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15 UNITED STATES DISTRICT COURT

16 DISTRICT OF ARIZONA

17 Friendly House; *et al.*

18 Plaintiffs,

19 v.

20 Michael B. Whiting; *et al.*,

21 Defendants.
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CASE NO. CV-10-01061-SRB

LODGED: PROPOSED *AMICUS
CURIAE* BRIEF OF LANDMARK
LEGAL FOUNDATION

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ARGUMENT

I. FEDERAL IMMIGRATION LAW DOES NOT PREEMPT SB 1070.

U.S. Const. Art. I, Sec. 8’s reservation of the naturalization of aliens to the federal government is in no way affronted by Arizona’s duly enacted “Support Our Law Enforcement and Safe Neighborhoods Act,” as amended (“SB 1070” or “the Act”). Rather, the Act complements, supports and is in perfect harmony with current national immigration provisions.

SB 1070 does not create any new or additional federal responsibilities. It does not establish any new or inconsistent obligations for aliens legally or illegally residing in or otherwise present in Arizona. There are no new standards for naturalization in Arizona, no new forms to carry or fill out, and no other new or unique standards exclusive to aliens situated in Arizona.

Arizona’s new law continues this nation’s tradition that most law enforcement activity respecting immigration and most other criminal laws in the country is carried out by the states. Beat cops, cops in cruisers, local detectives etc. – the federal government relies on infinite local and state decisions, actions, and untold resources to enforce federal immigration law. SB 1070 is a legitimate, measured and responsible exercise of Arizona’s long-standing authority and duty to provide for the safety and welfare of its inhabitants.

A. SB 1070 is Consistent With Rather Than Preempted By Current Immigration Law.

Intervener-Defendant Arizona Governor Janice Brewer demonstrates well in her motion to dismiss this cause of action that SB 1070 is not preempted by U.S. Const. Art.

1 VI, cl.2's Supremacy Clause, the Naturalization Clause or federal statutory scheme and is
2 fully consistent with current Supreme Court precedent. *Amicus Curiae* Landmark Legal
3 Foundation offers additional important insight related to the preemption issue, Plaintiffs'
4 failure to state an adequate facial constitutional challenge, and Mexico's inappropriate
5 and unwelcomed interference in this Nation's business.

7
8 **1. Facial constitutional challenges must meet an extremely high
9 standard.**

9 It is well established by *United States v. Salerno*, 481 U.S. 739 (1987) that a
10 plaintiff can only succeed in a facial challenge of a statute's constitutionality by
11 "establish[ing] that no set of circumstances exists under which the Act would be valid,"
12 *i.e.*, that the law is unconstitutional in all of its applications. *Wash. State Grange v. Wash.*
13 *State Republican Party*, 552 U.S. 442, 450 (2008). "While some Members of the Court
14 have criticized the *Salerno* formulation, all agree that a facial challenge must fail where
15 the statute has a 'plainly legitimate sweep.'" *Id.* (citing *Washington v. Glucksberg*, 521
16 U.S. 702, 739-740 (1997) (Stevens, J., concurring in judgments)).

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19 Facial challenges are disfavored because they rest on speculation, run contrary to
20 the principle that courts should not anticipate questions of constitutional law in advance
21 of the necessity of deciding one, and thwart the will of the people. *Id.* at 450-451. "In
22 determining whether a law is facially invalid, we must be careful not to go beyond the
23 statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.*
24 at 450 (citing *United States v. Raines*, 362 U.S. 17, 22 (1997)).
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1 SB 1070 as enacted is consistent with federal immigration law in all ways and
2 impedes federal law in none. As such its sweep is plainly legitimate and its applications
3 constitutional in all respects.
4

5 **2. SB 1070's state enforcement provisions defeat any facial challenge.**

6 In order to strike down SB 1070's new state policies designed to support federal
7 immigration law enforcement, this Court must conclude that they are not permissible
8 under any set of circumstances or that the provisions do not have a plain legitimate
9 sweep. *See Glucksberg*, 521 U.S. at 739-40. Plaintiffs' cannot make that case as
10 language in the Immigration and Naturalization Act ("INA") Section 287(g) contemplates
11 and invites state or local participation in enforcement of immigration law even in the
12 absence of formal agreement. See "State Efforts to Deter Unauthorized Aliens: Legal
13 Analysis of Arizona's S.B. 1070," Congressional Research Service, R41221 (May 3,
14 2010) at 10.
15

16
17 SB 1070's state enforcement provisions address issues that have traditionally
18 been subject to state regulation and upon which federal law is silent. The Act does not
19 permit or require any state action unless there is a lawful stop, detention or arrest and
20 reasonable suspicion that a person is an alien unlawfully present in the United States.
21 There is no legitimate argument with SB 1070's trigger and certainly not one that can
22 satisfy the stringent requirement for a facial constitutional challenge.
23

