

No. 11-182

In The
Supreme Court of the United States

—◆—
ARIZONA, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF OF AMICUS CURIAE
FREEDOM WATCH IN SUPPORT
OF PETITIONER ARIZONA**

—◆—
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TABLE OF CONTENTS

	Page
Table of Contents.....	i
Table of Authorities	ii
Summary of Argument.....	1
Argument.....	3
I. STATES HAVE A RIGHT TO PROTECT THEIR BORDERS.....	3
II. ANY LAW HAS THE POTENTIAL FOR DISCRIMINATORY PRACTICE.....	10
III. THIS ACT ADDRESSES THESE CON- CERNS	12
A. The Act Provides Specific Safeguards On Its Face	12
B. More Restrictions Over the Actions of State Law Enforcement Officers than the Federal Guidelines Set by the Jus- tice Department.....	14
Conclusion.....	15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

United States v. Darby, 312 U.S. 100 (1941)9
United States v. Brignoni-Ponce, 422 U.S. 873
(1975).....13, 15

FEDERAL STATUTES

U.S. Constitution, amendment X.....8, 9, 16
U.S. Constitution, Article I, Section 104, 9, 15, 16
U.S. Constitution, Article IV, Section 44

STATE STATUTES

A.R.S. § 11-1051(B).....12, 14
A.R.S. § 11-1051(K).....13

INTEREST OF THE AMICUS CURIAE

Freedom Watch is a public interest group dedicated to preserving freedom, pursuing individual rights and civil liberties, while fighting for ethics in government. As part of its goal to remain constant to the principles of the founding fathers, Freedom Watch is dedicated to ensuring the rights of all citizens through action, frequently with legal cases and other means. Freedom Watch wishes to speak on behalf of those unable to do so. As such, consistent with its organizational purpose, Freedom Watch seeks to provide the means and mechanism to protect the rights of American citizens in this matter of great public interest.¹



SUMMARY OF ARGUMENT

On April 23, 2010, Governor Jan Brewer signed into law the Support Our Law Enforcement and Safe Neighborhoods Act (the Act), more commonly known as “SB1070.” This Act has provided some of the toughest state measures against those who emigrate illegally into the United States. Freedom Watch supports the principle that the state of Arizona, a

¹ Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

sovereign body in these United States, has the right to enact and enforce the laws necessary to protect the health, safety and welfare of those within the state.

It goes without saying that any law can be enforced in a discriminatory manner. In this regard, despite a lack of credible evidence, after the Act was passed the Obama Justice Department, for political purposes, wasted no time alleging discriminatory actions by Arizona state agencies. The Obama administration also filed a complaint against Arizona before the United Nations Human Rights Commission, an unprecedented, if not illegal and treasonous act by an American president; namely to ask an international body to sanction an American state. The Obama administration claimed that persons of Mexican descent have been targeted simply based on their appearance and national origin, regardless of their legal status within the United States.

If widespread discrimination is indeed occurring – however suspect given the Obama administration’s politicization of immigration issues leading up to the elections in 2012 – these actions are wrong and must be remedied no matter where they occur. Persons and families of Latino descent have contributed greatly to our nation, and they must be appreciated, respected and not harassed simply because they are not of “anglo” origin. Most Latinos are in this country legally, and are productive U.S. citizens or permanent residents. Those who have entered illegally and commit crimes must answer to the law, as we all have to.

However, there has been no credible evidence that such widespread discriminatory acts have been or are being perpetrated in Arizona. Furthermore, the Act, as amended, contains specific provisions prohibiting the unconstitutional actions once feared and which the Obama Justice Department claims were in practice before its passage. Moreover, this Act actually provides for increased protection for immigrants of Mexican and other descent, as set forth below.



ARGUMENT

I. STATES HAVE A RIGHT TO PROTECT THEIR BORDERS

As concerns immigration, the U.S. Constitution provides that the federal government has the power “to establish a uniform rule of naturalization.” Naturalization is the process by which one becomes a citizen and the United States has set forth this process in the Immigration and Nationality Act (the I.N.A.). The U.S. Bureau of Citizenship and Immigration Services carries out these standards. Arizona has in no way intruded upon those duties. Arizona specially targets those who have chosen not to follow the laws as set forth by the United States. By targeting only those who chose to not follow the legal means of entry into the United States, Arizona is no longer under the purview of federal immigration standards.

The Constitution contains two more phrases relevant to the discussion of Arizona and its ability and right to protect its own borders. The Constitution states,

“[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion . . .”

