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THE ROAD TO S.B. 1070: HOW ARIZONA BECAME GROUND ZERO FOR THE IMMIGRANTS' RIGHTS MOVEMENT AND THE CONTINUING STRUGGLE FOR LATINO CIVIL RIGHTS IN AMERICA

Kristina M. Campbell¹

INTRODUCTION

When Arizona Governor Janice K. Brewer signed into law the Support Our Law Enforcement and Safe Neighborhoods Act—better known as S.B. 1070²—in April 2010, the world was taken aback not only by the State of Arizona's brazen attempt to regulate immigration at the state level, but also by the means it authorized for doing so. By giving state and local law enforcement officials the responsibility to detain persons whom they have "reasonable suspicion" to believe are unlawfully present,³ the Arizona immigration law was branded "the toughest immigration law in the country."⁴ It was heavily criticized as a law whose enforcement would rely on racial profiling of Latinos and other racial minorities and that would require anyone to produce proof of citizenship to law enforcement officers on demand.⁵

Although S.B. 1070 took many by surprise, residents of the State of Arizona and other observers of Arizona state politics are keenly aware that

¹ Assistant Professor of Law and Director, Immigration and Human Rights Clinic, University of the District of Columbia David A. Clarke School of Law. B.A., Saint Mary's College, 1997; J.D., Notre Dame Law School, 2002. This Article draws on some of my previous observations regarding Arizona's growing anti-immigrant sentiment and its attempt to regulate immigration at the state level over the past decade, *Imagining a More Humane Immigration Policy in the Age of Obama: The Use of Plenary Power to Halt the State Balkanization of Immigration Regulation*, 29 ST. LOUIS U. PUB. L. REV. 415 (2010) and *The High Cost of Free Speech: Anti-Solicitation Ordinances, Day Laborers, and the Impact of 'Backdoor' Local Immigration Regulations*, 25 GEO. IMMIGR. L.J. 1 (2010).

² See 2010 Ariz. Sess. Laws 113.

³ See *id.*

⁴ See, e.g., Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, available at http://www.nytimes.com/2010/04/24/us/politics/24immig.html?_r=1&hp ("[P]roponents and critics alike said [the Arizona law] was the broadest and strictest immigration measure in generations . . .").

⁵ There is no law that requires U.S. citizens to carry proof of citizenship with them or to present their citizenship documents to law enforcement officers, and opponents of S.B. 1070 have argued that the law will be disproportionately and discriminatorily enforced against persons of color. See, e.g., John Merline, *Opinion Roundup: Ariz. Immigration Lawsuit's Uncertain Future*, AOL NEWS (July 7, 2010), <http://www.aolnews.com/article/opinion-roundup-the-arizona-immigration-lawsuits-uncertain-fut/19545017> (quoting different experts' opinions about the merits of S.B. 1070 and the likelihood of success of the government's legal challenge to the law).

its passage by the Arizona legislature and its signing by Governor Brewer were in the making for the better part of the last decade. Beginning with the approval of Proposition 200 in 2004—a ballot initiative formally known as the Arizona Taxpayer and Citizen and Protection Act that prohibited undocumented persons from voting and receiving access to state and local public benefits⁶—Arizona state legislators and anti-immigrant groups joined in a concerted effort to enact more than half a dozen laws designed to regulate immigration and punish undocumented immigrants in the State of Arizona. While the anti-immigrant fervor in Arizona reached a crescendo with the enactment of S.B. 1070, its passage represents merely the codification of a long-standing scheme designed to spur “attrition through enforcement”⁷ of undocumented immigrants in the State of Arizona—particularly in Phoenix, the state capitol and the county seat of Maricopa County, which is home to more than three-fifths of the state’s population and is under the jurisdiction of the notorious Sheriff Joe Arpaio.⁸

This Article examines the road leading to the passage of S.B. 1070 in early 2010 and attempts to demonstrate how it and other state immigration laws purporting to be legitimate exercises of governmental authority are, in fact, tools of oppression, racism, and xenophobia, particularly against Latinos. In reviewing the state immigration laws that preceded S.B. 1070, this Article argues that by using alienage as a proxy for race, color, and national origin, Arizona’s attempt to regulate immigration at the state level is a form of legitimized vigilantism designed to purge the State of Arizona not only of undocumented persons, but of all persons who are or appear to be of Latino heritage, through racial profiling by state and local law enforcement.

Part I provides an overview of the pre-S.B. 1070 immigration regulations enacted in Arizona during the 2000s, either by the Arizona legislature or through the approval of ballot initiatives by Arizona voters. Part II discusses how this assault on the rights of Latino immigrants and citizens in the State of Arizona has given rise to a powerful grassroots response by Latinos and their allies demanding *jya basta!*⁹ against civil and human rights abuses. In light of this response, this Article examines how Arizona has transformed from a place where immigrants and Latinos suffered in relative silence into a home of a vocal, passionate group of advocates whose activism has made

⁶ See ARIZ. SEC’Y OF STATE, ARIZONA 2004 BALLOT PROPOSITIONS: PROPOSITION 200 (2004), <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.pdf>.

⁷ See Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT’L L. 155 (2008); see also 2010 Ariz. Sess. Laws 113 § 1 (“The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. *The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona.*”) (emphasis added), <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>.

⁸ See U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS: MARICOPA COUNTY, ARIZONA, <http://quickfacts.census.gov/qfd/states/04/04013.html> (last modified Nov. 4, 2010) (In 2009, 4,023,132 of Arizona’s 6,595,778 residents lived in Maricopa County, which accounts for nearly sixty-one percent of the state population).

⁹ Spanish for “enough!”

Phoenix the modern-day Selma in the struggle for immigrant and Latino civil rights in America. Finally, in Part III, it examines the landscape for state and local anti-immigrant regulations in the United States post-S.B. 1070 and offers a prognostication regarding the outcome of the continuing fight for immigrants' rights and Latino civil rights in America.

I. A GATHERING STORM: ANTI-IMMIGRANT LAWS IN ARIZONA, 2004-2010

Long before the enactment of S.B. 1070 thrust Arizona onto the national scene as a symbol of enforcement-only immigration policy, the state had already become the site of a growing effort by local legislators, politicians, and anti-immigrant groups to regulate the benefits, privileges, and rights available to undocumented persons on the state and local level. While many of the laws passed by the Arizona legislature or approved by voters as ballot initiatives were arguably just as mean-spirited—as well as constitutionally suspect—as S.B. 1070, they were implemented with little criticism or fanfare aside from a handful of lawsuits filed by civil rights groups such as the American Civil Liberties Union (ACLU) and the Mexican American Legal Defense and Educational Fund (MALDEF).¹⁰ As such, by the time S.B. 1070 arrived on Governor Brewer's desk for her signature in April 2010, over half a dozen laws restricting the rights of undocumented persons, either by statute or amendments to the Arizona Constitution,¹¹ were already in place in the State of Arizona.¹² This section will give an overview of the most significant anti-immigrant laws enacted in Arizona prior to the approval of S.B. 1070.

A. *Ballot Initiatives*

1. *Proposition 200*

Arizona's first successful anti-immigrant ballot initiative, Proposition 200,¹³ was approved by a majority of voters statewide in November 2004.¹⁴ It was modeled after California's Proposition 187, a statewide ballot initia-

¹⁰ Other notable exceptions to the general antipathy surrounding the steadily growing effort to codify discrimination against undocumented persons have been the grassroots efforts of the Latino community in Arizona, particularly the work of groups such as Somos America/We Are America and the Los Abogados Hispanic Bar Association of Arizona. See *infra* II.A., II.C.

¹¹ Many of the ballot initiatives directed at restricting the rights and privileges of undocumented persons, most notably Propositions 100, 102, and 200, amended the Arizona Constitution to provide *less* state constitutional protections to persons without legal immigration status. See *infra* I.A.2, I.A.3, I.A.1.

