



State of West Virginia  
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April 21, 2017

Jeff S. Sandy, CFE, CAMS  
Secretary of the West Virginia Department  
of Military Affairs & Public Safety  
1900 Kanawha Blvd. East  
Capitol Complex, Bld. 1, Room W-400  
Charleston, WV 25305

Dear Secretary Sandy:

You have asked for an Opinion of the Attorney General about what steps a West Virginia law enforcement officer would be legally authorized to take when he or she suspects that an illegal alien is working in West Virginia. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advise upon questions of law, . . . whenever required to do so, in writing, by . . . any . . . state officer, board, or commission." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

Your request raises the following legal question:

*May a West Virginia law enforcement officer, without being subject to liability, require a person working in West Virginia to produce identification to prove immigration status based on suspicion that the person is not lawfully present in the United States?*

Specifically, you have inquired whether a West Virginia law enforcement officer would be permitted to go to a workplace and request identification from the workers. We understand you to be asking what steps may be taken to enforce the law against the illegal alien worker, as opposed to steps that could be taken to enforce the law against the employer. And based on our correspondence and discussions, we understand that you are seeking advice about the steps that state law enforcement may take in the absence of cooperation with federal authorities.

We begin with the governing case law. The U.S. Supreme Court has recently issued a decision that provides guidance on the steps that state law enforcement may take to enforce federal immigration law. In *Arizona v. United States*, 567 U.S. 387, \_\_\_, 132 S. Ct. 2492, 2497-98

(2012), the Court reviewed four different provisions of an Arizona law designed to aid in the enforcement of federal immigration law to determine whether those provisions were preempted by federal law. The review of two of those provisions—in which the Court struck one provision and reserved a constitutional question regarding another—is relevant to your inquiry.

*First*, the Supreme Court struck down a provision of Arizona law that granted state law enforcement officers the authority to arrest a person based on probable cause that the person had committed an offense that made him or her removable from the United States. *Id.* at 2505–07. The Court concluded that this provision conflicted with a federal statutory scheme that governs the arrest of removable aliens. *Id.* at 2507. The Court interpreted the federal scheme to provide that “state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances.” *Id.* Those circumstances included “when the [United States] Attorney General has granted that [arrest] authority to specific officers in a formal agreement with a state or local government.” *Id.* at 2506. “Officers covered by these agreements,” the Court explained, “are subject to the Attorney General’s direction and supervision.” *Id.* In the Court’s view, therefore, the Arizona law created “an obstacle to the full purposes and objectives of Congress” “[b]y . . . authorizing state and local officers to engage in these enforcement activities as a general matter.” *Id.* at 2507.

*Second*, the Supreme Court rejected a facial challenge to a provision of Arizona law that required a state officer to make a reasonable attempt to determine a person’s immigration status when the officer had reasonable suspicion of unlawful presence with respect to a person stopped, detained, or arrested on some other basis. *Id.* at 2507–10. The Court explained that “Congress has done nothing to suggest it is inappropriate to communicate with [U.S. Immigrations and Customs Enforcement] in these situations” and, in fact, had “encouraged the sharing of information about possible immigration violations.” *Id.* at 2508.

The critical aspect to this holding is that the Court left open the constitutionality of a state officer stopping a person or prolonging a detention solely for the purpose of determining immigration status. Some parties argued that the requirement to check on immigration status might lengthen the time of an otherwise permissible stop or detention, and the Court agreed that “[d]etaining individuals solely to verify their immigration status would raise constitutional concerns.” *Id.* at 2509. But the Court explained that the Arizona law “could be read to avoid these concerns.” *Id.* The Court declined to pass on the constitutionality of this provision because if it only required “state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives.” *Id.* The Court thus did not address “whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law.” *Id.*

These two holdings in *Arizona* provide some guidance on the steps that may be taken by state law enforcement officers who believe that an illegal alien is working in West Virginia. *Arizona* prohibits a state law enforcement officer who is not cooperating with federal authorities from arresting a person for mere unlawful presence. But while *Arizona* suggested there may be

“constitutional concerns” with a state law enforcement officer detaining a person based on reasonable suspicion of unlawful presence, the Court did not ultimately answer that question.

