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President Barack Obama
The White House
Washington, DC 20500

Dear Mr. President:

Since 1974, the Society of American Law Teachers ("SALT") has been an independent organization of law teachers, deans, law librarians, and legal education professionals working to make the profession more inclusive, to enhance the quality of legal education, and to extend the power of legal representation to under-represented individuals and communities. An essential aspect of SALT's mission is to foster a culture of social justice in law schools, within the legal profession, and in society. As law professors, we aim to lead our students by example and to use our legal training to engage in civil rights matters of grave importance. Today we write to you to express SALT's opposition to Arizona's recently enacted and amended SB 1070 and to urge you to take swift action.

Arizona's law fits within thousands of anti-immigrant laws and practices that proliferated, particularly post-9/11, outside the scope of federal cooperation.[1] Many of these laws have sought to deputize local police to enforce not only federal, but also newly created state civil or criminal violations of immigration laws. States are claiming an inherent power to enact and enforce such laws, but this power runs afoul of federal law and constitutional preemption doctrine. More troubling is that displaced blame is creating an environment of enmity directed not only at immigrants, but towards their U.S. citizen families and friends. Calls for boycotts provide some hope for a more balanced approach to solving tensions arising from unauthorized immigration. However, without federal intervention, Arizona will implement SB 1070 and other states will likely follow Arizona's lead. Without federal intervention, the thousands of constitutionally suspect anti-immigration measures that preceded SB 1070 will remain largely intact.

The federal government may not hold exclusive power over all laws that affect immigrants; some laws may implicate important local interests and do not conflict with federal immigration policy.[2]

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[1] Just in 2009, as of November 20, 2009, state legislatures had enacted 222 laws and adopted 131 resolutions in 48 states, for a total of 353 laws and resolutions nationwide pertaining to immigrants. National Conference of State Legislatures, *2009 State Law Pertaining to Immigrants and Immigration*, *available at* http://www.ncsl.org/default.aspx?tabid=19232.

[2] *See, e.g.,* De Canas v. Bica, 424 U.S. 351 (1976) (upholding a California statute that prohibited employers from knowingly employing persons not entitled to lawful residence if such employment would adversely affect lawful residents in the state); and Cabell v. Chavez-Salido, 452 U.S. 432 (1982) (upholding the political-function exception that allowed states to require citizenship for probation officers).

However, SB 1070, by criminalizing the status of being an immigrant and creating dubious mechanisms for arrests and detection in the state, tramples on exclusive federal immigration powers. States are enacting these insidious laws even in the face of aggressive federal enforcement of immigration laws at and inside the border. SB1070 as a whole, and especially these latter provisions, have created an urgent constitutional and civil rights crisis.

SB 1070 and laws like it are no less than a revival of reactionary states' rights claims comparable to the resistance to federal desegregation policies and practices of the civil rights era. Thus, we urge you to adopt an Executive Order that would:

1. Firmly establish the constitutional principle that states cannot claim inherent powers to enforce federal immigration laws absent express congressional delegation, which currently is not authorized under federal law.

2. Affirm that comprehensive immigration reform is a fundamental human rights issue that calls for moving expeditiously and in a bi-partisan way towards adoption.

3. Order the Department of Homeland Security and the U.S. Immigration and Customs Enforcement to cease all local collaboration with the state of Arizona and its localities, including any and all Section 287(g) agreements, Secured Communities, the Criminal Alien Program, and any so-called fugitive operations. While some of these programs are jail-based, they cannot be divorced from the ill-effects of Arizona's law in the streets and eventually in its jails. Were the federal government to retain these programs, it would sanction the civil rights violations occurring within Arizona.

4. Order the Department of Justice to pursue independent litigation and to join litigation filed by civil rights groups challenging the constitutionality of SB 1070 and seeking an immediate injunction.

5. Order the Department of Justice to conduct aggressive and full investigations into the ongoing civil rights violations committed in the State of Arizona, especially by Sheriff Joe Arpaio, as a result of local immigration enforcement and consider civil rights litigation to stop those practices.

As law professors, we fully grasp the significance of what we are asking. Executive Orders should be employed sparingly and wisely with due respect to constitutional principles of separation of powers. Here, however, we believe that you not only possess constitutional and legislative authority to act, but that you must act quickly to restore constitutional order and to avoid a civil rights travesty, not only in the State of Arizona, but nationwide.

