

FROM 287(g) TO SB 1070: THE DECLINE OF THE FEDERAL IMMIGRATION PARTNERSHIP AND THE RISE OF STATE-LEVEL IMMIGRATION ENFORCEMENT

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In July 2009, the Department of Homeland Security (DHS) dramatically altered the notorious 287(g) program, a program that cultivates partnerships between Immigration and Customs Enforcement and local law enforcement. Billed as an effort to standardize immigration enforcement while focusing efforts upon priority aliens, the policy shift instead managed to subvert the drafters' intent, undermine local and federal enforcement goals, whittle the once broad and flexible 287(g) program down to impotent redundancy, and foster an environment that compels states and communities to take immigration enforcement into their own hands.

This was the opening salvo of a persistent campaign to bind state-level enforcement efforts to the Obama Administration's selective immigration enforcement policy. This effort would assume the national spotlight in the legal battle over the policy's own progeny, the controversial Support Our Law Enforcement and Safe Neighborhoods Act (SOLESNA), popularly known as Arizona Senate Bill 1070.

This Note is one part local immigration enforcement primer and one part chronicle of the struggles between federal and state policy. It must be so, for one cannot seriously examine the modern state-level immigration enforcement authority without endeavoring to chart the ironic trajectory of the Obama Administration's attempts to thrust its selective immigration enforcement scheme upon the states. This Note examines the foundations of local immigration enforcement. It then analyzes the evolution of the 287(g) program, concluding that the policy alterations therein have both precipitated and justified the accelerating

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trend toward sub-federal exercise of inherent authority and police power in the struggle against illegal immigration.

INTRODUCTION

Nothing about the immigration debate is simple.¹ Debate rages in regard to every conceivable aspect of immigration law and regulation, and it is little wonder. Groups with divergent perspectives cannot even agree upon a common lexicon for the discussion. Illegal aliens, illegal immigrants, migrants, undocumented immigrants, unauthorized immigrants, simple *immigrants*—all may refer to the same person, some class of person subtly yet significantly different, or people of wildly different circumstances, all depending upon the identity of the speaker and, perhaps, his political agenda. Vacuous, ill-defined concepts like “comprehensive immigration reform” serve as both talking points and Rorschach tests, meaning and imbuing upon their proponents any and every relevant mindset conceivable or convenient.

At the center of this debate is the argument concerning appropriate immigration enforcement. How shall immigration laws be enforced? When shall they be enforced? Where? And upon *whom* shall this nation *inflict* the letter of the law?² Responses to these queries are inextricably entwined and can often rely more upon feeling and sentiment than upon principle or rule of law.

Further, *who* should enforce immigration law? In recent years, the role of local law enforcement in the implementation of immigration law has been thrust

1. This Note does not intend to examine or assess the many reasons individuals and communities oppose illegal immigration. It will suffice to say that these attitudes and views prevail among a substantial portion of the American public. An October 2009 CNN/Opinion Research Poll found that 73% of adult Americans would “like to see the number of illegal immigrants currently in this country decreased.” CNN/Opinion Research Poll, Oct. 16–18, 2009, at 30, <http://i2.cdn.turner.com/cnn/2010/images/03/09/top15.pdf>. A March 2010 Rasmussen poll indicates that 67% of U.S. voters believe that illegal immigrants pose a major strain on the U.S. budget. *67% Say Illegal Immigrants Are Major Strain on U.S. Budget*, RASMUSSEN REPORTS (Mar. 3, 2010), http://www.rasmussenreports.com/public_content/politics/current_events/immigration/67_say_illegal_immigrants_are_major_strain_on_u_s_budget. This Note accepts the premise that there are substantial groups and sizeable communities that are interested in reducing illegal immigration in their areas; it concerns itself with the manner in which those communities have chosen to address the issue and the manner in which they will address the issue in the future.

2. In the immigration context, the questions of when a law ought to be enforced and upon whom are not as outlandish as they may initially seem. See *infra* Part III for an examination of the July 2009 modifications to the 287(g) program. The modifications include a newly adopted priority scheme that allows federal authorities to prohibit law enforcement agencies from transferring to immigration authorities certain illegal aliens who have illegally entered the U.S. and are illegally present and in custody, but do not meet an established threshold of criminality. See also *infra* Part IV.B.1.a, wherein this Note examines the federal executive’s attempts to impose such priority practices upon state-level enforcement efforts that exist outside of the 287(g) program, notably Arizona’s 2010 SOLESNA laws.

into the popular consciousness, becoming a veritable flashpoint for the immigration debate with the April 2010 passage of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act (SOLESNA), popularly known as Arizona Senate Bill 1070 (SB 1070).³

But the roots of the modern debate run much deeper. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) codified legislation that created what is now known as the 287(g) program,⁴ a federal program that allows local law enforcement agencies to partner with U.S. Immigration and Customs Enforcement (ICE) in order to perform certain duties of federal immigration officers. In the past, these partnerships authorized local law enforcement personnel to investigate and detain individuals suspected of violating certain provisions of federal immigration law, facilitating their transfer to ICE facilities and the initiation of removal proceedings.⁵

The 287(g) program has been championed by figures like Maricopa County, Arizona Sheriff Arpaio—elected officials who serve communities that seek solutions to the illegal immigration problem in their cities, counties, and states. Like all local immigration enforcement plans, it has also endured heated opposition, allegations of civil rights abuses, and denunciations as a hallmark of racism by those who oppose the enforcement program.⁶

Harkening to the concerns of the program's critics, the Department of Homeland Security (DHS), under the leadership of Secretary Napolitano and the then-new Obama Administration, issued in July 2009 a set of policy changes that significantly altered the nature of the 287(g) program.⁷ Billed as an effort to standardize local enforcement of immigration law while focusing efforts and resources upon priority aliens, the July 2009 policy shift and the DHS revisions to the 287(g) program boast a distinct, but equally impressive, set of accomplishments: they have managed to subvert congressional intent, undermine local and federal goals for immigration enforcement, whittle the once broad and flexible 287(g) program down to impotent redundancy, and foster an environment that encourages states and localities to not only take immigration enforcement into their own hands via state and local laws and regulations, but to do so in a manner that rejects the "prioritized" enforcement scheme that the Administration had attempted to uniformly impose. In short, the revisions do nothing to unify immigration enforcement schemes and absolutely nothing to augment immigration enforcement efforts in any manner.

3. SB 1070, 2010 Ariz. Sess. Laws 0113, *amended by* 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)); *see also infra* Part IV.B.1.a (providing a full discussion of the Act and its effects).

4. 8 U.S.C. § 1357(g) (2006).

5. *See infra* Part II (examining how the 287(g) program has generally been implemented).

6. *See infra* Part II.C (providing background regarding the controversies associated with the 287(g) program).

7. *See infra* Part III (discussing the policy alterations implemented in July 2009); *infra* Part IV (discussing the likely consequences of the policy shift).

To every action, there is an equal and opposite reaction. In crippling the 287(g) program, DHS deprived participating communities of a flexible federal partnership with which they could address generalized illegal immigration in their communities. The selective enforcement scheme adopted by the Administration created an enforcement vacuum—a vacuum that was particularly felt in the border state of Arizona. State action to fill that void was inevitable. As a product of the policy shift, SB 1070 is both its unavoidable result and its perfect complement. It is fitting, perhaps, that the very policy that spawned Arizona’s SB 1070 is the same that comprises one of the Administration’s primary objections to it.⁸

This Note explores the nature of local immigration enforcement. It observes the goals and needs of local partners under the original 287(g) program, and notes the manner in which the revised 287(g) program fails to meet those needs. It then considers how state- and local-level laws can rise to satisfy those needs, concluding that legislation like Arizona’s SOLESNA laws are both largely constitutional and enforceable. Part I of this Note addresses the extent to which states possess the inherent authority to police certain aspects of criminal immigration law. Part II examines the manner in which explicit 287(g) agreements were originally designed to enhance this authority, also addressing the 287(g) program’s underlying rationales and associated problems, both real and perceived. Part III analyzes how the July 2009 DHS modifications have substantially diminished its usefulness as a tool to address illegal immigration at a local level. Finally, in Part IV, this Note assesses the shifting tide of local enforcement of federal immigration law. It examines state-level laws like those created by Arizona SB 1070, predicting that more states will eschew federally-prescribed enforcement priorities and resort to sub-federal exercise of their inherent authority and general police power as they struggle with the complex problems surrounding illegal immigration.

I. THE BASIS OF STATE AND LOCAL IMMIGRATION ENFORCEMENT

A. *States and Localities Possess the Inherent Authority to Arrest or Detain on the Basis of a Criminal Violation of Federal Immigration Law*

States and localities are vested with broad police powers by “the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people.”⁹ These police powers are derived not from the federal government, but from state sovereignty under the principles of federalism.¹⁰ They are not bound by the enumerated powers doctrine that restricts

8. The Department of Justice (DOJ) alleges that the SOLESNA laws created under SB 1070 are preempted for failure to comport with the federal enforcement priorities specified by the Attorney General and the Secretary of DHS. See *infra* Part I.B for an overview of federal preemption law as it pertains to immigration enforcement. See *infra* Part IV.B.2 for analysis of the preemption claims leveled by the DOJ against the Arizona laws.

9. *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

10. See, e.g., *Sturges v. Crowninshield*, 17 U.S. 122, 193 (1819) (observing that, upon the drafting and ratification of the Constitution, “it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of

the federal government; rather, as the Tenth Amendment provides, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹¹ This means that local authorities, unlike the federal government, may exercise their police power in service of the greater public good in any manner, so long as it is not expressly prohibited by the Constitution or preempted by federal law.¹² Such police powers are said to be the inherent authority of the states and, in turn, the local authorities that the states have established.

In exercising these police powers, state and local law enforcement agencies have always had authority to arrest and detain for violations of federal criminal law.¹³ Federal immigration law is not unique in this regard. As numerous courts have held, state and local police have the inherent authority to arrest and detain individuals for suspected violations of the criminal provisions of federal immigration law.¹⁴

B. The Inherent Authority of States to Arrest for Federal Criminal Immigration Violations Has Not Been Preempted by Congress

Per the Supremacy Clause of the U.S. Constitution, federal law and regulation will preempt state or local action where the two are in conflict.¹⁵ Preemption is said to occur where a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁶ There are three recognized forms of federal preemption: (1) explicit preemption, where preemption is directly compelled by the language of a federal statute;¹⁷ (2)

America, but from the people of the several states”); *see also* Kris Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 199–200 (2005).

11. U.S. CONST. amend. X.

12. *See* Kobach, *supra* note 10, at 199.

13. *See, e.g.*, *Miller v. United States*, 357 U.S. 301, 303–06 (1958) (confirming local authority to make arrests for violations of federal narcotics laws); *United States v. Di Re*, 332 U.S. 581, 591 (1948) (affirming conviction for possession of counterfeit ration coupons, a violation of the Second War Powers Act of 1942); *id.* at 200.

14. *See, e.g.*, *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999) (acknowledging a “preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws”); *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (acknowledging local authority and holding that federal law does not preclude local enforcement of the criminal provisions of the Immigration and Nationality Act), *overruled on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999); *People v. Barajas*, 147 Cal. Rptr. 195, 199 (Cal. Ct. App. 1978) (holding that local police have authority to arrest for violations of federal immigration laws involving reentry into the country after deportation); *see also infra* Part I.B.

15. U.S. CONST. art. VI, cl. 2; *McCulloch v. Maryland*, 17 U.S. 316, 326–27 (1819).

16. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). And it is indeed Congress that is responsible for determining these objectives and goals. *See infra* Part IV.B.2.a.ii (discussing this element of preemption in the context of Arizona’s 2010 SOLESNA laws).

17. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (plurality opinion).

field preemption, where a scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,”¹⁸ and (3) conflict preemption, where “compliance with both federal and state regulations is a physical impossibility.”¹⁹ As the case law shows, none of these forms of preemption apply to the general concept of inherent local authority to arrest and detain for criminal violations of federal immigration law.²⁰ Courts have repeatedly held that state and local authorities hold inherent immigration police powers that are not preempted, including the power to arrest, detain, or otherwise police their communities in manners consistent with the criminal provisions of federal immigration law.

1. Federal and State Case Law Do Not Support Federal Preemption of the Inherent Authority of States to Arrest for Federal Criminal Immigration Violations

a. *DeCanas v. Bica*

*DeCanas v. Bica*²¹ addressed the legality of a California labor provision, but it is central to an understanding of federal preemption and local enforcement of federal immigration law. In *DeCanas*, a unanimous eight-Justice Supreme Court concluded that the “[p]ower to regulate immigration is exclusively a federal power.”²² However, the Court was quick to add that not all state and local laws targeting aliens were regulations of immigration subject to preemption.²³ A regulation of immigration, the Court declared, is “a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”²⁴ The California law at issue targeted the employment of aliens the federal government did not consider legally present, and thus did not constitute a regulation of immigration that would require preemption.

After establishing that the law did not unconstitutionally regulate immigration, the Court went on to find that there was no discernible demonstration of congressional intent to preclude local enforcement consistent with federal law

18. *Id.* at 98 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

19. *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963)).

20. Numerous courts have addressed this issue and failed to find the requisite congressional intent to indicate federal preemption. *See United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999); *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984); *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds by Hodggers–Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999); *People v. Barajas*, 147 Cal. Rptr. 195, 199 (Cal. Ct. App. 1978).

21. 424 U.S. 351 (1976).

22. *Id.* at 354.

23. *Id.* at 355. The law in question was a California statute that prohibited the knowing employment of an alien not lawfully present in the United States if the employment would adversely affect lawful resident workers. *Id.* at 353.

24. *Id.* at 355.

codified in the Immigration and Nationality Act (INA).²⁵ Even the comprehensive nature of the federal regulatory scheme in question was at the time insufficient to warrant preclusion absent a clear showing of intent to preclude.²⁶ The California law was not preempted, despite the fact that it targeted illegal aliens and despite the completeness of federal law governing the employment of illegal aliens.²⁷

b. *People v. Barajas*

Two years later, in *People v. Barajas*,²⁸ the California Court of Appeals made the specific finding that local police had authority to arrest and detain individuals for violations of the federal immigration provisions involving illegal entry and illegal reentry following deportation,²⁹ a criminal act under federal law.³⁰ The court even went so far as to say that state and local law enforcement were *obligated* to enforce criminal provisions of federal immigration law by the “two-edged sword” of the Supremacy Clause.³¹

The court rejected the defendant’s assertion that local police lack the power to enforce 8 U.S.C. § 1325 (Improper Entry by Alien) because it does not explicitly authorize local enforcement in the same manner as 8 U.S.C. § 1324 (Bringing in and Harboring Certain Aliens).³² Noting that the federal statutes in

25. *Id.* at 358–59. “Only a demonstration that complete ouster of state power . . . was ‘the clear and manifest purpose of Congress’ would justify [a finding of preemption].” *Id.* at 357 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963)).

26. *Id.* at 359. In fact, far from precluding state action against the employers targeted by the law, the Court found that certain provisions of the Farm Labor Contractor Registration Act, 7 U.S.C. §§ 2041–2055 (1970) *repealed and replaced by* Migrant and Seasonal Agricultural Worker Protection Act of 1973, ch. 20, 96 Stat. 2600, anticipated and accommodated state regulation of farm contractors who hired illegal aliens. *DeCanas*, 424 U.S. at 361–62.

27. Such a result would likely not be achieved today, as the Immigration Reform and Control Act (IRCA) includes statutory language that has explicitly preempted most (but not all) forms of employer sanctions targeting those who hire illegal aliens. 8 U.S.C. § 1324a(h)(2) (2006).

28. 147 Cal. Rptr. 195 (Ct. App. 1978).

29. *Id.* at 198–99.

30. *See* 8 U.S.C. §§ 1325–1326 (2006).

31. *Barajas*, 147 Cal. Rptr. at 199. The Supremacy Clause, in effect, cuts two ways: where Congress has precluded state action, the Supremacy Clause forbids state enforcement. *Id.* But where Congress has not precluded or limited state enforcement, the Supremacy Clause *requires* states to enforce Congressional provisions as though they were state law. *Id.*

32. *Id.* at 198. The court refuted the defense’s argument by looking to the legislative record, observing that earlier versions of the language in section 1324 had *greater* limitations upon which authorities may enforce its provisions than either 8 U.S.C. § 1325 or section 1326. *Id.* at 198–99. The final version of section 1324 was thus amended to render its authority more inclusive in what could be reasonably inferred to be an attempt to harmonize it with the standards of section 1325 and section 1326. *Id.* The legislative history of the statute thus dismantles the logic of the defense’s argument. *Id.*

Nonetheless, some scholars hold fast to the argument that local enforcement requires explicit authorization. *See, e.g.,* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1092–93 (2004).

question³³ do not contain any language expressly limiting enforcement, the court found no basis for preempting local enforcement of these criminal provisions.³⁴

c. *Gonzales v. City of Peoria*

In *Gonzales v. City of Peoria*,³⁵ the Ninth Circuit Court of Appeals adopted and expanded upon the conclusions reached in *Barajas*. *Gonzales* followed established precedent and held that city police may question and arrest individuals suspected of violating criminal provisions of federal immigration law.³⁶ The court held that an assertion of power to enforce a federal criminal statute does not inherently conflict with federal regulatory interest.³⁷ “Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized.”³⁸ There must be a genuine conflict between the language and aims of the federal scheme and the local enforcement action for preemption to occur.³⁹

More importantly, the *Gonzales* court made specific findings that narrowed the scope of local immigration authority. The court explicitly noted that state immigration arrests are only valid if they are authorized by state law in addition to comporting with the Constitution and the federal law that is to be enforced.⁴⁰ It also held that a mere lack of documentation does not constitute probable cause for an arrest under 8 U.S.C. § 1325 (Improper Entry by Aliens) absent further evidence of a violation.⁴¹

d. *United States v. Vasquez-Alvarez*

The Tenth Circuit Court of Appeals has also addressed the issues of inherent authority and preemption regarding local enforcement of immigration

33. 8 U.S.C. §§ 1325–1326 (2006) (governing improper entry by aliens and reentry of removed aliens, respectively).