Precedent from the U.S. Court of Appeals for the Fourth Circuit, which covers West Virginia, provides further important guidance. It answers in the negative the question *Arizona* reserved—*i.e.*, whether a state law enforcement officer may detain a person based on suspicion that that person is illegally present in the United States. In *Santos v. Frederick County Board of Commissioners*, 725 F.3d 451, 465 (4th Cir. 2013), the federal appeals court announced that a state law enforcement officer may, after its decision in that case, be subject to liability when that officer detains a person based only on suspicion that he or she is an illegal alien, unless the relevant state law enforcement agency has entered into an agreement with federal authorities and the officer has received training. Specifically, the Fourth Circuit concluded that “absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law” without violating the Fourth Amendment. *Id.* at 465.

The case involved the prolonged detention of an individual who, after being approached by state law enforcement outside her workplace, initially answered certain questions voluntarily. The Fourth Circuit noted that the initial encounter in *Santos* “did not implicate the Fourth Amendment” because the illegal immigrant had voluntarily submitted to questioning. *Id.* at 462. But after learning that there was a potentially applicable U.S. Immigration and Customs Enforcement warrant, the officers in *Santos* detained the illegal immigrant for roughly 15 minutes to confirm that the warrant was active. *Id.* at 458. The Fourth Circuit concluded that the officers “violated Santos’s rights under the Fourth Amendment when they seized her after learning that she was the subject of a civil immigration warrant and absent ICE’s express authorization or direction.” *Id.* at 468. Importantly, the officers’ law enforcement agency had reached an agreement with ICE that authorized some deputies to enforce federal immigration law, but the particular officers making the stop were not “trained or authorized to participate in immigration enforcement.” *Id.* at 457. Furthermore, because you have asked specifically about identifying suspected illegal aliens at places of employment, we note that although the officers had approached Santos outside her place of work during her lunch break and confirmed her employment before they seized her, *id.*, this fact did not change or appear to play any role in the Fourth Circuit’s analysis.

*Santos* establishes that a state law enforcement officer in West Virginia may be held liable if the officer detains a person working in West Virginia solely to determine whether he or she has lawful immigration status. The holding in *Santos* is broad: “absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.” 725 F.3d at 465. And the facts are similar to the enforcement scenario you have proposed—going to a workplace and requiring the presentation of identification based on suspicion that an employee is an illegal alien. Although we do not express an opinion on whether

the Supreme Court would agree with the conclusion in *Santos*,<sup>1</sup> the Fourth Circuit's decision is precedent in the governing circuit and could present the possibility of liability. *See Hunter v. Town of Mocksville, NC*, 789 F.3d 389, 396 (4th Cir. 2015) (qualified immunity turns on whether a constitutional right was "clearly established" at the time of the alleged violation).

Nevertheless, state law enforcement officers retain some options under governing precedent to investigate whether illegally present workers are employed in West Virginia. *First*, neither *Santos* nor *Arizona* prohibit a state law enforcement officer from checking immigration status of a person based on information learned during a consensual discussion. *Santos* concluded that the initial questioning of the illegal alien "did not implicate the Fourth Amendment" because the encounter had been consensual. 725 F.3d at 462. And though *Arizona* said that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns," 132 S. Ct. at 2509 (emphasis added), it did not suggest that a consensual discussion would be impermissible.

*Second*, state officers may confirm a person's immigration status based on information obtained during a lawful detention so long as that confirmation process does not prolong the detention. *Arizona* explained that an immigration status check "during the course of an authorized, lawful detention or after a detainee has been released . . . likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives." 132 S. Ct. at 2509. Similarly, *Santos* concerned only detention by state law enforcement that is "solely based on known or suspected civil violations of federal immigration law." 725 F.3d at 464 (emphasis added).

