

STATE IMMIGRATION-RELATED LEGISLATION

Last Year's Key Battles Set the Stage for 2012

JANUARY 2012

Last year, state legislators introduced a record number of immigration-related measures, but, all-told, states enacted fewer measures than many had predicted after the conservative political shift associated with the 2010 state elections. This wrap-up summarizes last year's battles in four key areas that, in 2012, will continue to play a prominent role in states' debates: (1) laws inspired by Arizona's SB 1070, the contentious bill passed in 2009; (2) laws mandating E-Verify enrollment and use; (3) laws requiring applicants for public benefits to verify their citizenship or immigration status; and (4) laws addressing immigrants' access to higher education.

■ Laws Inspired by Arizona's SB 1070

The 2011 state legislative session saw 25 states introduce legislation imitating core elements of Arizona's infamous SB 1070. These bills shared several features and, in many instances, required state and local law enforcement officers to transform routine encounters with community members into inquiries about immigration status, encouraging racial profiling in the name of immigration enforcement. The bills often included provisions that would permit warrantless arrests based on perceived immigration status or that criminalized the act of looking for work. Some state lawmakers went even further by passing provisions that were not in SB 1070. Alabama's law, for example, includes many extreme measures, including a requirement that parents provide proof of their children's immigration status when enrolling them in school. Indiana established criminal penalties for using or accepting foreign government-issued consular identification cards.

These SB 1070-inspired laws were aimed expressly at creating state immigration policies and punishments, including: imposing new, state-law penalties for violations of federal immigration law; criminalizing the daily actions of immigrants, of people who, in the eyes of law enforcers, appear to be immigrants, and of people who interact with immigrants; and, ultimately, either expelling immigrants from the state where the law was enacted or making life so difficult for immigrants and their families that they would choose to leave the state.

Because of the courageous and dedicated work of local communities, business and religious leaders, and immigrants' rights groups, of the 25 states where SB 1070-inspired



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legislation was introduced in 2011, only 5 (Utah, Indiana, Georgia, Alabama, and South Carolina) ultimately passed copycat bills in 2011. And, importantly, courts halted the implementation of core elements of the SB 1070–inspired laws that passed in Utah, Indiana, Georgia, and South Carolina before they could take effect and bring irreparable damage to local residents.¹

In sharp contrast, however, an Alabama federal district court issued decisions enjoining only certain parts of Alabama’s law and allowing several harmful provisions to go forward.² Weeks later, the U.S. Court of Appeals for the 11th Circuit temporarily enjoined two of these provisions but allowed three other provisions to remain in effect, including the requirement that local law enforcement officers verify the immigration status of virtually all individuals whom they lawfully stop (e.g., for traffic violations, etc.).³

Overall, sections in these state laws whose enforcement has been halted pending further appeal include those criminalizing day laborers and work by individuals without lawful immigration status; making it a crime to conceal, harbor, or transport unauthorized immigrants; prohibiting certain lawfully present and undocumented students from attending any public post-secondary institution in Alabama; and requiring families enrolling their children in grades K-12 to verify the children’s citizenship or immigration status and, potentially, the status of the parents. Sections in these laws that remain in effect pending legal challenge include those authorizing law enforcement officers to check the immigration status of people they stop, detain, or arrest; creating a felony for unauthorized immigrants to enter into a “business transaction” with the state of Alabama; and prohibiting the enforcement of certain contracts to which an unauthorized immigrant is party.

In the states that rejected these SB 1070–inspired measures, state legislators heard loud and clear that laws such as SB 1070 are unconstitutional, undermine public safety, and burden already stressed state and local budgets. Several factors contributed to victories in the states where SB 1070–inspired legislation was defeated:

- Strong grassroots organizing and coalition-building led to the defeat of copycat legislation. For example, in Florida, the “We Are Florida” campaign⁴ organized for a year and mobilized thousands of people over the course of three months to protest and provide testimony at the capitol. The Reform Immigration for Texas Alliance credits building a strong community organizing effort and a broad coalition that included faith-based leaders, law enforcement, and business as factors in defeating anti-immigrant bills in Texas.⁵
- Law enforcement opposed several bills, including those in Colorado and Nebraska.⁶ Laws that require local police to interrogate individuals regarding their immigration status increase a climate of fear and distrust, causing immigrant communities and those close to them to become more reluctant to seek help from the police.

