John J. Bouma (#001358)
Robert A. Henry (#015104)
Joseph G. Adams (#018210)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren
Phoenix, AZ 85004-2202
Phone: (602) 382-6000
Fax: (602) 382-6070
jbouma@swlaw.com
bhenry@swlaw.com
jgadams@swlaw.com

Joseph A. Kanefield (#015838)
Office of Governor Janice K. Brewer
1700 W. Washington, 9th Floor
Phoenix, AZ 85007
Telephone: (602) 542-1586
Fax: (602) 542-7602
jkanefield@az.gov

Attorneys for Intervenor Defendants Janice K. Brewer, Governor of the State of Arizona, and the State of Arizona

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Friendly House, et al.

Plaintiffs,

v.

Michael B. Whiting, Apache County Attorney, in his official capacity, et al.,

Defendants,

and

Janice K. Brewer, Governor of the State of Arizona, in her official capacity; and the State of Arizona,

Intervenor Defendants.

No. CV-10-1061-PHX-SRB

INTERVENOR DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

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Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Janice K. Brewer ("Governor Brewer") and the State of Arizona oppose plaintiffs' Motion for Preliminary Injunction (doc. 235), which seeks to enjoin enforcement of the "Support Our Law Enforcement and Safe Neighborhoods Act," as amended ("SB 1070" or the "Act"), on several grounds. First, for the reasons stated in Governor Brewer's Motion to Dismiss (doc. 238), plaintiffs do not have standing to pursue their claims and, even if plaintiffs did have standing, plaintiffs' Complaint fails to state a claim upon which relief can be granted. Second, the only alleged irreparable harm that plaintiffs claim they will suffer if the Court does not enjoin SB 1070 is the *potential* that their constitutional rights could be violated *if* Arizona's law enforcement officers do not implement the Act as required. Because such speculative and unfounded fears are insufficient to show that it is *likely* plaintiffs will suffer irreparable harm if SB 1070 is not enjoined, plaintiffs are not entitled to preliminary injunctive relief. Third, the Arizona Legislature and Governor Brewer have determined that SB 1070 is necessary to address the harmful effects of illegal immigration on Arizona's economy and the safety and welfare of its residents. Plaintiffs have failed to demonstrate that any potential harm they may suffer if SB 1070 is enforced outweighs the substantial public interests (as determined by Arizona's executive and legislative branches) in having SB 1070 enforced.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

Arizona has a vital and compelling interest in addressing and reducing the harmful effects of unchecked, unlawful immigration. By virtue of its shared border with Mexico and the sheer volume of unlawful immigrants traveling through Arizona, the State bears disproportionate and unique burdens relating to immigration. SB 1070 is focused on assisting the federal government in enforcing federal law and removing the restrictions certain "sanctuary cities" have placed on state and local law enforcement officers' authority to identify persons not lawfully present in this country.

A. Impact of Unlawful Immigration on Arizona

Arizona's shared border with Mexico is the most active point of entry for aliens not

lawfully present in this country. Almost 50% of illegal immigrants enter the United States through Arizona. *See* Braddock Decl. Ex. 19. Border Patrol agents in the Tucson sector have the highest number of border apprehensions in the United States. Braddock Decl. Exs. 35, at 3 & 23, at 13. In 2009, there were approximately 500,000 people in Arizona who were not lawfully present in this country. Braddock Decl. Ex. 4, at 4.[1]

In 2006, the House Committee on Homeland Security issued a report concluding that "[i]t is imperative that immediate action be taken to enhance security along our nation's Southwest border." Braddock Decl. Ex. 24, at 38. The Subcommittee reached this conclusion based, in part, on the following findings regarding illegal immigration:

- Illegal immigrants are often "dangerous criminals [who] are fleeing the law in other countries and seeking refuge in the United States." *Id.* at 3.
- "Mexican drug cartels operating along the Southwest border are more sophisticated and dangerous than *any other organized criminal enterprise*." *Id.* at 4 (emphasis added).
- "There are also indications the cartels may be moving to diversify their criminal enterprises to include the increasingly lucrative human smuggling trade." *Id.*
- "In addition to the criminal activities and violence of the cartels on our Southwest border, there is an ever-present threat of terrorist infiltration over the Southwest border." *Id.*
- "[N]ew and ever-increasing levels of ruthlessness and violence associated with these criminal organizations . . . are increasingly spilling across the border into the United States and moving into local communities." *Id.* at 6.
- "The existing resources of the U.S. Border Patrol and local law enforcement *must continue to be enhanced* to counter the cartels and the criminal networks they leverage to circumvent law enforcement." *Id.* (emphasis added).

Federal law enforcement estimates that *only* "10 percent to 30 percent of illegal aliens are actually apprehended and 10 percent to 20 percent of drugs are seized." *Id* at 3. Even so, the Arizona Department of Corrections has estimated that criminal aliens make up more than 17% of Arizona's prison population. *See* Dolny Decl. For example, 21.8% of felony

[1] *See* Glover Decl. ¶¶ 10-13 (discussing his experience in combating the importation of "black tar heroin" from Mexico and the fact that 100% of the runners his team has arrested for selling the heroin in Arizona have been unlawfully present in the country).

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

defendants in Maricopa County Superior Court are illegal immigrants. Braddock Decl. Ex. 3, at 5. The problem is even worse in counties that share a border with Mexico, where "as much as 37% of local criminal justice system assets have been diverted to matters illegal alien related." Braddock Decl. Ex. 14, at 4.

As this Court is likely aware, this influx of immigration has substantially increased the workload of the criminal justice system, including the federal courts. As Chief Judge John M. Roll noted last month regarding Fiscal Year 2009: (1) "[t]he 5 southwest border districts, although constituting only a small fraction of the nation's 94 federal districts, had almost 40% of all federal criminal case filings in the country"; (2) "the District of Arizona ranked 1st in the Ninth Circuit and 3rd in the nation in criminal case filings"; (3) "approximately 73% of the District of Arizona's criminal case filings involved either immigration offenses or drug charges"; and (4) "[o]f the District's 5,253 criminal case filings . . . , 2,687 (51%) involved immigration cases." Braddock Decl. Ex. 8, at 3, 4, & 6.

This influx of unlawful immigration has resulted in tremendous costs to Arizona and its taxpayers, including costs for providing health care and education to aliens and incarcerating aliens who commit crimes. Some estimates put the cost at $2 billion per year. Braddock Decl. Ex. 6. In 2007, Arizona spent more than $97 million to incarcerate more than 4,500 illegal aliens. Braddock Decl. Ex. 6, at 33:26. Unchecked immigration also results in substantial damage to Arizona land and the environment near the Mexico border. In 2008, the Bureau of Land Management collected over 468,000 pounds of trash, 800 tires, 404 bicycles, and 62 vehicles from the Arizona border area. Braddock Decl. Ex. 10, at 1. Most, if not all, of this litter was attributable to unlawful crossing of the border from Mexico. *See id.* The threats to wildlife, Arizona Game and Fish Officers, and citizens trying to use land along the Arizona border for outdoor pursuits is also considerable. Braddock Decl. Ex. 11, 12. Indeed, some portions of Arizona are virtually unusable due to illegal immigration. *See id.* Arizona Game and Fish officers located thirty-one large "layup sites" for clean up. These sites were "greater than 50 meters in one dimension," and "some sites were 150 meters long, by 50 meter wide." Braddock

Decl. Ex. 17, at 2; *see also* Thrasher Decl. ¶ 7 (describing the "increasing degradation of the environment" he has observed near the Arizona-Mexico border and the resultant "losses of livestock due to trash left behind by trespassers and vehicle chases").

Likewise, local law enforcement near the border report that residents "see their properties burglarized and damaged, fences cut, water sources destroyed and acres and acres of private and public lands littered with tons of trash and human waste." Braddock Decl. Ex. 14, at 3. "Citizens in these areas cannot leave their homes without anxiety of returning to find their belongings stolen or trashed." *Id.*[2] The federal government recently erected signs in certain parts of rural Arizona that read "Danger – Public Warning Travel Not Recommended." *See* Smith Decl. and attached exhibits.[3]

B. The Federal Government's Lack of Response

As President Obama observed last week, "the system is broken" and "everybody knows it." Braddock Decl. Ex. 18. "[W]e need to do more. We cannot continue just to look the other way as a significant portion of our economy operates outside the law. It breeds abuse and bad practices." *See id*. Arizona has repeatedly asked for federal assistance in dealing with the influx of aliens in Arizona. *See, e.g.*, Braddock Decl. Ex. 19 (Letter from then Governor Napolitano) ("I have contended for sometime that the federal government has lost operational control of the United States-Mexico Border and must redouble its efforts to return safety and security to this region. Resources, manpower and

[2] *See also* Thrasher Decl. ¶ 8 (describing the regular "break-ins, home invasions, vehicle thefts, and immigrant deaths on [local ranchers'] property" that occurs near the border); Glenn Decl. ¶¶ 11-20, 26 (explaining the serious problems caused by illegal aliens who cross through her property and cut water pipelines and fences, defecate, scare the cattle, steal solar panels, create trails, use the water troughs, and leave large amounts of trash).

[3] The warning signs, in their entirety, read:

DANGER – PUBLIC WARNING
TRAVEL NOT RECOMMENDED

- **Active Drug and Human Smuggling Area**
- **Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed**
- **Stay Away From Trash, Clothing, Backpacks, and Abandoned Vehicles**
- **If You See Suspicious Activity, Do Not Confront! Move Away and Call 911**
- **BLM Encourages Visitors to Use Public Lands North of Interstate 8**

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One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

policies directed at the Southwest Border have been categorically inadequate."); Braddock Decl. Ex. 20 (Letter from then Governor Napolitano) (asking for additional National Guard troops on the United States-Mexican border and explaining that federal policy has funneled illegal immigrants to the Arizona border); Braddock Decl. Ex. 33 (citing Mesa Mayor, Scott Smith: "Our government is telling us we can't ensure your safety over thousands of square miles of our country because basically its been taken over by criminals, foreign criminals.").