Article IV, Section 4. The federal government thus has a federal duty to “protect each of them against invasion.” This is one of two instances in which an invasion upon the borders of a state is specifically mentioned.

Article I, Section 10, of the Constitution provides that:

“[n]o state shall, without the consent of Congress . . . engage in War, unless actually invaded, or in such imminent danger as will not admit of delay.”

Article I, Section 10. This prohibition on states engaging in war has two exceptions. The first allows for a state to act on its own when “actually invaded.” The mass migration of illegal immigrants from another country amounts to nothing short of an invasion. There are an estimated ten to twelve million illegal immigrants that are currently residing within the United States. Some of them are armed and have fired upon and even killed Border Patrol agents, law enforcement officers, and citizens of the border states. Arizona, located at the border of the United States

and Mexico, accounts for a large number of those who have crossed over. Such a large scale invasion by the citizens of any other country surely demonstrates the need of the state to protect itself and its border and would fulfill the constitutional prerequisite for engaging in a war.

As provided in the Constitution, the power to repel against invasions was therefore granted to *both* the federal and the state governments. This action is consistent with the notion that the federal and state governments are both sovereign bodies within the United States. Furthermore, the state of Arizona, with its general police power, a power the Founding Fathers intentionally did not give to the federal government, surely has the power to protect the health, safety and welfare of those residing within its borders.

The second exception applies to when there is “imminent danger as will not admit of delay.” The state of Arizona faces a serious danger from the drug cartels and smugglers crossing over from Mexico. Thousands are killed near the border every year by the drug cartels, and there is an immediate danger of these crimes crossing over to the United States. Indeed, there are areas of land near the border that are in such danger of drug violence that citizens of the

United States are advised to avoid the area.² Clearly, this is imminent danger. With Congress and the Executive Branch unwilling or unable to provide for additional defenses of the southern border, Arizona is left with no choice but to act. It is clearly within the power of a state to provide for the safety of its citizens, especially when the federal government has failed to address the growing concern of the people of these border states.

Either provision of the Constitution allows for a state to act on its own accord if there is a threat to its security. While the actions of the state of Arizona do not rise to the level of “engaging in war,” the Act does help further the security of its populace. Furthermore, Article I, Section 10 delineates all of the prohibitive actions a state cannot do without the consent of Congress. There are no other prohibitions on actions Arizona can take.

Arizona has simply chosen to enforce its borders in a way in which the Congress has previously prescribed. This enforcement should be seen not as pre-emption but rather as cooperation. Arizona has not gone to war, as the Constitution provides for in a time of invasion, but has rather taken the minimal action of enforcing federal laws that the federal government simply does not have the manpower or will to enforce.

² National Park Service, *Border Concerns: When Visiting a Border Park*, available at <http://www.nps.gov/orpi/planyourvisit/boarder-concerns.htm>.

Arizona should be commended for its actions in taking actions that serve to protect American and Arizona citizens within its borders.

Other states have gone to further extremes to protect their citizens. In the city of New York, for example, the New York Police Department's commissioner recently announced that the police department – the NYPD – has the authority to shoot down airplanes in order to prevent future 9/11 type attacks from occurring. This type of action is approved of and even applauded because the threat of terrorism is a real one. But the action of shooting down an airplane is surely more an “act of war” than inquiring about the immigration status of people within Arizona. And, it is well known that terrorists, bent on harming the nation and its 50 states, have and continue to cross U.S. borders with near impunity given the lax immigration checks and controls of the federal government.

Thus, terrorism is an additional compelling reason why the borders must be protected. The borders of both Mexico and Canada must be secured from those wishing to invade our land in order to attack the United States.

Yet while the United States has been fortunate in avoiding any further major terrorist attacks, its citizens have been subject to violence from drug cartels on a regular basis. In the past few years, for example, Phoenix, Arizona has been subject to a sharp increase in home invasion robberies and kidnappings done at

the bequest of or implemented by Mexican drug cartels.³ Furthermore, while there have been limited terrorism related deaths in the United States since 9/11, dozens of Americans have been killed each year as a result of drug cartel violence.⁴

The federal government clearly has not done enough to address this issue, even with the urging of Arizona lawmakers such as Senator John McCain and former Representative Gabrielle Giffords.⁵ Arizona was simply left with no choice but to act on its own behalf, doing what was reasonable and necessary to protect those within its borders.

