

**THE SUPREMACY CLAUSE VERSUS
S.B. 1070: CAN ARIZONA’S STRICT ILLEGAL
IMMIGRATION LAW WITHSTAND
CONSTITUTIONAL CHALLENGE?**

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INTRODUCTION

Trackers searching for Rob Krentz could not locate him using a thermal imager. His body was too cold. Rob Krentz was dead.¹

Mr. Krentz was a member of “one of the best-known and oldest ranching families . . . in southeast Arizona.”² On March 27, 2010, he was found dead on his 35,000-acre ranch after suffering fatal gunshot wounds.³ Prior to his death, Mr. Krentz was riding around his property in an all-terrain vehicle when he radioed to his brother that he “was aiding someone he believed to be an illegal immigrant.”⁴ Presently, the authorities are unsure who killed Mr. Krentz.⁵ However, because of the “radio transmission . . . and heavy drug and illegal immigrant trafficking in that area,” it is widely suspected that Mr. Krentz was killed by a cross-border drug smuggler or human trafficker.⁶

Prior to Mr. Krentz’s death, the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) was introduced into the Arizona State Legislature.⁷ This strict immigration measure was initiated largely “because border authorities [in Arizona] arrest more people and seize more drugs than . . . any other state.”⁸ After Mr. Krentz’s death, he became the “face” of the Arizona immigration debate.⁹ Some politicians even pushed to name S.B. 1070 the “Rob Krentz Law.”¹⁰ In fact, one month after Mr. Krentz’s mysterious death, Arizona Governor Jan Brewer signed S.B. 1070 into law.

Following the passage of S.B. 1070, Hispanic families throughout Arizona have felt uneasy about living and working in the state.¹¹ For example, Manuela Quintana and her husband lived in Phoenix for fifteen years.¹² All of their children are

¹ Nathan Thornburgh, *The Battle for Arizona: Will a Border Crackdown Work?*, TIME, June 14, 2010.

² Randal C. Archibold, *Ranchers Alarmed by Killing Near Border*, N.Y. TIMES, Apr. 5, 2010, at A9.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Thornburgh, *supra* note 1.

⁸ Archibold, *supra* note 2, at A9.

⁹ Thornburgh, *supra* note 1.

¹⁰ *Id.*

¹¹ The effective date of S.B. 1070 is July 29, 2010.

¹² Kelly Cobiella, *Immigrant Families Leave Arizona, Fearing Law*, CBS NEWS (May 3, 2010, 8:00 PM), <http://www.cbsnews.com/stories/2010/05/03/eveningnews/main6457212.shtml>.

American citizens because they were born in the United States.¹³ Both Manuela and her husband are illegal immigrants.¹⁴ They fear that S.B. 1070 will lead to their imprisonment, and therefore, separation from their children.¹⁵ Because of these fears, the Quintana family packed all of their belongings and decided to move to Colorado, a state with less stringent immigration regulations.¹⁶ Before making this trip, Manuela spoke to a reporter and reaffirmed her belief that although she traveled to the United States illegally, she was not a criminal. She stated, “a criminal is someone who kills . . . I just want to work.”¹⁷

The stories of Mr. Krentz and the Quintana family demonstrate the complexity of the immigration debate. The circumstances surrounding Mr. Krentz’s death reveal the serious public safety issues facing Arizona as a result of the federal government’s failure to quell the drug violence and human trafficking that afflicts America’s southern border. Conversely, the story of the Quintana family provides insight into how S.B. 1070 may eventually harm Arizona’s economy because illegal immigrants, who “account for 8 percent of the state’s economic output, or \$29 billion,” are leaving the state.¹⁸ Also, instead of encouraging illegal immigrants to move back to their native countries, S.B. 1070 may lead to an exodus of illegal immigrants moving from Arizona into other American states with less strict immigration laws.

Understanding the political implications of S.B. 1070 is important because it provides context for analysis of the law. Shortly after the passage of the Arizona law, several lawsuits were filed challenging the statute’s constitutionality. This article will focus on one of these constitutional challenges: Does S.B. 1070 violate the Supremacy Clause of the U.S. Constitution?

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Illegal Immigrants Leaving Arizona Over New Law: Tough, Controversial New Legislation Scares Many in Underground Workforce Out of State*, CBS NEWS (Apr. 29, 2010), <http://www.cbsnews.com/stories/2010/04/29/national/main6442729.shtml>. This data is the result of a study performed by Judith Gans at the University of Arizona. In 2008, Ms. Gans’ study also “found that non-citizens, [in Arizona] held an estimated 280,000 full-time jobs.” Ms. Gans’ statistics were based on data collected in 2004.

