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18 FOR THE DISTRICT OF ARIZONA

19 Valle del Sol, *et al.*  
20  
21 Plaintiffs,  
22 v.  
23 Michael B. Whiting, *et al.*,  
24 Defendants.

CASE NO. CV-10-01061-PHX-SRB

**PLAINTIFFS' PROPOSED MOTION  
FOR PRELIMINARY INJUNCTION  
AND MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
(ORAL ARGUMENT REQUESTED)**

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1 Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Valle del Sol, *et al.*  
2 (“Plaintiffs”) hereby move for a preliminary injunction enjoining all Defendants from  
3 enforcing § 2(B) of Arizona Senate Bill 1070 (“SB 1070”), and from enforcing A.R.S. §  
4 13-2929, as enacted by § 5 of SB 1070.

### 5 INTRODUCTION

6 In *Arizona v. United States*, the Supreme Court addressed the preemption claims  
7 that the United States brought against four sections of S.B. 1070—§§ 3, 5(C), 6, and  
8 2(B)—in this Court. No. 11-182, \_\_\_ U.S. \_\_\_ (June 25, 2012) (slip op. available at  
9 <http://www.supremecourt.gov/opinions/11pdf/11-182b5e1.pdf>). The Supreme Court  
10 affirmed this Court’s injunction against §§ 3, 5(C), and 6. On the fourth provision—§  
11 2(B)—the Supreme Court found that an injunction was not appropriate based on the record  
12 before it, but explicitly preserved the possibility that § 2(B) could be enjoined in another  
13 action, and identified clear boundaries that § 2(B) may not lawfully cross.

14 Plaintiffs brought many of the same preemption claims as the United States,  
15 including the claims that have invalidated §§ 3, 5(C), and 6. But this action involves  
16 additional claims, evidence, and irreparable injuries beyond what the Supreme Court had  
17 before it in *Arizona*. In light of those claims, evidence, and injuries and the Supreme  
18 Court’s guidance in *Arizona*, Plaintiffs bring this Motion for Preliminary Injunction, which  
19 presents three issues:

20 *First*, Plaintiffs seek a preliminary injunction against § 2(B) of S.B. 1070 on  
21 preemption and Fourth Amendment grounds. The Supreme Court stated that if police  
22 extend detentions for status verification or other immigration purposes under § 2(B), that  
23 will “raise constitutional concerns . . . [a]nd . . . disrupt the federal framework.” *Arizona*,  
24 slip op. at 2. The Court declined to “assume” that § 2(B) would be implemented in such a  
25 manner based on the record before it. *Id.* at 24. Plaintiffs here submit additional evidence  
26 demonstrating that § 2(B) will be implemented in precisely the manner that the Supreme  
27 Court deemed unconstitutional thereby irreparably harming any individuals subject to  
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1 illegal detentions. Given this new evidence, Plaintiffs can establish a likelihood of success  
2 or serious questions going to the merits of these claims. Therefore, § 2(B) can and should  
3 be preliminarily enjoined—at least until the Arizona Supreme Court definitively interprets  
4 the provision in a way that forecloses unconstitutional implementation, which it could do  
5 on certification from this Court.

6         *Second*, Plaintiffs seek a preliminary injunction against § 2(B) of S.B. 1070 based  
7 on their Equal Protection Clause claim. Plaintiffs are likely to succeed in demonstrating  
8 that § 2(B) violates the Equal Protection Clause because racial or national origin  
9 discrimination was a motivating factor in its enactment. Even though merits discovery has  
10 been stayed in this case, there is already substantial evidence in each of the categories  
11 enumerated in *Village of Arlington Heights v. Metropolitan Housing Development*  
12 *Corporation*, 429 U.S. 252 (1977), which is probative of discriminatory intent. And while  
13 the evidence on this motion supports a finding of discriminatory intent, at this stage this  
14 Court need only find a likelihood of success or serious questions going to the merits of this  
15 claim.

