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Thomas A. Saenz

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Thelton E. Henderson Center for Social Justice  
Ruth Chance Lecture Series\*

## A NEW NULLIFICATION: ARIZONA'S S.B. 1070 TRIGGERS A NATIONAL CONSTITUTIONAL CRISIS

Thomas A. Saenz\*\*  
President & General Counsel  
Mexican American Legal Defense and Educational Fund  
(MALDEF)

I have had the opportunity over the past three months to talk about the issue of Arizona's S.B. 1070 all across the country.<sup>1</sup> I run into people and they ask, "Oh, you must be spending a lot of time in Arizona," but the truth of the matter is I don't spend a lot of time in Arizona. And that's not because I'm afraid of spending time in Arizona, or because I'm particularly engaged in a personal boycott, but really because I've been talking about Arizona in every other state, or almost every other state and region of the country. There is a tremendous amount of interest in this issue as you all know, particularly as we move toward a November mid-term election where far too many candidates across the country have pegged their campaigns in part to their pledge to introduce and seek to enact some replication of Arizona's S.B. 1070 in their own state. That goes from California all the way to Florida. In every region in the country, there are candidates; last count that I read, 22 states have had some elected official or potential elected official voice some interest in replicating S.B. 1070 in their own state. When I talk about S.B. 1070, I like to go back a long, long time ago because this just didn't come out of nowhere. It's important to know its context. And I'm going to be a little technical, since this is mostly a law school

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\*\* Thomas A. Saenz is a nationally recognized civil rights attorney and current President and General Counsel of the Mexican American Legal Defense and Educational Fund (MALDEF). Previously, as Counsel to Los Angeles Mayor Antonio Villaraigosa, Saenz served on the four-person executive team to the Mayor, where he provided legal and policy advice on major initiatives. During his four-year tenure with the City of Los Angeles, Saenz helped to lead the legislative effort to change the governance of Los Angeles Unified School District (LAUSD), the effect of which has been to take the City a step closer to securing a quality education for all students in Los Angeles. Saenz also served as the lead liaison on labor negotiations, with a goal of addressing serious financial challenges in partnership with the City's workers. Saenz had previously served at MALDEF for 12 years. During that time, he was a leader in the successful challenge to California's unconstitutional Proposition 187, and he led numerous civil rights cases in the areas of immigrants' rights, education, employment, and voting rights.

1. SB 1070, 2010 Ariz. Sess. Laws 0113, amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)).

audience, but I think it will be understandable to everyone.

Our Declaration of Independence actually included, among our grievances against King George, a concern that he was not encouraging or permitting immigration to the colonies.<sup>2</sup> That concern is not often talked about. What that means is that we are not only a nation of immigrants as everyone acknowledges, but in fact our *nationhood* began in part because of the issue of immigration – because of the colonists’ concerns that the King was not encouraging or permitting the level of immigration that was required, in their minds, to fully develop the colonies and then the United States. Twelve years later, after an experiment with the Articles of Confederation, with the adoption of the Constitution, immigration not only became a part of our very beginnings as a nation, but became an integral part, an essential attribute, of our being one nation.

We refer to the United States of America as a singular entity, and we do it in part because the Constitution assigns the power over foreign affairs and the power over naturalization exclusively to the federal government.<sup>3</sup> The Supreme Court from those assignments has concluded,<sup>4</sup> again logically, it being an essential attribute of any nation that only *one* regulator of immigration can exist in the United States, the federal government. Indeed, if we allowed Arizona, California, New York, Texas, each to have its own immigration system, we would cease to be one country. We would have each state become its own country with its own immigration rules, its own considerations about who would be allowed to enter and stay, and the conditions under which they would be allowed to stay. Thus, immigration goes back a long time in our history. Not only are we a nation of immigrants, not only is our nationhood in part predicated on concerns about immigration, but our Constitution embeds in it the notion that an essential attribute of our being one nation is that we have only one set of immigration regulations. So, this is an issue that is deep in our history, deep in our law, and deep in our values. It’s important to understand that S.B. 1070, then, is not a new discussion. It is not some new discovery by Jan Brewer or Russell Pearce or any other candidate for office of a significant issue or concern. It has been a concern since the beginnings of our nation’s existence.

One outcome of the Constitution exclusively assigning immigration regulation to the federal government is that well-developed jurisprudence<sup>5</sup> from the Supreme Court says: “States, no matter how much you may dislike what the federal government does with respect to regulation of immigration, you do not have the right to enact your own immigration regulations.” Which is not to say that we have not had previous attempts by states, including this one, to attempt to do just that, an attempt to regulate immigration in a state’s own right. As a result, the Supreme Court as well as courts of appeals and district courts have developed a vigorous doctrine of federal preemption under the Supremacy Clause<sup>6</sup> as applied to state or local regulations of immigration. Now, for anyone who is unfamiliar with supremacy and

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2. DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776) (“He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither . . .”).

