THE ROLE OF SPECULATION IN FACIAL CHALLENGES

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In recent years, the U.S. Supreme Court has been reluctant to respond favorably to constitutional challenges brought on the face of newly enacted state statutes. The facial challenge device has been used to challenge some of the most controversial legislation enacted in the states, including state-imposed voter identification requirements, new state primary election systems, and, recently in Arizona, immigration-related statutes. In this Article, I argue that the Court's hesitancy to uphold facial challenges is specifically based on a reluctance to rely on speculation to defeat an untested state statute. I suggest that a direct focus on speculation in the constitutional analysis is useful, and I ultimately explore Arizona's two controversial immigration-related statutes—and the facial challenges brought against them—to illustrate a role for speculation in facial challenges. Arizona's employer sanctions statute was recently upheld by the Supreme Court on a facial challenge. The constitutionality of Arizona's Senate Bill 1070 will likely be before the Court during its 2011–2012 term.

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INTRODUCTION

> We uphold the statute in all respects against this facial challenge, but we must observe that it is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision.[1]
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> How would that work? If we determined this was not preempted, . . . on its face, how would an as-applied challenge come about?[2]

Recent opinions from the Roberts Court suggest that the Supreme Court is not inclined to respond favorably to facial challenges to a state statute's constitutionality.[3] A "facial challenge," as opposed to an "as-applied challenge," does not seek to analyze the impact of a statute against the factual context of the case; rather, it seeks to invalidate a statute as unconstitutional on the basis of its text. In many instances, when the Court rejects a facial challenge, it specifically invites a future "as-applied" challenge to the statute.[4] The Court's approach to facial challenges impacts the most contemporary and controversial issues being played out in the states, including state-imposed voter identification requirements, state primary election systems, and most recently in Arizona, state regulation in the area of immigration.[5]

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1. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 861 (9th Cir. 2009) (upholding the Legal Arizona Workers Act, colloquially known as Arizona's employer sanction statute, against a facial challenge to its constitutionality), *aff'd sub nom.* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011).

2. Transcript of Oral Argument at 41, Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011) (No. 09-115) [hereinafter Transcript of Oral Argument, *Whiting*] (question from Chief Justice Roberts to Arizona's Solicitor General referring to Ninth Circuit's upholding Arizona's employer sanction statute in *Chicanos Por La Causa*).

3. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 200–04 (2008) (rejecting facial challenge to Indiana statute requiring voter identification); Baze v. Rees, 553 U.S. 35, 59–60 (2008) (rejecting facial challenge by upholding three-drug protocol for lethal injection); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 453–57 (2008) (rejecting facial challenge to Washington's blanket primary system); Gonzales v. Carhart, 550 U.S. 124, 156 (2007) (rejecting facial challenge); *cf.* Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329 (2006) (stating a strong preference for as-applied challenges). *But cf.* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 911–13 (2010) (finding the federal statute prohibiting corporations and unions from using general treasury funds for electioneering communications unconstitutional on its face).

4. *See, e.g.*, *Wash. State Grange*, 552 U.S. at 457–58 (noting that a factual determination regarding voter confusion is necessary to resolve the case and that "[such] factual determination must await an as-applied challenge").

5. *See, e.g.*, *Crawford*, 553 U.S. 181 (analyzing Indiana's voter identification requirement against a facial challenge); *Wash. State Grange*, 552 U.S. 442 (analyzing

This Article suggests that identifying the role of speculation in constitutional analysis provides a sensible approach to analyzing facial challenges. I begin with this thesis: the Roberts Court's enmity toward facial challenges is grounded in a reluctance to rely on "speculation" to invalidate statutes. Broadly and commonly defined, speculation refers to "conjectural consideration of a matter."[6] In its broadest sense, speculation is familiar ground for judicial decision-makers who must rely on conjecture—perhaps sensibly grounded but nonetheless conjecture—to reach critical conclusions in a case.[7] Broad conceptualizations, however, do not give shape to the sort of speculation that the Court appears to be concerned about in facial challenges. In this Article, I argue that courts reviewing a statute for facial constitutionality should focus a speculation inquiry on whether, and to what degree, a court must rely on hypothetical theories regarding human behavior triggered by the challenged statute's enforcement. Ultimately, I contend that a direct focus on speculation helps separate facial challenges that are likely to be successful—because they are grounded in a textual analysis—from those that are not—because they are grounded in speculation.

This Article begins by exploring facial challenges generally, recognizing differences among facial challenges, and suggesting that speculation plays a unique role in one specific type of facial challenge—the challenge brought against a novel state statute after it is enacted but before it goes into effect. Challenges brought before implementation of a novel state statute should be viewed as the "purest" form of facial challenge because there is no opportunity to consider the statute in context. Federalism principles suggest that such pure facial challenges should be the most difficult to support because plaintiffs are asking a federal judge to void a duly-enacted state statute before the state has had a chance to implement it. Thus, while a text-based facial challenge might be more easily supported and suitable for judicial determination even in a pure facial challenge, a judge may be hesitant to rely on speculation to support a constitutional ruling on the face of an untested state statute. Moreover, pure facial challenges raise a fundamental perplexity—such challenges are typically brought to the courts as requests for an injunction to prevent the statute from taking effect; and, as discussed in this Article, the standards for obtaining injunctions actually demand the type of speculation viewed skeptically by the Roberts Court.

To illustrate the current treatment of speculation in constitutional analysis, this Article describes two recent opinions in which the Supreme Court relied specifically on the role of speculation to reject pure facial challenges, despite seemingly controlling precedent to the contrary.[8] In addition to analyzing the importance of speculation on the Supreme Court's rulings in these cases, this Article mines the opinions to provide insight into several Justices' views on the

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Washington's blanket primary system against a facial challenge); *Chicanos Por La Causa*, 558 F.3d 856 (analyzing Arizona's employer sanction statute against a facial challenge).

6. *Speculation Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/speculation (last visited Jan. 10, 2010).

7. *See infra* notes 56–57 and accompanying text.

8. *See, e.g.*, *Crawford*, 553 U.S. at 201–02; *Wash. State Grange*, 552 U.S. at 454–56.

role of speculation in facial challenges, providing guidance on how the Court will likely treat future facial challenges.

Finally, using Arizona's recent immigration statutes and the litigation challenging these statutes on their face, this Article outlines some of the challengers' claims against the statutes and explores the role of speculation in the constitutional analysis. In the last few years, Arizona statutes pertaining to the employment of undocumented workers and state criminalization of undocumented status have thrust Arizona, and its immigration policies, into the national spotlight. On May 26, 2011, the Supreme Court decided *Chamber of Commerce of the United States of America v. Whiting*,[9] a facial challenge brought against the "Legal Arizona Workers Act," known widely as Arizona's "employer sanctions" statute.[10] As noted in this Article's opening quotation, the Ninth Circuit upheld Arizona's statute, relying heavily on the fact that the constitutional challenge was a facial challenge brought "against a blank factual background."[11] The Supreme Court affirmed, grounding its decision primarily in an interpretation of the federal statute's text.[12] Using Arizona's immigration statutes as examples, this Article concludes by examining and developing a role for speculation in the constitutional analysis.

I. EXPLORING THE FACIAL CHALLENGE

In general, a facial challenge is a constitutional challenge asserting that a statute is "invalid on its face as written and authoritatively construed, when measured against the applicable substantive constitutional doctrine," rather than against the facts or circumstances of a particular case.[13] Facial constitutional analysis has been generally described as "the device for assuming the facts necessary for constitutional scrutiny without referring either to the limited factual hearings below or to a significant and representative sample of outside medical or social science data."[14]

A. Identifying and Defining the Facial Challenge

Efforts to define facial challenges often begin by striving to distinguish facial challenges from as-applied challenges, yet such distinctions blur on close inspection. Some scholars have suggested, for example, that "all constitutional challenges are in some sense facial challenges,"[15] while others have suggested that

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9. 131 S. Ct. 1968 (2011).

10. ARIZ. REV. STAT. ANN. §§ 23-211 to -214 (2010).

11. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 861 (9th Cir. 2009), *aff'd sub nom. Whiting*, 131 S. Ct. 1968.

12. *Whiting*, 131 S. Ct. at 1977, 1980–81.

13. David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 58 (2006).

14. Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 674 (1988).

15. *See, e.g.*, Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 879 (2005).

all constitutional challenges are "in an important sense as-applied" challenges.[16] Indeed, the Supreme Court recently declared that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge."[17] Thus, challenges to a statute's constitutionality can have characteristics of both classifications, which may result in some confusion among the parties litigating the challenge.[18] Although drawing a line between facial and as-applied challenges has proven to be complex, it is a necessary exercise because, as noted below, the Court has relied on the categorization and refuses to allow a ruling on one type of challenge to control a future case raising the other type of challenge to the same statute.[19]

The Court has embraced the distinction between facial and as-applied challenges as a useful indicator of remedy, accepting the general view that the challenger's requested remedy defines the challenge and, conversely, that the distinction between challenges is useful to a court in deciding on and employing a remedy.[20] Under this "remedy-centered" approach, if a statute's challenger seeks

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16. *See, e.g.*, Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321, 1326 (2000).

17. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 893 (2010).

18. *See* Doe v. Reed, 130 S. Ct. 2811, 2816 (2010) (noting that the parties disagreed about whether a challenge brought against Washington's Public Records Act was facial or as applied because the challenge had characteristics of both). On one hand, the challenge looked "as applied" because it did not seek to strike the Public Records Act in all its applications but only "as applied" to referendum petitions. *See id.* at 2815–16. On the other hand, the challenge looked "facial" because it was not limited to the plaintiffs' particular case or toward striking the Act only as against the plaintiffs' referendum petition. *See id.* at 2816.

19. *See, e.g.*, Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464–68 (2007) (holding that the substantive First Amendment test established in an earlier facial challenge to a federal political advertising restriction, McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), did not apply in the current as-applied challenge); Wis. Right to Life, Inc. v. Fed. Election Comm'n, 546 U.S. 410, 412 (2006) (remanding to allow lower court to entertain an as-applied challenge to the Bipartisan Campaign Reform Act of 2002 ("McCain–Feingold Act"), Pub. L. No. 107-155, 116 Stat. 81 (2002), despite precedent rejecting a facial challenge); Buckley v. Valeo, 424 U.S. 1, 97 n.131 (1976) (per curiam) (specifically noting that a finding of facial validity would not preclude a future finding of invidious discrimination based on proof that the scheme is discriminatory in its effect); *see also* Pine, *supra* note 14, at 712 ("Adjudicative or legislative assumptions of fact made in the course of facial review should not bind subsequent courts presented with a full operational factual record when heightened scrutiny is required."). In *Citizens United*, the Court embraced a view on the merits expressed by a minority of judges who would have found the federal law's restriction on political communication a violation of the First Amendment on its face. 130 S. Ct. at 886 (agreeing with conclusion expressed by Justice Scalia's concurrence in *Wisconsin Right to Life* that the precedent upholding corporate political speech prohibitions was a "significant departure from ancient First Amendment principles" (quoting *Wis. Right to Life*, 551 U.S. at 490 (Scalia, J., concurring))).

20. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010) (distinguishing "facial" invalidation from "partial" invalidation); *Citizens United*, 130 S. Ct. at 893 (noting that the distinction between facial and as-applied challenges is "both instructive and necessary, for it goes to the breadth of the remedy

to void the statute in its entirety against circumstances beyond the challenger's individual case—rather than simply as the statute is applied to their circumstances—the attack on the statute would be defined at the outset as "facial."[21] Recently, for example, the Court held that although a challenge against a state's public records act looked "as applied," because it sought to strike the act only as it applied to referendum petitions rather than as against all public records, the challenge should be viewed as facial because the relief sought reached "beyond the particular circumstances of these plaintiffs."[22] Moreover, an ultimate ruling that defines a categorical or universal infirmity in a statute will not convert the plaintiff's as-applied challenge into a facial challenge. Such a ruling, however, may ultimately dictate the fate of the statute in all future circumstances, although in that case, the ruling would be determined by stare decisis rather than by facial invalidation.[23] Thus, in a facial challenge, the plaintiff targets the statute in applications beyond the plaintiff's own case and generally seeks to invalidate the statute in its entirety with respect to those applications. In contrast, an "as-applied" challenge targets the constitutionality of the statute as it is applied in the particular context of the case, and seeks to invalidate it only as applied to those circumstances.

To illustrate the distinction between the two challenges, suppose, for example, that a state has a number of criminal statutes that govern students' conduct in schools. One such statute makes it a crime for a person to "interfere with or disrupt" an educational institution.[24] A high school student who has been perfectly well-behaved in school may wonder what behaviors might trigger the imposition of this statute. Such a student has a choice: she can attend school and carefully avoid engaging in any speech or behavior that her teacher or principal might view as disrupting the educational institution, or she can attend school and not concern herself with such matters, risking the imposition of a juvenile criminal adjudication if she should cross a line. If she is unwilling to function in school under such uncertainty, the student could raise a constitutional challenge against the statute on its face—for example on the grounds that the language of the statute that prohibits "interfering with or disrupting" an educational institution is unconstitutionally vague or overbroad. The student's facial challenge will be focused on the statute's text as measured against the substantive constitutional doctrine, rather than the application of the statute to any of the student's own

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employed by the Court" and citing precedent that contrasts "facial challenge" with "a narrower remedy" (quoting United States v. Treasury Emps., 513 U.S. 454, 477–78 (1995))).

21. *See, e.g.*, Fallon, *supra* note 16, at 1337 (defining facial challenges as seeking complete abolishment of the statute instead of piecemeal rulings against the statute as it is applied).

22. *See Reed*, 130 S. Ct. at 2817.

23. *See* Skilling v. United States, 130 S. Ct. 2896, 2940 (2010) (Scalia, J., concurring).

24. *See, e.g.*, *In re* Nickolas S., 245 P.3d 446, 452–53 (Ariz. 2011) (analyzing a state statute that makes it a crime for a person to "knowingly abuse[]" teachers or school employees and holding that a student's juvenile adjudications must be vacated because the student's insulting and offensive words used in school were not fighting words inherently likely to provoke a violent reaction by the teacher).

behavior. Even if the challenge is framed as one that seeks to strike the statute as it applies only in the secondary-school setting, rather than as applied to all schools, it will be considered a facial challenge if the relief sought reaches beyond the individual student's particular circumstances.

The remedy-centered approach finds justification, if not direct support, in *United States v. Salerno*,[25] the Supreme Court case known for establishing the most widely used test for evaluating facial challenges. In *Salerno*, the Court upheld the Bail Reform Act of 1984 ("Act") against a facial challenge brought by two defendants who were committed for pretrial detention pursuant to the Act.[26] Although both defendants were charged under the Act, they never claimed that the Act was unconstitutional because of the way it was applied to them; rather, they raised a facial challenge.[27] In upholding the validity of the Act, the Court articulated a "no set of circumstances" test, finding that a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[28] Or, stated differently, the "no set of circumstances" test provides that if the state can articulate just one set of circumstances under which the statute can be applied constitutionally, the facial challenge will fail. The primary justification for the standard seems to rest with the requested remedy. It is sensible, one might argue, to impose *Salerno*'s weighty burdens on the statute's challengers simply because the remedy they seek—the total invalidation of the statute—is extreme.[29]

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25. 481 U.S. 739 (1987).