If you issue this Executive Order, you would only be acting to uphold the powers that have been expressly delegated to the Executive agencies, namely the Department of Homeland Security and the Department of Justice, through the Immigration and Nationality Act ("INA").[3] Congress has adopted only limited provisions authorizing states to enforce provisions in the INA, namely, INA § 274: Arrest authority to enforce prohibitions against transporting and harboring certain Aliens; INA § 276: Authority to arrest and detain re-entry offenders; that is, previously deported immigrants with a felony conviction who are found present in the United States; INA § 103(a)(8): Emergency powers conferred on the Secretary of Homeland Security (DHS) to authorize "any State or local law enforcement officer" to enforce federal immigration laws in the event the Secretary certifies that "an

[3] Immigration and Nationality Act §§ 103-104, 8 U.S.C. §§1103-1104.

actual or imminent mass influx of aliens arriving off the coast of the United States or near a land border" exists; and INA § 287(g): Authorizes immigration enforcement agreements between the Immigration and Customs Enforcement (ICE) and local law enforcement agencies. SB 1070 usurps the power from Secretary Janet Napolitano by expressly authorizing Arizona to enforce the federal immigration laws in the absence of a declared emergency under § 103(a)(8), and it further conflicts with the narrower delegated authority pre-existing under Arizona's § 287(g) agreement with ICE.

By issuing this Executive Order, you would amplify the urgent need to clarify whether states like Arizona can constitutionally legislate or simply enforce the federal immigration laws beyond what Congress has already authorized. Unfortunately, this area of the law has not been definitively settled, leading to confusion and conflicting practices. Only three federal circuit courts, the Ninth, the Tenth, and the Fifth, have ruled on the specific question of whether local law enforcement possesses inherent authority to make arrests for immigration offenses that have not been preempted by federal law.[4] A circuit split exists between the Ninth Circuit recognizing an inherent, non-preempted local law enforcement power to make such arrests, but restricting it to violations of federal criminal immigration laws[5] and the Fifth[6] and Tenth Circuits,[7] concluding similarly on the preemption issue, but without drawing the same distinction between civil and criminal offenses. In addition, the Third Circuit has recently upheld the legality of a warrantless arrest executed by local law enforcement for an immigration criminal violation without expressly addressing local law enforcement's authority to engage in that type of law enforcement in the first place.[8] Office of Legal Counsel's ("OLC") conflicting opinions drafted on this issue have exacerbated the uncertainty of states' authority to make arrests for immigration violations. In 1996, after the Ninth and Fifth Circuits issued opinions, but before the Tenth Circuit's opinion, the OLC accepted the Ninth Circuit's limits and concluded that state and local police may constitutionally detain or arrest persons who have violated criminal provisions of the INA, subject to state law, but may not do so solely for civil violations.[9] After September 11, 2001, the OLC issued a new 2002 opinion retracting its earlier position and concluding that state and local police possess inherent authority to make arrests for both criminal and civil violations that would render that person removable.[10]

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[4] Gonzalez v. City of Peoria, 722 F.2d 468 (9th Cir. 1983); U.S. v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999; U.S. v. Bowdach, 561 F.2d 1160 (5th Cir.1977).

[5] 722 F.2d at 474-76.

[6] 561 F.2d at 1167-78 (finding "[i]t is well established that absent an express federal statute defining who is allowed to execute federal arrest warrants, the validity of the arrest should be determined by the law of the state where the arrest took place").

[7] See 176 F.3d at 1296, 1299 at n. 4, 1300 (10th Cir. 1999); see also U.S. v. Salinas-Calderon, 728 F.2d 1298, 1301-02 (10th Cir. 1984); U.S. v. Santana-Garcia, 264 F. 3d 1188, 1193-1194 (10th Cir. 2001).

[8] U.S. v. Laville, 480 F.3d 187, 196 (3rd Cir. 2007).

[9] Theresa Wynn Roseborough, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, Assistance by State and Local Police in Apprehending Illegal Aliens (memorandum opinion for U.S. Attorney, S.D. Cal.) (Feb. 5, 1996), available at http://www.usdoj.gov/olc/immstopo1a.htm.

[10] Dep't of Justice, Office of Legal Counsel, Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest for Immigration Violations (Apr. 3, 2002), available at www.aclu.org/FilesPDFs/ACF27DA.pdf.

