

Congress of the United States
Washington, DC 20515

May 14, 2010

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Holder:

On behalf of the Congressional Hispanic Caucus, Congressional Asian Pacific American Caucus, Congressional Black Caucus, and Congressional Progressive Caucus, we write to request that you take three actions that are urgently necessary to reaffirm the federal government's exclusive role and responsibility in the enforcement of federal immigration law and prevent the institutionalization of racial profiling and discrimination in states and localities throughout the nation.

Specifically, we ask that you (1) commit all available Department resources to challenge Arizona law SB 1070 in court; (2) rescind the Office of Legal Counsel's (OLC) 2002 "inherent authority" opinion concluding that state police may arrest noncitizens on the basis of civil deportability; and (3) urge the Solicitor General to respond to the Supreme Court's November 2009 invitation to express the views of the United States in *Chamber of Commerce v. Candelaria* by supporting the petition for certiorari.

With regard to the recent passage of Arizona SB 1070, we applaud your expressed concern and commitment to review the law's constitutionality. Arizona's law intrudes on the federal domain and conflicts with the Immigration and Nationality Act (INA). It gravely undermines federal immigration authority and the rule of law. In light of this, we ask that the Department act quickly and forcefully to oppose and litigate against Arizona's affront to the federal prerogative of immigration regulation.

We denounce the use of racial profiling that will surely result from the passage of this law, which is repugnant to the Constitution's Fourth and Fourteenth Amendments. Although the law was hastily amended to remove its explicit endorsement of racial profiling, the revised version leads to the same result: Regular, pretextual traffic stops and municipal ordinance enforcement will be the shortcuts police use to question individuals' immigration status. Indeed, the law's drafters intend it to extend to "violations of property codes (i.e., cars on blocks in the yard) or rental codes (too many occupants of a rental accommodation)." The likely consequence of the law's implementation will be the widespread violation of the civil rights and erroneous detention of U.S. citizens and lawful permanent residents, and especially Hispanics, Asians and people of color. The federal government must not allow a twenty-first century version of what happened in our nation in the 1950's—some of the most shameful race-based legal exclusions in American history.

OLC's 2002 "inherent authority" opinion has unfortunately led to inspiring and legitimizing state and local initiatives like SB 1070. We believe the 2002 memo wrongly overturned a 1996 OLC opinion by former Deputy Assistant Attorney General Teresa Wynn Roseborough, which rightfully concluded that state and local police lack the authority to arrest noncitizens on the basis of civil deportability. This is one of at least three OLC analyses with conclusions contrary to the "inherent authority" opinion, dating back to that of Assistant Attorney General Douglas W. Kmiec in 1989.

The 2002 opinion relies on an out-of-context quotation from a 1928 court opinion to conclude that state and local police may arrest noncitizens for civil immigration violations because there is a "strong presumption against preemption of state [immigration] arrest authority." Supporters of Arizona's decision to take immigration enforcement into the state's own hands drink from the OLC's well. When, for example, the Department of Homeland Security withdrew Maricopa County Sheriff Joe Arpaio's task force authorization under section 287(g) of the INA—which he abused to conduct street sweeps of Hispanics—Arpaio responded that he would ignore the change because "[w]e have the inherent right to enforce federal immigration law."

Also inconceivable to us, the "inherent authority" memo does not even mention 287(g) and other provisions of the INA addressing state and local immigration enforcement, which would be superfluous if inherent authority exists. Shoddy legal reasoning aside, we think the "inherent authority" memo must also be rescinded because it has more general pernicious implications for federal law. Apart from unconstitutionally scattering immigration enforcement powers and causing the federal government to become complicit in civil rights violations committed in its name by state and local law enforcement, the principle of "inherent authority" is at odds with the Constitution's basic design. The federal government simply cannot lose control over the enforcement of federal law.

Finally, the Supreme Court's request that the Solicitor General provide the United States' views in *Candelaria* is another vital opportunity for the Department to take a firm stand against state usurpation of federal immigration authority. We join business, labor, and civil rights organizations who are speaking with one voice in favoring Supreme Court review. In the 1986 Immigration Reform and Control Act (IRCA), Congress elaborated a "comprehensive scheme" governing the employment of noncitizens and expressly preempted the intrusion of state laws that go beyond a narrow range. IRCA makes clear that sanctions for hiring unauthorized workers may not displace deterrence of employers from discriminating against noncitizens with employment authorization who look or sound foreign.


By creating a regime in which prospective workers are exposed to the exact discriminatory profiling IRCA prohibits, the 2007 Legal Arizona Workers Act at issue in *Candelaria* embeds bias against immigrants and minorities, just like Arizona's 2010 law does based on "inherent authority."


We strongly believe that these two Arizona laws impermissibly rely on state determinations of noncitizens' federal immigration status. Both are preempted by conflicting federal law and strike at the heart of imperative national uniformity in immigration enforcement. We strongly urge the

Department to take the three actions this letter advocates and thereby fulfill its mission, on behalf of the federal government, of defending both federalism and fundamental American values of equality and nondiscrimination.


Thank you for your consideration. We look forward to your response.

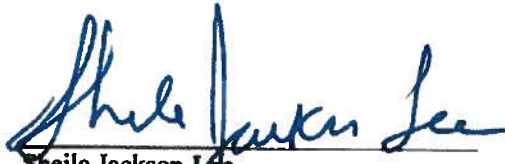
Sincerely,

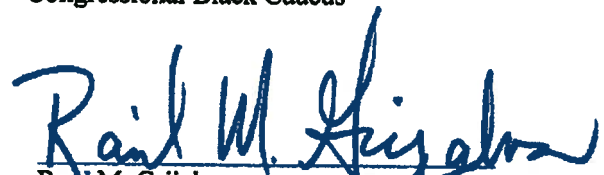

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