility and removal).

SB 1070 and it's training materials fail to provide much clarity on when or how an officer should form a reasonable suspicion that a person who has been lawfully stopped for another matter may be an unauthorized immigrant or one who is subject to removal because of a "public offense."[12] Officers may form their

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[11] The DHS and DOJ have exclusive authority and the required training to determine whether conviction of a state or federal crime renders an immigrant removable from the United States. *See* 8 U.S.C. § 1182(a)(2) (grounds of inadmissibility for criminal convictions); 8 U.S.C. § 1227(a)(2) (grounds of removal for criminal convictions). Arizona's training materials do not provide adequate training in this regard.

[12] Arizona law defines "public offense" to mean "conduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state in which it occurred." Ariz. Rev. Stat. § 13-105(26). S.B. 1070 § 3(F) provides an exception for a "person who maintains authorization from the federal government to remain in the United States." However, as discussed *supra*, and conceded by the United

reasonable suspicion based upon, for example, a person's "dress," "difficulty communicating in English," "demeanor," and "claim of not knowing others … at [the] same location." *See* Support Law Enforcement and Safe Neighborhoods Act Training Course. As the Court held in *Hines*, "[l]egal imposition[s] . . . upon aliens – such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials – thus bears an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one." *Hines v. Davidowitz*, 312 U.S. 52, 65-66 (1941).

Despite the provision that SB 1070 "shall be implemented in a manner consistent with federal laws regulating immigration," S.B. 1070 § 12, Arizona's detaining, arresting or prosecuting migrants simply because they are suspected of having entered without inspection, overstayed a non-immigrant visa, failed to register with the federal Government, seeking work, or have committed a "public offense" which may render then subject to removal in the future, entirely fails to take into account the complexities of federal immigration law and therefore is highly likely in repeated circumstances to stand as an obstacle to federal law.[13]

States, many categories of immigrants will have no documentary evidence that the federal government has authorized them to remain in the United States.

[13] As the United States Government explains, SB 1070's "monolithic 'attrition through enforcement' policy pursues only one goal of the federal immigration

In addition, § 5 of S.B. 1070 creates criminal penalties for unauthorized immigrants who solicit or perform work in Arizona. However, in the Immigration Reform and Control Act of 1986 ("IRCA"), Congress created a comprehensive statutory scheme addressing the employment of immigrants. *See* 8 U.S.C. § 1324a, *et seq*.; 8 C.F.R. § 274a. *See also Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002). Congress has opted *not* to criminalize the mere seeking of work or employment of immigrants whose presence is not authorized by the federal Government. SB 1070's criminalization of the seeking of or engaging in work by unauthorized immigrants clearly conflicts with and stands as an obstacle to the federal scheme on the same subject. Furthermore, as noted above, S.B. 1070 fails to address the wide range of immigrants who

S.B. 1070 also makes it illegal for a person in violation of a criminal offense to (1) transport an immigrant in Arizona in furtherance of the unlawful presence of the alien in the United States; (2) conceal, harbor, or shield an immigrant from detection; and (3) encourage or induce an immigrant to come to or reside in this state if the person knows that such coming to, entering or residing in the state is or will be in violation of law. S.B. 1070 § 5(A) (§ 13-2929). This provision is an obstacle to federal law for several reasons. First, as noted above, neither S.B. 1070

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system – maximum reduction of the number of unlawfully present aliens – to the exclusion of all other objectives." *United States v. Arizona*, Prelim. Injunction Motion at 13.

nor its training materials adequately take into account the complexities of the INA and DHS policies, particularly with regards immigrants whose presence may be authorized by federal law even though they do not possess lawful status. Given the numerous categories of immigrants whose presence is authorized by federal law or policy but who have not "registered" with the DHS and do not possess documentary evidence of their lawful presence, family members or friends of such immigrants are forced not to invite them to visit, live, or work in Arizona. This provision also interferes with federal law by infringing the Dormant Commerce Clause by restricting the interstate movement of immigrants. U.S. Constitution Article I, Section 8; *Anderson v. Mullaney*, 191 F.2d 123, 127 (9th Cir. 1951) (Dormant Commerce Clause violated by a state regulation discouraging out-of-state fishermen from entering Alaska).

The INA imposes criminal penalties on persons who "*knowing or in reckless disregard* of the fact that an alien has come to, entered, or remains in the United States in violation of law," attempts to "transport or move such alien within" the United States "*in furtherance of such violation of law*." 8 U.S.C. § 1324(a) (emphasis added). The INA is limited to smugglers and does not encompass the immigrant being smuggled. *See United States v. Hernandez-Rodriguez*, 975 F.2d 622, 626 (9th Cir. 1992). SB 1040 encompasses suspected smugglers whether or

not the transportation is provided "*in furtherance of [the smuggled alien's] violation of law*." *See* Az. Rev. Stat. § 13-2319(A).