- Business groups strongly criticized the bills introduced in Kansas⁷ and other states due to the burden such legislation places on businesses and the economic loss that Arizona experienced after the passage of SB 1070.
- Fiscal impact statements convinced cash-strapped states that the costs of anti-immigrant legislation were too high. The estimated cost of copycat legislation introduced in Kentucky was \$89 million per year⁸ and Tennessee's General Assembly Fiscal Review Committee estimated that copycat legislation would raise state expenditures by nearly \$3 million in the first year after enactment.⁹ Also, the mounting litigation expenses of defending unconstitutional legislation and the loss in revenue from cancelled conventions and conferences, as well as decreased tourism, have been costly for states already struggling to balance their budgets.¹⁰

ended. On August 5, 2011, U.S. Immigration and Customs Enforcement director John Morton announced (1) that the agency was unilaterally terminating the agreements it had with states for participation in S-Comm because, in ICE's estimation, the agreements were no longer necessary and (2) that states were required to participate in the program. The impact on states whose governors had requested that operation of S-Comm be terminated within their states remains unclear—and will likely become an issue for the courts to decide.

Lessons learned from the 2011 legislative session include the importance of advance grassroots organizing; building coalitions that include a broad array of voices, including nontraditional and unlikely allies such as business interests; making connections across states in order to share strategies and resources; and using a mix of arguments tailored to the specifics of the state, including those focused on values, economics, and public safety.

■ Laws Mandating E-Verify Enrollment and Use

During the 2011 legislative session, E-Verify legislation targeted at both employers and workers was proposed in 37 states. E-Verify is a mostly voluntary, Internet-based program that allows employers to electronically verify newly-hired employees' employment eligibility by accessing information in databases maintained by the Social Security Administration and the Department of Homeland Security. In 2011, only three states (Alabama, Georgia, and North Carolina) passed laws requiring all employers in those states to use E-Verify and five states (Florida, Indiana, Louisiana, Minnesota, and Virginia) either passed laws or their governor issued an executive order requiring some employers with state contracts to use E-Verify. In a turn against the tide, a law passed in California that prohibits the state and its localities from requiring employers to use E-Verify. Illinois is the only other state with such a law on the books.