3. U.S. CONST. art. I, §8, cl. 3. (“[t]o Establish a uniform Rule of Naturalization...”).

4. *See* *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”).

5. *See, e.g., id.* at 354-65.

6. U.S. CONST. art. VI, cl. 2.

federal preemption, it's the basic doctrine that federal law is supreme, and state laws and local laws cannot be enacted in an attempt to override federal laws. They cannot have that intent or that effect.

In the area of immigration, because of the constitutional basis of the assignment to the federal government of the authority to regulate immigration, the preemption doctrine is even better developed. In this area, there are actually *four* kinds of preemption; the first is *constitutional preemption*.<sup>7</sup> That means that even if Congress never enacted a single immigration law, chose never to regulate our borders – regulate who was allowed to enter, regulate who must leave – even if Congress chose tomorrow to repeal the entire title of the United States Code dealing with immigration and nationality, there would still be some requisite of immigration regulation that no state could enact. That is the notion of constitutional preemption. The Supreme Court has stated that the basic decisions about who is allowed to enter and the conditions under which they are allowed to stay in this country are constitutionally assigned to the federal government.<sup>8</sup> So, even if there were a total vacuum – Arizona, California, Texas, New York, could do nothing. They are powerless to attempt to regulate who can enter the country and the conditions under which those who enter are allowed to stay. That is a powerful notion of preemption, beyond what you see with respect to other federal laws.

Now the other elements of preemption – a quick review of those – apply in immigration as they do in other areas of federal law. The first is *field preemption*.<sup>9</sup> If the federal government has enacted comprehensive laws in a particular area, occupying the field, in this case immigration regulation, then states and localities cannot invade that field. It is occupied fully by the federal government. Now, in the context of immigration, we do have an entire code, an entire title of the U.S. Code that is specifically directed to immigration regulation in the Immigration and Nationality Act<sup>10</sup> – amended many times over the decades but still there. The federal government has occupied the field of immigration regulation. Now, the debate centers, as you all may surmise, on what are the outlines, what are the boundaries of that field, and how much of that field has been occupied. But, we do know that the field *has* been occupied, and we can debate how far it goes.

The second general notion of preemption is *conflict preemption*,<sup>11</sup> also applicable in this context. As the name suggests, conflict preemption means that no state or locality can enact a law that conflicts with federal law. Now, the Supreme Court has said there are two kinds of conflicts, one that you can call a direct conflict, where it is actually impossible to comply with both the federal law and state or local law. That kind of irreconcilable conflict cannot be allowed to continue under the Supremacy Clause. But the Supreme Court has also stated that another kind of conflict is obstacle preemption, where a state or local law presents an obstacle to

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7. See *De Canas*, 424 U.S. at 354-56 (discussing parameters of “constitutionality proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.”).

8. See *id.* at 355 (“regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”).

9. See *id.* at 357; *Fidelity Fed. Sav. & Loan. Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, (1947)).

10. Immigration and Nationality Act (INA) of 1952, 8 U.S.C. §§ 1101-1107 (2006).

11. See *De Canas*, 424 U.S. at 363; see also *Fidelity*, 458 U.S. at 153 (noting conflict preemption due to physical impossibility or obstacle).

achieving the objectives of federal law, even if you could technically comply with both. That too is preempted under the conflict doctrine.

And finally, I'll mention it briefly because it relates to another precursor to S.B. 1070; in immigration we also have the last kind of preemption, *express preemption*.<sup>12</sup> That is where Congress has expressly stated: "States, localities, you cannot enact regulations that do 'X.'" In the specific case of immigration, the most well-known form of express preemption flows out of the 1986 Immigration Reform and Control Act (IRCA).<sup>13</sup> This is the law that requires all of us when we seek employment to prove that we have the right to work. You have all seen the I-9 form. Probably had to come in with your two forms of identification when you've had a job to demonstrate you both have a lawful presence and have the right to work in this country. That law included an express preemption clause<sup>14</sup> that said, with certain limited exceptions, states and localities cannot regulate the employment of immigrants and cannot regulate employers hiring immigrants beyond what the federal law says. As I said, there are certain limited exceptions that became critical in a case now pending in the United States Supreme Court.