34. *Barajas*, 147 Cal. Rptr. at 199. *But see* *Barajas*, 147 Cal. Rptr. at 203–04 (Reynoso, J., dissenting); Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 981 (1995) (endorsing the dissent’s argument in *Barajas* that enforcement by different agencies with different training and policies will necessarily undermine the constitutional ideal of a “uniform” immigration policy from a practical perspective). This view finds enforcement of the same law against the same class of defendants insufficiently uniform, citing foreign policy concerns. *Barajas*, 147 Cal. Rptr. at 203–04; Manheim, *supra* at 981. It also relies upon an insufficient showing of legislative intent to preempt. *See* *DeCanas v. Bica*, 424 U.S. 351, 359 (1976).

35. 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999).

36. *Id.* at 474.

37. *Id.* *See generally infra* Part IV.B (providing a collection of legislation and case law authorizing state-level enforcement that mirrors federal criminal statutes and purposes).

38. *Gonzales*, 722 F.2d at 474.

39. *Id.*

40. *Id.* at 476–77 (concluding that the Peoria Police Department was authorized to enforce 8 U.S.C. § 1325 by ARIZ. REV. STAT. ANN. § 13-3883 (1990)).

41. *Id.*

law.⁴² In *United States v. Vasquez-Alvarez*,⁴³ the Tenth Circuit held that a local police officer was authorized to arrest and detain an individual who admitted he was an illegal alien.⁴⁴ The court rejected the argument that 8 U.S.C. § 1252c⁴⁵ created a conflict so as to preempt any state or local immigration arrests that did not meet its conditions and fall under its authority.⁴⁶ The court explained that § 1252c did not impose a limit upon local enforcement of criminal immigration provisions; rather, it was meant to augment the police power that local authorities already possessed and to encourage cooperation between local and federal authorities.⁴⁷ The simple fact that the federal statute authorized certain local enforcement could not be interpreted to mean that it forbade all other forms of enforcement, certainly not so as to constitute the “clear and manifest purpose of Congress” for preemption purposes.⁴⁸

e. *Muehler v. Mena*

Most recently, the Supreme Court confirmed the rights of local law enforcement to question detained individuals as to their immigration status. Reversing a Ninth Circuit opinion,⁴⁹ the Supreme Court in *Muehler v. Mena*⁵⁰ held that local law enforcement does not need independent reasonable suspicion in order to question an individual about his immigration status.⁵¹ Citing precedent regarding questioning of suspects,⁵² the Court held that such questioning in the context of a lawful detention already in progress does not implicate Fourth Amendment concerns.⁵³ The fact that the suspect in this case was a legal resident, not an illegal alien, did not influence the analysis or holding.⁵⁴

42. Concerning inherent authority, the Tenth Circuit Court of Appeals first held that state law enforcement agencies have the general authority to investigate possible immigration violations in *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984).

43. 176 F.3d 1294 (10th Cir. 1999).

44. *Vasquez-Alvarez*, 176 F.3d at 1299. For an in-depth discussion of this case, see Kobach, *supra* note 10, at 211–13.

45. 8 U.S.C. § 1252c (2006) authorizes state and local law enforcement, notwithstanding any other provision of law, and in compliance with their own state and local laws, to arrest aliens who are both illegally present and have been convicted of a felony and subsequently deported or fled the United States before they were deported.

46. *Vasquez-Alvarez*, 176 F.3d at 1299.

47. The statute’s sponsor explained on the House floor that the statute was designed to remove obstacles thought to prevent local law enforcement from making arrests based upon criminal immigration law. *Id.* at 1298–99; Kobach, *supra* note 10, at 212–13.

48. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

49. *Mena v. Simi Valley*, 332 F.3d 1255 (9th Cir. 2003).

50. 544 U.S. 93 (2005).

51. *Muehler*, 544 U.S. at 100–01.

52. “Mere police questioning does not constitute a seizure.” *Id.* at 101 (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

53. *Id.* at 100–01. The individual in this case was detained and handcuffed while a search warrant was executed upon the residence in which police found her. *Id.* at 95.

54. See *id.* at 95. The possibility that individuals who are not guilty of a certain crime may be stopped, detained, or even arrested for a suspected violation of that crime is a

2. *Congress Has Anticipated the Participation of State and Local Authorities in Criminal Immigration Enforcement.*

Beyond the relevant case law, Congress has repeatedly foreseen and accommodated the exercise of inherent authority by state and local authorities.⁵⁵ In fact, Congress has often passed legislation that welcomes state and local contributions to national immigration enforcement efforts. The most prominent example is the 287(g) program.⁵⁶ Section 287(g) invites state and local law enforcement agencies to enter into partnerships with ICE and to train their officers to carry out certain functions of federal immigration officers.⁵⁷ Further, section 287(g)(10) acknowledges the existence of an inherent local authority to participate in immigration enforcement beyond the powers granted by a 287(g) partnership.⁵⁸ Statutes that similarly acknowledge or anticipate local agency participation in immigration enforcement include 8 U.S.C. § 1103(c)⁵⁹ and 8 U.S.C. § 1252c.⁶⁰ Legislation codified in 8 U.S.C. § 1373⁶¹ and 8 U.S.C. § 1644⁶² also accommodate

reality in all aspects of law enforcement. Its occurrence in the immigration enforcement context does not call into question the validity of the underlying authority any more than a reasonable suspicion stop, a probable cause arrest, or even the act of filing and prosecuting charges against an individual would render an underlying law unconstitutional simply in light of the fact that the individual was not ultimately convicted.

55. See Kobach, *supra* note 10, at 202–08.

56. Section 287(g) is codified at 8 U.S.C. § 1357(g) (2006).

57. *Id.* § 1357(g)(1).

58. Section 1357(g)(10) reads:

Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

The statute itself acknowledges that local law enforcement has the authority to cooperate with federal authorities on immigration issues even without an agreement under its provisions. *Id.*

59. This code section dictates the powers and duties of the Secretary, the Undersecretary, and the Attorney General pertaining to the Department of Homeland Security. 8 U.S.C. § 1103 (2006). It authorizes “cooperative agreements with State and local law enforcement agencies for the purpose of assisting in the enforcement of the immigration laws.” *Id.* § 1103(c).

60. This code section authorizes state and local law enforcement, notwithstanding any other provision of law, and in compliance with their own state and local laws, to arrest aliens who are both illegally present and have been convicted of a felony and subsequently deported or fled the United States before they were deported. 8 U.S.C. § 1252c (2006). See *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999); Kobach, *supra* note 10, at 212–213. This authorization does not prohibit state and local enforcement of immigration law in other respects. See *supra* notes 42–48 and accompanying text.

61. 8 U.S.C. § 1373 (2006).

cooperation between federal and state authorities by prohibiting the imposition of any limitations or restrictions on communication between local agencies and federal immigration authorities.

It is clear, then, that Congress has fully anticipated and encouraged the participation of state and local law enforcement agencies in the national effort to address illegal immigration. The intent of Congress to promote local enforcement of immigration law provides no basis upon which a court may reasonably find the inherent local authority preempted. As courts have recognized, the inherent local authority to enforce criminal provisions of federal immigration law is legally sound and entirely consistent with the intentions of the Congress that drafted those laws.⁶³

As noted, Congress has enacted a series of laws which make it clear that it intends to encourage federal immigration authorities to avail themselves of any assistance that local law enforcement agencies are willing to provide. Among the most ambitious of such laws has been what is now commonly known as the 287(g) program.

II. THE 287(g) PROGRAM

Immigration and Nationality Act Section 287(g) authorizes the Attorney General to enter into agreements with local law enforcement agencies, permitting them to perform certain functions of federal immigration officers.⁶⁴ These agreements are manifest in various Memoranda of Agreement (MOA), which are written agreements that outline the authorities and responsibilities of both the individual law enforcement agency (LEA) and its supervisors in ICE.⁶⁵ The agreements follow two standard models⁶⁶: (1) a Task Force Officer Model, equipped to train patrol officers capable of investigating immigration violations in the field;⁶⁷ and (2) a Detention Model, equipped to train jail enforcement officers to screen inmates for potential immigration violations.⁶⁸ Generally, the agreements confirm the inherent authority of the LEA to question, arrest, and detain suspected criminal immigration offenders.⁶⁹ They also broadened the immigration

62. 8 U.S.C. § 1644 (2006) (“[N]o State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”).

63. See *supra* Part I.B.1.

64. 8 U.S.C. 1357(g) (2006).

65. See Dep’t Homeland Sec., Immigration & Customs Enforcement, *Template: Revised Memorandum of Agreement (MOA)* (Aug. 25, 2009), <http://www.ice.gov/doclib/foia/media-requests/09foia4646moutemplate.pdf> [hereinafter *Template*] (begins on page ten of the PDF). For a comprehensive examination of the original and revised Memoranda of Agreement, see *infra* Part III.

66. See *Template*, *supra* note 65, app. D, at 18; *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Nov. 7, 2010).

67. See *Template*, *supra* note 65, app. D, at 18–21.

68. See *Template*, *supra* note 65, app. D, at 21–23.

69. See *supra* Part I.

investigation and enforcement powers of the participating LEA, allowing it the latitude to gather evidence and pursue investigations in a capacity beyond its inherent powers.⁷⁰

The 287(g) program was added to the INA as part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.⁷¹ As part of the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) Service, the 287(g) program purports to assist seventy-one LEAs in addressing illegal immigration concerns at a local level in cooperation with ICE authorities.⁷² By July 2009, DHS reported over 1000 287(g) officers and credited 287(g) agreements with identifying more than 120,000 individuals suspected of being in the country illegally.⁷³

A. Federal Enforcement Goals of the 287(g) Program

The 287(g) program has served a variety of federal and local enforcement goals. Federal immigration authorities refer to the program as an “essential component” of federal immigration enforcement strategy.⁷⁴ In theory, the program serves as a force multiplier—with more than 1000 additional agents embedded in local communities, ICE is able to augment its immigration enforcement forces at the expense of the LEA.⁷⁵ For instance, according to a 2008 DHS 287(g) program review, the 287(g) program had supplemented the five ICE jail enforcement agents working in Maricopa County, Arizona. At the time of the review, sixty-four Maricopa County Sheriff’s Deputies had been trained and authorized to screen and process criminal aliens brought into custody.⁷⁶ These federally trained and locally maintained deputies serve to increase the efficacy of the jail enforcement efforts

70. See Template, *supra* note 65, app. D, at 17–23 (listing the powers and authority granted under a 287(g) agreement); *infra* Part III (comparing the powers granted and conditions of the original MOA with those of the Revised MOA template).

71. 8 U.S.C. § 1357(g) (2006).

72. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Nov. 7, 2010).

73. Press Release, Dep’t Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009) [hereinafter Napolitano], *available at* http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

74. *Id.*

75. See 8 U.S.C. § 1357(g)(1) (2006) (dictating that 287(g) enforcement efforts will be funded by the LEA itself). The extent to which ICE will fund any aspect of the 287(g) program is minimal. In accordance with the 287(g) MOA, ICE provides training materials and instruction for LEA officers selected for 287(g) certification. Template, *supra* note 65, at 5. The revised MOA template allows for an additional Inter-Governmental Service Agreement (IGSA) to partially cover expenses incurred incarcerating and transporting aliens as well as a reimbursement program for travel, housing, and per diem expenses of LEA officers undergoing 287(g) training, but these reimbursements are at the discretion of ICE and are subject to generalized budget concerns. Template, *supra* note 65, at 2, 5.

76. Jessica M. Vaughan & James R. Edwards, Jr., *The 287(g) Program: Protecting Home Towns and Homeland*, CTR. FOR IMMIGR. STUD. BACKGROUNDER, Oct. 2009, at 8, *available at* <http://www.cis.org/articles/2009/287g.pdf>.

undertaken by ICE authorities.⁷⁷ By incorporating local law enforcement personnel into immigration enforcement efforts, federal authorities are able to increase their numbers to a great degree. They also avail themselves of local knowledge and resources that a federal agency would normally be unable to access, helping both the federal authorities and the LEA to more comprehensively address illegal immigration problems in individual communities.⁷⁸

B. Local Enforcement Goals of the 287(g) Program

To date, some seventy LEAs have entered into 287(g) agreements, with two additional LEAs involved in “good faith negotiations” with ICE to implement a 287(g) agreement of their own.⁷⁹ These LEAs engage or attempt to engage in 287(g) agreements at substantial cost to themselves and with little hope of securing federal funding or reimbursement for their enforcement efforts.⁸⁰

Their willingness to enter into such agreements regardless of potential cost⁸¹ is born of a compelling localized interest in limiting the size of illegal alien communities within their respective jurisdictions. Beyond general sentiments of justice, fairness, and respect for the rule of law, this motivation is also driven by the perceived fiscal burden that illegal alien populations impose upon local communities.⁸² Other concerns include criminal activity and burdens on schools and hospital emergency rooms.⁸³

77. *Id.*

78. It is self-evident that local agencies are best equipped to enforce laws in their respective communities. *See infra* Part II.B (examining the incentives and advantages that LEAs have in the context of immigration law enforcement).

79. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Nov. 7, 2010). As of August 31, 2010, the Los Angeles County (CA) Sheriff’s Office and the Massachusetts Department of Corrections are in continued (“good faith”) negotiations regarding adoption of the 2009 revised Memoranda of Agreement. *Id.* Each of these LEAs are seeking to renew 287(g) agreements that existed prior to the July 2009 modifications. *Id.* Also engaged in negotiations regarding 287(g) agreements are the Rhode Island Department of Corrections and the Morristown Police Department (NJ); neither of these LEAs have engaged in 287(g) agreements in the past. *Id.*

80. *See supra* note 75 and accompanying text.

81. Indeed, not all potential costs are simply fiscal in nature. Some scholars believe that the pernicious effect of potential racial profiling in the 287(g) program outweighs many of the program’s potential benefits. Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 142 (2007). Others are concerned that 287(g) programs erode trust between law enforcement and immigrant communities. Anita Khashu, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, POLICE FOUND. (Apr. 2009), <http://policefoundation.org/pdf/strikingabalance/Role%20of%20Local%20Police.pdf>; *see infra* Part II.C (assessing the potential social costs facing communities that attempt to implement 287(g) programs).

82. For an impression of the costs of illegal immigration upon local communities, see Kris Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 459–60 (2008).

83. *Id.* at 460–61.

By cooperating with ICE and enforcing federal immigration law at their own expense, LEAs involved in the former 287(g) program subscribed to the concept of *attrition through enforcement*: the idea that “consistent, across-the-board enforcement” of immigration law will not only deter new settlement of illegal aliens but will also encourage those already present to self-deport.⁸⁴ The attrition-through-enforcement concept rejects as a false dichotomy the notion that the United States must either physically collect and remove every illegal alien in the country or tolerate and legalize his presence.⁸⁵ It instead seeks to disincentivize and discourage illegal immigration in individual communities by enforcing current federal criminal provisions and by creating and enforcing state and local laws and regulations that eliminate the appeal that states and cities hold for illegal aliens.⁸⁶

C. Controversy Surrounding Local Enforcement of Immigration Law

No earnest discussion of local immigration enforcement can be complete without a candid look at the social costs that often coincide with its implementation. The 287(g) program is the subject of heated debate and is passionately opposed by many civil rights and law enforcement groups.⁸⁷ Their complaints can generally be distilled into two primary criticisms⁸⁸: the 287(g) program is perceived to (1) encourage racial profiling and (2) impair law enforcement efforts by eroding trust between LEAs and local immigrant communities.⁸⁹

84. For a comprehensive overview of the concept of attrition through enforcement, see Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement*, CTR. FOR IMMIGR. STUD. BACKGROUNDER, May 2005, at 1, available at <http://www.cis.org/articles/2005/back605.pdf>.

85. *Id.*

86. *Id.* at 5–6. The attrition-through-enforcement model is the concept behind many state and local enforcement efforts. It is also the basis of the SOLESNA laws passed in Arizona under SB 1070. See *infra* Part IV.B (examining the attrition-through-enforcement effort implemented by these and other laws).

87. In August 2009, a coalition of 522 civil rights organizations signed a letter addressed to President Obama urging the immediate termination of the 287(g) program, citing racial profiling concerns and other civil rights abuses as primary concerns. Letter from Marielena Hincapie, Exec. Dir., Nat’l Immigration Law Ctr., to Barack Obama, U.S. President (Aug. 25, 2009) [hereinafter Letter to President], available at https://salsa.democracyinaction.org/o/371/images/LETTER_TO_PRESIDENT_20090825133229.pdf. Signatories included the American Civil Liberties Union (ACLU), the Immigrant Legal Resource Center (ILRC), the Mexican American Legal Defense and Educational Fund (MALDEF), and the National Council of La Raza (NCLR). *Id.*

88. A prominent outlier is the argument that LEAs that mobilize units under 287(g) authority divert resources from other law enforcement needs. Notable among these critics is a newspaper, the East Valley Tribune. See *Special Report: Reasonable Doubt*, E. VALLEY TRIB. (Phoenix), July 9–13, 2008, available at http://www.eastvalleytribune.com/special_reports/reasonable_doubt/.

89. These criticisms are also leveled against other local immigration enforcement schemes, notably those manifest in Arizona’s SOLESNA laws. See *infra* Part IV.B.1.