26. *Id.* at 741–43. The Bail Reform Act of 1984 permitted a federal court to hold an arrestee, pending trial, if the government could demonstrate at a hearing that there were no release conditions which could reasonably assure the safety of members of the community. *Id.* The government had charged the defendants with multiple Racketeer Influenced and Corrupt Organizations Act ("RICO") violations and detained them pending trial after convincing a district court judge that the defendants were prominent leaders of the Genovese crime family and that no condition of their release would assure the safety of the community. *Id.* at 743.

27. *Id.* at 745. Indeed, the Act, as applied specifically to the defendants, would have been moot as to both defendants. One defendant was sentenced and detained pursuant to another unrelated proceeding, and the other defendant was released as a cooperating witness. *Id.* at 756–757 (Marshall, J., dissenting). Thus, the Government asked the Court to address the "facial constitutionality" of the pretrial detention statute even though there no longer appeared to be an actual controversy between the parties. *Id.* at 758; *see infra* notes 38–42 and accompanying text (discussing the relationship of facial challenges to standing and case and controversy requirements). The Government likely invited the Court to see the challenge as a "facial" challenge so that the Court would determine whether the Bail Reform Act could be constitutional under any circumstances. The Court held by a 6–3 vote that the Bail Reform Act did not facially violate substantive due process and was not facially unconstitutional under the Eighth Amendment. *Salerno*, 481 U.S. at 755 (majority opinion). Therefore, the Government's gamble paid off.

28. *Salerno*, 481 U.S. at 745.

29. Justice Scalia, considered a proponent of the *Salerno* standard, has expressed the view that the harsh remedy of total invalidation justifies the onerous "no set of circumstances" standard. City of Chicago v. Morales, 527 U.S. 41, 77–78 (1999) (Scalia, J., dissenting).

Although the Court has relied extensively on the *Salerno* test to analyze facial challenges,[30] the standard has been controversial and criticized by some Justices as nearly impossible to satisfy.[31] Recently, the Roberts Court suggested that to succeed in a facial attack a challenger must establish either that no set of circumstances exists under which the statute would be valid, or that the statute lacked any "plainly legitimate sweep."[32] Taking the "plainly legitimate sweep" test a step further, the Court has recognized in the First Amendment context a "second type of facial challenge" under which a law may be invalidated on its face as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[33]

Finally, the underlying assumption of complete, i.e., "facial," invalidation, of the challenged statute ignores the interplay of the severability doctrine as applied to challenged statutes and is inconsistent with the *Ayotte v. Planned Parenthood* decision in which the Supreme Court instructed lower courts to hesitate before completely invalidating a statute as a remedy in facial challenges.[34] In *Ayotte*, which involved a facial challenge to a New Hampshire abortion statute, the Court held that entirely invalidating a statute pursuant to a

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30. The Court relied on the heavy burden required to mount a facial challenge in its recent decision upholding an Indiana law requiring voters to provide government-issued photo identification at polling stations. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198–202 (2008) (noting the lack of concrete evidence that a wide range of people would be unduly burdened by the requirement). Moreover, the distinction between the facial challenge's heavy burden and the less onerous burden imposed in an as-applied challenge supported the Court's ruling in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, in which the Court refused to apply a test established in an earlier facial challenge to the Bipartisan Campaign Reform Act of 2002 to a later as-applied challenge to that same statute. 551 U.S. 449, 464–68 (2007).

31. Justice Stevens, for example, has been a strong critic of the *Salerno* test. He has noted that "[t]he appropriate standard . . . [for] facial challenges . . . has been the subject of debate within th[e] Court." Vacco v. Quill, 521 U.S. 793, 738–40 (1997) (Stevens, J., concurring) (suggesting that the Court has rejected *Salerno*'s "no set of circumstances" standard in favor of an "all or most cases" standard that asks if the statute would not be invalid "in all or most cases in which it might be applied"). Justice Stevens has refused to recognize *Salerno* as even establishing the standard upon which courts should analyze facial challenges. *See Morales*, 527 U.S. at 55 n.22 ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . . ."). In addition, Justice Souter emphasized recently that if *Salerno* were the standard, there could never be a facial challenge to a voter identification requirement. Transcript of Oral Argument at 35–36, *Crawford*, 553 U.S. 181 (Nos. 07-21, 07-25) [hereinafter Transcript of Oral Argument, *Crawford*].

32. *See* United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (citing Washington v. Glucksberg, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring), for the plainly legitimate sweep test).

33. *Id.* In the *Stevens* case, the Court applied this test to conclude that a federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was facially invalid under the First Amendment. *Id.* at 1592.

34. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–31 (2006); *see also* Metzger, *supra* note 15, at 883 ("Defining facial challenges *Salerno*-style as leading to total invalidation . . . obscures the crucial role played by severability doctrine.").

successful facial challenge is not always necessary or justified when lower courts can respond more narrowly, while remaining faithful to legislative intent.[35] The Court explicitly acknowledged that in the past it had invalidated in their entirety abortion statutes sharing the same constitutional flaw present in the New Hampshire statute.[36] Yet, in *Ayotte*, the Court found neither that the facial challenge failed, such that the statute should be upheld, nor that it succeeded, such that the entire statute should be invalidated. Instead, the Court found that the facial challenge was sensible in some hypothetical applications and remanded the case to the lower court to fashion a narrow remedy.[37] Thus, if courts are trending toward narrowly carving out relief in facial challenges, rather than striking down statutes entirely, it is not sensible to define a facial challenge by its remedy or to impose a nearly impossible "no set of circumstances" burden on the statute's challengers.

B. Justifying the Facial Challenge

Federal courts are in the business of deciding actual disputes, not issuing advisory opinions that reach beyond the circumstances of the individual dispute before the court.[38] Justiciability doctrines, such as standing, ripeness, and

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35. 546 U.S. at 323. The *Ayotte* Court considered a pure facial challenge—brought before the statute went into effect—to a New Hampshire abortion statute that prohibited physicians from performing an abortion on a minor until 48 hours after written notice of the abortion was delivered to her parent or guardian. *Id.* at 323–24. The statute did not provide an exception to the waiting requirement in the event of a medical emergency. *Id.* at 324. The Court found first that "a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother,'" *id.* at 327 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992)), and that New Hampshire had conceded that "it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks," *id.* at 328. The Court then analyzed the question of remedy and found that despite the fact that the challenge to the statute was necessarily facial because the statute had never been applied, a lower court should nonetheless craft a narrow remedy such as a declaratory judgment and injunction prohibiting only the unconstitutional application of the statute. *Id.* at 330–31.

36. *Id.* (citing Stenberg v. Carhart, 530 U.S. 914, 930 (2000)).

37. *Id.* Recently, the facial challenges to the national healthcare legislation have resulted in split decisions regarding severability in the lower courts that have upheld the facial challenge. The U.S. District Court for the Northern District of Florida, for example, found the individual insurance mandate unconstitutional and determined that it was not severable from the Patient Protection and Affordable Care Act; thus, the court declared the entire Act void. Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1165 (N.D. Fla. 2010). In contrast, the U.S. District Court for the Eastern District of Virginia found the individual insurance mandate unconstitutional but it severed that provision leaving the remainder of the Act in place. Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 789–90 (E.D. Va. 2010). Similarly, in the facial challenge brought against SB 1070, the U.S. District Court for the District of Arizona severed the portions of SB 1070 determined to be facially unconstitutional from the entire statute rather than striking the statute as a whole. United States v. Arizona (*Arizona I*), 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011).

38. Article III, Section 2 of the U.S. Constitution expressly refers to judicial power extended to "Cases" and "Controversies," U.S. CONST. art. III, § 2, and the Court has noted that "the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions," Flast v. Cohen, 392 U.S. 83, 96 (1968).

mootness, define the judicial role and exist primarily to ensure that federal courts do not issue advisory opinions.[39] Such doctrines ensure that "concrete controversies" with "adverse litigants" are presented to the court for consideration.[40] The general prohibition against issuing advisory opinions respects separation of powers and federalism concerns by ensuring that federal courts do not improperly interject themselves in the legislative process by prematurely declaring a statute unconstitutional. A court's reluctance to uphold a facial challenge may be grounded in any number of these policies, including a respect for federalism, separation of powers, the doctrine of constitutional avoidance, or a heightened respect for the state and federal legislative functions and the need to provide deference to legislative enactments.[41]

These well-established justiciability doctrines, and the policies that support them, intersect with threshold arguments a state would likely advance to ward off a facial challenge.[42] Despite the justiciability doctrines' fundamental policies, the facial challenge doctrine, as currently conceptualized, presents an acknowledgement that some statutes can and should be declared unconstitutional based solely on their text because factual context is largely irrelevant. For example, the emergence of facial challenge principles likely derives from First Amendment prior restraint principles and the recognition that a vague or overbroad statute threatens constitutional speech rights, even if the statute has never actually

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39. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 60 (3d ed. 2006). Standing requires that a plaintiff demonstrate that he or she has or imminently will suffer actual harm. *Id.* at 55. Ripeness determines whether an actual dispute has occurred yet. *Id.* Mootness requires an actual, current dispute between the parties. *Id.*

40. *Id.* at 51 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).

41. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513 (2009) (ruling narrowly on the facts of the case rather than deciding that section 5 of the Voting Rights Act is unconstitutional and noting that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called upon to perform'" (quoting Blodgett v. Holden, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring))); *see also* Franklin, *supra* note 13, at 55–56 (asserting that the traditional role of the Court is to avoid "the 'strong medicine' of constitutional invalidation unless absolutely necessary" (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973))); *id.* at 56 n.69 ("[C]ourts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." (quoting *Broadrick*, 413 U.S. at 610–11)). In oral argument for *Crawford v. Marion County Election Board*, Justice Scalia referred to every facial challenge as an "immense dictum" on the part of the Court. *See* Transcript of Oral Argument, *Crawford*, *supra* note 31, at 37.

42. *See, e.g.*, Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003) (holding that national park concessioners' facial challenge to park regulations was not ripe for judicial resolution because the challengers could not show they had suffered any real hardship and the resolution of the case would be aided by the existence of factual context). In defending a facial constitutional challenge at the first level, respondents often raise initial arguments based on lack of standing and ripeness, along with threshold arguments underscoring the difficult standards attending facial challenges. Such theories are all generally based on an argument that plaintiffs bringing a case without factual context, which would necessarily be true in a pure facial challenge, lack standing and a ripe claim, and pure facial challenges based on speculation raise the same concerns encountered in ripeness challenges.

been applied to prohibit speech, because by its *terms* alone, the statute has the effect of chilling protected speech.[43] Thus, our hypothetical high school student's speech is chilled because she does not know what "disrupting" the educational institution means. In addition, other statutes may present pure questions of law that would not be informed by the application of a statute to any particular factual circumstance.[44] Similarly, facial challenges brought on the contention that a legislative body is without power to enact the challenged statute raise threshold questions of law that are not concerned with the downstream effect of a statute after it is put into effect.[45] In all of these circumstances, the facial challenge device operates sensibly, as justified by the nature of the challenged statutes. Finally, as discussed below, distinctions exist among facial challenges, and the policy objectives supporting such challenges vary depending on whether the challenge is brought prior to a statute's implementation or after the statute has been in operation for a number of years.

C. Distinguishing Among Facial Challenges

While a good deal of attention has been paid to attempting to distinguish between facial and as-applied challenges, few scholars have recognized the distinctions that exist within the category of facial challenges.[46] In fact, all facial

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43. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 494–95 (1965) (establishing that unduly vague and overbroad language of Louisiana's "Subversive Activities and Communist Control" statute facially violates the constitution).

44. Dean Chemerinsky suggests, for example, that if a city were to ban all abortions within its borders, any facts presented in the legal challenge to the statute would be immaterial. CHEMERINSKY, *supra* note 39, at 62.

45. *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 774 (E.D. Va. 2010) ("By their very nature, almost all constitutional challenges to specific exercises of enumerated powers, particularly the Commerce Clause, are facial."); *see also* Luke Meier, *Facial Challenges and Separation of Powers*, 85 IND. L.J. 1557, 1580–83 (2010) (focusing on the unique posture of the facial challenge that attacks the legislative branch's underlying power to pass the challenged statute). This is what I understand the Ninth Circuit to mean in its recent opinion on the facial challenge to Arizona's SB 1070 statute when it found that "there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent and therefore is preempted by the Supremacy Clause." *See* United States v. Arizona (*Arizona II*), 641 F.3d 339, 346 (9th Cir. 2011).

46. Caitlin Borgmann has suggested that all challenges, facial and as applied, can be divided into two general categories: (1) pre-enforcement challenges, which include those seeking full invalidation, those that are limited to a "subset of applications," and those that are specific to the challenger's case; and (2) post-enforcement challenges, that divide into similar sub-categories. Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563, 570–71 (2009). Marc Isserles has identified a distinction among facial challenges by categorizing some as overbreadth challenges and others as "valid rule facial challenges." *See* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 386–87 (1998); *see also* Franklin, *supra* note 13, at 58–62. In contrast to an overbreadth challenge, where the court is asked to examine a law's application to situations not before the court, a "valid rule facial challenge" asks the court to measure the statute's terms against the relevant law—constitutional doctrine—but not against any particular application of the statute. Isserles, *supra*, at 387.

challenges to state statutes are not the same; facial challenges can be raised prior to a statute's implementation and enforcement or years after the statute has been in effect. When a new state statute is challenged before it takes effect, there is no factual context within which a reviewing court could consider the impact of the statute. Furthermore, when an entirely novel statute is challenged before it takes effect, there is no data from other states to assist the court in making determinations regarding the statute's probable effect. Such challenges are unambiguously facial—or "pure" facial challenges—because of the complete lack of available factual context or actual implementation information.

