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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FRIENDLY HOUSE *et al.*, Plaintiffs, vs. MICHAEL B. WHITING *et al*, Defendants.	No. CV-10-01061-JWS *AMICUS CURIAE* BRIEF BY ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMARY INJUNCTION Hon. John W. Sedwick

Come now, David J. Euchner, Louis S. Fidel, Matthew H. Green and Adam N. Bleier, counsel for *Amicus Curiae* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE ("AACJ") and submit the following brief in support of the Plaintiff's motion for preliminary injunction.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Amicus curiae Arizona Attorneys for Criminal Justice ("AACJ") is a not-for-profit membership organization representing over 400 criminal defense lawyers licensed to practice in the State of Arizona, law students, and other associated professionals, which is dedicated to protecting the rights of the criminally accused in the courts and the legislature. AACJ offers this brief in support of Plaintiffs' motion for preliminary injunction because SB 1070 (and its "corrective" legislation, HB 2162), which will take effect on July 29, 2010, will have significant deleterious effects on the rights of all people to be free from unreasonable searches and seizures. This law requires police officers to conduct complete investigations into the immigration status of anyone who appears to be unlawfully present in the United States, and it permits private citizens to sue government entities if citizens feel that its government is not enforcing the law with sufficient vigor. The law provides no substantial guidance to officers in the field who will be expected to enforce it, thereby entrusting officers with unbridled discretion.

Ordinarily, unreasonable searches and seizures are challenged in the context of a criminal proceeding after charges are filed. However, SB 1070 is an exceptional law because its very language, while paying lip service to the constitutional ban on racial profiling, essentially requires unconstitutional racial profiling, detentions, and arrests by officers who are sworn to uphold it. SB 1070 casts such a wide net over the entire Hispanic population in Arizona (as well as those traveling through this State) that it will be impossible for the laws to be enforced in a racially-neutral manner. Inevitably, police will stop persons without reasonable suspicion[1] and arrest persons without probable cause. When considering that enormous segments of the population are Hispanic and speak a language other than English at home,[2] officers will be unable to detect

[1] SB 1070 is a peculiar law in that it references "reasonable suspicion," a judicial construct used for interpreting the Fourth Amendment. This can only be interpreted as an attempt to usurp judicial authority.

[2] According to the U.S. Census Bureau, as of 2008, 30.1% of people in Arizona are of Hispanic / Latino origin, and 25.9% speak a language other than English at home. Those numbers are higher in neighboring states: in New Mexico, 44.9% are Hispanic and 36.5% speak a non-English language at home, and in California, 36.6% are Hispanic and 39.5% speak a non-English

immigration status based on typical observations.

The test for granting preliminary injunctions in this circuit was stated in *Taylor v. Westly*, 488 F.3d 1197, 2000 (9th Cir. 2000), and the Plaintiffs can meet that standard. The harm that will befall countless people if this law is allowed to take effect is unquestionably irreparable; inevitably, people with no criminal history whatsoever will be taken into custody, and even booked into jail, based solely on officers' hunches that they *might* be in the country illegally and the persons' inability to prove their innocence. In communities with significant populations of people who are unlawfully present in this country, witnesses to crimes (both for the prosecution and for the defense) will be hesitant to come forward for fear of deportation. In fact, if a criminal defendant subpoenas such a person, then the prosecution will inevitably discover that person's immigration status and the witness will be prosecuted under SB 1070.

This Court must consider the balance of harms to the parties if injunctive relief is given or denied. *Humane Society v. Gutierrez*, 527 F.3d 788 (9th Cir. 2008); *Nelson v. NASA*, 568 F.3d 1028 (9th Cir. 2009). Plaintiffs and others who are lawfully present in the United States will suffer the substantial harm and indignity of arrest without probable cause. On the other hand, the characterization by some legislators and commentators of the unlawful presence of Mexican nationals in this country as an "invasion" is nothing more than political grandstanding. Particularly since the motion for preliminary injunction requests this Court only to maintain the *status quo* (rather than order specific conduct of defendants), the balance of harms tips decidedly in favor of the Plaintiffs and against the Defendants and intervenors. For these reasons, AACJ asks this Court to grant the Plaintiffs' motion for a preliminary injunction.

