



# Authority of State and Local Police to Enforce Federal Immigration Law

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## Summary

The power to prescribe rules as to which aliens may enter the United States and which aliens may be removed resides solely with the federal government, and in particular with Congress. Concomitant to its exclusive power to determine which aliens may enter and which may stay in the country, the federal government also has the power to sanction activities that subvert this system. Congress has defined our nation's immigration laws in the Immigration and Nationality Act (INA), a comprehensive set of laws governing legal immigration, naturalization, work authorization, and the entry and removal of aliens. These requirements are bolstered by an enforcement regime containing both civil and criminal provisions. Deportation and associated administrative processes related to the removal of aliens are civil in nature, while certain violations of federal immigration law, such as smuggling unauthorized aliens into the country, carry criminal penalties. Congressional authority to prescribe rules on immigration does not necessarily imply exclusive authority to enforce those rules. In certain circumstances, Congress has expressly authorized states and localities to assist in enforcing federal immigration law. Moreover, there is a notion that has been articulated in some federal courts and by the executive branch that states may possess "inherent" authority to assist in the enforcement of federal immigration law, even in the absence of clear authorization by federal statute. Nonetheless, states may be precluded from taking actions if federal law would thereby be thwarted.

Recently, several states have enacted measures to facilitate the detection of unlawfully present aliens by state and local law enforcement officials. Some of these measures have been subject to legal challenge. The ability of state and local police to make arrests for federal immigration violations is a subject of ongoing legal debate and conflicting jurisprudence. Traditionally, the prevailing view has been that state and local police are permitted, to the extent allowed under state and local law, to enforce the criminal provisions of the INA. By contrast, the enforcement of the civil provisions, including the apprehension of deportable aliens, was viewed as a federal responsibility, with state and local police playing, at most, a supporting role. This view may be changing, however, as some courts have concluded that, at least in some instances, state and local police are not preempted from arresting persons on the grounds that they are deportable, even in the absence of express authorization by federal statute. The Department of Justice (DOJ) currently takes the view that state and local police are not always preempted from arresting persons for immigration violations. However, in legal challenges brought against Arizona and Alabama, it has argued that federal immigration law and policy impose some limitations upon the exercise of this authority by state and local officers.

This report discusses the authority of state and local law enforcement to assist in the enforcement of federal immigration law through the investigation and arrest of persons believed to have violated such laws. It describes federal statutes that expressly permit state and local police to enforce immigration law directly, analyzes major cases concerning the ability of states and localities to assist in immigration enforcement, and briefly examines opinions on the issue by the DOJ's Office of Legal Counsel. This report does not directly address legal issues raised by states and localities enacting their own immigration-related laws, including measures intended to supplement federal law through the imposition of additional criminal or civil penalties. The legal implications of such measures are discussed in CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by Kate M. Manuel, Michael John Garcia, and Larry M. Eig; and CRS Report RL34345, *State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments*, by Kate M. Manuel, Jody Feder, and Alison M. Smith.

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## Introduction

The power to prescribe rules as to which aliens may enter the United States and which aliens may be removed resides solely with the federal government, and in particular with Congress.<sup>1</sup> Concomitant to its exclusive power to establish rules which determine which aliens may enter and which may stay in the country, the federal government also has the power to proscribe activities that subvert this system and establish penalties for those who undertake prohibited activities. These powers have primarily been implemented through the Immigration and Nationality Act of 1952, as amended (INA).<sup>2</sup> The INA establishes a comprehensive set of requirements for legal immigration, naturalization, and the removal of aliens, as well as rules governing aliens' continued presence in the United States. The INA also establishes an enforcement regime to deter violations of federal immigration law, including through the imposition of penalties upon persons who violate INA requirements.

In examining the INA, it is crucial to distinguish between its civil and criminal provisions. For example, the INA generally makes it a criminal offense for an alien to enter the United States without authorization,<sup>3</sup> with heightened penalties available in cases where an alien unlawfully reenters after having previously been ordered removed from the country.<sup>4</sup> Moreover, persons who transport unauthorized aliens into or within the United States, or harbor such aliens within the country, are generally subject to criminal penalty.<sup>5</sup>

On the other hand, some violations of the INA are subject to civil penalties.<sup>6</sup> For example, an entity that knowingly hires an alien who is not authorized to work in the United States may be subject to a civil monetary penalty.<sup>7</sup> Moreover, deportation and associated administrative processes related to the removal of aliens are civil in nature.<sup>8</sup> For example, an alien's

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<sup>1</sup> See, e.g., Chinese Exclusion Case, 180 U.S. 581, 609 (1889). Federal authority to regulate immigration derives from multiple sources. The Constitution provides Congress with the authority “[t]o regulate Commerce with foreign Nations,” and “[t]o establish an uniform Rule of Naturalization.” U.S. CONST., Art. I, §8, cl. 3-4. Federal authority to regulate the admission and presence of aliens also derives from its authority over foreign affairs. *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (discussing various constitutional provisions, as well as authority over foreign affairs, which may serve as a source for immigration regulation by the federal government). See also *Kleindienst v. Mandel*, 408 U.S. 753, 765-67 (1972) (discussing Congress's plenary authority over admission of aliens); *Jean v. Nelson*, 711 F.2d 1455, 1465-67 (11<sup>th</sup> Cir. 1983) (discussing sources of federal authority over immigration). For much of the nineteenth century, federal regulation of immigration was quite limited in scope, and state legislation concerning the rights and privileges of certain categories of aliens was common, including, for example, laws barring the admission of alien convicts arriving at state ports of entry. See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993). Subsequent developments in jurisprudence, along with a significant expansion in federal legislation concerning aliens, has greatly circumscribed the ability of states to regulate immigration-related matters.

<sup>2</sup> 8 U.S.C. §§1101 *et seq.*

<sup>3</sup> INA §275, 8 U.S.C. §1325.

<sup>4</sup> INA §276, 8 U.S.C. §1326.

<sup>5</sup> INA §274, 8 U.S.C. §1324.

<sup>6</sup> See, e.g., INA §274A(e)(4), 8 U.S.C. §1324A(e)(4) (civil penalties for knowingly hiring aliens who are not authorized to work in the United States); INA §274D, 8 U.S.C. §1324d (civil penalties for aliens ordered removed who willfully fail to depart).

<sup>7</sup> INA §274A(e)(4), 8 U.S.C. §1324A(e)(4). Such violations can also carry criminal penalties if the employer has engaged in a pattern or practice of hiring unauthorized aliens. INA §274A(f), 8 U.S.C. §1324A(f).

<sup>8</sup> *Padilla v. Kentucky*,—U.S.—, 130 S. Ct. 1473, 1481 (2010) (“We have long recognized that deportation is a particularly severe ‘penalty,’ but it is not, in a strict sense, a criminal sanction.”) (internal citations omitted); *INS v.* (continued...)

unauthorized immigration status makes him removable, but absent additional factors (e.g., having reentered the United States after being formally removed), unlawful presence does not constitute a criminal offense.<sup>9</sup> In some cases, conduct may potentially be subject to both civil and criminal sanction under the INA. For instance, an alien who unlawfully enters the United States may be subject to criminal penalty as well as deportation. However, the fact that an alien may be subject to both criminal sanction and removal for an immigration violation does not mean that each tool shall be employed.<sup>10</sup>

Congressional authority to prescribe rules on immigration does not necessarily imply exclusive authority to enforce those rules.<sup>11</sup> Congress may expressly authorize states and localities to assist in enforcing federal law. Moreover, there is a notion that has been articulated in some federal courts and by the executive branch that states may possess “inherent” authority to assist in the enforcement of federal immigration law, even in the absence of express authorization by federal statute.

Nonetheless, state enforcement of federal immigration law must always be consistent with federal authority. The Supremacy Clause of the Constitution establishes that federal law, treaties, and the Constitution itself are “the supreme Law of the Land.”<sup>12</sup> States can therefore be precluded from taking actions that are otherwise within their authority if federal law would thereby be thwarted. Congressional intent is paramount in the analysis as to whether federal law preempts state or local activity; accordingly, a court must determine whether Congress expressly or implicitly intended to preempt state or local action.<sup>13</sup> Generally, a court will determine that Congress intended to preempt a state regulation or activity when (1) Congress expresses preemptive intent in “explicit

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(...continued)

Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry. ... The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws.”).

<sup>9</sup> Although unlawful entry by an alien into the United States constitutes a criminal offense, not every alien who is unlawfully present in the United States entered the country without authorization. Notably, an alien who overstayed his visa would be unlawfully present, despite having legally entered the country. The only situation where unlawful presence is itself a crime is when an alien is found in the country after having been formally removed or after voluntarily departing the country while a removal order was outstanding. INA §276, 8 U.S.C. §1326.

<sup>10</sup> The vast majority of aliens apprehended by Border Patrol unlawfully entering the United States are not prosecuted for the criminal offense of unlawful entry, but are instead either formally removed or permitted to depart voluntarily in lieu of removal. This is largely because pursuing criminal charges in all cases would place a heavy burden upon prosecutorial resources and detention facilities. In recent years, the percentage of persons prosecuted for unlawful entry or reentry has grown considerably, but most aliens apprehended by Border Patrol who are attempting to enter the country unlawfully are removed from the United States without criminal sanction. *See* Transactional Records Access Clearinghouse, Syracuse University, “Illegal Reentry Becomes Top Criminal Charge,” *available at* <http://trac.syr.edu/immigration/reports/251> (providing data regarding criminal prosecutions for unlawful entry or reentry in comparison to total apprehensions by Border Patrol).