¹² *Id.*

¹³ Proposition 200 was ultimately codified as Arizona Revised Statutes § 46-140.01 and amended Arizona Revised Statutes §§ 16-152, 16-166, 16-579. See ARIZ. SEC'Y OF STATE, *supra* note 6, at 41.

tive passed by voters in 1994 that sought to prohibit undocumented people in California from receiving myriad public benefits and services, including the availability of public school for undocumented children.¹⁵ While not as far-reaching as Proposition 187,¹⁶ Proposition 200 also restricts the availability of state and local public benefits for undocumented persons and requires state and local government employees to verify the immigration status of all people seeking to obtain such benefits.¹⁷ The law also contains a controversial (and only recently defunct) “Voter ID” provision, which requires voters in Arizona to proffer proof of citizenship at the time they register to vote.¹⁸

Knowing that Proposition 187 was enjoined as unconstitutional before it could ever be enforced,¹⁹ the drafters of Proposition 200 were careful to write a law that would serve their intended purpose (prohibiting undocumented persons from receiving state and local public benefits in the State of Arizona) without running afoul of the U.S. Constitution.²⁰ Despite vigorous challenges to Proposition 200, including two lawsuits alleging its unconstitutionality filed in the U.S. District Court for the District of Arizona and appealed to the Ninth Circuit, *Friendly House v. Napolitano*²¹ and *Gonzalez v. Arizona*,²² both the federal courts and the Democratic Attorney General of

¹⁴ Proposition 200 was approved by fifty-six percent of the voters in Arizona’s 2004 general election. See Nat’l Immigr. Forum, *2004 Election Analysis: Arizona’s Proposition 200 1* (2004), <http://www.immigrationforum.org/images/uploads/AZProp200Analysis.pdf>.

¹⁵ See *Prop. 187 Approved in California*, MIGRATION NEWS (Dec. 1994) http://migration.ucdavis.edu/mn/comments.php?id=492_0_2_0_C.

¹⁶ Most notably, Proposition 200 does not prohibit undocumented children from attending public schools in Arizona, a requirement that would have almost undoubtedly been unconstitutional under the U.S. Supreme Court’s decision in *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down a Texas statute prohibiting undocumented children from attending public school on the grounds that undocumented immigrant children have an equal protection right to receive a free public education, notwithstanding the financial burden to the State of Texas imposed by such a requirement). However, there have recently been renewed efforts at the local level to verify the U.S. citizenship of children enrolled in Arizona schools. See Suzy Khimm, *Arizona’s Next Target: ‘Student’ Amnesty?*, MOTHER JONES, May 14, 2010, available at <http://motherjones.com/mojo/2010/05/arizona-students-illegal-immigrants>.

¹⁷ See ARIZ. REV. STAT. ANN. § 46-140.01 (2011) (West).

¹⁸ See Michelle Ye Hee Lee, *Appeals Court Strikes Down Voter ID Law*, ARIZ. REPUBLIC, Oct. 27, 2010, available at <http://www.azcentral.com/arizonarepublic/news/articles/2010/10/27/20101027voters1027.html>.

¹⁹ See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786 (C.D. Cal. 1995). The district court permanently enjoined several provisions of Proposition 187 as preempted by federal law. While the state initially appealed that decision to the Ninth Circuit Court of Appeals, after Governor Gray Davis took office in 1999, the state refused to defend the law and the appeal was voluntarily dismissed before the appeals court rendered a decision. See Patrick J. McDonnell, *Davis Won’t Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999, available at <http://articles.latimes.com/1999/jul/29/news/mn-60700>.

²⁰ As with Proposition 187, the major concern regarding the constitutionality of Proposition 200 was the claim by the law’s opponents that it was preempted by the U.S. Constitution as an impermissible state regulation of immigration. Therefore, the ballot initiative was carefully written to fall within the federal laws restricting public benefits to undocumented aliens contained in 8 U.S.C. § 1621 et. seq. See ARIZ. SEC’y OF STATE, *supra* note 6, at 46 (statement of Rachel Alexander, Phoenix Attorney & Editor, IntellectualConservative.com).

²¹ 419 F.3d 930 (9th Cir. 2005).

²² 485 F.3d 1041 (9th Cir. 2007).

Arizona, Terry Goddard,²³ determined the law to be constitutional on its face. Emboldened by the success of Proposition 200 with both the voting public and the federal courts, politicians and special-interest groups with an anti-immigrant and anti-Latino agenda continued to draft both legislation and ballot initiatives designed to regulate immigration at the state and local level. Led by Arizona State Senator Russell Pearce, who would later achieve national notoriety as one of the primary authors of S.B. 1070,²⁴ these groups ultimately won approval of three more statewide anti-immigrant ballot initiatives in 2006—Proposition 100, Proposition 102, and Proposition 300.²⁵

2. *Proposition 100*

Proposition 100, approved by an overwhelming majority of Arizona voters in November 2006,²⁶ amended Article II, Section 22 of the Arizona Constitution to prohibit bail for persons charged with certain felonies believed to be undocumented immigrants.²⁷ Proposition 100 makes persons accused of low-level felonies, such as forgery, categorically ineligible for bond.²⁸ However, perhaps the most disturbing aspect of Proposition 100 is that when requesting that persons be held without bail pursuant to Proposition 100, prosecutors need not proffer more evidence than their “belief” that the defendant is undocumented—which, in the case of persons being held without bond on forgery charges, is often based on nothing more than the arresting officer’s suspicion that the identification produced by the defendant is false. Although an individual held without bond pursuant to Proposition 100 has the opportunity to request a hearing challenging the magistrate’s

²³ In an advisory opinion, Attorney General Goddard determined that “[the programs] subject to Proposition 200 are those within Title 46 that are subject to eligibility restrictions in 8 U.S.C. § 1621.” State and Local Public Benefits Subject to Proposition 200, Op. Att’y Gen. No. I04-010 (R04-036) (2004), available at <http://www.azag.gov/opinions/2004/I04-010.pdf>.

²⁴ Pearce collaborated on the language of S.B. 1070 with law professor and Federation for American Immigration Reform (FAIR) counsel, Kris Kobach. See, e.g., Marcia Coyle, *The Law Professor Behind the Arizona Immigration Law*, NAT’L L.J., May 3, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202457530844>.

²⁵ See *infra* I.A.2, I.A.3, I.A.4.

²⁶ Nearly seventy-eight percent of Arizona voters voted “yes” on Proposition 100. See Ariz. Sec’y of State’s Office, *2006 General Election (Unofficial Results): Proposition 100, Bailable Offenses*, AZSOS.GOV, <http://www.azsos.gov/results/2006/general/BM100.htm> (last modified Nov. 28, 2006).

²⁷ Proposition 100 amended Article II of the Arizona Constitution to read:

All persons charged with crime shall be bailable by sufficient sureties, except for: . . . serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge . . .

ARIZ. CONST. art. II, § 22(A). Following the approval of Proposition 100, Arizona Revised Statutes § 13-3961 was amended to define “serious felony offenses” as follows: “A serious felony offense if the person has entered or remained in the United States illegally. For the purposes of this paragraph . . . (b) “serious felony offense” means any class 1, 2, 3 or 4 felony or any violation of section 28-1383.” ARIZ. REV. STAT. ANN. § 13-3961(A)(5) (2011) (West).

²⁸ Forgery is a Class 4 felony in Arizona. See ARIZ. REV. STAT. ANN. §13-2002(C) (2011) (West).

determination that he is ineligible for bond under the Arizona Constitution,²⁹ the prevailing practice in Arizona is that court-appointed defense counsel are not provided to persons who request such a hearing at their initial appearance.³⁰

Two separate challenges to the constitutionality of Proposition 100 have yielded few results thus far. In the first lawsuit, *Hernandez v. Lynch*,³¹ the Arizona Court of Appeals ruled that Proposition 100 was constitutional.³² Shortly thereafter, the ACLU and MALDEF filed another lawsuit challenging the constitutionality of Proposition 100 in the U.S. District Court for the District of Arizona, *Lopez-Valenzuela v. Maricopa County*.³³ Nearly two years following the initiation of the *Lopez-Valenzuela* litigation, the case remains pending before Judge Susan Ritchie Bolton,³⁴ and the law has remained in effect throughout the pendency of the constitutional challenge.³⁵ A hearing on cross-motions for partial summary judgment in this litigation was held on December 13, 2010, and the matter was taken under advisement by Judge Bolton.³⁶ It remains unclear how many persons have been denied bond pursuant to Proposition 100 and how many of those persons actually had lawful immigration status at the time of their detention.

3. *Proposition 102*

Another anti-immigrant ballot initiative passed in 2006: Proposition 102 garnered the approval of more than seventy-four percent of Arizona voters.³⁷ Like Proposition 100, Proposition 102 amended the Arizona Constitution to deprive persons alleged to be undocumented immigrants the right to seek punitive damages in a civil lawsuit filed in the State of Arizona. The passage of Proposition 102 added Section 35 to Article II of the Arizona Constitution, which is titled “Actions by Illegal Aliens Prohibited” and

²⁹ In Arizona, this is called a “Simpson Hearing” based on the Arizona case *Simpson v. Owens*, 85 P.3d 478 (Ariz. Ct. App. 2004).