None of the federal cases nor the OLC opinions authorize a state to create or enforce state immigration crimes, which is what SB 1070 seeks to do. SB 1070 significantly attempts to expand local police enforcement of federal immigration laws by creating new state immigration crimes and by prohibiting sanctuary policies in Arizona. Among other provisions, the Arizona law criminalizes hiring and even stopping to pick up day laborers, allegedly for blocking traffic, and the solicitation for employment of persons unauthorized to work. But the law goes even further and authorizes local police in the enforcement of any law or ordinance to question anyone present in the state about their immigration status on the basis of "reasonable suspicion" that they are not authorized to be in the country, subjecting those unable to prove their status to arrests without warrants. The law further criminalizes the harboring of undocumented immigrants within the state, as well as the mere presence in the State as a foreign national without sufficient proof of legal status. By enacting SB 1070, the Governor and the state legislature chose to ignore judicial precedent striking down similar laws in other states. These challenges properly found such statutes unconstitutional on several grounds, including preemption, due process, first amendment, and equal protection.[11]

The civil rights crisis provoked by SB 1070 has made obvious the urgent need to clarify the law in this area, and specifically its targeting and criminalization of unauthorized immigrants. It should be noted that the U.S. Congress has never codified the criminalization of unlawful presence for compelling reasons. Similar to past zoning and trespass ordinances employed shamefully to police the poor, the Arizona law similarly criminalizes status, not conduct, and as such, runs afoul of substantive due process.[12] The law's enforcement, moreover, will necessarily implicate racial profiling that will perpetuate the "foreignness" of so many ethnically diverse U.S. citizens and legal residents, particularly Latinos. It is not a meaningful solution to include a provision in the law that race cannot be a factor for "reasonable" suspicion except to the extent permitted by the federal or state constitution. Despite the recent amendment to SB 1070, racial profiling is still inevitable under this new law.[13] Pretextual stops will too readily lead to reasonable suspicion for people who become nervous, or speak English with an accent, speak in Spanish or some language other than English, or who simply cannot prove their immigration status. Moreover, victims and witnesses of crime will be too afraid to call the police for fear of this law's enforcement. Suddenly, not carrying a passport, a green card, or a birth or naturalization certificate becomes the basis for an arrest, without a warrant. This cannot be tolerated.

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[11] See, e.g., Lopez v. Town of Crave Creek, AZ, 559 F. Supp. 3d 1030 (D. Ariz. 2008); Comite Jornaleros de Redondo Beach v. City of Redondo Beach, 475 F. Supp. 2d 952 (C.d. Cal. 2006) (striking down state law restricting road solicitation of day laborers on first amendment grounds); Doe v. Vill. Of Mamaroneck, 462 F. Supp. 2d 520 (S.D. N.Y. 2006) (striking down on equal protection grounds selective law enforcement targeting day laborers); Lozano v. City of Hazelton, 496 F. Supp. 2d 477 (M.D. Pa. 2007); Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006); Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757 (N.D. Tex. 2007) (striking down, inter alia, local landlord/tenant restrictions targeting undocumented immigrants on due process, preemption, and equal protection grounds). See generally State and Local Involvement in Immigration and Policy: Federalism and Alienage Law in UNDERSTANDING IMMIGRATION LAW (Lexis-Nexis 2009) for a comprehensive discussion of constitutional restrictions on state attempts to regulate immigrants and immigration.

[12] See, e.g., Robert C. Ellickson, Controlling Public Misconduct in City Space: Of Panhandlers, Skid Rows, and Public-Space, 105 Yale L. J. 1165, 1202-19 (1996); Nicole Stelle Garnett, Relocating Disorder, 91 Va. L. Rev. 1075, 1088-98 (2005); and Lorne Sossin, The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement, 22 N.Y. U. Rev. L. & Soc. Change 623 (1996).

[13] HB 2162, April 30, 2010.

SB 1070 reveals all too well the dangers of the so-called inherent local power to enforce the immigration laws; such claims are inconsistent with Congressional intent. The selective nature of congressional delegation of immigration enforcement to local police under the INA powers confirms that Congress did not intend for local law enforcement to possess broader authority than that expressly provided. If such broad authority exists, then the express delegation would be superfluous.

Now is the time for presidential leadership to put to rest laws that do not contribute to a rational and fair national, comprehensive solution to unauthorized immigration. If you do so, you are simply acting within the scope of the authority delegated to you and Executive agencies by Congress; further, you would be acting to uphold fundamental rights of equal protection, substantive due process, and first amendment principles incorporated to apply to states in response to civil rights crises not unlike this one. We urge you to act now to engage the nation in a civil and humane national debate about comprehensive immigration reform.

Sincerely yours,

Raquel Aldana
Co-President

Steven Bender
Co-President