24
25 "Reasonable suspicion" is a "commonsense, nontechnical concept[] that deal[s]
26 with 'the factual and practical considerations of every day life on which reasonable and
27 prudent men, not legal technicians, act.'" *Ornelas v. United States*, 517 U.S. 690, 695
28

1 (1996). See *Estrada v. Rhode Island*, 594 F.3d 56, 64 (1st Cir. 2010) (Inquiry into
2 immigration status reasonable during traffic stop where passengers were on their way to
3 work, were unable to produce any identification, spoke little English, officer had
4 reasonable suspicion to suspect criminal activity.) SB 1070 prudently adopts this
5 sensible standard. Accordingly, Plaintiffs do not have a legitimate legal complaint.
6

7 **3. SB 1070's state criminalization provisions are facially valid.**

8
9 SB 1070 essentially adopts federal immigration provisions by making certain
10 federal violations state crimes. The provisions are well within the scope of historical
11 sovereign police powers. Moreover, the Act addresses matters that have either already
12 been on the Arizona books for years or are exercises of well established state police
13 powers. They in no way interfere with federal law.
14

15 In each case, SB 1070's state provisions have a plainly legitimate sweep and
16 cannot properly be challenged *on their face* as either preempted by federal law or the
17 Constitution. For example, human smuggling has long been a crime in Arizona. SB
18 1070 merely makes a minor adjustment to the longstanding law. Setting the permissible
19 conditions for hiring persons picked up along roadways is clearly reasonable and does not
20 pose a legitimate facial challenge. Furthermore, SB 1070's provisions make it a state
21 crime to violate federal alien registration requirements or for illegal aliens to solicit or
22 perform work in Arizona. These are similarly legitimate exercises of traditional state
23 police powers. Plaintiffs' facial challenge of SB 1070 simply cannot be sustained and
24 must be dismissed.
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1 **B. SB 1070 Is Consistent With Many Other State’s Immigration**
2 **Enforcement Provisions.**

3 Many if not most states require individuals incident to lawful stops and
4 questioning to establish who they are and where they’re from. This includes citizens and
5 non-citizens. While Arizona’s SB 1070 has attracted Plaintiffs’ and the federal
6 government’s ire, several other state and local jurisdictions have enacted immigration-
7 related enforcement laws that have not been challenged. For example, Missouri law
8 prohibits municipal “sanctuary” policies and prohibits unlawfully present aliens from
9 receiving state or local benefits. Public employees are also required to participate in a
10 “federal work authorization program.” Drivers licenses may not be issued to illegal
11 aliens and law enforcement officers must inquire as to the citizenship and/or immigration
12 status of any individual under arrest. See Mo. Rev. Stat. § 43.032.2, 208.009.1,
13 208.009.3, 302.063 and 28.824 (2010).

14 South Carolina requires public and private employers to verify the work
15 authorization of all new employees through the federal online E-Verify system or by
16 checking the individual’s driver’s license. Transporting or attempting to transport an
17 illegal immigrant within the state can result in a felony charge. Further, possession of a
18 false or fraudulent identity document can result in a criminal charge. See S.C. Code Ann.
19 § 8-14-10, 8-14-20, 16-9-460, 16-13-525 (2010).

20 Since 2007, Prince William County, Virginia (“PWC”) police officers must
21 inquire into the immigration status of all persons who are under physical custodial arrest.
22 PWC officers may also question an individual’s immigration status prior to a physical
23

1 arrest if, during the course of a stop, the officer develops “reasonable articulable
2 suspicion” that such an individual may be in violation of federal immigration laws.
3 Prince William County Police Department, “Manual of General Orders, General Order
4 45.01.”
5

6 The fact that these state and local laws go unchallenged is strong evidence that
7 Plaintiffs’ challenge to SB 1070 is a frivolous political exercise designed to further a
8 political controversy and thwart meaningful enforcement of federal immigration law. It
9 should be dismissed.
10

11 **II. MEXICO COMES TO THIS COURT WITH UNCLEAN HANDS AND HAS**
12 **NO BUSINESS INTRUDING IN THIS MATTER.**

13 Mexico’s self-serving intrusion in this matter represents a stunning breach of
14 diplomatic protocol. It is a poorly disguised effort to influence U.S. domestic policy
15 through the exertion of diplomatic pressure on this Court. It should be rejected outright.
16

17 We are aware of no other foreign government seeking to interfere with the internal
18 political, policy, and legal issues relating to this federal-state matter. Mexico is
19 attempting to gain through this litigation what it has not been able to achieve
20 diplomatically through the United States Congress. Moreover, Mexico appears to have
21 coordinated its participation in this case with Plaintiffs (and now with the federal
22 government in another challenge of this Act) in order to create a false record of
23 diplomatic distress resulting from Arizona’s enactment of SB 1070.
24