<sup>11</sup> Moreover, federal authority to set rules on the entry of aliens and the conditions of their stay still leaves some room for state laws directed towards non-citizens. *See* *De Canas v. Bica*, 424 U.S. 351, 355 (1976) (“[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted by this constitutional power, whether latent or exercised.”). *See also* *Chamber of Commerce of the United States v. Whiting*,—U.S.—, 131 S. Ct. 1968 (2011) (holding that federal law did not preempt state measure which revoked the business licenses of businesses that knowingly employed aliens who were not authorized by the federal government to work in the United States).

<sup>12</sup> U.S. CONST., art. VI, cl. 2.

<sup>13</sup> *See, e.g.,* *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

statutory language,” (2) a state entity regulates “in a field that Congress intended the Federal Government to occupy exclusively,” or (3) a state entity’s activity “actually conflicts with federal law.”<sup>14</sup> A question of ongoing legal dispute concerns whether state and local law enforcement may directly enforce federal immigration law, even in the absence of express authorization by federal statute, or whether they are generally preempted from such activity.

Recently, several states have enacted measures to facilitate the detection of unlawfully present aliens by state and local law enforcement officials. Many of these measures are the subject of ongoing litigation. The U.S. Department of Justice, in particular, has challenged measures enacted by Arizona and Alabama which are intended to deter the presence of unlawfully present aliens within their jurisdictions.

This report discusses the authority of state and local law enforcement to assist in the enforcement of federal immigration law through the investigation and arrest of persons believed to have violated such laws. It describes current provisions in federal law that permit state and local police to enforce immigration law directly, analyzes major cases concerning the ability of states and localities to assist in immigration enforcement, and briefly examines opinions on the issue by the Office of Legal Counsel (OLC) within the Department of Justice. This report does not discuss legal issues raised by state and local measures intended to supplement federal immigration laws through the imposition of additional criminal or civil penalties. The legal implications of such measures are discussed in CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona’s S.B. 1070*, by Kate M. Manuel, Michael John Garcia, and Larry M. Eig; and CRS Report RL34345, *State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments*, by Kate M. Manuel, Jody Feder, and Alison M. Smith.

## **Express Authorization for State and Local Law Enforcement Officers to Enforce Federal Immigration Law**

The enforcement of federal immigration law by state and local police is most clearly permissible when Congress has evidenced intent to authorize such activity.<sup>15</sup> In exercising its power to regulate immigration, Congress is free to delegate to the states, among other things, the authority to arrest, hold, and transport aliens into federal custody. Indeed, Congress has created several avenues for states and localities to assist in the enforcement of the federal immigration laws. The following sections discuss notable provisions in federal statutes that expressly authorize state and

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<sup>14</sup> *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). *See also* *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248-49 (1984); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203-04 (1983). Congressional intent to “occupy the field” to the exclusion of state law can be inferred when “[1] the pervasiveness of the federal regulation precludes supplementation by the States, [2] where the federal interest in the field is sufficiently dominant, or [3] where the object sought to be obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (internal quotations omitted).

<sup>15</sup> Conversely, state action may be preempted where Congress explicitly manifests its intent in law. *See* INA §274A(h)(2), 8 U.S.C. §1324A(h)(2) (explicitly prohibiting states from imposing criminal or civil sanctions [other than through licensing or similar laws] upon those who hire or employ unauthorized aliens).

local law enforcement to directly engage in immigration enforcement activities, including arresting persons who have violated federal immigration law. This section does not discuss those provisions of federal law that, while contemplating participation by state and local authorities in immigration enforcement matters, do not directly authorize state and local police to perform immigration enforcement duties.<sup>16</sup>

## **Delegation of Immigration Enforcement Authority via Cooperative Agreement Under INA Section 287(g)**

One of the broadest grants of authority for state and local immigration enforcement activity stems from Section 133 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which amended INA Section 287 to permit the delegation of certain immigration enforcement functions to state and local officers. Pursuant to INA Section 287(g), the Attorney General (now the Secretary of Homeland Security<sup>17</sup>) is authorized

to enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the [Secretary of Homeland Security] to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.<sup>18</sup>

Agreements entered pursuant to INA Section 287(g) (commonly referred to as “287(g) agreements”) enable specially trained state or local officers to perform specific functions relative to the investigation, apprehension, or detention of aliens, during a predetermined time frame and under federal supervision.<sup>19</sup> In order for state or local officers to perform functions pursuant to a 287(g) agreement, they must “have knowledge of and adhere to” federal law governing immigration officers and be certified as having received “adequate training” regarding the enforcement of immigration laws.<sup>20</sup> State or local officers performing functions pursuant to 287(g) agreements are not considered federal employees, except for purposes relating to certain

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<sup>16</sup> See, e.g., INA §287(d), 8 U.S.C. §1357(d) (authorizing federal immigration authorities, when informed by state or local law enforcement that an alien is within its custody on account of a controlled substance violation, to place a detainer on the alien authorizing his detention until federal authorities may assume custody); 8.U.S.C. §1373 (requiring federal immigration authorities to respond from requests by federal, state, and local government agencies, seeking to verify the immigration status of an individual within their jurisdiction for any purpose authorized by law); District of Columbia Appropriations Act, 2001, P.L. 106-553, App’x B, Title I, §119, 114 Stat. 2762A-69 (Dec. 21, 2000) (providing the Department of Justice with permanent authority, later transferred to the Department of Homeland Security, to lease state and local facilities for the purpose of detaining deportable aliens pending their removal from the United States).

<sup>17</sup> For several decades, the primary authority to interpret, implement, and enforce the provisions of the INA was vested with the Attorney General. The Attorney General, in turn, delegated authority over immigration enforcement and service functions to the Immigration and Naturalization Service within the DOJ. Following the establishment of the Department of Homeland Security pursuant to the Homeland Security Act of 2002 (P.L. 107-296), the INS was abolished and its enforcement functions were transferred to DHS. See 6 U.S.C. §251. Although the INA still refers to the Attorney General as having authority over 287(g) agreements, this authority is now exercised by the Secretary of Homeland Security.

<sup>18</sup> INA §287(g)(1), 8 U.S.C. §1357(g)(1).

<sup>19</sup> INA §287(g)(5), 8 U.S.C. §1357(g)(5).

<sup>20</sup> INA §287(g)(2), 8 U.S.C. §1357(g)(2).

tort claims and compensation matters, but are considered to be acting under color of federal law for purposes of liability and immunity from suit in any civil actions brought under federal or state law.<sup>21</sup>

INA Section 287(g)(10) specifies that a written agreement is not required for state or local officials to engage in certain cooperative functions with federal immigration authorities (though these officials would not be entitled to the same rights and immunities as persons operating under a 287(g) agreement<sup>22</sup>). Specifically, no agreement is necessary for a state or local officer to communicate with federal authorities concerning the immigration status of any person, including persons believed to be unlawfully present in the United States.<sup>23</sup> More broadly, no agreement is necessary in order for a state or local officer “otherwise to cooperate . . . in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”<sup>24</sup> An unsettled issue concerning state efforts to enforce federal immigration law is whether the “cooperation” contemplated under INA Section 287(g)(10) requires states and localities to consult and coordinate their immigration enforcement efforts with federal authorities, or whether the provision may also be interpreted to permit states and localities to independently pursue measures that are consistent with, and arguably further, federal policies related to the detection and removal of unauthorized aliens.

The 287(g) agreements follow two different models. Under the jail enforcement model (also referred to as the “detention model”), designated officers within state or local detention facilities are authorized to identify and process criminal aliens in preparation for removal by federal immigration authorities.<sup>25</sup> Under the task force model, designated officers may, during the course of their regular law enforcement duties within the community or under the direction of a supervising federal immigration officer, identify and arrest certain removable aliens.<sup>26</sup> Some 287(g) agreements singularly employ a task force or detention model, whereas others use both.<sup>27</sup> In 2009, U.S. Immigration and Customs Enforcement (ICE), the agency within the Department of Homeland Security which administers the 287(g) program, renegotiated agreements with participating jurisdictions in an effort to bolster federal oversight, training, and communication within the 287(g) program, and to prioritize the arrest and detention of aliens involved in serious criminal activity.<sup>28</sup> As of October 29, 2010, agreements pursuant to INA Section 287(g) were in place with 69 law enforcement agencies within 24 states.<sup>29</sup>

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<sup>21</sup> INA §287(g)(7)-(8), 8 U.S.C. §1357(g)(7)-(8).

<sup>22</sup> See *id.* (providing that state and local authorities acting under a 287(g) agreement shall be treated as federal employees for purposes of compensation by the federal government for injuries occurring during the performance of their duties, and also stating that such persons shall be considered to be acting under color of federal law in any civil suit arising from their immigration enforcement activities).

<sup>23</sup> INA §287(g)(10), 8 U.S.C. §1357(g)(10).

<sup>24</sup> *Id.*

<sup>25</sup> Office of Inspector General, *The Performance of 287(g) Agreements*, Department of Homeland Security, Mar. 2010, at 3, available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_10-63\\_Mar10.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See U.S. Immigration and Customs Enforcement, Office of State and Local Coordination, Updated Facts on ICE’s 287(g) Program, Apr. 12, 2010, available at [http://www.ice.gov/pi/news/factsheets/section287\\_g-reform.htm](http://www.ice.gov/pi/news/factsheets/section287_g-reform.htm).

<sup>29</sup> See U.S. Immigration and Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, available at <http://www.ice.gov/news/library/factsheets/287g.htm> (discussing 287(g) program and providing links to copies of agreements in force) (last updated Oct. 29, 2010).