16         *Third*, Plaintiffs seek a preliminary injunction against A.R.S. § 13-2929 on  
17 preemption grounds. The Supreme Court’s analysis of §§ 3 and 5(C) further clarifies that  
18 § 13-2929, the state harboring crime created by § 5 of S.B. 1070, is both field and conflict  
19 preempted. Plaintiffs did not specifically seek a preliminary injunction against this portion  
20 of § 5 in their initial motion for a preliminary injunction, and the Court has not addressed  
21 field or conflict preemption challenges to this provision in either this case or in the U.S.  
22 case (No. 2:10cv1413). Given the unanimous disapproval of similar harboring laws by  
23 other federal courts and the Supreme Court’s recent decision, Plaintiffs are likely to  
24 succeed in showing that § 13-2929 is preempted.

25         The requested injunction would protect the individual Plaintiffs and members of  
26 Plaintiff organizations from irreparable harm, including the harms of unlawful detention  
27 and arrest under § 2(B) and § 13-2929; prosecution under § 13-2929; and the stigma  
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1 imposed by the racial and national origin discrimination underlying § 2(B). These harms  
2 to individuals and organizations were not before the Supreme Court in *Arizona*. The  
3 public interest will likewise be served by the suspension of provisions that threaten  
4 fundamental constitutional rights, disrupt the nation’s ability to speak with one voice on  
5 immigration matters, and embody racial and national origin animus. Accordingly,  
6 Plaintiffs respectfully request that the Court grant the preliminary injunction they seek. As  
7 to § 2(B), as discussed below, Plaintiffs alternatively request that the Court grant  
8 Plaintiffs’ request for certification of questions concerning § 2 to the Arizona Supreme  
9 Court and preliminarily enjoin § 2(B) pending the results of such certification.

### 10 **ARGUMENT**

11 Ordinarily, “[a] plaintiff seeking a preliminary injunction must establish that he is  
12 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
13 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in  
14 the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

15 Where “the balance of hardships tips sharply in the plaintiff’s favor,” the plaintiff need  
16 only “demonstrate[] . . . that serious questions going to the merits were raised” to justify  
17 an injunction. *Alliance of the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir.  
18 2011). Plaintiffs are entitled to a preliminary injunction under either standard.

#### 19 **I. Plaintiffs Are Likely To Succeed on the Merits**

##### 20 **A. Plaintiffs Are Likely to Prove That § 2(B) Is Preempted by Federal Law** 21 **and Violates the Fourth Amendment**

22 In *Arizona*, although the Supreme Court reversed the Ninth Circuit’s ruling on §  
23 2(B), the Supreme Court did not hold that § 2(B) is constitutional; indeed, the Court  
24 explicitly preserved the possibility that § 2(B) could be enjoined in another action.  
25 *Arizona*, slip op. at 24. And the Supreme Court outlined the showing that would be  
26 sufficient to hold § 2(B) preempted by federal law:

27 Detaining individuals solely to verify their immigration status would raise  
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1 constitutional concerns. *See, e.g., Arizona v. Johnson*, 555 U.S. 323, 333  
2 (2009); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (“A seizure that is  
3 justified solely by the interest in issuing a warning ticket to the driver can  
4 become unlawful if it is prolonged beyond the time reasonably required to  
5 complete that mission”). And it would disrupt the federal framework to put  
6 state officers in the position of holding aliens in custody for possible  
7 unlawful presence without federal direction and supervision. *Cf.* Part IV–C,  
8 *supra* (concluding that Arizona may not authorize warrantless arrests on the  
9 basis of removability). The program put in place by Congress does not  
10 allow state or local officers to adopt this enforcement mechanism.

11 *Id.* at 22.

12 Thus, if § 2(B) allows detention for immigration status verification, it is preempted  
13 by federal law *and* raises other constitutional concerns. And this Court has previously  
14 found in this case that both the first and second sentences of § 2(B) would, on their face,  
15 cause such detention, based on their plain language and the evidence in the record  
16 regarding the length of immigration status checks. Doc #447 at 35-38.

17 Without addressing that finding, however, the Supreme Court indicated that “§ 2(B)  
18 could be read to avoid these concerns,” because “state courts may conclude that, unless the  
19 person continues to be suspected of some crime for which he may be detained by state  
20 officers, it would not be reasonable to prolong [a] stop,” *Arizona*, slip op. at 22, and one  
21 could also read the second sentence of § 2(B) “as an instruction to initiate a status check  
22 every time someone is arrested, or in some subset of those cases, rather than as a command  
23 to hold the person until the check is complete no matter the circumstances.” *Id.* at 23. In  
24 sum, on the record before the Court, “[t]here [was] a basic uncertainty about what the law  
25 means and how it can be enforced.” *Id.* at 24.