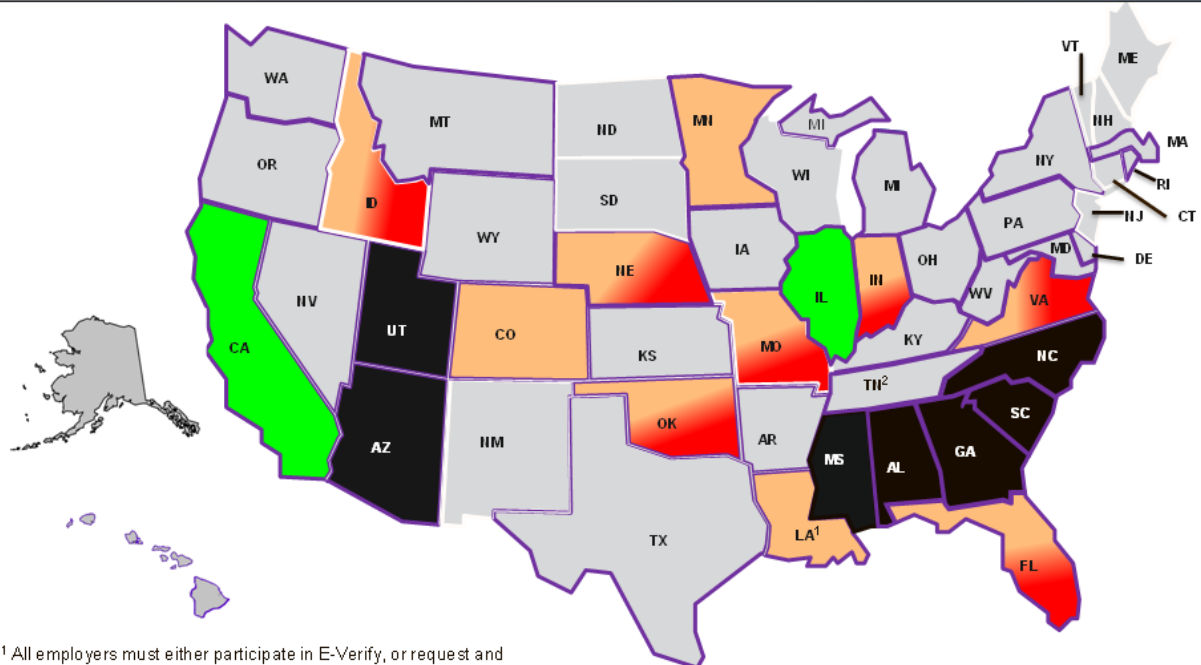
Laws passed in 2011 making use of E-Verify mandatory for every employer in the state augment previously passed legislation in Arizona, Mississippi, South Carolina, and Utah. These mandates, however, remain in the minority: a vast majority of states rejected E-Verify legislation during the 2011 state legislative session, and most states do not have any E-Verify mandates.

E-Verify legislation was rejected during the 2011 legislative session for many reasons, including:

- The negative associations between such legislation and Arizona SB 1070 copycat bills.
- Opposition from businesses, including the agricultural industry.
- Growing awareness of E-Verify's shortcomings, including inaccuracy rates and stories of employment-authorized immigrants and U.S. citizens unable to work due to E-Verify.
- Extensive organizing by immigration, labor, and worker advocates.

In May 2011, the U.S. Supreme Court upheld a 2007 Arizona law requiring all employers in the state to use E-Verify or risk loss of their business licenses. Although the court's ruling was rooted in the particularities of Arizona's law, some states may perceive the decision as a green light to introduce various proposals mandating E-Verify or otherwise attempting to regulate work by non-U.S. citizens, and it is clear that battles over these proposals will continue in 2012.

Current State E-Verify Laws and Policies | January 2012



¹ All employers must either participate in E-Verify, or request and maintain a copy of identity and work authorization documents, for new hires.

2 All employers must either participate in E-Verify, or request and maintain a copy of identification and work authorization documents, for new hires. Legislation in Tennessee encourages private employers to use E-Verify by providing a presumption of good faith for employers who use it, but not for those who comply with other employment verification requirements.

	Mandatory E-Verify for all employers
	Mandatory E-Verify for public agencies
	Mandatory E-Verify for state contractors
	Localities prohibited from mandating E-Verify
	E-Verify legislation introduced in 2011

■ Laws Requiring Applicants for Public Benefits to Verify Their Citizenship or Immigration Status

In 2011, Alabama and Indiana enacted laws establishing requirements that reach beyond existing federal mandates that applicants for public benefits verify their citizenship or immigration status. Georgia added a new layer to an increasingly complicated verification scheme that legislators have revisited session after session. Montana legislators declined to enact a measure imposing cumbersome verification rules on state services but referred a referendum for voters to be considered on the 2012 ballot. Like other restrictionist trends did, the trend toward proposing and passing benefit verification laws and initiatives originated in Arizona, which passed Proposition 200, the

“Arizona Taxpayer and Citizen Protection Act,” in 2004. Since that time, at least twelve states have enacted one or more such laws, either as stand-alone measures or as components of omnibus restrictionist legislation.