It should be noted that federal immigration authorities have entered cooperative arrangements with states pursuant to statutory authorities other than INA Section 287(g).<sup>30</sup> For example, under the Criminal Alien Program (CAP), ICE officers assigned to federal, state, and local prisons are tasked with identifying criminal aliens in order to facilitate their removal, including through the placement of detainers upon such aliens so that federal immigration authorities may take them into custody upon completion of their criminal sentences.<sup>31</sup> A separate program, Secure Communities, is also used to identify criminal aliens in local law enforcement custody. When a person is booked by a law enforcement agency participating in the Secure Communities program, his fingerprints are checked against FBI and DHS records. If fingerprints match DHS immigration records, ICE is immediately made aware and determines whether to pursue the removal of the identified alien.<sup>32</sup> Unlike 287(g) agreements, neither CAP nor the Secure Communities initiative involves direct enforcement of federal immigration law by state or local law enforcement officers or agencies.<sup>33</sup> Moreover, federal immigration authorities sometimes have informal cooperative arrangements with state or local law enforcement, particularly along the northern and southern border, in which officers will provide support to one another in the performance of their law enforcement duties.

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<sup>30</sup> Indeed, the 287(g) program is only one of several cooperative arrangements with state and local law enforcement that is administered by ICE, under the umbrella of the Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) program. *See generally* U.S. Immigration and Customs Enforcement, ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS), available at <http://www.ice.gov/news/library/factsheets/access.htm>.

<sup>31</sup> *See generally* U.S. Immigration and Customs Enforcement, Fact Sheet: Criminal Alien Program, Nov. 19, 2008, available at <http://www.ice.gov/news/library/factsheets/cap.htm> (last updated Mar. 29, 2011); Andrea Guttin, Immigration Policy Center, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, Feb. 2010, at 4-6 (discussing development and implementation of CAP).

<sup>32</sup> The template for agreements which have traditionally been entered between ICE and state identification bureaus relating to implementation of the Secure Communities initiative can be viewed at [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesmoatemplate.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf). Under the initiative, ICE has deployed biometric information-sharing capability to a growing number of jurisdictions. As of August 2, 2011, this capability has been activated in 1,508 jurisdictions in 44 states and territories, and ICE expects such capability to be available nationwide in 2013. U.S. Immigration and Customs Enforcement, Secure Communities: Activated Jurisdictions, available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> (last viewed on Aug. 2, 2011).

<sup>33</sup> Indeed, legal authority supporting the establishment of CAP and Secure Communities does not derive from INA §287(g), but instead from a number of other provisions. *See, e.g.*, INA §236, 8 U.S.C. §1226 (authorizing the establishment and implementation of a system by which federal immigration authorities may identify aliens convicted of aggravated felonies who are in state or local custody); INA §238, 8 U.S.C. §1228 (requiring the provision of expedited removal proceedings of certain criminal aliens at federal, state, and local correctional facilities); INA §287(d), 8 U.S.C. §1357(d) (authorizing federal immigration authorities, when informed by state or local law enforcement that an alien is within their custody on account of a controlled substance violation, to place a detainer on the alien authorizing his detention until federal authorities may assume custody); Consolidated Appropriations Act, 2008, P.L. 110-161, Div. E, U.S. Immigration and Customs Enforcement, Salaries and Expenses, 121 Stat. 2051 (Dec. 26, 2007) (providing appropriations to DHS to improve methods to identify criminal aliens for removal, and requiring DHS to submit to Congress “a strategy for [ICE] to identify every criminal alien, at the prison, jail, or correctional institution in which they are held ... [and thereafter] make every reasonable effort to remove, upon their release from custody, all criminal aliens judged deportable”).

## **Delegation of Immigration Enforcement Authority to Respond to Mass Influx of Aliens**

Section 372 of IIRIRA amended INA Section 103(a) to authorize the Attorney General (now the Secretary of Homeland Security<sup>34</sup>) to call upon state and local police to perform immigration enforcement functions in response to an actual or imminent mass influx of aliens. Specifically, INA Section 103(a) provides:

In the event that the [Secretary of Homeland Security] determines that an actual or imminent mass influx of aliens arriving off the coast of the United States or near a land border presents urgent circumstances requiring an immediate Federal response, the [Secretary] may authorize any State or local law enforcement officer, with the consent of the head of the department, agency or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the power, privileges or duties conferred or imposed by the Act or regulations issued thereunder upon officers or employees of the service.<sup>35</sup>

Thus, state and local officers may exercise the civil or criminal arrest powers of federal immigration officers when certain criteria are met: (1) the designated state and local officers are expressly authorized by the Secretary of Homeland Security to exercise such authority; (2) the head of the relevant state or local law enforcement agency has given its consent to the performance of federal immigration functions by the agency's officers; and (3) the Secretary has made a determination that an imminent or ongoing mass influx of aliens requires an immediate response. Any authority delegated to state or local law enforcement officers under this provision can only be exercised for the duration of the emergency.

In 2002, the Department of Justice (DOJ) issued a final rule that implemented INA Section 103(a)(10) and described the cooperative process by which state or local governments could agree to place authorized state and local law enforcement officers under the direction of the INS in exercising federal immigration enforcement authority.<sup>36</sup> The following year the DOJ found it necessary to amend the previous regulations, determining that the regulations did not provide the Attorney General with sufficient flexibility to address unanticipated situations that might occur during a mass influx of aliens. When such action is deemed necessary to protect public safety, public health, or national security, the new rules also allow the abbreviation or waiver of training requirements for state and local law enforcement.<sup>37</sup>

Although one preemptory agreement was entered with Florida pursuant to INA Section 103(a)(1) in 1998, which could go into effect in the event that a mass influx of aliens is declared,<sup>38</sup> it does not appear that any other agreements have been entered pursuant to this authority.

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<sup>34</sup> Although INA §103(a)(10) refers to the Attorney General, the authority described in the provision now appears to be exercised by the Secretary of Homeland Security, as a result of the transfer of immigration enforcement functions to DHS. *See supra* text accompanying footnote 17.

<sup>35</sup> 8 U.S.C. §1103(a)(10).

<sup>36</sup> Codified at 28 C.F.R. §65.84. *See also* Powers of the Attorney General to Authorize State or Local Law Enforcement Officers to Exercise Federal Immigration Enforcement Authority During a Mass Influx of Aliens, 67 Fed. Reg. 48354 (Jul. 24, 2002).

<sup>37</sup> Abbreviation or Waiver of Training for State or Local Law Enforcement Officers Authorized to Enforce Immigration Law During a Mass Influx of Aliens, 68 Fed. Reg. 8820-22 (Feb. 26, 2003) (codified at 28 C.F.R. §65.84(a)(4)).

<sup>38</sup> *See* Immigration and Naturalization Service, Press Release, *INS and Florida Sign Historic Agreement on Response to a Mass Migration*, Oct. 19, 1998.

## Authorization to Arrest and Detain Previously Removed Criminal Aliens

Section 439 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA, P.L. 104-132) authorizes state and local law enforcement officers to arrest unlawfully present criminal aliens who have presumably violated INA Section 276 (concerning the reentry of previously removed aliens). Section 439 states in part:

[T]o the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—(1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.<sup>39</sup>

This provision originated as a floor amendment during congressional consideration of AEDPA, and its author intended it to overcome a perceived federal limitation on state or local officers' ability to arrest and detain criminal aliens so that they could be transferred to the custody of federal immigration authorities.<sup>40</sup> There is some debate as to whether such a limitation actually existed prior to the enactment of AEDPA, and whether states and localities are now only permitted to arrest and detain aliens on account of their unlawful reentry pursuant to the procedure established under AEDPA Section 439 (i.e., when state or local officers have obtained prior confirmation by federal immigration authorities of a suspect's unauthorized immigration status). As discussed *infra*, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) appears to have construed AEDPA Section 439 in this manner,<sup>41</sup> while the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) has recognized that federal law pre-AEDPA did not preclude states and localities from enforcing federal immigration law.<sup>42</sup>

## Authorization to Enforce the Federal Alien Smuggling Statute

Congress appears to have authorized state and local police to enforce INA Section 274, which criminalizes activities relating to the smuggling, transport, or harboring of unauthorized aliens.<sup>43</sup> INA Section 274(c), entitled "Authority to Arrest," states that:

No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and *all other officers whose duty it is to enforce criminal laws*.<sup>44</sup>

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<sup>39</sup> 8 U.S.C. §1252c.

<sup>40</sup> 142 CONG. REC. 4619 (Rep. Doolittle offering amend. no. 7 to H.R. 2703).

<sup>41</sup> *United States v. Arizona*, 641 F.3d 339, 364-64 (9<sup>th</sup> Cir. 2011).

<sup>42</sup> *United States v. Vasquez-Alvarez*, 176 F. 3d 1294, 1299-1300 (10<sup>th</sup> Cir. 1999) (holding that AEDPA §439 was not "intended to displace preexisting state or local authority to arrest individuals violating federal immigration laws").

<sup>43</sup> 8 U.S.C. §1324.

<sup>44</sup> 8 U.S.C. §1324(c) (emphasis added).