The preemption doctrine in the area of immigration is full-scope and vigorous; starting with that basic notion that constitutionally only the federal government can regulate immigration. But that is not to say, regrettably, that there have not been many attempts over the years by states to regulate immigration. One with which I am very familiar comes right out of California sixteen years ago in Proposition 187.<sup>15</sup> Now, many of you were probably quite young at the time – making me feel very old, I had fewer grey hairs then. But, in November 1994, 58% of California voters voted "yes" on Proposition 187.

I want to talk a little bit in-depth about 187 because it is an important precursor, including as foreshadowing some of the exact language used in S.B. 1070.<sup>16</sup> But, I want to tell you the entire political context of Proposition 187. I am going to tell it using my own personal experience. I had just joined MALDEF as a staff attorney in 1993, and one of the things that MALDEF was doing, together with civil rights organizations across California, was tracking a number of proposals for initiatives to go before voters that would regulate the rights of immigrants. If I recall correctly, we were tracking four different proposals, some much more limited than others. The most extreme of these, that covered everything you could imagine, was the one that would become Proposition 187. And indeed we – not MALDEF, but one of our allied organizations – had a mole in the campaign for Proposition 187 that was feeding us information on a regular basis about how close they were to qualifying this most extreme measure for the ballot. And every indication was that they would

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12. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

13. See Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 324a(a)(1)(A) (2000).

14. See 8 U.S.C. § 1324a(h)(2) (2006) ("[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

15. Proposition 187 – Illegal Aliens Ineligibility for Public Services Verification and Reporting. Initiative Statute, 1994 Cal. Legis. Prop. 187.

16. *Compare* S.B. 1070, 49th Leg., 2d Reg. Sess., § 2(B) (Ariz. 2010) (signed into law Apr. 23, 2010) ("where reasonable suspicion exists"), *with* CA Prop. 187 § 5(c) (use of "reasonable suspicion" and "reasonably suspects").

not have the signatures they needed. It takes a significant number<sup>17</sup> of signatures, particularly given that many of them would be disqualified, to put something on a statewide ballot. Up until a month before the deadline to qualify for the November election, every indication was that, what would become Proposition 187, was going to die for a lack of signatures to put it on the ballot.

But, in that last four weeks, Pete Wilson, a moderate Republican governor, without a reputation for taking on extreme issues, without a reputation at that time for exploiting wedge politics, was running for reelection in November of 1994. He was losing in the polls.<sup>18</sup> He was looking for an issue to inspire his base, to inspire others to come out and vote for him. So, Governor Pete Wilson arranged for the state Republican Party to do a mass mailing seeking signatures to qualify Proposition 187 for the ballot. And it was only through that in-kind mailing that they secured the signatures necessary to get 187 on the ballot. I want you to remember that as we talk about S.B. 1070: a moderate governor without a reputation for extreme views, without a reputation for exploiting wedge politics, in a fight for political life, seized on Proposition 187. And then Wilson built his campaign around that initiative. You may have seen some of the commercials, now infamous: shadowy, grainy photos of people crossing the border and the words, “they just keep coming.”

Pete Wilson did succeed in his reelection campaign by using Proposition 187. What is remarkable about Proposition 187 – as I mentioned, the most extreme of the measures that we were tracking – is that it covered virtually every government service you could imagine. It had sections touching on law enforcement, touching on kindergarten through twelfth grade public education, touching on higher education in the U.C.s<sup>19</sup>, Cal States<sup>20</sup> and community colleges, touching on social services and touching on publicly provided health care.<sup>21</sup> And with respect to each one of these services, it laid out a virtually identical drill of tasks for government workers: they had to first determine if they “reasonably suspected” – remember those words “reasonably suspected” – that someone seeking services was undocumented.<sup>22</sup> Now remarkably, they left out the word “reasonable” or “reasonably” in the area of law enforcement; it must have been a typo, and I’ll tell you why. Through the course of the Proposition 187 debate, I had to debate every person who claimed to have authored that initiative, and there were many of them. So, I can only conclude that they wrote it by committee – and there must have been twenty of them – and it must have been a typo because they left out the word “reasonably/reasonable” with respect

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17. CAL. CONST. art. II, § 8(b) (requiring five percent of gubernatorial vote to qualify initiative statute).