It must then be determined whether the actions taken by Arizona were within its rights as provided in the Constitution. The Tenth Amendment to the Constitution provides, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Indeed, as the Supreme Court had indicated,

³ Alicia A. Caldwell, *Mexican Drug Violence Spills Over Into US* (2009), available at http://www.huffingtonpost.com/2009/02/09/mexican-drug-violence-spi_n_165422.html.

⁴ Michael Webster, *America’s Death toll in Mexico’s Drug War Surges* (2008), available at <http://www.americanchronicle.com/articles/view/84945>.

⁵ Foxnews.com, *Lawmakers Demand Administration Deploy National Guard, Border Patrol After Killing* (2010), available at <http://www.foxnews.com/politics/2010/03/30/lawmakers-demand-administration-deploy-national-guard-border-patrol-killing/>.

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

United States v. Darby, 312 U.S. 100, 124 (1941).

Powers granted to the federal government are the limited and enumerated powers specifically granted in the Constitution. The powers “prohibited by it to the states” are those the Constitution specifically prohibited in Article I, Section 10. Since the Constitution neither exclusively grants the federal government the right to enforce its borders, nor specifically prevents the state from doing so, the right of the state to protect its borders must be one reserved for the state, as confirmed by the Tenth Amendment. Any law created by the federal government that purports to preempt the border enforcement efforts of a state is therefore invalid as a violation of the Tenth Amendment.

II. ANY LAW HAS THE POTENTIAL FOR DISCRIMINATORY PRACTICE

Freedom Watch represents Latinos who have legally entered the United States and agree that the immigration laws should be enforced. Those who cross the border illegally create tension between ordinary citizens, legal residents, and illegal residents. Latinos, as well as any other nationality in this country, do not wish to be singled out simply based on their skin color and ancestry. To do so would not only be ethically unacceptable and against American principles, but would also amount to unconstitutional actions.⁶

The state of Arizona simply has more immigrants from Mexico than any other foreign country. This fact alone provides for the likelihood that there will be an increased number of illegals from Mexico being arrested as a result. This fact helps to disprove the

⁶ Freedom Watch will be the first to represent those facing discrimination, but there has been no credible showing of widespread discrimination within the state of Arizona. The Obama Justice Department has opened a politically motivated investigation against Sheriff Joe Arpaio. Yet based on Freedom Watch's familiarity with Sheriff Arpaio and his work, as well as the politicization of the Obama Justice Department, this investigation appears to be a sham. Ironically, it is the Obama administration which is discriminating against those who simply want to enforce the law. This also explains the administration's complaint filed against Arizona with the United Nations, an unprecedented act in American history by a U.S. President and his administration. This act, which borders on treason, unmaskes the political motivations of the Obama administration.

allegations that those of Mexican descent are being targeted by offering an alternate reason for it. If there are far more people of Mexican descent in the population than any other nationality, then proportionally it is likely that more of those from Mexico will be detained.

There is potential for discrimination against lawful residents. While the goal of the law “is aimed at identifying *illegal* aliens,” it is not determinable by sight as to who is illegal. Clothing, language, and location are all in no way indicative as to the immigration status of an individual. A citizen of the state may wear clothing from Mexico simply because he likes its appearance and style, or because it is all he can afford. Similarly, languages are hard to acquire as one gets older, and the inability to speak English could be due to nothing more than late exposure to the language in one’s life. Even those who study languages for years in formal education may never develop the linguistic abilities of those born into the language.

Targeting of individuals based on race would create a sense of distrust between the Latino community and law enforcement. With distrust comes increased instances of unreported crimes, and a sense of protectionism that may prevent Latinos from turning in one of their own to the police. The consequences are not in the best interest of any party. Hard working immigrants, both legal and illegal, would be targeted, while less attention would be paid to those committing the crimes.

III. THIS ACT ADDRESSES THESE CONCERNS

A. The Act Provides Specific Safeguards On Its Face

Freedom Watch submits that the Act has dealt with these concerns appropriately. The law was specifically amended to further protect the civil rights of those within the state. The passage of the Act, as amended, specifically disallows some of the actions previously committed by law enforcement officials.

The Act provides that after a “lawful contact,” a law enforcement officer may, upon the finding of “reasonable suspicion,” make a reasonable attempt “to determine the immigration status of the person.” Yet the statute clarifies that law enforcement officers “may not solely consider race, color, or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.” Section (B). This mirrors the exception “to the extent permitted by the Constitution” specifically allowed by the Justice Department’s Civil Rights Division for race being used as a factor by law enforcement officials.