The plain language in this subsection seems to indicate that state and local law enforcement officers are permitted to make arrests for violations of the federal alien smuggling statute, as they are “officers whose duty it is to enforce criminal laws.” The legislative history of INA Section 274 seems to confirm this understanding. The Senate-passed version of this provision stated that arrests for violations could only be made by federal immigration agents and “other officers *of the United States* whose duty it is to enforce criminal laws.”<sup>45</sup> The House, however, struck the words “of the United States,” so that state and local officials could enforce this provision as well.<sup>46</sup>

Although the federal alien smuggling provision appears to permit state and local law enforcement to directly enforce its provisions, other INA provisions which criminalize immigration-related conduct do not contain similar authorizing language. Nonetheless, as discussed *infra*, reviewing courts have recognized that state and local law enforcement may arrest persons for criminal violations of the INA, regardless of whether the applicable INA provision expressly authorizes such arrests.<sup>47</sup>

## Appellate Court Decisions Concerning Immigration Enforcement

The degree to which state and local police officers may, in the absence of express authorization by federal law, act to enforce federal immigration law is a subject of ongoing legal dispute and conflicting judicial opinion. Thus far, reviewing federal courts have recognized that state and local law enforcement officers may make arrests for *criminal* violations of the INA, at least so long as such arrests are permitted under state law. However, courts have disagreed as to whether state and local officers may, in the absence of express federal statutory authorization, arrest a person on account of his commission of a *civil* violation of the INA that renders him removable.

It should be noted that inquiries by state and local law enforcement that touch upon the immigration status of stopped individuals do not always constitute attempts to enforce federal immigration law. Such inquiries might arise in the normal course of an investigation unrelated to immigration enforcement. For example, an officer investigating an offense under state or local law might question a person regarding his identity, and such questioning might possibly touch upon that person’s immigration status (e.g., requesting the production of any documents that may verify the person’s purported identity, including perhaps any federal immigration documents in the person’s possession).<sup>48</sup> These situations might not raise the same legal issues as situations

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<sup>45</sup> 98 CONG. REC. 810 (1952) (emphasis added).

<sup>46</sup> CONF. REP. NO. 1505, 82 Cong., 2d Sess. (1952). Representative Walter offered the amendment to strike the words “of the United States.” He stated that the purpose of the amendment was “to make it possible for any law enforcement officer to make an arrest.” 98 CONG. REC. 1414-15 (1952).

<sup>47</sup> See, e.g., *Gonzales v. City of Peoria*, 722 F.2d 468, 474-75 (9<sup>th</sup> Cir. 1983) (examining legislative history of INA and concluding that state and local law enforcement were not intended to be precluded from enforcing the INA’s criminal provisions).

<sup>48</sup> In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that law enforcement may briefly stop and investigate an individual when there is “reasonable suspicion” that the person is involved in criminal activity, without infringing upon the person’s right under the Fourth Amendment to be free from unreasonable searches and seizures. Questioning a suspect regarding his identity may be a part of many *Terry* stops. See, e.g., *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177, 186 (2004) (“Obtaining a suspect’s name in the course of a *Terry* stop serves important government interests.”); *Hayes v. Florida*, 470 U.S. 811, 816 (1985) (“[I]f there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order (continued...)”).

where questioning regarding immigration status either serves as the legal justification for a person's initial stop, detention, or arrest,<sup>49</sup> or constitutes a basis for detaining a person beyond the period necessary to resolve any non-immigration related matters that justified the person's stop or detention.<sup>50</sup>

This section discusses notable appellate court decisions addressing the ability of state and local law enforcement to detain or arrest persons for violations of the INA in the absence of clear federal authorization.<sup>51</sup> The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) and the

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(...continued)

to identify him, question him briefly, or to detain him briefly while attempting to obtain additional information.”). Additionally, the Fourth Amendment is not implicated in consensual encounters with and questioning by law enforcement. *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (“Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure.”). In *INS v. Delgado*, for example, the Supreme Court held that questioning by federal immigration authorities regarding the immigration status of employees during a worksite inspection did not constitute a “seizure” under the Fourth Amendment because, in view of the surrounding circumstances, “most workers could have had no reasonable fear that they would be seized upon leaving.” 466 U.S. 210, 219 (1984). In consensual encounters, “even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual’s identification; and request consent to search his or her luggage.” *Bostick*, 501 U.S. at 434.

<sup>49</sup> Nonetheless, there may be circumstances where inquiries by state or local police into the immigration status of an individual may raise preemption issues, even in cases where the person has been stopped and detained on non-immigration related grounds and the questioning does not result in the person’s extended detention. *See United States v. Arizona*, 703 F.Supp. 2d 980 (D. Ariz. 2010) (preliminarily enjoining state measure requiring state and local police to verify the immigration status of persons stopped for a state or local offense who are reasonably suspected of being unlawfully present, on the grounds that the measure was likely preempted by federal immigration law, in part because the “mandatory” nature of the state requirement would unduly burden those federal agencies responsible for responding to immigration status verification requests coming from the state).

<sup>50</sup> For example, in *Muehler v. Mena*, the Supreme Court held that local police officers’ questioning of the defendant about her immigration status while they searched the premises of a house she occupied for dangerous weapons did not violate the Fourth Amendment, because it did not prolong her detention. 544 U.S. 93, 101 (2005). *See also Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (“A seizure that is justified solely by [an] interest ... can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”); *Estrada v. Rhode Island*, 594 F.3d 56, 64 (1<sup>st</sup> Cir. 2010) (applying *Muehler* in case where police officer inquired into the immigration status of passengers of stopped vehicle).

<sup>51</sup> In addition to the cases discussed in this section, a few other federal appellate courts have considered cases where state or local law enforcement have investigated or arrested persons for suspected violations of federal immigration law. However, these cases generally have not contained clear pronouncements regarding the ability of state or local police to enforce the civil provisions of federal immigration law. *See, e.g., Estrada*, 594 F.3d at 64-65 (state police officer who stopped a van for traffic violations and subsequently inquired into passengers’ immigration status and thereafter transferred them to federal immigration authorities was entitled to qualified immunity in case brought by passengers which claimed he had violated their constitutional and statutory rights; court noted that the officer contended he had probable cause to believe petitioners had committed “immigration violations,” and cited to provisions in INA carrying criminal penalties); *United States v. Laville*, 480 F.3d 187 (3<sup>rd</sup> Cir. 2007) (finding that state police officer’s warrantless arrest of alien was supported by probable cause that he had committed the criminal offense of unlawfully entering the United States); *United States v. Rodriguez-Arreola*, 270 F.3d 611 (8<sup>th</sup> Cir. 2001) (reversing lower court’s finding that a state trooper, after stopping the vehicle which defendant occupied for speeding, violated the defendant’s Fourth Amendment rights by questioning him and the driver of the vehicle about the defendant’s immigration status). In *Lynch v. Cannatella*, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit considered civil claims brought by several foreign stowaways who alleged mistreatment by local police when they were apprehended and detained, pending transfer to federal authorities, after having attempted to enter the United States unlawfully. 810 F.2d 1363 (5<sup>th</sup> Cir. 1987). In dismissing plaintiffs’ claim that they were detained in a manner that was contrary to federal law, the court found that although the process used by local authorities was not expressly authorized by federal statute, it was also not prohibited by it. It further stated that no federal statute “precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation’s immigration laws.” *Id.* at 1371. Given the context in which this statement was made, it is unclear whether the court intended to convey a broad recognition of the ability of state and local police to enforce the criminal and civil provisions of federal immigration (continued...)

U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) have issued opinions which recognize that state and local law enforcement are generally preempted from making arrests for civil violations of the INA in the absence of clear authorization under federal law. On the other hand, the Tenth Circuit has issued a series of rulings which appear to support the position that state and local law enforcement have implicit authority to investigate and arrest persons for *either* criminal or civil violations of federal immigration law.

It seems likely that this body of jurisprudence will develop noticeably in the near future, though it remains to be seen whether any consensus will be reached by reviewing courts. In recent years, several states have enacted measures designed to discourage the presence of unlawfully present aliens within their jurisdictions, including by authorizing state and local police to investigate the status of persons within their custody who are suspected of being in the United States illegally. Many of these state laws have been challenged on preemption grounds and are the subject of ongoing litigation in different federal circuits.<sup>52</sup> As of the date of this report, only one federal appellate court has rendered an opinion on the legality of a state measure requiring state and local police to investigate the immigration status of a person suspected of being unlawfully present. In that case (*United States v. Arizona*, discussed *infra*), the Ninth Circuit held that state and local police are generally preempted from arresting persons solely on account of being unlawfully present. It remains to be seen whether the Ninth Circuit's analysis will be endorsed by other circuits in their consideration of legal challenges to state laws targeting unlawfully present aliens. Moreover, it remains to be seen whether any of these lawsuits will ultimately be reviewed by the Supreme Court, potentially leading to a more definitive pronouncement as to the degree to which state and local police may enforce federal immigration law.<sup>53</sup>

## Ninth Circuit Jurisprudence

The issue of whether state and local law enforcement agencies are precluded from enforcing provisions of the INA was analyzed by the Ninth Circuit in the 1983 case of *Gonzales v. City of Peoria*<sup>54</sup> and the 2011 case of *United States v. Arizona*.<sup>55</sup> In *Gonzales*, a three-judge panel examined a Peoria policy that authorized local officers to arrest aliens who violated INA Section 275, which makes it a criminal offense for an alien to enter the United States unlawfully.<sup>56</sup> The petitioners, who had been questioned and detained pursuant to the city's policy, claimed that

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(...continued)

law, or whether the court was only referring to the ability of state, local, and federal law enforcement to arrest persons attempting to enter the United States unlawfully.

<sup>52</sup> See, e.g., *Buquer v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 68326, 1:11-cv-708 (S.D. Ind. Jun. 24, 2011) (granting preliminary injunction to prevent enforcement of Indiana law authorizing state and local law enforcement to arrest aliens for non-criminal immigration violations); *Ga. Latino Alliance for Human Rights v. Deal*, 2011 U.S. Dist. LEXIS 69600, 1:11-CV-1804 (N.D. Ga. Jun. 27, 2011) (granting preliminary injunction to prevent implementation of aspects of Georgia law targeting unlawfully present aliens).