In 2005, former Arizona Governor Janet Napolitano (currently the Secretary of the Department of Homeland Security ("DHS")) wrote to the U.S. Department of Defense to address the fact that "Arizona has more undocumented immigrants entering the country through its border than any other state in the nation," which results "in property damage or other crimes" that had cost Arizona over $217 million. Braddock Decl. Ex. 19. In March 2008, Napolitano wrote to the DHS to express her concern regarding the inadequacy of the federal government's response to such issues in which she stated that "[h]uman and drug smuggling rings continue to thrive in Arizona, crossing our border and using our cities as major hubs to transport crossers throughout the country." Braddock Decl. Ex. 21. In June 2010, Governor Brewer wrote to President Obama to express frustration over the signs the federal government posted warning Arizona residents "not to access federal lands due to criminal activity associated with the border" and to propose a four-point strategy for addressing Arizona's border-control issues. Braddock Decl. Ex. 22. And just yesterday, Arizona Attorney General Terry Goddard wrote to President Obama to address the "rampant trafficking of drugs, humans, guns and money across our border" caused by the Mexican drug cartels, which Goddard believes to be "responsible for the murders of more than 22,700 people south of our border since 2007." Braddock Decl. Ex. 37.

C. The Enactment of SB 1070

As a direct result of the failure of the federal government to act, Arizona enacted SB 1070 and amendments thereto following comprehensive hearings regarding the harmful effects of unlawful immigration on Arizona and its citizens. The Legislature

Snell & Wilmer L.L.P.
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One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

heard testimony regarding the numerous incidents of serious violence against Phoenix police officers by aliens, including the eight officers killed by undocumented aliens since 1999. Braddock Decl. Ex. 2, at 46:47, Ex. 27, at 1:53:19. At the same time, the Legislature heard testimony regarding the Phoenix Police Department abandoning its proactive policy on immigration enforcement and restricting its cooperation with the U.S. Customs and Immigration Enforcement ("ICE"). Braddock Decl. Ex. 27.

Among other things, the Legislature concluded that it would serve the public interest to assist the federal government in enforcing the federal immigration laws. *See, e.g.* Braddock Decl. Ex. 2, at 50:55 (statement of Mark Spencer) (stating that "the federal government is miserably failing at protecting the borders. The border patrol needs all the support and assistance it can get."); Braddock Decl. Ex. 6, at 32:56 (statement of Sen. Melvin) (stating that the federal government has dropped the ball on illegal immigration). As a result, the Arizona Legislature passed SB 1070 and Governor Brewer signed the Act into law. *See* Braddock Decl. Ex. 6, at 33:26 (statement of Sen. Al Melvin) (explaining his vote by stating that illegal immigration is costing Arizona $2 billion per year in costs to education, incarceration and medication); 36:06 (statement of Sen. Linda Gray) (explaining her vote by listing 21 victims of serious crimes committed by illegal immigrants); 40:08 (statement of Sen. Sylvia Allen) (explaining her vote by describing crime, drugs, and human smuggling as reasons for voting for SB 1070).

D. The State's Law Enforcement Officers are Prepared to Implement SB 1070 in a Proper Manner

By Executive Order dated April 23, 2010, Governor Brewer directed the Arizona Peace Officer Standards and Training Board ("AzPOST") to prescribe a course of training for all law enforcement officers in the State to implement SB 1070. *See* Braddock Decl. Ex. 34. The Executive Order directed AzPOST to provide "statewide and uniform practices" to ensure that law enforcement officers and agencies are implementing SB 1070 "in a manner that is consistent with federal laws regulating immigration, protects the civil rights of all persons and respects the privileges and immunities of United States citizens."

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One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Id. Following this directive, AzPOST retained experts in the areas of federal immigration law and immigration documents to participate in the training, development, and presentation. Braddock Decl. Ex. 29.[4] The training materials were sent to all 170 agencies in the state on June 29, 2010. Braddock Decl. Ex. 32.

Among other things, the training DVD contains approximately 20 minutes of training regarding racial profiling and related issues involving race and ethnicity, including the clear instruction that: "Officers ***shall not consider*** race or color in determining reasonable suspicion that a person is unlawfully present in the United States. If you don't have reasonable suspicion without reliance on race or color, then you don't have reasonable suspicion that a person is unlawfully present." Braddock Decl. ¶ 32 & Ex. 30, at 16 (emphasis added). This merely reinforces the training *all* Arizona law enforcement officers receive in connection with their AzPOST certification. *See* Vasquez Decl. ¶ 5 ("My AzPOST certification also included training relating to cultural awareness, racial profiling, and ethical standards for law enforcement professionals."); Gafvert Decl. ¶ 7; Braddock Decl. Ex. 31 (containing writing training materials for AzPOST certification). The SB 1070 training also covers twenty different factors that might alert an officer to whether a person is unlawfully present. Braddock Decl. Ex. 30, at 14-15.

The training materials also make it clear that SB 1070 does not apply to "consensual contacts," and that "[i]t applies only in circumstances where you make a lawful stop, detention or arrest of an individual." *Id.* at 11. The training DVD instructs officers that the statute gives them the discretion to make the decision that they do not have the time, resources, or ability for "whatever reason" at a certain time to pursue an inquiry into a person's immigration status. *Id.* at 17.[5]

[4] The AzPOST training materials, which have now been developed, provide instructions to law enforcement officers regarding the proper implementation of SB 1070. It includes a video presentation and written lesson plans. Braddock Decl. Exs. 30, 31.

[5] These factors include how many other calls are waiting, the availability of other personnel, the location, whether or not back up is available, the criticality of the incident as opposed to others that might need attention, and any directions from a supervisor. Braddock Decl. Ex. 30, at 17.

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One Arizona Center, 400 E. Van Buren
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(602) 382-6000

When an Arizona law enforcement officer determines that it is appropriate to investigate a person's immigration status, ICE and Border Patrol are available to assist 24 hours a day, 365 days a year. Cramer Decl. ¶ 17, 19-21. In fact, federal law expressly *requires* ICE to provide information regarding a person's immigration status to state and local law enforcement officers. *See* 8 U.S.C. § 1644 ("Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States."). The Law Enforcement Support Center ("LESC") in Williston, [Vermont,] . . . provides around-the-clock support to ICE and federal, state and local law enforcement by supplying information on immigration status and identity information on suspects." Braddock Decl. Ex. 28. LESC can generally determine a person's immigration status in a matter of minutes. Cramer Decl. ¶ 18.[6] "In FY08, LESC responded to 807,106 queries from law enforcement on the immigration status of aliens in police custody – an increase of nearly 11 percent over the previous year's total." Braddock Decl. Ex. 28.

Finally, not to be lost in the rhetoric of plaintiffs' arguments is the critical fact that SB 1070 does not change what many state and local law enforcement officials have been doing, and have demonstrated that they are capable of doing, in connection with providing assistance with the enforcement of federal immigration laws. *See*, *e.g.*, Vasquez Decl. ¶¶ 22-25; Cramer Decl. ¶¶ 10-11; *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1297-1300 (10th Cir. 1999). Critically, SB 1070 prohibits local governments from adopting policies that prohibit the law enforcement officers on the front line from reporting to federal authorities persons whom they know or have reason to believe are unlawfully present in the country. That is, SB 1070 reflects the determination by the State of Arizona that it will not have "sanctuary cities" – cities that adopt internal policies that *prohibit*

[6] *See also* Gafvert Decl. ¶ 11 (stating that he "cannot recall an instance in which [the 287(g) verification process] took more than ten minutes"); Judd Decl. ¶¶ 5-10 (describing his experience as a Border Patrol Agent responsible for verifying whether individuals are lawfully present in the United States, and confirming that a person's immigration status can be verified immediately).

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

their law enforcement personnel from reporting unlawful immigrants or other criminal activity to federal immigration officials.[7]

II. STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (U.S. 2008); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009). "[I]t has long been held that an injunction is 'to be used sparingly, and only in a clear and plain case.'" *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (quoting *Irwin v. Dixion*, 9 How. 10, 33 (1850)); *see also Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 510 (2d Cir. 2005) (a preliminary injunction "'is an extraordinary and drastic remedy . . . that should not be granted unless the movant, by a clear showing, carries the burden of persuasion'") (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

III. PLAINTIFFS HAVE NOT ESTABLISHED IRREPARABLE HARM

"'Because a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.'" *Dominion Video Satellite Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990)) (reversing the district court's grant of a preliminary injunction because plaintiff had not demonstrated that it was likely to suffer irreparable harm); *see also Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1019 (9th Cir. 2009) (finding that "plaintiffs [were] likely to succeed on the merits," but remanding to the district court to consider the non-merits factors before ruling on the request for injunctive relief).

[7] These policies pose serious threats to Arizona's law enforcement officers. *See* Glidewell Decl. ¶¶ 3-6, 10-15 (discussing being shot in the chest during a routine traffic stop by an illegal alien who was wanted for attempted murder in El Salvador, and explaining the two to three occasions prior to that date in which a "sanctuary" policy prevented police officers from contacting ICE or Border Patrol in order to ascertain the alien's identity).

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

The purpose of a preliminary injunction is "to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future." *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) (denying injunctive relief to Connecticut based on Massachusetts' alleged intent to divert water from the watershed of the Connecticut River at some point in the future). In *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988), for example, the Ninth Circuit reversed the issuance of a preliminary injunction that prohibited the government "from placing female observers on board commercial tuna boats" because the declarations plaintiffs submitted to support their claim of irreparable harm merely "speculate[d] that accommodation of a female federal observer may be costly." The court further found that because "[m]ultiple contingencies must occur before [the plaintiffs'] injuries would ripen into concrete harms. . . . [the] injury is too speculative to constitute an irreparable harm justifying injunctive relief." *Id.* at 675.

A. The State and Governor Brewer Object to the Declarations Plaintiffs Have Submitted to Demonstrate Plaintiffs' Alleged Irreparable Harm

The Court's decision as to whether to grant a motion for preliminary injunction under Rule 65 is discretionary and thus the Court *may* give inadmissible evidence *some* weight when it is advisable and when necessary to avoid irreparable harm. *Flynt Distributing Co., v. Harvey*, 734 F. 2d 1389, 1394 (9th Cir. 1984). Although the standard for admissibility may be relaxed, and the Court may consider hearsay contained within affidavits, the statements contained in the affidavits must be based on personal knowledge and be relevant to the issue in dispute. *See Beijing Tong Ren Tang Corp. v. TRT USA Corp.*, 676 F. Supp. 2d 857, 861 (N.D. Cal. 2009) (in considering motion for preliminary injunction, striking allegations in declarations that "are not relevant to the . . . dispute").[8] Plaintiffs filed sixteen declarations in support of their request for injunctive relief (*see*

[8] *See also Chase Bank USA, N.A. v. Dispute Resolution Arbitration Group*, No. 02:05-CV-1208-LRH (LRL), 2006 U.S. Dist. LEXIS 43130, at *13 (D. Nev. Jun. 9, 2006) (declining to consider portions of an affidavit that are "immaterial to the preliminary injunction").