I. Racial Profiling

Critics of the 287(g) program and of local enforcement of immigration law generally associate it with the “widespread use of pretextual traffic stops, racially motivated questioning, and unconstitutional searches and seizures primarily in communities of color.”⁹⁰ Opponents argue that immigration enforcement requires special civil rights training that is not available to participating LEAs.⁹¹ Groups that oppose the 287(g) program believe that LEAs, lacking this specialized training and knowledge, are more likely to make racially motivated pretextual stops and arrests than a federally trained immigration officer.⁹²

a. Cobb County, Georgia

The American Civil Liberties Union (ACLU), one of the most prominent opponents of local immigration enforcement, does not mince words when describing its perspective of the 287(g) program:

ICE often deputizes politicians (mostly sheriffs) “after they champion anti-immigrant agendas.” Almost eighty percent of 287(g) agreements have been signed with jurisdictions in the South, and eighty-seven percent of the states and localities signing on with ICE had a higher rate of Latino population growth than the national average. Such figures seem to support the view that 287(g) is propelled by race, not crime.⁹³

90. Letter to President, *supra* note 87, at 1.

91. Linda Reyna Yañez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 TEX. HISP. J.L. & POL’Y 9, 12–13 (1994). It should be noted that training in civil rights laws, the Department of Justice’s “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,” and instruction regarding cross-cultural issues are some of the requirements of the Immigration Authority Delegation Program (IADP), the 287(g) training program formulated and delivered by ICE. These requirements are present in both the former 287(g) agreements and in the Revised 287(g) Template. *See, e.g.*, Memorandum of Agreement, Maricopa Cty. Sheriff’s Dept., 2 (Aug. 14, 2007), <http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/maricopacounty.pdf> [hereinafter Maricopa County MOA]; *see also* Template, *supra* note 65, app. D, at 17–18.

92. Informal allegations of racial profiling and civil rights violations by LEAs that enforce criminal immigration law are common. Documentation of profiling allegations from Cobb County characteristic of the variety that LEAs typically encounter has been compiled by the Georgia ACLU. Azadeh Shashahani, *Terror and Isolation in Cobb: How Unchecked Police Power Under 287(g) Has Torn Families Apart and Threatened Public Safety*, ACLU (Oct. 2009), <http://www.aclu.org/immigrants-rights/terror-and-isolation-cobb-how-unchecked-police-power-under-287g-has-torn-families-> (last visited Jan. 4, 2010).

93. *Id.* at 6 (quoting Aarti Shahani & Judith Greene, *Local Democracy on Ice: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement*, JUSTICE STRATEGIES, available at <http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf> (last visited on Jan. 4, 2009)).

To accept the assertion that the listed figures support the notion that the program is propelled by race, one must accept wholesale the ideologically driven premise that all, or at

The ACLU stands fast to this claim, and has chosen to highlight the 287(g) program in Cobb County, Georgia as evidence that the program is propelled by racism. “In Cobb,” the Georgia ACLU insists, “members of the immigrant community live their daily lives in terror as Cobb law enforcement and jail personnel abuse the power afforded to them by their contract with ICE.”⁹⁴ The ACLU contends that the 287(g) program in Cobb County has been misused and has resulted in racial profiling, particularly in the context of traffic stops.⁹⁵

The Georgia ACLU illustrates the purported racial profiling with a series of anecdotes culled from interviews. Rubi, a young Latina mother, was pulled over for having expired tags and was arrested when it was found that she was driving without a license. She insists that she was pulled over not for her expired tags but for her race.⁹⁶ Gabriel, a Latino construction worker, was pulled over for an improper stop at a stop sign and was arrested for driving without a license. He insists he was pulled over for his race and that “Caucasians” had not been pulled over for the same violation.⁹⁷ Frederico was arrested when he was involved in an accident and did not possess a driver’s license.⁹⁸ Rogerio was arrested and subsequently deported to Mexico, “targeted simply for driving on a closed road without a driver’s license.”⁹⁹

Such is the nature of most racial-profiling allegations relating to traffic stops. The traffic stop pits the word of a police officer or deputy against the word

least the majority of the LEAs currently engaged in or negotiating a 287(g) agreement, are led by individuals who “champion anti-immigrant agendas.” One must also accept that the prevalence of 287(g) agreements in “the South” and in areas with higher Latino population growth rates is indicative of racism *ipso facto*. In addition, one must simultaneously dismiss outright the idea that this geographic prevalence may be a reaction not to race but to the crime of illegal immigration, a crime whose effects are more likely to be keenly felt by communities that have experienced population booms exacerbated by proximity to the southern U.S. border.

94. Shahani, *supra* note 92, at 7. It is unclear whether this comment refers to lawful immigrants or to illegal aliens. The Georgia ACLU does not recognize or acknowledge any distinction between lawful immigrant populations and illegal alien populations in this report. *Id.*

95. *Id.* at 7–8. In 2008, 3180 inmates were processed for ICE detention in Cobb County. Of those transferred, 2180 (69%) were apprehended for traffic-related violations. *Id.*

96. *Id.* at 9–10. The ACLU report is vague regarding the end result of this encounter. However, it does note that she was eventually given access to her consulate, implying that Rubi was later subject to ICE detention. *Id.* at 10.

97. *Id.* at 10–11. At the time of the report (October 2009), Gabriel was in removal proceedings. He continues to work in Cobb County. *Id.* at 11.

98. *Id.* at 11. Frederico did not possess a driver’s license because he was an illegal alien. *Id.* His wife, whose immigration status is unknown, says that she now avoids driving and “has stopped going to Mexican restaurants to avoid police surveillance and harassment.” *Id.*

99. *Id.* at 12. The ACLU report alleges that Rogerio was never informed of his right to speak to the Mexican Consulate. *Id.* It also claims that the patrol deputy questioned him regarding his immigration status before he was asked for a driver’s license. *Id.*; see *supra* Part I.B.1 (discussing the inherent police right to question an individual suspected of violating federal criminal immigration law).

of the individual who is stopped, and with the low burden of proof required for reasonable suspicion it is easy to imagine how a detained motorist may believe that a traffic stop was pretextual.¹⁰⁰

Many of the allegations of racial profiling contained in the anecdotes in the Cobb County ACLU report are problematic in that they are accompanied by readily observable traffic violations. Coupled with the inherent authority to question regarding suspected criminal violations of federal law, many of these seemingly lawful stops led to ICE detention and removal proceedings.¹⁰¹ For a community that has voluntarily entered into a 287(g) agreement with the federal government, this seems to be a satisfactory result.

This, however, is an incomplete illustration of the state of affairs. Not all claims of racial profiling and civil rights violations against 287(g) LEAs are so readily dismissed. One case that has garnered national attention is the pending class action against the Sheriff's Office of Maricopa County, Arizona, *Ortega Melendres v. Arpaio*.¹⁰²

b. *Ortega Melendres v. Arpaio*

In July 2008, Manuel de Jesus Ortega Melendres was joined by three other individuals and the organization Somos America in a class action against Maricopa County and its Sheriff, Joe Arpaio.¹⁰³ The plaintiffs allege that the Maricopa County Sheriff's Office (MCSO) violated the U.S. and Arizona Constitutions in its implementation of "crime suppression sweeps" under its 287(g) authority.¹⁰⁴ The complaint alleges that the sweeps—large scale enforcement operations where 287(g)-trained deputies stop individuals suspected of breaking laws and then question them regarding their immigration status¹⁰⁵—target minorities and minority communities in an impermissible manner.¹⁰⁶ Plaintiffs allege that the sweeps are marked by racially motivated pretextual stops and

100. For an examination of race-based pretextual stops in the immigration enforcement context, see Arnold, *supra* note 81, at 132–37.

101. See Shahani, *supra* note 92, at 9–11.

102. *Ortega Melendres v. Arpaio*, 598 F. Supp. 2d 1025 (D. Ariz. 2009).

103. See First Amended Complaint at 1, *Ortega Melendres v. Arpaio*, No. CV-07-2513 (D. Ariz. July 16, 2008) [hereinafter *Melendres Complaint*]. Melendres et al. are supported by the ACLU, the ACLU Foundation of Arizona, and MALDEF. *Id.*

104. *Id.* at 3. At the time of the complaint, the Maricopa County Sheriff's Office had a joint enforcement MOA that included both the Detention Model and the Task Force Officer (TFO) Model. As a result of the July 2009 287(g) modification and renegotiations, the MCSO has relinquished the TFO aspect of its 287(g) program, but retains authority under the Detention Model MOA. JJ Hensley, *Sheriff Arpaio May Lose Some Immigrant Authority*, ARIZ. REPUBLIC, Oct. 3, 2009, <http://www.azcentral.com/arizonarepublic/news/articles/2009/10/03/20091003arpaio-ice1003.html>. The MCSO was the only LEA to have its TFO authority revoked following the July 2009 287(g) MOA revision. *Id.*

105. See Howard Witt, *Does Crackdown Cross Line?*, CHI. TRIB., May 26, 2008, http://www.chicagotribune.com/news/nationworld/chi-profiling_wittmay26,0,4678882.story. Many of the stops are made for minor infractions such as broken taillights and traffic violations. *Id.*

106. *Melendres Complaint*, *supra* note 103, at 3.

interrogations and that they are often accompanied by illegal searches, baseless arrests, and other forms of mistreatment.¹⁰⁷

The named plaintiff in the *Melendres* complaint, a Latino male, alleges that he was handcuffed, searched, and taken into custody despite producing valid identification and a current visa.¹⁰⁸ He also alleges that during the nine hours he was in custody he was never read his Miranda rights, allowed to make a phone call, or given an explanation for his arrest.¹⁰⁹

In spite of the legal action and a pending Department of Justice investigation,¹¹⁰ Sheriff Arpaio is adamant in his claims that the MCSO 287(g) crime sweeps are not racially discriminatory.¹¹¹ ICE officials have tended to agree.¹¹² Despite the *Melendres* action, it is reported that no firsthand complaints involving 287(g) officials in Arizona have been made to DHS or ICE.¹¹³ In 2009, the Phoenix ICE spokesman said the MCSO had not violated the 287(g) agreement's prohibition of racial profiling.¹¹⁴ "Arizona's 287(g) program," he stated, "is working as intended."¹¹⁵

Racial profiling in the immigration context is a contentious issue. Some, like Sheriff Arpaio, believe that it is possible to determine whether an individual is an illegal alien without acting on some racial animus. "We know how to determine whether these guys are illegal," Arpaio says. "The way the situation looks, how

107. *Id.*

108. *Id.* at 19. Melendres was one of multiple Latino male passengers in a vehicle driven by a "Caucasian" that MCSO deputies operating in Cave Creek, Arizona stopped for speeding. *Id.* at 18. The driver was told that he had been stopped for speeding, but he was never issued a citation. *Id.*

109. *Id.* at 18–20.

110. In March 2009, the Department of Justice opened an investigation into complaints of civil rights violations surrounding MCSO enforcement of federal immigration law. Daniel González, *Arpaio To Be Investigated over Alleged Civil-Rights Violations*, ARIZ. REPUBLIC, Mar. 11, 2009, <http://www.azcentral.com/news/articles/2009/03/10/20090310arpaio-justice0310-ON.html>; see also Letter from Loretta King, Acting Assistant Attorney General, U.S. Dept. of Justice, to Sheriff Joseph Arpaio, Maricopa Cty. Sheriff's Office (Mar. 10, 2009), available at <http://www.azcentral.com/ic/pdf/0310justice.pdf>. The investigation has yet to reach any conclusions. See *infra* note 115 and accompanying text.

111. Daniel González, *4 Key Dems in Congress Seek Inquiry into Arpaio Sweeps*, ARIZ. REPUBLIC, Feb. 14, 2009, <http://www.azcentral.com/arizonarepublic/news/articles/2009/02/14/20090214arpaio-probe0214.html>.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* The Holder DOJ has since initiated a racial discrimination investigation against Sheriff Arpaio and the MCSO. See Jerry Markon & Stephanie McCrummen, *U.S. May Sue Arizona's Sheriff Arpaio for Not Cooperating in Investigation*, WASH. POST, Aug. 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/17/AR2010081703637.html?hpid=topnews>. The investigation is ongoing and heretofore inconclusive; however, U.S. Attorney General Eric Holder has already been quoted saying that he expects this particular investigation to "produce results." *Id.*

they are dressed, where they are coming from.”¹¹⁶ Others, however, believe that race is inextricably linked to immigration status and that officers will make decisions based upon race whether they mean to or not.¹¹⁷ Given this state of affairs, one may conclude that as long as criminal immigration laws are enforced by any agency operating in the field, the targets of any enforcement plan and their respective advocacy groups will be likely to level charges of racial profiling.

2. Community Policing

The other prominent criticism of the 287(g) program and local enforcement of immigration law is the belief that it will necessarily have a deleterious effect upon community policing.¹¹⁸ All law enforcement agencies understand that public trust and support are vital components of effective policing, but many critics assert that participation in a 287(g) program will damage the relationship between LEAs and both lawful immigrants and illegal alien communities.¹¹⁹ Many police groups believe that the 287(g) program discourages cooperation from immigrant communities, where individuals may fear that they or their family members will be at risk of removal if they make contact with law enforcement.¹²⁰ Crimes go unsolved, and communities lacking a close relationship with the police become breeding grounds for criminal activity.¹²¹

The Police Foundation, a nonpartisan group that conducts research concerning law enforcement policy, takes these concerns seriously. The Foundation believes that these costs, inherent to the 287(g) program and to sub-federal immigration enforcement efforts, outweigh the possible benefits.¹²²

Various cities and agencies have assumed this logic in their adoption of “sanctuary laws” and policies.¹²³ Wary of compromising trust and the relationships

116. Witt, *supra* note 105. See Melendres Complaint, *supra* note 102, at 11, for an example of the manner in which 287(g) opponents have used this statement to imply that Arpaio and the MCSO condone racial profiling. See *infra* Part IV.B.1.a (discussing racial profiling and nonracial reasonable suspicion in the context of Arizona SB 1070).

117. Subconscious or unconscious racial prejudice on the part of law enforcement is a concept often invoked in racial profiling discussions. See *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1450 (9th Cir. 1994) (observing that “[r]acial stereotypes often infect our decision-making processes only subconsciously”); Arnold, *supra* note 81, at 134.

118. Khashu, *supra* note 81, at 8.

119. *Id.*

120. *Id.* Police Foundation statistics estimate that 85% of immigrants live in mixed-status families. *Id.*

121. *Id.* “As a police chief . . . asked, ‘How do you police a community that will not talk to you?’” *Id.*

122. *Id.* at 31. The Police Foundation encourages LEAs to abstain from arresting individuals for violations of federal criminal immigration law if they have not violated state criminal law as well. In the alternative, the Foundation argues that LEAs that nonetheless participate in the program should limit their immigration enforcement action to jails and prisons per the 287(g) Detention Model. *Id.* at 31–32.

123. See Huyem Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382–84 (2006). At its apex, as many as twenty-three cities and three states had adopted “sanctuary laws” or similar policies. *Id.* at 1383. These states and cities had each passed laws and resolutions

between police agencies and illegal alien communities, governing bodies in various localities have developed policies that prohibit LEAs from using resources to enforce criminal immigration law and prohibit any LEA inquiry as to an individual's immigration status.¹²⁴

On the other hand, the Center for Immigration Studies (CIS) contends that fears of a "chilling effect" surrounding 287(g) enforcement programs are unfounded.¹²⁵ CIS claims that there exists no hard data or social research¹²⁶ to support the assertion that local enforcement of federal immigration law results in a trend of noncooperation among immigrant groups.¹²⁷

Critics of local enforcement of federal immigration laws and the 287(g) program take heed of the allegations of racial profiling that are frequently linked to its implementation. They are wary of the perceived risk of racially motivated pretextual stops that accompany the field interrogations often associated with the Task Force Officer enforcement model. They are also concerned with the potentially harmful effect that any assumption of immigration enforcement authority might have on the trust relationships between police groups and immigrant communities of any immigration status.

These critics of the 287(g) program were not alone. The Department of Homeland Security under the Obama Administration appears to have considered these concerns at least in part in adopting its July 2009 modifications to 287(g) enforcement policy.

III. THE JULY 2009 MODIFICATIONS TO THE 287(g) PROGRAM

Many critics of 287(g) had hoped that the incoming Obama Administration would cancel or dismantle the controversial program.¹²⁸ They were

that prohibited cooperation with the then-named Immigration and Naturalization Service (INS). *Id.* The 1996 Amendments to the INA introduced legislation that precluded such restrictions upon LEAs cooperation with federal authorities. 8 U.S.C. § 1644 (2006); *see supra* Part I.B.2.

124. *See* Pham, *supra* note 123, at 1389–95.

125. Vaughan & Edwards, *supra* note 76, at 19. CIS suggests that the "chilling effect" may be the product of an irrational fear or a "politically motivated invention." *Id.*

126. The Police Foundation can produce no hard data or statistics, but it has conducted several focus group surveys with law enforcement personnel who reported having encountered such effects. Khashu, *supra* note 81, at 23. As an example of this chilling effect, one official shared an anecdote of an entire community alienated by the deportation of an illegal immigrant whose immigration status was revealed in court by the attorney representing the defendant he had come forward to testify against. *Id.*

127. Vaughan & Edwards, *supra* note 76, at 19. CIS notes that existing research tends to show that immigrants who do not report crimes are more likely not to do so because of language and cultural factors than out of fear of authorities. *Id.* Indeed, it seems unlikely that individuals unwilling to report crimes out of fear of deportation will be eager to discuss their fear with researchers.

128. *See, e.g.,* Editorial, *Wrong Paths to Immigration Reform*, N.Y. TIMES, Oct. 11, 2009, at A22, available at http://www.nytimes.com/2009/10/12/opinion/12mon2.html?_r=2; Bill Ong Hing, *ICE-Police Cooperation Expanded Despite Known Problems*, NEW AM. MEDIA, July 23, 2009, http://news.newamericamedia.org/news/view_article.html?article_id=dddbe539afbb7b7de6338e32ea1c555e; *ICE Should End*,

undoubtedly disappointed when DHS Secretary Napolitano announced the expansion of the program to eleven new agencies in July 2009.¹²⁹ News of the expansion was, however, accompanied by the announcement of a series of modifications to the 287(g) program that have sought to create a national standard for the program and to address the concerns held by groups skeptical of the program's value.¹³⁰

The new, uniform 287(g) policy alters the previous version of the program in two key respects. First, it implements a priority scheme targeting "dangerous criminal aliens."¹³¹ Second, it requires that LEAs pursue all charges that precipitated the arrest of any suspected illegal alien before ICE will initiate removal proceedings.¹³²

A. The "Dangerous Criminal Alien" Requirement

The Revised MOA Template makes clear from the outset that its new focus is upon those criminal aliens who pose a danger to society. "The purpose of this collaboration is to enhance the safety and security of communities by focusing resources on identifying and processing for removal criminal aliens who pose a threat to public safety or a danger to the community."¹³³

Aside from this statement of purpose, the "dangerous criminal alien" preference exists in the updated MOA most visibly in the form of a three-tiered "prioritization model."¹³⁴ Citing ICE's "sole discretion in determining how it will manage its limited resources and meet its mission requirements," the newly standardized MOA sets forth a series of three priority levels: (1) Priority Level One, consisting of "Aliens convicted/arrested for major drug offenses and/or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping;" (2) Priority Level Two, consisting of "Aliens convicted/arrested for minor drug offenses and/or mainly property offenses;" and (3) Priority Level Three, consisting of "Aliens who have been convicted or arrested for other offenses."¹³⁵ "To ensure resources are managed effectively," the MOA template dictates, "ICE requires the

Not Expand Agreements With Local And State Law Enforcement, Says ACLU, ACLU (Oct. 16, 2009), <http://www.aclu.org/immigrants-rights/ice-should-end-not-expand-agreements-local-and-state-law-enforcement-says-aclu>.