I. IMMIGRATION REGULATION: A BRIEF HISTORY

In the first century of the United States' existence, the federal government did not engage in immigration regulation.¹⁹ However, by 1849, the Supreme Court began to assess the constitutionality of state and local laws regulating immigration. In the *Passenger Cases*, Boston and New York City laws "that imposed special taxes on aliens and passengers arriving from foreign ports" were struck down as unconstitutional.²⁰ Years later in 1875, in *Henderson v. Mayor of New York*,²¹ the Supreme Court "definitively barred state restrictions on immigration."²² The Supreme Court reiterated this rationale in *Chy Lung v. Freeman*²³ where the "Court struck down a California statute regulating Chinese immigration."²⁴ In *Chy Lung*, the Court stated that the "passage of laws which concern the admission of citizens . . . of foreign nations to our shores belongs to Congress, and not to the States."²⁵

In the twentieth century, Congress "solidified the federal government's control over immigration."²⁶ In 1952, Congress passed the Immigration Nationality Act (INA), and in 1986, Congress voted in favor of passing the Immigration Reform and Control Act (IRCA).²⁷ The INA and the IRCA created an "in-depth system that governs immigrants' entrance into and exit out of the United States" while also "defin[ing] the conditions of employment for immigrants."²⁸

¹⁹ Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 581–82 (2009) (the federal government did not engage in immigration regulation because (1) "it was unclear whether the federal government was even intended . . . to have power to regulate immigration" because the "Constitution contains no language . . . expressly grant[ing] Congress the power to regulate immigration," and (2) the federal government "favored unrestricted immigration" at that time); see also Juliet P. Stumpf, *State of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1566 (2008).

²⁰ McKanders, *supra* note 19, at 582.

²¹ 92 U.S. 259 (1875).

²² McKanders, *supra* note 19, at 582.

²³ 92 U.S. 275 (1875).

²⁴ Stumpf, *supra* note 19, at 1571.

²⁵ *Id.*

²⁶ McKanders, *supra* note 19, at 583.

²⁷ *Id.*

²⁸ *Id.*

II. THE SUPREMACY CLAUSE AND PREEMPTION

The federal government asserted its control over immigration regulation through Article VI, Clause 2 of the Constitution, better known as the Supremacy Clause. The Supremacy Clause establishes “federal law, treaties, and the Constitution itself [as] ‘the supreme Law of the Land.’”²⁹ A state or local law that violates the Supremacy Clause is preempted, and therefore, invalid. There are two categories of preemption. First, “express preemption” occurs when Congress “expressly preempts state legislation by stating so in a statute.”³⁰ Second, a state or local law can also be “impliedly preempted.” There are two subsets of implied preemption: (1) Field Preemption, and (2) Conflict Preemption. Field preemption exists “when Congress intends to occupy the [entire regulatory] field and leaves no room for state or local action.”³¹ Conflict preemption arises “when a state or local statute ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”³²

III. S.B. 1070 AND THE SUPREMACY CLAUSE

Despite the potential violation of the Supremacy Clause, the Arizona State Legislature passed S.B. 1070. The purpose of the law is to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”³³ This strict immigration law “requires state and local law enforcement officials to facilitate the detection of unauthorized aliens in their daily enforcement activities.”³⁴ Several legal commentators have stated that the provisions of S.B. 1070 “test the legal limits . . . of greater state involvement [in immigration].”³⁵

The U.S. Supreme Court’s decision in *De Canas v. Bica*³⁶

²⁹ MICHAEL JOHN GARCIA ET AL., CONGRESSIONAL RESEARCH SERVICE, STATE EFFORTS TO DETER UNAUTHORIZED ALIENS: LEGAL ANALYSIS OF ARIZONA’S S.B. 1070, 5 (2010), available at <http://www.fas.org/sgp/crs/homsec/R41221.pdf>.

³⁰ Gabriel J. Chin et al., *A Preliminary Report on Legal Issues Raised by Arizona’s New Statute Regulating Immigration* 29 (Working Paper Version 1.2, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440.

³¹ McKanders, *supra* note 19, at 591.

³² *Id.*

³³ 2010 Ariz. Sess. Laws 113 § 1 (codified Ariz. Rev. Stat. § 11-1051 (LexisNexis 2011)).

³⁴ GARCIA ET AL., *supra* note 29, at 1.

³⁵ *Id.* at 2.