26 In this action, and on this record, however, there is not a “basic uncertainty”  
27 regarding the implementation of § 2(B). Plaintiffs present evidence establishing that  
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1 multiple law enforcement agencies in the state intend to enforce § 2(B) in a way that  
2 crosses the line the Supreme Court drew. Thus, this Court need not “assume” based on the  
3 statutory language that § 2(B) will extend stops and detentions. Instead, evidence not in  
4 the record in *Arizona* shows that § 2(B) will extend detentions and Plaintiffs are,  
5 accordingly, substantially likely to prevail on their claims that § 2(B) is preempted and  
6 that it violates the Fourth Amendment.

7 Because Plaintiffs also meet the remaining elements of the preliminary injunction  
8 standard, *see infra* Part II, Plaintiffs are entitled to a preliminary injunction against § 2(B).  
9 At a minimum, this Court should obtain a definitive interpretation of § 2(B) as to the  
10 detention issue by certifying relevant questions to the Arizona Supreme Court, and issue a  
11 preliminary injunction to maintain the status quo pending the Arizona Supreme Court’s  
12 response.

13 **1. Arizona Law Enforcement Agencies Will Extend Detentions Under §**  
14 **2(B)**

15 The evidence establishes that, notwithstanding the Supreme Court’s ruling, Arizona  
16 law enforcement will interpret § 2(B) as requiring them to extend stops and other  
17 detentions beyond when they would ordinarily conclude, solely for immigration-related  
18 purposes. As an initial matter, while the Supreme Court held that the language of § 2(B)  
19 could conceivably be interpreted not to require extended detentions, interpreting § 2(B) to  
20 mandate detention is the most natural reading of the statute. Indeed, that is how Arizona  
21 agencies have continued to interpret § 2(B). Nothing in the state’s newly reissued training  
22 materials on S.B. 1070 indicates that § 2(B) *cannot* be used to extend detentions solely for  
23 immigration purposes, nor do these materials set any limit on the length of time an  
24 individual can be held pending the results of immigration verification requests. *See Br. for*  
25 *Pls., United States v. Arizona*, No. 10-1413 (Doc. 64-5, Ex. 35) (transcript of AZ POST  
26 training video); Melissa Keaney Decl. (authenticating June 25, 2012 supplemental AZ  
27 POST training) (Ex. A). Moreover, in the short amount of time since the Supreme Court  
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1 ruled, multiple Arizona law enforcement officials have publicly stated that implementation  
2 of § 2(B) will in fact cause officers to detain individuals for immigration status verification  
3 when they would not otherwise have been detained.<sup>1</sup>

4 In a declaration submitted with this motion, Tucson Police Chief Roberto  
5 Villaseñor explains some of the problems posed by § 2(B) in detail, including the way that  
6 police operating under § 2(B) will extend detention solely for immigration purposes.  
7 Villaseñor Decl. ¶¶ 4-9 (Ex. D). In particular, Chief Villaseñor outlines two common  
8 scenarios in which § 2(B) will extend detentions. *Id.* ¶¶ 8-10. First, the Tucson Police  
9 Department currently makes approximately 36,000 “cite in lieu of detention” arrests per  
10 year. *Id.* ¶ 8. The Chief states that “[u]nder Section 2(B) if we cannot get immediate  
11 confirmation from federal officials of the immigration status of these suspects, we will  
12 have to extend their detentions in the field until we get a status determination from federal  
13 officials, or book them into jail to await these results. *Id.* Either situation will result in  
14 extended detention of thousands of individuals—even if it is for brief periods of time.” *Id.*  
15 ¶ 9.

16 Second, Chief Villaseñor expects that “status checks under Section 2(B) will  
17 operate the following way, both in my department and in other departments: once we make  
18 the request mandated under Section 2(B), we will wait to hear back from federal  
19 immigration officials before releasing the person.” *Id.* ¶ 10. That too will extend  
20 detentions, especially in light of the fact that the private cause of action authorized in §  
21 2(H) will put “Arizona law enforcement officers . . . under intense pressure to enforce the  
22 provisions of SB 1070,” undermining the effectiveness of protections that putatively  
23 safeguard constitutional rights. *Id.* ¶¶ 6-7.