129. Napolitano, *supra* note 73.

130. *Id.* DHS Secretary Napolitano proclaimed that the modifications would serve immigration enforcement goals by "providing uniform policies for partner state and local immigration enforcement efforts throughout the United States." *Id.* Referring to the new 287(g) agreement, Napolitano asserted that it would "also [promote] consistency across the board to ensure that all of our state and local law enforcement partners are using the same standards in implementing the 287(g) program." *Id.*

131. Template, *supra* note 65, at 1.

132. *Id.* at 2.

133. *Id.* at 1. Compare *id.*, with Maricopa County MOA, *supra* note 91, at 1 (detailing a generalized purpose to "set forth the terms and conditions pursuant to which selected LEA personnel (participating AGENCY personnel) will be nominated, trained, and thereafter perform certain functions of an immigration officer within the LEA").

134. Template, *supra* note 65, app. D, at 17.

135. *Id.*

AGENCY to also manage its resources dedicated to 287(g) authority under the MOA.”¹³⁶ In other words, the Revised MOA Template establishes this priority scheme for ICE’s resources, but also requires the locally funded LEA to divert its resources in the same manner.¹³⁷

The rationale behind this modification is readily apparent: DHS has expressed an interest in preventing “pretextual arrests” for minor offenses as a “guise to initiate removal proceedings.”¹³⁸ In adopting the three-tiered prioritization model as an allocation framework and asserting “sole discretion” to manage the resources of both ICE itself and the LEA partner,¹³⁹ ICE has established a system through which it may plausibly reject transfer of individuals detained on the basis of offenses falling under Priority Levels Two and Three.¹⁴⁰

This policy shift marks a departure from the apparent intent of the Congress that created the 287(g) program. In enacting the legislation behind the 287(g) program, Congress intended to create a means to grant certain state and local bodies the authority “to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.”¹⁴¹ The statute imposes no limitations upon the types of aliens that 287(g) enforcement officers may apprehend and makes no reference to dangerousness.¹⁴² Those closest to the bill are emphatic that the scope of the 287(g) program was not meant to be limited to “criminal aliens” or aliens deemed dangerous to the community in some manner. In response to the July 2009 policy modifications, Iowa Senator Chuck Grassley, the principal author of the bill, said the following in a letter to DHS Secretary Napolitano:

136. *Id.*

137. *See supra* part II.B (discussing 8 U.S.C. § 1357(g)(1) (2006) and the funding options available for 287(g) LEAs).

138. Napolitano, *supra* note 73.

139. This authority to impose ICE’s own discretionary enforcement scheme derives from 8 U.S.C. § 1357(g)(3), which dictates that state-level participants “shall be subject to the direction and supervision of the Attorney General” in their duties per the partnership.

140. Since the July 2009 announcement, ICE has already demonstrated an unwillingness to process illegal immigrants who would otherwise fall under Priority Level Three. ICE officials instructed MCSO deputies to release three individuals who had confessed to being in the country illegally but had not committed any other crime. Gary Grado, *Arpaio: ICE Made Deputies Release 3 Illegals*, EAST VALLEY TRIB., July 24, 2009, <http://www.eastvalleytribune.com/story/142122>. The situation was further exacerbated by an ICE claim that it was the MCSO who had released the illegal immigrants of its own accord. *See* Editorial, *ICE Gags Sheriff*, WASH. TIMES, Aug. 5, 2009, <http://www.washingtontimes.com/news/2009/aug/05/ice-gags-sheriff/>. A recording of the conversation that favored the county’s version of events was released to the media by the MCSO, prompting ICE to threaten revocation of the 287(g) agreement on the basis of a violation of the MOA “gag-order” requirement that all relevant media releases be made in coordination with ICE. *Id.*; *see* Template, *supra* note 65, at 9.

141. 8 U.S.C. § 1357(g)(1) (2006).

142. 8 U.S.C. § 1357(g). Subsection (3) does provide that an officer or employee of an LEA exercising 287(g) is subject to the direction and supervision of the Attorney General.

When it was created, the 287(g) program was meant to help officers arrest and detain all illegal immigrants – not just convicted criminals or serious offenders. There is nothing in the Act that requires that the aliens in question be criminal aliens or be convicted of or arrested for other offenses. . . . I am concerned that the changes being made will weaken our attempts to arrest and detain illegal immigrants in this country, no matter the magnitude of their crime. I'm afraid that your Department is too much concerned about criminal aliens, and not at all focused on illegal aliens who knowingly broke the law by crossing the border or overstayed a visa. . . . I'm afraid these new changes to the 287(g) program may preclude local law enforcement from apprehending illegal aliens who they encounter in the course of their normal duties.¹⁴³

His co-author, Rep. Lamar Smith, has publicly spoken to the same effect: “[The 287(g) program] was created to let state and local law-enforcement officials help enforce all immigration laws, not a select few. It only makes sense to remove illegal immigrants from the streets before they commit more serious crimes.”¹⁴⁴

Congress could not have foreseen that 287(g) enforcement would be confined to efforts targeting “dangerous criminal aliens.” The statute itself gives no indication of intent to adopt this policy; the authors of the bill that created the law similarly did not anticipate such a shift. Nevertheless, Secretary Napolitano and the Obama Administration DHS have adopted policies that narrow the scope of the program in a manner unanticipated by Congress.¹⁴⁵ The three-tiered priority scheme and the stated intent to “[focus] resources on identifying and processing for removal criminal aliens who pose a threat to public safety” enable ICE authorities to potentially reject transfer of detained illegal aliens if their criminal records do not qualify them for consideration under Priority Level One.¹⁴⁶

It should be noted that critics of the 287(g) program are not satisfied by the adoption of the new purpose and priority scheme. The ACLU laments the level of discretion that the priority system affords ICE agents¹⁴⁷ in the 287(g) context,¹⁴⁸

143. Press Release, U.S. Senator Chuck Grassley (R-IA), Grassley: Homeland Security Department Hampers State and Local Law Enforcement Ability to Apprehend Illegal Aliens (July 14, 2009), available at http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=21811.

144. Rep. Lamar Smith, Letter to the Editor, *Lamar Smith Defends Immigration Law Enforcement*, WALL ST. J., July 20, 2009, at A12 [hereinafter Smith Letter].

145. Jon D. Feere of the Center for Immigration Studies (CIS) characterizes the policy shift as a contradiction of statutory law and congressional intent and as a redefinition of the 287(g) program. Jon D. Feere, *The Obama Administration's 287(g): An Analysis of the New MOA*, CTR. FOR IMMIGR. STUD. BACKGROUNDER, Oct. 2009, at 1, available at <http://www.cis.org/articles/2009/undermining287g.pdf>.

146. Indeed, ICE has already proven its willingness to reject deportation of lawfully detained illegal aliens who do not meet its standards for dangerousness. See *supra* note 140.

147. The ACLU Immigrants' Rights Project has compiled its own comparisons between former MOA and the Revised MOA Template. See, e.g., *ACLU Immigrants' Rights Project, 287(g) Comparison*, ACLU, http://www.aclu.org/files/pdfs/immigrants/287g_comparison_20090716.pdf (last visited Feb. 10, 2010) [hereinafter ACLU

implying a preference for nondiscretionary mechanisms that would ensure compliance with the MOA's stated priorities.¹⁴⁹

Nevertheless, the priority scheme implemented in the revised MOA template demonstrates a disregard for Congress's intent that the 287(g) program be used to detain illegal aliens of all varieties. The 2009 DHS effort to fundamentally alter the character of the 287(g) program also takes the form of a requirement that all potential transferees be convicted of a state, local, or federal offense prior to transfer.

B. The Mandatory Pursuit of All Charges

The second key change to the Revised MOA Template concerns the pursuit of charges leveled against alleged illegal aliens. The new standard MOA is clear: ICE will only take custody of aliens (1) who have been convicted of State, local, or federal offenses and have served their full sentences; (2) who have prior criminal convictions and when immigration detention is required by statute; and (3) when ICE decides, on a case-by-case basis, to take custody of an alien who does not belong to one of the classes of alien described.¹⁵⁰ The previous MOA contained no such requirement.¹⁵¹ Much like the creation of the three-tiered

Comparison] (showing the ACLU's comparison between the new MOA template and the former MOA for Maricopa County, Arizona).

148. Compare this position with that adopted by the ACLU in its suit challenging Arizona's SOLESNA laws. See Complaint at 40–42, *Friendly House v. Whiting*, No. CV 10-1061 (D. Ariz. May 17, 2010) [hereinafter *ACLU Complaint*], available at http://www.aclu.org/files/assets/az_sb1070_complaint_20100517.pdf (characterizing the “discretionary determinations of federal officials” as important federal interests that require protection under preemption theory).

149. ACLU Comparison, *supra* note 147, at 1. The ACLU chart suggests that an obligation to compare arrest information to the priority scheme would aid in ensuring effective prioritization. Further, the ACLU Immigrants' Rights Project is of the opinion that, despite affording ICE the means and justification to decline transfer of aliens who are not “dangerous criminal aliens,” the priority scheme as it stands “plainly does not prevent or discourage arrests for ‘low-priority offenses.’” *Id.*

150. Template, *supra* note 65, at 2.

151. See Maricopa County MOA, *supra* note 91, at 2. Upon unveiling the new MOA policy, DHS addressed the prosecution requirement with the understanding that it was a novel development for the 287(g) program. Napolitano, *supra* note 73. The original MOAs typically included the expectation that ICE would not take custody of an alleged illegal alien until any charges that had resulted in his custody had been fully pursued, but the language of the MOA did not presume that aliens facing criminal prosecution would be the only defendants eligible for ICE transfer. No prosecution requirement was imposed as a condition of transfer. See Maricopa County MOA, *supra* note 91, at 4.

In comparing the original MOAs with the Revised MOA Template, the ACLU incorrectly inferred from this language that the earlier MOAs had a prosecution requirement for transfer. ACLU Comparison, *supra* note 147, at 4. This language, however, retained from the previous MOAs, works in concert with the above-quoted transfer requirements to effect mandatory prosecution for all transferred defendants with a provision for ICE discretion on a “case-by-case basis.” See *supra* note 150 and accompanying text.

priority scheme for transfer and removal, this shift in policy seems to be directed at preventing arrest for minor offenses as a “guise to initiate removal proceedings.”¹⁵²

Like the priority scheme, the revised MOA’s prosecution requirement defies congressional intent. The 287(g) program was never intended to require prosecution;¹⁵³ the text of the statute makes no reference to prosecution, conviction, or criminality in any sense.¹⁵⁴

In imposing the priority scheme and the prosecution requirement upon 287(g)-participating LEAs, ICE and DHS have substantially diminished the capacity of local enforcement groups to address illegal immigration issues in their communities. The new policies reflected in the Revised MOA Template run counter to the federal and local objectives of the original 287(g) program¹⁵⁵ and are contrary to the intentions of the Congress that created the program. This sea change in ICE policy has substantially transformed the 287(g) program and raises difficult questions about the evolving role of local law enforcement in criminal immigration enforcement.

IV. THE FUTURE OF LOCAL IMMIGRATION ENFORCEMENT

By establishing a prioritized enforcement scheme of this nature, the new ICE policy and the Revised MOA Template represent a departure from the established role of local enforcement of immigration law as it had been understood for thirteen years.¹⁵⁶ Agencies and localities dedicated to combating illegal immigration in their communities found their immigration enforcement abilities substantially diminished by the revisions made to the program.

To date, all but six¹⁵⁷ of the 287(g) agreements previously in force have been updated and now comport with the new ICE policy and the Revised MOA template.¹⁵⁸ Further, two new MOAs are pending with LEAs that have never previously engaged in a 287(g) partnership.¹⁵⁹ This portion of the Note will examine the potential effects of compliance with the 287(g) program as modified by the federal executive. It will also explore alternative enforcement strategies that are likely to be implemented by communities and local law enforcement agencies that seek to control illegal immigration.

152. Napolitano, *supra* note 73.

153. See Grassley Press Release, *supra* note 143; Smith Letter, *supra* note 144.

154. 8 U.S.C. § 1357(g) (2006).

155. See *supra* Part II.A–B.

156. The 287(g) program was codified in the INA in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). 8 U.S.C. § 1357(g).

157. ICE Announces Standardized 287(g) Agreements with 67 State and Local Law Enforcement Partners, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/pi/nr/0910/091016washingtondc.htm> (last visited Sept. 3, 2010). The ICE announcement notes that the six LEAs that withdrew from the 287(g) program did so “for a variety of reasons, including implementation of the Secure Communities program, budgetary constraints and limited program utilization.” *Id.*

158. See *supra* note 79. The only significant change in partnership is the revocation of the Task Force Ordinance (TFO) portion of the MOA between ICE and Maricopa County, Arizona. See *supra* note 104.

159. See *Fact Sheet: 287(g)*, *supra* note 79.

A. Compliance with the Revised 287(g) Program

Through the July 2009 policy modifications, the DHS and ICE agencies under the Obama Administration have taken great pains to demonstrate their reluctance to take custody of suspected illegal aliens who are not violent or major drug offenders and who have not completed sentences for the crimes for which they were apprehended.¹⁶⁰ The Revised MOA Template reflects the selective enforcement policy adopted by the administration. If followed to the letter, the updated MOA will certainly limit the ability of 287(g) LEAs to transfer to ICE criminal aliens who have not committed serious crimes. Even convicted criminal aliens could ostensibly be barred from transfer should their offenses not rank high enough on the MOA-dictated priority scheme.

This selective-enforcement scheme effectively restricts the 287(g) program to targeting criminal aliens that would presumably be identified and removed by procedures and programs already in place.¹⁶¹ The inefficiencies of this policy lie not simply in the fact that it will allow detained illegal aliens who do not meet certain criteria to go free, but also in the fact that the “dangerous criminal aliens” it purports to target are aliens who are already targeted by a variety of programs currently in effect. By limiting the 287(g) program to transfers of aliens who “pose a threat to communities,” ICE and DHS render ineffective and redundant what was intended to be a broad and unqualified immigration enforcement authority.¹⁶²

The ICE Office of State and Local Coordination (OSLC) has developed a variety of cooperative programs that seek to combine the forces of LEAs and federal authorities.¹⁶³ The 287(g) program was formerly the most flexible and

160. See Template, *supra* note 65, at 2, 17; *supra* Part III.

161. See, e.g., 8 U.S.C. § 1373(c) (2006) (obligating federal immigration authorities to maintain records and respond to inquiries from any agent or agencies acting under color of law regarding an individual’s immigration status); *Fact Sheet: Law Enforcement Support Center*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/lesc.htm> (last visited Nov. 9, 2010) (detailing ICE participation in and maintenance of prior immigration offense information on the National Criminal Information Center (NCIC) system, a database within which it interacts with LEAs to identify criminal aliens without the need for a 287(g) agreement); *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/offices/enforcement-removal-operations/secure-communities/index.htm> (last visited Nov. 7, 2010) (outlining “A Comprehensive Plan to Identify and Remove Criminal Aliens” that involves integrated record checks on all arrested and incarcerated persons including fingerprint and biometric scanning—all without a 287(g) agreement); see also *Fact Sheet: Operation Community Shield*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/community-shield.htm> (last visited Nov. 9, 2010) (describing Operation Community Shield, an arm of the ICE Office of Investigations that specifically targets violent transnational street gangs with the cooperation of law enforcement and without requiring a 287(g) partnership).

162. See *supra* Part III.

163. *Office of State and Local Coordination*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/offices/leadership/osltc/> (last visited Nov. 7, 2010); *ICE ACCESS*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/access/> (last visited Nov. 7, 2010) [hereinafter ICE ACCESS].

adaptive of them all,¹⁶⁴ but it was only one component of the larger ACCESS program.¹⁶⁵ Like the revised 287(g) program, these alternate ACCESS programs are focused exclusively upon narrow classes of criminal aliens.

Notable among these alternate programs is the Secure Communities initiative.¹⁶⁶ Funded from a reported \$1.4 billion appropriation from Congress for criminal alien enforcement,¹⁶⁷ the Secure Communities initiative commenced deployment in October 2008.¹⁶⁸ It has since sought to use integrated records systems and biometric technology to identify and process criminal aliens who have been taken into custody for criminal offenses or released on parole.¹⁶⁹ Naturally, one of the other primary directives of the Secure Communities initiative is to prioritize its enforcement actions and the actions of its partner LEAs.¹⁷⁰ Secure Communities employs a “risk-based approach,” directing its efforts towards a class of dangerous criminal aliens indistinguishable from those who would fall under priority level one of the revised 287(g) MOA.¹⁷¹ “By prioritizing the removal of the most dangerous criminals, Secure Communities enables ICE to heighten public safety while reducing disruption to communities and law-abiding immigrant families.”¹⁷²

164. 287(g) authority under the TFO model at one point offered LEAs the latitude to initiate investigations that would result in ICE transfer as part of standard field operations, as was intended by Congress. *See supra* Part II (outlining the former nature of the 287(g) TFO program). *Compare* Template, *supra* note 65, app. D, at 18–21, with *supra* Part III (examining the narrowed scope of 287(g) enforcement after the July 2009 modifications).