25 Mexico’s argument that the Arizona law creates a patchwork of inconsistent
26 American immigration standards is better considered in the diplomatic framework —
27
28

1 imagine if every country that benefits from the illegal migration of its citizens into the
2 United States, as encouraged by the government of Mexico, were to cobble together a
3 legal brief aimed mostly for the domestic consumption of its population in a brazen effort
4 to use United States courts to effect internal United States policies. See Brief of the
5 United Mexican States, p. 4-5. What next – will foreign governments enter into litigation
6 to influence United States drug, environmental, health care and other policies?
7

8
9 Mexico’s abhorrent record respecting its treatment of aliens illegally present
10 within her borders provides the Court with additional reason to ignore Mexico’s
11 submission. *USA Today* reports that the National Human Rights Commission found that
12 91 “migrants” were kidnapped and held for ransom with the direct participation of the
13 Mexican police between September 2008 and February 2009. The Human Rights
14 Commission also found that migrants are “routinely stopped and shaken down for
15 bribes.” Chris Hawley, “Activists blast Mexico’s immigration law.” *USA Today*, May
16 25, 2010.
17

18
19 Amnesty International recently completed a report entitled “*Invisible Victims:*
20 *Migrants On The Move in Mexico*,” documenting repeated instances where Mexican
21 officials engaged in excessive force and extortion of illegal immigrants, particularly those
22 from Central American countries such as Guatemala, Honduras and El Salvador –
23 countries with indigenous populations having a foreign appearance. Amnesty
24 International recounts various stories where “irregular migrants” (illegal immigrants)
25 were brutalized by Mexican federal and state authorities. For example, in one recorded
26 incident three federal police vehicles stopped a freight train and forced the illegal
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28

1 immigrants “to get off the train and lie face down and stole their belongings.” Amnesty
2 International, “*Invisible Victims Migrants On The Move In Mexico.*” Amnesty
3 International Publications, 2010. Another recorded incident involved Mexican state
4 police opening fire “on a truck carrying around 45 ‘irregular migrants’ from El Salvador,
5 Guatemala, Honduras, Ecuador and China.” Id.

7 Mexican immigration law is highly selective and provides for harsh penalties for
8 foreigners who enter the country illegally. Under Mexico’s “General Law on
9 Population” foreigners are admitted only “according to their possibilities of contributing
10 to national progress.” (Article 32.) Mexico maintains a national catalog of foreigners
11 that assigns each admitted alien a unique tracking number. Aliens who are in possession
12 of false immigration papers can be fined or imprisoned. (Article 116.) An alien who has
13 been deported and attempts to re-enter the country without authorization can be
14 imprisoned for up to ten years. (Article 118.) If an individual enters Mexico illegally the
15 individual can serve up to two years in prison and pay a fine of three hundred to five
16 thousand pesos. Finally, Mexican law provides that if a Mexican national marries a
17 foreigner with the sole objective of aiding the foreigner to live in Mexico, that Mexican
18 national can be imprisoned for up to five years. (Article 127.)

22 In response to whether aliens from countries such as Guatemala, Honduras, El
23 Salvador or Nicaragua could “just walk in [to] Mexico,” Mexican President Felipe
24 Calderon said:
25

26 *No. They need to fulfill a form. They need to establish their right name. We*
27 *analyze if they have not a criminal precedent. And they coming into Mexico.*
28 *Actually...*

1 Do Mexican police go around asking for paper of people they suspect are
2 illegal immigrants?

3 *Of course. Of course, in the border, we are asking the people, who are you?*

4 Felipe Calderon, transcript interview with Wolf Blitzer, "The Situation Room."

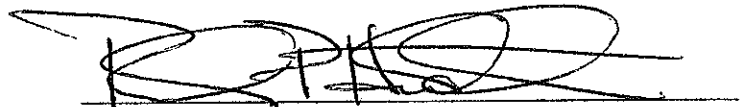
5 Available at, <http://transcripts.cnn.com/TRANSCRIPTS/1005/19/sitroom.01.html>.

6 When asked about the deportation policies of Mexico, President Calderon
7 responded, "*If – if somebody [enters the country] without permission, we send back – we*
8 *send back them [sic].*" Id. Of course, Mexico has every right to deport illegal aliens, but
9 so does the United States of America.

10 III. CONCLUSION

11 Plaintiff's facial challenge to SB 1070 is utterly without merit and should be
12 dismissed. In addition, *Amicus Curiae* Mexico's arguments are self-serving, without
13 legal grounding, and presented to the Court with unclean hands. Landmark urges the
14 Court to disregard the Mexican government's unseemly abuse of this Nation's judicial
15 system.

16 Respectfully submitted,

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