Challengers raising pure facial challenges before the statute's implementation generally seek temporary and permanent injunctions to prevent the statute from going into effect. There are a number of reasons why parties may choose to challenge a statute so quickly, before evaluating how it plays out once implemented. The challenger may fear that the statute, once implemented, would have an immediate chilling effect or that its enforcement would invite state officials to engage in intolerable discriminatory behavior. Alternatively, when statutes regulate within a particular, limited time frame, the length of time required for an as-applied challenge to develop renders case-by-case decisionmaking impractical and ineffective.[47]

In contrast to the pure facial challenge, the Supreme Court has frequently analyzed facial challenges long after the statute has gone into effect—sometimes after it has been operating for years. The most obvious reason parties may style their statutory challenge as facial, rather than "as applied," despite the existence of context, is to compel a particular result—a complete ban on a statute in all its possible applications.[48] In *City of Chicago v. Morales*, for example, a number of individual defendants were prosecuted under a Chicago anti-loitering statute that had been in operation for years.[49] Yet, despite years of factual context, the plaintiffs brought a suit challenging the statute on its face, which may have reflected an attempt to invalidate the entire statute. Another reason why the litigants in *Morales* may have brought a facial challenge is that they may have concluded that an as-applied challenge would likely prove unsuccessful given the factual context presented by their circumstances.[50] In addition, a case grounded in

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47. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 895 (2010) ("By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on, even if they could establish that the case is not moot because the issue is 'capable of repetition, yet evading review.'" (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983))). Justice Ginsburg has commented that the motive for bringing a facial challenge to a voter identification statute is that without it, "the horse is going to be out of the barn." Transcript of Oral Argument, *Crawford*, *supra* note 31, at 38–39.

48. *See supra* notes 20–29 and accompanying text.

49. 527 U.S. 41, 49–50 (1999) ("During the three years of [the Act's] enforcement, the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance.").

50. As Justice Scalia noted in dissent: "[I]t is doubtful whether some of these respondents could even sustain an *as-applied* challenge on the basis of the majority's own criteria." *Id.* at 82 (Scalia, J., dissenting). Justice Scalia provides as an example that three of the respondents admitted to being members of a street gang, were loitering with other

factual context may become moot, raising the possibility that the court would decide the matter as a facial challenge anyway.[51] Finally, a facial challenge might have been intentionally raised and argued as a "test case" when, for example, a justiciability doctrine prevents the case from being heard on an as-applied challenge.[52]

When context exists for an as-applied challenge, ignoring it to frame arguments solely on the statute's face elicits what Justice Stevens recognized as an "uneasy feeling."[53] For example, consider again our school hypothetical: imagine a high school student setting off a bomb in class and finding himself charged under the state statute that makes it a crime to interfere with or disrupt an educational institution. Should such a student be able to mount a facial challenge against the statute? When a constitutional challenge is put before a court, the general rule is that the challenger must show that the statute violates his own rights.[54] Facial challenges in general are an exception to this rule. While the exception makes sense for pure facial challenges, because no applicable context exists for a challenger to even attempt to demonstrate a personal constitutional violation, when a statute has apparently been applied in a constitutional manner and the challenger nonetheless pursues a facial rather than an as-applied challenge, we are confronted directly with the uneasy feeling Justice Stevens acknowledged.[55]

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known members, and were ordered to disperse and subsequently arrested. *Id.* at 83 ("Even on the majority's assumption that to avoid vagueness it must be clear to the object of the dispersal order *ex ante* that his conduct is covered by the ordinance, it seems most improbable that any of these as-applied challenges would be sustained."); *see also* Franklin, *supra* note 13, at 51–52 (noting that in Gonzales v. Raich, 545 U.S. 1 (2005), and other commerce clause cases, the Court did not take "meaningful account" of the particular facts; thus, it was engaging in "essen[tially]" a facial challenge review even though context was available and the Court claimed to be sidestepping facial review).

51. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 745, 756–57 (1987) (case became moot as to the two respondents who brought the case so it was converted into a facial challenge).

52. *See, e.g.*, *id.* at 769 (Stevens, J., dissenting) (labeling the case as a government "test case").

53. *Id.* (expressing the "uneasy feeling" that the "Government is much more interested in litigating a 'test case' than in resolving an actual controversy concerning respondents' threat to the safety of the community").

54. *See* New York v. Ferber, 458 U.S. 747, 767 (1982).

55. The answer to this "uneasy feeling" dilemma for some on the Court has been to rely on the *Salerno* test to rule against the facial challenge because the challenger's own case shows at least one set of circumstances to which the statute, as applied, would be constitutional. *Morales*, 527 U.S. at 83 (Scalia, J., dissenting). On the flip side, if a statute is arguably unconstitutional as applied to the challenger's circumstances—let us say for example a student is charged for disrupting the educational institution because he wore a black armband to class in protest of the war in Iraq—some might argue that the challenger should be required to pursue only the narrower as-applied challenge rather than pursuing a broader remedy under a facial challenge. *See* United States v. Stevens, 130 S. Ct. 1577, 1593 (2010) (Alito, J., dissenting) ("The 'strong medicine' of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court.").

When a pure facial challenge is brought in federal court against a novel state statute, the federal court's power over the state is great because the judge can deprive a state of any opportunity to implement and enforce its duly enacted statute. Given the federalism and separation of powers concerns at issue in such pre-enforcement challenges, a federal judge is not likely to invalidate the entire state statute on the basis of what appear to be speculative arguments. Thus, defining carefully the sort of speculation that is likely to concern a reviewing court and focusing on that speculation in considering a statute's constitutionality helps distinguish facial challenges that are most likely to be successful from those that are not.

II. EXPLORING SPECULATION

Relying on speculation, broadly defined, to make predictions and arrive at conclusions is not uncommon for judicial decision-makers.[56] The substantive law, for example, might require that judges or jurors decide if something is likely to happen in the future—such as a determination of whether a defendant will continue to stalk a victim in the future, an occurrence that is not actually "provable" because it has not yet actually happened.[57] To make such determinations, fact finders may rely in important ways on testimony, empirical facts, non verifiable facts, and their own understandings of the world, frequently grounded in personal biases, experiences, and social conventions. This predictive speculation, while unsupported by reliable "proof," is, ideally, informed by concrete data, reasoned judgment, and common sense.

In reviewing a statute for constitutionality pursuant to either a facial or as-applied challenge, I propose a targeted focus on speculation that explores the degree to which a decision-maker must accept hypothetical theories about human behavior that the statute's challengers suggest would likely be triggered by the operation of the challenged statute. If the statutory challenge is grounded materially in this sort of speculation, such that the challenge to the statute's constitutionality cannot be supported without reliance on the speculation, it should fail. Facial and as-applied challenges produce substantially different considerations with regard to such speculation. For example, mounting an as-applied challenge may require the decision-maker to rely on little or no speculation because the plaintiffs, allegedly wronged by the operation of the statute, can appear in court to challenge the statute as it uniquely applied to them. The individualized facts of such plaintiffs' cases are central to as-applied challenges. At the first level of the as-applied challenge, the hearing or trial in the lower court would produce a factual

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56. *See generally* CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS (2007) (identifying two categories of unprovable facts in criminal cases: those pertaining to predictions of dangerousness necessary in sentencing and those pertaining to mens rea or culpability, which require the decision-maker to enter into the defendant's mind).

57. *Id.* at 8–11 (discussing the need to prove at the penalty phase of capital cases or commitment proceedings that a defendant likely will, in the future, offend again); *see also* Andrew E. Taslitz, Book Review, 22 CRIM. JUST. 70 (2007) (reviewing SLOBOGIN, *supra* note 56).

record largely about that individual plaintiff's encounter with the statute without the need to extrapolate on how the statute would likely be applied to others. If the plaintiff successfully demonstrates that the statute improperly infringed his or her constitutionally protected interests, the statute would be deemed unconstitutional with respect to those applications in the future.

In contrast, a facial challenge is not concerned about application of the statute in an individualized context. Indeed, pure facial challenges can never be about individualized results because that state's statute, or even another state's similar statute, have never been implemented against the plaintiff or anyone else. Such challenges may raise purely legal arguments about the statute's text, requiring a decision-maker to interpret the text against substantive constitutional doctrine. But if the challenge goes beyond such a textual interpretation and requires some assessment of the statute's probable impact, we would expect that the challenge would require a decision-maker to attempt to predict how the statute would operate in the future. Effectively, this would require the decision-maker to engage in predictive speculation. It is this particular type of facial challenge—with its reliance on speculation—that is suspect.

If, as I suggest, the current Court is reluctant to uphold a pure facial challenge grounded in speculation, asking what "facts" it will accept as properly supporting such a challenge is a critical inquiry in evaluating the challenge's success.[58] With no individualized contextual facts, the decision-maker must rely on other sources of evidence, such as expert witness testimony and empirical data, to support predictions about the likely effect a statute will have once it is implemented. The Court has long struggled with the appropriate role of empiricism and data in judicial decisionmaking.[59] Individualized case facts and context are comfortable ground for judges, while pragmatic decisionmaking based on empirical data and what might be deemed legislative fact-finding is suspect.[60] If similar statutes were enacted in other states, for example, a court might evaluate

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58. *See infra* Part III. Even in the *Citizens United* case, where the Court overruled its precedent and upheld a facial challenge to a federal statute, the Court specifically noted that it was not prematurely interpreting the statute "on the basis of a factually barebones record," Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 894 (2010) (citing Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008)), because in the earlier *McConnell* case analyzing a facial challenge to the same statute the parties had developed an "extensive record, which was 'over 100,000 pages' long" in the district court, *id.* (quoting McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 209 (D.D.C. 2003)).

59. *See* Pine, *supra* note 14, at 674–77; Susan M. Wolf, *Pragmatism in the Face of Death: The Role of Facts in the Assisted Suicide Debate*, 82 MINN. L. REV. 1063, 1089–97 (1998) (noting the Court's struggle, without reaching a resolution, with the role of empirical data in assisted suicide cases).

60. *See* Wolf, *supra* note 59, at 1070 (suggesting that few commentators have directly addressed the problem of empiricism's role in the assisted suicide debate and arguing that ignoring the role of facts ensures that the debate will continue with the debaters talking past each other by giving different weight to abstraction verses data). Wolf notes that pragmatism in general has been criticized as "antitheory, mindlessly enslaved to facts," and so "tethered to the world as we know it that it supports only small tinkering with the status quo rather than the abrupt changes that are sometimes needed." *Id.* at 1073.

what one scholar termed an "aggregate reality"—information pertaining to the impact of similar statutes in other states.[61] If, on the other hand, the challenged state statute is novel, such information will not exist. Relevant predictions can sometimes be based on credible, concrete data, such as population records or past arrest statistics; however, other predictions must rely on the decision-maker's own assessments of human behavior, such as evaluating an argument that employers or police will probably engage in discriminatory practices if a statute is implemented. Thus, a hearing or trial at the first level of the pure facial challenge may produce a record that contains no facts on the statute's application and little aggregate or credible data to support hypothetical conclusions about the statute's impact upon implementation. If the challenge is dependent on predictive hypothetical theories about human behavior triggered by the statute's operation, it will likely fail.

Ironically, given the Court's skepticism of speculation-based conclusions, a challenger's need to advance speculative arguments is seemingly unavoidable in the pure facial challenge due to the standards that govern such proceedings at the first level of the challenge. Pure facial challenges go hand-in-hand with motions for injunctions to prevent the statute from taking effect, and speculation assumes an integral role in evaluating motions for injunctions. Under the prevailing standards, challengers seeking temporary and permanent injunctions against a statute's enforcement are required to demonstrate that they are likely to succeed on the merits, that they would suffer irreparable harm in the absence of the injunction, and that the balance of equities tips in favor of issuing the injunction.[62] These requirements, by their terms, actually invite challengers to engage in some degree of speculation because they require that the challengers demonstrate "irreparable" harm and articulate a theory that explains the burden that will befall them if the statute is allowed to go into effect. The threshold standards for obtaining a temporary injunction require that parties speculate on what will likely happen if the statute is enforced. Therefore, a case framed to the trial court around speculative arguments of irreparable harm may ultimately be evaluated by appellate courts that are generally skeptical of speculation. When threshold, hypothetical fact scenarios offered to establish burden and irreparable harm overlap with the constitutional analysis of the statute on its face, the case becomes one seemingly grounded entirely in speculation.

III. THE ROBERTS COURT ON THE ROLE OF SPECULATION AND CONTEXT IN PURE FACIAL CHALLENGES

Two recent opinions from the Supreme Court—*Washington State Grange v. Washington State Republican Party*[63] and *Crawford v. Marion County Election Board*[64]—support the premise that the Roberts Court is uniquely hostile to speculation and may be embracing a renewed support for the importance of concrete facts in adjudication. Both cases involve pure facial challenges—they both bring challenges to statutes before the statutes were implemented, and they

61. *Id.* at 1064 (arguing that "facts matter" and "aggregate reality" should count more than idealized or imagined cases in analyzing states' assisted suicide statutes).

62. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).

63. 552 U.S. at 454–57.

64. 553 U.S. 181, 200–02 (2008).

both reject the facial challenges raised against the statutes. A hesitancy to rely on speculation to defeat the statute is a central theme that emerges from a consideration of these cases.

A. Washington State Grange v. Washington State Republican Party

In *Washington State Grange*, the Washington State Republican Party filed suit challenging on its face a Washington statute that created a blanket primary system. Under the state law, candidates for office in the primary election would be identified on the ballot by their self-declared "party preference."[65] A political party could not prevent a candidate from designating it as the party preference, even if the candidate was unaffiliated with or repugnant to the political party, and the two candidates receiving the most votes advanced to the general election regardless of party preference designations.[66] The law never went into effect—the Washington State Republican Party filed its suit immediately after the state enacted regulations to implement the new law.[67]

In its lawsuit, the Washington State Republican Party argued that the law violated its First Amendment associational rights by forcing it to associate with candidates it did not endorse.[68] Both the district court and the Ninth Circuit Court of Appeals ruled in favor of the plaintiffs and enjoined the implementation of the state statute, finding that it burdened associational rights because the party-preference designation created a risk that voters would perceive primary winners as the party nominee. Furthermore, both courts found that the ballot created an impression that candidates were associated with the party of preference, even when the party did not wish to be associated with that candidate. In upholding the facial challenge, the Ninth Circuit invalidated the statute in its entirety.[69]

Despite the existence of relevant precedent supporting the lower courts' rulings,[70] the Supreme Court reversed in a 7–2 opinion written by Justice Thomas. The Court held that this facial challenge would require the Court to rely on speculation—which it refused to do—regarding whether voters would be likely to

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65. *Wash. State Grange*, 552 U.S. at 444.

66. *Id.*

67. *Id.* at 448.

68. *Id.* The Washington State Democratic Central Committee and the Libertarian Party of Washington later joined the lawsuit as plaintiffs. *Id.*

69. *Id.* at 448–49.

70. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (holding that a state law requiring the Boy Scouts to admit a homosexual scoutmaster violated the Boy Scouts' associational rights); Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000) (holding that California's blanket primary system, which allowed nonmembers to participate in selecting the political parties' nominees, violated political parties' associational rights). In its ruling in *Washington State Grange*, the Supreme Court distinguished *Jones* as a primary system that allowed voters unaffiliated with the party to choose the parties' nominee while the Washington statute did not, by its terms, actually choose the parties' nominee even if voters were confused by the meaning of the party-preference designation. 552 U.S. at 453–54. Similarly, the Court distinguished *Dale* by declaring that *Dale* involved an actual association threat and not the "mere *impression* of association." *Id.* at 457 n.9.

misinterpret the candidates' designation on the ballot form as the parties' nominee or as associated with the designated party.[71] The Court was expressly uncomfortable with the role speculation played in the constitutional analysis, finding that the challengers' arguments that the statute would impose a severe burden on political parties' associational rights rested on "factual assumptions about voter confusion that can be evaluated only in the context of an as-applied challenge."[72] The Court repeated the same theme in the majority opinion: it would not rely on the speculation necessarily advanced by the statute's challengers regarding voter confusion to support this facial challenge.[73]

The fact that the parties brought their challenge to the Washington statute prior to the law's implementation weighed heavily in the Court's analysis. The Court noted that it was essentially being asked to assume that voters would be confused by a ballot that did not yet exist and, as such, could not be evaluated.[74] Interestingly, the Court decided that because the challengers asked it to speculate on voter confusion, it should not "stop there" but must,

> in fairness to the voters of the State of Washington who enacted [the law] and in deference to the executive and judicial officials who are charged with implementing it, ask whether the ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment.[75]

The Court, when asked to speculate, indicated its willingness to speculate on all sides of the question, positing that the ballots might be printed in such a manner that "no reasonable voter would believe that the candidates listed there are nominees or members of, or otherwise associated with, the parties the candidates claimed to 'prefer.'"[76]

Chief Justice Roberts wrote a separate concurrence, joined by Justice Alito, to underscore the point that in this case, the Court was being asked to evaluate a crucial element of the constitutional analysis—voter perception of an expressed party preference—when that preference was to be expressed on a ballot that had not yet been written and that no one had seen.[77] A key component underlying the concurring Justices' position was the fact that the "respondents

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71. *Wash. State Grange*, 552 U.S. at 444.

72. *Id.*

73. *See, e.g.*, *id.* at 454 ("We reject each of these contentions for the same reason: They all depend, not on any facial requirement of [the Washington statute], but on the possibility that voters will be confused as to the meaning of party-preference designation. But respondents' assertion that voters will misinterpret the party-preference designation is sheer speculation."); *id.* at 457 ("Each of [respondents'] arguments rests on factual assumptions about voter confusion, and each fails for the same reason: In the absence of evidence, we cannot assume that Washington's voters will be misled. That factual determination must await an as-applied challenge." (citation omitted)).

74. *Id.* at 455 ("[B]ecause [the Washington statute] has never been implemented, we do not even have ballots indicating how party preference will be displayed.").

75. *Id.* at 455–56.

76. *Id.* at 460 (Roberts, C.J., concurring).

77. *Id.*

brought this challenge before the State of Washington had printed ballots for use under the new primary regime."[78]

In dissent, Justice Scalia, joined by Justice Kennedy, expressed his view that individualized context should play only a limited role in a facial challenge. Justice Scalia would find Washington's statute unconstitutional on its face because it would impose a severe burden on the parties' associational rights.[79] Applying the *Salerno* standard for facial challenges, Justice Scalia found that allowing candidates to say on the ballot "I prefer the D's" or "I prefer the R's" would link candidates to unwilling parties in such a way that there could be "'no set of circumstances' under which Washington's law would not severely burden political parties and no good reason to wait until Washington has undermined its political parties to declare that it is forbidden to do so."[80] With respect to whether it is best to wait and see if voters actually become confused—and then respond to that confusion with an as-applied challenge—Justice Scalia remarked that "[i]t does not take a study to establish that when statements of party connection are the sole information listed next to candidate names on the ballot, those statements will affect voters' perceptions of what the candidate stands for, what the party stands for, and whom they should elect."[81]

B. Crawford v. Marion County Election Board

In addition to *Washington State Grange*, the Court's decision in *Crawford v. Marion County Election Board* [82] sheds additional light on some Supreme Court Justices' views on the role of speculation and the importance of individualized factual context in a facial challenge. In *Crawford*, the Court rejected a facial challenge to Indiana's voter identification law requiring in-person voters to present a single piece of government-issued photo identification at their polling location,[83] which could be obtained, if necessary, without a fee.[84] The challenge was brought against the law promptly after its enactment and prior to its implementation.[85] In the plurality decision, the Justices split 3–3–3, with six Justices upholding Indiana's law against the facial attack, but for different reasons.[86] The Justices struggled during oral argument with the role of record facts in this facial challenge.[87] Ultimately, the Court in *Crawford* could not produce a majority view

78. *Id.*

79. *Id.* at 462 (Scalia, J., dissenting) (observing further that Washington did not demonstrate a compelling interest and that "Washington's only plausible interest is precisely to reduce the effectiveness of political parties").

80. *Id.* at 466 (citation omitted).

81. *Id.* at 469.

82. 553 U.S. 181 (2008).

83. *Id.* at 188–89.

84. *Id.* at 186. A voter without photo identification like a driver's license could obtain a government-issued card by presenting at least one "primary" document, which could be a birth certificate, U.S. passport, certificate of naturalization, or certain military cards. *Id.* at 198 n.17.

85. *Id.* at 186–87.

86. *Id.* at 204 (Scalia, J., concurring).

87. The Justices posed numerous questions during oral argument that reflected a concern over the lack of individualized context and a well-developed factual record in this

specifically because of a disagreement among the Justices regarding the importance of the record, the need for individualized facts, and the role of speculation in a facial challenge.

Writing for one plurality group, Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy, decided that the state statute should be upheld because evidence in the record did not satisfy the high standard imposed on challengers who seek complete invalidation of a statute.[88] This plurality noted that it was not possible, on this record, to quantify the magnitude of the burden the law might impose on the class of voters most heavily impacted—for example, the elderly, homeless, or those who have a religious objection to being photographed.[89] In particular, the plurality noted the absence of evidence on a number of relevant facts including the number of registered voters without photo identification; the distribution of voters who lacked photo identification; how difficult it would be for voters without identification to get the government-issued identification card; how uniquely difficult it might be for indigent voters to get a card; how many indigent voters lacked copies of their birth certificate; and how difficult it would be for voters with religious objections to get cards.[90] The plurality insisted on trial-tested facts and refused to accept speculation based on "Internet research" to fill in these points, noting that such research is "not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication."[91] The clear message for litigants from this plurality opinion is to wait before bringing a lawsuit: wait until the law is implemented and then develop a factual record, using both individualized facts and more broadly applicable data, to demonstrate a burden on constitutional rights that satisfies the onerous standard imposed on challengers seeking complete invalidation of a statute. Pure facial challenges would rarely, by definition, fit within this plurality's preferred process.

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facial challenge. For example, Chief Justice Roberts and Justice Scalia inquired as to whether the record reflected even a single instance of somebody who was denied the right to vote because he or she did not have voter identification. Transcript of Oral Argument, *Crawford*, *supra* note 31, at 10–11. To this inquiry, the petitioner responded by noting that the record had been developed before an election had happened, to "try to prevent an irreparable loss of constitutional rights in advance of the implementation" of the law. *Id.* at 11. Justice Scalia asked whether we knew, on this record, whether the State would provide a religious exemption to the photo identification requirement. *Id.* at 15–16. Justice Roberts asked how far away the furthest county seat is for somebody in the county. *Id.* at 16. Chief Justice Roberts and Justice Alito (and others) struggled to understand what percentage of people in Indiana did not have photo identification. *Id.* at 17, 26–28. Overall, the Justices were hard-pressed to understand the impact that would be imposed by the statute when there was arguably no quantification of the actual burden measured by the number of voters who would be adversely affected. *See, e.g.*, *id.* at 26–27 ("How do we tell whether this is on one side of the line or the other side of the line?"); *id.* at 27 ("What are we supposed to look at, how are we supposed to do it?").

88. *Crawford*, 553 U.S. at 201–03.

89. *Id.* at 201–02.

90. *Id.* at 201–03.

91. *Id.* at 202 & n.20.

Writing for the other plurality group, however, Justice Scalia, joined by Justices Thomas and Alito, rejected any need to develop a factual record or rely on individualized context.[92] This plurality concluded that the challengers' premise—that the voter identification law may impose a special burden on some voters—is irrelevant: courts should analyze burdens only generally, not individually, and if the generalized burden appears minimal, the court should ascertain whether the state interest is sufficient to sustain the statute.[93] The plurality clearly rejected any form of an "individual-focused" approach to facial challenges of this type.[94] It noted that in prior considerations of voting rights challenges, the Court analyzed burdens on voters generally, but not burdens on individual voters.[95] Moreover, Justice Scalia noted that even if "*stare decisis* did not foreclose adopting an individual-focused approach," he would "reject it as an original matter," reasoning that requiring individuals to bring challenges based on their own unique facts would require the court to engage in a "voter-by-voter examination of the burdens of voting regulations" that would be impractical, disruptive, and encourage constant litigation.[96]

The three dissenters in *Crawford* would have found the law unconstitutional on its face because the state had not made a "particular, factual showing that threats to its interests outweigh the particular impediments" the law imposed.[97] In an opinion joined by Justice Ginsburg, Justice Souter analyzed the financial burden that the state statute would place on elderly, disabled, and poor voters to travel to an Indiana Bureau of Motor Vehicles ("BMV") to get the photo identification they would need to vote.[98] Relying in part on data from Indiana County government and Indiana Department of State websites, Justice Souter analyzed whether Indiana counties offered a sufficient number of BMV branches for the number of active voting precincts in the county, and evaluated the state of public transportation in Indiana in weighing the burden on a voter without a car traveling to a distant BMV branch.[99] Furthermore, Justice Souter evaluated "record evidence and facts open to judicial notice" to conclude that the number of individuals likely to be affected by the financial burdens of the statute would be significant.[100] Having found the burdens imposed by the voter identification law

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92. *Id.* at 207–08 (Scalia, J., concurring).

93. *Id.* at 208–09.

94. *Id.* at 208.

95. *Id.* at 205–06 ("In the course of concluding that the Hawaii laws at issue in *Burdick* 'impose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote,' we considered the laws and their reasonably foreseeable effect on *voters generally*. We did not discuss whether the laws had a severe effect on Mr. Burdick's own right to vote, given his particular circumstances." (alteration in original) (quoting Burdick v. Takushi, 504 U.S. 428, 439 (1992))).

96. *Id.* at 208.

97. *Id.* at 209 (Souter, J., dissenting) (balancing the "voting-related interests that the statute affects" and finding the law unconstitutional "because it imposes a disproportionate burden upon those eligible voters who lack a . . . valid form of photo ID").

98. *Id.* at 211–16. Justice Breyer dissented separately but accepted Justice Souter's analysis. *See id.* at 237–41 (Breyer, J., dissenting).

99. *Id.* at 211–16 (Souter, J., dissenting).

100. *Id.* at 218.

"far from trivial," Justice Souter engaged in a "rigorous assessment" of the state's justifications for the law, and found the state interests insufficient "to justify the practical limitations placed on the right to vote."[101] With respect to the need to analyze information and data beyond the record and the case's individual factual context, Justice Souter was unconcerned that the statute's challengers were unable "to nail down precisely how great the cohort of discouraged and totally deterred voters" would be, noting that "empirical precision" has "never been demanded for raising a voting-rights claim."[102]

C. Assessing the Court's View on the Role of Speculation

Taken together, the *Washington State Grange* and *Crawford* opinions provide a window to the Court's approach to the use of speculation in the constitutional analysis of a statute challenged on its face. In both *Washington State Grange* and *Crawford*, the Court upheld state statutes against pure facial challenges suggesting, at least superficially, that the Roberts Court may be generally hostile to facial attacks. On deeper analysis, these two recent cases provide some nuanced insight on how a few members of the Court would likely view specific evidence advanced by challengers seeking to invalidate a statute on its face before the statute is implemented.

In both *Washington State Grange* and *Crawford*, Chief Justice Roberts and Justice Stevens adhered to a strongly stated, consistent demand that a statute's challenger provide individualized record facts to demonstrate that the statute imposed a significant burden on constitutionally protected interests. In *Washington State Grange*, Chief Justice Roberts wrote a separate concurrence to underscore the importance of facts demonstrating voter confusion over Washington's primary ballot—he refused to engage in speculation that voters would perceive from the ballot an association between the candidate and candidate's preferred political party.[103] In *Crawford*, Justice Stevens authored a plurality opinion, which Chief Justice Roberts joined, that insisted on credible (ideally trial tested) record facts to demonstrate that Indiana's voter identification statute would place a significant burden on Indiana voters.[104] In both cases, Chief Justice Roberts and Justice Stevens would impose this heavy burden of fact production and contextual support for constitutional argument on the statute's challenger. In both cases, they found that the challenger did not meet that burden; thus, they voted to uphold the state statute against a facial challenge.

Justice Scalia, widely considered the strongest proponent on the Court of a strict application of the *Salerno* test and the strongest critic of facial

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101. *Id.* at 223–24, 237.

102. *Id.* at 221. The oral argument in *Crawford* further illustrates the Court's concentration on and concern with speculation in the constitutional analysis. *See* Transcript of Oral Argument, *Crawford*, *supra* note 31, at 28–34 (questioning from Justice Souter attempting to find basis for estimates of voters who would be adversely affected by the voter identification statute).

103. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 460–61 (2008) (Roberts, C.J., concurring).

104. 553 U.S. at 200–01.

challenges,[105] also expressed a consistent view across the *Washington State Grange* and *Crawford* cases, but his view on the role of factual context was in stark contrast to that of Chief Justice Roberts and Justice Stevens. In both cases, Justice Scalia consistently stated that individualized context and record facts should not play a significant role in the constitutional analysis of a statute subject to a facial challenge.[106] Notably, Justice Scalia would have invalidated the state statute at issue in *Washington State Grange* as unconstitutional on its face, reasoning that it seemed obvious, at least to him, that voters would perceive an association between the candidate and the preferred party.[107] From Justice Scalia's point of view, it did not matter that the statute had not yet gone into effect, or that the ballots had not yet been printed or evaluated.[108] In *Crawford*, Justice Scalia voted to uphold the state voter identification statute, but he wrote a separate plurality opinion because, unlike the other plurality group, he would not require that the challengers prove an individualized burden. To Justice Scalia, it was sufficient that the burden on voters, in general, appeared to be minimal.[109]

Several of the other Justices expressed inconsistent views between these cases on the role of context and speculation. For example, in *Crawford,* both Justice Alito and Justice Thomas joined with Justice Scalia to form the plurality that specifically found individualized facts irrelevant in the constitutional burden analysis.[110] Yet, in *Washington State Grange*, Justice Thomas wrote the majority opinion, which expressly called for facts to prove voter confusion and refused to speculate that voters would perceive an association between the candidate on a ballot and the candidate's preferred party.[111] Justice Alito joined Chief Justice Roberts's concurrence, insisting that individualized facts exist to demonstrate voter

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105. *See* Stuart Buck, Salerno v. Chevron*: What to Do About Statutory Challenges*, 55 ADMIN. L. REV. 427, 434 (2003) (calling Justice Scalia "the most prominent proponent of *Salerno*"); Fallon, *supra* note 16, at 1322 ("Justice Scalia has mounted a militant—but only intermittently successful—effort to enforce *Salerno*."). *But see Wash. State Grange*, 552 U.S. at 465–66 (Scalia, J., dissenting) (rejecting the majority's decision upholding a statute against a facial challenge using the reasoning of *Salerno*). Justice Scalia recently expressed his view that he "continue[s] to doubt whether 'striking down' a statute is ever an appropriate exercise of [the Court's] Article III power." Skilling v. United States, 130 S. Ct. 2896, 2940 (2010) (Scalia, J., concurring).

