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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRIENDLY HOUSE, *et al.*,

Plaintiffs,

v.

MICHAEL B. WHITING, et al.,

Defendants,

PHOENIX LAW ENFORCEMENT ASSOCIATION, INC.,

Applicant.

CASE NO. 2:10-cv-001061-SRB

PHOENIX LAW ENFORCEMENT ASSOCIATION, INC.'S PROPOSED BRIEF IN SUPPORT OF DEFENDANTS.

Pursuant to F.R.C.P. 24, F.R.A.P. 29, and the pending Motion of Phoenix Law Enforcement Association, Inc. ("PLEA") to Intervene as of Right, or in the Alternative Permissively Intervene, or Alternatively for Leave to File as *Amicus Curiae*, PLEA respectfully submits this Proposed Brief in support of Defendants.

RESPECTFULLY SUBMITTED this 14th day of July, 2010.

NAPIER, ABDO, COURY & BAILLIE, P.C.

s/ James P. Abdo
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INTEREST OF PHOENIX LAW ENFORCEMENT ASSOCIATION ("PLEA")

PLEA is a non-profit corporation and represents more than 2,400 Phoenix police officers. PLEA's purpose is to promote the positive role of police and secure its members' rights. PLEA spends over one million dollars each year representing and protecting its officers.

PLEA has a direct and unique interest in this case. As the "boots on the ground," its members will be the ones enforcing sections 2 through 6 of SB 1070. But, for the past two years PLEA members have been performing some SB 1070 functions in the regular course and scope of their duties. As a result, they have transferred over 3,000 illegal aliens into U.S. ICE custody. These transfers were accomplished in the same manner as is codified in SB 1070 Section 2 — during a lawful stop, upon reasonable suspicion that the subject is an unlawfully present alien, the officers verify the subject's immigration status with ICE.

This lawsuit seeks to nullify a body of uniform precedent and eviscerate Congressionally-approved cooperation between local law enforcement officers and the federal government on which PLEA members rely. PLEA members live daily with the risks of encounters with illegal aliens. Since 1997, illegal aliens have killed or seriously injured nine PLEA members. SB 1070 was enacted to abate the risks caused by the need to police large populations of illegal aliens, attracted to the Phoenix area by a collapse in immigration enforcement.

INTRODUCTION

PLEA supports Governor Brewer's Motion to Dismiss in its entirety and opposes Plaintiffs' Motion for Preliminary Injunction. However, PLEA's brief focuses on its members' authority to assist in immigration enforcement, Plaintiffs' discredited "preemption by omission" theory, proper preemption analysis, and on preemption law in the area of alien registration as well as recent court decisions that uphold an officer's use of the alien registration laws.

ARGUMENT

I. Section 2 Codifies Immigration-Related Enforcement Activities Which PLEA Officers Already Perform On A Discretionary Basis.

Plaintiffs allege that Section 2 of SB 1070 is preempted because "federal law…carefully assigns arrest authority to designated categories of officials, requires warrantless arrests to be followed by specific procedures, and delineates a very narrow role for state and local officials in immigration enforcement." Pls.' Br. at 20-21. Plaintiffs' reasoning conflicts with Supreme Court and Appellate court precedents that uphold the procedure in SB 1070 Section 2.

During a lawful detention, an officer can inquire into the detainee's immigration status without a prior reasonable suspicion of unlawful immigration status. *Muehler v. Mena*, 544 U.S. 93, 101 (2005). If the officer forms a reasonable suspicion of unlawful status, the officer may verify that suspicion by contacting the federal government. Appellate courts uniformly hold that during a lawful stop an officer may (1) inquire into immigration status, (2) verify a suspect's status with ICE upon a reasonable suspicion that the person is unlawfully present, and (3) detain the alien if he is unlawfully present. *Estrada v. Rhode Island*; 594 F.3d 56 (1st Cir. 2010); *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 2001); *United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007); *United States v. Rodriguez-Arreola*, 270 F.3d 611, 619 (8th Cir. 2001); *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1300 (10th Cir. 1984); *United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001); *United States v. Favela-Favela*, 41 F. App'x 185, 191 (10th Cir. 2002). Recently, the Ninth Circuit agreed with its sister Circuits. *Martinez-Medina v. Holder*, 2010 U.S. App. LEXIS 10663 (9th Cir. 2010) (unpub.) (holding that after an officer has a reasonable suspicion that the detained alien is unlawfully in the country, the officer may hold the

alien and contact ICE for verification). This agreement among the Circuits is not surprising, as Congress expressly encourages concurrent enforcement. 8 U.S.C. §§ 1357(g)(10); 1373(a)-(b).