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

docs. 235-36) – fifteen of which are objectionable.[9]

First, the following declarations should be excluded on the basis that they provide improper legal conclusions: Bo Cooper (doc. 235-3) (asserting a legal opinion as to the language in SB 1070, how the terms and phrases used in SB 1070 relate to federal law, the interplay between SB 1070, and the existing federal scheme for regulating alien employment and federal registration); George Gascon (doc. 235-6) (assessing constitutionality of SB 1070); Samuel Granato (doc. 236) (same); Vicki Gaubeca (doc. 235-7) (legal conclusions regarding New Mexico licenses as sufficient proof of identification); Abraham F. Lowenthal (doc. 236-3) (interpreting SB 1070 and making conclusions about warrantless arrests); and Doris Meissner (doc. 236-7) (making conclusions about matters reserved to Congress, foreign relations, and federal courts).

Second, most, if not all, of the declarations contain generalized statements regarding: (1) the declarants' vague fears about SB 1070[10] and (2) the declarants' comments on the wisdom of the legislation.[11] This testimony is not relevant and should be excluded. *See Beijing*, 676 F. Supp. 2d at 861; Fed. R. Evid. 401, 402.

Third, most (if not all), of the declarations contain statements that are nothing more than pure speculation or conjecture. The Court should exclude speculative or conclusory testimony in favor of facts based on personal knowledge as required under Fed. R. Evid. 602. *See* Gascon Decl. (doc. 235-6) ¶¶ 9-12; Hansen Decl. (doc. 236-1) ¶ 6; Enrique Decl. (doc. 236-9) ¶ 19; Medina Decl. (doc. 236-5) ¶¶ 7, 13, 15; Lowenthal Decl. (doc. 236-3) ¶ 12; Meissner Decl. (doc. 236-7) ¶¶ 8, 9, 14, 15, 21, 22, 24, 35; Ibarra Decl. (doc. 236-2) ¶¶ 12, 13; Gonzalez Decl. (doc. 235-8) ¶¶ 12, 13.

[9] The Declaration of Susan Boyd (235-1) contains no substantive statements; it merely attempts to provide foundation or authentication for the attached 35 exhibits. Further, the fears expressed in these declarations existed well before SB 1070. For example, a 2008 report suggests that nearly six-in-ten (57%) Latinos worry that they, or someone they know, will be deported. Braddock Decl. Ex. 15.

[10] *See* Anderson Decl. (doc. 235-2); Gaubecca Decl. (doc. 235-7) ¶ 9; Jane Doe 1 Decl. (doc. 236-12) ¶ 15; Vargas Decl. (doc. 236-10) ¶ 7; Enrique Decl. (doc. 236-9) ¶¶ 3, 7; Villa Decl. (doc. 236-11) ¶ 8; Granato Decl. (doc. 236) ¶¶ 6, 19.

[11] Gascon Decl. (doc. 235-6) ¶¶ 11, 22; Enrique Decl. (doc. 236-9) ¶ 3; Gonzales Decl. (doc. 235-8) ¶¶ 13, 19; Granato Decl. (doc. 236) ¶ 17; Meissner Decl. (doc. 236-7) ¶ 8.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Fourth, even under the less stringent standard for Rule 65 motions, declarations must be based on personal knowledge. Fed. R. Evid. 602. Many of the declarants lack the requisite personal knowledge to testify in support of plaintiffs' Motion. *See* Gascon Decl. (doc. 235-6) ¶¶ 9, 10, 13, 14, 17, 18, 20; Granato Decl. (doc. 236) ¶ 8; Hansen Decl. (doc. 236-1) ¶ 6; Gonzalez Decl. (doc. 235-8) ¶¶ 3, 14-18; Lowenthal Decl. (doc. 236-3) ¶ 13; and Meissner Decl. (doc. 236-7) ¶¶ 12, 17, 21, 24, 28, 32.

Fifth, the declarations of George Gascon (doc. 235-6) and Tupac Enrique (doc. 236-9) include inappropriate lay opinion testimony that should be excluded from the record. Fed. R. Evid. 701, 702, 703. The declaration of Doris Meissner (doc. 236-7) ¶¶ 7, 9 is objectionable under Fed. R. Evid. 702.

B. Plaintiffs Have Not Shown that Enforcement of SB 1070 Is Likely to Result In a Violation of Their Constitutional Rights

Plaintiffs argue that they will suffer irreparable harm if the Court does not enjoin SB 1070 because they will be "subjected to an unconstitutional law." Pls. Mem. at 32. Merely asserting a constitutional claim, however, does not establish irreparable harm. *See Stormans*, 586 F.3d at 1138. Rather, plaintiffs must demonstrate a *likelihood* that enforcement of SB 1070 will violate *their* constitutional rights. *Id.*; *Continental Baking Co. v. Woodring*, 286 U.S. 352, 369 (1932) ("[A]ppellants had no right to resort to equity merely because of an anticipation of improper or invalid action in administration.").[12] This is a heavy burden for plaintiffs, because they must overcome the presumption that Arizona's law enforcement officers will implement SB 1070 in a constitutional manner.

[12] Plaintiffs cite two cases to support the proposition that "being subjected to an unconstitutional law" constitutes irreparable injury. Pls. Mem. at 32. In the first, *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997), the court stated the general rule that a constitutional infringement can constitute irreparable harm, but remanded the case to the district court to consider whether equitable relief was appropriate. In *American Trucking Associations, Inc. v. City of Los Angeles*, the court found irreparable injury because the plaintiffs were faced with a "Hobson's choice" of either accepting an agreement that would "likely force [them] to adhere to unconstitutional conditions and cause a good deal of economic harm" or "give up their business." 559 F.3d 1046, 1058-59 (9th Cir. 2009). On remand, however, the district court denied injunctive relief and the Ninth Circuit affirmed with one exception. *See Am. Trucking Ass'ns, Inc. v. City of L.A.*, 596 F.3d 602, 604-05 (9th Cir. 2010).

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See Panama Refining Co. v. Ryan, 293 U.S. 388, 446 (1935) ("Every public officer is presumed to act in obedience to his duty . . .").

Plaintiffs first attempt to meet this burden by expressing their "fear" that they will be arrested or detained by law enforcement officers because of their "foreign" appearance or possession of New Mexico drivers' licenses. Pls. Mem. at 34-35. These alleged fears reflect a basic misunderstanding of SB 1070, which requires a *reasonable* investigation into a person's immigration status only if a person is first lawfully stopped, detained, or arrested based on reasonable suspicion of some other unlawful activity, and then only if: (1) a law enforcement officer has, at a minimum, reasonable suspicion to believe that the person is an alien ***and*** in the country unlawfully; (2) it is practicable for the officer to investigate the person's immigration status; and (3) the investigation will not hinder or obstruct an investigation. *See* A.R.S. § 11-1051; *see also* Bolton Decl. ¶¶ 15-16.

Plaintiffs have not articulated any reason why law enforcement officers are *likely* to arrest or detain anyone based solely on their appearance. Plaintiffs' mere "foreign" appearance or possession of New Mexico driver's licenses would not give rise to a reasonable suspicion that they are in the country unlawfully. *See* Braddock Decl. Ex. 30, at 14-15 (setting forth factors that give rise to a reasonable suspicion of unlawful presence); Glover Decl. ¶¶ 23-25; Cramer Decl. ¶¶ 31-35; Gafvert Decl. ¶¶ 21. Plaintiffs' foreign appearances and possession of New Mexico drivers' licenses simply do not establish even a *possibility* that SB 1070 will be enforced against them. Plaintiffs also attempt to demonstrate irreparable harm by asserting their fears that their *lawful* efforts to seek work will result in a violation of their constitutional rights. These fears are equally unfounded, however, because SB 1070 does not regulate persons "with permission to live and work in the U.S." *See* Pls. Mem. at 35; A.R.S. § 13-2928.

C. Plaintiffs Have Not Established a Likelihood of Racial Profiling

Plaintiffs claim that they will suffer irreparable harm because they "will be subject to unlawful racial profiling and additional police scrutiny if SB 1070 is implemented." Pls. Mem. at 33. But the only support plaintiffs provide for this assertion is the

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speculation of various declarants that SB 1070 *could* result in racial profiling. *Id.* These concerns are not well founded. Not only does SB 1070 expressly *prohibit* racial profiling, *see* A.R.S. § 11-1051(B), but the AzPOST training for SB 1070 clearly and repeatedly informs officers that SB 1070 *does not* permit racial profiling. Braddock Decl. Ex. 30, at 4, 6-10, 33. In addition, *all* Arizona law enforcement officers are trained regarding racial profiling in connection with their certification to become law enforcement officers. Bolton Decl. ¶ 8; Glover Decl. ¶ 5; Vasquez Decl. ¶ 5. Plaintiffs have presented no evidence suggesting that police officers are likely to disregard these provisions or their training. As a result, plaintiffs have not demonstrated that they are *likely* to "be subject to unlawful racial profiling" if SB 1070 becomes effective. *See Connecticut*, 282 U.S. at 674; *Baldrige*, 844 F.2d at 674.

D. Diversion of Organizational Resources Is Not Irreparable Harm

Plaintiffs' assertions that SB 1070 will require them to "divert organizational resources to address their members' or clients' concerns about the law" and make it harder to "encourage[their] clients to seek services" (Pls. Mem. at 34) fails to establish irreparable harm. This alleged "diversion of resources" is not based on any actual requirement that SB 1070 imposes. No provision of SB 1070 directly regulates these organizations or requires them to take any action to "address their members' or clients' concerns." Rather, this argument is based entirely on plaintiffs' clients' purported misunderstandings about the Act's requirements and unfounded fears that SB 1070 will result in racial profiling and violations of their constitutional rights. For the same reasons plaintiffs cannot establish that SB 1070 is likely to subject *them* to racial profiling and violations of *their* constitutional rights, plaintiffs cannot establish irreparable harm based on any fears that SB 1070 will subject their *clients* to constitutional violations and racial profiling.