165. ICE ACCESS, *supra* note 163.

166. *Secure Communities Fact Sheet*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/doclib/pi/news/factsheets/secure_communities.pdf (last visited Feb. 12, 2010) [hereinafter *Secure Communities Fact Sheet*].

167. *Id.*

168. *Id.* at 2. Secure Communities has phased deployment over 2009 and 2010 to jurisdictions considered to have high concentrations of criminal aliens, with a goal of deploying in all U.S. jurisdictions by 2013. *Secure Communities Deployment*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/deployment/ (last visited Feb. 12, 2010). The Initiative deployed its first biometric identification system in Houston, Texas on October 27, 2008, and was deployed in fifty select jurisdictions by May 2009. *Secure Communities Mission*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/offices/enforcement-removal-operations/secure-communities/index.htm> (last visited Nov. 8, 2010).

169. *Secure Communities Fact Sheet*, *supra* note 166, at 1. Acknowledging the criminal alien propensity to provide aliases and false identification, the Secure Communities program is working toward integrating the records check procedures of LEAs with the Integrated Automated Fingerprint Identification System (IAFIS) developed by the FBI’s Criminal Justice Information Services (CJIS) Division and with the Automated Biometric Identification System (IDENT) developed by the DHS US-VISIT Program. *Id.*

170. *Id.* at 2.

171. *Id.* at 1; *see* Template, *supra* note 65, app. D, at 17.

172. *Secure Communities Fact Sheet*, *supra* note 166, at 2. The Secure Communities Fact Sheet does not elaborate upon the aside referring to “law-abiding immigrant families.” The remark seems incongruous, as one would not expect ICE immigration enforcement efforts to have a negative impact upon law-abiding immigrant

The Secure Communities initiative is just one of a handful of programs, partnerships, and provisions currently implemented by DHS that cover the same territory to which the new 287(g) program is now confined: identification and removal of “dangerous criminal aliens” who have been detained for serious criminal offenses.¹⁷³ Well before the inception of the Secure Communities program, ICE began coordinating data-sharing efforts with LEAs through its Law Enforcement Support Center (LESC).¹⁷⁴ Established in 1994, the LESC has long served to help identify and apprehend “criminal aliens” who have had prior encounters with law enforcement.¹⁷⁵ The ICE LESC maintains data on immigration offenders on the National Crime Information Center (NCIC) system and interacts with LEAs when they receive “hits” on the database for criminal defendants whom they detain or apprehend.¹⁷⁶ Further, programs like Operation Community Shield¹⁷⁷ and Operation Firewall¹⁷⁸ establish partnerships with LEAs to target criminal alien subsets that would otherwise presumably fall under the purview of the 287(g) program. All of these programs already in place target the same narrow set of “dangerous criminal aliens” to which the 287(g) program has been relegated. By limiting the scope of the 287(g) program to “dangerous criminal aliens” who are facing criminal charges, ICE and DHS have not simply narrowed the focus of the program in a way that was not intended or anticipated by Congress, they have minimized the program to redundancy.

These ACCESS programs offer specialized support and partnerships with LEAs designed to identify and remove highly particularized classes of illegal

families. If ICE is indeed referring to law-abiding, lawfully present immigrant families—and not illegal aliens who don’t fall under the “dangerous criminal alien” classification—then one is left to wonder at why ICE and the leaders of the Secure Communities initiative felt compelled to juxtapose them against dangerous criminal aliens and to make this distinction in the first place.

173. It should be noted here that one of the reasons cited by the LEA that discontinued their 287(g) partnerships following the July 2009 modifications was their participation in the Secure Communities initiative. *See supra* note 157.

174. *Fact Sheet: Law Enforcement Support Center*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/lesc.htm> (last visited Nov. 7, 2010).

175. *Id.*

176. *Id.* The NCIC is a nationwide database of criminal justice information used by the vast majority of LEAs in the United States. *Criminal Justice Information Systems*, FBI, <http://www.fbi.gov/about-us/cjis/ncic> (last visited Nov. 10, 2010). In practice, ICE participation in the NCIC system will automatically inform LEAs if an apprehended individual has a criminal immigration record—that is to say, if the individual is a criminal alien, documented as having been ordered removed after being detained and transferred to ICE at some point in the past. The LEA will confirm the “hit” by contacting ICE LESC, verifying that the individual is in fact a criminal alien. *Fact Sheet: Law Enforcement Support Center*, *supra* note 174.

177. *Operation Community Shield*, *supra* note 161 (targets transnational criminal street gangs).

178. *Operation Firewall targets criminal activity relating to bulk cash smuggling. Operation Firewall: Combating Bulk Cash Smuggling*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/firewall.htm> (last visited Feb. 10, 2010).

aliens. They are geared specifically towards the location and removal of violent criminal aliens, alien prisoners, drug traffickers, gang members, and immigration fugitives. What they do not offer is a flexible, general partnership capable of assisting local law enforcement in addressing burgeoning populations of illegal aliens in their communities. For the past decade, this void has been filled by the original version of the 287(g) program. Now, however, the scope of the 287(g) program has been narrowed to focus upon “dangerous criminal aliens,” apprehended for violent or major drug offenses and sitting in prison, facing criminal charges for their conduct—in other words, precisely the class of alien meant to be identified and removed by any one of the other ACCESS programs.

The July 2009 policy modifications have defanged the 287(g) program. The new policies add nothing to the current enforcement scheme and frustrate the original aims of LEAs who undertook 287(g) partnerships, particularly those subscribing to the attrition through enforcement model.¹⁷⁹ With 287(g) partnerships neutered as a means to curb the general illegal alien populations in a given jurisdiction, communities that seek to control illegal immigration in their neighborhoods have resorted to alternative immigration enforcement strategies.

B. Circumvention and Alternative Means of Enforcement

While many jurisdictions have chosen to comply with the “prioritized” enforcement model adopted by the modified 287(g) program, the policy modifications that surround it have undermined the purpose that the program served to many LEAs. State and local authorities, bearing the burdens of illegal immigration more acutely than federal authorities, have sought and continue to seek alternative means to discourage illegal immigration. Ironically, or perhaps fittingly, this development has undermined the DHS effort to standardize immigration enforcement efforts across the board.¹⁸⁰

Local authorities who have seen their 287(g) authority diminished have resolved to continue their efforts to crack down on illegal immigration in their jurisdictions. Perhaps most notably, the Maricopa County Sheriff’s Office, which saw its entire Task Force Ordinance (TFO) field authority rescinded, quickly vowed to continue its crime-suppression sweeps as usual despite the modifications to its 287(g) MOA.¹⁸¹ MCSO Sheriff Joe Arpaio, in response to the decision to revoke the Maricopa County TFO agreement, stated, “Now I’m not under their

179. See *supra* Part II.B.

180. Napolitano, *supra* note 73.

181. The MCSO saw its field enforcement authority rescinded by DHS in the wake of the 2009 renegotiation period. Gary Grado, *Feds Strip Arpaio of Immigration Authority*, EAST VALLEY TRIB., Oct. 5, 2009, http://www.eastvalleytribune.com/article_99e7ab40-bb5d-50f9-ac0f-def1321d7f17.html. Nonetheless, MCSO Sheriff Joe Arpaio announced that his crime-suppression sweeps targeting illegal aliens would continue undisturbed. *Id.* And indeed they have: Arpaio and the MCSO completed their seventeenth crime sweep in the previous sixteen months on July 29, 2010, the day that the SOLESNA laws were scheduled to go into effect. Anna Gorman, *Arizona Sheriff Launches 17th Immigration Sweep*, L.A. TIMES, July 30, 2010, <http://articles.latimes.com/2010/jul/30/nation/la-na-arizona-immigration-raids-20100730>.

control . . . [n]othing changes; that's the irony of all of this."¹⁸² "It doesn't bother me, because we are going to do the same thing . . . I am the elected sheriff. I don't take orders from the federal government."¹⁸³

Much to the chagrin of his many critics, Sheriff Arpaio has a point. There are a variety of means by which LEAs like the MCSO may combat illegal immigration without submitting to the constraints of the new 287(g) agreement. The inherent authority of states and localities to enforce criminal immigration law is central to these efforts.¹⁸⁴ Derived from the principles of federalism¹⁸⁵ and the mandates of the Supremacy Clause,¹⁸⁶ this inherent authority vests state and local law enforcement with the power to question, arrest, and detain individuals suspected of violating criminal provisions of federal immigration law.¹⁸⁷

But the power to question, arrest, and detain immigration offenders could be for naught if ICE refuses to authorize a transfer. Apprehension on its own may not serve as a sufficient deterrent. States and localities adhering to the attrition-through-enforcement model¹⁸⁸ have sought to address this need by creating alternative legal avenues for deterring illegal immigration within their borders.

State legislative activity concerning illegal immigration has increased significantly over the past few years;¹⁸⁹ the shifting enforcement priorities of ICE and DHS will undoubtedly accelerate this trend. The state-level legislative

182. Grado, *supra* note 181. MCSO launched another crime-suppression sweep of this sort almost immediately after the announcement that the TFO portion of its MOA had been rescinded. Jacques Billeaud, *Ariz. Sheriff Launches Immigration Sweep*, ASSOCIATED PRESS, Oct. 19, 2009, available at <http://www.cnsnews.com/news/article/55743>.

183. Billeaud, *supra* note 182.

184. See *supra* Part I (discussing this inherent authority as the basis of local enforcement of immigration law).

185. See *supra* notes 9–11 and accompanying text.

186. See *supra* notes 15–19 and accompanying text.

187. See, e.g., *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999) (acknowledging a “preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws”); *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983) (recognizing that state immigration arrests are valid when authorized by state law) *overruled on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999); *People v. Barajas*, 147 Cal. Rptr. 195, 199 (Cal. Ct. App. 1978) (holding that local police have authority to arrest for violations of federal immigration laws involving the reentry into country after deportation).

188. See *supra* notes 84–86 and accompanying text.

189. NAT'L CONFERENCE OF STATE LEGISLATURES IMMIGRANT POLICY PROJECT, STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION: JANUARY 1 – JUNE 30, 2009, at 1 (July 17, 2009), available at <http://www.ncsl.org/documents/immig/ImmigrationReport2009.pdf>. In 2005, 300 immigration-related bills were introduced to state legislatures, thirty-eight of which were enacted. *Id.* In 2006, 570 were introduced with eighty-four enacted; in 2007, 1562 with 240 enacted; and in 2008, 1305 with 206 enacted. *Id.* 2009 saw the introduction of approximately 1500 bills in forty-eight states, approximately 353 of which were enacted. *2009 State Laws Related to Immigrants and Immigration January 1 – December 31, 2009*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=19232> (last visited Feb. 15, 2010) [hereinafter NCSL 2009].

alternatives have generally taken two forms: (1) state-level criminal laws that address illegal immigration; and (2) state-level regulations designed to discourage illegal immigration.

1. State Criminal Laws that Address Illegal Immigration

Criminal law is a powerful tool in the fight against illegal immigration. States and localities that have made illegal immigration a priority have increasingly sought to pass legislation criminalizing acts related to illegal immigration. In recent years, new pieces of legislation creating task forces, funding studies, and creating criminal statutes concerning human trafficking have been enacted with increasing frequency.¹⁹⁰ The criminal statutes enacted commonly serve to define and penalize human trafficking and to criminalize associated offenses like involuntary servitude of trafficked persons, forced sexual labor of trafficked persons, destruction of immigration documents of another for purposes of extortion, and other conduct.¹⁹¹

One of the most popular and effective means of criminalizing and punishing conduct relating to illegal immigration at the state level without the benefit of a potent 287(g) partnership is the enactment of criminal statutes that mimic in some manner the provisions of federal immigration statutes.¹⁹² Mirroring federal legislation is a recognized and constitutional means of concurrently

190. In 2005, nine states enacted laws addressing human trafficking. Five of these states—Arizona, Illinois, Kansas, Louisiana, and New Jersey—enacted laws that criminalized human trafficking under state law. *Immigrant Policy Project: A Review of State Immigration Legislation in 2005*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/Default.aspx?TabId=13133> (last visited Feb. 15, 2010) [hereinafter NCSL 2005]. In 2006, thirteen laws concerning human trafficking or smuggling of persons were passed, criminalizing or stiffening penalties in seven different states. *Immigrant Policy: 2006 State Legislation Related to Immigration: Enacted and Vetoed*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 31, 2006), <http://www.ncsl.org/Default.aspx?TabId=13137> [hereinafter NCSL 2006]. In 2007, eighteen laws were enacted, criminalizing forms of human trafficking and adjusting penalties for offenses in nine states. NAT'L CONFERENCE OF STATE LEGISLATURES IMMIGRANT POLICY PROJECT, 2007 ENACTED LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 13–15 (rev. Jan. 31, 2008), available at <http://www.ncsl.org/Portals/1/documents/immig/2007Immigrationfinal.pdf> [hereinafter NCSL 2007]. In 2008, five laws were enacted, four of which criminalized aspects of human trafficking or expanded the scope of existing relevant statutes in four different states. NAT'L CONFERENCE OF STATE LEGISLATURES IMMIGRANT POLICY PROJECT, 2008 ENACTED LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 9–10 (rev. Jan. 2009), <http://www.ncsl.org/Portals/1/documents/immig/StateImmigReportFinal2008.pdf> [hereinafter NCSL 2008]. In 2009, human trafficking laws tripled, with sixteen laws concerning the offense passed in ten states. NCSL 2009, *supra* note 189.

191. See *supra* note 190.

192. See Kobach, *supra* note 82, at 475–76.

enforcing federal immigration law;¹⁹³ some states have already enacted legislation to this end.¹⁹⁴

a. SB 1070: Support Our Law Enforcement and Safe Neighborhoods Act

Arizona has pioneered the legislation and enforcement of such laws, and no set of Arizona laws better exemplifies the concurrent enforcement effort than those enacted by the deeply controversial Support Our Law Enforcement and Safe Neighborhoods Act (SOLESNA), popularly known as SB 1070.¹⁹⁵ First signed into law on April 23, 2010,¹⁹⁶ and initially scheduled to go into effect on July 29, 2010,¹⁹⁷ SB 1070 immediately ignited a firestorm of denigration.¹⁹⁸ Famously

193. Plyler v. Doe, 457 U.S. 202, 225 (1982) (noting that “the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal”).

194. See, e.g., Kobach, *supra* note 82, at 475–76 (examining Oklahoma’s statutory language prohibiting transportation or harboring of illegal aliens, codified at Okla. Stat. tit. 21, § 446 (2007), legislation that is a near facsimile of the federal prohibition at 8 U.S.C. § 1324(a)(1)(A)).

195. SB 1070, 2010 Ariz. Sess. Laws 0113, *amended by* 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)). The Arizona legislature has published a useful version of the bill, including both the original SB 1070 provisions and the amendments made by HB 2162, at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

196. *Id.*

197. General Effective Dates, ARIZONA STATE LEGISLATURE, <http://www.azleg.gov/GeneralEffectiveDates.asp> (last visited May 17, 2010). A preliminary injunction delayed the enforcement of certain SOLESNA provisions. See *infra* note 217 and accompanying text.

198. Activist organizations, politicians, pop stars, professional athletes, and law professors were early and vocal opponents of the new law. Lucas Guttentag, director of the ACLU Immigrants’ Rights Project, believes that the law will “increase racial profiling and discrimination against Latinos and anyone who might appear to be an immigrant.” John Schwartz & Randal C. Archibold, *A Law Facing a Tough Road Through the Courts*, N.Y. TIMES, Apr. 28, 2010, at A17, available at <http://www.nytimes.com/2010/04/28/us/28legal.html>. Phoenix Mayor Phil Gordon and U.S. Representative Raul Grijalva of Arizona are among the many politicians who have been vocal critics of the law. John Blackstone, *Congressman Touts Boycott of Immigration Law*, CBS NEWS, April 24, 2010, available at <http://www.cbsnews.com/stories/2010/04/24/eveningnews/main6429215.shtml>. Colombian pop star Shakira has also expressed concerns about the law; in the wake of its passage she declared that the Act “goes against all human dignity.” Scott Wong & Lily Leung, *Shakira Condemns Arizona’s Immigration Law*, ARIZ. REPUBLIC, April 29, 2010, <http://www.azcentral.com/news/articles/2010/04/29/20100429shakira-condemns-arizona-immigration-law29-ON.html>. The Phoenix Suns, Arizona’s professional basketball team, opted to wear their “Los Suns” jerseys on May 16, 2010, in honor of the Cinco de Mayo holiday and as a political statement against SB 1070. Brett Pollakoff, *Steve Nash Discusses SB 1070 After Suns’ Game 2 Win*, NBA FANHOUSE, May 6, 2010, <http://nba.fanhouse.com/2010/05/06/nash-speaks-on-arizonas-immigration-law-after-suns-game-2-win/>. Suns point guard Steve Nash (a Canadian) believes the Act may be “an infringement, or a possible infringement, on human rights.” *Id.* Additionally, legal scholars including Erwin Chemerinsky and Hiroshi Motomura claim that the Act’s provisions are unconstitutional. See Schwartz, *supra*.

compared by some members of the public to the practices of Nazi Germany and the Soviet regime,¹⁹⁹ SB 1070 quickly drew criticism from top U.S. officials in spite of its fidelity to federal law.²⁰⁰

The laws created by SOLESNA do not merit such fanfare. Citing a “compelling interest in cooperative enforcement” and declaring its purpose to “make attrition through enforcement the public policy of all state and local government agencies in Arizona,”²⁰¹ the SOLESNA laws are crafted to do little more than create state-level offenses corresponding to existing federal criminal offenses and mandate their enforcement by Arizona LEAs.²⁰² It comprises three key provisions: (1) a “cooperation mandate” requiring law enforcement to, under certain circumstances and where practicable, ascertain the immigration status of individuals for whom there exists reasonable suspicion that the suspect is an alien and is unlawfully present,²⁰³ (2) a state misdemeanor offense for the willful failure to carry an alien registration document in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a),²⁰⁴ and (3) a state misdemeanor offense for the knowing or reckless transportation, concealment, or harboring of an illegal alien.²⁰⁵ Other provisions include a law prohibiting the roadside solicitation of workers²⁰⁶ and an expansion of warrantless arrest authority to include individuals who have

199. This rhetoric was first employed by Cardinal Roger Mahony of the Los Angeles Archdiocese of the Roman Catholic Church days before the bill was signed into law. Tim Rutten, *Mahony's Personal Crusade*, L.A. TIMES, Apr. 21, 2010, <http://articles.latimes.com/2010/apr/21/opinion/la-oe-0421-rutten-20100421-6>.