106. *Crawford*, 553 U.S. at 207–08 (Scalia, J., concurring); *Wash. State Grange*, 552 U.S. at 467–69 (Scalia, J., dissenting).

107. *Wash. State Grange*, 552 U.S. at 467–68 (Scalia, J., dissenting).

108. *Id.* at 469 ("It does not take a study to establish that [preferences on a ballot] will affect voters' perceptions . . . ."). Justice Scalia did not appear to be applying a more lenient First Amendment test to this facial challenge because he cited to and applied *Salerno*, concluding that in his view, there was "'no set of circumstances' under which Washington's law would not severely burden political parties and no good reason to wait until Washington has undermined its political parties to declare that it is forbidden to do so." *Id.* at 466 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)). Thus, the dissent illustrates that it is indeed possible for even a "prominent proponent" of the strict *Salerno* standard to find it satisfied.

109. *Crawford*, 553 U.S. at 208–09 (Scalia, J., concurring).

110. *Id.* at 204.

111. *Wash. State Grange*, 552 U.S. at 455.

confusion.[112] Thus, both Justices voted to uphold both of the state statutes at issue in the cases, but their reasoning in the cases was inconsistent with respect to the role of facts and, accordingly, the role of speculation when evaluating constitutional burdens. Similarly, Justice Kennedy's views were also inconsistent across these two cases. Justice Kennedy joined Justice Stevens's plurality in *Crawford* insisting that a statute's challenger demonstrate a constitutionally significant burden with individualized, ideally trial-tested, facts,[113] yet he joined Justice Scalia's dissent in *Washington State Grange* arguing that individualized context was unnecessary to conclude that voters would certainly be confused on the First Amendment association issue.[114] Like Justice Scalia, Justice Kennedy would have invalidated Washington's primary statute on its face and would have upheld Indiana's voter identification statute. However, unlike Justice Scalia, his view on the role of speculation is unclear. Because the role of facts and speculation is at the heart of the plurality divide in *Crawford*, it is likely that Justice Kennedy would give more weight to the need to develop a contextual record, subject to the rigors of trial evidence admissibility standards, and avoid relying on what that plurality would consider to be speculation.[115]

In sum, these cases reflect the Court's struggle to identify the importance of contextual facts and the role of speculation in facial challenges to state statutes. The Court's concern with relying on speculation to overturn a state statute was an overriding theme in these cases, and this concern will likely continue to play an important role in the Court's evaluation of facial challenges against state statutes, including, as evaluated here, the current challenges brought against Arizona's controversial immigration-related statutes.

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112. *Id.* at 459 (Roberts, C.J., concurring).

113. *Crawford*, 553 U.S. at 184.

114. *Wash. State Grange*, 552 U.S. at 462 (Scalia, J., dissenting). Justice Stevens's plurality in *Crawford* cited the "plainly legitimate sweep" test for reviewing facial challenges, 553 U.S. at 202, while Justice Scalia's dissent in *Washington State Grange* cited *Salerno*'s "no set of circumstances" test for facial challenges, 552 U.S. at 464–66 (Scalia, J., dissenting). It does not appear that this difference explains Justice Kennedy's reasoning as it would be unlikely that one would argue for an individualized record of facts only in First Amendment challenges because the Court has been increasingly softening Salerno's strict standards in First Amendments facial challenges. *See supra* note 33 and accompanying text.

115. Justices Souter, Ginsburg, and Breyer expressed loosely inconsistent views in *Washington State Grange* and *Crawford*; however, their opinions do not reflect a clear enough division to draw any conclusions about their views of context and speculation. All three Justices joined the majority opinion in *Washington State Grange* upholding the state statute against a facial challenge and refusing to speculate about voter confusion. *Wash. State Grange*, 552 U.S. at 443. Moreover, all three dissented in *Crawford*. 553 U.S. at 209 (Souter, J., dissenting); *id.* at 237 (Stevens, J., dissenting). They would vote to invalidate Indiana's voter identification statute, specifically accepting research beyond the facts associated with the individual parties to the case demonstrating that the statute would impose a significant burden on Indiana's non-drivers to obtain identification.

IV. FACIAL CHALLENGES BROUGHT AGAINST ARIZONA'S IMMIGRATION STATUTES

Recently, Arizona's efforts to legislate in the area of immigration have demanded attention in the national headlines.[116] Facial challenges brought against Arizona's so-called "employer sanction statute" were rejected by the Supreme Court during its 2010–2011 term.[117] Arizona's effort, under Senate Bill 1070 ("SB 1070"), to criminalize undocumented presence and empower local law enforcement to enforce federal immigration laws is currently the subject of seven facial challenges, including one brought by the federal government.[118] The lawsuits challenging both laws were filed prior to the statutes taking effect.[119] After introducing the specific facial challenges brought against both statutes, I suggest a role that speculation might play in evaluating claims raised against the statutes.

A. Arizona's Employer Sanction Statute

On July 2, 2007, then-Arizona Governor Janet Napolitano signed into law House Bill 2779,[120] titled the "Legal Arizona Workers Act," and known colloquially as the "employer sanctions" law.[121] She described the new law as taking "the most aggressive action in the country against employers who knowingly or intentionally hire undocumented workers."[122] The law, when first signed and as it exists in Arizona today, provides that all Arizona employers must

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116. It is difficult to exaggerate the controversy created by Arizona's legislation, especially the most recent enactment of Senate Bill 1070 which provoked a reaction from President Obama and a number of criticisms directed generally toward the state. *See, e.g.*, President Barack Obama, Address at Naturalization Ceremony for Active-Duty Service Members (Apr. 23, 2010) (transcript available at http://www.whitehouse.gov/the-press-office/remarks-president-naturalization-ceremony-active-duty-service-members) (calling Senate Bill 1070 a threat "to undermine basic notions of fairness . . . as well as the trust between police and their communities"); President Barack Obama, Immigration Address at American University (July 1, 2010) (transcript available at http://www.american.edu/media/president_obama_visit_transcript.cfm) (calling Senate Bill 1070 "divisive" and "fan[ning] the flames of an already contentious debate"); *see also, e.g.*, Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1; Nicholas Riccardi, *Ramping Up Praise for Arizona Crackdown*, L.A. TIMES, June 5, 2010, at 11.

117. Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011).

118. *Arizona I*, 703 F. Supp. 2d 980 (D. Ariz. 2010). The Ninth Circuit Court of Appeals recently affirmed the district court's order granting a preliminary injunction against key provisions of SB 1070. *Arizona II*, 641 F.3d 339 (9th Cir. 2011). Arizona has filed a petition for certiorari to the Supreme Court. *See* Ginger Rough, *Arizona Asks High Court to Rule on SB 1070*, ARIZ. REPUBLIC, Aug. 11, 2011, at A1.

119. *See infra* notes 130, 151–52 and accompanying text.

120. Letter from Janet Napolitano, Governor of Ariz., to Jim Weiers, Speaker of the House, Ariz. House of Representatives (July 2, 2007) (on file with the Office of the Secretary of State).

121. 2007 Ariz. Sess. Laws 1st Reg. Sess. ch. 279 (codified at ARIZ. REV. STAT. ANN. §§ 23-211 to -214 (2008)).

122. Letter from Janet Napolitano, *supra* note 120.

use the federal government's E-Verify system to verify that every newly hired employee is legally authorized to work in the United States.[123] In addition, the law provides that if a court determines, after a hearing, that an Arizona employer knowingly or intentionally hired an undocumented worker, the employer's business license can be suspended temporarily upon a first offense, and revoked permanently upon a second offense.[124]

After signing the bill into law, Governor Napolitano delayed the date on which the law became effective for five months, until January 1, 2008, with the intention of giving the Arizona legislature time to pass some necessary improvements to the statute.[125] In addition, the Governor intended the delay to provide Arizona employers with an opportunity to learn about the law and prepare for the significant changes it was expected to bring to employment practices.[126] For

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123. ARIZ. REV. STAT. ANN. § 23-214 (2008). E-Verify is a federal online system by which employers can verify the work status of potential new employees by comparing the information provided by the employees on I-9 forms with records contained in the databases of the Department of Homeland Security and the Social Security Administration. *See E-Verify*, DHS, http://www.dhs.gov/files/programs/gc_1185221678150.shtm (last visited Jan. 12, 2011). Under the federal system, participation in the E-Verify program is voluntary for most employers. *See id.* The Arizona law makes participation mandatory, by requiring that Arizona employers "shall" use E-Verify. ARIZ. REV. STAT. ANN. § 23-214 (2008). However, there is no sanction on employers who do not use E-Verify. Transcript of Oral Argument at 36, Chamber of Commerce of U.S. v. Candelaria, 130 S. Ct. 3498 (2010) (No. 09-115). Because the initial Arizona employer sanction statute used both the terms "hired" and "employed" to describe employees who must be verified, there was some dispute during the ensuing litigation as to whether the law required employers to verify all employees, including those hired before the law went into effect, or only those hired after the effective date of the new law. *See* Chris Kahn & Paul Davenport, *Pearce Says Sanctions Law Covers All Workers*, AZCENTRAL.COM (Dec. 13, 2007, 9:30 PM), http://www.azcentral.com/news/articles/1213AZsanctions1213-ON.html (summarizing the statements of Arizona State Representative Russell Pearce, the main proponent of the law, who commented that businesses would "be penalized for knowingly employing any illegal immigrant after [the law went into effect], regardless of when that person started working"). The Arizona Legislature eventually passed legislation clarifying that the employers sanction law applied only to employees hired after January 1, 2008. *See* Jacques Billeaud, *Bill to Revise Employer Sanctions Law Clears Arizona House*, KTAR.COM (Apr. 1, 2008, 9:59 PM), http://ktar.com/?sid=793067&nid=6.

124. ARIZ. REV. STAT. ANN. § 23-212(F) (2008).

125. Letter from Janet Napolitano, *supra* note 120 ("Because of these [previously specified] infirmities, and because many employers have told me either that they did not have sufficient time to let the legislature know of their concerns with the final version of House Bill 2779 or that their concerns were not given thorough consideration, I am willing to call the legislature into special session this fall to enable it to fix this bill before its January 1, 2008 effective date.").

126. *See* Paul Giblin & Dennis Welch, *East Valley Labor Pool Dips Due to Hiring Law*, E. VALLEY TRIBUNE (Mesa), July 6, 2007, *available at* 2007 WLNR 12821215 (noting that the Arizona Restaurant and Hospitality Association intended to hold regular meetings to educate employers about the nuances of the new law); Brady McCombs, *Employer-Sanctions Law: Murky or Easy to Enforce?*, ARIZ. DAILY STAR, July 22, 2007, at B1 (outlining concerns expressed by some business owners and efforts to help business owners prepare for the coming changes); Becky Pallack, *New Arizona Law on Hire Checks*

example, to educate employers on the law's requirements, the bill specifically required that the Arizona Department of Revenue mail notices informing all Arizona employers of the law's requirements.[127] The notice was intended to inform employers that the law prohibited intentionally or knowingly employing an undocumented worker and to explain the progressive sanctions for each violation of the new law.[128]

On July 13, 2007, just 11 days after Governor Napolitano signed the bill into law,[129] and long before the law was scheduled to go into effect, the first complaint challenging the law on its face was filed in the U.S. District Court for the District of Arizona.[130] The primary plaintiffs included Arizona Contractors Association, Inc., the United States and Arizona Chambers of Commerce, the Arizona Restaurant and Hospitality Association, the Arizona Roofing Contractors Association, and the Arizona Landscape Contractors Association.[131] The complaint alleged that the law violated procedural due process under federal and state constitutions, substantive due process under federal and state constitutions, the dormant Commerce Clause, the Fourth Amendment to the Federal Constitution, and the Supremacy Clause and federal preemption principles.[132] Eventually, Chicanos Por La Causa, Inc. and Somos America filed a complaint and joined the litigation.[133]

As the litigation developed in federal district court, many Arizona employers reported feeling increasingly confused about the state of the law and their obligations.[134] By the time the law went into effect in January of 2008, only about 9000 of an estimated 150,000 total employers in Arizona had registered with the E-Verify program.[135] Reportedly, many were waiting to see what would

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to Be Explained, ARIZ. DAILY STAR, Nov. 13, 2007, at D1 (announcing a presentation to be given by the Governor's policy adviser for commerce to educate small business commissions about the law's potential impacts); Mike Sunnucks, *Law Firm Hosts Seminar on Immigration Law*, PHX. BUS. J., Oct. 22, 2007, *available at* 2007 WLNR 20722167 (describing a law firm's conference for business clients worried about the law and noting several similar conferences held by other law firms in the state).

127. 2007 Ariz. Sess. Laws 1st Reg. Sess. ch. 279, § 3.

128. *Id.*

129. Press Release, Exec. Office of the Governor of Ariz., Governor Napolitano Signs Employer Sanctions Bill (July 2, 2007) (on file with *Arizona Law Review*).

130. Complaint, Ariz. Contractors Ass'n v. Napolitano, 526 F. Supp. 2d 968 (D. Ariz. 2007) (No. 07-cv-01355-PHX-NVW).

131. *Id.* at 1.

132. *Id.*

133. Complaint, *Ariz. Contractors Ass'n*, 526 F. Supp. 2d 968 (No. 2:07-cv-01684-PHX-NVW).

134. *See* Ron Ruggless, *Arizona's Immigration Law Sparks Worker Defections, More Employer Sanctions*, NATION'S RESTAURANT NEWS (Jan. 20, 2008), http://www.nrn.com/article/ariz%E2%80%99s-immigration-law-sparks-worker-defections-more-employer-sanctions.

135. Muzaffar Chishti & Claire Bergeron, *Arizona Employer Sanctions Law Takes Effect*, MIGRATION POLICY INST. (Jan. 16, 2008), http://www.migrationinformation.org/USfocus/display.cfm?id=669.

happen with the federal case.[136] Thus, the delay in the implementation of the Arizona statute did not have the intended effect of producing a "cleaned up" statute and a more informed community. Rather, the delay primarily allowed litigation to proceed against the statute before it was given effect or context.