E. The Alleged Diversion of Federal Resources Will Not Result In Irreparable Harm to Plaintiffs

Plaintiffs' final attempt to establish irreparable harm is their argument that SB 1070

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will result in a "diversion of federal resources to responding to Arizona state officials' requests for determination of status." Pls. Mem. at 34. Again, this argument is highly speculative. More importantly, plaintiffs fail to articulate how such a diversion could result in any direct harm to *them* – much less the imminent, irreparable harm that plaintiffs must demonstrate to justify injunctive relief. *Baldrige*, 844 F.2d at 674.

IV. ISSUING AN INJUNCTION WOULD HARM THE GENERAL PUBLIC

In determining whether to issue a preliminary injunction, "'courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Winter*, 129 S. Ct. at 376-77 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). In *Winter*, the Supreme Court held that "a proper consideration of [the irreparable injury and public interest] factors alone require[d] denial of the requested injunctive relief" without regard for whether "plaintiffs have also established a likelihood of success on the merits." *Id*. at 376; *see also Yakus v. United States*, 321 U.S. 414, 440 (1944) ("The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff."); *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 443 (5th Cir. 1981) (affirming the denial of an injunction based on its finding that "the harm to the defendants and the general public" as a result of "serious traffic and safety hazards that result from . . . overcrowded highways" outweighed the harm to the plaintiffs).

Plaintiffs bear an especially heavy burden when they seek to enjoin the State. "When a plaintiff seeks to enjoin the activity of a government agency . . . his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'" *Rizzo*, 423 U.S. at 378-79 (citation omitted). "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Id.* at 378 (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). "The more serious the

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threat to the state's welfare, the more drastic the remedy which may be applied." *Id.*; *Yakus*, 321 U.S. at 443 ("Even the personal liberty of the citizen may be temporarily restrained as a measure of public safety.").[13]

Here, the harm to the State of Arizona if SB 1070 were enjoined would be significant. And it would involve real and actual harm, not speculative and hypothetical harm. The harm, in fact, would be the *status quo*. There cannot be any dispute that Arizona has borne tremendous costs and harmful effects from unlawful immigration, including crime, environmental hazards, and substantial economic costs. *See* Section I, *supra*. The Arizona Legislature implemented SB 1070 – after careful consideration – to provide law enforcement officers with the tools they need to help with the enforcement of immigration laws within the State – working in harmony with and in support of existing *federal* immigration laws. SB 1070's primary purpose is to permit officers who come across suspects whom they know or reasonably suspect are in violation of state or local laws *and* federal immigration laws to inform the appropriate federal authorities or, in some limited circumstances, to arrest and prosecute unlawful immigrants engaging in expressly defined criminal activity that the State of Arizona has concluded to be harmful to its law enforcement personnel and its lawful residents. This is indeed a dispute about irreparable harm, but it exists on the side of the citizens of the State of Arizona, not the plaintiffs.

Plaintiffs contend that the public interest would be harmed if SB 1070 is *not* enjoined. Pls. Mem. at 36-40. Rather than present specific evidence of public harm, plaintiffs do no more than repeat their legal arguments that SB 1070 is preempted and that it will somehow lead to racial profiling. These fears find no support in SB 1070. To the contrary, as set forth above, the law expressly prohibits racial profiling and allows for inquiry into a person's immigration status *only* if the person is lawfully stopped, detained,

[13] *See also Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 239 (1984) ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the needs to be served by social legislation . . .") (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

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or arrested for another reason and *only* when there is reasonable suspicion that the person is not lawfully present in this country. In other words, the officer's investigation must satisfy the Fourth Amendment's search-and-seizure standards with respect to *both* the predicate act of unlawful conduct *and* the person's unlawful presence in the country.

V. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

As set forth in Governor Brewer's Motion to Dismiss (doc. 238), plaintiffs' Complaint should be dismissed because plaintiffs lack standing to pursue their claims and the Complaint fails to state a claim upon which relief may be granted. *See* Mot. to Dismiss at 4-33. Even if plaintiffs' Complaint survives the pending Motion to Dismiss, plaintiffs still cannot establish that they are *likely* to succeed on the merits of their claims such that they are entitled to preliminary relief. *See Doe v. Reed*, 586 F.3d 671, 681 n.14 (9th Cir. 2009), *aff'd by* 2010 U.S. LEXIS 5256 (June 24, 2010) (failure to establish *likelihood* of success on the merits warrants denial of requested injunctive relief).

Of critical significance in this case is that plaintiffs seek to invalidate SB 1070 *on its face*. To succeed on such a facial challenge, plaintiffs must "'establish that no set of circumstances exists under which the Act would be valid.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). When considering a facial challenge, the Court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 450; *United States v. Raines*, 362 U.S. 17, 22 (1960).[14] Further, the Court must assume that Arizona's law enforcement officers will implement SB 1070 in a constitutional manner. *See Panama Refining Co.*, 293 U.S. at 446; *United States v. Booker*, 543 U.S. 220, 279-80 (2005) ("[In] facial invalidity cases . . . we ought to presume whenever possible that those charged with writing and implementing legislation will and can apply 'the statute consistently with the constitutional command.'") (quoting

[14] Facial challenges are disfavored because they: (1) "often rest on speculation;" (2) "run contrary to the fundamental principle of judicial restraint" with respect to constitutional challenges; and (3) "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 450-51.

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Time, Inc. v. Hill, 385 U.S. 374, 397 (1967)).

A. Federal Law Does Not Preempt SB 1070

To establish their claim that federal law impliedly preempts SB 1070, plaintiffs must demonstrate that: (1) SB 1070 purports to regulate immigration, an exclusively federal power; (2) federal law occupies the field; or (3) SB 1070 conflicts with federal law. *See De Canas v. Bica*, 424 U.S. 351, 355-63 (1976).[15] Plaintiffs must also overcome the presumption, which the Supreme Court has held applies "[i]n all pre-emption cases, . . . that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (U.S. 2009) (citation omitted). Plaintiffs cannot establish implied preemption under any of these tests.

1. SB 1070 is not a regulation of immigration

A statute is a "regulation of immigration" if it defines "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas*, 424 U.S. at 354-55. The Supreme Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power." *Id.* at 355. In fact, the Court has expressly held that "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982).

Numerous decisions of the Ninth Circuit and this Court have applied *De Canas'* "regulation of immigration" definition to find that state laws affecting aliens valid under the Supremacy Clause. *See, e.g., Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 5321 (June 28, 2010) (holding that federal law does not preempt the Legal Arizona Workers Act because "the Act does

[15] "Federal preemption can be either express or implied." *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 5321 (June 28, 2010); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (U.S. 2008). Plaintiffs have not argued that any provision of federal law expressly preempts SB 1070.

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not attempt to define who is eligible or ineligible to work under [federal] immigration laws," but, instead, "is premised on enforcement of federal standards as embodied in federal immigration law"); *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1010 (9th Cir. 2007); *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cnty. Bd. of Supervisors*, 594 F. Supp. 2d 1104, 1114 n.5 (D. Ariz. 2009).

Plaintiffs do not even acknowledge, let alone address, these relevant authorities. Instead, plaintiffs attempt to establish that SB 1070 is an impermissible "regulation of immigration" by relying on inapposite case law and by misconstruing what it means to regulate immigration. First, plaintiffs argue that SB 1070 is a regulation of immigration because the Arizona Legislature intended it to assist in the enforcement of federal immigration laws, which will directly impact immigration. Pls. Mem. at 11. The fatal flaw in this argument, however, is that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth*, 129 S. Ct. at 1194 (citation omitted). Several federal statutes manifest Congress' clear intent to encourage (in fact, Congress has *prohibited* imposing any restrictions on) the cooperation between federal, state, and local authorities that SB 1070 requires. *See, e.g.*, 8 U.S.C. §§ 1373(c) and 1644.[16] Plaintiffs' reliance on *Toll v. Moreno* is misplaced because *Toll* merely stands for the proposition that "state regulation not congressionally sanctioned that discriminates against aliens ***lawfully admitted to the country*** is impermissible if it imposes additional burdens not contemplated by Congress." 458 U.S. 1, 12-13 (1982) (emphasis added and citation omitted).

Second, plaintiffs argue that SB 1070 imposes "additional 'conditions' on entering and remaining in the United States" and authorizes state officials "to classify non-citizens into statuses that are not defined or readily ascertained under federal law." Pls. Mem. at 11-12. It is true that a state cannot impose conditions on an alien's entry into or right to

[16] It is well-established that states may assist in the enforcement of federal immigration laws. *See, e.g., Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987) ("No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws."); *In re Jose C.*, 198 P.3d at 1099-1100.

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remain in the country, or implement state-specific classifications on aliens. Pls. Mem. at 12-14. But SB 1070 does none of those things. SB 1070 merely requires state and local law enforcement officers to obtain information on aliens' immigration status directly from the federal government or its authorized agent.[17] *See* A.R.S. § 11-1051(B) (requiring that a person's immigration status "be verified with the federal government pursuant to 8 [U.S.C. §] 1373(c)"); A.R.S. § 11-1051(E).[18] Because "requiring state agents simply to verify a person's status with the INS involves no independent judgment on the part of state officials and ensures uniform results consistent with federal determinations of immigration status," there is no preemption. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 770 (C.D. Cal. 1995).

Third, plaintiffs argue that the criminal penalties SB 1070 imposes on *employment* of persons unlawfully present in the United States is a regulation of immigration. Pls. Mem. at 12. However, these penalties have no bearing on whether such persons may *enter or remain* in the country and the very authorities plaintiffs cite defeat this argument. In *De Canas*, for example, the Supreme Court expressly held that California's "criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country . . . [is] not . . . a constitutionally proscribed regulation of immigration." 424 U.S. at 355-56.

Plaintiffs' final argument on the "regulation of immigration" issue is that SB 1070 is somehow adversely affecting relations between the United States and Mexico. Pls. Mem. at 14-15. The fact that the Mexican government opposes SB 1070, however, does

[17] Plaintiffs' arguments regarding the complexity of federal immigration classifications is a red herring. Pls. Mem. at 12-14. SB 1070 does not authorize law enforcement officers to exercise any independent judgment regarding a person's ultimate immigration status.