18. See UC DATA, *Cal. Field Polls*, (Feb. 1993-Apr. 1994), [http://ucdata.berkeley.edu/data\\_record.php?recid=3](http://ucdata.berkeley.edu/data_record.php?recid=3) (citing the changes in voter approval between February 1993 and April 1994. Specifically, in Feb. 1993 – Brown/Wilson/Undecided (53/37/10), Garamendi/Wilson/Undecided (51/35/12); in May 1993 – Brown/Wilson/Undecided (53/35/17), Garamendi/Wilson/Undecided (49/30/21); in Aug. 1993 – Brown/Wilson/Undecided (50/37/10), Garamendi/Wilson/Undecided (47/35/18); in Oct. 1993 – Brown/Wilson/Undecided (50/33/17), Garamendi/Wilson/Undecided (46/34/20); in Jan. 1994 – Brown/Wilson/Undecided (46/38/16), Garamendi/Wilson/Undecided (48/37/15); and in Apr. 1994 – Brown/Wilson/Undecided (51/39/10), Garamendi/Wilson/Undecided (50/39/11)).

19. Universities of California.

20. California State Universities.

21. See 1994 Cal. Legis. Prop. 187 §§ 4 (law enforcement), 5 (public social services), 6 (public health care), 7 (K-12 public education), 8 (public higher education).

22. See, e.g., *id.* §§ 5(c), 6(c), 7(c), 8(c).

to one entity: law enforcement.<sup>23</sup>

In law enforcement, under Proposition 187, all law enforcement had to do was “suspect.” It did not have to be reasonable, they just had to “suspect” that someone was undocumented. But with respect to all of the others it was “reasonably suspect.” With no guidance about what reason you could rely upon to arrive at your suspicions. The rest of the drill was: if you reasonably suspected someone, you had to attempt to verify his or her status – again, without much guidance about how to do that. You had to then deny services if you continued to suspect, reasonably, that they were undocumented. You had to send them a notice, essentially telling them: the State of California has determined you are undocumented; you should therefore legalize your status or leave.<sup>24</sup> And finally, you had to report those you reasonably suspected to the State Attorney General, to the then Immigration and Naturalization Service (I.N.S.), and to various other entities within the state depending upon the particular service that was involved.<sup>25</sup> So a detailed – but not detailed enough – list of what these bureaucrats would have to do: suspect, verify, deny, notify, report. Touching every government service that state or local government provides.

What was remarkable is that with respect to one of these services, Proposition 187 was plainly – and they acknowledged it – unconstitutional. That is because the Supreme Court had decided in 1982, a dozen years before Proposition 187, that under the Equal Protection Clause, you cannot deny enrollment in public kindergarten through twelfth grade or charge tuition for a public school on the basis of a child’s immigration status.<sup>26</sup> Established precedent, twelve years old. The authors – again, twenty of them or however many it was – openly acknowledged that their proposal directly contradicted *Plyler*.<sup>27</sup> Their argument was that they wanted to test it. Their secondary argument was that they wanted to send a message to the federal government. So remember that as well. Plainly unconstitutional. Note, that there were also preemption/Supremacy Clause concerns with 187. But, at that point in time, that precedent was not as clear as *Plyler*. So, with respect to the provision relating to kindergarten through twelfth grade education, [187 was] a clearly, plainly, openly unconstitutional proposal. Nonetheless, as I indicated, it passed with 58% of the vote. Remarkably, and an indication of the damage that may have been done to California by the campaign, this was a very racially split vote. At the end of the day, exit polling told us that 78% of Latino voters voted no.<sup>28</sup> 78% . . . extraordinary. But those exit polls also told us that a majority of African-Americans, and a majority of Asian Americans, also voted no. So it only got to 58% of the vote because of a tremendous amount of support from white voters and from the fact that at that time – and as of today – white voters outnumber minority voters regardless of what the general population is.<sup>29</sup>

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23. See *id.* § 4 (a)-(b).

24. See *id.* §§ 4(b)(2), 5(c)(2), 6(c)(2), 7(c), 8(c).

25. See *id.* §§ 4(b)(3) (AG and INS); 5(c)(3) (Att’y Gen., INS, and State Dir. of Soc. Servs.), 6(c)(3) (Att’y Gen., INS, and State Dir. of Health Servs.), 7(c) (Att’y Gen, INS, State Superintendent of Pub. Instruction).

26. *Plyler v. Doc*, 457 U.S. 202, 230 (1982).

27. *Id.*

28. Daniel M. Weintraub, *Crime, Immigration Issues Helped Wilson, Poll Finds: Election: Proposition 187 Wins Among Whites, But Loses Among All Other Ethnic Groups, Exit Survey Shows*, Exit Poll, L.A. TIMES (Nov. 9, 1994), [http://articles.latimes.com/1994-11-09/news/mn-60574\\_1\\_ethnic-group](http://articles.latimes.com/1994-11-09/news/mn-60574_1_ethnic-group).