³⁰ See Comment by Ariz. Pub. Defender Ass’n, In the Matter of July 3, 2007 Order Amending Rules 4.2, 7.2, 7.4, 27.7 and 31.6, Rules of Criminal Procedure, to the Supreme Court of the State of Arizona 2 n.2 (2007) (“Other than Pima and Pinal Counties, none of the other jurisdictions have court-appointed counsel available for IAs at this time. Even when counsel is present, the courts have not enabled them to meet with defendants prior to their interviews with pretrial services agencies and have not permitted them to have an active role in preparing for or participating in hearings regarding Proposition 100 issues.”).

³¹ 167 P.3d 1264 (Ariz. Ct. App. 2007).

³² *Id.* at 1275.

³³ No. 2:08-cv-00660 (D. Ariz. filed April 4, 2008).

³⁴ The S.B. 1070 litigation is also before Judge Bolton. See *United States v. Arizona*, 703 F.Supp.2d 980 (D. Ariz. 2010).

³⁵ Plaintiffs did not seek a preliminary or permanent injunction prohibiting enforcement of Proposition 100 during the pendency of the litigation.

³⁶ *Lopez-Valenzuela v. Maricopa Cnty.*, No. 2:08-cv-00660-SRB (D. Ariz. Dec. 13, 2010) (order taking under advisement plaintiffs’ motion for summary judgment and defendants’ motion for partial summary judgment).

³⁷ See Ariz. Sec’y of State, *2006 General Election (Unofficial Results): Proposition 102, Standing in Civil Actions*, Azsos.gov, <http://www.azsos.gov/results/2006/general/BM102.htm> (last modified Nov. 28, 2006).

states: “A person who is present in this state in violation of federal immigration law related to improper entry by an alien shall not be awarded punitive damages in any action in any court in this state.”³⁸

Like most other anti-immigrant ballot initiatives in Arizona, Proposition 102 was authored by Russell Pearce.³⁹ Mr. Pearce stated in 2006 his motivation for seeking to place this ballot initiative before Arizona voters as follows:

It makes no sense for a person who breaks the law by illegally entering and remaining illegally in the United States to profit from a civil proceeding. Plain and simple: courts of law should not reward lawbreakers. We discourage illegal immigration when it is broadly known that the courts of Arizona will not overlook any person’s illegal status. By enacting this referendum we discourage illegal aliens from suing American citizens with the expectation of receiving big rewards.⁴⁰

To date, the practical effect of this amendment to the Arizona Constitution has yet to be determined.⁴¹ However, like the anti-immigrant laws in Arizona that came before and after it, Proposition 102 was plainly motivated by a desire to punish persons unlawfully present in the State of Arizona by seeking to deprive them of rights and privileges afforded to other people in the jurisdiction.

4. *Proposition 300*

Rounding out the trio of anti-immigrant ballot initiatives approved by Arizona voters in 2006 is Proposition 300, which prohibits undocumented persons enrolled in Arizona public community colleges and universities from benefitting from in-state tuition rates, receiving financial aid, or participating in adult education classes.⁴² The resulting laws, A.R.S. 15-1825 and

³⁸ See ARIZ. CONST. art. II, § 35, available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/const/2/35.htm>.

³⁹ See *About Russell*, ARIZ. ST. SENATOR RUSSELL PEARCE, www.russellpearce.com (follow “About” hyperlink; then “Bio” hyperlink) (last visited Apr. 19, 2011) (“In ’06 I [a]uthored Proposition 102 to require that any illegal alien who sues an American [c]itizen cannot receive ANY punitive damages (passed by 75%)”). Despite Mr. Pearce’s description of his own legislation, it should be noted that Article II, Section 35 of the Arizona Constitution prohibits the recovery of punitive damages by an undocumented person in “any action in any court in this state,” not merely those suits brought against “American [c]itizen[s].” ARIZ. CONST. art. II, § 35, available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/const/2/35.htm>.

⁴⁰ See ARIZ. SEC’Y OF STATE’S OFFICE, 2006 BALLOT PROPOSITION GUIDE: PROPOSITION 102 (2006), http://www.azsos.gov/election/2006/Info/PubPamphlet/Sun_Sounds/english/prop102.htm (Arguments “for” Proposition 102).

⁴¹ To date, there have been no challenges to the constitutionality of Proposition 102.

⁴² See ARIZ. SEC’Y OF STATE, 2006 BALLOT PROPOSITIONS & JUDICIAL PERFORMANCE REVIEW: PROPOSITION 300 (2006), <http://www.azsos.gov/election/2006/info/PubPamphlet/english/Prop300.htm>.

A.R.S. 15-1803, also require educational institutions to verify and report the immigration status of students enrolled in their schools each year.⁴³

Like Proposition 102, Proposition 300 has not been challenged since its approval in 2006. Although the California Supreme Court recently upheld the constitutionality of its in-state tuition waiver statute for non-California residents attending state colleges and universities,⁴⁴ it is unlikely that a suit seeking to require Arizona to allow undocumented students to pay in-state tuition would be successful.⁴⁵ With the defeat of the DREAM Act by Congress in the winter of 2010⁴⁶ and comprehensive federal immigration reform appearing more unlikely by the day, the implementation of Proposition 300 means that higher education will continue to be cost-prohibitive for undocumented students in Arizona for the foreseeable future.

B. Statewide Legislation

1. State Anti-Human Smuggling Law

One state regulation of immigration, Arizona's anti-human smuggling law, A.R.S. § 13-2319, initially had bipartisan support in the Arizona legis-

⁴³ See *Background, Legislative Requirements and FAQ (Proposition 300)*, ARIZ. STATE U., <http://students.asu.edu/prop300background> (last visited Apr. 19, 2011).

Each community college and state university are [sic] required to report to the Joint Legislative Budget Committee the following on December 31 and June 30 of each year: the number of students entitled to classification as an [sic] in-state student and the number of students not entitled to in-state classification because the student was not a citizen or legal resident or is without lawful immigration status [sic] and the number of students who applied and the number of students who were not entitled to tuition waivers, fee waivers, grants, scholarship assistance, financial aid, tuition assistance or any other type of financial assistance that is funded in whole or in part with state monies because the student was not a citizen or legal resident is [sic] not lawfully present in the United States.

Id.

⁴⁴ *Martinez v. Regents of the U. of Cal.*, 241 P.3d 855 (Cal. 2010) (holding that California's in-state tuition waiver law for non-California residents is not preempted by 8 U.S.C. § 1623).

⁴⁵ See *Goodhart v. Bd. of Visitors of the U. of Va.*, 451 F.Supp.2d 804 (W.D. Va. 2006) (holding that a state has a legitimate interest in protecting the rights of bona fide residents to attend public colleges and universities on a preferential basis and that states may establish "reasonable criteria" for granting preferences to residents).

⁴⁶ H.R. 6497, The Development Relief and Education for Alien Minors Act (DREAM Act) was passed by the House of Representatives on December 8, 2010. However, the Senate version, S. 3992, failed to overcome a cloture motion on December 18, 2010. The DREAM Act would have allowed certain undocumented individuals to apply for temporary legal status and obtain permanent status after attending college or serving in the military. See Nat'l Immigr. Forum, *The DREAM Act in the 111th Congress*, <http://www.immigrationforum.org/policy/legislation/the-dream-act-in-the-111th-congress> (last visited Apr. 19, 2011); see also Shankar Vedantam, *DREAM Act Defeat Reveals Failed Strategy*, WASH. POST, Dec. 19, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/18/AR2010121803271.html>.

lature.⁴⁷ However, support waned when then-Maricopa County Attorney Andrew Thomas began to prosecute victims of smuggling based on a controversial reading of A.R.S. §13-2319 and the Arizona conspiracy statute that included such victims as part of the criminal conspiracy to “smuggle themselves.”⁴⁸ Members of the Arizona legislature who authored the bill subsequently stated that the intention of the law was to punish those who profit from human smuggling—the smugglers, or *coyotes*—not the victims themselves.⁴⁹ Nonetheless, Mr. Thomas and his deputies continued to prosecute hundreds for the crime of conspiracy to smuggle themselves.⁵⁰

The Maricopa County Public Defender’s Office challenged Mr. Thomas’ interpretation of the Arizona anti-human smuggling law on behalf of their

⁴⁷ See S.B. 1372, 47th Leg., First Reg. Sess. (Ariz. 2005), available at http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1372&Session_ID=82 (listing bipartisan sponsors of S.B. 1372).