I. FOURTH AMENDMENT GENERALLY

The Fourth Amendment to the United States Constitution grants the right to be free from unreasonable searches and seizures. Article II, § 8 of the Arizona Constitution

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language at home. http://quickfacts.census.gov/qfd/states/ (last accessed 6/19/10).

similarly provides that "no person shall be disturbed in his private affairs … without authority of law." The right to privacy granted by the Arizona Constitution has been held to be even broader than the Fourth Amendment in certain circumstances. *State v. Johnson*, 220 Ariz. 551, ¶¶ 12-13, 207 P.3d 804 (App. 2009); *State v. Tykwinski*, 170 Ariz. 365, 371, 824 P.2d 761 (App. 1991).

Investigatory stops; vehicle stops

The Fourth Amendment applies to all seizures of the person, including those that are limited to a brief detention or investigatory stop of persons or vehicles. *Terry v. Ohio*, 392 U.S. 1, 16-19, 88 S.Ct. 1868 (1968); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574 (1975); *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690 (1981); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776 (1996). Passengers in a vehicle subject to an investigatory stop are likewise "seized" under the the Fourth Amendment for the duration of the stop. *Arizona v. Johnson*, 129 S.Ct. 781, 784 (2009), *citing Brendlin v. California*, 551 U.S. 249, 255, 127 S.Ct. 2400 (2007); *Whren v. United States*, 517 U.S. 806, 809-10, 116 S.Ct. 1769 (1996) ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of this provision.").

Because of the limited intrusion of an investigatory stop, the United States Supreme Court has explained that an investigatory stop only requires "reasonable suspicion," a lesser quantum of cause than the probable cause necessary for an arrest under the Fourth Amendment. *Terry*, 392 U.S. 1. However, "the concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581 (1989), *quoting Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317 (1983).

Reasonable suspicion and the ban on policing by "hunch"

In *Terry*, the Court first set forth the the objective concept of "reasonable suspicion," explaining that, to justify an investigatory stop, law enforcement "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21. Reasonable suspicion must arise *before* the stop, and the police may not stop individuals or pull over vehicles on a "hunch," rather they must be able to articulate specific facts to justify the stop. *Id.* The Arizona Supreme Court similarly banned policing by "hunches," holding that the assessment of reasonable suspicion "does not include a weighing of the officer's 'unparticularized suspicions' or 'hunches' about a suspect or situation." *State v. Graciano*, 134 Ariz. 35, 38-39, 653 P.2d 683 (1982). Stops must be based upon a "particularized" or "founded" suspicion by the officer, who must be able to state an "articulable reason" for the stop. *Id.* at 37.

An investigatory stop, however brief, must still be justified by some objective manifestation that the person stopped is engaged in criminal activity, or is about to become so engaged. *Cortez*, 449 U.S. at 417; *United States v. Arvizu*, 534 U.S. 266, 272-73, 122 S.Ct. 744 (2002); *United States v. Sanchez-Vargas*, 878 F.2d 1163, 1166 (9th Cir. 1989); *Gonzalez-Gutierrez*, 187 Ariz. at 120. Thus, police may not detain a person "even momentarily without reasonable, objective grounds for doing so." *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319 (1983). Subjective impressions are never enough to transform innocent behavior into suspicious activity. *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1445-48 (9th Cir. 1994). Absent any particularized suspicion of noncompliance of the law based on officers' observations, officers may not pull over vehicles just to see if drivers are in compliance with the law. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391 (1979); *State v. Ochoa*, 112 Ariz. 582, 584-85, 544 P.2d 1097 (1976). Officers do not have unbridled discretion in making a stop. *Nicacio v. I.N.S.*, 797 F.2d 700, 705 (9th Cir. 1985), *overruled in part on other grounds in Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999).

Terry scope requirement; seizure lawful at inception can become unlawful if prolonged

A court evaluating reasonable suspicion must look at whether an officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances justifying the interference in the first place. *Terry*, 392 U.S. at 20. As reasonable suspicion must arise before the stop, an investigatory stop may not be initiated on a "hunch" and then justified by reasonable suspicion or probable cause found subsequent to the stop.