<sup>53</sup> *Arizona v. United States*, petition for cert., filed Aug. 10, 2011.

<sup>54</sup> 722 F.2d 468, 474 (9<sup>th</sup> Cir. 1983). *Gonzales* was subsequently overruled by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9<sup>th</sup> Cir. 1999), on grounds unrelated to issues discussed in this report.

<sup>55</sup> *United States v. Arizona*, 641 F.3d 339 (9<sup>th</sup> Cir. 2011) [hereinafter "*Arizona II*"].

<sup>56</sup> 8 U.S.C. §1325. The plaintiffs alleged that the city police engaged in the practice of stopping and arresting persons of Mexican descent without reasonable suspicion or probable cause and based only on their race. Furthermore, they alleged that those persons stopped under this policy were required to provide identification indicative of legal presence in the United States, and that anyone without acceptable identification was detained at the jail for release to immigration authorities.

enforcement of federal immigration laws was the exclusive responsibility of the federal government, precluding any concurrent enforcement activities by states or localities.

The appellate court disagreed. As an initial matter, the *Gonzales* court noted that the “general rule is that local police are not precluded from enforcing federal statutes,”<sup>57</sup> and that federal regulation of a particular field “should not be presumed to preempt state enforcement activity ‘in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.’”<sup>58</sup> The court concluded that the enforcement of the criminal provisions of the INA by states and localities did not inherently conflict with federal interests. Moreover, the court found that neither the structure nor legislative history of the INA manifested an intent by Congress to preclude state or local enforcement of the INA’s criminal provisions.<sup>59</sup> Accordingly, the *Gonzales* court declared that local police officers may, subject to state law, constitutionally stop or detain individuals when there is reasonable suspicion or, in the case of arrest, probable cause that such persons have violated, or are in the process of violating, the *criminal* provisions of the INA.<sup>60</sup>

In the course of its analysis of the preemptive effect of federal immigration law, the *Gonzales* court appeared to distinguish the preemptive effect of the INA’s civil and criminal provisions, and assumed that the former constituted a pervasive and preemptive regulatory scheme, whereas the latter did not. The court stated:

We assume that the civil provisions of the [INA], regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration. However, this case does not concern that broad scheme, but only a narrow and distinct element of it—the regulation of criminal immigration activity by aliens. The statutes relating to that element are few in number and relatively simple in their terms. They are not, and could not be, supported by a complex administrative structure. It therefore cannot be inferred that the federal government has occupied the field of criminal immigration enforcement.<sup>61</sup>

Whereas the Ninth Circuit had “assumed” in *Gonzales* that state and local law enforcement were precluded from directly enforcing the civil provisions of federal immigration law, a more definitive pronouncement to that effect was made by the circuit court in *Arizona*. The case centered on legislation enacted by Arizona in 2010, commonly referred to as S.B. 1070, which is intended to deter the entry or presence of aliens within the state who lack lawful status under federal immigration law.<sup>62</sup> S.B. 1070 generally (1) requires state and local police to investigate the immigration status of persons in their custody who are reasonably believed to be unlawfully present aliens; (2) authorizes the police to make warrantless arrests of aliens when there is probable cause to believe they have committed a criminal offense making them deportable; and (3) establishes criminal penalties for certain conduct that may facilitate the presence of unlawfully present aliens within the state. The Department of Justice and a number of private

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<sup>57</sup> *Gonzales*, 722 F.2d at 474.

<sup>58</sup> *Id.* at 475 (quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976)).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 474-75.

<sup>62</sup> The text of S.B. 1070, as amended by H.B. 2162, can be viewed at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>. For further discussion, see CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona’s S.B. 1070*, by Kate M. Manuel, Michael John Garcia, and Larry M. Eig.

entities filed separate lawsuits to prevent aspects of the Arizona statute from going into effect. The reviewing federal district court granted the federal government's request to preliminarily enjoin most of the challenged provisions of the Arizona law from going into effect, after it found that the DOJ was likely to prevail in its argument that these provisions were preempted by federal immigration law and policy.<sup>63</sup>

On appeal, a three-judge panel of the Ninth Circuit affirmed the lower court's ruling. While unanimous on some aspects of its decision, the panel split on the permissibility of those provisions of S.B. 1070 concerning immigration status verifications and warrantless arrests of deportable aliens by state and local police. By a 2-1 decision, the panel held that state and local police officers generally lacked the authority to enforce the non-criminal provisions of the INA, and also held that states may not mandate that police investigate the immigration status of persons suspected of being unlawfully present aliens.

In reaching this conclusion, the panel majority construed those provisions of INA Section 287(g) permitting state and local officers to perform immigration enforcement functions pursuant to a written agreement with the Secretary of DHS as indicative of congressional intent for state involvement in immigration enforcement to generally occur under federal supervision.<sup>64</sup> The majority further found that INA Section 287(g)(10), which refers to state and local "cooperation" in immigration enforcement in the absence of a 287(g) agreement, encompasses only assistance on "an incidental and as needed basis" when requested by the Secretary or otherwise necessary.<sup>65</sup> The majority also viewed the Arizona statute as being inconsistent with congressional intent, on the ground that it permits state and local police to arrest aliens for civil deportation violations in a broader set of circumstances than had been authorized under AEDPA Section 439.

The panel majority further found that the government was likely to prevail in its preemption challenge because of the Arizona measure's "deleterious effect" on foreign relations, as well as "the threat of 50 states layering their own immigration enforcement rules on top of the INA."<sup>66</sup>

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<sup>63</sup> United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz., 2010) [hereinafter "*Arizona I*"].

<sup>64</sup> *Arizona II*, 641 F.3d at 348-349.

<sup>65</sup> *Id.* at 348. The majority was concerned that reading INA §287(g)(10) without reference to subsections (g)(1)-(9) would "nullify" these provisions. Specifically, the majority pointed to use of the word "removal" in subsection (g)(10)(B) as indicating that "cooperation" is generally limited to assistance under a 287(g) agreement because states and localities cannot remove aliens, only the federal government can. *Id.* at 349-350. Apparently taking the view that the federal government must authorize state and local enforcement of federal immigration law, the majority found that INA §287(g)(10) does not "operate as a broad alternative grant of authority" for state and local officers to enforce federal law absent a 287(g) agreement, or permit them to "adopt laws dictating how and when state and local officers *must* communicate with the Attorney General regarding the immigration status of an individual." *Id.* at 349-350. The majority did not address the argument that states and localities have inherent authority to enforce federal immigration law in its discussion of Section 2(B), although it did in its discussion of Section 6.

<sup>66</sup> *Id.* at 352, 354. The district court had similarly expressed concern that Section 2(B) could potentially interfere with the federal government's responsibility "to maintain international relationships, for the protection of American citizens abroad as well as to ensure uniform national foreign policy." *Arizona I*, 703 F. Supp. 2d at 997 (citing *Hines*, 312 U.S. at 62-63, and also quoting *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) ("We recognize ... the Nation's need to 'speak with one voice' in immigration matters.")). In addition to joining the majority opinion, Judge John T. Noonan wrote a separate concurrence to emphasize his view that provisions of S.B. 1070 were inconsistent with federal foreign policy. He further characterized the regulation of immigration as a subset of foreign policy, and argued that the "foreign policy of the United States preempts the field entered by Arizona." *Arizona II*, 641 F.3d at 368 (Noonan, J., concurring).

In a partial dissent from the majority's ruling, one member of the panel criticized the majority for holding that states and localities are generally preempted from enforcing the civil provisions of the INA or investigating the immigration status of persons suspected of being deportable aliens. He characterized most jurisprudence as supporting the proposition that state and local officers are generally not preempted from making arrests for violations of federal law, including arrests for immigration violations.<sup>67</sup> The dissent also construed INA Section 287(g)(10) as reflecting congressional recognition that state police may assist in the enforcement of both the civil and criminal provisions of the INA, even in the absence of a 287(g) agreement. The dissent further claimed that AEDPA Section 439 was not intended to define the parameters of state authority to arrest aliens for civil immigration violations.<sup>68</sup> The dissenting judge also construed 8 U.S.C. Section 1373(c), which requires federal authorities to respond to immigration status requests by state and local authorities, as being indicative of congressional support for state and local participation in immigration enforcement activities.<sup>69</sup>

It should be noted that while the circuit panel majority found that state and local police are generally preempted from making arrests for civil violations of the INA, its related ruling that S.B. 1070's immigration verification requirements were preempted appeared to be based on the "mandatory" nature of these requirements. Thus, the court's decision would not necessarily bar Arizona law enforcement from attempting to verify the immigration status of persons on a more limited, case-by-case basis. The panel majority's opinion apparently contemplates such attempts at verification in limited circumstances.<sup>70</sup> The DOJ also seemed to suggest in its argument before the district court that it did not view discretionary attempts by state or local law enforcement to verify the immigration status of individuals as raising the same preemption concerns as Arizona's "mandatory" requirements relating to status verification.<sup>71</sup>

Arizona has submitted a petition for certiorari to the Supreme Court. If the Supreme Court decides to review the case, it could potentially set the stage for a definitive pronouncement as to the degree to which state and local police may enforce federal immigration law.