Typically, these laws require that adults seeking public benefits sign a statement, subject to prosecution for fraud, attesting that they are U.S. citizens or lawfully present immigrants; the agencies then verify immigrants’ status through the Systematic Alien Verification for Entitlements (SAVE) program, a federal database. As part of these schemes, a few states have also attempted to severely limit the types of documents that applicants for benefits may use to prove their identity. The laws typically adopt the definitions of “federal public benefits” and “state and local public benefits” appearing in federal law. Services available under federal law regardless of immigration status—such as emergency medical care—are typically exempted from the new verification schemes.

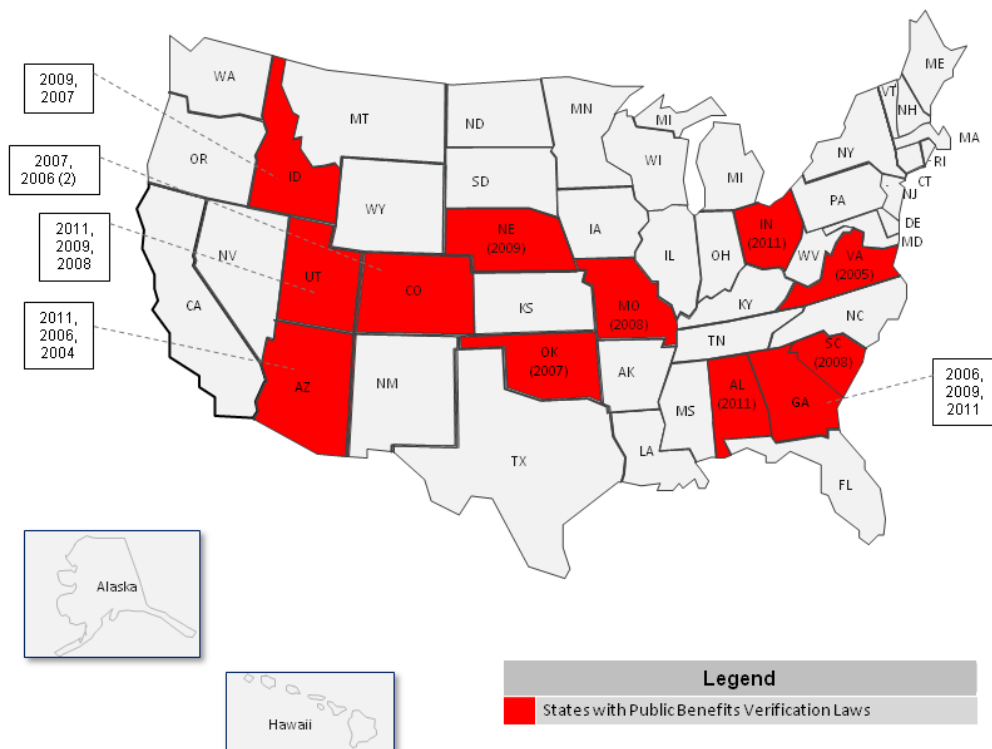
These laws have been resisted successfully in many states. Their critics often have noted that they are “solutions in search of a problem.” Federal law already bars unauthorized immigrants from the major public benefit programs and requires that applicants for these programs have their status verified through the SAVE system. Heated rhetoric aside, proponents of new citizenship and immigration verification measures have not presented any significant evidence that unauthorized immigrants fraudulently obtain public benefits for which they are ineligible. In fact, state benefit agencies implementing such measures are hard-pressed to point to any state savings resulting from denying unauthorized immigrants benefits. For example, 18 Colorado state benefits agencies reported a first year cost of over \$2 million to implement a law passed in 2006. None of the agencies could identify any savings.¹¹ The net loss is consistent with states’ experience implementing a federal citizenship documentation mandate, also advanced as necessary to save money by warding against fraud by undocumented immigrants seeking Medicaid. According to a 2007 report by the Government Accountability Office, six states spent over \$8.3 million to find eight undocumented immigrants (out of a caseload of over 3.6 million Medicaid enrollees) for a total savings of only \$11,048.¹²