Furthermore, "[t]he scope of the detention must be carefully tailored to its underlying justification... [A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. A lawful seizure "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834 (2005); *United States v. Jacobsen*, 466 U. S. 109, 124, 104 S.Ct. 1652 (1984). Generally, a lawful roadside stop ends when the police have no further need to detain the individuals further, and inform the driver and passengers they are free to leave. *Brendlin*, 551 U.S. at 258. As soon as the original justification for the stop has dissipated, there must be reasonable suspicion of another sort if the detention is to be further prolonged.

If an officer extends the duration of the stop or alters the nature of the stop with inquiries into matters unrelated to the justification for the traffic stop, including questioning about immigration status, the seizure becomes unlawful. *Johnson*, 129 S.Ct. at 788; *Muehler v. Mena*, 544 U.S. 93, 100-01, 125 S.Ct. 1465 (2005); *United States v. Place*, 462 U. S. 696, 709, 103 S.Ct. 2637 (1983); *Dunaway v. New York*, 442 U. S. 200, 212, 99 S.Ct. 2248 (1979); *see also United States v. Holt*, 264 F.3d 1215, 1240 (10th Cir. 2001) (Murphy, J., concurring in part and dissenting in part) (noting that "*Terry's* scope requirement ... prevents law enforcement officials from fundamentally altering the nature of the stop by converting it into a general inquisition about past, present and future

wrongdoing, absent an independent basis for reasonable articulable suspicion or probable cause").

Although officers are free to approach and question individuals in public places and at random, they cannot convey the message that compliance is required. *Florida v. Bostick*, 501 U.S. 429, 435, 111 S.Ct. 2382 (1991). No reasonable suspicion is required for such questioning so long as a reasonable person would feel free "to disregard the police and go about his business." *Id*. at 434; *California v. Hodari D.*, 499 U.S. 621, 628, 111 S.Ct. 1547 (1991); *I.N.S. v. Delgado*, 466 U.S. 210, 104 S.Ct. 1758 (1984); *Royer*, 460 U.S. at 498; *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870 (1980).

Similarly, if an officer questions an individual already subject to a lawful stop on other matters, it must be done in a way such that a reasonable person would understand that he or she could refuse to answer. *Bostick*, 501 U.S. at 431; *Kolender v. Lawson*, 461 U.S. 352, 365, 103 S.Ct. 1855 (1983) (Brennan, J., concurring). If the officer conveys the message that the individual is not free to leave or ignore the questioning, the officer must have reasonable suspicion for the new line of questioning or probable cause to arrest. *Royer*, 460 U.S. at 498 ("[The] refusal to listen or answer does not, without more, furnish [reasonable suspicion]."); *Kolender*, 461 U.S. at 365-66; *Terry*, 392 U.S. at 34 (White, J., concurring) ("[T]he person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest."). A state "cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a *Terry* encounter." *Kolender*, 461 U.S. at 366-67.

II. UNCONSTITUTIONALITY OF SB 1070

SB 1070 is an impermissible "stop-and-identify statute

The freedom to ignore police questioning and walk away has been challenged by "stop-and-identify" statutes that criminalize the refusal to produce identification upon police demand. *Kolender*; *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637 (1979). In *Brown*, the Court invalidated a conviction under a Texas statute criminalizing the failure to produce identification upon police demand, where the police had no reason to stop the

individual except to ascertain his identity. 443 U.S. at 52-53. In *Kolender*, the Court struck down as unconstitutionally vague a California statute that criminalized the failure to produce "credible and reliable" identification upon demand after an otherwise lawful stop. 461 U.S. at 361. Although the *Kolender* holding was not based on the Fourth Amendment, the statute at issue violated Fourth Amendment protections, as Justice Brennan acknowledged in his concurring opinion. 461 U.S. at 362. Justice Brennan reasoned that "States may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer ... [m]erely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes." *Id.* Justice Brennan stated that *Brown* "held squarely that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion." *Id.* at 368.