### ***United States v. Urrieta (Sixth Circuit)***

In the 2008 case of *United States v. Urrieta*,<sup>72</sup> a three-judge circuit panel similarly appeared to construe federal immigration law as generally precluding states and localities from arresting or

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<sup>67</sup> See *Arizona II*, 641 F.3d at 384-87 (Bea, J., dissenting) (citing and discussing, *inter alia*, *United States v. Di Re*, 332 U.S. 581 (1948) (involving arrest by state officers of person for knowingly possessing counterfeit gasoline ration coupons, in violation of federal law); *Muehler v. Mena*, 544 U.S. 93 (2005) (holding that that local police officers' questioning of an individual regarding her immigration status while they searched the premises of a house she occupied for dangerous weapons did not violate the Fourth Amendment)).

<sup>68</sup> See *Arizona II*, 641 F.3d at 387-91 (Bea, J., dissenting).

<sup>69</sup> *Id.* at 382 (Bea, J., dissenting).

<sup>70</sup> *Id.* at 349-50 (noting that state and local authorities can communicate immigration status information obtained or needed in the performance of "regular state duties," so long as these duties do not entail the systematic enforcement of federal immigration law absent a 287(g) agreement).

<sup>71</sup> *United States v. Arizona*, Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof, at 25 (D. Ariz. filed Jul. 6, 2010) [hereinafter "Arizona PI Motion"] available at [http://www.justice.gov/usao/az/press\\_releases/2010/Arizona%20PI%20Brief%20\(2\).pdf](http://www.justice.gov/usao/az/press_releases/2010/Arizona%20PI%20Brief%20(2).pdf). ("Before passage of S.B. 1070, Arizona police had the same discretion to decide whether to verify immigration status during the course of a lawful stop as any other state or federal law enforcement officer.")

<sup>72</sup> 520 F.3d 569 (6<sup>th</sup> Cir. 2008).

detaining persons for civil immigration violations. The case concerned the lawfulness of the petitioner's extended detention following the issuance of a traffic citation by local law enforcement, during which time the officer attempted to determine whether the petitioner was an unlawfully present alien. During the extended detention, the petitioner consented to a search of his vehicle, which resulted in the discovery of firearms and fraudulent documents. In his subsequent criminal trial for unlawful possession of these items, the petitioner sought to have the evidence discovered during his extended detention suppressed, arguing that his extended detention beyond the period necessary to issue a traffic citation was unlawful.

The circuit panel concluded that the petitioner's extended detention could not be justified solely on account of the police officer's reasonable suspicion that the petitioner was an unlawfully present alien. In so doing, the panel characterized INA Section 287(g) as "stating that local law enforcement officers cannot enforce completed violations of civil immigration law (i.e., illegal presence) unless specifically authorized to do so by the Attorney General under special conditions that are not applicable in the present case."<sup>73</sup> Although the majority opinion in *Urrieta* appeared to recognize that state or local law enforcement could detain a person on account of a *criminal* violation of the INA,<sup>74</sup> it indicated that an alien could not be detained solely on account of unauthorized immigration status in the absence of a 287(g) agreement or other express federal authority.<sup>75</sup> Because the local officer did not have "reasonable suspicion that [the petitioner] was engaged in some nonimmigration-related illegal activity" that could justify his extended detention,<sup>76</sup> the court ruled that the petitioner was unlawfully detained and ordered the evidence discovered during this detention to be suppressed in subsequent criminal proceedings.<sup>77</sup>

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<sup>73</sup> *Id.* at 574.

<sup>74</sup> Prior to searching the defendant's vehicle, the stopping officer contacted federal authorities to determine whether the defendant was legally in the country, and learned that there was no record of the defendant. The majority noted that this lack of information was significant, because it indicated that the defendant was not present in the country after previously having been deported, which is a criminal offense. *See* INA §276, 8 U.S.C. §1326. The majority opinion found the lack of a deportation record to be "significant because illegal reentry after deportation is the only immigration violation that [the local officer] had the authority to enforce." *Urrieta*, 520 F.3d at 571-72.

<sup>75</sup> Further, the court also recognized that a person's false or evasive statements regarding immigration status do not provide law enforcement with reasonable suspicion to believe that the alien is engaged in unrelated criminal activity which could justify his continued detention. The court reasoned that:

Although false or evasive statements to a law enforcement officer might indicate criminal activity, *see* *United States v. \$67,220.00 in U.S. Currency*, 957 F.2d 280, 286 (6<sup>th</sup> Cir.1992), the fact is that very few undocumented immigrants are likely to admit to law enforcement that they are in the country illegally. The government's reasoning that dishonesty about one's immigration status suggests drug running, therefore, opens the door to allowing millions of undocumented immigrants to be detained for further questioning on that basis. To hold that one's illegal presence in this county is a sign of anything more than an immigration violation stretches the Fourth Amendment much too far.

*Id.* at 579.

<sup>76</sup> *Id.* at 574-75.

<sup>77</sup> Although one judge of the panel dissented from the court's ruling, believing that the officer had reasonable suspicion to detain the defendant following the issuance of a traffic citation in order to investigate possible criminal activity, he agreed with the majority that the officer "had no authority to arrest [the defendant and his passenger] for an immigration violation because neither of them [had committed the criminal offense of having] reentered the country illegally." *Id.* at 580 (McKeague, J., dissenting).

## Tenth Circuit Jurisprudence

In contrast to the approach taken by the Sixth and Ninth Circuits, the Tenth Circuit Court of Appeals has issued a series of rulings that arguably supports the view that state and local officers are not preempted from investigating and arresting persons who have violated *either* the criminal or civil provisions of the INA. Although these cases arose in the context of criminal investigations, they concerned activities undertaken by state or local officers involving the enforcement of the civil provisions of federal immigration law—namely, the arrest or extended detention of persons in order to determine whether they were unlawfully present aliens.

In the 1984 case of *United States v. Salinas-Calderon*,<sup>78</sup> a three-judge circuit panel considered a case involving a state trooper who had pulled over the criminal defendant for driving erratically, and who had subsequently found six individuals in the back of the defendant's truck. Because neither the driver nor the six individuals spoke English or carried identification documentation, and another passenger (the driver's wife) stated that they were from Mexico, the state trooper arrested them and attempted to verify their immigration status. The driver was subsequently charged with the criminal offense of unlawfully transporting unauthorized aliens, but moved to suppress statements made by himself and the six passengers in which they admitted their unauthorized immigration status.

Examining the record, the circuit panel found that, based on the observable facts that had been available, the trooper had probable cause to detain and arrest all of the individuals. Moreover, the court rejected the defendant's argument that the state trooper lacked authority to detain the passengers in order to inquire into their immigration status. The court determined that a "state trooper has general investigatory authority to inquire into possible immigration violations,"<sup>79</sup> and that based on his questioning of the defendant and passengers, the trooper had "probable cause to make a warrantless arrest for violation of the immigration laws."<sup>80</sup>

In 1999, the Tenth Circuit Court of Appeals once again considered state and local authority to enforce federal immigration laws in the case of *United States v. Vasquez-Alvarez*.<sup>81</sup> The case concerned an Oklahoma police officer's arrest of an individual, who was being monitored by the officer partially due to suspicion of drug trafficking, following the individual's admission that he was an "illegal alien."<sup>82</sup> Subsequently, the alien admitted that he had a felony record and had previously been deported from the United States, and was charged by federal authorities with the criminal offense of unlawfully reentering the United States.<sup>83</sup> As discussed previously,<sup>84</sup> Section 439 of AEDPA expressly permits state and local law enforcement to arrest previously deported aliens who have been convicted of criminal activity and thereafter unlawfully reenter the United States, but requires that law enforcement acting pursuant to this authority first obtain confirmation of the alien's immigration status prior to making an arrest. In the instant case, however, the law enforcement officer did not act pursuant to the authority conferred under

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<sup>78</sup> 728 F.2d 1298 (10<sup>th</sup> Cir. 1984).

<sup>79</sup> *Id.* at 1301 n.3.

<sup>80</sup> *Id.* at 1301.

<sup>81</sup> 176 F.3d 1294 (10<sup>th</sup> Cir. 1999).

<sup>82</sup> *Id.* at 1296.

<sup>83</sup> *Id.* at 1295.

<sup>84</sup> *See supra* at "Authorization to Arrest and Detain Previously Removed Criminal Aliens."

AEDPA Section 439. Instead, the arrest was premised upon Oklahoma state law, which permitted state and local law enforcement to make arrests for any violation of federal law.<sup>85</sup>

The *Vasquez-Alvarez* court rejected the defendant's argument that because his arrest was not in accordance with the procedure detailed in AEDPA Section 439, it was therefore unlawful. Citing *Salinas-Calderon*, the circuit court noted that it had previously "held that state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws."<sup>86</sup> Examining the language and legislative history of AEDPA Section 439, the court determined that the provision neither expressly nor implicitly limited or displaced "the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration law."<sup>87</sup> Instead, the circuit panel held that AEDPA Section 439 "merely creates an additional vehicle for the enforcement of federal immigration law,"<sup>88</sup> besides any independent authority to make such arrests under state law.

In the 2001 case of *United States v. Santana-Garcia*,<sup>89</sup> the Tenth Circuit once again addressed the role of state and local law enforcement in immigration matters, reaffirming and expanding upon its prior rulings in *Salinas-Calderon* and *Vasquez-Alvarez*. The case concerned a traffic stop by a Utah state trooper. The driver of the car did not possess a driver's license, a misdemeanor under Utah law, and did not speak English. The passenger in the car spoke limited English and explained that he and the driver were traveling from Mexico to Colorado, which prompted the officer to ask if they were "legal." The passenger and the driver appeared to understand the question and answered "no."<sup>90</sup> Following further inquiry, the driver and passenger consented to a search of their vehicle, which revealed illegal drugs. In subsequent criminal proceedings, the driver and passenger moved to suppress this evidence on the grounds that the police lacked reasonable suspicion to detain them beyond the purpose of the initial stop.