24 Other Arizona law enforcement officials have also indicated that § 2(B) will extend  
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26 <sup>1</sup> Indeed, both this Court, *United States v. Arizona*, 703 F. Supp. 2d 980, 993-98 (D. Ariz.  
27 2010), and the Ninth Circuit, *United States v. Arizona*, 641 F.3d 339, 346-52 (9th Cir.  
28 2011), found that to be a natural interpretation of the statute. And, even in oral argument  
before the Supreme Court, the state repeatedly refused to represent that § 2(B) would not  
extend detentions in practice. Transcript of Oral Argument at 11, 14-15, 20, *Arizona v.*  
*United States*, No. 11-182, \_\_\_ U.S. \_\_\_ (June 25, 2012).

1 detentions for status verification. For example, Santa Cruz County Sheriff Antonio  
2 Estrada explained that § 2(B) “may result in detention of people while citizenship is  
3 clarified” and noted that some geographic regions in Arizona would be more susceptible to  
4 these extended detentions. Manuel C. Coppola, Locals Mixed on Court OK of ‘Show Me  
5 Your Papers’ Rule, Nogales International, June 26, 2012 (Ex. B-1); *see also* Brady  
6 McCombs, Fed Moves Will Limit SB 1070 Enforcement: Court Only Keeps Section  
7 Allowing Police to Stop Suspected Illegal Immigrants Homeland Security Will Not Pick  
8 Them Up Unless They Are Criminal, Arizona Daily Star, June 26, 2012 (Pima and Santa  
9 Cruz County Sherriffs will hold people for “a reasonable amount of time” for Border  
10 Patrol) (Ex. B-2). *See also* JJ Hensley, Arizona Agencies Prepare to Enforce SB 1070:  
11 Ariz. Police Training Helps Identify When ‘Reasonable Suspicion’ Exists’, Ariz.  
12 Republic, June 26, 2012 (Sergeant Tommy Thompson of the Phoenix Police Department  
13 indicating that one-hour roadside stops under § 2(B) are not out of the question) (Ex. B-3).

14       Indeed, at least one Arizona law enforcement official has not only indicated that  
15 stops will be prolonged, but has also indicated that he will use detentions under § 2(B) in  
16 ways that conflict with federal authority. Cochise County Sheriff Larry Dever indicated  
17 that his agency will extend detentions for immigration purposes even as to people that  
18 “ICE or Border Patrol won’t come get”; his agency will “take them to [federal authorities],  
19 dump them on their doorstep and say, you figure it out.” Sean Hannity, Arizona Law  
20 Enforcement Reacts to Supreme Court Immigration Ruling, White House Response, Fox  
21 News television broadcast, June 25, 2012 (Ex. B-4).

22       Finally, immediately after the Supreme Court decision, Maricopa County Sheriff  
23 Joe Arpaio indicated that he will look for ways to detain people that he suspects of  
24 violating immigration law: “[I]t will be interesting when we arrest someone . . . What will  
25 I do with them? Dump them on the street? . . . Let them go? . . . I don’t like to do that  
26 [because] that’s amnesty . . . I’m going to see what other options I have.” Neil Munro,  
27 Arpaio Looking for ‘A Way Around’ Obama Admin To Enforce State [immigration]  
28

1 Laws, The Daily Caller, June 27, 2012 (Ex. B-7). *See also* Erin Burnett, Outfront,  
2 Supreme Court Upholds Key Arizona Provision; Interview with Sheriff Joe Arpaio, CNN  
3 television broadcast, June 25, 2012 (“So what do we [law enforcement] do? We dump  
4 them on the streets even though they’re here illegally? . . . I have a couple ideas and I’ll  
5 face that issue when it comes up.” (Ex. B-6).