The Supreme Court recently upheld Nevada's stop-and-identify statute in *Hiibel v. Sixth Judicial Dist.*, 542 U.S. 177, 124 S.Ct. 2451 (2004). In upholding the statute, the Court emphasized that the officer had reasonable suspicion to question Hiibel initially, satisfying *Brown*, and that the statute was not challenged on vagueness grounds as that in *Kolender*. *Id*. at 184. Once the officer had reasonable suspicion for the initial detention, the Court held that it was permissible to require the suspect to give his name, which is all that is required by the statute. *Id*. at 181, 185 ("As we understand it, the statute does not require a suspect to give the officer a driver's license or any other document."). The *Hiibel* Court reiterated that "[u]nder these principles, an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." 542 U.S. at 188. The demand to produce documents is still unreasonable under *Brown* and *Kolender*.

SB 1070 bears closest resemblance to the law that was struck down in *Kolender* requiring persons to provide "credible and reliable" information of their identity. Officers conducting an immigration status check on an individual need more information than the person's name; such a check requires identification and other federal documents proving one's legal status. Even this much assumes that the detained person is actually admitted

to the country as a lawful permanent resident or on a visa; citizens are not required to have such paperwork at all. While an Arizona driver's license would suffice as evidence that the person is here legally, it cannot be said enough that there is no requirement that any person have a driver's license, or that a person who is a passenger or pedestrian carry a driver's license. Mere inability to prove one's lawful presence in the country cannot rise to the level of reasonable suspicion or probable cause to believe the person is in the country illegally. For this reason, SB 1070 is facially overbroad and unconstitutional.

In Arizona, race, language, and national origin cannot justify a detention by local law enforcement officers

Courts have frequently cited the danger of officers using "hunches" as stand-ins for racial prejudice. *See, e.g., Terry*, 392 U.S. at 27. This danger is recognized in caselaw replete with instances of skin color, accents or other stand-ins for race or national origin being used improperly as a factor in the reasonable suspicion analysis. *See, e.g., Gonzalez-Rivera v. I.N.S.*, 2 F.3d 1441 (9th Cir. 1994); *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1418-19 (9th Cir. 1989); *United States v. Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975). Similarly, the Ninth Circuit has cautioned to "be watchful for mere rote citations of factors which were held, in some past situations, to have generated reasonable suspicion, leading [the court] to defer to the supervening wisdom of a case not now before" the court. *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 n.9 (9th Cir. 2000), *quoting United States v. Rodriguez*, 976 F.2d 592, 594 (9th Cir. 1992).

In *Brignoni-Ponce*, the Supreme Court held that while race could not represent the lone justification for a stop, it was a permissible facor that Border Patrol agents could use: "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor." 422 U.S. at 886-87. The Arizona Supreme Court similarly stated, *in the context of federal immigration law enforcement*, that "enforcement of immigration laws often involves a relevant consideration of ethnic

factors." *Graciano*, 134 Ariz. at 39 n.7 (Ariz. 1982) (citing *State v. Becerra*, 111 Ariz. 538, 534 P.2d 743 (1975)).

Yet, *Brignoni-Ponce* and its progeny recognize the danger of allowing law enforcement to rely primarily on this factor to find reasonable suspicion. The Supreme Court held that Hispanic appearance alone "would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens." *Id.* at 886-87. In *Gonzalez-Gutierrez*, 187 Ariz. at 120, the Arizona Supreme Court, in interpreting *Brignoni-Ponce*, considered "observations that may lead to lawful immigration stops." Although the case involved a defendant who was prosecuted under state law for possession and transportation of marijuana, the initial detention of the defendant by a U.S. Border Patrol agent, "whose primary responsibility was the detection and apprehension of illegal aliens." *Id.* at 118.