⁴⁸ In 2006, several Arizona state legislators, community groups, and individuals sued the Maricopa County Board of Supervisors in U.S. District Court for the District of Arizona, seeking an injunction to prevent Andrew Thomas from arresting persons for conspiring to “smuggle themselves” under A.R.S. § 13-2319. See *We Are Am./Somos Am. Coalition of Ariz. v. Maricopa Cnty. Bd. of Supervisors*, No. Civ 06-2816 PHX RCB, 2007 WL 2775134 (D. Ariz. Sept. 21, 2007). Two of the legislative plaintiffs—State Representatives Kyrsten Sinema and Steve Gallardo—had sponsored the House version of A.R.S. §13-2319, H.B. 2539. See H.B. 2539, 47th Leg., First Reg. Sess. (Ariz. 2005), available at http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=HB2539&Session_ID=82 (listing sponsors of H.B. 2539). A document written by the Plaintiffs’ counsel in the *We Are America Coalition* litigation states that “the conspiracy policy is inconsistent with and violates the State’s anti-coyote law.” See *We Are Am./Somos Am. Coalition of Ariz. et al., Background and Talking Points of Interest Regarding Maricopa County Immigrant Conspiracy Policy and the Case of We Are America Coalition of Arizona v. Maricopa County*, CTR. FOR HUM. RTS. & CONST. L. 3, <http://www.centerforhumanrights.org/11-21-06ConspiracyCaseTalkingPoints.pdf> (last visited Apr. 19, 2011). In *Gonzalez Alvarado*, Judge Thomas W. O’Toole sustained the defendants’ indictments under A.R.S. §§ 13-1003(A), 13-2319 for smuggling themselves, stating that

The court finds that the defendants may be prosecuted for conspiracy to smuggle themselves, a violation of the conspiracy and human smuggling statutes, A.R.S. §13-1003(A) and §13-2319. To prove this conspiracy the state must prove that one or more of the defendants, with the intent to promote or aid in the commission of human smuggling, agreed with one or more other persons that at least one of them or another person would engage in the smuggling of illegal aliens for profit or commercial purpose by providing them transportation or procuring transportation knowing or having reason to know that the persons are illegal aliens not lawfully in Arizona. Given the circumstances alleged, the State will also be required to prove that the Defendant and other illegal alien co-defendants supplied themselves as human cargo to be smuggled.

Arizona v. Gonzalez Alvarado, CR2006-005932-033 DT 3 (Maricopa Cnty. Superior Ct., June 9, 2006) (order denying defendants’ motion to dismiss), available at <http://www.courtminutes.maricopa.gov/docs/Criminal/062006/m2257277.pdf>.

⁴⁹ See *We Are Am./Somos Am. Coalition of Ariz. et al.*, *supra* note 48, at 2. Rep. Jonathan Paton, R-Tucson, stated “This is something the county attorney came up with himself . . . I never intended that immigrants would be arrested. That’s not what I sold the bill as, and that’s not what our attorneys at the time told us.” Additionally, Sen. Timothy Bee, R-Tucson said “That’s the first time I’ve seen that interpretation of the law. The law was designed to go after those who are involved in drug trafficking and human trafficking for a profit.” *Id.*

⁵⁰ See Michael Kiefer, *Maricopa Court Upholds Migrant Smuggling Law*, ARIZ. REPUBLICAN, June 10, 2006, available at <http://www.azcentral.com/arizonarepublic/local/articles/0610conspiracy0610.html>.

client, Juan Barragan-Sierra, in *Arizona v. Barragan-Sierra*.⁵¹ Mr. Barragan-Sierra, who had been convicted of one count of conspiracy to commit human smuggling in Maricopa County Superior Court, appealed his conviction in the Arizona Court of Appeals, Division One, in 2008. He had been apprehended in 2006 by Maricopa County Deputy Sheriffs when they stopped a truck that was allegedly transporting him from Mexico to Arizona on State Route 85. Mr. Barragan-Sierra was concealed in the truck bed under some carpeting and was discovered by the MCSO deputies when he attempted to flee the vehicle. Based on his location in the truck and his attempted escape, the Sheriff's deputies determined that Mr. Barragan-Sierra was attempting to be smuggled into the United States without inspection.⁵²

Mr. Barragan-Sierra challenged his conviction for conspiracy to commit human smuggling on the grounds that: (1) the trial court abused its discretion in refusing to grant his motion for judgment of acquittal for failure to satisfy the corpus delicti rule, (2) the offense was not cognizable under Arizona law, and (3) the state human smuggling statute as applied to him was preempted by the federal anti-human trafficking law.⁵³

The Arizona Court of Appeals, however, did not sustain any of these arguments. Stating that “we . . . have no difficulty concluding that the circumstances of Appellant’s capture give rise to a reasonable inference, independent of his incriminating statements, that Appellant made an agreement to pay money to another person to be smuggled into the United States from Mexico,”⁵⁴ the Court of Appeals held that the Maricopa County Attorney’s Office interpretation and application of the state anti-human smuggling law to include prosecution for self-smuggling was permissible under both Arizona and federal law. Characterizing its analysis as a matter of pure statutory construction, the Court of Appeals declined to give weight to the legislative intent behind the anti-smuggling law and held that “[t]he language of the conspiracy and human smuggling statutes . . . is clear and unambiguous, and those statutes, read together, plainly allow the person smuggled to be convicted of conspiracy to commit human smuggling.”⁵⁵ The Court of Appeals similarly dismissed the preemption and other argu-

⁵¹ 196 P.3d 879 (Ariz. Ct. App. 2008).

⁵² *Id.* at 882-83 (“Based on Appellant’s appearance and the fact that he was found concealed under the carpet in the bed of the truck, Deputy Ross testified, ‘I believe that he was attempting to be smuggled into the country.’”). Defendant then admitted that he was entering Arizona from Mexico illegally. *Id.* at 883.

⁵³ See 8 U.S.C. § 1324(a)(1)(A)(ii) (2005). The federal statute states that:

Any person who . . . knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law . . . shall be punished as provided in subparagraph (B).

Id. The Arizona Court of Appeals held that in enacting its state anti-human smuggling law, “Arizona’s objectives mirror federal objectives,” and therefore, it is not preempted by federal law under *De Canas v. Bica*, 424 U.S. 351 (1976). *Barragan-Sierra*, 196 P.3d. at 890.

⁵⁴ *Barragan-Sierra*, 196 P.3d at 884.

⁵⁵ *Id.* at 885.

ments made by Mr. Barragan-Sierra and affirmed his sentence and conviction for conspiracy to smuggle himself under Arizona law.⁵⁶

In 2007, the Arizona legislature introduced two bills, H.B. 2270⁵⁷ and 2271,⁵⁸ which would have eliminated the application of conspiracy and other preparatory offenses under the state human smuggling statute to the persons being smuggled. However, the bills died in committee.⁵⁹ Prosecutions for self-smuggling in Maricopa County ceased only because Mr. Thomas' successor as Maricopa County Attorney, Rick Romley,⁶⁰ chose not to accept his predecessor's interpretation of the law.⁶¹ Although chances appear slim that Arizona's anti-human smuggling law will be repealed, in July 2010, the Ninth Circuit reversed District Judge Robert Broomfield's dismissal of a 2006 class-action lawsuit challenging Mr. Thomas' interpretation of the law, which allows the plaintiffs to pursue their lawsuit seeking to enjoin further prosecutions for self-smuggling.⁶²

2. *Legal Arizona Workers Act (LAWA)*

In 2007, then-Arizona Governor Janet Napolitano (now Secretary of Homeland Security in the Obama Administration)⁶³ signed the Legal Ari-

⁵⁶ *Id.* at 891.

⁵⁷ H.B. 2270, 48th Leg., 1st Reg. Sess. (Ariz. 2007), available at <http://www.azleg.gov/legtext/48leg/1r/bills/hb2270p.pdf>.

⁵⁸ H.B. 2271, 48th Leg., 1st Reg. Sess. (Ariz. 2007), available at <http://www.azleg.gov/legtext/48leg/1r/bills/hb2271p.pdf>.