A state law that stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted under the third *De Canas* test. *De Canas v. Bica*, 424 U.S. 351, 363 (1976). *See also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 376 (2000) (Massachusetts law restricting purchases from companies doing business with Burma interfered with the executive branch's authority over economic sanctions against that country and impeded executive discretion as to the appropriate balance of interests to be reflected in U.S. policy towards Burma); *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 349 (2001) (Food, Drug, and Cosmetic Act comprehensive enforcement scheme preempted state law tort claims premised on fraud committed against the FDA that could be an obstacle the "balance sought by the Administration" implementing the FDCA); *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 283-84 and 286 (1986) (striking a Wisconsin law that prohibited certain violators of the National Labor Relations Act because states are prohibited from "providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act").

S.B. 1070 at bottom entirely fails to recognize the numerous ways described above in which immigrants residing in Arizona may be present pursuant to federal

law or policy, and yet not have lawful status, not have registered pursuant to 8 U.S.C. § 1302, and therefore not possess proof of such registration. Arizona's training materials fail to elaborate on these issues and in fact make matters worse by focusing on immigrants' manner of speech, English language capacity, appearances, location, etc. Implementation of S.B. 1070 will naturally and inevitably result in numerous detentions and arrests involving conflicts between state and federal laws and policies.

/ / /

D. CONCLUSION

For all of the reasons stated above, *amici curiae* urge the Court to affirm the preliminary injunction entered in this case by the United States District Court for the District of Arizona.

Respectfully Submitted,

Dated: September 30, 2010

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/ / /

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29, Fed. R. App. P. 32(a)(7), and Circuit Rule 32-1, the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 6,641 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: September 30, 2010.

/s/ Peter A. Schey
Peter A. Schey
Attorney for *Amici Curiae*

Exhibit 1

Policy Number: 16021.1
FEA Number: 054-14

Office of the Assistant Secretary

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

AUG 20 2010

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: Peter S. Vincent
Principal Legal Advisor

James Chaparro
Executive Associate Director,
Enforcement and Removal Operations

FROM: John Morton
Assistant Secretary

SUBJECT: Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions

Purpose

This memorandum establishes U.S. Immigration and Customs Enforcement (ICE) policy for the handling of removal proceedings before the Executive Office for Immigration Review (EOIR) involving applications or petitions filed by, or on behalf of, aliens in removal proceedings. This policy outlines a framework for ICE to request expedited adjudication of an application or petition for an alien in removal proceedings that is pending before U.S. Citizenship and Immigration Services (USCIS) if the approval of such an application or petition would provide an immediate basis for relief for the alien.[1] This policy will allow ICE and EOIR to address a major inefficiency in present practice and thereby avoid unnecessary delay and expenditure of resources.

Background

Historically, where a *Petition for Alien Relative* (hereinafter Form I-130 or petition) was pending before USCIS, this fact tended to promote delays in removal proceedings. Indeed, in July of 2009, EOIR identified approximately 17,000 removal cases that have been continued pending the outcome of USCIS decisions on petitions. Recognizing that many of these cases may ultimately result in relief for the alien, ICE has been working with USCIS and EOIR to identify more effective procedures to resolve these pending petitions along with other applications to promote increased docket efficiency.

[1] This memo applies only to applications or petitions that USCIS legally has jurisdiction to adjudicate during removal proceedings.

To this end, USCIS will issue guidance to complement this memorandum and will endeavor to complete the adjudication of all applications and petitions referred by ICE within 30 days for detained aliens and 45 days for non-detained aliens. Close coordination and communication between the ICE Offices of Chief Counsel (OCC) and USCIS will ensure that all applications and petitions are adjudicated quickly to realize our shared goal of efficiently resolving cases in removal proceedings.

New ICE Policy

As a matter of prosecutorial discretion and to promote the efficient use of government resources, I hereby issue new ICE policy to govern the handling of removal proceedings involving aliens with applications or petitions pending with USCIS. This policy extends both to the prosecution of removal proceedings by OCCs and to any associated detention decisions by Enforcement and Removal Operations (ERO).

1. Expedited Adjudication

A. In any case involving a detained alien whose application or petition is pending with USCIS, OCC shall affirmatively request that USCIS expedite the adjudication of the application or petition. ICE should promptly transfer the applicant's A-file to USCIS. USCIS will endeavor to adjudicate all the detained cases referred to it by ICE within 30 days of receiving the A-files. ICE will ensure that, if needed, USCIS has access to the detained individual to conduct an interview.