In determining whether the agent had reasonable suspicion to detain Gonzalez-Gutierrez, in furtherance of his specific responsibilities in immigration law enforcement, the court held that "Mexican ancestry alone, that is, Hispanic appearance, is not enough to establish reasonable cause, but if the [suspect's] dress or hair style are associated with people currently living in Mexico, such characteristics may be sufficient." *Id.* at 120. But "many thousands of citizens and legal residents of Mexican ancestry reside in close proximity to Tucson. The only characteristic that might have set defendant apart from others – his Hispanic origin – is, standing alone, an improper reason to stop a motorist." 187 Ariz. at 121. In this case, the agent relied on the defendant's Mexican appearance plus his demeanor plus the agent's intuition regarding "scratching one's head, a slouched passenger, or a firm grip on the steering wheel," which "substantially resembles the description of vast numbers of law-abiding citizens." *Id.* "To [validate this stop] would do injustice to principles of fundamental fairness established under the Constitution for the protection of all citizens, including our minority citizens." *Id.*

In Arizona specifically, reliance on race, language, and dress as the basis for reasonable suspicion used to justify a seizure all but guarantees a constitutional violation. In a 1985 class action against the INS for engaging in a pattern of unlawful stops to interrogate persons of Hispanic appearance, the Ninth Circuit Court of Appeals held that Hispanic appearance and presence in an area where illegal aliens travel is not enough to justify a stop. *Nicacio*, 797 F.2d at 703. In that case, the government also used the manner of dress as a factor in the reasonable suspicion analysis. However, the Court rejected that factor, noting that such "characteristics were shared by citizens and legal aliens in the area, as well as illegals. As the district court found, the appearance and dress factors relied upon by the agents 'are a function of the individual's socioeconomic status.'" *Id.* at 704.

The Ninth Circuit reemphasized this holding in *Montero-Camargo*, holding that where a majority of people share certain characteristics, "that characteristic is of little or no probative value in [the reasonable suspicion] analysis." 208 F.3d at 1132; *see also Graciano*, 134 Ariz. at 38 (finding no reasonable suspicion where skin color used as factor); *United States v. Rodriguez-Sanchez*, 23 F.3d 1488, 1492 (9th Cir. 1994) (holding that reasonable suspicion cannot be based "on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped"); *Rodriguez*, 976 F.2d at 596 (noting that the "profile tendered by the agents to justify their stop of Rodriguez is calculated to draw into the law enforcement net a generality of persons unmarked by any really articulable basis for reasonable suspicion").

The scheme employed by SB 1070 pays lip service to the constitution by stating that race cannot be the sole factor for making a stop. However, as seen in decades of case law, officers routinely use race as the primary basis for a stop and cite "rote" factors as described in *Rodriguez* or "profiles" of driving behavior such as those described in *Gonzalez-Gutierrez* that do not distinguish criminal activity from innocent activity. All too often, our attorneys see cases filed by law enforcement officers of all jurisdictions where the initial stop was based on the driver's demeanor. Included in the list of factors

to be used for determining reasonable suspicion include the driver looking at an officer in a parked vehicle as he passes and the driver not looking at the officer. SB 1070 *requires* state and local officers to investigate a status offense for which they have no objective basis to investigate except for the race or language of the individual. Such an investigation, when it involves the detention of the individual, is a clear violation of the Fourth Amendment.

SB 1070 and reasonable suspicion of unlawful presence

"Unlawful presence" is a highly technical term, meant to describe the status of individuals who are present in the United States without the proper governmental authorization. Just like citizenship, it cannot be determined by physical appearance or language, but is established by operation of law. The absence of immigration documents does not mean that someone is unlawfully present in the United States. Athough SB 1070 establishes, pursuant to A.R.S. § 11-501, a presumption that a person who can produce an Arizona driver's license is not unlawfully present, this provision is ultimately useless to protect the Fourth Amendment rights of citizens, lawful permanent residents, and immigrants lawfully admitted with visas. There are no outwardly visible signs or easily identifiable factors for reasonable suspicion of unlawful presence that do not rely on skin color, appearance, language or other stand-ins for race and national origin, such as language and dress.