The fiscal costs imposed by these laws have complicated their passage in some states. In 2008, after the Commonwealth of Pennsylvania estimated implementation costs of between \$19 million and \$23 million during its first year alone,¹³ a bill that seemed invincible stalled, though battles on successor bills in Pennsylvania continue. In 2011, a Tennessee benefits verification bill suffered a major blow when legislative staff estimated its cost to taxpayers at almost \$8 million. The estimate was reduced to \$1 million after the sponsor modified the bill, but for many, that price tag still seemed too high, and further consideration of the bill was postponed.¹⁴

Critics also note that U.S. citizens are the group most harmed by these laws, particularly in states that require verification through a restricted list of documents. A 2006 study by the Brennan Center for Justice found that 11 percent of U.S. citizens do not have government-issued photo ID and that the percentages of citizens without photo ID who are, respectively, low-income persons, seniors, or African Americans are even

higher.¹⁵ In 2011, concerns regarding the “unintended consequences” of verification laws on U.S. citizens, and the additional burdens they impose on state and local agencies, led the attorneys general of Georgia and Alabama to recommend a narrower application of these laws. These experiences should serve as a cautionary tale for states considering similar measures in 2012.

Laws Requiring Verification of Immigration Status for Public Benefits | July 11, 2011



■ Laws Addressing Immigrants' Access to Higher Education

The 2011 state legislative sessions witnessed a boost in activity on issues involving immigrant student's access to higher education. Advocates made significant progress in persuading legislators to improve access to education for all students last year, with campaigns to continue in several states in 2012. The results of the 2011 sessions were mixed, however, with both inclusive and restrictive bills becoming law. Challenges to these new laws, through litigation and pending voter referendums, have begun.

Tuition Equity

Tuition equity laws provide in-state tuition rates at colleges or universities to students who attend high school in a state for a number of years, graduate, and meet certain other criteria, regardless of their immigration status. These laws help make college more

affordable for many U.S. citizens and documented immigrants, as well as undocumented students who were brought to the U.S. as children and have grown up here.

Tuition equity bills were signed into law in Maryland and Connecticut in 2011. Maryland's law, however, faced an immediate backlash when its opponents qualified a repeal referendum for the November 2012 ballot. A lawsuit filed by Casa of Maryland has challenged the validity of the electronic signatures gathered for this petition drive.

In the meantime, tuition equity efforts gained ground in other states. Most recently, Rhode Island's Board of Governors for Higher Education voted unanimously to provide access to in-state tuition at the state's public colleges and universities to certain students regardless of their immigration status. Rhode Island governor Lincoln Chafee expressed his support for the policy, which is scheduled to take effect in the fall of 2012. Bills in Colorado and Oregon passed one house of the state legislature. Tuition equity efforts in Massachusetts were bolstered when the governor appeared at a joint hearing, expressing his support for the measures. The Massachusetts Taxpayers Foundation estimated that the bills, if enacted, would increase the state's revenues by up to \$7.4 million by the fourth year.¹⁶ Advocacy on these measures, fueled by the inspiring students who were profiled in these debates, will continue next session.

Wisconsin, by contrast, lost its tuition equity law when the legislature adopted a repeal that the governor had incorporated into an omnibus budget measure. In Indiana, a bill denying in-state tuition to students who are not lawfully present became law; the state's SB1070-inspired bill also included provisions denying in-state tuition, scholarships, grants, and financial aid to undocumented students.