The circuit panel upheld the admission of the evidence, finding that the state trooper had probable cause to arrest the defendants for violations of state criminal law (i.e., driving without a valid driver's license) and federal law at the time they consented to a search of the vehicle. With respect to federal law, the court held that the defendants' admission of unlawful status provided the state officer with probable cause to arrest them for suspected violations of federal immigration law. The *Santana-Garcia* panel also seemed to dismiss the suggestion that state law must explicitly authorize state and local officials to make such arrests.<sup>91</sup> The court relied upon a number of inferences from earlier decisions that recognized the "implicit authority" or "general investigatory authority" of state officers to inquire into possible immigration violations.<sup>92</sup> The

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<sup>85</sup> *Vasquez-Alvarez*, 176 F.3d at 1296-97 (citing *Salinas-Calderon*, 728 F.2d at 1301-02 & n.3).

<sup>86</sup> *Id.* at 1296-97.

<sup>87</sup> *Id.* at 1295.

<sup>88</sup> *Id.*

<sup>89</sup> 264 F.3d 1188 (10<sup>th</sup> Cir. 2001).

<sup>90</sup> *Id.* at 1190.

<sup>91</sup> *Id.* at 1193-94. The court, nonetheless, cited Utah's peace officer statute (UTAH CODE ANN. §77-7-2), which empowers Utah state troopers to make warrantless arrests for "any public offense." The court also found the defendant's acknowledgment in *Vasquez-Alvarez* that the relevant state law specifically authorized local law enforcement officials to make arrests for violations of federal law unnecessary to that decision. *Id.* at 1194 n.7.

<sup>92</sup> *Id.* at 1193-94. The circuit court also approvingly cited to a few non-immigration-related decisions in other circuits which recognized state and local law enforcement's general authority to make arrests for federal offenses, presuming that the exercise of such authority is not barred under state law. *Id.* (citing *United States v. Janik*, 723 F.2d 537, 548 (7<sup>th</sup> Cir. 1983) and *United States v. Bowdach*, 561 F.2d 1160, 1167 (5<sup>th</sup> Cir. 1977)).

court also seemed to rely upon a broad understanding of a Utah state law that empowers officers to make warrantless arrests for any public offense committed in the officer's presence to include violations of federal law.<sup>93</sup>

Although the defendants in *Santana-Garcia* were apparently in violation of a *civil* provision of the INA (i.e., unauthorized presence), the *Santana-Garcia* court made no distinction between state and local police officers' ability to enforce either the civil or criminal provisions of federal immigration law, although the supporting cases which the court cited generally involved arrests for criminal matters. Moreover, it remains unclear how the court, pursuant to its broad understanding of Utah state law, would have ruled if there had not been an independent legal basis supporting the state officer's stop (i.e., a traffic violation) unrelated to the investigation as to whether a civil violation of federal immigration laws had occurred. Accordingly, it can be argued that this decision still leaves unresolved the precise circumstances in which state and local police officers may enforce the civil provisions of the INA.<sup>94</sup>

## Office of Legal Counsel Opinions

In recent decades, the executive branch has repeatedly opined on the scope of potential state and local involvement in the enforcement of federal immigration law. Over the years, it has modified its views as to whether state and local officials may enforce the civil provisions of the INA. In a 1978 press release, the Department of Justice (DOJ) "reaffirmed . . . that the enforcement of the immigration laws rests with [federal immigration authorities], and not with state and local police."<sup>95</sup> The DOJ further urged state and local police not to "stop and question, detain, arrest, or place an 'immigration hold' on any persons not suspected of crime, solely on the ground that they may be deportable aliens."<sup>96</sup> In 1983, the DOJ announced revisions to this policy to encourage greater involvement by state and local police in the enforcement of immigration laws, but emphasized that federal authorities "remain responsible for all arrests for [civil] immigration violations."<sup>97</sup> In 1989, the DOJ's Office of Legal Counsel (OLC) opined that while state and local law enforcement could enforce the provisions of the INA concerning criminal offenses, it was "unclear" whether they could enforce non-criminal federal statutes.<sup>98</sup>

In 1996, the OLC reached a more definitive conclusion on the question, issuing an opinion which found that while state and local police are not preempted from making arrests for criminal

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<sup>93</sup> *Santana-Garcia*, 264 F.3d at 1194 n.8 (citing UTAH CODE ANN. §77-7-2).

<sup>94</sup> The Tenth Circuit reaffirmed its prior recognition of the inherent authority of state and local police to enforce federal immigration law in an unpublished 2002 opinion, without appearing to distinguish between criminal and civil offenses. *United States v. Favela-Favela*, 41 Fed. App'x. 185 (10<sup>th</sup> Cir. 2002) (upholding alien smuggling conviction of person stopped by local law enforcement for a traffic violation and thereafter questioned regarding the immigration status of his passengers). As with prior cases, however, the case involved a stop made pursuant to an investigation of an offense under state law (a traffic violation), rather than being solely premised on an investigation into the immigration status of the occupants of the stopped vehicle. Moreover, the defendant's extended detention occurred during an investigation of illegal activity carrying criminal penalties under federal immigration law (unlawfully transporting unauthorized aliens).

<sup>95</sup> Interpreter Releases, vol. 55, Aug. 9, 1978, at 306 (quoting DOJ press release).

<sup>96</sup> *Id.*

<sup>97</sup> Interpreter Releases, vol. 60, Mar. 4, 1983, at 172-73 (quoting guidelines approved by the Attorney General on Feb. 10, 1983).

<sup>98</sup> Dep't of Justice, Office of Legal Counsel, *Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File*, at 4, 5, & n.11 (April 11, 1989).

violations of the INA, they “lack recognized legal authority” to enforce the INA’s civil provisions.<sup>99</sup> The opinion acknowledged that “[i]t is well-settled that state law enforcement officers are permitted to enforce federal statutes where such enforcement activities do not impair federal regulatory interests.”<sup>100</sup> Such enforcement is “subject to the provisions and limitations of state law.”<sup>101</sup> However, the OLC concluded, based upon an examination of jurisprudence, that “state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws.”<sup>102</sup> In particular, the OLC construed the Ninth Circuit’s ruling in *Gonzales v. City of Peoria* as holding that state and local authority to enforce the INA “is limited to criminal violations.”<sup>103</sup>

## 2002 OLC Opinion

In 2002, the OLC issued a memorandum which concluded that “federal law did not preempt state police from arresting aliens on the basis of civil deportability,” and it withdrew the advice of the 1996 opinion which had suggested otherwise.<sup>104</sup> The 2002 OLC Opinion described the states, like the federal government, as possessing the status of “sovereign entities.”<sup>105</sup> Because of this status, states do not require affirmative delegation of federal authority in order to make arrests for violations of federal law—“[i]nstead, the power to make arrests inheres in the ability of one sovereign to accommodate the interests of the other.”<sup>106</sup>

The 2002 OLC Opinion recognized that the exercise of states’ inherent authority to arrest persons for federal violations may be subject to federal preemption. However, it concluded that “federal law should be presumed not to preempt this arrest authority,” because “it is ordinarily unreasonable to assume that Congress intended to deprive the federal government of whatever assistance States may provide in identifying and detaining those who have violated federal

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<sup>99</sup> Dep’t of Justice, Office of Legal Counsel, *Assistance by State and Local Police in Apprehending Illegal Aliens*, 1996 OLC LEXIS 76, at \*2-\*3 (Feb. 5, 1996) [hereinafter “1996 OLC Opinion”].

<sup>100</sup> *Id.* at \*8 (citing, *inter alia*, *Ker v. California*, 374 U.S. 23 (1963); *Florida Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)). The opinion also discussed a number of legal authorities that recognized that state and local police were not preempted from enforcing the criminal provisions of federal immigration law. 1996 OLC Opinion, *supra* footnote 99, at \*8-\*13 (discussing, *inter alia*, *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9<sup>th</sup> Cir. 1983); *People v. Barajas*, 81 Cal. App. 3d 999 (1978) (state appellate court decision recognizing ability of state police to arrest persons who commit criminal offenses under the INA relating to unlawful entry and reentry)).

<sup>101</sup> 1996 OLC Opinion, *supra* footnote 99, at \*9.

<sup>102</sup> *Id.* at \*16.

<sup>103</sup> *Id.* at \*14 (quoting *Gonzales*, 772 F.2d at 476). The OLC Opinion also noted a California case which recognized that “[t]he civil provisions of the INA constitute a pervasive regulatory scheme such as to grant exclusive federal jurisdiction over immigration, thereby preempting state enforcement.”). 1996 OLC Opinion, *supra* footnote 99, at \*14 (quoting *Gates v. Superior Court*, 193 Cal. App. 3d 205, 213 (1987)).

<sup>104</sup> Dep’t of Justice, Office of Legal Counsel, *Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations*, at 8 (Apr. 3, 2002) [hereinafter “2002 OLC Opinion”]. Initially, the DOJ did not make the 2002 OLC Opinion publicly available. Several immigration and public interest groups sought disclosure under the Freedom of Information Act. See *Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350 (2d Cir. 2005). As a result of this litigation, the DOJ was required to release a redacted version of the opinion, which can be viewed at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf> or [http://www.fairus.org/site/DocServer/OLC\\_Opinion\\_2002.pdf?docID=1041](http://www.fairus.org/site/DocServer/OLC_Opinion_2002.pdf?docID=1041).

<sup>105</sup> 2002 OLC Opinion, *supra* footnote 104, at 8.

