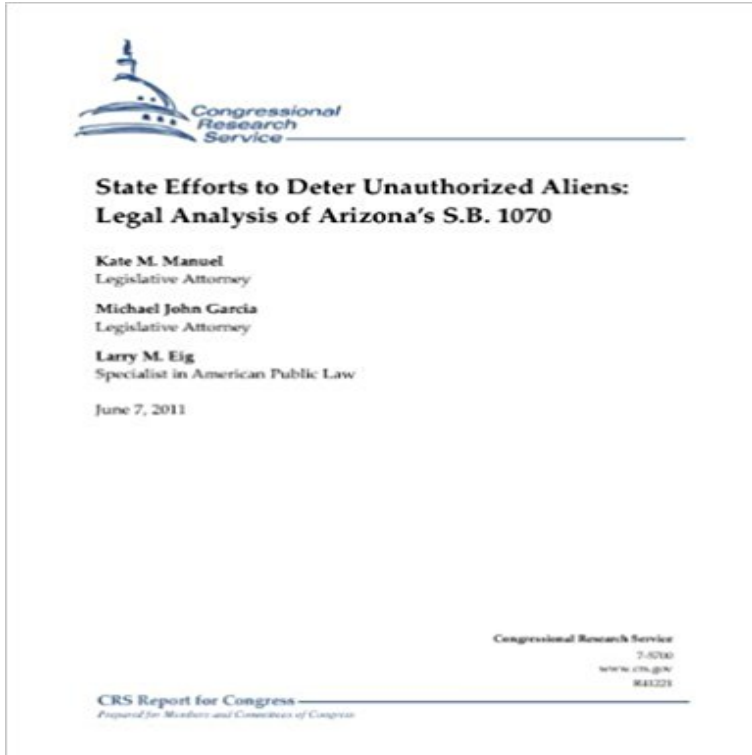


# State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070



On April 23, 2010, Arizona enacted S.B. 1070, which is designed to discourage and deter the entry or presence of aliens who lack lawful status under federal immigration law. Potentially sweeping in effect, the measure requires state and local law enforcement officials to facilitate the detection of unauthorized aliens in their daily enforcement activities. The measure also establishes criminal penalties under state law, in addition to those already imposed under federal law, for alien smuggling offenses and failure to carry or complete alien registration documents. Further, it makes it a crime under Arizona law for an unauthorized alien to apply for or perform work in the state, either as an employee or an independent contractor. The enactment of S.B. 1070 has sparked significant legal and policy debate. Supporters argue that federal enforcement of immigration law has not adequately deterred the migration of unauthorized aliens into Arizona, and that state action is both necessary and appropriate to combat the negative effects of unauthorized immigration. Opponents argue, among other things, that S.B. 1070 will be expensive and disruptive, will be susceptible to uneven application, and can undermine community policing by discouraging cooperation with state and local law enforcement. In part to respond to these concerns, the Arizona State Legislature modified S.B. 1070 on April 30, 2010, through the approval of H.B. 2162. Whenever states enact laws or adopt policies to affect the entry or stay of noncitizens, including aliens present in the United States without legal authorization, questions can arise whether Congress has preempted their implementation. For instance, Congress may pass a law to preempt state law expressly. Further, especially in areas of strong federal interest, as evidenced by broad congressional regulation and direct federal

enforcement, state law may be found to be preempted implicitly. Analyzing implicit preemption issues can often be difficult in the abstract. Prior to actual implementation, it might be hard to assess whether state law impermissibly frustrates federal regulation. Nevertheless, authority under S.B. 1070, as originally adopted, for law enforcement personnel to investigate the immigration status of any individual with whom they have lawful contact, upon reasonable suspicion of unlawful presence, could plausibly have been interpreted to call for an unprecedented level of state immigration enforcement as part of routine policing. H.B. 2162, however, has limited this investigative authority. Provisions in S.B. 1070 criminalizing certain immigration-related conduct also may be subject to preemption challenges. The legal vulnerability of these provisions may depend on their relationship to traditional state police powers and potential frustration of uniform national immigration policies, among other factors. In addition to preemption issues, S.B. 1070 arguably might raise other constitutional considerations, including issues associated with racial profiling. Assessing these potential legal issues may be difficult before there is evidence of how S.B. 1070, as modified, is implemented and applied in practice. S.B. 1070, as amended, was scheduled to go into effect on July 29, 2010. However, the U.S. Department of Justice sued to preliminarily enjoin enforcement of certain sections of S.B. 1070. On July 28, 2010, a federal district court enjoined enforcement of those provisions pertaining to immigration status verifications, among other things. Arizona appealed, and on April 11, 2011, the U.S. Court of Appeals for the Ninth Circuit issued an opinion affirming the district court. Arizona then appealed to the Supreme Court, which granted certiorari on December 12, 2011. The Court's decision could determine the permissibility not only of the challenged provisions of S.B. 1070 but also of subsequent measures enacted by Alabama, South Carolina, and Utah.

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