The district court held a consolidated hearing on the plaintiffs' complaint and request for a preliminary injunction on January 16, 2008.[137] By the time the case was in front of the court for a hearing, the plaintiffs had dropped all but their federal preemption due process claims.[138] The preemption claim alleged that the Immigration Reform and Control Act ("IRCA") expressly and impliedly preempted Arizona's employer sanction statute.[139] IRCA imposes federal sanctions against employers who hire unauthorized aliens; in it, Congress expressly provided for preemption of similar state laws by declaring that IRCA "preempt[s] any State 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."[140] The due process claim alleged that the Act, as properly interpreted, violated employers' due process rights by denying them an opportunity to challenge the federal determination of an employee's work-authorization status. Ultimately, the federal district court ruled in favor of the defendants on all claims and upheld the Arizona statute. The court ruled that IRCA did not expressly or impliedly preempt the Arizona statute, relying importantly on a conclusion that the parenthetical licensing exception, the so-called "savings clause" within IRCA's express preemption provision, by its terms authorized,

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136. *See, e.g.*, Becky Pallack, *Arizona Employers Slow to Get with Program*, ARIZ. DAILY STAR, Mar. 30, 2008, http://azstarnet.com/business/article_eade3fa1-fae2-5c7e-8881-6c02e7462130.html (noting that only 15% of Arizona employers had registered with E-Verify two months after the law went into effect); Shelley Shelton, *Employer Sanctions Law: Navigating the Maze*, ARIZ. DAILY STAR, Oct. 7, 2007, at D1 (noting that attorneys challenging the constitutionality of the law advised employers not to enroll in the E-Verify program until after the lawsuits were resolved); *see also* Daniel González, *In the Face of Employer-Sanctions Law, Most Undocumented Immigrants Decide to Wait and See; Exodus Hinges on 2 Court Challenges*, ARIZ. REPUBLIC, Oct. 8, 2007, at A1 (noting that the majority of undocumented immigrants were staying in Arizona to wait for the results of court challenges to the law).

137. Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1041 (D. Ariz. 2008), *aff'd sub nom.* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009), *aff'd sub nom.* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011). The court dismissed the first challenge to the statute finding that the plaintiffs failed to name the county attorneys as defendants, and they were the group that was to enforce the statute. Ariz. Contractors Ass'n v. Napolitano, 526 F. Supp. 2d 968, 984–85 (D. Ariz. 2007). The plaintiffs appealed that ruling but immediately filed a new complaint naming, among other defendants, the county attorneys. Ariz. Contractors Ass'n v. Candelaria, No. 07-cv-02496-PHX-NVW, 2008 WL 486002, at *1 (D. Ariz. Feb. 19, 2008).

138. *Candelaria*, 534 F. Supp. 2d at 1061 (finding the commerce clause claim precluded because "the Act does not regulate employees completely outside of the State").

139. Legal Brief in Support of Temporary Restraining Order and Motion for Preliminary Injunction at 9–21, *Candelaria*, 534 F. Supp. 2d 1036 (No. 2:07-cv-02496-NVM).

140. 8 U.S.C. § 1324a(h)(2) (2006).

rather than preempted, Arizona's employer sanctions statute.[141] On the due process issue, the court interpreted the statute as providing sufficient process.[142]

The statute's challengers appealed and the Ninth Circuit affirmed, upholding the statute in all respects against the challengers' facial challenge.[143] Notably, the court expressly relied on the absence of context to support its ruling and it invited future challenges to the statute after the statute is enforced and factual background is developed.[144]

At the end of its 2009–2010 term, the Supreme Court granted certiorari.[145] The Court winnowed the issues down to questions based solely on preemption doctrine. The questions presented to the Court were whether the Arizona statute was (1) expressly preempted by Congress's express preemption clause or saved by the parenthetical language pertaining to states' "licensing and similar laws," (2) impliedly preempted because it requires that all Arizona employers use a federal resource that federal law makes voluntary, and (3) impliedly preempted because it undermines the comprehensive scheme that Congress created to regulate the employment of undocumented workers.[146] On May 26, 2011, the Court affirmed the Ninth Circuit in a 5–3 decision holding that Arizona's employer sanction law was not expressly preempted because it fit within the confines of the "licensing and similar laws" savings clause and it did not conflict, under implied preemption doctrine, with federal immigration law.[147] In analyzing the alleged conflict, a four-Justice plurality noted the various ways that Arizona law traced federal law, concluding that Arizona had exercised the authority Congress expressly granted to the states to impose sanctions on employers through licensing and similar laws by taking the "route least likely to cause tension with federal law."[148] Justice Thomas did not join this portion of the opinion. In response to the concern that employers will likely err on the side of discriminating against employees rather than risk losing their business license, those four Justices concluded that "[t]he most rational path for employers is to obey the law—both the law barring the employment of

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141. *Candelaria*, 534 F. Supp. 2d at 1046.

142. *Id.* at 1058.

143. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 869 (9th Cir. 2009), *aff'd sub nom.* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011).

144. *Id.* at 861 ("[W]e must observe that [this facial challenge] is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision.").

145. Chamber of Commerce of U.S. v. Candelaria, 130 S. Ct. 3498 (2010), *argued sub nom.* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011).

146. Petition for Writ of Certiorari, *Candelaria*, 130 S. Ct. 3498 (No. 09-115). Justice Kagan recused herself from consideration of the case because as Solicitor General, she had filed an advisory brief encouraging the Court to grant certiorari. Docket, Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011) (No. 09-115), *available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-115.htm.

147. *Whiting*, 131 S. Ct. at 1987.

148. *Id.* at 1981–87.

unauthorized aliens and the law prohibiting discrimination—and there is no reason to suppose that Arizona employers will choose not to do so."[149]

B. Arizona's Senate Bill 1070

On April 23, 2010, Arizona Governor Jan Brewer signed into law the "Support Our Law Enforcement and Safe Neighborhoods Act," known as Senate Bill 1070.[150] The law did not take immediate effect; rather, it was scheduled to take effect on July 29, 2010.[151] Six days after the signing, on April 29, 2010, the first facial challenges were filed against SB 1070.[152] Ultimately, five lawsuits were filed challenging the statute on its face,[153] including a challenge brought by the federal government.[154]

In general, SB 1070 is Arizona's attempt to address the impact of unlawful immigration on Arizona and to assist federal agencies through "the cooperative enforcement of federal immigration laws."[155] SB 1070 contains a number of provisions that are subject in various ways to the facial challenges brought against the statute. Relevant sections of SB 1070 provide:

- Law enforcement officials must "cooperat[e] and assis[t] in [the] enforcement of immigration laws" by making a "reasonable attempt . . . when practicable, to determine the immigration status of [a] person" if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." Furthermore, SB 1070 requires that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released."[156] (Section 2).

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149. *Id.* at 1984.

150. 2010 Ariz. Sess. Laws 2d Reg. Sess. ch. 113; *see also* Governor Jan Brewer, Address: Support Our Law Enforcement and Safe Neighborhoods Act (Apr. 23, 2010). The law was amended one week later when Governor Brewer signed House Bill 2162. 2010 Ariz. Sess. Laws 2d Reg. Sess. ch. 211 (amending sections of Arizona Revised Statutes as added by Senate Bill 1070). As used throughout this Article and consistently with all court documents and orders, "SB 1070" refers to Senate Bill 1070 as amended.

151. ARIZ. CONST. art. 4, pt. 1 § 1(3) ("[N]o act passed by the legislature shall be operative for ninety days after the close of the session of the legislature enacting such measure . . . .").

152. Nat'l Coal. of Latino Clergy v. Brewer, No. 10-cv-00943-PHX-SRB (D. Ariz. Apr. 29, 2010).

153. Complaint, *Arizona I*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-01413-SRB); Complaint, Friendly House v. Whiting, No. 10-cv-01061-PHX-MEA (D. Ariz. May 17, 2010); Complaint, Escobar v. Brewer, No. 10-cv-00249-TUC-DCB (D. Ariz. Apr. 29, 2010); Complaint, *Latino Clergy*, No. 10-cv-00943-PHX-SRB; Complaint, Salgado v. Brewer, No. 10-cv-00951-PHX-ROS (D. Ariz. Apr. 29, 2010).

154. *Arizona I*, 703 F. Supp. 2d 980.

155. 2010 Ariz. Sess. Laws 2d Reg. Sess. ch. 113, *amended by* 2010 Ariz. Sess. Laws 2d Reg. Sess. ch. 211.

156. ARIZ. REV. STAT. ANN. § 11-1051(B) (2011).

- It is unlawful under state law for a person to engage in "willful failure to complete or carry an alien registration document."[157] (Section 3).
- It is unlawful under state law for a person to "intentionally engage in the smuggling of human beings for profit or commercial purpose."[158] (Section 4).
- It is unlawful under state law for a person who "is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona.[159] (Section 5).
- It is unlawful under state law for a person in violation of a criminal offense to "transport or move" or "conceal, harbor or shield" an alien who is in the United States in violation of the law.[160] (Section 9).
- Law enforcement officials may make a warrantless arrest of a person where there is probable cause to believe the person has committed a "public offense that makes the person removable from the United States."[161] (Section 6).

The Arizona statute's challengers sought temporary and permanent injunctions against SB 1070, arguing that the statute violated the Equal Protection Clause, the First Amendment, the Commerce Clause, and federal preemption principles grounded in the Supremacy Clause of the U.S. Constitution. In contrast to IRCA and employer sanctions, the general federal immigration laws at issue in the SB 1070 litigation do not contain any express preemption provisions or savings clauses that purport to exempt certain state powers from express preemption.[162] Thus, the challengers rested their federal preemption arguments primarily on implied preemption doctrine.[163]

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157. *Id.* § 13-1509(A).
158. *Id.* § 13-2319(A).
159. *Id.* § 13-2928(C).
160. *Id.* § 13-2929(A)(1)–(2) .
161. *Id.* § 13-3883(A)(5).
162. In its petition for certiorari, the State of Arizona argued that the Immigration and Nationality Act expressly authorizes states to communicate or cooperate with the federal government and it repeatedly referred to this provision as a "savings clause." Petition for Writ of Certiorari at 5, Arizona v. United States, No. 11-182 (U.S. Aug. 10, 2011). However, INA contains no express preemption provision thus this language is not a savings clause in that it does not "save" a state statute from express preemption.
163. Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof, *Arizona I*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-01413-SRB) [hereinafter Plaintiff's Motion for a Preliminary Injunction, *Arizona I*], *aff'd*, 641 F.3d 339 (9th Cir. 2011). The United States grounded its challenge almost entirely on federal preemption. It raised a dormant Commerce Clause claim against one portion of SB 1070, but did not rely on any other legal grounds to challenge the statute. *Id.* at 44–46 (challenging section five of SB 1070 under the dormant Commerce Clause).

A group of the statute's challengers, including the United States, argued motions for a preliminary injunction in federal district court in July 2010. On July 28, 2010, the district court granted the federal government's motion for a preliminary injunction with respect to key provisions of SB 1070 including section 2, section 3, and section 6 noted above, as well as the provision of section 5 related to employment.[164] The State of Arizona filed an immediate appeal to the Ninth Circuit Court of Appeals, which affirmed the district court's preliminary injunction order.[165] The State filed a petition for certiorari in the Supreme Court on August 10, 2011, asking the Court to consider the case in its 2011–2012 term.[166]

C. Evaluating the Facial Challenges—The Role of Speculation

> With past rulings supporting Arizona's employer sanctions law, the courts have made it clear [that] States have the inherent power to enforce the laws of this country. . . . I am confident that the courts will back the provisions in SB 1070 temporarily blocked by Judge Bolton.[167]

As Arizona's two controversial immigration-related statutes made their way through the judicial review process, many have wondered how the Court's recent ruling on the employer sanctions statute might impact the SB 1070 challenge, which is anticipated to be before the Court in its 2011–2012 term.[168]

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164. *Arizona I*, 703 F. Supp. 2d at 1008. The court refused to grant the federal government's request to grant a temporary injunction against SB 1070 in its entirety; thus, the remainder of the statute's provisions went into effect on July 29, 2010. *Id.*

165. *Arizona II*, 641 F.3d 339, 367 (9th Cir. 2011); *see also* Preliminary Injunction Appeal, *Arizona I*, 703 F. Supp. 2d 980 (No. 2:10-cv-01413-SRB). The State of Arizona filed an opening brief on August 26, 2010, the United States filed a brief on September 23, 2010, and the State of Arizona replied on October 12, 2010. Appellants' Opening Brief, *Arizona II*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645); Brief for Appellee, *Arizona II*, 641 F.3d 339 (No. 10-16645); Appellants' Reply Brief, *Arizona II*, 641 F.3d 339 (No. 10-16645). The Ninth Circuit Court of Appeals heard oral argument on November 1, 2010. Oral Argument, *Arizona II*, 641 F.3d 339 (No. 10-16645), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_vid=0000006117.

166. Arizona's petition for certiorari was filed shortly before this Article was finalized for publication. Rough, *supra* note 118; *see also* Ginger Rough, *Attorney Picked in SB 1070 Case*, ARIZ. REPUBLIC, June 7, 2011, at B1 (noting that Arizona's Governor selected former U.S. Solicitor General Paul Clement to argue the case in the Supreme Court).

167. This was the reaction of Arizona State Senator Russell Pearce, leading sponsor of both statutes, to Judge Susan Bolton's ruling granting a preliminary injunction against many sections of SB 1070. *Officials, Groups React to SB 1070 Ruling*, ABC15.COM (July 28, 2010), http://www.abc15.com/dpp/news/state/arizona-reacts-to-ruling-on-sb1070; *see also* Randal C. Archibold, *Judge Blocks Arizona's Immigration Law*, N.Y. TIMES, July 29, 2010, at A1.