³⁶ 424 U.S. 351 (1976).

provides guidance for analyzing S.B. 1070 under the Supremacy Clause. In *De Canas*, a California statute prohibiting employers from “knowingly employ[ing] an alien who is not entitled to lawful residence in the United States,”³⁷ survived constitutional attack because the Court found that the statute was not an “immigration regulation.”³⁸ The Court stated that an immigration regulation is one that determines “who should or should not be admitted into the county, and the conditions under which a legal entrant may remain.”³⁹ The California statute at issue in *De Canas* merely regulated employment relationships, and therefore, the Court held that the statute was not an immigration regulation. Additionally, the court further held that not every state “enactment that deals with immigrants is per se preempted.”⁴⁰

Under the *De Canas* rationale, S.B. 1070 would fit the definition of an “immigration regulation.” As previously stated, the purpose of the Arizona statute is to “deter the unlawful entry and presence of aliens.”⁴¹ Unlike the statute in *De Canas*, the Arizona law does not limit itself to merely regulating the employer-employee relationship. Instead, S.B. 1070 attempts to determine “who should or should not be” admitted into the United States. The Arizona law is a more expansive regulation of immigration than the statute at issue in *De Canas*, and a compelling argument can be made that S.B. 1070 intrudes into a “field” where the federal government has passed extensive legislation—leaving no room for state action.⁴² Additionally, other legal commentators have argued that state or local laws (such as S.B. 1070) that act as direct “immigration regulations” should be impliedly preempted because of foreign policy concerns. This argument assumes that by regulating foreign nationals “states [may] . . . unnecessarily embroil the [United States] in arguments with other countries.”⁴³ This scenario has already come to fruition in Arizona. Shortly after the passage of S.B. 1070, Mexico’s President Felipe Calderon expressed criticism of the statute by stating that the law is “a terrible idea: using racial

³⁷ Mark S. Grube, *Preemption of Local Regulations Beyond Lozano v. City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391, 400 (2010).

³⁸ *Id.* at 401.

³⁹ *Id.*

⁴⁰ McKanders, *supra* note 19, at 591.

⁴¹ S.B. 1070 § 1.

⁴² McKanders, *supra* note 19, at 590, 599.

⁴³ *Id.* at 600.

profiling as a basis for law enforcement.”⁴⁴

Even if Arizona is not precluded from passing S.B. 1070 generally, the specific provisions within the law may also be attacked on preemption grounds. For example, section 2 of the Arizona statute authorizes “intensive, daily involvement in immigration law enforcement by state and local officers.”⁴⁵ However, under section 287(g) of the INA, there is a system already in place for delegating federal immigration authority to specially trained state and local authorities. Under section 287(g) Congress “authorized the Attorney General . . . to enter into formal agreements with state or local entities . . . to play a direct role in the enforcement of federal immigration law.”⁴⁶ Neither prior to, nor after the passage of S.B. 1070, did Arizona enter into any agreement with the federal government to enforce federal immigration law. It can be argued that “enforcement functions by Arizona officials . . . not done pursuant to a 287(g) agreement”⁴⁷ are performed in violation of the INA, and therefore, violate of the Supremacy Clause.

CONCLUSION

S.B. 1070 faces serious preemption challenges. The statute is also being attacked on several other grounds, including (but not limited to) alleged violations of the Fourteenth Amendment’s protections against racial profiling, and the Fourth Amendment’s protection against unreasonable search and seizure. With the chance that this statute will be struck down as unconstitutional, this signals the importance for federal action to solve the serious immigration issues facing the United States. If the federal government takes action to regulate immigration, the regulations must balance xenophobia with economic pragmatism. This means that the legislation needs to protect the safety of ranchers like Rob Krentz from illegal immigrants seeking to deal drugs, traffic humans, and commit murder. However, the legislation cannot be tainted with racist motivations or allow for impermissible targeting of illegal immigrants, like the Quintana family, whose work in the United States is vitally important for

⁴⁴ Brian Knowlton, *Calderón Again Assails Arizona Law on Detention*, N.Y. TIMES., May 21, 2010, at A6.

⁴⁵ GARCIA ET AL., *supra* note 29, at 8.

⁴⁶ *Id.* at 9.

⁴⁷ *Id.* at 10.

the American economy.⁴⁸

⁴⁸ See Kevin C. Wilson, *And Stay Out! The Dangers of Using Anti-Immigrant Sentiment as a Basis for Social Policy: America Should Take Heed of Disturbing Lessons from Great Britain's Past*, 24 GA. J. INT'L & COMP. L. 567, 578 (1995) ("A belief persists that illegal immigrants are stealing jobs and draining the state's Treasury by taking advantage of public welfare benefits. However, in reality, undocumented immigrants improve the economy by taking the lowest quality jobs and providing cheap labor for big business. . . . Also, there is overwhelming evidence that undocumented immigrants pay more in taxes than they receive in public benefits." (citing Stanley Mailman, *California's Proposition 187 and its Lessons*, N.Y. L.J., Jan 3, 1995, at 3)); see also Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M. L. REV. 219, 243 (1991) ("As to the 'net drain' argument, every empirical study of illegals' economic impact demonstrates the opposite of what the nativists allege: undocumented[sic] actually contribute more to public coffers in taxes than they cost in social services.").