[18] These provisions are also consistent with congressional intent because federal law expressly *requires* ICE to provide to state and local law enforcement agencies "information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. § 1644. Further, as set forth in Governor Brewer's Motion to Dismiss, SB 1070's use of the term "unlawfully present" is regularly used in both federal law and Ninth Circuit precedent. *See* Mot. to Dismiss at 26.

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not make the Act a "regulation of immigration."[19] Although a potential adverse impact to foreign relations is one of the *policies* underlying federal preemption, *see Hines v. Davidowitz*, 312 U.S. 52, 63-64 (1941),[20] plaintiffs have not cited any authority to support the proposition that either a foreign government's disapproval of a state law or an officials' personal opinions regarding the law's impact on foreign relations can invalidate an otherwise constitutional law. The fact that our federal statutes *encourage* state and local assistance in the enforcement of federal immigration law further demonstrates that Congress concluded that state and local law enforcement was important to the overall scheme of federal immigration law.

2. Federal law does not cover the field

Plaintiffs' argument that "[t]he INA does not allow or leave room for the creation of state schemes, such as SB 1070"[21] (Pls. Mem. at 15) fails because the Supreme Court has expressly considered and rejected the possibility that the INA might be so comprehensive that it leaves no room for state action. *See De Canas*, 424 U.S. at 358 ("[Respondents] fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general."). Further, the fact that multiple provisions of the INA *invite* state and local police into the field confirms that the INA does not occupy the field. *See, e.g.*, 8 U.S.C. §§ 1357(g)(10), 1373(c), and 1644; *In re Jose C.*, 198 P.3d 1087, 1099 (Cal. 2009), *cert. denied*, 129 S. Ct. 2804 (U.S. 2009) ("A series of provisions of the INA demonstrate Congress, far from occupying the field, welcomed state and local assistance in enforcement.").

[19] The fact that the Mexican government opposes SB 1070 or that others suggest SB 1070 impairs international relations must be weighed against Mexico's own Reglamento de la Ley General de Poblacion, which includes a provision that permits federal and local authorities to request that foreigners present documents confirming their immigration status before performing particular acts or contracts. Braddock Decl. Ex. 5.

[20] The regulation at issue in *Hines* was significantly different from SB 1070 in that it imposed "distinct, unusual and extraordinary burdens and obligations upon aliens" who were "perfectly law-abiding." *Hines*, 312 U.S. at 65-66.

[21] Plaintiffs assert this as a conflict-preemption argument, but it is more appropriately read as an argument that federal law occupies the field.

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One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

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One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

3. SB 1070 does not conflict with federal law

"Conflict preemption" is present only "when 'compliance with both State and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Ariz. Contractors Ass'n v. Napolitano*, No. CV07-1355-PHX-NVW, 2007 U.S. Dist. LEXIS 96194, at *25 (D. Ariz. Dec. 21, 2007) (citations omitted). Neither "[t]ension between federal and state law" nor a "hypothetical conflict" is sufficient to establish conflict preemption. *Incalza*, 479 F.3d at 1010 (citations omitted). "Where state law 'mandates compliance with the federal immigration laws and regulations, it cannot be said [that state law] stands as an obstacle to accomplishment and execution of congressional objectives embodied in the INA.'" *In re Jose C.*, 198 P.3d at 1100 (citations omitted).

i. A.R.S. § 13-1509 does not conflict with federal law

Plaintiffs argue that 8 U.S.C. §§ 1304(e) and 1306(a) preempt A.R.S. § 13-1509 because the Supreme Court supposedly declared that alien registration is "off-limits" to the states. Pls. Mem. at 16.[22] In *Hines*, the Supreme Court invalidated a statute that required aliens to register with the State of Pennsylvania *in addition to* registering under federal law, which conflicted with the federal government's provision "for alien registration in a single integrated and all-embracing system." 312 U.S. at 56, 74. A.R.S. § 13-1509, however, does not impose separate registration requirements. Rather, A.R.S. § 13-1509 merely reinforces and mirrors federal law: "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document ***if the person is in violation of 8 [U.S.C. §] 1304(e) or 1306(a)***." A.R.S. § 13-1509(A) (emphasis added).[23] Because the state and federal statutes have identical

[22] 8 U.S.C. § 1304(e) requires every alien eighteen years of age and over to "at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card." 8 U.S.C. § 1306(a) imposes penalties upon any "alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted."

[23] A.R.S. § 13-1509 further mirrors federal law by imposing the *same* misdemeanor penalties as federal law imposes for violations of 8 U.S.C. § 1304(e): a maximum fine of $100 and a maximum imprisonment of 30 days. A.R.S. § 13-1509(A), (H).

purposes, there is no preemption. *See Plyler*, 457 U.S. at 225; *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999)).

Plaintiffs also argue that 8 U.S.C. §§ 1304(e) and 1306(a) preempt A.R.S. § 13-1509 because A.R.S. § 13-1509 imposes state penalties for a violation of federal law. Pls. Mem. at 17. The imposition of additional penalties, however, does not create a conflict. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (holding that a state law authorizing punitive damages did not conflict with federal law because "[p]aying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible[, n]or does exposure to punitive damages frustrate any purpose of the federal remedial scheme").[24]

Finally, plaintiffs argue that 8 U.S.C. §§ 1304(e) and 1306(a) preempt A.R.S. § 13-1509 because it "would be highly unlikely" that the federal government would prosecute a person for a violation of 8 U.S.C. §§ 1304(e) or 1306(a). Pls. Mem. at 17-18. The federal government's preemption power is based on such predictions. Preemption occurs only when *Congress* has "unmistakably so ordained." *De Canas*, 424 U.S. at 356 (citation omitted). In *Wyeth*, for example, the Supreme Court rejected an argument that the Food and Drug Administration ("FDA") preempted state law by including a preamble in the Federal Food, Drug, and Cosmetic Act ("FDCA") stating that "the FDCA establishes both a floor and a ceiling, so that FDA approval of labeling ... preempts conflicting or contrary State law." *Id.* at 1200 (internal quotations and citations omitted). Despite the *FDA's*

[24] The Supreme Court's holdings in the authorities upon which plaintiffs rely were limited to the specific regulations before them. *See Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 285-87 (1986) (finding that the National Labor Relations Act ("NLRA") preempted "a Wisconsin statute debarring certain repeat violators of the Act from doing business with the State" because the NLRA was such a comprehensive scheme that "the States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits"); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366-78 (2000) (finding that a state law "restricting the authority of its agencies to purchase goods or services from companies doing business with Burma" was preempted because "Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range" and the state law "penalize[ed] individuals and conduct that Congress has explicitly exempted or excluded from sanctions").

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Phoenix, Arizona 85004-2202
(602) 382-6000

clear intent to preempt state law, the Court rejected the defendant's argument that the FDCA did so because "all evidence of *Congress'* purposes is to the contrary." *Id.* at 1199 (emphasis added). The Court further held that "[i]f Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history." *Id.* at 1200.

The same holds true here. As in *Wyeth*, plaintiffs have presented no evidence suggesting that *Congress* intended that the federal government would *not* enforce the INA's registration regulations.[25] Congress has revised the INA several times since enacting 8 U.S.C. §§ 1304(e) and 1306(a), including via the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009. If Congress believed the INA's registration provisions to be "obsolete and unenforceable," Congress could have repealed them. The fact that Congress has neither done so nor expressly preempted concurrent state regulation "is powerful evidence that Congress did not intend" the INA's registration provisions to exclude state action. *See Wyeth*, 129 S. Ct. at 1200.

ii. Federal law does not preempt A.R.S. § 13-2928

Plaintiffs next argue that A.R.S. § 13-2928 conflicts with federal law because the Immigration Reform and Control Act of 1986 ("IRCA") "includes neither civil fines nor criminal penalties for workers who seek or perform unauthorized work." Pls. Mem. at 19-20. This argument misconstrues the requirements for establishing conflict preemption. "A mere difference between state and federal law is not conflict." *Ariz. Contractors Ass'n*, 2007 U.S. Dist. LEXIS 96194, at *25 (citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963)). Conflict preemption exists *only* "when 'compliance with both State and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citation omitted). And "'[t]he case for federal pre-emption is particularly weak where

[25] As this Court has already held: it should not be inferred that ineffective enforcement is "the 'real' federal policy from which state law must not deviate." *See Ariz. Contractors Ass'n Inc. v. Candelaria*, 534 F. Supp. 2d 1036, 1055 (D. Ariz. 2008) (quoting Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 80 (2007)).

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Congress has indicated its awareness of the operation of state law in a field of interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'" *Wyeth*, 129 S. Ct. at 1200 (citation omitted).[26]

There is no conflict between IRCA and A.R.S. § 13-2928 because it is possible to impose sanctions on both an employer and an employee and A.R.S. § 13-2928 does not impede the federal purpose. As plaintiffs recognize, A.R.S. § 13-2928 merely imposes sanctions on "workers who seek or perform *unauthorized* work." Pls. Mem. at 19-20 (emphasis added). In other words, A.R.S. § 13-2928 imposes sanctions for conduct that federal law expressly prohibits. "Where state law 'mandates compliance with the federal immigration laws and regulations, it cannot be said [state law] stands as an obstacle to accomplishment and execution of congressional objectives embodied in the INA.'" *In re Jose C.*, 198 P.3d at 1100 (citations omitted).

Preemption cannot be lightly inferred in this instance because "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *De Canas*, 424 U.S. at 356. In *De Canas*, the Supreme Court recognized the important state interests that such regulation serves:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico.

Id. at 356-57. Arizona is also a border state that receives a "significant influx . . . of illegal aliens from neighboring Mexico" and these problems are equally acute here. *See*

[26] It is significant that Congress could have, but chose not to, expressly preempt state and local laws that impose civil or criminal sanctions upon employees. *See* 8 U.S.C. § 1324a(h)(2); *Wyeth*, 129 S. Ct. at 1196 ("[W]hen Congress enacted an express pre-emption provision for medical devices in 1976 . . . it declined to enact such a provision for prescription drugs."). Plaintiffs' argument that Congress considered and rejected adopting criminal sanctions against the employee (Pls. Mem. at 19) only underscores this point because it demonstrates that Congress recognized the potential for such regulations, yet chose *not* to expressly preclude them at the state level.