<sup>106</sup> *Id.*

law.”<sup>107</sup> The 2002 OLC Opinion explicitly rejected the 1996 opinion’s conclusion that federal law preempts state or local enforcement of the civil provisions of the INA, because “[o]n re-examination, we believe that the authorities we cited in the 1996 OLC opinion provide no support for our conclusion that state police lack the authority to arrest aliens solely on the basis of civil deportability.”<sup>108</sup> In particular, it construed the Ninth Circuit’s statements in *Gonzales v. City of Peoria* regarding the preemptive nature of the INA’s civil provisions as “mere *assumption in dictum*,”<sup>109</sup> and instead emphasized Tenth Circuit jurisprudence supporting the inherent authority of state and local police to enforce both the criminal and civil provisions of federal immigration law.<sup>110</sup>

Some critics of the 2002 OLC Opinion have characterized it as “deeply flawed” and unsupported by judicial precedent or historical practice in the field of immigration.<sup>111</sup> For example, it has been argued that immigration has long been understood to be a distinctly federal concern, and that Congress would not have provided express statutory authorization for state and local enforcement of civil immigration laws in limited circumstances (e.g., pursuant to INA Section 287(g)) unless it was understood that state and local police were otherwise preempted from making arrests for civil immigration violations.<sup>112</sup>

It should be noted that the 2002 OLC Opinion concerned whether states are preempted from arresting persons for violations of federal immigration law. The opinion characterized this as “an extremely limited . . . preemption question,” which does not, “[u]nlike the typical preemption scenario,” involve a state enacting its own immigration-related measures, which might “arguably conflict with federal law or intrude into a field that is reserved to Congress or that federal law has occupied.”<sup>113</sup>

OLC opinions are generally viewed as providing binding interpretive guidance for executive agencies and reflecting the legal position of the executive branch,<sup>114</sup> but they cannot compel state action and do not have the same weight as an act of Congress. Generally, courts will consider opinion letters by executive agencies on legal matters to the extent that they “have the power to persuade.”<sup>115</sup>

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<sup>107</sup> *Id.* at 13.

<sup>108</sup> *Id.* at 7.

<sup>109</sup> *Id.* (italics in original).

<sup>110</sup> *Id.*

<sup>111</sup> See American Civil Liberties Union, *Re: 2002 OLC Opinion on State and Local Immigration Enforcement*, Mar. 6, 2009, available at <http://www.aclu.org/files/assets/olc-exp-ag-4.pdf>.

<sup>112</sup> *Id.* at 3.

<sup>113</sup> 2002 OLC Opinion, *supra* footnote 104, at 7-8.

<sup>114</sup> *Tenaska Washington Partners, L.P. v. United States*, 34 Fed. Cl. 434, 439 (Fed. Cl. 1995) (“Memoranda issued by the OLC . . . are binding on the Department of Justice and other Executive Branch agencies and represent the official position of those arms of government.”).

<sup>115</sup> *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). See also *Committee on Judiciary, U.S. House of Representatives v. Miers*, 558 F.Supp.2d 53, 104 (D.D.C. 2008) (OLC opinions are entitled by the courts “to only as much weight as the force of their reasoning will support”); *Tenaska*, 34 Fed. Cl. at 440 (“[T]he fact that the Department of Justice asserts a legal theory does not bind the court to accept the reasoning as legally correct.”).

## ***Department of Justice Legal Challenges to State Immigration Laws***

Although the 2002 OLC Opinion remains in effect, some of the arguments raised by the DOJ in legal challenges brought against Arizona and Alabama indicate that the Justice Department believes there are limitations on the ability of state and local police to investigate and arrest persons for suspected violations of federal immigration law. These lawsuits center on measures enacted by Arizona and Alabama which are intended to deter the entry or presence of aliens who lack lawful status under federal immigration law.<sup>116</sup> Both statutes impose sanctions upon certain activity that may facilitate the presence of unlawfully present aliens within the states' jurisdictions. Each statute also contains provisions which involve the direct enforcement of federal immigration law by state and local police. Specifically, both the Arizona and Alabama statutes generally require state and local police to investigate the immigration status of persons who come within their custody when they have reason to believe those individuals are unlawfully present aliens. In addition, the Arizona statute authorizes state and local police to make warrantless arrests of persons who have committed certain kinds of deportable offenses.

The DOJ claims that aspects of the Arizona and Alabama statutes, including those provisions involving the direct enforcement of federal immigration law by state and local police, are preempted by federal immigration law and policy. As previously discussed, most of the challenged provisions of the Arizona statute were preliminarily enjoined by the reviewing district court pending a final ruling on the merits of the DOJ's challenge. The district court's injunction was affirmed by the Ninth Circuit, and Arizona is now seeking Supreme Court review. The DOJ's legal challenge against Alabama, which was filed in August 2011, raises many of the same arguments that were brought against the Arizona statute. As of the date of this report, the reviewing court has yet to issue a ruling.

In its legal challenge against Arizona's S.B. 1070, the DOJ has argued that the measure's grant of authority to state and local police to make warrantless arrests of aliens believed to be deportable on criminal grounds is preempted because of the burdens it would impose on lawfully present aliens. The DOJ claims that the measure would likely lead to the harassment and arrest of lawfully present aliens who were mistakenly believed by state or local authorities to have committed a criminal offense that made them deportable. The DOJ argued that determining whether an alien is deportable on account of criminal activity falls under the exclusive authority of the federal government, and state and local police are ill-equipped to determine whether a particular crime makes an alien removable. The DOJ has further argued that law enforcement officers acting pursuant to S.B. 1070 would "undoubtedly erroneously arrest many aliens who could not legitimately be subject to removal," and thereby impose "distinct and extraordinary" burdens upon aliens authorized to remain in the United States.<sup>117</sup>

With respect to the Arizona and Alabama laws' requirements concerning immigration status determinations, the DOJ argued that the "mandatory" nature of these requirements would unduly burden lawfully present aliens and also lead to a significant increase in immigration status

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<sup>116</sup> The text of the challenged Arizona statute, as amended, can be viewed at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>, and the text of the Alabama statute is available at <http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011rs/bills/hb56.htm>. For discussion and analysis of the Arizona statute, see CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by Kate M. Manuel, Michael John Garcia, and Larry M. Eig.

<sup>117</sup> Arizona PI Motion, *supra* footnote 71, at 33.

verification requests being received by federal authorities, causing those authorities to divert resources away from other federal immigration enforcement priorities.<sup>118</sup> Accordingly, the DOJ alleges that these provisions are preempted because they conflict or otherwise interfere with the objectives of federal immigration law and policy.

The DOJ also appears to argue (at least in the Alabama challenge) that while federal immigration law permits state and local “cooperation” in matters of immigration enforcement, state and local participation in immigration enforcement must generally be responsive to federal immigration enforcement priorities. According to the DOJ, a “mandatory and systematic” immigration verification scheme would, by its nature, be “non-cooperative,” on the ground that it would not take into account the enforcement priorities or preferences of the federal immigration authorities. In its legal challenge to the Alabama statute, the DOJ claims that:

Because DHS is charged with administering the immigration laws, and therefore with setting a direction for enforcement, the INA’s “cooperation” requirement means that a state may not adopt its own mandatory set of directives to implement the state’s own enforcement policies because such a mandate would serve as an obstacle in every instance to the ability of individual state and local officers to cooperate with federal officers administering federal policies and discretion as the circumstances in the particular case require. Thus, for example, a state may systematically involve itself ... in immigration enforcement only if state and local officers remain in a position to respond to the judgment and discretion of appropriate federal officers, and only if the state acts consistently with the policies and any applicable direction set by federal officials. Accordingly, a state is not acting “cooperatively” if it disregards express federal direction; attempts to force the federal government to routinely deploy scarce enforcement resources in accordance with an immigration enforcement regime of a state’s choosing; or if it attempts to deny its officers (who are assisting federal officers in enforcing the INA) the opportunity to exercise their discretion on a case-by-case basis so that they can be responsive to the direction and priorities of the federal officials charged with implementing and enforcing the immigration laws.<sup>119</sup>

At the same time, however, the DOJ has suggested that such activities would not raise the same preemption issues if they were done on a more limited, discretionary basis,<sup>120</sup> or if they were performed consistently with the priorities of federal immigration authorities. In its legal suit against Alabama, the DOJ noted that it was not challenging a state’s “power to *authorize* its officers to assist federal officers in their enforcement of the immigration laws.”<sup>121</sup> However, the DOJ claims that any such authorization must allow state and local officers to be responsive to the direction and priorities of federal immigration authorities.<sup>122</sup>

It remains to be seen whether the OLC will modify or supplement any of the conclusions reached in its 2002 opinion. In its decision in *United States v. Arizona*, a majority of the Ninth Circuit

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<sup>118</sup> Arizona PI Motion, *supra* footnote 71, at 25-34; *United States v. Alabama*, Plaintiff’s Motion For Preliminary Injunction, No. 11-J-2746-S, at 58-65 (S.D. Ala., filed Aug. 1, 2011) [hereinafter “Alabama PI Motion”], available at <http://www.justice.gov/opa/documents/motion-preliminary-injunction.pdf>.

<sup>119</sup> Alabama PI Motion, *supra* footnote 118, at 54.

<sup>120</sup> See Arizona PI Motion, *supra* footnote 71, at 25.

<sup>121</sup> Alabama PI Motion, *supra* footnote 118, at 54 n.4 (italics in original).

<sup>122</sup> *Id.*

panel explicitly rejected the reasoning of the OLC opinion,<sup>123</sup> but it is possible that other courts will be more receptive to its arguments.

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<sup>123</sup> *Arizona II*, 641 F.3d at 365 n. 24.