Section 11-1051(B) makes clear that “race, color, or national origin” are no longer, in any extent that they were, legal criteria for implementing Arizona’s immigration laws. This statute simply reinforces and codifies federal protection into Arizona law.

The Justice Department allows for consideration of race and ethnicity to some extent “because

enforcement of the laws protecting the Nation's borders may necessarily involve consideration of a person's alienage in certain circumstances." Thus, even the Justice Department acknowledges that race may be one factor which officers may use in making "routine or spontaneous law enforcement decisions."

Yet this consent to utilize race as a factor is not broad. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). As the court explained in *Brignoni-Ponce*, race alone "would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country" even when located near a border crossing. This example, even in the most extreme of circumstances, disallows the use of race as a sole criterion for law enforcement is simply not acceptable. This shows the extent of the value placed on protections against racial profiling.

In order to further clarify, the Act reiterates this mandate against using race in section (K), which provides:

"This section shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."

A.R.S. § 11-1051(K). On its face, there is simply no evidence that the Act is intended to be used in any way to racially profile. In fact, all indications are that the law disallows the use of race. Thus, any

allegations of this law enabling racial profiling are not based on fact. Moreover, this Act not only codifies existing federal protections into Arizona law, but expands these protections to those previously unprotected. This is seen in the actual language of the Act. By protecting the “civil rights of all *persons*,” Arizona makes it a specific point that civil rights are extended to even those who are not U.S. citizens. Thus, the state of Arizona has solidified and extended civil rights protections to both legal and illegal residents.

If the law is enforced in a discriminatory way, “as applied” discrimination, it would be against the laws of both Arizona and the United States. Thus, there are already mechanisms in place which protect those vulnerable to misapplication of the Act. Furthermore, since the Act has not yet been enforced, it is impossible to predict future abuses.

B. More Restrictions Over the Actions of State Law Enforcement Officers than the Federal Guidelines Set by the Justice Department

Similarly, the law in Arizona states officers “may not solely consider race, color, or national origin” in implementing the Act. A.R.S. § 11-1051(B). The use of the word “solely” thereby infers that these factors may be used as one of several in the implementation. This section of the law then essentially mirrors the federal usage, and follows the Constitutional

precedent as set forth by this Court in *Brignoni-Ponce* by allowing race as one of many factors in conducting a lawful stop.

Indeed, the Justice Department's own guidelines allow race and ethnicity as criteria "to the extent permitted by the Constitution and laws of the United States."⁷ These standards were put in place in 2003, and have yet to be modified during Obama's tenure. To emphasize, this is the exact language provided by the same agency now bringing forth this lawsuit. Yet instead of modifying their own standards, the Obama Justice Department has instead decided to bring forth a politically motivated lawsuit in an attempt to garner support during an election year.



CONCLUSION

Article I, Section 10 provides clear grounds for the state of Arizona to even "engage in war" to protect itself from an invasion. Millions have immigrated to the United States illegally. While most are hard-working, some are blatantly committing crimes and bringing the Mexican drug wars into the United States. If these actions do not amount to an invasion,

⁷ United States Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf

they are surely arising to the level of “imminent danger.” In the absence of proper enforcement actions by Congress or the Executive Branch to remedy the crisis, Arizona was left with no choice but to act on its own. Under either provision it is clear that Article I, Section 10 provides specific grounds on which Arizona can enable its own legislation.

The Tenth Amendment restates the longstanding rights of the states. One of these rights is the state’s general police power, enabling it to create laws intended to provide for the health and safety of its residents. When faced with the rampant crimes of the drug cartels, Arizona is clearly within its powers to do what is necessary to protect its people. Cities such as New York are claiming the capability to shoot down airplanes in order to protect their residents from a far less likely danger, that of another major terrorist attack. Arizona’s goal of verifying the immigration status of those detained during a lawful police stop, is a reasonable means of dealing with the actual and ongoing threat posed by drug cartels and others who have crossed into the United States illegally.

The Act specifically, on its face, outlaws any discrimination based on race, color, or national origin. The wording mirrors the guidelines set by the Obama Justice Department, the same agency now bringing forth this lawsuit. Any allegations of discrimination, as applied, should be dealt with if and when they happen. Freedom Watch pledges to be the first to take

legal action on behalf of those discriminated against should the need arise.

Respectfully submitted,

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