Additionally, Plaintiffs' claim that "[f]ederal law authorizes state and local police to make immigration-related arrests only in specific situations," ignores cases in which courts have upheld an officer's detention and arrest of illegal aliens in contexts well beyond the limitations sought by Plaintiffs. For example, in *Martinez-Medina*, 2010 U.S. App. LEXIS 10663, the Ninth Circuit upheld the officer's detention of an alien on nothing more than an admission of alien status and failure to possess "green cards." *See id.* at 2, 5-6. In *Vasquez-Alvarez*, 176 F.3d 1294, the Tenth Circuit rejected a preemption argument similar to Plaintiffs'— that "all arrests not authorized by § 1252c are prohibited by it" through preemption. *Id.* at 1297. Instead, the Tenth Circuit upheld the arrest, which was "based solely on the fact that Vasquez was an illegal alien." *Id.* at 1295. The court explained that Congress' intent was to "displace [any] perceived federal limitation on the ability of state and local officers to arrest aliens in the United States," *id.* at 1298-99, rather than to "restrict[] immigration enforcement by states and localities to very specific and narrow circumstances," as Plaintiffs contend. Pls.' Br. at 22.[1]

Section 2 codifies the body of precedent upholding assistance by PLEA members in the enforcement of immigration law. To find Section 2 preempted, this Court would have to hold that while PLEA officers have the discretion to verify a person's immigration status during a lawful stop, a State mandate that they do so is preempted. Because such a proposition is plainly irrational, Plaintiffs cannot show a likelihood of prevailing in their facial challenge to Section 2.[2]

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[1] Courts have also upheld warrantless arrests for immigration violations. *See Salinas-Calderon*, 728 at 1298 (upheld warrantless arrest of alien with no driver's license or green card).

[2] Plaintiffs' collateral arguments that Section 2 will "interfere[] with federal regulatory interests" and conflict with federal officials' "considerable discretion in how best to use [immigration enforcement] resources" are illogical. Pls.' Br. 22-23. Federal immigration agents are already

II. Plaintiffs' Theory Of "Preemption by Omission" Has Been Rejected By The Courts And Is Inconsistent With The Supreme Court's Preemption Analysis

In arguing that Section 4 is preempted, Plaintiffs seek to revive a discredited theory of "preemption by omission," namely that because Congress did not expressly criminalize the solicitation of work by unauthorized workers, States are preempted from doing so. Pls.' Br. 20. However, this argument was expressly rejected in *De Canas v. Bica*, 424 U.S. 351, 356 (1976). The *De Canas* plaintiffs argued that the "Texas proviso," a since-repealed exemption to the federal harboring law that excluded the employment of illegal aliens as a violation of the statute, preempted a California state law criminalizing the employment of illegal aliens. *See De Canas*, 424 U.S. at 360. Instead, the Supreme Court held that the law was not preempted, despite that proviso. *Id.* at 361. Following *De Canas*, the Ninth Circuit and this Court have rejected this same argument. *See Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 866-867 (9th Cir. 2009) (rejecting argument that Congressional authorization for voluntary participation in the federal E-verify program by implication preempted Arizona from mandating it); *Ariz. Contrs. Ass'n, Inc. v. Candelaria*, 534 F. Supp. 1036, 1055-56 (D. Ariz. 2007) (provisions requiring that E-Verify be voluntary on the national level did not mean that Congress preempted states from mandating its use); *see also Gray v. City of Valley Park*, 2008 U.S. Dist. LEXIS, 7238, 58 (D. Mo. 2007) ("Congress's decision not to make the [E-Verify] program mandatory" does not "restrict[] a state or local government's authority [to do so] under the police powers.").