Attempts to repeal the tuition equity laws in California, Kansas, Nebraska, Oklahoma, Texas, and Utah were unsuccessful in 2011. Policymakers, educators, labor, and business groups in these states recognize the ongoing benefits of the tuition equity policies. In addition to the policy adopted in Rhode Island, 12 states currently have tuition equity laws on the books: California, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington. At least two of these states, Texas and New Mexico, also offer state financial aid to eligible students, regardless of their status. Minnesota provides a "flat tuition rate" in some of its college systems. For more information on tuition equity laws, see NILC's "Basic Facts about In-State Tuition for Undocumented Immigrant Students."¹⁷

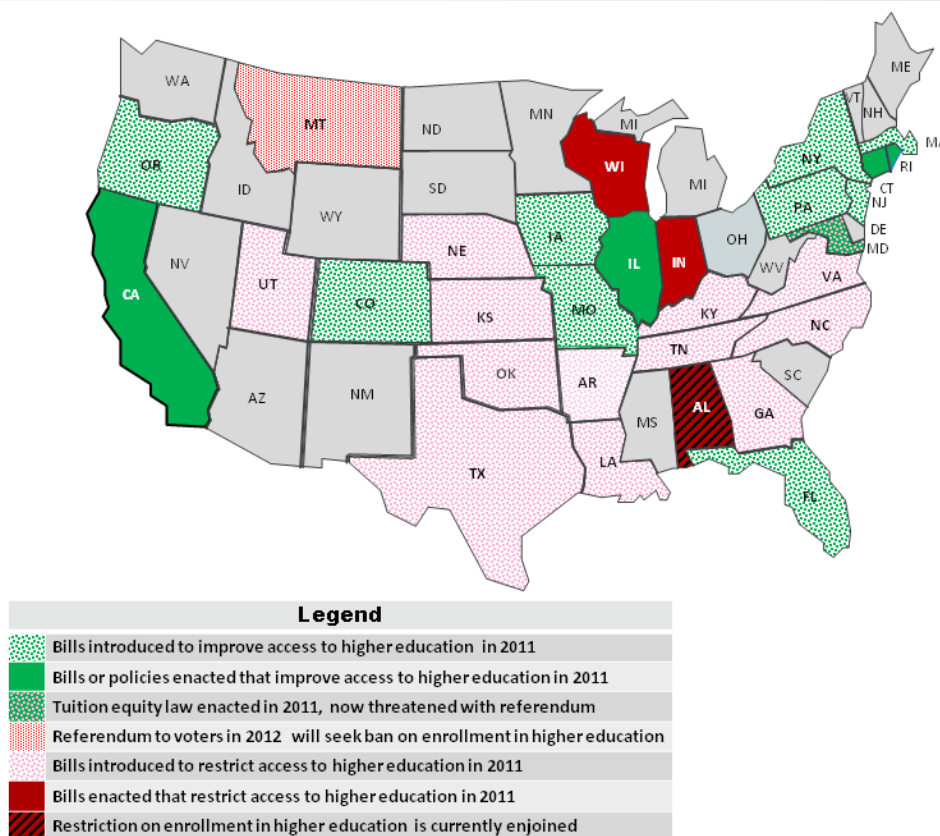
Tuition equity laws have withstood every legal challenge brought to date, including a unanimous California Supreme Court opinion upholding California's law. In June 2011, the U.S. Supreme Court declined to review this decision. This bolstered the confidence of legislators and advocates pursuing similar legislation in other states.

Scholarships and Financial Aid

Even when in-state tuition rates are available, higher education remains inaccessible for many students and their families if they cannot qualify for financial aid or scholarships. California enacted California DREAM part I (AB 130), providing access to

scholarships derived from private sources donated to public colleges and universities, for students who are eligible to pay in-state tuition rates. And on October 8, 2011, Governor Jerry Brown signed California DREAM part II (AB 131), which will make these students eligible for most forms of state financial aid and fee waivers. Illinois enacted a law that, among other things, establishes a DREAM fund commission that will provide privately

Bills to Improve or Restrict Access to Higher Education Introduced or Enacted in 2011 | October 2011



funded scholarships to children of immigrants and make a “college savings pool” and prepaid tuition available to persons with individual taxpayer identification numbers (ITINs).