*Third*, state law enforcement officers may also work in cooperation with federal authorities to detain a person that they believe is employed in West Virginia while illegally present in the United States. *Arizona* and *Santos* leave at least two paths available for such cooperation.

Both *Arizona* and *Santos* acknowledged that state law enforcement agencies may enter agreements with the U.S. Attorney General that permit officers of the state law enforcement agency to perform immigration enforcement functions. 8 U.S.C. § 1357(g)(1); *Arizona*, 132 S. Ct. at 2506; *Santos*, 725 F.3d at 457, 463. These agreements must include a written certification that the state officers "have received adequate training regarding the enforcement of relevant Federal immigration laws." 8 U.S.C. § 1357(g)(2). State officers enforcing federal immigration law under one of these agreements are "subject to the direction and supervision of the [U.S.] Attorney General." *Id.* § 1357(g)(3).

These federal-state agreements may be encouraged under the current presidential administration. A recent executive order declared that "[i]t is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions

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<sup>1</sup> In 2014, the Supreme Court declined to review *Santos* itself, *see Frederick County Bd. of Comm'rs v. Santos*, 134 S. Ct. 1541 (2014) (denying certiorari), but such discretionary denials of review do not necessarily reflect the view of a majority of the Court on the merits of the lower court decision.

of an immigration officer in the interior of the United States to the maximum extent permitted by law.” Executive Order, Enhancing Public Safety in the Interior of the United States, § 8 (Jan. 25, 2017) (available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>); *see also* Executive Order, Border Security and Immigration Enforcement Improvements, § 10 (Jan. 25, 2017) (available at <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>). The Secretary of Homeland Security has been instructed to “take appropriate action, through agreements under section 287(g) of the [Immigration and Nationality Act, 8 U.S.C. § 1101, et seq.], or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary.” Executive Order, Enhancing Public Safety in the Interior of the United States, § 8(b); Executive Order, Border Security and Immigration Enforcement Improvements, § 10(b).<sup>2</sup>

*Arizona* and *Santos* also leave open the possibility that state officers may, in response to a specific request from U.S. Immigrations and Customs Enforcement, detain an illegally present person suspected of working in West Virginia. Under federal law, no federal-state agreement is required for state officers to communicate with the U.S. Attorney General regarding the immigration status of an individual or to otherwise cooperate with the Attorney General “in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.” 8 U.S.C. § 1357(g)(10). *Arizona* concluded that this provision did not authorize the Arizona law that allowed state officers to unilaterally arrest a person when the officers had probable cause to believe that person was illegally present in the United States. 132 S. Ct. at 2505–07. And *Santos* rejected the state officers’ reliance on a request from ICE that came 45 minutes after the officers had already detained the individual. 725 F.3d at 465–68. What is absent from these decisions is a timely request from the federal government. We believe these decisions leave open the ability of state officers to detain a person with “express direction or authorization by federal statute or federal officials.” *Id.* at 465; *see Arizona*, 132 S. Ct. at 2507 (noting the “absen[ce] [of] any request, approval, or other instruction from the Federal Government”).

In sum, while we conclude that controlling case law prohibits a state law enforcement officer from detaining an individual based solely on suspicion that the person lacks lawful immigration status, there are other options available to state law enforcement, including several methods of cooperating with the federal government.<sup>3</sup>

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<sup>2</sup> The responsibility for overseeing agreements with state and local law enforcement has been transferred to the Secretary of Homeland Security. *See* 6 U.S.C. § 251.

<sup>3</sup> We do not understand you to be asking, and therefore do not address in this Opinion, the circumstances in which a state or local law or policy prohibits or interferes with efforts by state law enforcement to communicate with federal authorities on immigration matters. *See* Executive Order, Enhancing Public Safety in the Interior of the United States, § 9; *see also* 8 U.S.C. § 1373.

Jeff S. Sandy, Secretary  
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Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Morrissey". The signature is written in a cursive, somewhat stylized font.

Patrick Morrissey  
Attorney General

Elbert Lin  
Solicitor General

Gilbert Dickey  
Assistant Attorney General