A "preemption by omission" theory also turns upside down preemption analysis. This Court must "begin [its preemption] analysis with the assumption that the historic police powers

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required to respond to all inquiries from State and local officials regarding the immigration status of any person. 8 U.S.C. § 1373(c). And, nothing in Section 2 interferes with a federal discretion as to whether to prosecute or to receive an alien into federal custody. An immigration agent may decline to accept custody of a verified illegal alien, an operational decision federal agents have made on a daily basis for decades long before the enactment of SB 1070.

of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008); *see also De Canas*, 424 U.S. at 356 ("Federal regulation… should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons…"). Plaintiffs ask this Court to begin with a presumption of preemption—because Congress did not act, it must have meant to preempt—rather than the opposite and correct presumption.

Furthermore, this "assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Altria*, 129 S. Ct. at 543.[3] Any Congressional legislation is in the field of employment, an area in which States enjoy "broad authority under their police powers." *De Canas*, 351 U.S. at 356. Like California in *De Canas*, Arizona drafted Section 4 to focus on the "local problems" of illegal alien employment in the State. *Id.* at 357.[4] As such, the presumption applies with "particular force" to Section 4.

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[3] *See also Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) ("…particularly [when] Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.")

[4] Plaintiffs misstate the definition of a "regulation of immigration" in *De Canas*, a preemption analysis distinct from field, conflict, and express preemption. Pls.' Br. p. 11. Plaintiffs claim a *De Canas* "regulation of immigration" occurs when "a state law involving immigration [does not] primarily address legitimate local concerns and [does not] only [have] a 'purely speculative and indirect impact on immigration.'" *Id.* This is a gross misstatement of the holding and of the sentence to which Plaintiffs cite. A "regulation of immigration" is "a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain." *See De Canas*, 424 U.S. 351at 355-56 (quoted by *CPLC*, 558 F.3d 856, 864 (9th Cir. 2009)). Regardless, SB 1070 does affect legitimate local concerns. PLEA officers have been severely injured or killed by illegal aliens in Arizona, whose current population is an estimated 460,000. Hoefer, Rytina, & Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States* 4 (U.S. DHS, 2010) *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf. Illegal aliens cost the state an estimated $2.569 billion each year. Martin & Ruark, Fed'n for Am. Immigration Reform, *The Fiscal Burden of Illegal Immigration on United States Taxpayers* 4 (2010) *available at* http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf?docID=4921. Uncompensated criminal justice costs alone total $340 million annually. *Id.* at 64.

Finally, had it wanted, Congress knew how to preempt state laws that criminalized the acceptance or solicitation of unauthorized employment. Congress expressly preempted state or local "civil and criminal sanctions" on *employers* who hire unauthorized workers. 8 U.S.C. § 1324a(h)(2). If any inference is to be drawn from Congressional action, it must be that Congress did *not* intend to preempt state laws that criminalized the solicitation and acceptance of work by unauthorized workers. Plaintiffs' Section 4 preemption challenge is not likely to succeed.[5]

III. The alien registration provisions of SB 1070 Section 3 fully comport with the purposes of federal alien registration legislation.

Plaintiffs' reliance on field preemption to preempt Section 3 is misplaced. Cmplt. ¶ 99 ("Section 3 of SB 1070…enacts a state…scheme in an area that Congress has exclusively regulated.").[6] Plaintiffs cite to *Hines v. Davidowitz*, 312 U.S. 52 (1941) to support this theory. Pls.' Br. 16 (claiming that the "Supreme Court has explicitly declared [the alien registration laws] off-limits"). However, the *Hines* majority expressly limited its decision to *conflict* preemption, *not* field preemption. *Id.* at 62 (The Court "expressly le[ft] open all of appellees' other contentions, *including the argument that the federal power in this field, whether exercised or unexercised, is exclusive.*"). Instead, the Court reviewed the Pennsylvania alien registration law under an as-applied conflict preemption challenge.[7] *Id.* at 67. ("Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as

[5] Section 4's restrictions on employment by illegal aliens are also not *field* preempted, *De Canas*, 424 U.S. at 357, nor are they expressly preempted. The "express preemption" clause of the employer sanctions statute, 8 U.S.C. § 1324a(h)(2), targets employers, not employees. *See CPLC*, 558 F.3d at 863 (express preemption clause prohibits sanctions against *employers*).
[6] Additionally, a presumption against preemption applies in all cases. *Altria*, 129 S. Ct. at 543.
[7] In this case, Plaintiffs have brought a "facial challenge," which is a tougher standard to meet than the standard for the *Hines* plaintiffs. In a "facial challenge," Plaintiffs must show that "no set of circumstances exists under which the Act would be valid." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

an obstacle to…the full purposes and objectives of Congress."). The key case on which Plaintiffs rely does not support their claim that Congress "field preempted" this area of law.