Legislation providing for ethnic concentration camps or genocide has not been introduced in Arizona. These allusions may lack credibility.

200. President Obama was quick to denounce the Arizona law as “undermin[ing] basic notions of fairness.” Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1, available at <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>. Attorney General Eric Holder also immediately expressed fears that the law could result in racial profiling. However, nearly a month after passage of the law, Holder was forced to admit that he still had not “had a chance to” read the law, relying upon media reports for his opinion. *Holder Admits to Not Reading Arizona's Immigration Law Despite Criticizing It*, FOXNEWS.COM (May 14, 2010), <http://www.foxnews.com/politics/2010/05/13/holder-admits-reading-arizonas-immigration-law-despite-slamming/>. DHS Secretary Napolitano found herself in a similar position, forced to admit she had not read the law after weeks of referring to it as “bad law enforcement law.” *Napolitano Admits She Hasn't Read Arizona Immigration Law in 'Detail,'* FOXNEWS.COM (May 18, 2010), <http://www.foxnews.com/politics/2010/05/18/napolitano-admits-read-arizona-immigration-law/>.

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

202. *See id.*

203. ARIZ. REV. STAT. ANN. § 11-1051 (2010) (created and amended by 2010 Ariz. Sess. Laws 0113, 0211).

204. *Id.* § 13-1509 (created and amended by 2010 Ariz. Sess. Laws 0113, 0211).

205. *Id.* § 13-2929 (created and amended by 2010 Ariz. Sess. Laws 0113, 0211).

206. *Id.* § 13-2928 (created and amended by 2010 Ariz. Sess. Laws 0113, 0211).

committed public offenses that would render them removable.²⁰⁷ Importantly, the SOLESNA laws also effectively prohibit sanctuary policies in Arizona.²⁰⁸

Looking to the scope and effect of each individual law, one may classify them into one of two categories. First, there are the SOLESNA enforcement mandates, which seek to require and assist LEAs in implementing immigration-related enforcement practices. These include the “cooperation mandate”²⁰⁹ and the warrantless arrest authority statutes.²¹⁰ Second, there are the “mirror laws,” Arizona criminal statutes that create state-level crimes concurrent to and consistent with federal criminal immigration law. These include SOLESNA’s alien registration statute,²¹¹ the transportation, concealment, and harboring statute,²¹² and the pre-existing human-smuggling statute that received line amendments as part of the SOLESNA Act.²¹³

The Act’s passage prompted swift political²¹⁴ and legal action on the part of its opponents, whose ranks include civil rights organizations²¹⁵ and, more

207. *Id.* § 13-3883(A)(5) (created and amended by 2010 Ariz. Sess. Laws 0113). This provision is the most likely among the SOLESNA laws to face preemption issues. *See infra* notes 256–58 and accompanying text.

208. This is accomplished in two ways. First, the “cooperation mandate” requires all Arizona law enforcement to inquire as to an individual’s immigration status in certain situations. Second, the law creates a cause of action enabling any legal Arizona resident to file suit against an official or agency that adopts a policy that limits or restricts the enforcement of federal immigration laws. ARIZ. REV. STAT. ANN. § 11-1051(B), (H)–(K) (2010).

209. *Id.* § 11-1051. Like the other SOLESNA enforcement mandate, the warrantless arrest power, the “cooperation mandate” statute does not affix a criminal penalty to any unlawful behavior. Its provisions merely govern the conduct of law enforcement in the course of their duties.

210. *Id.* § 13-3883(A).

211. *Id.* § 13-1509.

212. *Id.* § 13-2929.

213. *See id.* § 13-2319; *see infra* notes 280–84 and accompanying text (providing an analysis of Arizona’s 2005 Human Smuggling Act). The SOLESNA statute prohibiting roadside hiring and solicitation does not mirror any federal law, but may be considered along with these laws as a criminal statute that aims to use inherent state police power to deter behavior associated with the illegal alien workforce. ARIZ. REV. STAT. ANN. § 13-2928 (2010).

214. The cities of Washington, D.C., Los Angeles, CA, San Francisco, CA, San Diego, CA, and Austin, TX, are among those who have either passed or considered official boycotts of Arizona. Ethan Sacks, *Battle over Arizona’s SB 1070: Oklahoma Eyes Similar Immigration Law, City Councils Eye Boycotts*, N.Y. DAILY NEWS, Apr. 30, 2010, http://www.nydailynews.com/news/national/2010/04/30/2010-04-30_battle_over_arizonas_sb_1070_oklahoma_eyes_similar_immigration_law_city_councils.html#ixzz0meLopi8o. One proponent of an economic boycott was U.S. Representative Raul Grijalva. Blackstone, *supra* note 198. Rep. Grijalva is a U.S. Congressman elected to represent and serve the interests of the State of Arizona.

215. The ACLU Foundation Immigrants’ Rights Project formed an alliance with MALDEF, the NAACP, the National Immigration Law Center (NILC), the Asian Pacific American Legal Center (APALC), and other activist groups to challenge the law. ACLU Complaint, *supra* note 148.

recently, the U.S. Department of Justice.²¹⁶ The DOJ obtained a preliminary injunction on portions of the Act the day before the SOLESNA laws were scheduled to go into effect.²¹⁷ The principal constitutional arguments leveled against the new laws claim: (1) they encourage racial profiling and targeting in violation of the U.S. Constitution and federal law;²¹⁸ and (2) they create a “legal regime regulating and restricting immigration”²¹⁹ and are preempted by federal law under the Supremacy Clause.²²⁰

i. Racial Profiling

Perhaps most prominent among the fears of the Act’s opponents is the notion that the cooperation mandate will encourage impermissible forms of racial profiling.²²¹ Critics assail the law’s reasonable suspicion standard²²² for

216. After weeks of anticipation and review, the Department of Justice also filed its own suit challenging the SOLESNA laws. Complaint, *United States v. Arizona*, CV 10-04143 (D. Ariz. July 6, 2010), available at <http://www.justice.gov/opa/documents/az-complaint.pdf> [hereinafter DOJ Complaint].

217. Order, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), available at [http://www.azd.uscourts.gov/azd/courtinfo.nsf/983700DFEE44B56B0725776E005D6CCB/\\$file/10-1413-87.pdf?openelement](http://www.azd.uscourts.gov/azd/courtinfo.nsf/983700DFEE44B56B0725776E005D6CCB/$file/10-1413-87.pdf?openelement) [hereinafter Injunction Order]. District Court Judge Susan R. Bolton enjoined portions of the ARIZ. REV. STAT. ANN. section 11-1051 cooperation mandate, portions of the section 13-2928 prohibition on the solicitation of roadside workers, the entirety of the section 13-1509 alien registration law, and the section 13-3883(A)(5) expansion of the warrantless arrest power. *Id.* at 996, 998–99, 1006.

218. See, e.g., ACLU Complaint, *supra* note 148, at 6, 34, 47–51. The DOJ suit does not allege any unlawful profiling; however, Attorney General Eric Holder has indicated that the DOJ may file a second suit with such allegations should the laws go into effect and racial profiling occurs. Katherine Skiba, *Arizona Immigration Law Could Lead to a Second Suit, Holder Says*, L.A. TIMES, July 11, 2010, <http://articles.latimes.com/2010/jul/11/nation/la-na-holder-arizona-20100712>.

219. ACLU Complaint, *supra* note 148, at 6, 55.

220. Opponents also advance the community-policing concerns that generally accompany local enforcement of criminal immigration law. See Khashu, *supra* note 81.

221. See, e.g., ACLU Complaint, *supra* note 148, at 6, 34, 47–51. President Obama, for instance, imagines that it would lead to unbridled harassment on the basis of race and ethnicity. “[Y]ou can try to make it really tough on people who look like they, quote, unquote look like illegal immigrants . . . [Y]ou can imagine if you are a Hispanic American in Arizona, your great, great grandparents may have been there before Arizona was even a state. But now suddenly if you don’t have your papers and you took your kid out to get ice cream, you’re going to be harassed.” Jake Tapper & Sunlen Miller, *President Obama Says Arizona’s “Poorly-Conceived” Immigration Law Could Mean Hispanic-Americans Are Harassed*, POL. PUNCH (Apr. 27, 2010, 6:55 PM), <http://blogs.abcnews.com/politicalpunch/2010/04/president-obama-says-arizonas-poorlyconceived-immigration-law-could-mean-hispanicamericans-are-haras.html>.

222. “Reasonable suspicion” is the legal standard which allows law enforcement to make an investigatory stop when an officer infers that a suspect is committing a crime, has committed a crime, or is preparing to commit a crime. This inference must be based on a set of specific and articulable facts; it must be more than a mere “hunch.” See *Terry v. Ohio*, 392 U.S. 1 (1968).

questioning²²³ and argue that this standard will inevitably lead (or require) police to stop, question, and detain individuals of any immigration or citizenship status on the basis of their race or ethnicity.²²⁴

This perceived risk of racial profiling or harassment does not have any basis in the law itself. The cooperation mandate at issue expressly forbids the unconstitutional consideration of race in its enforcement.²²⁵ Thus, the argument that enforcement of this law could encourage unconstitutional racial profiling is necessarily premised upon an assumption that law enforcement *will not obey the provisions of this law*. Further, the mandate (1) creates a presumption of lawful presence upon the presentation of many common forms of identification²²⁶ and (2) only triggers upon a lawful stop, contact, or arrest made in the enforcement of some other state or local law or ordinance.²²⁷ These requirements create significant obstacles to the unprovoked racial harassment envisioned by this Act's opponents.²²⁸

Even though it must be predicated on lawful police contact pertaining to a separate law and is not itself authorized to initiate police contact, the cooperation mandate's reasonable suspicion standard is at the heart of the racial profiling fears that surround the Act.²²⁹ Opponents of the cooperation mandate believe that the

223. This criticism refers primarily to the newly-created ARIZ. REV. STAT. ANN. § 11-1051 (2010), requiring law enforcement under certain circumstances to ascertain the immigration status of an individual where there exists reasonable suspicion that he is an alien and unlawfully present.

224. *See, e.g.,* ACLU Complaint, *supra* note 148, at 6, 34, 47–51. The ACLU also alleges that “SB 1070 has caused racial tensions because it is widely understood that it is motivated by and will result in discrimination against Latinos and other racial minorities.” *Id.* at 31. Arizona Governor Jan Brewer has publicly reaffirmed Arizona’s commitment to civil rights in enforcing the new immigration provisions. Upon signing the bill into law, Brewer issued an executive order directing the development of a training program to educate officers on the reasonable suspicion standard and how to avoid making race-based determinations. Press Release, Office of the Governor of Arizona, Statement by Governor Jan Brewer (Apr. 23, 2010), available at http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf.

225. ARIZ. REV. STAT. ANN. § 11-1051(B) (2010) provides that “[a] law enforcement official or agency . . . may not consider race, color, or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.” This antidiscrimination requirement is included in all of the pertinent provisions of the Act. *See* ARIZ. REV. STAT. ANN. §§ 13-1509(C), 13-2928(D), 13-2929(C) (2010).

226. Sections 11-1051(B)(1)–(4) recognize this presumption upon presentation of an Arizona driver’s license or identification card, a tribal identification card, or any valid U.S. federal, state, or local identification card if such card requires proof of legal presence before issuance.

227. *Id.* § 11-1051(B).

228. In other words, the ice cream parlor scenario imagined by President Obama would be completely inconsistent with the new law. *See supra* note 221.

229. The ACLU argues that the reasonable suspicion standard in this law is unworkable, inapplicable, and requires impermissible reliance upon race. *See* ACLU Complaint, *supra* note 148, at 32. To the contrary, the law requires no such reliance, and in fact forbids it. *See* ARIZ. REV. STAT. ANN. § 11-1051(B).

reasonable suspicion standard is prone to abuse. They are correct. But potential for abuse puts this law on par with every other criminal law enforced in the United States.²³⁰ Unconstitutional racial profiling or harassment perpetrated by police under the guise of enforcing SOLESNA's cooperation mandate would be unconstitutional, illegal, and would be a cause of action for a § 1983 suit.²³¹ Such generalized potential for abuse, however, does not justify striking down a law that explicitly forbids such conduct.

ii. Federal Preemption

Most of the SOLESNA laws also overcome the federal preemption arguments leveled against them. The DOJ has urged federal courts to find the SOLESNA laws preempted primarily on the basis of two distinct but interrelated claims: (1) that the SOLESNA laws conflict with federal policies that would otherwise excuse certain immigration violations that the state laws would not,²³² and (2) that the individual SOLESNA statutes encroach upon legal ground that is solely the province of the federal government.²³³ With perhaps one exception,²³⁴ both arguments should fail. The individual SOLESNA provisions should survive preemption claims because they codify enforcement schemes that fall within Arizona's inherent authority while remaining consistent with congressional goals and objectives.

The DOJ complaint summarizes the first strain of its preemption argument as follows:

There is question, however, regarding what in fact does constitute reasonable suspicion. Kris Kobach, the Missouri attorney and law professor who helped draft the law, explained that reasonable suspicion here is a combination of circumstances, primarily conduct-based, none of which may include race. Byron York, *A Carefully Crafted Immigration Law in Arizona*, WASH. EXAMINER, Apr. 26, 2010, <http://www.washingtonexaminer.com/opinion/columns/Byron-York/A-carefully-crafted-immigration-law-in-Arizona-92136104.html>. Kobach gives an example of a traffic stop in which driver and passengers in an overloaded car on a known smuggling corridor cannot produce identification. *Id.*

230. Reasonable suspicion, a vital tool for law enforcement and the legal standard for criminal investigatory stops for over forty years, has been criticized for its abuse potential since its inception. *See, e.g.,* Tracey Maclin, Terry v. Ohio's *Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998) (providing an examination of reasonable suspicion and potential abuses in a general criminal context).

231. 42 U.S.C. § 1983 (2006) creates a cause for action for any person whose constitutional rights are violated by an agent acting under the color of law.

232. *See, e.g.,* DOJ Complaint, *supra* note 216, at 2–3. This complaint is directed towards the entirety of the Act, but its focus is directed primarily toward the “enforcement mandate” statutes enacted under SOLESNA.

233. *See, e.g.,* DOJ Complaint, *supra* note 216, at 16–23 (listing the Supremacy Clause violations alleged against each provision, in turn). These complaints are directed toward both the “enforcement mandate” statutes and the “mirror laws” enacted within SOLESNA.

234. The warrantless arrest provision enacted by SOLESNA and codified in ARIZ. REV. STAT. ANN. § 13-3883(A)(5) does face preemption issues. *See infra* notes 256–58 and accompanying text.

If allowed to go into effect, S.B. 1070's mandatory enforcement scheme will conflict with and undermine the federal government's careful balance of immigration enforcement priorities and objectives. For example, it will impose significant and counterproductive burdens on the federal agencies charged with enforcing the national immigration scheme, diverting resources and attention from the dangerous aliens who the federal government targets as its top enforcement priority.²³⁵

In adopting this argument, the DOJ puts itself in an uncomfortable position. Its argument necessarily hinges upon the premise that, for preemption purposes, its own policy of selective enforcement constitutes "the full purposes and objectives of Congress"²³⁶ and is thus binding upon the states' inherent enforcement authority—a premise that has no basis in federal law.²³⁷ Only within the confines of the 287(g) partnership does federal legislation dictate that state-level immigration enforcement must comply with both federal law *and* the discretionary enforcement policies of the federal executive.²³⁸ Beyond that context, federal legislation requiring a state to submit to the discretionary enforcement goals of the federal executive in the exercise of its own inherent immigration authority simply does not exist.²³⁹

What does exist, however, is ample evidence that Congress has anticipated and welcomed the exercise of the inherent state-level immigration authority, bound only by the Constitution itself and by the codified statutes that constitute actual federal law.²⁴⁰ As dictated by the Tenth Amendment and by the United States' traditional treatment of state sovereignty, and as clarified in the voluminous body of jurisprudence concerning the Supremacy Clause and federal preemption, every preemption analysis begins "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act

235. DOJ Complaint, *supra* note 216, at 2–3. The ACLU challenge makes similar claims, arguing that "SB 1070 attempts to create a legal regime regulating and restricting immigration" in a manner that "fundamentally conflicts with federal immigration law and legislates in fields occupied by such law." ACLU Complaint, *supra* note 148, at 6, 32.

236. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

237. Congressional intent and goals will, of course, be reflected in federal law. Where Congress has deigned to make executive discretion or policy an aspect of its "full purposes and objectives," it will have done so by legislating in a manner that reflects that desire.

238. See 8 U.S.C. § 1357(g)(3) (2006) (stating that "[i]n performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General").

239. The distinction is critical. While the SOLESNA provisions respect the boundaries of the inherent state authority to enforce federal immigration law, 287(g) officers act under the color of federal authority and thus may wield powers that are reserved solely for the federal government—including, prominently, the power to determine immigration status. 8 U.S.C. § 1357(g)(8); see Template, *supra* note 65, app. D, at 18–23.