Legislators in New York, Connecticut, and at least two other states also introduced measures that expand access to scholarships, financial aid, or other opportunities for immigrant students this year. Advocates will continue their campaigns on these bills in the coming year.

Banning Enrollment in Higher Education

Not content with charging out-of-state tuition rates and denying financial aid, grants or scholarships, legislators in at least eight states sought to ban undocumented students from enrolling in higher education. Prior to this year, only South Carolina had enacted such a ban. In May, the Montana legislature voted to place a referendum on the November 2012

ballot asking whether “state services,” including enrollment in a public university and financial aid, should be denied to undocumented immigrants. Alabama’s omnibus anti-immigrant law attempted to deny public post-secondary education to undocumented immigrants as well as many categories of lawfully present immigrants. This ban on enrollment in higher education was preliminarily enjoined by a federal district court in the lawsuit filed by a broad coalition of civil rights groups that includes NILC.

Bills that sought to deny enrollment to undocumented students in Arizona, Georgia, Kentucky, North Carolina, Tennessee, and Virginia were defeated or failed to move in 2011. Although DREAMers and their allies were able to prevent a total ban on enrollment, Georgia’s Board of Regents proceeded with its plan to deny enrollment to undocumented students who are accepted by the five most selective institutions in the University System of Georgia. For a more detailed report on access to higher education as well as K-12 measures considered during the 2011 state legislative sessions, see NILC’s “State Campaigns on Education for Immigrant Students Gain Momentum in 2011.”¹⁸

■ Maintaining Vigilance in 2012

As 2011 came to a close, individuals and entities that advocate restrictive state immigration legislation confronted several challenges. As the economic and fiscal costs of restrictive measures became clearer, a split among conservative legislators began to emerge, and business groups surfaced as a potent force urging restraint. In states that enacted Arizona SB 1070–inspired bills, influential figures that had supported the measures began to question the wisdom of the approach. In a stunning fall from power, Russell Pearce, the politician who sponsored SB 1070, was recalled by his constituents, the first recall of a sitting state senate president in U.S. history. Although these and other developments have sapped momentum from the anti-immigrant movement, many states nevertheless seem poised to consider restrictive measures in 2012. Immigrants and their advocates and allies will need to remain vigilant in 2012.

NOTES

¹ In Utah, a federal district court issued a temporary restraining order (see www.nilc.org/document.html?id=152) halting implementation of HB 497, pending full consideration of a preliminary injunction motion filed by NILC and its partners. A hearing on the motion is set for Feb. 17, 2012. In Indiana, Georgia and South Carolina, where NILC and its partners sued to block the implementation of the laws, the federal courts agreed with many of our arguments and temporarily blocked key provisions from taking effect. The court decisions in these cases are available, respectively, at www.nilc.org/document.html?id=150, www.nilc.org/document.html?id=80, and www.nilc.org/document.html?id=495 (all URLs last accessed Jan. 5, 2012).

² The court's memorandum opinion of Sept. 28, 2011, is available at www.nilc.org/document.html?id=140 (last accessed Jan. 5, 2012).

³ The 11th Circuit's order is available at www.nilc.org/document.html?id=129 (last accessed Jan. 5, 2012).

⁴ <http://wearefl.com/> (last accessed Jan. 5, 2012).

⁵ See <http://reformimmigrationfortexas.org/1/2011/coming-soon-report-on-how-communities-beat-arizona-style-bills-in-texas/> (last accessed Jan. 5, 2012).