29. *Id.*

Because California law says that an initiative takes effect the very day after the election, there were half a dozen lawsuits filed the very next day in federal and state courts challenging various provisions, including that plainly, openly, unconstitutional provision of Proposition 187. One of those cases, a case led by the ACLU and MALDEF, challenged every single provision in Proposition 187.<sup>30</sup> We succeeded in obtaining a temporary restraining order and a preliminary injunction. The state appealed that preliminary injunction, but the Ninth Circuit Court of Appeals upheld the injunction. And for four years we litigated with that injunction in place, and ultimately, obtained two different decisions from the same district court judge indicating that the vast, vast majority of the initiative was unconstitutional.<sup>31</sup> Not because of *Plyler v. Doe*, not because of that openly unconstitutional provision, but because of federal *supremacy* and *preemption*.

Judge Mariana Pfaelzer – a reasonable, smart, careful judge – concluded that all, but two minor provisions of 187, violated all three of the doctrines of preemption, other than “express” that I mentioned previously. She concluded that 187 was an unconstitutional regulation of immigration, preempted under the Constitution itself; that Congress had occupied the field of immigration regulation; that 187 invaded that field; and, that there were elements, significant elements of 187, that conflicted or presented obstacles to federal law in the specific areas that they addressed.<sup>32</sup> It took four years, but ultimately California’s attempt to enter the exclusive realm of federal regulation of immigration ended in court. There was an appeal that went to the Ninth Circuit, which we briefed. Fortunately, before it was heard in the Ninth Circuit, there was a change in governor. The new governor, Gray Davis, agreed to mediate. We went to mediation, and the Ninth Circuit basically agreed to drop our respective appeals. We had filed a cross-appeal on those two minor provisions that I said earlier were allowed to stay in place, and with that settlement, Proposition 187 met its final demise. However, it does mean that in the Ninth Circuit Court of Appeals there is no circuit precedent on Proposition 187. This is important of course because Arizona is in the same circuit.

*Fast-forward to 2010.* We’ll review a little of what happened in between, later. Arizona Senate Bill 1070: What does it seek to do? Well, it deals with a number of different subjects, all of them related to the rights of undocumented immigrants and seeking to restrict those rights. It ranges from, the portions you’ve heard about and that I’ll review dealing with law enforcement, to a provision that deals with the right to solicit work by day laborers who are undocumented, to further regulation of employers’ ability to hire immigrants. It deals with a number of different subjects. Not as many as Proposition 187. In terms of government services it really only looks at law enforcement, but it uses that similar language.<sup>33</sup>

What you’ve heard about, the most egregious provision of S.B. 1070, is a requirement that every law enforcement officer in Arizona determine whether he or she has a “reasonable suspicion.” That is whether they reasonably suspect that someone they come into contact with is an undocumented immigrant<sup>34</sup> – as Jan

30. Gregorio T. v. Wilson, C.D. Cal. Case No. CV 94-7652 MRP (filed 1994).

31. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

32. *Id.* at 768-86.

33. See *Ariz. S.B. 1070* § 2.

34. *Id.* at § 2(B) (“where reasonable suspicion exists that the person is an alien who is

Brewer signed it, S.B. 1070 specifically stated “for any lawful contact.”<sup>35</sup> About a week or two later, realizing what a public relations disaster that would be, they amended S.B. 1070 to change it to apply only to lawful stops, detentions, or arrests.<sup>36</sup> But, hidden within S.B. 1070 was a new state crime in Arizona, for simply being undocumented.<sup>37</sup> So, you can see the bootstrapping. If you, as a law enforcement officer in Arizona, reasonably suspect that someone is undocumented, then you have a reasonable suspicion that they violated that new state law: that new state crime for being undocumented. Therefore, you have a reason to lawfully stop or detain them. You are now in a lawful stop, detention or arrest, and you have to determine if you have that reasonable suspicion.

So basically, despite the amendment, S.B. 1070 still would have required law enforcement officers in *every* contact, to determine if they had a reasonable suspicion that someone was undocumented. If they did have that reasonable suspicion, as with Proposition 187, officers were to try to verify the status of the person they suspected.<sup>38</sup> A little more guidance about consulting the federal government where possible is provided in S.B. 1070, but because of that new crime for being undocumented, you can see how that reasonable suspicion also leads to detention and potential arrest. Another provision that you also may have heard of, would have given law enforcement officers in Arizona the ability to arrest without warrant any person they believed to have committed a crime that would render them deportable or removable from the country:<sup>39</sup> a right to warrantless arrest as to immigrants who commit any crime that a relatively untrained Arizona law enforcement officer believes would render them removable. S.B. 1070 also included, as I mentioned, a provision that specifically states that if you are undocumented you cannot solicit work in Arizona.<sup>40</sup> It also included various other provisions.