6 **2. Plaintiffs Are Substantially Likely to Prevail on Their Claim That § 2(B)**  
7 **Is Preempted by Federal Law**

8 Because, as explained above, § 2(B) will allow detention solely for immigration  
9 verification, *Arizona* explains that it “disrupt[s] the federal framework” and is not allowed  
10 by “the program put in place by Congress”—in other words, it is preempted. Slip op. at  
11 22. The Supreme Court’s disapproval of extended detention for verification under § 2(B)  
12 flows directly from its analysis sustaining the injunction against § 6, S.B. 1070’s  
13 warrantless arrest provision. In its § 6 analysis, the Supreme Court first explained that  
14 because ordinarily “it is not a crime for a removable alien to remain in the United States,”  
15 “the usual predicate for an arrest is absent” if the arrest is based on “nothing more than  
16 possible removability.” *Id.* at 15-16. Furthermore, federal law both “instructs when it is  
17 appropriate to arrest an alien during the removal process” and “specifies limited  
18 circumstances in which state officers may perform the functions of an immigration  
19 officer.” *Id.* at 16-17 (citing 8 U.S.C. §§ 1357(g)(1), 1103(a)(10), 1252c, 1324(c)). In  
20 authorizing arrest for having “committed a public offense that makes the person  
21 removable,” § 6 does not fall within any of those authorizations and “violates the principle  
22 that the removal process is entrusted to the discretion of the Federal Government.” *Id.* at  
23 18.

24 Detention solely for the purpose of obtaining immigration status verification under  
25 § 2(B) is even less justifiable than arrest under § 6 (which required at least probable cause  
26 of removability) and is even more clearly preempted under the Supreme Court’s analysis.  
27 *See id.* at 22 (citing § 6 portion of ruling and concluding that detention under § 2(B) for  
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1 status verification is barred by “[t]he program put in place by Congress”). Because, as  
2 explained above, the evidence shows that Arizona officials intend to enforce § 2(B) in a  
3 way that extends detentions solely for verification purposes, Plaintiffs are substantially  
4 likely to prevail on their preemption claim against § 2(B).

5 **3. Plaintiffs Are Substantially Likely to Prevail on Their Claim That § 2(B)**  
6 **Violates the Fourth Amendment**

7 In addition to being preempted, by allowing detention for immigration status  
8 verification § 2(B) also violates the Fourth Amendment. In *Arizona*, the Supreme Court  
9 stated that such detention “would raise constitutional concerns,” the Supreme Court cited  
10 two Fourth Amendment cases, *Arizona v. Johnson*, 555 U.S. 323, 333 (2009), and *Illinois*  
11 *v. Caballes*, 543 U.S. 405, 407 (2005), and quoted *Caballes*’s holding that “[a] seizure that  
12 is justified solely by the interest in issuing a warning ticket to the driver can become  
13 unlawful if it is prolonged beyond the time reasonably required to complete that mission.”  
14 *Arizona*, slip op. at 22.

15 As the Court’s statement regarding “constitutional concerns” suggests, detaining  
16 individuals under § 2(B) solely for immigration status verification would violate bedrock  
17 Fourth Amendment principles. An initially lawful “seizure becomes unlawful when it is  
18 ‘more intrusive than necessary.’” *Ganwich v. Knapp*, 319 F.3d 1115, 1122 (9th Cir. 2003)  
19 (quoting *Florida v. Royer*, 460 U.S. 491, 504 (1983)). Accordingly, “[t]he scope of a  
20 detention must be carefully tailored to its underlying justification,” *id.* (internal quotation  
21 omitted), and a “detention must . . . last *no longer* than is necessary to effectuate the  
22 *purpose of the stop.*” *Royer*, 460 U.S. at 500 (emphasis added); *accord Johnson*, 555 U.S.  
23 at 333 (inquiries into matters unrelated to the legitimate justification for a stop may not  
24 “measurably extend the duration of the stop”); *Caballes*, 543 U.S. at 407; *United States v.*  
25 *Sharpe*, 470 U.S. 675, 686 (1985). Because “the usual predicate for an arrest is absent”  
26 where detention is “based on nothing more than possible removability,” *Arizona*, slip op.  
27 at 16, detaining individuals solely for immigration investigation under § 2(B) violates the  
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1 Fourth Amendment.

2 Moreover, Plaintiffs here present irreparable injuries to individuals and  
3 organizations from Fourth Amendment violations that were not before the Supreme Court  
4 in *Arizona*. *Arizona*, slip op. at 19-24 (no discussion of irreparable injury or balance of  
5 hardships to individuals or organizations); *See also supra* II (discussing irreparable injury  
6 and balance of hardship specific to Plaintiffs). In addition to establishing likelihood of  
7 success, Plaintiffs have raised “serious questions” going to the merits of their Fourth  
8 Amendment claims and have demonstrated that the balance of hardships tips sharply in  
9 their favor. *See Alliance for the Wild Rockies*, 632 F.3d at 1135.