A.R.S. § 11-1051(B) directs local law enforcement officers to prolong an otherwise brief detention whenever "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States," and that the officer must, when practicable, make a reasonable attempt to "determine the immigration status of the person." In doing so, the statute claims that a law enforcement officer may not consider race, color, or national origin "except to the extent permitted by the United States or Arizona Constitution." *Id*. This language that permits race, color, or national origin to be considered in a reasonable suspicion analysis is highly problematic, since *in the context*

of federal immigration law enforcement both Arizona and federal law recognize the lawfulness of race-based analyses.

But every person of "Mexican ancestry" or "Hispanic appearance" who is subject to the mandatory prolonged detention sanction of A.R.S. § 11-1051(B) will not have been initially detained by a law enforcement officer "whose primary responsibility [is] the detection and apprehension of illegal aliens." *Gonzalez-Gutierrez*, 187 Ariz. at 118. To the contrary, the new law clearly states that the subsequent detention to determine immigration status only arises after the initial "stop or detention ... in the enforcement of any other law or ordinance of a county, city or town or this state." SB 1070 does not merely authorize local law enforcement officers to take on the role of federal immigration law enforcement officers in situations where they detain someone for reasonable suspicion of violating any state law, no matter how minor. SB 1070 *requires* local law enforcement officers to effect prolonged detentions of Hispanics who embrace Mexican culture in their "dress or hair style." *Id.* at 121. That such detentions are compelled by SB 1070 is made clear in the mandate of A.R.S. § 11-1051(A) for all local law enforcement officers to enforce "federal immigration laws to the extent permitted by federal law."

SB 1070 poses an immediate and irreparable harm in that it compels the unlawful detention of U.S. citizens and others who are lawfully present in this country. The prolonged detention requirement of A.R.S. § 11-1051(B) immediately violates the rights of every U.S. citizen in Arizona of "Mexican ancestry" or "Hispanic appearance." Although the statute allows a presumption of lawful immigration status if the Hispanic citizen produces an Arizona state driver's license, there is certainly no requirement under Arizona law for a citizen to possess a driver's license when he or she leaves home each day. And as a citizen, a person of Hispanic appearance or Mexican descent, of course, does not possess valid immigration documents because he or she is not an immigrant.

SB 1070 transforms investigatory stops into *de facto* arrests without the requisite probable cause

The statutory scheme created by SB 1070 would subject individuals to *de facto* arrests absent adequate constitutional protections. SB 1070 proposes to substitute reasonable suspicion for the well-established requirement that an arrest must be justified by probable cause to believe that a violation has occurred. Even in cases where an investigative stop by police is justified by reasonable suspicion, it is possible for police to exceed the permissible scope of the stop and convert an investigative detention into a *de facto* arrest, and SB 1070 seeks to do just that. *Dunaway*, 442 U.S. at 12, *quoting Brignoni-Ponce*, 422 U.S. at 881-82 ("The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent or probable cause*."). In *State v. Winegar*, 147 Ariz. 440, 443, 711 P.2d 579 (1985), the Arizona Supreme Court examined the detention of a murder suspect who was walking on the street. Police had no probable cause to arrest Winegar, so they "asked" her to accompany them to City Hall across the street and later she was told to accompany them for interrogation at the county sheriff's office more than twenty miles away. *Id*. The Court found that Winegar was not free to leave because she was surrounded by four armed police officers and no reasonable person would believe she could walk away. *Id*. at 446. A person's immigration status is not something that can be determined by state and local law enforcement officers, or even by federal immigration officers, in the context of a brief investigatory detention. Instead, persons seized will be subject to a prolonged detention, for which the Fourth Amendment demands a finding of probable cause. SB 1070, however, permits this prolonged detention without the requisite finding of probable cause that the person is unlawfully present in the United States.