⁵⁹ See *HB2270 Bill Status Overview*, ARIZ. ST. LEGISLATURE, <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/bills/hb2270o.asp> (last visited Apr. 19, 2011) (noting final disposition of bill as "Held in Committees"); *HB2271 Bill Status Overview*, ARIZ. ST. LEGISLATURE, <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/bills/hb2271o.asp> (last visited Apr. 19, 2011) (noting final disposition of bill as "Held in Committees").

⁶⁰ Andrew Thomas resigned as Maricopa County Attorney in April 2010 in order to run for the Republican nomination for Arizona Attorney General, and Mr. Romley was appointed Interim Maricopa County Attorney. See Michael Kiefer, *Arizona Primary Election: Romley Concedes County Attorney GOP Race, Calls Montgomery*, ARIZ. REPUBLIC, Aug. 25, 2010, available at <http://www.azcentral.com/news/election/azelections/articles/2010/08/24/20100824arizona-primary-election-maricopa-county-attorney-race24-ON.html>.

⁶¹ See, e.g., Luige del Puerto, *Maricopa County Attorney Rick Romley's Immigration Plan Differs*, ARIZ. CAPITOL TIMES, May 19, 2010, available at http://findarticles.com/p/news-articles/arizona-capitol-times/mi_8079/is_20100519/maricopa-county-attorney-rick-romleys/ai_n53768970/ (recounting Romley's statement that "[t]here will no longer be conspiracy to smuggle yourself [in Maricopa County] after July 29[, 2010]"). Mr. Romley's decision not to seek such prosecutions after July 29 was predicated on the belief that S.B. 1070 would become effective on that date. See *id.*

⁶² See Michael Kiefer, *Court: Human-Smuggling Suit OK*, ARIZ. REPUBLIC, July 15, 2010, available at <http://www.azcentral.com/arizonarepublic/local/articles/2010/07/15/20100715apellate0715.html>.

⁶³ President Barack Obama nominated Governor Napolitano as Secretary of Homeland Security on December 1, 2008, and she was confirmed by the U.S. Senate on January 20, 2009. See Matthew Benson, *Napolitano Resigns, Now Leads Homeland Security*, ARIZ. REPUBLIC, Jan. 20, 2009, available at <http://www.azcentral.com/news/articles/2009/01/20/20090120napolitano-confirmed0120-ON.html>.

zona Workers' Act (LAWA),⁶⁴ a statewide employer-sanctions law requiring Arizona businesses to participate in the otherwise-voluntary federal E-Verify Program⁶⁵ and penalizing businesses that “intentionally” employ undocumented persons.⁶⁶ Known colloquially as the “business death penalty” due to the fact that employers prosecuted under LAWA face both suspension and/or revocation of their business license if found to be in violation of the law,⁶⁷ LAWA was immediately challenged by a coalition of business and civil rights groups as preempted by the federal employer sanctions provisions in the Immigration Reform and Control Act of 1986 (IRCA).⁶⁸

The plaintiffs in the suit, *Arizona Contractors Association, Inc. v. Candelaria*,⁶⁹ argued that LAWA is unconstitutional on its face because, in addition to being preempted by IRCA, it violated the equal protection rights of legal immigrants and naturalized citizens by subjecting them to greater scrutiny by potential employers when seeking and applying for jobs.⁷⁰ Awareness that such people were more likely than others to have their work authorization wrongfully challenged was noted not only by the *Contractors* plaintiffs, but also by Governor Napolitano herself. In the statement accompanying her signature approving LAWA, Governor Napolitano expressed concern that the law, as drafted, may pose civil rights concerns—specifically, work-authorized immigrants and racial minorities may be unlawfully racially profiled and asked to produce different or more proof of their work eligibility in violation of federal anti-discrimination laws.⁷¹

Nonetheless, Judge Neil Wake of the U.S. District Court for the District of Arizona declined to enjoin enforcement of LAWA and ultimately ruled it was not preempted by federal law and did not violate the Equal Protection Clause of the Fourteenth Amendment.⁷² In 2009, the Ninth Circuit affirmed Judge Wake's decision, holding that state regulation of the employment of undocumented immigrants is a valid exercise of Arizona's historic police powers.⁷³ In July 2009, the plaintiffs filed a Petition for a Writ of Certiorari with the U.S. Supreme Court.⁷⁴ On June 28, 2010, the Supreme Court granted the Petition, certifying all three questions presented by the petition-

⁶⁴ ARIZ. REV. STAT. ANN. §§ 23-211 to 23-214 (2011) (West).

⁶⁵ See Nat'l Conference of State Legislatures, *Immigrant Policy Project: E-Verify: Frequently Asked Questions*, NCSL.ORG, <http://www.ncsl.org/?tabid=13127> (last modified Jan. 18, 2011).

⁶⁶ See ARIZ. REV. STAT. ANN. §§ 23-212, 23-212.01 (2011) (West).

⁶⁷ See Nat'l Conference of State Legislatures, *supra* note 65.

⁶⁸ See *id.* (describing how Arizona's law was challenged as federally preempted by 8 U.S.C. § 1324(a)(h)).

⁶⁹ 534 F.Supp.2d 1036 (D. Ariz. 2008).

⁷⁰ *Id.*

⁷¹ See Press Release, Janet Napolitano, Governor, Governor Signs Employer Sanctions Bill (July 2, 2007), available at <http://www.formi9.com/news/ArizonaBillSigned.pdf> (“[T]he bill also contains flaws that must be addressed: . . . There is no expressed provision protecting Arizona citizens or legal residents from discrimination under the terms of this bill.”).

⁷² *Arizona Contractors*, 534 F.Supp.2d 1036.

⁷³ See *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 864–65 (9th Cir. 2009).

⁷⁴ See Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Chamber of Commerce of the United States of America et. al. v. Candelaria, 558 F.3d

ers for review.⁷⁵ Oral arguments in the case, now styled *United States Chamber of Commerce v. Whiting*, were heard December 8, 2010, and a decision is expected in Spring 2011.⁷⁶

C. Failed State Immigration Regulations

1. Anti-Solicitation Laws Directed at Day Laborers

Several provisions of S.B. 1070 make it unlawful for day laborers to solicit work in traditional public fora in the State of Arizona and prohibit potential employers from offering work to those soliciting employment.⁷⁷ Although Judge Bolton enjoined a portion of these anti-solicitation provisions on preemption grounds,⁷⁸ it is worth noting that the anti-solicitation provisions ultimately incorporated into S.B. 1070 were approved by the Arizona legislature and vetoed by then-Governor Janet Napolitano twice previously, in 2005⁷⁹ and 2007.⁸⁰ With anti-immigrant Republican Governor Jan Brewer in office, however, Russell Pearce and other immigration restriction-

856 (2009) (No. 09-115), available at http://www.scotusblog.com/wp-content/uploads/2009/10/09-115_pet.pdf.

⁷⁵ Chamber of Commerce of U.S. v. Candelaria, 130 S.Ct. 3498 (2010). The questions for review presented by Petitioners and granted by the Supreme Court are:

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly preempt[s] any [s]tate 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. 8 U.S.C. § 1324a(h)(2).
2. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note.
3. Whether the Arizona statute is impliedly preempted because it undermines the comprehensive scheme that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

See U.S. SUP. CT., 09-115 CHAMBER OF COMMERCE V. WHITING, <http://www.supremecourt.gov/qp/09-00115qp.pdf>. The U.S. Solicitor General, who had been asked by the Court to file a brief expressing the view of the United States on the questions presented in November 2009, had recommended that the Court limit its grant of review to Question 1. See Brief for the United States as Amicus Curiae at 22, Chamber of Commerce of the U.S. v. Candelaria, 558 F.3d 856 (2010) (No. 09-115), available at http://www.scotusblog.com/wp-content/uploads/2010/05/09-115_cvsg-grant-limited.pdf.

⁷⁶ See Docket File: No. 09-115, *Chamber of Commerce of the U.S. v. Whiting*, SUPREMECOURT.GOV., <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-115.htm> (last visited Apr. 19, 2011). New Supreme Court Justice Elena Kagan, who served as Solicitor General at the time the Petition was filed, has recused herself from this case. See *id.*

⁷⁷ See e.g., 2010 Ariz. Sess. Laws 113 § 5(C).

⁷⁸ See *United States v. Arizona*, 703 F.Supp.2d. 980, 987 (D. Ariz. 2010).

