

**Senate Committee on Judiciary  
March 15, 2023**

**House Bill 2350  
Testimony of the BIDS Legislative Committee  
Presented by Emily Brandt  
Opponent**

Dear Chairwoman Warren and Members of the Committee:

House Bill 2350 would create the crimes of human smuggling and aggravated human smuggling. Although heavily amended by the House Corrections and Juvenile Justice Committee to tailor the reach of the bill, the BIDS Legislative Committee opposes HB 2350.

HB 2350 Will Put Strain on Kansas' State Court Infrastructure

Our State Court Infrastructure is not presently designed to make immigration determinations or to protect the due process rights of people alleged to be in the United States illegally. The federal immigration system is administered by the Executive Office for Immigration Review. (EOIR). Immigration court proceedings are *civil administrative proceedings* wherein a federal immigration judge decides whether a person should be removed from the United States or granted some protection from removal.

For 40 years the EOIR has been tasked with interpreting and administering federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings. The mission of the EOIR is to provide fair, expeditious, and uniform application of federal immigration laws in all cases. Asking State Court Judges, in the middle of *criminal proceedings* against someone else no less, to interpret and administer federal immigration law will unnecessarily put strain on our State Court System.

That strain will be felt throughout the State Court System. What happens when an alleged smuggler wants to appeal his conviction based on the theory that the person he allegedly smuggled was here in the United States legally? Does he have standing to raise a challenge to someone else's alien status? The State Appellate Courts will also be unnecessarily tasked with interpreting and administering federal immigration law.

Questions of alien status are best left to the experts: the Executive Office for Immigration Review.

## HB 2350 Risks Denying Due Process to Vulnerable Populations

HB 2350 puts vulnerable populations—the very same populations that the proponents purport to be looking out for—at significant risk of criminal liability themselves. As a matter of law, a state prosecutor would have to prove, beyond a reasonable doubt, that the person being “smuggled” is in the United States illegally. By the disposition of a case prosecuted under HB 2350, the alleged victim will have been found in violation of federal law.

Federal immigration law is a complex area of law that has its own federal court system. The status of aliens in federal immigration cases is decided solely by a federal immigration judge. There are no juries in federal immigration cases.

By being an element of the crime of human smuggling, “knows, or should have known, that the individual is entering into or remaining in the United States illegally,” Kansas juries will be in a position to make a determination regarding a person’s legal status. As written, HB 2350 does not define what it means to be in the United States illegally. Nor is there currently a PIK instruction to define a person’s legal status. Without some definition, it is irresponsible to put the burden of determining a person’s legal status on laypeople in a jury.

This raises serious concerns about the “smuggled” person’s due process rights. United States Supreme Court Precedent makes clear that all persons, aliens and citizens alike, are protected by the 5<sup>th</sup> and 14<sup>th</sup> Amendment Due Process Clauses.<sup>1</sup> Will the alleged victim of human smuggling be forced to testify against her smuggler? Thereby risking her testimony being used against her in a future immigration proceeding or federal criminal proceeding? Will a state prosecutor inform her of her right to remain silent—her right to not make incriminating statements regarding her status? Statements about alien status made on the record in state criminal proceedings could be used as evidence against the victim for federal offenses where immigration status is an element.

And because under HB 2350 the “smuggled” person is a victim of the proposed crimes, she would not have standing during state criminal proceedings to put on a defense regarding her status in the United States. Once a state court judge or jury makes a determination that a person is in the United States illegally, that bell cannot be unring.

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<sup>1</sup>*Mathews v. Diaz*, 426 U.S. 67, 77–78, 96 S. Ct. 1883, 1890, 48 L. Ed. 2d 478 (1976)

## HB 2350 Is Likely Preempted by Federal Law and Will Cost Kansas Taxpayers Money to Defend the Law in Federal Court

A near-identical law in Arizona was struck down in federal court as preempted by federal immigration law.<sup>2</sup>

Arizona defined the phrase “smuggling of human beings” as the **transportation, procurement of transportation or use of property or real property by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state or have attempted to enter, entered or remained in the United States in violation of law.**

HB 2350 proposes defining “human smuggling” in part as transporting, harboring or concealing an individual into or within Kansas when the person knows, or should have known, that the individual is entering into or remaining into the United States illegally.

At their core, both laws make it a crime to transport people who the transporter knows or has reason to know are illegally in the United States.

The federal court held that the Arizona law was field preempted because federal law prohibits a near identical set of activities.<sup>3</sup> The federal government has clearly expressed more than a “peripheral concern” with the entry, movement, and residence of aliens within the United States, and the breadth of the federal laws illustrates an overwhelming dominant federal interest in the field.<sup>4</sup>

The federal court also held that the Arizona law was conflict preempted because although it shared similar goals with the federal laws, it “interfered with the careful balance struck by Congress with respect to the harboring of unauthorized aliens.” The Arizona law created additional state penalties and divested federal authorities of the exclusive power to prosecute the crime of harboring or smuggling aliens.

Based on the Arizona case, it is likely that HB 2350, if enacted, will similarly be challenged in federal court and will similarly be struck down as preempted by federal immigration law. Fighting the challenge in federal court will cost Kansas taxpayers significant money.

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<sup>2</sup>*United States v. State of Arizona*, 119 F. Supp. 3d 955 (D. Ariz. 2014)

<sup>3</sup>See 8 U.S.C. 1324

<sup>4</sup>*Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1026 (9th Cir. 2013)

The BIDS Legislative Committee Opposes HB 2350

HB 2350 leaves a vulnerable population of people without legal protection, asks State courts to apply complex federal immigration law, and is likely preempted by federal law. For the reasons above, the BIDS Legislative Committee urges you to reject this proposal.

Thank you for your time and consideration,

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