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Borjas Aff. ¶ 7 (stating, among other things, that the loss resulting to Arizona's low-skilled authorized workers as a result of illegal immigration "amounts to more than $200 million"); *Ariz. Contractors Ass'n Inc. v. Candelaria*, 534 F. Supp. 2d 1036, 1049 (D. Ariz. 2008). And, just like the California statute at issue in *De Canas*, SB 1070 "focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils." 424 U.S. at 357. Accordingly, A.R.S. § 13-2928 is well within Arizona's police powers and is not preempted by federal law.

iii. SB 1070 does not establish any new authority to enforce federal immigration laws

Plaintiffs also argue that SB 1070 is preempted because it exceeds the authority the INA provides state and local law enforcement officers to enforce federal immigration laws. Plaintiffs again misconstrue the preemption doctrine. It is well-established that "the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution." *Ker v. California*, 374 U.S. 23, 37 (1963). For preemption to occur there must be more than a mere difference between SB 1070 and the INA – there must be an actual (not a hypothetical) conflict. *Ariz. Contractors Ass'n*, 2007 U.S. Dist. LEXIS 96194, at *25 (citation omitted).

Here, there is no conflict between SB 1070 and any of the INA's provisions relating to state and local law enforcement officers' ability to enforce federal immigration laws. As set forth in greater detail in Governor Brewer's Motion to Dismiss, 8 U.S.C. § 1357(g) does not conflict with SB 1070 because 8 U.S.C. § 1357(g)(10) expressly authorizes the assistance that SB 1070 provides in the enforcement of federal immigration law. *See* Mot. to Dismiss at 18-20. Nor does 8 U.S.C. § 1252c impose limits on state and local law enforcement officers' arrest authority because, as the Tenth Circuit has already held, such a result "would both contradict the plain language of § 1252c and give the statute an interpretation and effect that Congress clearly did not intend." *Vasquez-Alvarez*, 176 F.3d at 1297-1300. And nothing in § 1103(a)(10) limits the circumstances in which state and local law enforcement officers may assist the federal government in the

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enforcement of the immigration laws.

Indeed, courts routinely recognize state and local law enforcement officers' authority – without reference to any authority granted under the INA – to "investigate and make arrests for violations of federal immigration laws." *Vasquez-Alvarez*, 176 F.3d at 1296 (citing cases); *Martinez-Medina v. Holder*, No. 06-75778, 2010 WL 2055675, at *2-3 (9th Cir. May 25, 2010); *United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001).[27] Nor are Arizona's law enforcement officers bound by the arrest authority set forth in the immigration regulations. *See Samayoa-Martinez v. Holder*, 558 F.3d 897, 900-01 (9th Cir. 2009) (finding that a military policeman was not acting as an agent of the federal government and, therefore, could arrest a person for violating immigration laws based on the authority military police have to arrest persons for "on-base violations of civil laws").

iv. The alleged "burden" SB 1070 may impose on federal resources does not create a conflict

Plaintiffs' final argument is that SB 1070 conflicts with federal law because it somehow burdens and interferes with "the enforcement resources and priorities of the federal government." Pls. Mem. at 23-24. The only factual support plaintiffs provide for this argument are the speculative and conclusory statements of Secretary Napolitano and Doris Meissner. *Id*. Even if these opinions were probative of SB 1070's likely burden on federal resources (which they are not), a "hypothetical conflict" is not enough to establish conflict preemption. *Incalza*, 479 F.3d at 1010. The only legal authority upon which plaintiffs rely is *Garrett v. City of Escondido*, in which the district court found that the City's "use of federal resources and procedures for a *private* benefit" would "likely place burdens on the Department of Justice and Homeland Security that will impede the functions of those federal agencies." 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006)

[27] The Department of Justice has also reached this conclusion. Braddock Decl. Ex. 26.

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(emphasis added).[28] Here, however, ICE has established the LESC for the express purpose of providing state and local law enforcement officers with "timely and accurate information to law enforcement officers on the immigration status and identities of individuals who have been arrested or are under investigation for criminal activity." Braddock Decl. Ex. 1.

The most critical flaw in plaintiffs' argument is that it fails to recognize the express congressional mandates of 8 U.S.C. §§ 1373(c) and 1644, which *require* the INS to respond to inquiries by state and local police officers seeking to verify the immigration status of any person. Pursuant to these provisions, ICE has established LESC, which "operates 24 hours a day, 365 days a year to provide timely and accurate information to law enforcement officers on the immigration status and identities of individuals who have been arrested or are under investigation for criminal activity." Braddock Decl. Ex. 1. SB 1070 does nothing more than require Arizona's law enforcement officers to make the very inquiries to which Congress has compelled ICE to respond. There is no conflict.

B. SB 1070 Does Not Infringe Upon Plaintiffs' Right To Travel

Plaintiffs allege that "SB 1070 violates the fundamental right to travel because it burdens the right of residents of other states to travel in Arizona free of fear of unjustified detention or arrest." Pls. Mem. at 2. In particular, plaintiffs claim that "[t]he Act will subject certain out-of-state drivers to increased scrutiny and pressure them to carry additional documentation, impermissibly burdening their right to travel freely throughout Arizona." Pls. Mem. at 25.

1. Plaintiffs misunderstand SB 1070

Plaintiffs misunderstand the presumption afforded by A.R.S. § 11-1051(B), as well as the Act's provisions impacting detention and arrest in several respects. First, plaintiffs contend that the Act requires or "pressures" out-of-state individuals to obtain and carry additional documentation. Pls. Mem. at 25. In fact, the Act provides individuals who

[28] The *Garrett* court cited no authority to support the proposition that a potential burden on federal resources can provide a basis to enjoin a state or local regulation under the Supremacy Clause. *See Garrett*, 465 F. Supp. 2d at 1057.

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present certain forms of identification to law enforcement officers or agencies with a presumption that they are lawfully present in the United States. A.R.S. § 11-1051(B). The identification referenced in SB 1070 is *not required* to prove that a person is a citizen or a lawful alien and, in fact, does not even impact the determination of whether a person is unlawfully present in the United States.[29] *See* A.R.S. § 11-1051(B). Nor is there any penalty for out-of state drivers if their home states have not adopted the same policies for issuing driver's licenses as those used in Arizona. *See* Pls. Mem. at 25. SB 1070 merely reinforces the authority law enforcement authorities have, and have had for years, in all states – whether New Mexico, Utah, Arizona, or elsewhere – to investigate a person's immigration status if the officer has a reasonable suspicion to believe that the individual is unlawfully present in the United States.[30] Thus, the law imposes no new requirements for individuals to produce identification or other evidence of identity.[31]

Second, plaintiffs contend that other states will have to "legislate or retaliate" in response to SB 1070, which plaintiffs argue "compounds" the constitutional violation. Pls. Mem. at 27 (citing *Austin v. New Hampshire*, 420 U.S. 656 (1975)). However, *Austin* bears no relation to this case, as it was an action challenging the constitutionality of the New Hampshire Commuters Income Tax, which taxed the New Hampshire-derived income of non-residents. *Austin*, 420 U.S. at 657-58. Not only did the New Hampshire statute create an in-state versus out-of-state classification, which SB 1070 does not, but it also diverted tax revenues to New Hampshire from Maine, unless Maine repealed its own

[29] The AzPOST training for SB 1070 expressly states: "Just because an identification document is not on the list of presumptive identification, does not mean it is invalid nor does that fact alone suggest unlawful presence." Braddock Decl. Ex. 30, at 20 (citing excerpt of AzPOST training DVD).

[30] *See, e.g.*, *Santana-Garcia*, 264 F.3d at 1193; *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984).

[31] Showing identification that verifies a person is a citizen is just one of many ways in which a person may dispel reasonable suspicion that he or she is unlawfully present in the United States. Cramer Decl. ¶ 34. Arizona's police officers have been trained on the reasonable suspicion and probable cause standards which set forth the constitutional limitations on an officer's ability to stop, detain, or arrest a person the officer believes may have engaged or is engaging in unlawful activity. Vasquez Decl. ¶ 4, 13.

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credit provision for income taxes paid to another state. *Id*. at 666. SB 1070 contains no such provision that would require other states to legislate in response, nor does it impact the laws of other states.

Third, plaintiffs argue that SB 1070 "burdens the right of residents of other states to travel in Arizona free of fear of unjustified detention or arrest." Pls. Mem. at 2. However, the Act does not expand the authority of law enforcement officials or agencies to detain or arrest individuals. The Act requires only that if a person is stopped, detained *or* arrested, the law enforcement officer has the person's immigration status determined if (1) the law enforcement official or agency has reasonable suspicion that the person is an alien and is unlawfully present in the United States and (2) such determination is practicable and does not hinder or obstruct an investigation. *See* A.R.S. § 11-1051(B).[32] Questioning an individual regarding his or her immigration status is not a form of detention. "Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment." *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 185 (2004); *see also Muehler v. Mena*, 544 U.S. 93, 101 (2005) (discussing that the Supreme Court has repeatedly held that mere police questioning does not constitute a seizure).[33]

2. SB 1070 does not violate the right to travel

The right to travel embraces three primary components: (1) the right of a citizen of one state to enter and to leave another state; (2) the right to be treated as a welcome visitor

[32] An officer may make an investigatory stop based upon specific, articulable facts which, together with objective and reasonable inferences, form a basis for suspecting that a particular person detained is engaged in criminal activity. *Hernandez-Alvarado*, 891 F.2d at 1416; *see also Salinas-Calderon*, 728 F.2d at 1301 n.3 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Even the DOJ has concluded that states already have the authority to make arrests that SB 1070 has codified in A.R.S. § 13-3883(5). *See* Braddock Decl. Ex. 26.

[33] Not only do law enforcement officers in all areas of the country ask for identification as a matter of course in connection with any stop, detention, or arrest, but the *Muehler* Court held that a police officer investigating another violation of law may inquire into a person's immigration status *regardless* of whether the officer has reason to believe that the person is in the country unlawfully. *Muehler*, 544 U.S. at 101. Asking for identification is part of officers' standard practice so that they can run the information through their computers and determine, for the officers' safety, issues such as whether the person has any outstanding warrants. *See* Vasquez Decl. ¶¶ 18-19; Gafvert Decl. ¶¶16-17.