Plaintiffs then argue that SB 1070 conflicts with federal law because "the federal government rarely prosecutes registration violations" and "the statutes referenced in SB 1070 specifically rely on federal regulations that have not been kept up-to-date." Pls.' Br. 17. These claims ignore basic agency law and relevant court decisions. First, statutes do not rely on regulations, regulations rely on statutes. Claiming that an agency has not kept its regulations "up-to-date" cannot form the basis for preemption. Second, whether an agency chooses to prosecute certain crimes likewise cannot form the basis of conflict preemption, which examines the "purposes and objectives of *Congress*." *De Canas*, 424 U.S. at 363. Third, such claims ignore federal court decisions, including a 2010 Ninth Circuit opinion, which reference the alien registration crimes in validating detentions and arrests of unlawfully present aliens. *See Estrada*, 594 F.3d at 65; *Martinez-Medina*, 2010 U.S. App. LEXIS 10663at 2-4; *Salinas-Calderon*, 728 F.2d at 1301; *United States v. Dameshghi*, 2009 U.S. Dist. LEXIS 66819, 22 (D. Utah 2009).[8]

Plaintiffs are attempting to distract this Court from the Supreme Court's actual conflict analysis in *Hines*. The Supreme Court clarified the term "full purposes and objectives of Congress" to explain why the 1939 Pennsylvania state law was preempted:

> If the purpose of the [Federal] act cannot otherwise be accomplished -- if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect -- the state law must yield to the regulation of Congress within the sphere of its delegated power.

[8] Aliens who illegally enter without inspection are charged under § 1306(a), not § 1304(e), because no registration documents were issued to them. *U.S. v. Mendez-Lopez*, 528 F. Supp. 972, 973-974 (N.D. Okla. 1981)("…Congress made distinct provisions for registered aliens failing to carry their registration documents, and aliens failing ever to register in the first place.")

Id. at 68, n. 20. The Pennsylvania law failed this test for two reasons. First, the State created its own alien registration scheme, requiring all aliens to register with the State, whereas Congress intended to have an integrated national system. *Id.* at 60-61, 74. Second, the Pennsylvania law required aliens to carry their registration with them at all times. *Id.* at 60-61. Congress rejected including such provision in the 1940 federal Act due to Congressional purpose. *Id.* at 72. [9]

In contrast, Section 3 satisfies this test and is distinguishable from the Pennsylvania law in its language, scope and operation. SB 1070 does not create an Arizona-specific registration system or improperly "complement" the federal scheme. The conduct prohibited by SB 1070 § 3(A), which references the relevant U.S. Code sections, is *identical* to the conduct prohibited by the federal law. A.R.S. § 13-1509(A)(citing 8 U.S.C. § 1304(e) (willful failure to carry) and 8 U.S.C. § 1306(a) (willful failure to register)). Arizona expressly provides for and defers to federal control of prosecutions by: (1) requiring prior federal verification of status (A.R.S. § 13-1509(B)); (2) exempting from state prosecution "any person who maintains authorization from the federal government to remain in the United States" (A.R.S § 13-1509(F)[10]); and (3) requiring state deferral to federal authority in statutory construction and interpretation (SB 1070, § 12).

[9] Justice Brennan's general concerns in *dicta* about abusive carry requirements in pre-World War II Europe to establish preemption are inapplicable. *See* Pls.' Br. p. 18 (quoting *Hines*, 312 U.S. at 65-66, 76). In 1952, Congress amended the federal alien registration act to add the existing willful failure to carry alien registration crime, 8 U.S.C. § 1304(e). Congressional purpose had obviously changed in that regard. SB 1070 § 3 is fully consistent with current law.