168. *See, e.g.*, Craig Harris, *Supreme Court to Look at Arizona's Employer-Sanctions Law*, ARIZ. REPUBLIC, Dec. 5, 2010, at B1; Robert Robb, *SB 1070 is No High-Court Slam Dunk*, ARIZ. REPUBLIC, Aug. 1, 2010, at B13. After the Supreme Court issued its decision in the employer sanctions case, many of the blog postings and newspaper articles describing the employer sanction decision mentioned SB 1070 and the ongoing litigation related to that statute. *See* Joan Biskupic, *Supreme Court Upholds Arizona*

The constitutional challenges brought against the employer sanctions statute and SB 1070 share some threshold similarities. Both are grounded in preemption arguments and both are pure facial challenges—they were brought before the statutes went into effect. Indeed, the challengers sought temporary and permanent injunctions in an effort to prevent the statutes from taking effect. Ultimately, many of the general arguments made against both statutes are grounded in the following identical premise: once this statute goes into effect, participants (employers or state officials) will operate under the statute in a manner that will offend the Constitution, cause irreparable harm, and create burdens such that the balance of equities demands that an injunction should issue. Moreover, as pure facial challenges, the litigation against both Arizona statutes triggered a number of fairly onerous threshold standards. First, the weighty *Salerno* "no set of circumstances" test governed the analysis in the lower courts, requiring the challengers to show that no circumstances exist under which the statute could validly operate.[169] In addition, because the challenges were brought as motions for a temporary injunction, the plaintiffs were required to demonstrate that they were likely to

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Employer Sanctions Law, USA TODAY, May 27, 2011, at 3B; Adam Liptak, *Illegal Workers: Court Upholds Faulting Hirers*, N.Y. TIMES, May 27, 2011, at A18. Some analysts attempted to use the employer sanction ruling to predict a ruling on SB 1070. *See, e.g.*, Emily Bazelon, *Chamber of Pain,* N.Y. TIMES, Aug. 7, 2011, § MM (Magazine), at 9 ("Last term, [Justice Kennedy] was part of the five-justice majority that upheld Arizona's effort to crack down on businesses that hire illegal immigrants, suggesting that he might also uphold that state's practice of stopping people to ask for their papers if it reaches the [C]ourt."); Lyle Denniston, *Opinion Recap: Shared Role on Aliens' Jobs*, SCOTUSBLOG (May 26, 2011, 12:51 PM), http://www.scotusblog.com/2011/05/opinion-recap-shared-role-on-aliens-jobs ("There was even a hint that Arizona's more controversial alien control law—now widely known as 'SB 1070'—may not fare as well as its worker control law now has . . . ."); Richard Samp, *The Constitutionality of SB 1070*, SCOTUSBLOG (July 11, 2011, 9:28 AM), http://www.scotusblog.com/2011/07/the-constitutionality-of-s-b-1070 (stating that the *Whiting* decision "significantly increases the likelihood that the Supreme Court will agree to review the Ninth Circuit's decision and will ultimately uphold major portions of S.B. 1070").

169. *Arizona I*, 703 F. Supp. 2d at 991–92; Ariz. Contractor's Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1044 (D. Ariz. 2008), *aff'd sub nom.* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009), *aff'd sub nom.* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011). Interestingly, the Supreme Court did not cite to *Salerno* in its decision upholding Arizona's employer sanction statute. *See* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011). In the SB 1070 litigation brought by the United States, the district court's order partially granting a temporary injunction dutifully recites the *Salerno* standard as a threshold legal standard, noting that courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Arizona I*, 703 F. Supp. 2d at 991–92 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008)). In addition, the district court relied directly on the *Salerno* standard to reject the federal government's argument that Arizona's law conflicts with the federal alien smuggling statute because it does not provide an express exemption for religious groups. *Id.* at 1002 n.18. The court refused to engage in the speculation required to find that Arizona's narrower law would overreach and apply to persons that would be exempted under the broader federal law. *Id.* (citing the *Salerno* "no set of circumstances" standard and relying on *Washington State Grange* to support refusal to speculate about hypothetical or imaginary cases).

succeed on the merits, suffer irreparable harm in the absence of the injunction, and that the balance of equities tipped in their favor.[170]

An independent focus on the role of speculation in these constitutional challenges, however, demonstrates that the two statutes have important differences that support different results on their constitutionality. As discussed below, most of the early challenges raised against the employer sanctions statute relied for their success on the court accepting speculation—and as the case made its way to the Supreme Court, some of the speculation-dependent claims fell away. Ultimately, the key legal case theories brought against the employer sanction statute began in text—dependent on the definition of "licensing and similar laws"—but moved beyond text to speculation with many of the critical allegations and claims reliant on speculation to succeed. In contrast, as discussed below, while the challenge to SB 1070 involved allegations dependent on both text and speculation, the most critical constitutional challenges raised against SB 1070 do not rest on speculation.

1. Assessing the Challenger's Allegations as Grounded Predominately in Text or Speculation

In general, at the outset of a facial challenge, a speculation-focused review is particularly useful for litigants because identifying speculative arguments at the trial stage provides litigants with a touchstone. The injunction standard, predominant at the initial stage of any facial challenge, requires petitioners to present arguments on irreparable future harm; thus, focusing on suspect speculation early in the litigation provides a useful check for litigants. Evaluating the allegations, claims, and case theories for reliance on speculation ultimately separates challenges that have a better chance of succeeding from those that do not.

The SB 1070 litigation provides an example. The United States raised a number of alleged conflicts with federal law and argued that Arizona's statute should be impliedly preempted by federal immigration law.[171] Analyzing the federal government's claim with an eye toward speculation requires determining whether the allegation requires a decision-maker to rely predominately on hypothetical theories about human behavior arguably triggered by the statute's enforcement. For example, the following table summarizes and labels the government's key allegations in its complaint:

170. *See* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).
171. Complaint, *Arizona I*, 703 F. Supp. 2d 980 (No. 2:10-cv-01413-SRB).

Table 1

***United States v. Arizona*—Complaint for the United States Federal Preemption Arguments**[172]

SB 1070 Section	Allegations of Conflict with Federal Law	Predominate Reliance
Section 2	Arizona statute, in its text, expressly requires maximum scrutiny of immigration status and imposition of criminal penalties, while federal law does not expressly or practically provide such penalties (due to, for example, other federal enforcement priorities or humanitarian considerations).	Text
Section 2	Mandatory nature of documentation requests under Arizona law will increase inspections and detentions, result in "prolonged detentions," and impose burdens on lawful citizens who do not have identification readily available.	Speculation
Section 2	Federal verification that follows Arizona police officers' inspection of identification will result in a "dramatic increase" of verification requests to DHS and will place a "tremendous burden" on DHS resources which will require a reallocation of federal resources away from its priorities.	Speculation
Section 3	Arizona law expressly requires arrest if person has no documents to establish citizenship, while federal law does not expressly require such an arrest and would not require arrest under some circumstances.	Text
Section 4	Definitions pertinent to "smuggling" provisions are not limited to transportation that is provided in furtherance of unlawful immigration, while federal law is expressly limited in that respect.	Text
Section 4	Authorities in Arizona will use the smuggling provision along with another Arizona law to prosecute the alien as well as the transporter, unlike federal law.	Speculation
Section 4	Definitions pertinent to "smuggling" are not targeted to international border smuggling, while the federal law is targeted to international crossings.	Text
Section 4	Risk of a documentation check will impose a burden on lawfully present aliens, who will stop using commercial transportation once the statute is effective.	Speculation
Section 5	Arizona law expressly makes it a crime for an individual to seek work without documentation, while Congress only imposes sanctions on an employer who hires an undocumented worker. Federal law does not penalize employees who seek work.	Text
Section 6	Arizona law will be used by police and prosecutors to arrest and prosecute aliens who engage in out of state crimes, unlike federal law.	Speculation

172. *Id.*

As the above table demonstrates, the United States raised a number of allegations in its complaint against SB 1070—some were grounded primarily in text while others were grounded in speculation about human behavior that it argued would be triggered by the implementation of the statute. For example, the United States alleged that once SB 1070 takes effect, it will impose various burdens on lawful citizens, including the reluctance among citizens to use commercial transportation. Rather than being grounded in the text of the statute, such allegations require an acceptance of theories that are based on anticipated human behavior or reactions caused by the impact of the new statute in the state. Separating allegations in the complaint that are grounded in the statute's text from those grounded in predictions about human behavior arguably triggered by the statute provides an introduction to the importance of speculation in individual arguments. Assessing allegations and arguments allows both the litigants and the decision-maker to see precisely where speculation assumes a critical role and where it is less material. Once that landscape is assessed, the decision-maker should consider the case theories and claims as a whole to decide ultimately whether it is necessary to rely extensively on speculation to resolve the facial challenge.

2. Considering the Need to Rely on Speculation to Decide Critical Claims and Case Theories

The pure facial challenges raised against Arizona's immigration statutes illustrate the difference between—and ultimately the success of—claims and theories that rest on speculation and claims that rely on the interpretation of statutory text or that are supported by data that is not reliant on predicting human behavior. Both of Arizona's statutes provide a number of examples of the role speculation does and should play in the constitutional analysis.

a. Employer Sanctions Statute

The plaintiffs challenging Arizona's employer sanction statute raised a number of claims at the outset against the statute including claims based on express and implied preemption, due process, and the dormant Commerce Clause. The primary focus of the plaintiffs' challenge was grounded in preemption doctrine.

The plaintiffs' preemption claim began with express preemption—an interpretation of the intent of Congress as expressed in the text of the statute. As noted above, the federal statute at issue in the case was the Immigration Reform and Control Act. IRCA has an express preemption clause with a savings provision in it which states that IRCA "preempt[s] any State 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."[173] Arizona argued that the employer sanction statute, putting business licenses at risk, was a "licensing or similar law" expressly allowed by the statute, or saved from

173. 8 U.S.C. § 1324a(h)(2) (2006). As noted by the majority in *Whiting*, "IRCA expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others." 131 S. Ct. at 1981.

the statute's express preemption language.[174] The statute's challengers, on the other hand, argued that Arizona's employer sanctions statute was expressly preempted, and it was not saved from express preemption because it was not a licensing or similar law.[175] By the time the case made its way to the Supreme Court, many of the arguments made in the briefs and at oral argument focused on the question of whether Arizona's statute should be expressly "saved" from preemption as a "licensing or similar law."[176]

The pivotal question of whether the Arizona statute is a "licensing law" is a question of law. At oral argument, Justice Kennedy acknowledged that his initial reaction in looking at the case was to think that "licensing" was probably a "defined term" with some established definition to be found in a legal source.[177] As it turned out, interpreting Congress's meaning in the phrase "licensing and similar laws" was not as easy as Justice Kennedy initially hoped, but this statutory interpretation question did not require the Court to decide the issue based on speculation about future human behavior. If the Court had found that the Arizona statute was not a "licensing or similar law," the statute would have been expressly preempted. Because the Court ultimately decided, as a matter of statutory interpretation, that Arizona's statute was a "licensing or similar law," it held that the statute was saved from express preemption.[178] Thus, the express preemption arguments did not depend on speculation regarding future human conduct, and the analysis was easily suitable for review and decision on a facial challenge.

Unlike the express preemption claims, all of the plaintiffs' implied preemption claims were grounded in speculation. In general, the plaintiffs argued that even if the Arizona statute was considered a "licensing or similar law," it nonetheless should be preempted because it conflicted with the purpose of the federal statute and would upset the balance of several policy considerations that Congress sought to strike in IRCA.[179] They argued, for example, that because the sanction imposed on employers under Arizona's statute (loss of a business license) was so much more severe than the primary sanction imposed under the federal statute (monetary fines), an employer would likely react by discriminating on the basis of race or ethnicity in hiring decisions to avoid the risk of losing its business license.[180] This argument is persuasive, and Justices Breyer and Ginsburg accepted it in dissent.[181] But, it is an example of a preemption argument that goes well

174. Brief for Respondents at 22, Chamber of Commerce of U.S. v. Candelaria, 130 S. Ct. 3498 (2010) (No. 09-115), *decided sub nom. Whiting*, 131 S. Ct. 1968.

175. Brief for Petitioners at 21–22, *Candelaria*, 130 S. Ct. 3498 (No. 09-115).

176. *See supra* note 146. At oral argument, Justice Scalia asked the petitioner's counsel: "So it all essentially comes down to—to the licensing issue, doesn't it?" The petitioner's counsel agreed. Transcript of Oral Argument, *Whiting*, *supra* note 2, at 6.

177. Transcript of Oral Argument, *Whiting*, *supra* note 2, at 6. For example, Justice Kennedy noted: "[W]hen I picked up this—this brief and looked at this case, I thought: Oh, well, licensing, that's a defined term; I'll look in Corpus Juris Secundum or ALR or something." *Id.*

178. *Whiting*, 131 S. Ct. at 1978–80.

179. Brief for Petitioners at 44–45, *Candelaria*, 130 S. Ct. 3498 (No. 09-115).

180. *Id.*

181. *Whiting*, 563 S. Ct. at 1992 (Breyer, J., dissenting) ("[T]he Arizona statute will impose additional burdens upon lawful employers and consequently lead those

beyond a textual comparison of state and federal statutes to rely predominately on speculation about what employers would do after the statute goes into effect. The Ninth Circuit specifically rejected the argument because of its speculative nature, concluding that it "is essentially speculative, as no complaint has yet been filed under the Act and we have before us no record reflecting the Act's effect on employers.[182] There is thus no adequate basis in this record for holding that the sanctions provisions create an implied conflict rendering the Act facially invalid."[183] A focus on speculation suggests that a claim like this one is more properly pursued in an as-applied rather than a facial challenge.[184] Similarly, Chief Justice Roberts, writing for himself and three other Justices, found that "there is no reason to suppose that Arizona employers will choose not to [follow both the Arizona statute's prohibition against discrimination as well as the ban against hiring unauthorized aliens]."[185]

Under another implied preemption theory, the plaintiffs argued that notwithstanding the express provision that seemed to "save" Arizona's statute from preemption, the statute, when practically applied, would conflict with the congressional purpose embedded in IRCA because employers may be subject to conflicting rulings from state and federal courts based on the same hiring circumstances.[186] The Ninth Circuit was not convinced by the plaintiffs' argument, finding it too grounded in speculation and noting that "[w]hether principles of comity or issue preclusion would allow such a result are questions not addressed by the parties. In any event, a speculative, hypothetical possibility does not provide an adequate basis to sustain a facial challenge."[187]

The plaintiffs' due process claim, advanced in the lower courts, provides an example of a statutory interpretation theory that must rely, to some extent, on speculation because the text of the Arizona statute is seemingly contradictory. The

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employers to erect ever stronger safeguards against the hiring of unauthorized aliens—without counterbalancing protection against unlawful discrimination."). At oral argument, Justice Breyer asked counsel for the State of Arizona how to reconcile Arizona's intent to prevent discrimination with a law that puts a business's license in jeopardy, commenting that, "If you're a businessman, every incentive under that law is to call close questions against hiring this person. Under the Federal law, every incentive is to look at it carefully." Transcript of Oral Argument, *Whiting*, *supra* note 2, at 33.

182. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 867 (9th Cir. 2009), *aff'd sub nom. Whiting*, 131 S. Ct. 1968.

183. *Id.*

184. Deciding that a facial challenge is not appropriate to decide the question of whether employers will behave in an unconstitutionally discriminatory manner under the state's employer sanction statute is not to embrace the statute as constitutionally sound, but simply to say that this question is best put to an as-applied challenge. Thus, to answer the question posed by Chief Justice Roberts as quoted in the introductory materials of this Article, an as-applied challenge would come about when a constitutional argument against a statute is grounded in human behavior triggered by the statute and demonstrated by the facts of the case, such as the argument that employers will choose to discriminate against job applicants on the basis of their appearance or their accent.

185. *Whiting*, 131 S. Ct. at 1984.

186. *Chicanos Por La Causa*, 558 F.3d at 866.