⁷⁹ See Jacques Billeaud, *Arizona Governor Vetoes Two Immigration Bills, Signs Another*, N. CNTY. TIMES, May 21, 2005, available at http://www.nctimes.com/news/state-and-regional/article_d3871734-3723-5aac-9a27-4f060710149e.html.

⁸⁰ See Thomas Spriggs, *Napolitano Criticized for Day-Labor Veto*, GROUND REP., May 3, 2007, available at <http://www.groundreport.com/Politics/Napolitano-Criticized-for-Day-labor-Veto/2833705>.

ists succeeded in incorporating the anti-solicitation provisions into S.B. 1070 with no veto, finally completing their anti-immigrant agenda.

2. *Prohibition of Birthright Citizenship for Children Born in the United States to Undocumented Persons*

A proposal made by members of the U.S. Congress to deny birthright citizenship to the U.S.-born children of undocumented immigrants generated a great deal of press throughout the summer and the latter half of 2010,⁸¹ culminating with the introduction of H.R. 140 Birthright Citizenship Bill in the U.S. Congress by Rep. Steve King (R-Iowa) in January 2011.⁸² The passage of S.B. 1070 and Russell Pearce's comment that repealing birthright citizenship in the State of Arizona was next on his legislative agenda⁸³ paved the way for members of Congress to seek a federal constitutional amendment to deny citizenship to untold millions of children born on U.S. soil. Despite serious doubts regarding whether Arizona, or any other state, may constitutionally deny citizenship to anyone born in the United States,⁸⁴ it should come as no surprise that Mr. Pearce has previously tried to do so via ballot initiative.

In 2007, a group calling itself the Birthright Citizenship Political Committee collected signatures in support of placing on the November 2008 ballot an initiative entitled the Arizona Birthright Citizenship Alignment Act.⁸⁵ The Act would have denied birth certificates to children born to noncitizens and would have required hospitals to check the citizenship of newborns' parents.⁸⁶ Though the ballot initiative was not officially sponsored by Russell Pearce,⁸⁷ he admitted to providing drafting advice to the initiative's spon-

⁸¹ See, e.g., Gebe Martinez, Ann Garcia, & Jessica Arons, *Birthright Citizenship Debate is a Thinly Veiled Attack on Immigrant Mothers*, CTR. FOR AM. PROGRESS (Aug. 18, 2010), http://www.americanprogress.org/issues/2010/08/citizenship_debate.html (“They come here to drop a child. It’s called “drop and leave,”” said Sen. Lindsey Graham (R-SC) during an interview on Fox News . . . [H]is comments buoyed the push to end birthright citizenship, creating an echo on Capitol Hill where conservative leaders then called for hearings on the issue.”).

⁸² See H.R. 140, 112th Cong. (1st Sess. 2011).

⁸³ See, e.g., Liz Goodwin, *Author of Arizona Immigration Law Wants to End Birthright Citizenship*, YAHOO! NEWS (May 21, 2010), http://news.yahoo.com/s/ynews/20100521/pl_ynews/ynews_pl2192.

⁸⁴ See Alia Beard Rau, *14th Amendment Faces Challenge from Immigration Hardliners*, ARIZ. REPUBLIC, Sept. 12, 2010, available at <http://www.azcentral.com/news/election/azelections/articles/2010/09/12/20100912th-amendment-birthright-citizenship-challenge.html> (“Some advocates have proposed repealing or changing the 14th Amendment, but both Kavanaugh and Pearce have said they find that unnecessary. They want the Supreme Court to reconsider its interpretation.”).

⁸⁵ See Yvonne Wingett, *Ballot Proposal Reins in Birthright Citizenship*, ARIZ. REPUBLIC, Dec. 4, 2007, available at <http://www.azcentral.com/news/articles/1204birth1204.html>. Full text of the initiative is available at http://www.azsos.gov/election/2008/general/ballotmeasure_text/i-13-2008.pdf.

⁸⁶ Wingett, *supra* note 85 (“The State of Arizona shall register no birth certificate or record issued to any child born to parents who are subject to a foreign Power, who do not owe direct and immediate allegiance to the United States,” states language on the initiative application.”).

⁸⁷ A woman named Della Montgomery filed the paperwork for the ballot initiative. *Id.*

sors⁸⁸ and was himself the sponsor of a concurrent proposal in the Arizona legislature.⁸⁹ Ultimately, the effort to repeal birthright citizenship by popular vote in Arizona stalled when too few signatures were gathered to place it on the ballot in 2008.⁹⁰ However, the approval of S.B. 1070—and now the introduction of H.R. 140 in the U.S. Congress—represents a renewed call to repeal or reexamine the Fourteenth Amendment’s guarantee of *jus soli*,⁹¹ presenting a significant threat to birthright citizenship and the civil liberties of all children born on U.S. soil.

II. GRASSROOTS RESPONSES OF THE LOCAL LATINO COMMUNITY TO ANTI-IMMIGRANT AND ANTI-LATINO SENTIMENT IN ARIZONA PRIOR TO S.B. 1070

The passage of S.B. 1070 has energized the Latino community in both Arizona and the United States as a whole.⁹² However, years before S.B. 1070 put Arizona’s war against immigrants on the national stage, the Latino community in Arizona had been working tirelessly, and often thanklessly, to combat what they properly identified as a dangerously escalating anti-immigrant and anti-Latino sentiment in the state. While many individuals significantly contributed to the fight in Arizona since the anti-immigrant groundswell began in 2004, three groups in particular mounted a grassroots response that ultimately facilitated the organization of advocates nationwide following the approval of S.B. 1070 in 2010.

A. *Somos America/We Are America*

Somos America/We Are America (hereinafter “Somos America”) was founded in early 2006 to fight for justice for immigrant and Latino commu-

⁸⁸ See Op-Ed., *Anti-Immigrant Birthright Initiative Unconstitutional*, ARIZ. DAILY STAR, Dec. 7, 2007, available at <http://www.law.arizona.edu/news/Press/2007/Silverman120707.pdf> (“It’s also not surprising that state Rep. Russell Pearce, R-Mesa, had a hand in the ballot initiative, filed last week by Della Montgomery. . . . Pearce told The Associated Press this week that he is not involved with the initiative effort, but that he spoke twice by phone with Montgomery to review the wording of her proposal. ‘I helped tweak it a little bit,’ Pearce told the AP. ‘What she gave me looked pretty good.’”).

⁸⁹ H. Con. Mem’l 2005, 48th Leg., First Reg. Sess. (Ariz. 2007), available at <http://www.azleg.gov/legtext/48leg/1r/bills/hcm2005p.pdf>.

⁹⁰ See Dana Goldstein, *Taking the Initiative*, AM. PROSPECT, Oct. 21, 2008, available at http://www.prospect.org/cs/articles?article=taking_the_initiative (“In Arizona, where just two years ago voters approved four harsh anti-immigrant proposals, the only immigration-related initiative on the ballot this year actually *weakens* a 2007 law sanctioning employers for hiring undocumented workers. An initiative to deny birthright citizenship to the children of illegal immigrants failed to gain enough signatures to make it onto the ballot.”).

⁹¹ Latin for “birthright citizenship,” literally meaning “right of the soil.”

⁹² See, e.g., Maria Polletta, *Activists Say SB 1070, Economy Could Boost Latino Turnout*, YUMA SUN, Sept. 3, 2010, available at <http://www.yumasun.com/articles/latino-63644-latinos-arizona.html>.

nities in Arizona.⁹³ A grassroots, community-based organization, Somos America has consistently been at the forefront of immigrants' rights and Latino civil rights advocacy, including litigation,⁹⁴ over the past decade. Using such tactics as phone trees and text messages to warn the community of raids by Maricopa County Sheriff Joe Arpaio,⁹⁵ members of Somos America acted as watchdogs and guardians of civil liberties in Arizona. Somos America's work demonstrates how a strong foundation of grassroots advocacy can become crucial in developing a rapid response in a crisis.

In addition to being heavily involved in anti-S.B. 1070 efforts prior to the injunction halting enforcement of the law in July 2010,⁹⁶ Somos America has remained at the forefront of activism in the Latino community in Arizona. In particular, Somos America has been instrumental in organizing and perpetuating a boycott of companies that do business in Arizona, including high-profile organizations such as Budweiser⁹⁷ and Major League Baseball.⁹⁸ Chairman of the Somos America Arizona boycott committee, former Arizona Senator Alfredo Gutierrez, stated:

The intent of the business boycott is not to punish companies by asking our supporters to not purchase their products. It is to get Arizona business to realize that their support of these individuals for even 'strictly business' purposes is creating conditions of hate, fear, and violence against Latinos and immigrants in Arizona.⁹⁹

Today, the Arizona boycott continues, and Somos America remains on the front lines of both the boycott and anti-S.B. 1070 activities.¹⁰⁰

⁹³ See *We Are America/Somos America*, SOMOS AMERICA, <http://somosamerica.org/> (last visited Apr. 19, 2011).

