Written by **Joe Wolverton, II, J.D.** on December 5, 2011

Ninth Circuit Court Denies Policeman's Standing to Challenge SB 1070

The appellant, Martin Escobar, is a patrolman with the Tucson police department. He filed suit last year claiming that he was "mandated to enforce SB 1070" and therefore he had standing sufficient to proceed with his complaint.

Simply put, "standing" is a legal concept wherein the party bringing the suit proves to the court that he has "connection to and harm from the law or action challenged to support that party's participation in the case."

Escobar defended the sufficiency of his standing by explaining that "if he refuses to enforce the Act, he can be disciplined by his employer," and if he does enforce it, he "can be subject to costly civil actions" for "deprivation of civil rights of the individual against whom he enforces the Act."

The Court of Appeals was not persuaded, and it ruled against Escobar's assertion of standing. As a result of its holding in the Escobar case, the Ninth Circuit upheld the decision of the lower court dismissing the suit.

A second prong of Officer Escobar's argument for standing in the case was also rejected by the court. In his appeal, Escobar had asserted that as a man of Hispanic descent he was subject to the law and thus was suffering harm as the result of its application.

The court held that in making this claim, Escobar "alleged insufficient facts" to show injury based on this claim and that "mere conclusory allegations" are not enough to show injury.

In a statement released after the publication of the Ninth Circuit's decision, Governor Jan Brewer of Arizona said she was "pleased with today's decision by the Ninth Circuit affirming the dismissal of this case challenging SB 1070. I'll continue to defend the State of Arizona's duty and obligation to protect the safety and welfare of its citizens."

Since its enactment in 2010, the Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070) has been the subject of several legal challenges.

In November, for example, the U.S. Department of Justice (DOJ) filed a brief with the Supreme Court, encouraging the nation's highest court to refuse to hear an appeal of an earlier Ninth Circuit Court of Appeals decision enjoining the enforcement of various provisions of the law.

In its decision granting the injunction, the Court of Appeals upheld an injunction placed by a lower court before the law was to be enforced. As a result of those two negative decisions, the state of Arizona

has filed a writ of certiorari petitioning the Supreme Court to hear its appeal on the granting of the injunction.

The Supreme Court may have tipped its hand regarding the direction it might take in the case of SB 1070 in a decision handed down last May in the case of *Chamber of Commerce v. Whiting*. In that matter, the court held that the state law in Arizona governing the relationship of immigration to employment was not preempted by federal law covering similar issues.

As has been covered for the last year and a half by *The New American*, the Obama administration has sued Arizona (and several other states that subsequently passed similar anti-illegal immigration measures) in federal district court, claiming that the federal government has exclusive jurisdiction over the arena of immigration policy and that the Constitution does not provide for a "patchwork of state and local immigration policies throughout the country."

The question of exclusivity of jurisdiction can be answered by recurring to the plain language of the Constitution and a survey of the powers granted therein to the government of the United States.

Is there a clause in the Constitution endowing Congress with power to promulgate laws drawing the circumference of immigration policy and procedure? If such a clause exists, discussion of SB 1070 would be moot, as that law would fail constitutional muster as an exercise of a power delegated to the federal government. What follows is an inquiry into the existence or absence of federal authority over immigration.

In all the clauses of Article I, Section 8 of the Constitution there is found no enumeration of power over immigration given to Congress.

In the absence of explicit, enumerated authority to legislate, the power remains with the states and the people according to the 10th Amendment. The responsibility for deciding who may or may not enter a state is upon the government of that state, and not the national government.

Arizona's expression of its legislative will — setting criteria for whether an immigrant may remain within its borders — is, therefore, absolutely legal and without vulnerability to claims of federal exclusivity.

Moreover, not only is there no federal supremacy over state laws with regard to immigration policy, but there is no constitutional accession of federal jurisdiction over immigration whatsoever.

As President Ulysses S. Grant wrote in a memo to the House of Representatives: "Responsibility over immigration can only belong with the States since this is where the Constitution kept the power."