187. *Id.*

plaintiffs argued, for example, that the statute violated due process on its face because it denied employers a hearing on an essential element of liability—whether an employee is an unauthorized alien.[188] The plaintiffs pointed to the statutory language providing that "[o]n determining whether an employee is an unauthorized alien, the Court shall consider only the federal government's determination pursuant to 8 U.S.C. § 1373(c)" to support its argument that employers will have no chance to present any evidence that their employee is authorized.[189] The State, however, pointed to the next sentence in the same provision, which states that "[t]he federal government's determination creates a rebuttable presumption of the employee's lawful status,"[190] to support its argument that determination is merely "rebuttable," not exclusive, and the superior court can consider all evidence on questions of liability.[191] The district court, noting that the "subsection requires interpretation," ultimately found that under any interpretation, the process afforded by the statute was sufficiently fair to satisfy due process because the employers had opportunities to be heard through the federal process and could ask the superior court to pass a work authorization decision on to the federal government for secondary review and a further determination.[192] In response to the plaintiffs' argument that the federal government would likely refuse to consider the employer's evidence in such a secondary review, the district court noted: "The facial constitutionality of this process is not defeated by hypothetical situations that may result in no secondary verification taking place. Such abstraction is not the business of a facial challenge. The plaintiffs may raise those [as] as-applied challenges if and when such procedural failures occur."[193]

Finally, in the trial court, the plaintiffs argued that the employer sanction statute violated the dormant Commerce Clause because it could be interpreted in a way that would allow the state directly to regulate commerce outside its borders. They argued that since the statute defined "employee" as "any person who provides services or labor for an employer" who is licensed in Arizona,[194] it was broad enough to include employees working in other states.[195] The plaintiffs thus posited that the state would be using the statute to reach into other jurisdictions to evaluate the citizenship status of out-of-state employees and impose sanctions on out-of-state employers.[196] The State, however, disagreed with that interpretation and noted that the statute expressly required that enforcement actions must be filed "against the employer by the county attorney in the county where the unauthorized

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188. Legal Brief in Support of Temp. Restraining Order and Motion for Preliminary Injunction at 9, Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008) (No. 07-cv-02496-PHX-NVW).

189. *Id.*

190. ARIZ. REV. STAT. ANN. § 23-212(H) (2011).

191. State Defendants' Sur-Reply at 10, *Candelaria*, 534 F. Supp. 2d 1036 (No. 07-cv-02496-PHX-NVW) [hereinafter State Defendants' Sur-Reply, *Candelaria*].

192. *Candelaria*, 534 F. Supp. 2d at 1057.

193. *Id.*

194. ARIZ. REV. STAT. ANN. § 23-211 (2011).

195. Complaint at 25–28, *Candelaria*, 534 F. Supp. 2d 1036 (No. 07-cv-02496-PHX-NVW).

196. *See id.*

alien is employed,"[197] thus precluding extra-territorial application.[198] Any suggestion that the state would try to use the statute broadly to regulate interstate commerce was speculation. The district court agreed with the State's interpretation and found that the statute did not regulate employees completely outside of Arizona.[199]

b. Senate Bill 1070

Section 2(B) of SB 1070 provides a stark illustration of the difference between an argument grounded in text and one that relies on speculation. Section 2(B) of SB 1070 contains two sentences. It provides as follows:

> For any lawful stop, detention or arrest made by [an Arizona] law enforcement official or . . . law enforcement agency . . . in the enforcement of any other law or ordinance of a county, city or town of this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released.[200]

The United States argued that section 2(B) should be held impliedly preempted by federal law because it "will result in the harassment of lawfully present aliens and will burden federal resources and impede federal enforcement and policy priorities."[201] The federal government grounded its argument in two theories regarding the two sentences of section 2(B). First, it argued that the second sentence of section 2(B) must be read as requiring that Arizona law enforcement officials must determine the immigration status of *every* person arrested in Arizona, which will necessarily cause substantial burdens on lawful immigrants in a way that will frustrate congressional concern for a nationally uniform immigration system and impermissibly shift the allocation of federal resources away from federal priorities.[202] Second, it argued that the demands of the first sentence of section 2(B), requiring citizenship determination when reasonable suspicion exists during a lawful stop, would "dramatic[ally] increase" verification requests on the federal government from Arizona, which would place a "tremendous burden" on the agencies and ultimately force the federal government to realign enforcement priorities and reallocate limited resources to meet Arizona's demands.[203]

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197. ARIZ. REV. STAT. ANN. § 23-212(D) (2011).
198. State Defendants' Sur-Reply, *Candelaria*, *supra* note 191, at 13.
199. *Candelaria*, 534 F. Supp. 2d at 1061.
200. ARIZ. REV. STAT. ANN. § 11-1051(B) (2011).
201. *Arizona I*, 703 F. Supp. 2d 980, 993 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011).
202. *Id.* at 993–96.
203. Complaint at 18, *Arizona I*, 703 F. Supp. 2d 980 (No. 2:10-cv-01413-SRB); *see also* Plaintiff's Motion for a Preliminary Injunction, *Arizona I*, *supra* note 163.

While the federal government's theories on the two sentences of section 2(B) advance an identical argument—that the requirements of section 2(B) will impose a tremendous burden on federal agencies that will force realignment of federal priorities—the need to rely on speculation to arrive at that conclusion is vastly different. With respect to the second sentence, the district court was required first to interpret the language of the statute to decide if the second sentence of section 2(B) was modified by the first sentence, as the State of Arizona had argued, or whether it stood alone as an independent requirement for *all* persons arrested.[204] After looking at the legislative history, the court concluded that the sentence must be read independently.[205] Having concluded that all persons arrested must be subjected to a determination of immigration status, the court could rely on data submitted by the parties demonstrating how many people are arrested each year in Arizona to conclude that the influx of requests to the federal government for immigration status under the second sentence would be burdensome enough to shift the allocation of federal resources away from federal priorities.[206] Thus, the analysis required the court first to interpret the text of the statutory language and then to assess the statute's probable impact based on data from past years regarding arrest numbers and federal resources. The court had no need to rely on speculation regarding human behavior arguably triggered by the implementation of the statute to find a burden on federal resources and a realignment of federal priorities sufficient to support a ruling that the statute was preempted and thus unconstitutional on its face.[207]

In contrast, the statute's first sentence required the court to rely significantly on speculation. Because Arizona has never had a similar requirement (indeed, there has never been such a requirement imposed anywhere) and because the statute never went into effect, the number of verification requests the federal government would actually receive from Arizona because "reasonable suspicion" existed under the first sentence is unknown—it amounts only to a guess. While it is certainly reasonable to conclude, as the district court did, that the first sentence will cause an impermissible burden on the federal government, it is nonetheless a

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204. *See Arizona I*, 703 F. Supp. 2d at 994.

205. *Id.*

206. The district court found that 36,821 people were arrested and immediately released in 2009 in Tucson alone. *Id.* at 995 (citation omitted).

207. The district court further held that SB 1070's mandatory immigration verification upon arrest requirement is likely to burden legally present aliens. *Id.* at 996. While it did not rely expressly on a speculation-focused approach, the Ninth Circuit Court of Appeals opinion affirming the district court's preliminary injunction order directly supports the speculation-focused analysis. In its review of SB 1070, the two-judge majority narrowed its focus of SB 1070 to the text, and refused to consider possible applications of the statute if it concluded that the text facially conflicted with congressional intent as expressed in the Immigration and Nationality Act. *See Arizona II*, 641 F.3d 339, 345–46 (9th Cir. 2011). With respect to section 2(B), for example, the Ninth Circuit agreed with the district court that the first sentence of 2(B) does not modify the plain meaning of the second sentence and that *all* arrests must be verified, and then concluded that this statutory mandate conflicted with Congress' intent that state officers should aid federal immigration enforcement "only under particular conditions, including the Attorney General's supervision." *Id.* at 349.

conclusion based on hypothetical facts unsupported by data from past years.[208] Such a conclusion is grounded in speculation.

c. Assessing the Role of Speculation in Evaluating Arizona's Statutes

Focusing on the role of speculation in evaluating the challenges against Arizona's immigration-related statutes highlights important differences that exist between what may seem to be similar pure facial challenges. In the employer sanctions case, the primary argument in support of and challenging the state statute is grounded in an interpretation of Congress's express text—the meaning of "licensing or similar laws"—which does not require the decision-maker to rely substantially on speculation about future human behavior triggered by the operation of the statute. Such an argument fits sensibly within the facial challenge analysis. Because the Supreme Court deemed Arizona's employer sanction statute to be a "licensing or similar law," within the statute's savings clause, it agreed with the district court that Arizona's statute is not expressly preempted.[209] The resolution of this critical question is dependent on the interpretation of statutory text, not speculation.

Once past the express preemption argument, however, a number of the challengers' key arguments based on implied preemption, the Due Process Clause, and the dormant Commerce Clause were dependent on speculation—to be successful, they required a judge to accept arguments about what employers or the state would do once the statute was in effect. Because these arguments were based on attempting to predict human behavior triggered by the statute, courts would be likely to view them as more appropriately brought in an as-applied challenge, rather than in a facial challenge. Indeed, as discussed above, both the U.S. District Court for the District of Arizona and the Ninth Circuit Court of Appeals rejected the facial challenge in important part expressly because of the role of

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208. *Arizona I*, 703 F. Supp. 2d at 998. Wisely, the federal government did not rest its theories regarding burden solely on speculative arguments about the statute's probable effect—it also argued that the burden of the statute was already being felt, even though the statute had not yet gone into effect, because Mexico and other countries were uneasy with the legislation in a way that was already impacting their relationships with the United States. Plaintiff's Motion for a Preliminary Injunction, *Arizona I*, *supra* note 163, at 24. Moreover, boycotts against Arizona were initiated immediately upon the statute's enactment, thus demonstrating a burden that is palpable rather than speculative. *See, e.g.*, Bob Christie, *SB 1070 Boycotts Costly, Study Says*, AZCENTRAL.COM (Nov. 19, 2010, 12:00 AM), http://www.azcentral.com/arizonarepublic/business/articles/2010/11/19/20101119biz-boycott1119.html. Thus, the federal government successfully managed to address the temporary injunction standard in its facial challenge with concrete evidence as well as speculation. The Ninth Circuit found this argument persuasive, noting that the record demonstrates that SB 1070 "does not threaten a '*likelihood* . . . [of] produc[ing] something more than *incidental* effect'; rather Arizona's law has created *actual* foreign policy problems of a magnitude far greater than incidental." *Arizona II*, 641 F.3d at 353 (alterations in original) (citation omitted).

209. Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1981 (2011). ("We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted.").

speculation.[210] In rejecting the challengers' implied preemption arguments, the Supreme Court did acknowledge its reluctance to accept speculation in one argument,[211] and in articulating congressional intent, the Court was clearly guided primarily by a textual approach, relying on the federal statute's savings clause and noting that Arizona's law cannot be said to conflict with federal law when it is simply implementing the sanctions "that Congress expressly allowed Arizona to pursue through licensing laws."[212]

SB 1070 challengers, on the other hand, do not need to rely materially on speculation to mount many critical arguments against the statute in their facial challenge. In contrast to the hurdles before the plaintiffs in the employer sanction case, challengers to SB 1070 do not have to overcome a "savings" clause within an express preemption provision that directly exempts certain state legislation from express preemption. In addition, in its challenge to SB 1070, the United States raised a number of text-based allegations that do not require a reliance on speculation to resolve.[213] For example, a judge can determine that SB 1070's express language prohibiting any limitation or restriction on "the enforcement of federal immigration laws to less than the full extent permitted by federal law" conflicts with the absence of such a requirement in the federal law based on an analysis of the state and federal statutes' text (or lack thereof) and legislative intent without any need to consider speculation.[214]

Moreover, a key challenge to the requirements in section 2(b) of SB 1070 governing procedures upon arrest of "any person" provides strong support for an unconstitutional usurpation and burden on federal resources that does not depend on accepting speculation about human behavior under the statute.[215] After interpreting the statute's text to decide that "any person arrested" is not qualified by other text and simply means all persons arrested, and concluding that the statute expressly requires that all arrested persons "shall have [their] immigration status determined before [they can be] released," the judge need only look at actual data to decide if the statute forces a realignment of federal priorities.[216] The actual data

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210. *See supra* notes 144, 173–99 and accompanying text.

211. *See supra* text accompanying note 186.

212. *Whiting*, 131 S. Ct. at 1981. Throughout its discussion on implied preemption, the Court relied consistently on the text of the federal statute to conclude that "Congress did not intend to prevent the States from using appropriate tools to exercise" the authority it expressly preserved for the states. *Id.*; *see also id.* at 1984 ("As with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA. Part of that balance, however, involved allocating authority between the Federal government and the States. IRCA . . . preserved state authority over a particular category of sanctions—those imposed 'through licensing and similar laws.'"). Thus, the Court rejected the challengers' implied preemption arguments, relying instead primarily on the federal statute's *text* to gauge Congressional intent regarding implied preemption.

213. *See supra* Table 1.

214. *See* ARIZ. REV. STAT. ANN. § 11-1051(B) (2011).

215. *See supra* notes 203–07 and accompanying text. In addition, the federal government's evidence of SB 1070's effect, even prior to enforcement, on foreign relations demonstrates further evidence of actual impact of the statute rather than speculative likely impact. *See supra* note 207.

216. *See* ARIZ. REV. STAT. ANN. § 11-1051(B) (2011).

regarding past arrest numbers in Arizona can be considered against the data on federal resources available for immigration determination checks, federal spending to conduct such checks, and competing demands on the available federal resources to gauge whether the state statute will force a change in federal spending priorities. Although the judge will have to make some assumptions that the arrests, resources, and spending numbers will remain roughly constant, the judge will not have to accept speculation about human behavior arguably triggered by the statute to resolve the issue. Thus, a speculation-focused analysis of this provision, as well as the specific allegations of the United States' complaint challenging the statute, suggests that while speculation plays a role in some of the arguments mounted against SB 1070, key constitutional arguments against the statute exist that do not require the decision-maker to rely on speculation. Ultimately, a focus on speculation distinguishes these two seemingly related immigration statutes and provides a useful structure for evaluating the constitutional challenges raised on the face of the statutes.

CONCLUSION

Whether a decision-maker must rely on speculation to find a statute unconstitutional is a pivotal inquiry in evaluating a facial challenge. This Article contends that the Roberts Court is particularly reluctant to uphold facial challenges that are materially grounded in speculation—defined in this Article as hypothetical theories about human behavior that the statute's challengers argue will be triggered by the operation of the statute. In a pure facial challenge, one raised before the state statute has gone into effect, a court will be particularly hesitant to rely on speculation to invalidate the statute. Focusing on speculation in the analysis of the allegations, claims, and case theories advanced in a pure facial challenge allows challengers to separate those claims that are appropriate for facial challenge review and likely to succeed, such as those grounded in textual interpretation, from those that a court would be inclined to find are better suited for an as-applied challenge. For example, a focus on the role of speculation in the recent constitutional challenges to Arizona's immigration-related statutes reveals that while the facial challenges to the statutes appear similar, they in fact differ in ways that mandate opposite results on the question of the state statutes' constitutionality.