B. In any case involving a non-detained alien whose application or petition is pending with USCIS, OCC shall affirmatively request that USCIS expedite the adjudication of the application or petition. ICE should promptly transfer the applicant's A-file to USCIS. USCIS will endeavor to adjudicate all non-detained cases referred to it by ICE within 45 days of receiving the A-files.

2. *Dismissal without Prejudice of Certain Cases in Removal Proceedings*

Detained Cases

Where there is an underlying application or petition filed with USCIS by or on behalf of a detained alien and ICE determines as a matter of law and in the exercise of discretion that such alien appears eligible for relief from removal, OCC shall promptly consult with the Field Office Director (FOD) and Special Agent in Charge (SAC) to determine if there are any investigations or serious, adverse factors weighing against dismissal of proceedings.[2] Adverse factors include, but are not limited to, criminal convictions, evidence of fraud or other criminal misconduct, and national security and public safety considerations. If no investigations or serious adverse factors

[2] ICE offices in the Fifth and Ninth Circuits must be sensitive to the issue of *res judicata* that may arise in dismissing proceedings without prejudice. *See, e.g., Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007); *Medina v. INS*, 993 F.2d 499, 503 (5th Cir. 1993). To protect the government's interests, motions to dismiss without prejudice in the 5th and 9th Circuits should be made in writing, i.e., not orally. The Office of the Principal Legal Advisor (OPLA) has developed a template for motions to dismiss without prejudice for use in these two circuits.

exist, the OCC should promptly move to dismiss proceedings without prejudice before EOIR, and notify the FOD of the motion. Once the FOD is notified, the FOD must release the alien pursuant to the dismissal of proceedings.

Non-Detained Cases

Where there is an underlying application or petition and ICE determines in the exercise of discretion that a non-detained individual appears eligible for relief from removal, OCC should promptly move to dismiss proceedings without prejudice before EOIR.[3]

Standard for Dismissal

Only removal cases that meet the following criteria will be considered for dismissal:

- The alien must be the subject of an application or petition filed with USCIS to include a current priority date, if required, for adjustment of status;[4]
- The alien appears eligible for relief as a matter of law and in the exercise of discretion;
- The alien must present a completed *Application to Register Permanent Residence or Adjust* Status (Form I-485), if required; and
- The alien beneficiary must be statutorily eligible for adjustment of status (a waiver must be available for any ground of inadmissibility).

An alien in removal proceedings may appear eligible for relief but for a variety of reasons, ICE may oppose relief on the basis of discretion. In those cases, ICE should continue prosecution of the case before EOIR regardless of whether USCIS has approved the underlying application or petition.

Standard Operating Procedures

In coordination with the local USCIS field office, each OCC must develop a standard operating procedure (SOP) to identify removal cases that involve an application or petition pending before USCIS. This SOP should address the categories of cases discussed above: (1) those identified for expedited adjudication, and (2) those for which dismissal of proceedings may be appropriate. The request to expedite shall be made to by OCC to USCIS. No obligation for such requests shall be placed on the alien's attorney, accredited representative, or the immigration judge. The SOP regarding requests to expedite must establish the following:

- A mechanism whereby the ICE attorney who handles the master calendar hearing in a case determines whether a request to expedite the pending petition or application is appropriate;
- A structure to communicate the ICE request to expedite to USCIS;

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[3] As more fully stated in footnote 2, ICE offices in the Fifth and Ninth Circuits must be sensitive to the issue of *res judicata* that may arise in dismissing proceedings without prejudice. OPLA has developed a template for motions to dismiss without prejudice for use in these two circuits.

[4] At the OCC's discretion, other cases not meeting this criterion may be appropriate for dismissal.

- A system to ensure that decisions about the application or petition are received from USCIS, uploaded into GEMS, and received by the ICE attorney scheduled to handle the subsequent hearing; and
- A method by which A-files will be routed as appropriate so as to avoid delays in either the adjudication or the immigration court proceedings.

Any questions regarding this memorandum should be directed to OPLA Field Legal Operations or ERO Field Operations through appropriate channels.[5]

cc: Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

[5] This document provides only internal ICE guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil, or criminal. Likewise, no limitations are placed on otherwise lawful enforcement or litigative prerogatives of DHS or ICE.

CERTIFICATE OF SERVICE

I hereby certify that I am over the age of 18, not a party to this action, and on September 30, 2010, I electronically transmitted the foregoing document to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

_/s/ _____
Carlos Holguin

/ / /