Jan Brewer signed S.B. 1070. Jan Brewer is the Governor of Arizona. Parallel to Pete Wilson: she is not a politician who had a reputation for extreme views; she is not a politician who had a reputation for engaging in wedge politics; she’s seeking re-election; she faced a tough campaign. Step back, I made an error. Where the analogy breaks down is she’s not actually seeking reelection. Jan Brewer was never elected Governor of Arizona before. She is only Governor of Arizona by virtue of having been elected Secretary of State and having acceded to the Office of Governor when Governor Janet Napolitano was tapped by President Obama to serve in his cabinet as Secretary of Homeland Security.<sup>41</sup> So, she is seeking her first election, her first election as governor. She’s tied her election, as you have seen, to S.B. 1070. Every word out of her mouth about this seems to be more and more extreme, including an allegation, without any support whatsoever, that over half of

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unlawfully present in the United States”).

35. *Id.* (“[f]or any lawful contact”).

36. H.B. 2162, 49th Leg., 2d Reg. Sess., § 3(B) (Ariz. 2010) (“[f]or any lawful stop, detention or arrest”).

37. Ariz. S.B. 1070 § 3.

38. *Id.* at § 2(B) (“a reasonable attempt shall be made . . . to determine the immigration status of the person”).

39. *Id.* at § 6(A)(5).

40. *Id.* at § 5(C).

41. Matthew Benson, *Napolitano Joins Obama, Pledges Smooth Transition To Brewer*, THE ARIZONA REPUBLIC (Dec. 1, 2008, 3:56 PM), <http://www.azcentral.com/news/articles/2008/12/01/20081201obamacabinet01-on.html>.

those who cross the border are drug mules, including various other allegations.<sup>42</sup> But she's tying her campaign to S.B. 1070. I think the parallels continue because while there is no open violation of *Plyler v. Doe*, Arizona's law is plainly unconstitutional.

Today, there is better-developed precedent across the country on the issue of preemption/federal supremacy with respect to immigration regulation. So many warned [Governor Brewer], including MALDEF, before she signed the bill, that it was likely to be struck down in court. Governor Brewer seemed not to care, signed the bill, signed the amendment, attempting to fix the public relations disaster that was "every lawful contact" and moved forward with defending the law in court. Remarkably, seven lawsuits were filed to prevent S.B. 1070 from taking effect in federal court, all of them alleging a number of claims.<sup>43</sup> MALDEF and the ACLU are lead counsel in one of the most comprehensive of those cases, which challenges S.B. 1070 under not only the Supremacy Clause, and the preemptive theories that I have already outlined, but also as a violation of the Fourth Amendment (protection against unreasonable seizures), a violation of the First Amendment because of that provision restricting the right to solicit work, and a violation of equal protection in the invitation. More than an invitation, it is a direction, it is a mandate, to engage in racial profiling because Arizona law enforcement officers have no training or informed ability to base their "reasonable suspicions" on anything other than appearance, including race, color, accent, language, clothing.<sup>44</sup>

You've heard many across the country speculating about what "reasonable suspicions" could be based on, including shoes. I believe there was a Congress member out of the Midwest who suggested you could tell them by their shoes.<sup>45</sup> I categorically deny that I'm up here and not leaving the dais because you cannot see my shoes. No guidance means that law enforcement is basically being directed to use stereotypes about who is undocumented, all of them illegitimate because there is no action per se indicative of being undocumented because it is a status. The action would be crossing the border without inspection, but law enforcement officers in Arizona are not on the border. They are not watching to see anyone commit that act. So there are no actions to base these suspicions. They can only base them on appearance, including all the illegitimate bases I have detailed. Not surprisingly, a federal district court judge in Phoenix preliminarily enjoined S.B. 1070 for the most egregious provisions it contained.<sup>46</sup> She held up from implementation the provisions that I already described: warrantable arrest, the reasonable suspicion, and the

42. Ginger Rough, *Brewer: Most Illegal Immigrants Smuggling Drugs*, THE ARIZONA REPUBLIC (June 25, 2010, 4:40 PM), <http://www.azcentral.com/news/articles/2010/06/25/20100625arizona-governor-says-most-illegal-immigrants-smuggle-drugs.html>.

