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

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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

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INTRODUCTION

When Arizona Governor Janice K. Brewer signed into law the Support Our Law Enforcement and Safe Neighborhoods Act—better known as S.B. 1070—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, the Arizona immigration law was branded “the toughest immigration law in the country.” 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.

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

3 See id.

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-future/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 benefits—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” 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.

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 ¡ya basta! 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

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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!”
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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-

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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 I.A.2, I.A.3, I.A.1.
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. While not as far-reaching as Proposition 187, 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. 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.

Knowing that Proposition 187 was enjoined as unconstitutional before it could ever be enforced, 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. 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 and Gonzalez v. Arizona, both the federal courts and the Democratic Attorney General of

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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).


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).
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Arizona, Terry Goddard, 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, these groups ultimately won approval of three more statewide anti-immigrant ballot initiatives in 2006–Proposition 100, Proposition 102, and Proposition 300.

2. Proposition 100

Proposition 100, approved by an overwhelming majority of Arizona voters in November 2006, amended Article II, Section 22 of the Arizona Constitution to prohibit bail for persons charged with certain felonies believed to be undocumented immigrants. Proposition 100 makes persons accused of low-level felonies, such as forgery, categorically ineligible for bond. 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

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).
determination that he is ineligible for bond under the Arizona Constitution,\(^\text{29}\) 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.\(^\text{30}\)

Two separate challenges to the constitutionality of Proposition 100 have yielded few results thus far. In the first lawsuit, \textit{Hernandez v. Lynch},\(^\text{31}\) the Arizona Court of Appeals ruled that Proposition 100 was constitutional.\(^\text{32}\) 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, \textit{Lopez-Valenzuela v. Maricopa County}.\(^\text{33}\) Nearly two years following the initiation of the \textit{Lopez-Valenzuela} litigation, the case remains pending before Judge Susan Ritchie Bolton,\(^\text{34}\) and the law has remained in effect throughout the pendency of the constitutional challenge.\(^\text{35}\) 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.\(^\text{36}\) 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. \textit{Proposition 102}

Another anti-immigrant ballot initiative passed in 2006: Proposition 102 garnered the approval of more than seventy-four percent of Arizona voters.\(^\text{37}\) 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


\(^{30}\) 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.”).


\(^{32}\) 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.


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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.”

Like most other anti-immigrant ballot initiatives in Arizona, Proposition 102 was authored by Russell Pearce. 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.

To date, the practical effect of this amendment to the Arizona Constitution has yet to be determined. 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. The resulting laws, A.R.S. 15-1825 and

41 To date, there have been no challenges to the constitutionality of Proposition 102.
A.R.S. 15-1803, also require educational institutions to verify and report the immigration status of students enrolled in their schools each year. 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, it is unlikely that a suit seeking to require Arizona to allow undocumented students to pay in-state tuition would be successful. With the defeat of the DREAM Act by Congress in the winter of 2010 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.


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).

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.”

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. Nonetheless, Mr. Thomas and his deputies continued to prosecute hundreds for the crime of conspiracy to smuggle themselves.

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


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.
client, Juan Barragan-Sierra, in *Arizona v. Barragan-Sierra*. 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.

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.

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,” 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.”

The Court of Appeals similarly dismissed the preemption and other arguments.

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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.

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).

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.\textsuperscript{56}

In 2007, the Arizona legislature introduced two bills, H.B. 2270\textsuperscript{57} and 2271,\textsuperscript{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.\textsuperscript{59} Prosecutions for self-smuggling in Maricopa County ceased only because Mr. Thomas’ successor as Maricopa County Attorney, Rick Romley,\textsuperscript{60} chose not to accept his predecessor’s interpretation of the law.\textsuperscript{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.\textsuperscript{62}

2. \textit{Legal Arizona Workers Act (LAWA)}

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

\textsuperscript{56} Id. at 891.


\textsuperscript{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.


zona Workers’ Act (LAWA), a statewide employer-sanctions law requiring Arizona businesses to participate in the otherwise-voluntary federal E-Verify Program and penalizing businesses that “intentionally” employ undocumented persons. 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, 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).

The plaintiffs in the suit, Arizona Contractors Association, Inc. v. Candelaria, 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. 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.

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. 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. In July 2009, the plaintiffs filed a Petition for a Writ of Certiorari with the U.S. Supreme Court. On June 28, 2010, the Supreme Court granted the Petition, certifying all three questions presented by the petition-
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 ers for review. 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.

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. Although Judge Bolton enjoined a portion of these anti-solicitation provisions on preemption grounds, 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 2005 and 2007. With anti-immigrant Republican Governor Jan Brewer in office, however, Russell Pearce and other immigration restrictionists for review. 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.

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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 agenda\(^{83}\) 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-

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\(^{81}\) 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).


\(^{84}\) 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/2010/09/12/2010091214th-amendment-birthright-citizenship-challenge.html (“Some advocates have proposed repealing or changing the 14th Amendment, but both Kavanagh and Pearce have said they find that unnecessary. They want the Supreme Court to reconsider its interpretation.”).


\(^{86}\) 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.*
sors and was himself the sponsor of a concurrent proposal in the Arizona legislature. 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. 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 \textit{jus soli}, presenting a significant threat to birthright citizenship and the civil liberties of all children born on U.S. soil.

II. \textsc{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. 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. \textit{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-
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

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93 See We Are America/Somos America, SOMOS AMERICA, http://somosamerica.org/ (last visited Apr. 19, 2011).
99 Id.
The National Day Labor Organizing Network (NDLON) is dedicated to advocating for the rights of day laborers. 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.” 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.” Additionally, NDLON describes its vision as “aspir[img] 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.”

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. 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.

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102 Id.
103 Id.
104 Id.
Building on this call to action, NDLON is now party to litigation challenging S.B. 1070\textsuperscript{107} and has helped organize another grassroots campaign, Alto!Arizona, designed to combat the effects of the law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{110} Often acting as amicus curiae in litigation challenging anti-immigrant laws in Arizona,\textsuperscript{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.\textsuperscript{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?\textsuperscript{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

\textsuperscript{107} See Friendly House v. Whiting, No. CV 10-1061 (D. Ariz. filed May 17, 2010).
\textsuperscript{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_ba1cabab82-9aa7-11df-9a91-001cc4e02e0.html.
The Road to 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-

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.
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.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{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.

idly changing racial demographics nationwide,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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, \textit{¡si se puede}!\textsuperscript{125}

\begin{itemize}
\item\textsuperscript{125} Spanish for “yes we can!”
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