Federal immigration law is a complex, nuanced statutory scheme that cannot be addressed quickly or in a cursory fashion. Due to the myriad complexities and the sheer volume of cases, federal authorities themselves simply are unable to address all immigration cases that arise. Instead, they have chosen to prioritize and address only the

most serious crimes. (Motion for Injunction, p. 7-8). Historically, Arizona's local law enforcement officers have similarly prioritized their contacts due to overwhelming volume. In 2009, for example, the Tucson Police Department alone recorded 36,821 instances where people were arrested and immediately released in the field rather than being taken into custody. (Cross-Claim of City of Tucson,[3] ¶38). The same pattern of prioritization is apparent with regard to local law enforcement contacts with individuals who pose immigration concerns. Of all contacts made by more than 12,000 local law enforcement officers in Arizona, only 1,283 cases were referred to a unit of ICE designed specifically to respond to requests for assistance from local law enforcement officers. (Motion for Injunction, p. 23 n.16)

SB 1070 demands far more from federal and local law enforcement officers. It *requires* that local law enforcement officers check the immigration status of *every* person with whom they come into contact when there is reasonable suspicion to believe the person is unlawfully present in the United States. A.R.S. §11-1051(b). Furthermore, any person arrested may not be released until his immigration status is determined. *Id*.

This statutory scheme flies in the face of current state and federal practices that have been shaped by decades of case law and practical considerations. State authorities, who are already required to release many persons following arrest, will be forced to take into custody a veritable flood of people with immigration concerns while they await checks by federal authorities. In turn, federal authorities, who are trained specifically to address immigration issues, and are already unable to process all arrests, would be inundated with many more cases. These same federal authorities have already made clear that they would not be able to handle all cases that would be referred to them if SB 1070 came into effect. (Petition for Injunction, pp. 7, 33 n.30).

State and federal systems are already forced to prioritize cases, and SB 1070 will flood them with even more by requiring a check on immigration status in *every* case. Clearly such a procedure will require far lengthier seizures than would a mere

[3] City of Tucson filed a cross-claim in this Court in *Escobar v. Brewer, et al*., No. 10-CV-249-DCB on May 26, 2010)

investigatory detention. Such an institutional logjam will violate the constitutional rights of all persons seized under SB 1070. The Fourth Amendment permits limited seizures based on the reduced standard of reasonable suspicion, but probable cause is still required to justify a *de facto* arrest. Accordingly, the justification of mere reasonable suspicion contemplated by SB 1070 is inadequate, and the statute is unconstitutional.

Putting the cart before the horse: SB 1070 manufactures cause

Individuals are entitled to Fourth Amendment protection as they walk and drive the streets of Arizona. *Terry*, 392 U.S. at 9. The question here is whether SB 1070 can be enforced without violating those individuals right to personal security with unreasonable searches and seizures. *Id.* SB 1070 cannot be enforced without violating the Fourth Amendment, for the following three reasons: (1) it makes it a crime for individuals to refuse to answer police questions and produce identification during an investigatory stop; (2) regardless of the "lip service" to the constitution in HB 2162 that prohibits racial profiling, it is impossible to obtain reasonable suspicion of unlawful presence without relying primarily on race and national origin; and (3) it requires police to detain individuals longer than what is permissible to inquire about and verify immigration status.

First, SB 1070 criminalizes the failure to produce identification upon police request, the exact type of law that was refuted in *Brown* and *Kolender*. As Justice Brennan noted in his *Kolender* concurrence, states cannot avoid the Fourth Amendment by criminalizing the refusal to listen to or answer police questions or to produce identification. 461 U.S. at 365-67. Not only does Arizona seek to criminalize the failure to produce identification, but the failure to answer questions about immigration status could be used as proof of unlawful presence.

Second, SB 1070 is unworkable because it is impossible to gain reasonable suspicion of unlawful presence during a *Terry* stop without relying on the disfavored factors of race, class and language. That HB 2162 adds a subsection disclaiming racial profiling provides no relief to the multitudes of legally-present individuals who will

inevitably be racially profiled. Finally, SB 1070 is not merely a stop-and-identify statute similar to that upheld in *Hiibel*. Instead, it requires police to verify immigration status before releasing a detainee. The required immigration questioning violates the constitutional rules set forth in *Caballes*, *Royer* and *Johnson*, by altering the nature of the stop and prolonging it longer than necessary. In effect, it requires police to *de facto* arrest persons without probable cause, in violation of the Fourth Amendment.

CONCLUSION

For these reasons, AACJ requests that this Court grant the Plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 18th day of June, 2010

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CERTIFICATE OF SERVICE

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