240. See *supra* Part I (discussing the inherent state authority to enforce criminal provisions of federal immigration law, including an examination of the judicial precedent and congressional action that encourages the exercise of such authority).

unless that was the clear and manifest purpose of Congress.”²⁴¹ Thus, a state law alleged to violate the Supremacy Clause must be considered valid by presumption,²⁴² such a law will only be in violation of the Supremacy Clause if it is subsequently determined to be prohibited by the Constitution or preempted by Congress.²⁴³

Contrary to the DOJ’s claims, Congress has not adopted a “dangerous criminal alien” policy, the dictates of the newly standardized 287(g) MOA, nor any other DHS discretionary enforcement scheme as either a component of its “full purposes and objectives”²⁴⁴ or as a superseding scheme by “clear and manifest purpose.”²⁴⁵ What Congress *has* adopted is a set of provisions that courts have interpreted to support state claims of inherent immigration enforcement authority with relatively few limitations.²⁴⁶ Unless and until Congress adopts the “dangerous criminal alien” policy as a full purpose and objective, state-level immigration enforcement consistent with and concurrent to extant federal law should be

241. *Altria Grp., Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

242. *Id.* (requiring an assumption against preemption). Legal scholars skeptical of the SOLESNA laws’ constitutionality have characterized the counterarguments against preemption of the laws as both originating from and concluding with the idea that state laws are concurrent with federal laws. *See* Gabriel J. Chin, Carissa Byrne Hessick, Toni Massaro & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440, 28 (“Professor Kobach’s notion that because the federal government can regulate something, that is strong evidence that the states can as well, is fundamentally amiss.”) In their portrayal of Kobach’s argument, Chin et al. cast the concurrence of federal and state laws as the origin of the police power to enact such laws. *Id.* at 27 (asserting that “Professor Kris Kobach . . . has argued in a law review article that the very fact that the United States has enacted immigration statutes gives states authority to regulate the same area” (citing Kobach, *supra* note 82, at 475)). However, proponents of the legislation maintain that the origin of this police power lies in the principles of the Tenth Amendment and state sovereignty under the federalist tradition, while the focus upon concurrent federal and state goals is directed toward the more pressing (and less definitively settled) question of whether the particular laws at issue survive the preemption inquiry. Kobach, *supra* note 10, at 199. Chin et al. also acknowledge that general police power would be the source of this authority: “If there is some source of state authority . . . it will have to come from somewhere else, presumably from its general police powers.” Chin et al. at 28–29.

243. *Altria Grp., Inc.*, 129 S. Ct. at 543.

244. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

245. *Rice*, 331 U.S. at 230.

246. Indeed, the most significant limitations take the form of the Supremacy Clause prohibition on “regulation of immigration” as defined by the Supreme Court and the explicit preemption provisions of certain civil immigration regulation acts. *See DeCanas v. Bica*, 424 U.S. 351, 355 (1976); *see also, e.g.*, Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324a(h)(2) (2006) (preempting “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens”). Courts have generally rejected arguments that the language or legislative history of permissive criminal and civil immigration provisions serve to limit state-level immigration enforcement authority. *See supra* notes 29–36, 44–50 and accompanying text.

permitted to the full scope of the inherent authority and unfettered by the “careful balance”²⁴⁷ of political and social objectives adopted by any particular administration.

The preemption inquiry thus necessarily turns upon whether the SOLESNA laws are consistent and concurrent with federal goals as dictated by Congress. In other words, in order to survive the challenge, the SOLESNA laws cannot directly conflict with federal statute,²⁴⁸ nor may they operate in fields that Congress has explicitly²⁴⁹ or implicitly²⁵⁰ occupied. Despite DOJ protestations that “Arizona’s adoption of a maximal ‘attrition through enforcement’ policy²⁵¹ disrupts the national enforcement regime set forth in the INA and . . . the federal government’s prioritization of enforcement against dangerous aliens,”²⁵² the SOLESNA laws do not disrupt the former and are not bound by the latter.

The Supreme Court has stated that a disruptive and constitutionally preempted regulation of immigration is “a determination of who should or should not be admitted into the country, and the conditions under which a legal immigrant may remain.”²⁵³ None of the Act’s prominent laws compel such a determination or condition. The keystone of the SOLESNA laws, or, rather, their saving grace, is

247. DOJ Complaint, *supra* note 216, at 2–3.

248. This is known as “conflict preemption.” *See supra* note 19 and accompanying text.

249. Explicit preemption occurs where the plain language of a federal statute directly compels preemption. *See supra* note 17 and accompanying text.

250. Field preemption, a form of implied preemption, exists where a scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” *Rice*, 331 U.S. at 230.

251. The DOJ and ACLU complaints both attack on preemption grounds the invocation of an attrition-through-enforcement policy in SB 1070’s statement of intent. *See* SB 1070, 2010 Ariz. Sess. Laws 0113, *amended by* 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)); DOJ Complaint, *supra* note 216 at 14; ACLU Complaint, *supra* note 148, at 55 (describing the language as an “attempt[] to bypass federal immigration law and to supplant it with a state policy of ‘attrition through enforcement,’ in violation of the prohibition on state regulation of immigration”). The fact that both sets of plaintiffs seek to enjoin SB 1070’s initial statement of intent—a declaration of intent with no legal impact that does not compel any state action—speaks volumes, perfectly illustrating plaintiffs’ misunderstanding of both preemption standards and of the relationship between federal executive branch policy goals and the purposes and objectives of federal immigration legislation as set out by Congress. “Attrition,” so to speak, is Arizona’s desired result. “Enforcement” is the means of achieving that result. It is enforcement that constitutes the active effects of the SOLESNA laws, and unless the DOJ wishes to challenge the fact or potential existence of illegal alien attrition on its face—to challenge the very idea of a reduction of the illegal alien population in the United States as an objective contrary to the goals of Congress—it is the “enforcement” aspect of SOLESNA that is the rightful focus of the preemption inquiry.

This reasoning is adopted in part by the District Court that ultimately enjoined other portions of the Act. Injunction Order, *supra* note 217, at 993 (noting that “the Arizona Legislature is free to express its viewpoint and intention as it wishes, and [the statement of intent] has no operative function”).

252. DOJ Complaint, *supra* note 216, at 14.

253. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

the fact that they seek to employ *federal* determinations of unlawful presence.²⁵⁴ Contrary to ACLU claims,²⁵⁵ nearly all pertinent sections of the Act require that determinations of immigration status pursuant to enforcement be made by either federal immigration authorities or by law enforcement agents authorized by the federal government to perform this function.

The notable exception to this rule is SOLESNA's new warrantless arrest provision, allowing warrantless arrests where the suspect has "committed any public offense that makes the person removable from the United States."²⁵⁶ In drafting this provision, the Arizona legislature failed to include the specific language requiring an individual or agency with federal authority to make the determination of which public offenses qualify. As it stands, the plain language of the statute can be read to say that the officer making the arrest would make that determination. Local law enforcement who have not been delegated this power by federal authorities do not have the power or ability to fulfill this duty;²⁵⁷ as a result, the section 13-3883(5) warrantless arrest provision, as written, will most likely fail a preemption challenge.²⁵⁸

Otherwise, the new Arizona laws are faithful to the dictates of the Supremacy Clause and the goals of Congress. Far from instituting a preempted regulation of immigration, the bulk of the SOLESNA laws operate within the Constitution by mirroring—establishing state-level offenses consistent with federal

254. ARIZ. REV. STAT. ANN. §§ 11-1051(E), 13-1509(B), 13-2928(E), 13-2929(D) (2010). These sections provide that:

- In the enforcement of this section, an alien's immigration status may be determined by: (1) A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.
(2) The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code section 1373(c).

Id. In other words, immigration status for these purposes may be determined by a 287(g) officer acting under delegated federal authority or a federal authority itself. This language invokes 8 U.S.C. § 1373(c), which obligates federal immigration authorities to maintain records and respond to inquiries from any agent or agencies acting under color of law regarding an individual's immigration status.

255. The ACLU complaint repeatedly implies that the laws charge local law enforcement with making unilateral determinations of whether or not an individual is lawfully present. *See, e.g.*, ACLU Complaint, *supra* note 148, at 40–43.

256. ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2010).

257. Indeed, the task itself is daunting. The INA and associated acts have codified countless offenses that could render an individual removable; complicating matters, many of these are instance-specific and hinge upon the individual's circumstances and criminal history. *See, e.g.*, 8 U.S.C. § 1227 (2006) (delineating classes of deportable aliens).

258. This is the logic adopted by the District Court that enjoined this portion of the statute. *See* Injunction Order, *supra* note 217, at 1004–06 (observing that "[u]nder any interpretation of the revision to A.R.S. § 13-3883, it requires an officer to determine whether an alien's public offense makes the alien removable from the United States, a task of considerable complexity that falls under the exclusive authority of the federal government").

offenses²⁵⁹—and by mandating enforcement—requiring Arizona agencies to exercise their existing inherent authority to enforce criminal immigration law.²⁶⁰ Federal preemption under the Supremacy Clause occurs where the sub-federal law in question conflicts with federal or constitutional law. Laws mirroring the offenses and purposes of federal criminal-immigration statutes²⁶¹ advance, rather than conflict with, the purposes of the federal criminal law.

This is so even when the legislature behind a state-level enforcement effort affixes its own criminal penalty to conduct that already constitutes a federal offense. The SOLESNA “mirror laws” addressing alien registration, unlawful hiring or solicitation of work, and the knowing or reckless transportation, concealment, or harboring of an illegal alien all adopt state-level criminal penalties for conduct that would also constitute a federal crime.²⁶² Even so, Arizona’s decision to attach state-level criminal penalties to federal crimes is consistent with Congress’s objectives in creating those federal crimes.²⁶³ Where concurrent enforcement shares a compatible purpose with the emulated federal law, the imposition of distinct state-level sentences is permitted.²⁶⁴ For instance, the SOLESNA law pertaining to alien registration works concurrently with federal law by criminalizing noncompliance with federal registration statutes, conduct which itself makes the offender guilty of a federal misdemeanor.²⁶⁵ In general, state-level

259. States have the authority to enact laws that mirror federal criminal statutes. “Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized.” *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (citing *Fla. Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)).

260. See ARIZ. REV. STAT. ANN. § 11-1051 (2010) (requiring law enforcement to ascertain the immigration status of individuals under certain circumstances); see *supra* Part I (examining the inherent state authority to detain, question, and arrest for violations of federal criminal immigration law).

261. ARIZ. REV. STAT. ANN. § 13-1509 (2010) is a state-level codification of both 8 U.S.C. § 1304(e) (2006) and 8 U.S.C. § 1306(a) (2006), federal criminal statutes governing a legal alien’s willful failure to carry an immigration registration document and willful failure to complete an application for an immigration registration document, respectively. 8 U.S.C. § 1304(e) is a misdemeanor with a maximum sentence of thirty days or a \$100 fine, or both; 8 U.S.C. § 1306(a) is a misdemeanor with a maximum sentence of six months or a \$1000 fine, or both; and the Arizona law imposes its own misdemeanor penalty in addition to any federal penalties, with a maximum sentence of \$100 or twenty days for a first offense. ARIZ. REV. STAT. ANN. § 13-1509(H).

262. ARIZ. REV. STAT. ANN. §§ 13-1509, 13-2928, 13-2929 (2010). All three sections create Class One misdemeanors for violations of their provisions. *Id.*

263. In this context, the best analogy would be another anti-illegal immigration statute enacted in Arizona, the 2005 Human Smuggling Statute. ARIZ. REV. STAT. ANN. § 13-2319 (2008). This law is a state codification of provisions from the federal human smuggling statute, 8 U.S.C. § 1324 (2006). Like the SOLESNA mirror laws, the Arizona smuggling statute attaches its own criminal penalties (a violation is most commonly a Class Four felony). ARIZ. REV. STAT. ANN. § 13-2319(B); see *infra* notes 280–84 and accompanying text (discussing this law and its constitutionality).

264. *Arizona v. Barragan-Sierra*, 196 P.3d 879, 890 (Ariz. App. 2008); *We Are Am. v. Maricopa Cnty. Bd. of Supervisors*, 594 F. Supp. 2d 1104, 1111–14 (D. Ariz. 2009), *rev’d in part on other grounds*, 2010 WL 2781879 (9th Cir. 2010).

265. ARIZ. REV. STAT. ANN. § 13-1509 (criminalizing at the state level violations of 8 U.S.C. § 1304(e) and 8 U.S.C. § 1306(a)). Plaintiffs and scholars who favor preemption

efforts to advance federal goals in areas that Congress has not sought to occupy completely may naturally resort to appropriate criminal penalties for their deterrent value. This will continue to be the case unless and until Congress demonstrates that a “complete ouster of state power” was its “clear and manifest purpose.”²⁶⁶ And, once again, Congress has done no such thing. By design, the “mirror laws” incorporated into SOLESNA do not conflict with the (identical) purposes of the federal law, nor do they interfere with the punishment schemes in a manner that would warrant preemption.

Some have also criticized the SOLESNA provisions for a perceived ability to divert resources in a manner that may conflict with federal policy and purposes.²⁶⁷ These criticisms, however, are unfounded. SOLESNA will not compel federal authorities to respond to immigration status queries in an unconstitutional manner. Federal law already requires federal authorities to make this information available to sub-federal agencies upon request.²⁶⁸ Such cooperation was the obvious intent of Congress in passing that statute; it cannot be sincerely argued that full federal compliance with the laws of Congress would obstruct the purposes of Congress so as to render a state law preempted. Once again, this argument relies

have strained to compare this statute with the type that was deemed preempted by the Supreme Court in the seminal case *Hines v. Davidowitz*. See, e.g., Chin, et al., *supra* note 242, at 29–31 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (speculating that the SOLESNA alien registration provision could be an “additional or auxiliary regulation” as characterized in the *Hines* holding prohibiting state action regarding alien registration that would “conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations” in a manner “[inconsistent] with the purpose of Congress”). However, the Pennsylvania act that was held preempted in *Hines* is not comparable. In *Hines*, Pennsylvania adopted a state registration scheme in which aliens were required to, among other things, register annually with the State of Pennsylvania and pay yearly fees to its Department of Labor and Industry. *Hines*, 312 U.S. at 59–60. By comparison, the Arizona alien registration provision in § 13-1509 clearly does not create a state-level alien registration scheme, but instead requires adherence to the federal scheme with a milder penalty affixed in order to deter and punish noncompliance. Not only does this belie the notion that the Arizona statute is an “additional or auxiliary” regulation, it also casts grave doubt upon the idea that its enforcement would be “inconsistent with the purpose of Congress.” *Hines*, 312 U.S. at 67.

Even so, the *Hines* analogy was fully embraced by the district court that initially enjoined § 13-1509. See Injunction Order, *supra* note 217, at 998–99 (concluding that the Arizona law is an “additional or auxiliary” regulation that is “inconsistent with the purpose of Congress” because it “alters the penalties established by Congress under the federal registration scheme.”).

266. *DeCanas v. Bica*, 424 U.S. 351, 357 (1976) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1963)).

267. See, e.g., DOJ Complaint, *supra* note 216, at 18 (claiming that “[m]andatory state alien inspection schemes and attendant federal verification requirements will impermissibly impair and burden the federal resources[,] . . . will necessarily result in a dramatic increase in the number of verification requests being issued to DHS, and will thereby place a tremendous burden on DHS resources, necessitating a reallocation of DHS resources away from its policy priorities”); ACLU Complaint, *supra* note 148, at 55. The district court that issued the initial preliminary injunction also adopted this logic. See Injunction Order, *supra* note 217, at 995–98; *infra* note 273 and accompanying text.

268. 8 U.S.C. § 1373(c) (2006).

upon the baseless presumption that policy decisions made by the federal executive in this field constitute the “full purposes and objectives of Congress.” In any case, any increase in the number of immigration status queries that may result from the SOLESNA enforcement laws would be neither unmanageable nor disruptive.²⁶⁹ Further, there is no requirement that federal authorities accept transfer of illegal aliens arrested and convicted under these laws.²⁷⁰ The federal executive maintains complete discretion to decline to prosecute, punish, or remove any individual that LEAs may detain for ICE transfer.

Nevertheless, the early days of the SOLESNA laws were marked by substantial legal hurdles. The U.S. District Court in Arizona issued a preliminary injunction on portions of the Act the day before it was scheduled to go into effect, barring the enforcement of certain provisions of the SOLESNA laws.²⁷¹ Most prominently, the injunction postponed enforcement of key provisions of the cooperation mandate, citing what the court perceived to be potential burdens upon immigrants, citizens, and federal agencies. In enjoining the cooperation mandate,

269. In her sworn declaration in support of Arizona’s defense of the SOLESNA statutes, Jessica Vaughan of the Center for Immigration Studies (CIS) notes that an increase in LESC immigration status queries would complement the federal enforcement scheme without being unduly burdensome:

It is widely acknowledged that ICE must rely on referrals from local law enforcement agencies to locate and remove criminal aliens and investigate criminal cases involving foreign nationals [F]ederal immigration authorities cannot properly do their jobs without the active participation of local law enforcement, especially today, since ICE is focused nearly exclusively on removing illegal aliens who have committed other crimes In fact, ICE actively solicits cooperation with local law enforcement through a variety of programs and initiatives *The LESC was set up for the express purpose of responding to queries from other law enforcement agencies* Its mission has never included any language to suggest, and I have never heard any ICE official suggest, that any kind of query from a legitimate law enforcement encounter would be unwelcome, inappropriate or burdensome. In fact, several ICE field office managers have told me that in most cases they very much prefer that local agencies in their area of responsibility make the LESC their first point of contact for this purpose.

Jessica Vaughan, *Declaration in Support of Arizona Immigration Law SB1070*, CTR. FOR IMMIGR. STUD. ¶¶ 41–45 (July 2010), <http://www.cis.org/node/2115> (emphasis added). She further observes that, despite DOJ claims that the Arizona laws would overwhelm the LESC system, LESC traffic is currently well below capacity and, even if Arizona traffic were to double, it would still be nowhere near capacity. Importantly, she goes on to note that there is no reason to expect Arizona LESC traffic to increase greatly because the most heavily populated counties in Arizona already screen all individuals arrested and jailed as part of the Secure Communities initiative. *Id.* ¶¶ 50–56.

270. See Oscar Avila, *ICE Chief Criticizes Arizona Immigration Law*, ARIZ. REPUBLIC, May 19, 2010, <http://www.azcentral.com/news/articles/2010/05/19/20100519arizona-immigration-law-ICE-chief-opposes.html> (quoting the ICE Assistant Secretary as saying that the agency “will not necessarily process illegal immigrants referred to them by Arizona officials”); see also *supra* Part III (examining how ICE’s revised 287(g) priority scheme allows the agency discretion to accept only the transfers of its choosing).