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rather than an unfriendly alien when temporarily present in the second state; and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state. *Michael C. ex. rel. Stephen C. v. Radnor Twp. Sch. Dist.*, 202 F.3d 642, 655 (3d. Cir. 2000) (citing *Saenz v. Roe*, 526 U.S. 489, 500 (1999)). "Burdens placed on travel generally, such as gasoline taxes, or minor burdens impacting interstate travel, such as toll roads, do not constitute a violation of [the right to travel.]" *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999) (citation omitted) (stating that "plaintiff's argument that the right to operate a motor vehicle is fundamental because of its relation to the fundamental right of interstate travel is utterly frivolous."). "[A]n otherwise constitutional law that incidentally discourages migration is not necessarily rendered suspect or invalid merely because of such incidental effect." *Michael C.*, 202 F.3d at 655. And "a valid detention and arrest . . . preclude[s] claims based upon the right to travel." *See, e.g., United States v. Rodriguez-Rosario*, 845 F.2d 27, 29-30 (1st Cir. 1988) (holding that a stop and consensual interrogation complied with the Fourth Amendment and that the right to travel was not implicated).

i. SB 1070 does not discriminate against out-of-state individuals

Plaintiffs' argument that SB 1070 interferes with their right to travel under the Privileges and Immunities Clause fails because "[d]iscrimination on the basis of out-of-state residency is a necessary element for a claim under the Privileges and Immunities Clause." *Russell v. Hug*, 275 F.3d 812, 821 (9th Cir. 2002) (quoting *Gianni v. Real*, 911 F.2d 354, 357 (9th Cir. 2002)). SB 1070 does not discriminate against out-of-state residents as it does not alter the fact that an officer must have reasonable suspicion to investigate whether a person is an unlawful alien, ***whether the person is from in-state or out-of-state***. *See* A.R.S. § 11-1051(B).

ii. SB 1070 does not penalize a person's right to travel

A statute is subject to strict scrutiny analysis if it *penalizes* a person's right to travel. *See Fisher v. Reiser*, 610 F.2d 629, 633 (9th Cir. 1979) (citing *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled on other grounds by Edelman v. Jordan*,

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415 U.S. 651 (1974)) (concluding that the appellants' right to travel is not penalized, and thus strict scrutiny is not required); *Benson v. Ariz. State Bd. of Dental Examiners*, 673 F.2d 272, 277 (9th Cir. 1982) (finding that a scheme limiting *everyone* "who obtains only a restricted permit . . . to unpaid work for a dental clinic" did not "penalize[] the exercise of the right to travel").[34]

Plaintiffs' reliance upon *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), to support their contention that "drivers from states like New Mexico will be penalized with prolonged questioning and the risk of detention *even if* they present a valid state driver license" is misplaced. *See* Pls. Mot. at 27. *Soto-Lopez* involved a New York statute that was determined to be unconstitutional because it granted civil service employment preference (in the form of points added to examination scores) to certain honorably discharged veterans and New York residents who were seeking to be hired or promoted. 476 U.S. at 900. The Supreme Court explained that the civil service employment preference to veterans resulted in "a permanent deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time, [and] clearly operates to penalize appellees for exercising their rights to migrate." *Id*. at 909. Section 2 of SB 1070, by contrast, does not provide a permanent deprivation or even a "preference" towards in-state residents, nor does it provide benefits to in-state residents that out-of-state residents are ineligible to receive. *See* A.R.S. § 11-1051(B). SB 1070 treats in-state and out-of-state residents uniformly.

Similarly, the Sixth Circuit affirmed the dismissal of plaintiffs' right to travel claim alleging, among other claims, that Tennessee's denial of a driver license to aliens impermissibly burdens the aliens' fundamental right to travel. *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 526 (6th Cir. 2007). The court explained that

[34] The Supreme Court has explained that "a classification that had the effect of imposing a *penalty* on the exercise of the right to travel violated the *Equal Protection Clause* 'unless shown to be necessary to promote a *compelling* governmental interest.'" *Saenz*, 526 U.S. at 499 (emphasis added). Plaintiffs have not alleged a violation of the right to travel under the Equal Protection Clause, but rather, have alleged only a violation pursuant to the Privileges and Immunities Clause. Compl. ¶ 209-14.

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"[t]he state's denial of state-issued photograph identification to temporary resident aliens may arguably result in inconvenience, requiring the bearer of a certificate for driving to carry other personal identification papers, but this inconvenience can hardly be said to deter or penalize travel. To the extent this inconvenience burdens exercise of the right to travel at all, the burden is incidental and negligible, insufficient to implicate denial of the right to travel." *Id*. at 535 (citation omitted). Moreover, the court added that "[p]otential difficulties that may be experienced by one who does not have a driver license for use for identification purposes were held not to implicate the right to travel." *Id*.

Section 2 of SB 1070 does not implicate the right to travel; it does not warrant strict scrutiny analysis and should be upheld as it operates as a mechanism to concurrently enforce federal law.[35] The right to travel has never operated as a limitation of an officer's authority to detain or arrest a person with reasonable suspicion or probable cause.

iii. Even if SB 1070 were subject to strict scrutiny, it is valid because it serves a compelling state interest

Although SB 1070 provides no classifications that penalize the right to travel which would warrant a compelling state interest test analysis, SB 1070 can withstand this burden. Arizona has a significant, legitimate – even compelling – state interest in assisting with the enforcement of federal immigration laws and combating the effects of illegal immigration. Prior to the enactment of SB 1070, the Arizona Legislature evaluated the dire need for its enactment, as the federal government has failed in its responsibility to the citizens of the United States. *See* Section I, *supra.*

C. SB 1070 Complies With the First Amendment

Plaintiffs argue that A.R.S. § 13-2928 violates the First Amendment because it is a content-based regulation of protected speech for individuals. *See* Pls. Mem. at 28-32. However, governing Supreme Court and Ninth Circuit precedent allow a state to impose

[35] If a statute does not impact a fundamental right nor target a suspect class, it will be upheld if it bears a rational relation to some legitimate end. *Vacco v. Quill*, 521 U.S. 793, 799 (1997); *see also Ariz. Downs v. Ariz. Horsemen's Found.*, 130 Ariz. 550, 555, 637 P.2d 1053, 1058 (1981). Section 2 of SB 1070 undeniably meets the rational relation test.

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reasonable time, place, and manner restrictions on speech, and to regulate conduct.

1. A.R.S. § 13-2928(A)-(B) is a reasonable time, place, and manner restriction

A.R.S. § 13-2928(A) makes it unlawful for "an occupant of a motor vehicle that is stopped on a street, roadway or highway to *attempt to hire or hire and pick up* passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic." (emphasis added). A.R.S. § 13-2928(B) makes it unlawful for "a person to *enter* a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic." (emphasis added).

The Supreme Court has permitted reasonable restrictions on the time, place, and manner of speech so long as they are: (1) content-neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted)[36]

i. "Content-neutral"

A restriction on acts of solicitation is content-neutral when "passed to support legitimate government concerns unrelated to suppressing any particular message." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, Nos. 06-55750, 06-56869, 2010 WL 2293200, at *5 (9th Cir. June 9, 2010). In *Redondo Beach*, the Ninth

[36] As a result of Ninth Circuit's recent decision in *Redondo Beach*, several of plaintiffs' cases are no longer good law. First, the decision reversed *Comite de Jornalerors de Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952 (C.D. Cal. 2006). This also affects *Lopez v. Town of Cave Creek*, 559 F. Supp. 2d 1030 (D. Ariz. 2008), which relied on the now-overruled district court opinion in *Redondo Beach* in analyzing the ordinance prohibiting solicitation of "employment, business, or contributions." 559 F. Supp. 2d at 1035. Third, the ordinances at issue in *Cave Creek, Comite de Jornaleros de Glendale v. City of Glendale*, No. 04-CV-3521 (C.D. Cal. May 13, 2005), and *Coalition for Humane Immigrant Rights of Los Angeles v. Burke*, No. 98-CV-4863, 2000 WL 1481467, at *10 (C.D. Cal. Sept. 12, 2000), are similarly not dispositive because they regulate conduct beyond that regulated in Section 5 of SB 1070, including solicitations that do *not* block or impede the flow of traffic and therefore does not create traffic congestion or safety concerns.

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Circuit affirmed an ordinance that made it unlawful "for any person to stand on a street or highway and solicit, or attempt to solicit, employment, business or contributions from an occupant of any motor vehicle." *Id.* at *2. Reviewing the applicable case law, the Ninth Circuit applied the general rule that "an ordinance is content neutral if it is aimed at acts of solicitation and 'not at any particular message, idea, or form of speech.'" *Id.* at *6 (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 706 (1992) (Kennedy, J., concurring)). Applying this standard, the Ninth Circuit held that the statute (like an similar Phoenix statute that had been upheld) was "content-neutral because it was aimed narrowly at barring acts of solicitation directed toward the occupants of vehicles . . . and was not related to any particular message or content of speech." *Id.*

A.R.S. § 13-2928(A)-(B) is similar to the ordinance at issue in *Redondo Beach*. A.R.S. § 13-2928(A)-(B) narrowly restricts the *act* of soliciting work from occupants of a vehicle, and only when that vehicle is actually blocking traffic.[37] More specifically, it restricts the act of *entering* a vehicle in order to be hired or *attempting to hire* an individual when such conduct blocks or impedes the normal movement of traffic. A.R.S. § 13-2928(A)-(B). As with the ordinance in *Redondo Beach*, no one would violate the statute by "communicating a message by means that did not adversely affect traffic." 2010 WL 2293200, at *6.

Plaintiffs contend, however, that these provisions are *not* content-neutral because they single out a particular form of speech and require law enforcement officers to examine the message to determine if it violates the statute. *See* Pls. Mem. at 31. The Ninth Circuit addressed both of these arguments in *Redondo Beach*. As the court explained, "an ordinance does not single out specific messages for different treatment merely because it regulates broad categories of communication." 2010 WL 2293200, at *7. The statute in this instance covers solicitation for work; the *Redondo Beach* ordinance

[37] *See Int'l Soc'y for Krishna Consciousness of Cal. v. City of Los Angeles*, Case No. CV-97-03616 (9th Cir. July 7, 2010), *adopting* 48 Cal.4th 446, 227 P.3d 395 (Cal. 2010) (rejecting religious organization's claim that ordinance prohibiting solicitation and immediate receipt of funds at the airport violated the First Amendment because ordinance is a valid time, place, and manner restriction).