⁹⁴ See, e.g., *Ortega Melendres, et al. v. Arpaio, et al.*, ACLU, <http://www.aclu.org/immigrants-rights/ortega-melendres-et-al-v-arpaio-et-al> (last visited Apr. 19, 2011).

⁹⁵ See Lydia Guzman, *Immigration Advocate, Uses Texts to Warn of Sheriff Joe Arpaio's Crime Sweeps*, HUFFINGTON POST (Jan. 3, 2010), http://www.huffingtonpost.com/2010/01/04/lydia-guzman-immigration-_n_410146.html.

⁹⁶ See *Protests of SB 1070 Planned for July 29*, KTAR & ASSOC. PRESS, July 20, 2010, available at <http://ktar.com/?sid=1315953&nid=6>.

⁹⁷ See *Somos America Calls on Latinos to Boycott Budweiser*, MYFOXPHOENIX.COM (Aug. 23, 2010), <http://www.myfoxphoenix.com/dpp/news/immigration/somos-america-boycott-budweiser-8-23-2010>.

⁹⁸ See Naima Ramos-Chapman, *SB 1070 Protesters Take a Swing at Major League Baseball*, COLORLINES (Aug. 24, 2010), http://colorlines.com/archives/2010/08/boycotts_and_baseball.html.

⁹⁹ *Id.*

¹⁰⁰ Somos America launched and continues to maintain the Arizona Boycott Clearinghouse. See ARIZ. BOYCOTT CLEARINGHOUSE, <http://www.boycottarizona1070.com/whowere.php> (last visited Apr. 19, 2011).

B. National Day Labor Organizing Network

The National Day Labor Organizing Network (NDLON) is dedicated to advocating for the rights of day laborers.¹⁰¹ NDLON's mission is to "unify and strengthen its member organizations to be more strategic and effective in their efforts to develop leadership, mobilize, and organize day laborers in order to protect and expand their civil, labor[,] and human rights."¹⁰² It does this in an effort to "foster[] safer[,] more humane environments for day laborer[s], both men and women, to earn a living, contribute to society, and integrate into the community."¹⁰³ Additionally, NDLON describes its vision as "aspir[ing] to live in a world of diverse communities where day laborers live with full rights and responsibilities in an environment of mutual respect, peace, harmony[,] and justice."¹⁰⁴

Expanding upon its core mission, NDLON launched a major offensive against the anti-immigrant sentiment in Arizona by launching its "Arizona Campaign" to combat anti-immigrant and anti-Latino sentiment in Arizona.¹⁰⁵ Presciently recognizing the impending crisis in Arizona, NDLON stated:

The abuse of immigrants in Maricopa County, Arizona has become nothing less than a domestic human rights crisis that demands a response from us all. A coordinated national intervention effort will not only alleviate local suffering by bringing much needed attention, resources, and support to our brothers and sisters in Arizona, it will also generate consensus to help scaffold efforts to achieve broader federal immigration reform goals. We may not be able to pass large-scale, immigration reform legislation in Washington[,] DC right away, but we can—and we must—put a stop to the dehumanization of immigrants. We can find unity in our condemnation of the worst treatment of immigrants, and we can make clear that we will not allow our country to become like Arizona.¹⁰⁶

¹⁰¹ *Our Mission and Vision*, NDLON.ORG, http://www.ndlon.org/index.php?option=com_content&view=category&layout=blog&id=74&Itemid=53 (last visited Apr. 19, 2011).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., *Join Us As We March on Phoenix, AZ and Declare "Arpaio's America IS NOT Our America" on Jan. 16th, 2010*, NDLON.ORG, http://www.ndlon.org/index.php?option=com_content&view=section&layout=blog&id=22&Itemid=146 (last visited Apr. 19, 2011).

¹⁰⁶ *An Urgent Appeal for Action in Arizona and a Plan to Turn the Tide*, NDLON.ORG, http://www.ndlon.org/index.php?view=article&id=181%3Aurgent-appeal-for-action-in-arizona&option=com_content&Itemid=146 (last visited Apr. 19, 2011).

Building on this call to action, NDLO is now party to litigation challenging S.B. 1070¹⁰⁷ and has helped organize another grassroots campaign, Alto!Arizona, designed to combat the effects of the law.¹⁰⁸

C. *Los Abogados Hispanic Bar Association of Arizona*

Los Abogados, an affiliated member of the Hispanic National Bar Association (HNBA), is the Hispanic Bar Association of Arizona.¹⁰⁹ The mission of Los Abogados is to enhance the quality of legal services provided in Arizona; to educate the Hispanic community regarding its rights, its remedies, and its access to legal services; to receive and administer funds for the promotion and advancement of the Arizonan Hispanic legal profession; and to aid in gathering, exchanging, and disseminating facts and information relating to the business methods of the Hispanic legal profession. It does this with a view of promoting the business of the Hispanic legal profession within Arizona.¹¹⁰ Often acting as *amicus curiae* in litigation challenging anti-immigrant laws in Arizona,¹¹¹ several leaders of Los Abogados have continued to play a prominent role in speaking out against S.B. 1070 and organizing immigrant and Latino communities at the grassroots level.¹¹²

III. AFTER S.B. 1070: A NEW DAY DAWNS FOR IMMIGRANT AND LATINO CIVIL RIGHTS AND THE SOUL OF AMERICA

A. *Arizona's Immigration Regulations: State-Sanctioned Vigilantism Against "Aliens"*

After S.B. 1070's passage, people opposed to it frequently lamented: How could this happen? How, in the twenty-first century United States, could such a law not only pass, but be approved by such an overwhelming percentage of both Arizonans and the national populace?¹¹³ Even though U.S. District Judge Susan R. Bolton enjoined the most controversial parts of S.B. 1070 in July 2010 following the Department of Justice's lawsuit against

¹⁰⁷ See *Friendly House v. Whiting*, No. CV 10-1061 (D. Ariz. filed May 17, 2010).

¹⁰⁸ See ALTOARIZONA, <http://www.altoarizona.com/> (last visited Apr. 19, 2011).

¹⁰⁹ *About Us*, LOS ABOGADOS HISP. BAR ASS'N, <http://www.losabogados.org/> (last visited Apr. 19, 2011).

¹¹⁰ See *Mission Statement*, LOS ABOGADOS HISP. BAR ASS'N, <http://www.losabogados.org/> (last visited Apr. 19, 2011).

¹¹¹ See, e.g., Press Release, Hispanic Nat'l Bar Ass'n, HNBA Joins as Amicus Curiae to Challenge Ariz. Senate Bill 1070 (June 17, 2010), available at <http://www.hnba.com/hnba-joins-as-amicus-curiae-to-challenge-arizona-senate-bill-1070/>.

¹¹² See, e.g., Mike Sakal, *S.B. 1070 Foes, Backers React to Injunction*, E. VALLEY TRIB., July 30, 2010, available at http://www.eastvalleytribune.com/arizona/immigration/article_ba1c-ab82-9aa7-11df-9a91-001cc4c002e0.html.

¹¹³ See, e.g., Pew Research Ctr. for People & the Press, *Broad Approval for New Arizona Immigration Law* 1 (2010), <http://people-press.org/report/613/arizona-immigration-law> (stating that, considering everything, fifty-nine percent of the persons polled for the survey support S.B. 1070).