271. See Injunction Order, *supra* note 217.

the court envisioned that such an enforcement scheme would impose an impermissible “possibility of inquisitorial practices and police surveillance.”²⁷² It also imagined that full exercise of Arizona’s inherent authority and police power would somehow overwhelm the LESC and associated federal agencies that were created to interact with LEAs on such issues.²⁷³ Additionally, the court enjoined the alien registration statute,²⁷⁴ the warrantless arrest power,²⁷⁵ and a provision of the prohibition on solicitation of roadside workers that was directed explicitly toward unauthorized workers.²⁷⁶

Nonetheless, it is clear that most of the SOLESNA laws enacted via Arizona SB 1070 and HB 2162 were crafted to withstand constitutional challenges. Despite legal setbacks, their merits and their lawfulness are self-evident; the majority of the SOLESNA statutes should prevail against legal challenges under current law. They have also demonstrated hardiness in the face of blistering criticism. Not only do the SOLESNA laws maintain a solid majority of public approval,²⁷⁷ but their popularity has also piqued the interest of legislators in other

272. Injunction Order, *supra* note 217, at 993–99 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941)). It must be noted that the court interpreted the language of ARIZ. REV. STAT. ANN. § 11-1051 to require LEAs to determine the immigration status of all persons arrested under any circumstances, regardless of the “reasonable suspicion when practicable” language present in the opening portion of the statute. It then considered this language to apply to all legal arrests, including offenses that would otherwise result in citation and immediate release. The court then concluded that this would extend detention time for arrestees and would “[increase] the intrusion of police presence into the lives of legally-present aliens (and even United States citizens), who will necessarily be swept up by this requirement.” See Injunction Order, *supra* note 217, at 16–19.

273. Injunction Order, *supra* note 217, at 995–98. Despite seeming adherence to the declaration of David Palmatier, Unit Chief of LESC, this argument is untenable. See Vaughan Declaration, *supra* note 269.

274. Injunction Order, *supra* note 217, at 998–99. *But see supra* note 265 and accompanying text.

275. Injunction Order, *supra* note 217, at 1004–06.

276. *Id.* at 1000–02 (concluding that ARIZ. REV. STAT. ANN. § 13-2928(c) (prohibiting unlawful workers from knowingly working or soliciting work in public places) is preempted because it conflicts with the comprehensive federal employment scheme created by IRCA).

277. According to Rasmussen polls, as many as 64% of Arizona voters approve of the new laws, 60% of voters nationally approve of the law, and 55% of voters would like a similar law to be passed in their own state. *Arizona Voters Favor Welcoming Immigration Policy, 64% Support New Immigration Law*, RASMUSSEN REPORTS (Apr. 28, 2010), http://www.rasmussenreports.com/public_content/politics/general_state_surveys/arizona/arizona_voters_favor_welcoming_immigration_policy_64_support_new_immigration_law; *Nationally, 60% Favor Letting Local Police Stop and Verify Immigration Status*, RASMUSSEN REPORTS (Apr. 26, 2010), http://www.rasmussenreports.com/public_content/politics/current_events/immigration/nationally_60_favor_letting_local_police_stop_and_verify_immigration_status; *55% Favor Immigration Law Like Arizona’s for Their State*, RASMUSSEN REPORTS (May 17, 2010), http://www.rasmussenreports.com/public_content/politics/current_events/immigration/55_favor_immigration_law_like_arizona_s_for_their_state.

states.²⁷⁸ SOLESNA-type laws that abolish sanctuary policies, mandate local enforcement of federal criminal immigration law, and establish state laws that mirror federal immigration crimes exemplify the attrition-through-enforcement model; they send a clear message to illegal aliens²⁷⁹ and are certain to be popular among opponents of illegal immigration.

b. Other Criminal Statutes Designed to Address Illegal Immigration

Another prominent manifestation of the “mirroring” strategy already in effect is the Arizona Human Smuggling Statute of 2005.²⁸⁰ The statute provides that it is “unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose.”²⁸¹ In referring to “the smuggling of human beings,” the construction of this statute avoids the use of any language implying that the human being to be smuggled is someone other than the offender. This has enabled prosecutors in Maricopa County, Arizona to prosecute individuals who pay smugglers for their own passage into the United States as conspirators under the human smuggling statute.²⁸² Courts have found that such prosecutions interpret the statute’s plain meaning in a permissible manner.²⁸³ Further, courts have held repeatedly that the law itself, its criminal penalties, and

278. Lawmakers in nearly a dozen states, including Colorado, Maryland, Missouri, North Carolina, and Ohio, have expressed interest in adopting similar laws to the ones adopted in Arizona. David A. Patten, *Arizona-Style Rebellions over Immigration Spread*, NEWSMAX.COM (May 5, 2010), <http://newsmax.com/Newsfront/arizona-immigration-states-illegal/2010/05/05/id/357991>; see also Michael W. Savage, *Oklahoma, South Carolina and Utah May Follow Arizona's Lead on Immigration Law*, WASH. POST, July 8, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/07/AR2010070703017.html>.

279. The SOLESNA laws seem to have had a practical effect upon illegal immigrant population levels even months before their effective date. See Amanda Lee Myers, *Illegal Immigrants Plan to Leave over Ariz. Law*, TULSA WORLD, Apr. 29, 2010, http://www.tulsaworld.com/news/article.aspx?subjectid=13&articleid=20100429_13_0_PO NXMn308677&allcom=1.

280. ARIZ. REV. STAT. ANN. § 13-2319 (2008).

281. *Id.* Smuggling of human beings is defined within the statute as “the transportation, procurement of transportation or use of property or real property by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state.” *Id.* § 13-2319(E)(3).

282. This policy was first implemented by former Maricopa County Attorney Andrew Thomas and has been repeatedly contested under preemption theories since its adoption shortly after enactment of the 2005 statute. See, e.g., *We Are Am. v. Maricopa Cnty. Bd. of Supervisors*, 594 F. Supp. 2d 1104, 1111–14 (D. Ariz. 2009), *rev'd in part on other grounds*, 2010 WL 2781879 (9th Cir. 2010); *We Are Am. v. Maricopa Cnty. Bd. of Supervisors*, 2007 WL 2775134, at *4–8 (D. Ariz. Sept. 21, 2007); *Barragan-Sierra*, 196 P.3d 879 (Ariz. App. 2008); *Arizona v. Salazar*, C.R. 2006-005932-003DT, Slip Op. at 7 (Ariz. Super. Ct. June 9, 2006).

283. *Barragan-Sierra*, 196 P.3d at 885–86.

its interpretation to include the illegal entrant as a conspirator, are not preempted by federal law.²⁸⁴

Laws related to identity theft and false documents also have a role to play in providing a state-level criminal law deterrent for illegal immigration.²⁸⁵ Identity theft often goes hand-in-hand with illegal immigration and attempts by unauthorized workers to seek employment in the United States.²⁸⁶ States that are cognizant of the connection between illegal immigration, illegal employment, and document fraud can enact or expand criminal statutes to target illegal aliens who use false documents. Arizona, for instance, has criminalized the “[a]ggravated taking [of the] identity of another person or entity.”²⁸⁷ The statute penalizes the taking, purchase, creation, possession, or use of the identity or identifying information of another person, real or fictitious, *with the intent of gaining employment*.²⁸⁸

As the effects of the undermining of the 287(g) program are felt in communities that previously used it to enforce immigration law within their jurisdictions, legislatures looking to curb the growth of illegal alien populations will continue to embrace state-level criminal laws that can be used to prosecute offenses relating to illegal immigration. The trends toward enacting such laws will continue to accelerate²⁸⁹ in response to the enfeebling of the 287(g) partnership. Further, states and localities would be wise to explore various forms of civil regulations designed to disincentivize illegal immigration within their borders.

2. State Regulations Designed to Discourage Illegal Immigration

States tasked with deterring illegal immigration without the benefit of an effective and comprehensive 287(g) partnership can also look to enacting various civil regulations. Passage of these laws can both dissuade potential illegal immigration and encourage already-present illegal alien populations to self-deport.²⁹⁰ The most effective strains of these regulations will target the employment of illegal aliens.

284. *We Are Am.*, 594 F. Supp. 2d at 1111–14 (holding that federal law does not preempt the Arizona human smuggling statute under field preemption theory); *Barragan-Sierra*, 196 P.3d at 889–91 (finding that the human smuggling statute is not preempted under any of the three preemption theories on its face or in practice).

285. State legislative data also shows an accelerating trend toward enacting document-and-identification-related laws that target illegal immigration. *See, e.g.*, NCSL 2005, *supra* note 190; NCSL 2006, *supra* note 190; NCSL 2007, *supra* note 190, at 16–20; NCSL 2008, *supra* note 190, at 10–15; NCSL 2009, *supra* note 189 (listing the number and nature of immigration-related document and identification laws enacted in their respective years).

286. *Kobach*, *supra* note 82, at 477.

287. ARIZ. REV. STAT. ANN. § 13-2009 (2007). This statute has not been challenged in Arizona courts.

288. *Id.* § 13-2009(A)(3).

289. *See supra* note 190.

290. *See supra* Part II.B (discussing self-deportation and the attrition-through-enforcement model).

Most illegal immigration is committed in pursuit of employment. Eliminating the employment incentive in a locality will invariably reduce the illegal alien population in that community.²⁹¹ Federal law already prohibits the hiring of legal or illegal aliens who are not authorized to accept the employment in question.²⁹² Enforcement, however, is inconsistent, and the ubiquity of false documents undermines federal attempts to implement the enacted regulations. A “knowing” element in the statute,²⁹³ combined with a general inability on the part of employers to identify false documents, makes for a lax enforcement situation.²⁹⁴ Unsurprisingly, federal law and authorities are ill-equipped to handle the unauthorized employment problem.

This is an area where states and localities can drastically improve the illegal immigration situation in their jurisdictions. States can pass laws that improve upon employment regulations within their borders.²⁹⁵ Arizona, for instance, has criminalized the knowing or intentional employment of unauthorized alien workers.²⁹⁶ Arizona also requires all employers to use the federal E-Verify program²⁹⁷ to confirm that all new hires are lawfully employable in the United States.²⁹⁸ Penalties for offenses under the Legal Arizona Workers Act (LAWA) are harsh. The penalty for an initial LAWA violation is a three-year probation period and a suspension of business licenses for a maximum of ten business days.²⁹⁹ A second LAWA violation while under the probation provision results in *permanent* revocation of business licenses.³⁰⁰

This groundbreaking law has faced and withstood multiple challenges in court.³⁰¹ Courts tasked with scrutinizing LAWA have held that the Act is not an unconstitutionally preempted attempt to regulate immigration at the state level.³⁰²

291. Kobach, *supra* note 82, at 470–71.

292. Immigration Reform and Control Act, 8 U.S.C. § 1324a (2006). The provisions therein were codified in the INA as part of the 1986 Immigration Reform and Control Act.

293. *Id.* § 1324a(a)(1)(A).

294. Kobach, *supra* note 82, at 471.

295. See *DeCanas v. Bica*, 424 U.S. 351 (1976); *supra* notes 21–27 and accompanying text.

296. ARIZ. REV. STAT. ANN. § 23-212 (2010). Known as the Legal Arizona Workers Act, this statute represents one of the nation’s most aggressive employment regulations systems pertaining to illegal aliens. Kobach, *supra* note 82, at 471.

297. E-Verify is an automated online system operated by DHS that checks federal employment eligibility records to confirm that a given worker is lawfully employable in the United States. See *E-Verify*, DEP’T HOMELAND SEC., http://www.dhs.gov/files/programs/ge_1185221678150.shtm (last visited Feb. 20, 2010).

298. ARIZ. REV. STAT. ANN. § 23-212(I)–(J) (2010).

299. *Id.* § 23-212(F)(1).

300. *Id.* § 23-212(F)(2).

301. See, e.g., *Ariz. Contractors Ass’n. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008); *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted*, 130 S.Ct. 3498 (2010).

302. *Candelaria*, 534 F. Supp. 2d at 1044–47, 1051–57 (noting that “[f]ederal policy encourages the utmost use of E-Verify The Act’s requirement that Arizona employers use E-Verify therefore does not actually conflict with Congress’ objectives.”); *Chicanos Por La Causa*, 558 F.3d at 864–67. It is important to note, as the 9th Circuit

Specifically, courts have consistently held that the Act is not preempted by employment regulations contained in the Immigration Reform and Control Act (IRCA)³⁰³ because licensing provisions are specifically exempted from preemption under an IRCA savings provision that explicitly provides for sanctions “through licensing and similar laws.”³⁰⁴ However, in spite of the savings clause that gives states the express authorization to pass licensing laws punishing employers of unlawful workers, the plaintiffs in one suit have petitioned for and received certiorari for the express preemption issue to appear before the Supreme Court.³⁰⁵

Arizona’s success with this employment law is well documented.³⁰⁶ Following suit, Mississippi enacted an analogous employment law of its own.³⁰⁷ In light of the neutering of the 287(g) program, this trend can be expected to continue. Where states and localities are unable to avail themselves of a functional federal partnership to enforce criminal immigration law and to deter generalized illegal immigration in their jurisdictions, prudent legislatures and enforcement authorities will increasingly adopt employer sanction laws similar to LAWA as a means to discourage localized illegal immigration at the state level.

CONCLUSION

The causal and reciprocal relationships between the 2009 287(g) policy shift and the emergence of inherent-authority immigration enforcement laws like Arizona’s SOLESNA are fascinating to behold. It was a desire to rein in state and local immigration efforts with a uniform policy of selective enforcement that gave birth to the federal policy modifications; but it was that same desire and that same policy that would prove to be the harness against which states would buck by resorting to sub-federal immigration measures. And just as the federal executive’s ambition to focus immigration efforts upon “dangerous criminal aliens” to the detriment of general enforcement is what spurred the 287(g) modifications, the

comments in *Chicanos Por La Causa*, that mandating use of the federal E-Verify program is not a “regulation of immigration” for purposes of preemption. *Chicanos Por La Causa*, 558 F.3d at 866 (observing that “the Act does not attempt to define who is eligible or ineligible to work under our immigration laws It is premised on enforcement of federal standards as embodied in federal immigration law [T]he Act is a ‘licensing’ measure that falls within the savings clause of IRCA’s preemption provision.”).

303. 8 U.S.C. § 1324a (2006).

304. *Id.* § 1324a(h)(2). The statutory language addressing preemption reads: “The provisions of this section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” *Id.* (emphasis added); see *Chicanos Por La Causa*, 558 F.3d at 864–65; *Candelaria*, 534 F. Supp. 2d at 1045–46.

305. *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted*, 130 S.Ct. 3498 (2010).

306. See, e.g., Kobach, *supra* note 82 at 472; Randal C. Archibold, *Arizona Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, <http://www.nytimes.com/2008/02/12/us/12arizona.html>. The success of LAWA has been rooted in its deterrent effect; actual employer sanctions under the act have been issued infrequently since its inception in 2007.

307. MISS. CODE ANN. § 71-11-3 (2010).

very fact of that ambition is now the administration's rationale for preemption and invalidation of Arizona's SOLESNA laws.

The Obama Administration's adoption of a selective-enforcement scheme has proven to be a flawed policy decision that has failed to satisfy even its own narrow objectives. By prioritizing its immigration enforcement efforts in a manner that concerns itself primarily and perhaps exclusively with certain classes of illegal aliens, the federal executive has left the local enforcement programs within its influence impotent, their utility seriously limited by the prioritized enforcement schemes. Despite the well-publicized problems and legitimate criticisms of the 287(g) program, the old version of the program offered a flexible and functional means for local law enforcement to work in cooperation with ICE to limit the general population of illegal aliens in their communities.

The gelded version offers no such aid. The priority schemes have removed nearly all of the unique benefits that 287(g) agreements previously held, rendering the program significantly weakened and substantially redundant. LEAs engaged in up-to-date 287(g) agreements no longer have the broad power to initiate removal proceedings against the larger class of aliens that would not normally be identified and removed absent the partnership. Nevertheless, it remains the federal executive's aim to saddle all local immigration efforts with its own discretionary enforcement policies, regardless of their ill effects and regardless of its lack of constitutional authority to do so.

Above all else, the Obama Administration's antagonism toward the SOLESNA laws and their attrition-through-enforcement roots speaks eloquently of its policy positions and of the immigration-enforcement path upon which it has embarked. By taking the position that its own executive discretion policies and selective enforcement schemes are tantamount to congressional intent so as to embody the unassailable "supreme Law of the Land," the Department of Justice under the Obama Administration attempts to supplant the sovereign state police power to act in a manner consistent with federal criminal immigration laws and to replace it with a binding, top-down policy that prioritizes apprehension and removal of some classes of aliens while neglecting others in a manner wholly inconsistent with the attrition-through-enforcement interests of countless states and communities. By attacking the attrition-through-enforcement philosophy on its face, the DOJ and other SOLESNA plaintiffs attack both the idea that immigration enforcement taken to its legal threshold can result in a reduction in the size of illegal-alien communities and the idea that such a result is desirable. If, after the 2009 287(g) modifications, the states and the American public needed any additional indication that the Obama Administration is disinterested in doing one iota more than the bare minimum to maintain the illegal-immigration status quo, they need look no further than the Department of Justice's lawsuit seeking to enjoin the entirety of SOLESNA as contrary to federal goals and interests.

State and local authorities will continue to seek alternative means to minimize illegal immigration in their communities, and the documented successes of sub-federal laws will not go unnoticed. As the federal executive persists in its quest to impose harmful and ineffective selective enforcement schemes upon all parties who attempt to enforce criminal immigration law, controversial criminal

enforcement laws like those enacted by SOLESNA will only become more popular, and sub-federal regulations monitoring the employment of illegal aliens will continue to deter illegal immigration and disincentivize illegal presence. In lieu of effective 287(g) partnerships, more LEAs and legislatures will likely follow the lead of states like Arizona and exercise their inherent authority to reduce the illegal alien populations in their communities without the hindrance of a selective enforcement policy developed and implemented from Washington, D.C.