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covered solicitation for employment, business, or contributions. Although the *Redondo Beach* ordinance is somewhat broader in scope, it is not unreasonable to conclude that solicitation for work is sufficiently broad to be considered content-neutral under these principles.

Like *Redondo* Beach, the statute here is a "minor place restriction" on a category of communication. Requiring officers to briefly examine a message to determine whether it is covered by the statute does *not* make the law content-based. As the Ninth Circuit observed, the Supreme Court has made it clear that it has "*never* held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule applies to a course of conduct." *Id.* at *8 (quoting *Hill v. Colorado*, 530 U.S. 703, 721 (2000)). If, as here, the law requires only "a cursory examination of the solicitor's communication, not a substantive evaluation of a speaker's message," the law is not content-based for First Amendment purposes. *Id.* As in *Redondo Beach*, enforcing these provisions of SB 1070 requires only a brief examination of the speaker's conduct and a determination of whether traffic is being blocked.[38]

ii. "Narrowly tailored"

A content-neutral regulation is narrowly tailored for First Amendment purposes, even if it restricts more speech or conduct than is absolutely necessary. *Ward*, 491 U.S. at 798; *Redondo Beach*, 2010 WL 2293200, at *9. As such, "narrow tailoring" does not require the government to adopt the least restrictive or least intrusive means of serving the statutory goal. *Hill*, 530 U.S. at 726.

The overriding objective of A.R.S. § 13-2928(A)-(B) is to promote traffic flow, public safety, community order, and the protection of citizens from criminal conduct. *See* Braddock Decl. Ex. 36, at 38:11. A vehicle must actually block traffic before any violation of A.R.S 13-2928(A)-(B) has occurred. As the Ninth Circuit emphasized, it is

[38] A.R.S. § 13-2928(A)-(B) does *not*, as plaintiffs claim, completely ban a particular category of speech from occurring in all public places throughout the State. *See* Pls. Mem. at 30. A.R.S. § 13-2928(A)-(B) is limited to solicitations for work directed towards a vehicle stopped on a street, roadway, or highway, and only when the vehicle is blocking traffic.

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"virtually axiomatic" that cities have significant interests in promoting traffic flow and safety. *Redondo* Beach, 2010 WL 2293200, at *8. Nonetheless, plaintiffs argue that other state and local laws addressing traffic safety are less restrictive means of addressing these safety issues. *See* Pls. Mem. at 31-32. But A.R.S. § 13-2928(A)-(B) need not be the least restrictive means available to survive First Amendment intermediate scrutiny. *See Ward*, 491 U.S. at 798. By limiting the statute's reach to situations in which the traffic is blocked or impeded, the law is narrowly tailored. *See Redondo Beach*, 2010 WL 2293200, at *9 (noting "the evidence dangers of physical injury and traffic disruption that are present when individuals stand in the center of busy streets trying to engage drivers") (quoting *ACORN v. City of Phoenix*, 798 F.2d 1260, 1269 (9th Cir. 1986).

iii. "Alternative channels for communication"

A.R.S. § 13-2928(A)-(B) allows ample alternative channels for communication because it allows a wide range of methods for soliciting work, such as solicitation on the sidewalk from pedestrians, soliciting in areas where it will not interfere with traffic, and numerous other methods of communication. As with the statute at issue in *Redondo Beach*, A.R.S. § 13-2928(A)-(B) "has not banned the only effective means to communicate with prospective employers, who can be reached in safer and less disruptive ways than by soliciting drivers in the street." 2010 WL 2293200, at *12.

2. A.R.S. § 13-2928(C) restricts purely commercial speech

Plaintiffs argue that A.R.S. § 13-2928(C), which prohibits solicitations of work by unauthorized aliens in a public place,[39] is a content-based regulation of speech. *See* Pls. Mem. at 29. A.R.S. § 13-2928(C) makes it unlawful for a person unlawfully present in the country and an unauthorized alien to "knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor."

This provision restricts purely commercial speech – that is, expression "related solely to the economic interests of the speaker and its audience" and "proposing a

[39] To investigate a violation of this statute, a law enforcement officer must have, at a minimum, reasonable suspicion to believe that a worker does not have the requisite authorization from the federal government. *See, e.g., Terry*, 392 U.S. at 24.

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commercial transaction." *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004). Commercial speech receives "lesser protection" under the First Amendment. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). The framework for analyzing regulations of commercial speech is "substantially similar" to the test for time, place, and manner restrictions on speech. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). For commercial speech to be protected by the First Amendment, it must first "concern lawful activity and not be misleading." *Id.* at 475. The state may impose a lawful restriction on such speech if: (1) the asserted governmental interest is substantial; (2) the regulation directly advances the governmental interest asserted; and (3) the restriction has a reasonable "fit" between the government's ends and means chosen to accomplish those ends (but the restriction need not be the least restrictive means). *Fox*, 492 U.S. at 475-80.

First, A.R.S. § 13-2928(C) does not regulate speech protected by the First Amendment because it is directed only at the solicitation of work by persons not authorized to perform such work. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that NLRB may not award back pay to an unauthorized alien terminated in violation of federal labor law, because an alien who is not lawfully entitled to be present and employed in the United States would be "unavailable" for work during the back pay period). Because the speech at issue in A.R.S. § 13-2928(C) does not concern lawful activity it is not protected by the First Amendment. *Fox*, 492 U.S. at 475.

Even if A.R.S. § 13-2928(C) restricts speech that was protected by the First Amendment, it is constitutional because the governmental interest is substantial and the regulation directly advances the governmental interest asserted. "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State" – whether through child labor laws, laws affecting occupational health and safety, workers' compensation, or laws regulating employment of unauthorized

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

aliens.[40] *De Canas*, 424 U.S. at 356-57. Indeed, employment of unauthorized aliens in times of high unemployment deprives lawful residents of jobs and creates substandard terms as to wages and working conditions. *Id.* A.R.S § 13-2928(C) was to intended to address these issues. *See* Braddock Decl. Ex. 36, at 38:11, 39:12, 47:28 (statement of Rep. Konopnicki) (stating that "the underground economy, in my opinion, has been one of the most important things we could address.").

A.R.S. § 13-2928(C) directly advances the State's interests because it prohibits solicitation of work by an unauthorized alien – a person not entitled to lawful presence in the United States, or entitled to work in the United States. *De Canas*, 424 U.S. at 356-57. The statute focuses directly on protecting the lawfully resident labor force from the deleterious effects on its economy resulting from the employment of unauthorized aliens and protecting the State's fiscal interests by prohibiting solicitation of unauthorized work.[41] *De Canas*, 424 U.S. at 357. This determination by the legislature is entitled to deference. *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 665-66 (1994).

Finally, A.R.S. § 13-2928(C) is narrowly tailored to achieve the State's desired objective in curbing employment of unauthorized aliens because its goals "would be achieved less effectively absent the regulation." *One World One Family Now v. City & Cnty. of Honolulu*, 76 F.3d 1099, 1013 (9th Cir. 1996). Put simply, without the regulations set forth in A.R.S. § 13-2928(C), unauthorized aliens would be free to solicit unauthorized and unlawful work, substantially undermining the State's efforts to prevent employment of unauthorized aliens.[42] *Id.*

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[40] Indeed, the State regulates numerous aspects of employment without offending the First Amendment. *See, e.g.,* A.R.S. § 23-211, *et seq.* (regulating employment of unauthorized aliens); A.R.S. § 23-230, *et seq.* (prohibiting certain youth employment); A.R.S. § 23-493, *et seq.* (permitting termination of employee's employment based on positive drug test or alcohol results). Likewise, the State regulates acts of solicitation of unlawful conduct without offending the First Amendment. *See, e.g.,* A.R.S. § 13-3201 ("A person who knowingly entices any other person into a house of prostitution, or elsewhere, for the purpose of prostitution with another person, is guilty of a class 6 felony.").

[41] *State v. Flores*, 218 Ariz. 407, 188 P.3d 706 (App. 2009) (finding that "Arizona's human smuggling law furthers the legitimate state interest").

[42] Plaintiffs claim that A.R.S. § 13-2928(C) sweeps too broadly because it prohibits solicitations of work that are permissible under federal law. *See* Pls. Mem. at 29. This is

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

In their motion, plaintiffs contend that law enforcement officers will not be able to determine the immigration status of the speaker, and that a person wishing to express willingness to engage in day labor may be chilled from engaging in such speech. *See* Pls. Mem. at 30. For a violation of First Amendment rights to occur, the harm must be of the "type that would chill a person of ordinary firmness from continuing to engage in the protected speech." *Eaton v. Meneley*, 379 F.3d 949, 954 (10th Cir. 2004). Here, A.R.S. § 13-2928(C) does not prohibit solicitation of any lawful work – it merely prohibits solicitation of work that is unauthorized and unlawful in the first place. *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (statute that does not prohibit all persuasion, but only that which is "corrupt," does not proscribe lawful or constitutionally protected speech). Accordingly, the chilling alleged does not arise from "an objectively justified fear of real consequences." *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004); *see also Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

VI. CONCLUSION

For the foregoing reasons, Governor Brewer and the State of Arizona respectfully request that the Court deny plaintiffs' request to enjoin enforcement of SB 1070.

Respectfully submitted this 9th day of July, 2010.

SNELL & WILMER L.L.P.

By s/John J. Bouma
John J. Bouma
Robert A. Henry
Joseph G. Adams
One Arizona Center
400 E. Van Buren
Phoenix, AZ 85004-2202

and

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inaccurate. Federal law clearly prohibits *both* the employment of, and the independent contractor work relationship with, an unauthorized alien. 8 U.S.C. § 1324a(a); 8 C.F.R. § 274a.5. Accordingly, A.R.S. § 13-2928(C) merely compliments the overall policy behind the federal statutory scheme.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

By s/Joseph A. Kanefield *with permission*
Joseph A. Kanefield
Office of Governor Janice K. Brewer
1700 W. Washington, 9th Floor
Phoenix, AZ 85007

Attorneys for Intervenor Defendants State of Arizona and Janice K. Brewer, Governor of the State of Arizona

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2010, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants on record.

s/John J. Bouma

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000