43. *Frisancho v. Brewer*, No. 10-CV-00926 (D. Ariz., filed Apr. 27, 2010); *Friendly House v. Whiting*, No. 10-CV-1061 (D. Ariz., filed May 17, 2010); *Salgado v. Brewer*, No. 10-CV-00951 (D. Ariz., filed May 17, 2010); *Escobar v. Brewer*, No. 10-CV-00249 (D. Ariz., filed May 18, 2010); Nat. Coal. of Latino Clergy and Christian Leaders v. Arizona, No. 10-CV-00943 (D. Ariz., filed June 9, 2010); *United States v. Arizona*, No. 10-CV-01413 (D. Ariz., filed Jul. 6, 2010); *League of United Latin Am. Citizens v. Arizona*, No. 10-CV-1453, (D. Ariz., filed Jul. 9, 2010).

44. See Complaint, *Friendly House v. Whiting*, No. 10-1061 (D. Ariz. filed May 17, 2010).

45. Sahil Kapur, *Rep. King: Spot Illegal Immigrants By Their 'Shoes,' 'Grooming,' 'Accent' Or 'A Sixth Sense'*, THE WASHINGTON INDEPENDENT (June 15, 2010, 2:25 PM), <http://washingtonindependent.com/87028/rcp-king-spot-illegal-immigrants-by-their-shocs-grooming-accent-or-a-sixth-sense>.

46. See *United States v. Arizona*, 703 F. Supp.2d 980 (D. Ariz. 2010).

prohibition on solicitation if you are an undocumented immigrant. It now moves to the Ninth Circuit.<sup>47</sup>

You have seen all the parallels of 187. However, another difference is that this time the federal government has joined the show, filing its own lawsuit on behalf of the United States against S.B.1070.<sup>48</sup> Unlike our lawsuit, the federal government's lawsuit is limited in its claims.<sup>49</sup> It raises only a preemption claim, and a claim under the Commerce Clause, which is also a structural protection of the prerogatives of the federal government. It is a more limited case. But the federal government is who it is, the big dog. The judge heard arguments on the preliminary injunctions in our case first, in the morning. And I hasten to note that our lawsuit was filed many, many weeks before the federal government's. Our motion was filed weeks before the federal government filed their case. Our argument was heard the morning before the afternoon when the federal government's motion was heard. But the big dog got the ruling.<sup>50</sup> So the judge ruled in the federal government's case. That is the case now pending before the Ninth Circuit. I'm very optimistic that the preliminary injunction will be upheld, and it will go through a more or less lengthy process of resolving the case finally in district court. Hopefully not the four years that it took with Proposition 187, but a similar journey.

What's remarkable about S.B. 1070 is that it is not the first, nor apparently the last attempt by Arizona to invade the federal government's exclusive authority to regulate immigration. Currently pending before the United State Supreme Court is a case that involves the Legal Arizona Workers' Act, an attempt by Arizona several years ago to exploit the limited exception to the express preemption of employment regulations by states and localities.<sup>51</sup> That case is before the Supreme Court and the Court will determine whether it is a violation of the express preemption in the Immigration Reform and Control Act.

As I said, it is apparently not the last attempt that Arizona will make. The author – in this case only one not twenty, I guess that's also where the analogy might break down – Russell Pearce, although he admits he had help from someone, who went to my law school regrettably, in drafting it. But S.B. 1070 may be followed, according to its author Senator Russell Pearce, by two other proposals. These, like S.B. 1070, like Proposition 187, directly and openly confront constitutional precedent. He has announced an intention to reintroduce a proposal to charge tuition in public schools, kindergarten through twelfth grade, to any child who is undocumented – a direct violation of the *Plyler vs. Doe* precedent that I mentioned earlier. He has also proposed, in his most extreme initiative,<sup>52</sup> to make it virtually impossible for a child born in Arizona to an undocumented parent to obtain a birth certificate to prove their citizenship to which they are entitled under the Fourteenth

47. *United States v. State of Arizona*, No. 10-cv-16645 (9th Cir. argued Nov. 1, 2010).

48. *See* Complaint, *United States v. State of Arizona*, No. 10-cv-01413 (D. Ariz., filed Jul. 6, 2010).

49. *United States v. Arizona*, 703 F.Supp.2d 980 (2010).

50. *See* 703 F. Supp.2d at 980.

51. *See* Chamber of Commerce of the United States v. Whiting, No. 09-115 (U.S. S.Ct. argued Dec. 8, 2010), <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-115.htm>.

52. Morgan Loew, *'Anchor Babies' Could Be Ariz.'s Next Target*, KPHO PHOENIX (May 24, 2010, 12:32 PM), <http://www.kpho.com/news/23623047/detail.html> (“I also intend to push for an Arizona bill that would refuse to accept or issue a birth certificate that recognizes citizenship to those born to illegal aliens, unless one parent is a citizen.”).