⁶ See, e.g., Charles Ashby, "Law Like Arizona's a No-Go, Says Republican," *The Daily Sentinel*, Jan. 2, 2011, www.gisentinel.com/news/articles/law_like_arizonas_a_nogo_says (last accessed Jan. 5, 2012), and Rachel Albin, "Lincoln's Police Chief Strongly Cautions Against Arizona-Style Immigration Law in Nebraska," *Daily Nebraskan*, Feb. 28, 2011, www.dailynebraskan.com/news/lincoln-s-police-chief-strongly-cautions-against-arizona-style-immigration-law-in-nebraska-1.2500649#.TweFwPKPXIU (last accessed Jan. 5, 2012).

⁷ Minutes of the House Judiciary Committee, Hearing on HB 2372: Requiring Verification of Employment Eligibility and Making Other Amendments Concerning Immigration, Mar. 31, 2011, www.kslegislature.org/li/b2011_12/year1/measures/documents/ctte_h_jud_1_20010310_min.pdf (last accessed Jan. 5, 2012).

⁸ Commonwealth of Kentucky State Fiscal Note Statement, Measure 2011 BR No. 0045, SB 6GA, Note No. 20, prepared by Mike Mullins & Jennifer Anglin, Jan. 13, 2011, www.lrc.ky.gov/record/11RS/SB6/FN.doc (last accessed Jan. 5, 2012).

⁹ Tennessee General Assembly Fiscal Review Committee, Fiscal Note: SB 780 - HB 1380, Mar. 14, 2011, www.capitol.tn.gov/Bills/107/Fiscal/SB0780.pdf (last accessed Jan. 5, 2012).

¹⁰ See Philip E. Wogin & Angelea Maria Kelley, *Your State Can't Afford It: The Fiscal Impact of States' Anti-Immigrant Legislation* (Center for American Progress, July 5, 2011), www.americanprogress.org/issues/2011/07/state_immigration.html (last accessed Jan. 5, 2012).

¹¹ Mark P. Couch, "Colorado Immigration Law Falls Short of Goal," *Denver Post*, Jan. 25, 2007, www.denverpost.com/news/ci_5081255 (last accessed Jan. 5, 2012).

¹² *Summary of GAO and Staff Findings: Medicaid Citizenship Documentation Requirements Deny Coverage to Citizens and Cost Taxpayers Millions* (Majority Staff, U.S. House of Representatives Committee on Oversight and Government Reform, July 24, 2007), <http://oversight-archive.waxman.house.gov/documents/20070724110341.pdf> (last accessed Jan. 5, 2012), interpreting data from *Medicaid: States Reported That Citizenship Documentation Requirement Resulted in Enrollment Declines for Eligible Citizens and Posed Administrative Burdens* (U.S. Govt. Accountability Office, GAO-07-889, June 2007), www.gao.gov/new.items/d07889.pdf (last accessed Jan. 5, 2012).

¹³ Fiscal Note Re. Pennsylvania SB9, prepared by Vincent Rossi, March 31, 2008, available from www.nilc.org/document.html?id=586 (last accessed Jan. 5, 2012).

¹⁴ Tom Humphrey, “Illegal Immigration Bill Put on Hold: Arizona Immigrant Law Was Model; Haslam Backs Employee Rules, *Knoxville News Sentinel*, May 18, 2011, www.knoxnews.com/news/2011/may/18/illegal-immigration-bill-put-on-hold/ (last accessed Jan. 5, 2012).

¹⁵ *Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification* (Brennan Center for Justice at NYU School of Law, Nov. 2006), www.brennancenter.org/page/-/d/download_file_39242.pdf (last accessed Jan. 5, 2012).

¹⁶ Maria Sacchetti, “Patrick Backs Illegal Immigrants on Tuition,” *Boston Globe*, July 21, 2011, http://articles.boston.com/2011-07-21/news/29798836_1_eric-balderas-illegal-immigrants-legal-residency (last accessed Jan. 5, 2012).

¹⁷ www.nilc.org/basic-facts-instate.html (last accessed Jan. 5, 2012).

¹⁸ www.nilc.org/ed-legislative-session-summary.html (last accessed Jan. 5, 2012).