[10] Subsection (F) exempts from prosecution aliens who are authorized by the federal government to remain in the United States. Police would verify with the federal government an alien's immigration status pursuant to 8 U.S.C. § 1373(c). If the required government response confirms lawful presence, the alien is exempt from state prosecution. Again, in a "facial challenge," Plaintiffs must show no set of circumstances under which the Act is valid. *See Wash. State Grange*, 552 U.S. at 449.

Thus, the actual implied preemption question facing the Court is whether, given that courts allow police to make arrests for violations of the alien registration crimes, does *codifying* the identical misdemeanors frustrate the purpose of the federal Act?[11] The correct answer is no.

First, an implied preemption argument cannot be based on the ground that Arizona has authorized the state prosecution of state versions of federal criminal misdemeanors. The Supreme Court has long upheld parallel criminal enforcement and dual prosecution in general. *Bartkus v. Illinois*, 359 U.S. 121, 131-132 (1959); *Moore v. Illinois*, 55 U.S. 13 (1852).

Plaintiffs' broader political complaint that, on its face, SB 1070 will somehow "interfer[e] with federal governmental interests" or "creat[e] serious foreign relations issues," Complaint, ¶¶ 144-148, could not support preemption of Section 3 even if Plaintiffs had standing to assert it. In enacting the 1952 statutes that criminalized an alien's failure to carry his or her registration document, Congress reported that "the provisions have been modified…to require… *the registration and fingerprinting of all aliens in the country and to assist in the enforcement of those provisions*." 2 U.S. Code Cong. & Ad. News 1723 (1952). Nowhere do Plaintiffs identify federal law or regulations that provide for immunity from prosecution on national policy grounds for either failure to carry or failure to register. In contrast, Congressional policy is the registration of all aliens for the purpose of restricting the presence of aliens in the United States to those persons with demonstrated eligibility for classification in some valid immigration status. 8 U.S.C. § 1201; *United States v. Campos-Serrano*, 404 U.S. 293, 299-300 (1971)(purpose of alien registration document is to identify the alien and govern his activity and presence in this country). As for requiring lawfully present aliens (who are exempt from prosecution under § 3

[11] Again, Plaintiffs misconstrue *Hines* by claiming that the Court held that "even laws that 'complement the federal alien registration law and enforce additional or auxiliary regulations'" are preempted. Pls.' Br. p. 16. As explained *supra*, this was *dicta* and *Hines* expressly refused to rule on the issue of field preemption, on which Plaintiffs mistakenly base their challenge.

of SB 1070) to comply with alien registration laws, the Ninth Circuit held that such a requirement imposes an inconvenience the Court found to be entirely permissible and foreseeable. *United States v. Ritter*, 752 F.2d 435, 438 (9th Cir. 1985).[12]

It is illogical to assert that the codification of enforcement actions under SB 1070 facially frustrates executive agency foreign policy or humanitarian interests, but that the existing judicially-approved practice of detaining aliens by officers for violations of alien registration misdemeanors does not.[13] There is no conflict with the implied preemption doctrine articulated in *Hines* because there is no distinction between the text, operation or standards of current federal alien registration law and SB 1070 Section 3, beyond the entirely permissible enactment of a state enforcement mechanism. Federal and state alien registration laws in this case are seamlessly integrated, and their symbiotic existence should not be blocked or restrained based on Plaintiffs' facial objections to Section 3's validity.

CONCLUSION

Amicus requests that Plaintiffs' Motion for a Preliminary Injunction be denied and that Defendant Governor Brewer's Motion to Dismiss be granted.

RESPECTFULLY SUBMITTED this 14th day of July, 2010.

/s James P. Abdo
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[12] The information displayed on an alien registration document is not confidential. *Ascencio-Guzman v. Chertoff*, 2009 U.S. Dist. LEXIS 32203 (S.D. Tex. 2009). The executive agencies are required to verify inquiries by Arizona law enforcement agencies and any state or local officials as to the immigration status, "lawful or unlawful, of any person." 8 U.S.C. §§ 1373, 1644.

[13] Plaintiffs do not even attempt to demonstrate that SB 1070 § 3 frustrates the operation of policies expressed in Congressional acts or treaties.