Amendment. Note, this is not directly saying, “You don’t have citizenship if you are born in Arizona,” but it is a proposal to make it virtually impossible to obtain a birth certificate to actually prove that you are a United States citizen, creating a class of stateless babies. But this proposal too, as we all know from the repositioning by Senator McCain, a previously moderate, non-extreme senator, and others, you know that this citizenship right is in the Fourteenth Amendment. And some are talking about changing the amendment. But Pearce doesn’t go there. As a state legislator, he simply wants to take away your citizenship by making it impossible to prove.

We also know that this will not be the last attempt across the country to regulate immigration. As I mentioned previously, we have dozens of suggestions that someone, somewhere else in a locality or state, will champion and seek to enact a replication of S.B. 1070. I used to call them “copycats,” but I was convinced by someone who heard me speak about the issue that copycat is too much of a playground term. It sounds less nefarious than it is. So instead I came up with two alliterative phrases. You can choose them based on partisanship or any other basis. I refer to them as either “duplicitous duplications” or “reprehensible replications” of S.B. 1070. But we have these proposals across the country. What is remarkable is that so many of them directly seek to confront long standing constitutional precedent.

This is what creates a constitutional crisis in this country, a concern that goes well beyond Arizona, well beyond the mid-term elections in November, and well beyond the attempt to exploit this issue by so many candidates for governor, senator, and state legislator across the country. This constitutional crisis comes in the form of elected officials who feel that they can openly champion unconstitutional laws, that they can directly defy constitutional precedent. This too has precedent. You may know from history lessons that fifty years ago, following the Supreme Court’s progressive, appropriate, much-needed unanimous decision in *Brown v. Board of Education*,<sup>53</sup> governors in the deep South, championing the continuing existence of Jim Crow, actually announced their belief in nullification. Their belief that, as governors, they had the right to nullify a Supreme Court decision, ignore it, and defy what the Supreme Court determined the Constitution meant. I believe that that constitutional crisis – which took a unified effort nationwide, across all communities, across all professions, to confront and defeat – has a resonance in what is going on today. Jan Brewer follows in the dubious footsteps of George Wallace, Orval Faubus, and others, who quite literally stood to bar the door of progress and argued that they could defy the Constitution. What is audacious about this “new nullification” is that they are not confronting a recent decision by the Supreme Court. They are not seeking to defy a new doctrine. They are defying constitutional doctrines that go back as much as 220 years. You talk about the federal government’s exclusive authority to regulate immigration. It goes back 220 years to the Constitution’s drafting and ratification. When you talk about the invitation to take away a child’s citizenship, which is a precedent that goes back 150 years to a hard-fought amendment, the Fourteenth Amendment that followed the Civil War. When you talk about a mandate to engage in racial discrimination in the form of profiling, that is a precedent that goes back at least as far as *Brown*, half a century ago. The most recent precedent that they choose to defy – that they argue implicitly that they can nullify – is a twenty-eight-year-old precedent in *Plyler v. Doe*. This

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53. *Brown v. Bd. of Educ.*, 347 U.S. 483, 496 (1954).

new nullification is audacious indeed. It attempts not to defy a recent doctrine but to push back our Constitution half-a-century. A century and a half. Two centuries and longer. All in the name of wedge politics.

This constitutional crisis ought to concern everyone interested in the law, everyone believing in law and order. Remarkable, isn't it? That so many of these governors, would-be governors, would-be senators champion law and order, claim to be candidates that support law and order, but they leave out the fundamental law of the nation in the Constitution and choose to defy it. This constitutional crisis is about believing in law, believing in the Constitution. It will take a unified effort, not just of lawyers in court, but of voters, community activists, business, labor, clergy, across the country, and not just from the community most impacted, but across all racial and ethnic groups. Defeating this constitutional crisis is basic and important. This is not only about immigration. It's about the Constitution. But the Constitution does relate to immigration, and not just in the historical ways that I mentioned going back to the Declaration of Independence. The Constitution is the one piece of law about which we can say there is near universal acquiescence in this country. And that is because even the most recent immigrant – non-voter, not yet eligible to vote, whether undocumented or lawful permanent resident – has an understanding of the values that make this country what it is. Those values are reflected in our Constitution. So even if it is an incipient, nascent, not fully developed form, every person – at least every person over the age of eighteen, every person with the ability to rationalize, with the ability to act on that understanding – believes in this law that is the Constitution.

And that is what I talk about with respect to S.B. 1070. Yes, there is a relationship to immigration. Yes, there is relationship to the need to comprehensive immigration reform at the federal level. But at bottom, S.B. 1070 and the crisis we face is about belief in the Constitution. I invite everyone who believes in the Constitution to join in attempting to avert this nascent constitutional crisis.

Thank you.