Arizona challenging the law's constitutionality,¹¹⁴ immigrants' rights and Latino civil rights advocates outside the State of Arizona remained bewildered that such a law could burst forth, seemingly out of nowhere, rife with elements of racial profiling, causing fear, confusion, and race-based hostility toward them and their communities.¹¹⁵

In tracing the genesis of S.B. 1070, this Article attempts to put its passage in context and demonstrate that it did not, in fact, come out of nowhere. As a staff attorney for the leading Latino civil rights law firm in the United States during this time period,¹¹⁶ the author was intimately involved in the litigation and advocacy surrounding much of Arizona's slow but steady attempt to pass, implement, and enforce what the author believes to be an attempt to form an organized, state-sanctioned ethnic-cleansing of immigrants and Latinos from the State of Arizona. For years leading up to the day Governor Brewer signed S.B. 1070 into law, Arizona—particularly Maricopa County, which also has a 287(g) agreement with Immigration and Customs Enforcement (ICE) that allows cross-deputized state and local law enforcement officials to enforce some aspects of federal immigration law¹¹⁷—has been more than unfriendly to immigrants and Latinos. Because of the combination of state legislation, ballot initiatives, and voluntary participation in federal immigration enforcement cooperation agreements like 287(g), Arizona has become a laboratory for efforts by state and federal law enforcement to identify, apprehend, and remove persons believed to be undocumented, often at the expense of due process, equal protection, and in the most extreme cases, despite the fact that the “alien” in question is actually a U.S. citizen.¹¹⁸

S.B. 1070 did not happen in a vacuum. It arose in a climate of frustration by states, localities, and the general public, over the lack of federal comprehensive immigration reform and of what the author perceives to be willful blindness toward the anti-immigrant and anti-Latino sentiment in Arizona by both those in power and the non-Latino community.¹¹⁹ While so-

¹¹⁴ See *United States v. Arizona*, 703 F.Supp.2d 980 (D. Ariz. 2010).

¹¹⁵ See, e.g., Julianne Hing, *Arizona Legalizes Racial Profiling with SB 1070, Says Advocates*, COLORLINES (Apr. 23, 2010), http://colorlines.com/archives/2010/04/brewer_signs_sb1070_legalizes_racial_profiling_of_arizonas_immigrants.html; see also Anna Gorman & Nicholas Riccardi, *Arizona was Once Tolerant of Illegal Immigrants. What Happened?*, L.A. TIMES, Aug. 1, 2010, available at <http://articles.latimes.com/2010/aug/01/nation/la-na-arizona-immigration-20100802>.

¹¹⁶ The author was previously a Staff Attorney (2006-2009) and Acting Regional Counsel (2007) for the L.A. office of MALDEF and acted as co-counsel in much of the pre-S.B. 1070 litigation in Arizona discussed in this Article during that time period.

¹¹⁷ See ARIZONA MOA WITH IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE.GOV, http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gmaricopacountyso102609.pdf.

¹¹⁸ See, e.g., *ACLU Sues Arpaio over Crime Sweeps*, KPHO (Aug. 20, 2009), <http://www.kpho.com/news/20468282/detail.html>.

¹¹⁹ There are exceptions, the most vocal and notable being Phoenix Mayor Phil Gordon. See Rebecca Spence, *Phoenix Mayor Challenges Popular Sheriff's Anti-Immigration Tactics*, JEWISH DAILY FORWARD, July 24, 2008, available at <http://www.forward.com/articles/13849/>; Lauren Smiley, *Police Chief George Gascon Says Arizona Immigration Law Lets Thugs Run*

cial justice advocates often give lip-service to the duty of all people to speak up when injustice occurs, even if it does not harm them individually,¹²⁰ the State of Arizona has perpetrated vigilantism against its own residents—particularly its Latino community and other communities of color, both immigrants and citizens alike—revealing a political agenda rooted in the most base of human emotions: racism and xenophobia. Arizona’s attempt to regulate persons based on alienage using skin color, accent, and other supposed indicators of “foreignness” as barometers of “reasonable suspicion” for purposes of determining an individual’s immigration status, shows that we still have a long way to go in the struggle for immigrants’ rights and Latino civil rights in the United States.

B. S.B. 1070 and What it Means to be an American

The U.S. Supreme Court will soon determine, at least in a very narrow context, whether or not Arizona’s attempt to regulate immigration at the state level is a valid exercise of its historic police powers or whether such laws are preempted by the Supremacy Clause of the U.S. Constitution.¹²¹ Regardless of the Court’s determination of the constitutionality of Arizona’s state immigration laws passed in the last decade, this article argues that the manner in which Arizona has attempted to regulate immigration—by trampling on the civil rights of U.S. citizens, legal residents, Latinos, and other communities of color—is a form of state-sanctioned vigilantism that, left unchecked, resulted in one of the most egregious and unconstitutional laws in modern history. A public inflamed by anti-immigrant rhetoric, given license to vilify the “other,” the “alien,” in a downtrodden economy and amid rap-

Wild, S.F. WKLY., July 6, 2010, available at http://blogs.sfweekly.com/thesnitch/2010/07/gas_con_says_arizonas_papers_pl.php. However, it is the author’s opinion that the situation in Arizona leading up to the approval of S.B. 1070 proves the platitude attributed to Edmund Burke that ‘all it takes for evil to thrive is for good men to do nothing.’

¹²⁰ Pastor Martin Niemoller’s 1945 observation about how the horrors of the Holocaust were perpetrated in plain view offers a lesson on our responsibility to speak up whenever we see injustice occurring, even if it is not occurring to us:

First they came for the communists, and I did not speak out—because I was not a communist; Then they came for the socialists, and I did not speak out—because I was not a socialist; Then they came for the trade unionists, and I did not speak out—because I was not a trade unionist; Then they came for the Jews, and I did not speak out—because I was not a Jew; Then they came for me—and there was no one left to speak out for me.

See Harold Marcuse, *Martin Niemoller’s Famous Quotation: “First They Came for the Communists”*, U. CAL. SANTA BARBARA, <http://www.history.ucsb.edu/faculty/marcuse/niem.htm> (last visited Apr. 19, 2011).

¹²¹ See *Chamber of Commerce of the United States v. Whiting*, SCOTUSBLOG.COM, <http://www.scotusblog.com/case-files/cases/chamber-of-commerce-of-the-united-states-v-can-delaria/> (last visited Apr. 19, 2011).

idly changing racial demographics nationwide,¹²² embraced a law premised on nothing more than racial profiling and ethnic stereotyping.

Whether S.B. 1070 marks the beginning or the end of these types of laws remains to be seen, but one thing is certain: a new day has dawned not just for immigrant and Latino communities, but for all of us—a day in which the stakes are high and the world is watching to see what happens in Arizona.¹²³ In some ways, the success or failure of S.B. 1070 means the success or failure of everything we as Americans purport to cherish—liberty, equality, and freedom. The dangerous failure to recognize that laws that threaten the civil rights of immigrants and racial minorities equally threaten the civil liberties of us all, has been repeated throughout U.S. history—particularly in the context of our immigration laws.¹²⁴

The author's hope is that S.B. 1070 will leave as it appeared to arrive: swiftly and with much fanfare. However, should the challenges to the law fail and should other jurisdictions across the nation seek to replicate it, the author takes strength from the courage she's witnessed by the Latino community in Arizona who has been fighting a valiant fight, with little recognition, for years. Despite long odds, small numbers, and an intricate web of politicians, government officials, and hate groups seeking to silence their opposition, these advocates have remained strong and have continued to fight for immigrants' rights and Latino civil rights with grace and dignity—never stooping to engage in the sort of fear tactics and ad hominem attacks leveled at them and their allies. Should the road to S.B. 1070 lead out of Arizona and into other states, others should follow the example of the Latino and immigrants' rights communities in Arizona and be willing to engage in battle without regard for themselves, but with the interests of justice and equality for all first and foremost in their hearts and minds. It cannot be done alone—but together, *¡si se puede!*¹²⁵

¹²² See, e.g., Carl Haub, *Hispanics Account for Almost One-Half of U.S. Population Growth*, POPULATION REFERENCE BUREAU (2006), <http://www.prb.org/Articles/2006/HispanicsAccountforalmostOneHalfofUSPopulationGrowth.aspx?p=1>.

¹²³ See, e.g., Jonathan J. Cooper, *The World Will be Watching You, Arizona Police Officers Cautioned*, DESERET NEWS, July 1, 2010, available at <http://www.deseretnews.com/article/700044916/The-world-will-be-watching-you-Arizona-police-officers-cautioned.html>.

¹²⁴ See, e.g., Asian Pacific Am. Legal Ctr. of S. Cal. & Asian Am. Just. Ctr., *The Impact of SB 1070 on Asian Americans and Pacific Islanders*, ASIAN AM. JUST. CTR. (2010), http://www.advancingequality.org/attachments/files/380/Effect_of_SB_1070_on_APIs.pdf (noting the history of U.S. discrimination towards Asian Americans and Pacific Islanders, namely via the Chinese Exclusion Act and Japanese internment during World War II).

¹²⁵ Spanish for “yes we can!”