10 **4. At a Minimum, the Court Should Certify the Question of Whether §**  
11 **2(B) Authorizes Additional Detention to the Arizona Supreme Court**

12 Plaintiffs are entitled to a preliminary injunction against § 2(B) of S.B. 1070  
13 because law enforcement agencies will interpret the Section the same way that this Court  
14 and the Ninth Circuit have previously interpreted it—*i.e.*, as authorizing additional  
15 detention for immigration verification purposes. Plaintiffs recognize, however, that the  
16 Supreme Court noted that the Arizona state courts have not yet provided a “definitive  
17 interpretation” of the provision, which could clearly establish that § 2(B) does *not* allow  
18 such detention in spite of its plain language. *Arizona*, slip op. at 24. This Court can  
19 request the definitive interpretation that the Supreme Court lacked by certifying relevant  
20 questions to the Arizona Supreme Court.<sup>2</sup> *See Arizonans for Official English v. Arizona*,

21 \_\_\_\_\_  
22 <sup>2</sup> In the event that this Court decides to certify to the Arizona Supreme Court, Plaintiffs  
23 respectfully propose the following question: “Does § 2(B) of S.B. 1070 authorize law  
24 enforcement officers to detain an individual, including by extending an individual’s  
25 detention beyond the point he or she would otherwise be released, in order to determine or  
26 verify the individual’s immigration status?” Should the Court decide to seek the guidance  
27 of the Arizona Supreme Court as to § 2(B), it would also be appropriate, as a matter of  
28 judicial economy, to certify a similar question as to § 2(D), namely: “Does § 2(D) of S.B.  
1070 authorize law enforcement officers to detain an individual, including by extending an  
individual’s detention beyond the point he or she would otherwise be released, based on  
‘verification’ that the individual is ‘unlawfully present’?” Plaintiffs include the question  
regarding § 2(D) because, while not currently enjoined, it is also challenged in this



1 520 U.S. 43, 76 (1997) (“Certification procedure . . . allows a federal court faced with a  
 2 novel state-law question to put the question directly to the State’s highest court, reducing  
 3 the delay, cutting the cost, and increasing the assurance of gaining an authoritative  
 4 response.”); *see also* A.R.S. § 12-1861 (providing that the Arizona Supreme Court may  
 5 answer questions of law certified to it by a United States District Court, where there are  
 6 issues of Arizona state law that may be determinative of the cause pending with the United  
 7 States District Court, and where there is no controlling precedent in the decisions of the  
 8 Arizona Supreme Court and intermediate appeals courts of Arizona).

9 Because the statute will likely be applied in an unconstitutional manner in the  
 10 absence of a definitive ruling limiting § 2(B), if the Court decides to certify, it should  
 11 preliminarily enjoin § 2(B) on these grounds pending the state court’s response.

12 **B. Plaintiffs Are Likely to Prove That § 2(B) Violates the Equal Protection**  
 13 **Clause**

14 Plaintiffs are likely to succeed on their equal protection challenge to SB 1070. As  
 15 the Supreme Court held in *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429  
 16 U.S. 252 (1977), a plaintiff challenging a facially race-neutral law as intentionally  
 17 discriminatory is not required to prove that “the challenged action rested solely on racially  
 18 discriminatory purposes.” *Id.* at 265. Rather, Plaintiffs need only show that unlawful  
 19 discrimination was “a ‘substantial’ or ‘motivating’ factor behind enactment” of S.B. 1070.  
 20 *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). Once Plaintiffs make a showing of  
 21 discriminatory intent, the burden shifts to Defendants “to demonstrate that the law would  
 22 have been enacted without this factor.” *Id.*

23 *Arlington Heights* identified a number of factors that constitute highly relevant and  
 24 admissible circumstantial evidence of discriminatory intent. 429 U.S. at 266-68. These  
 25 factors include whether: (1) the legislative history, especially contemporaneous statements  
 26

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27 litigation and presents a similar question of statutory interpretation with respect to  
 28 detention as that presented by § 2(B).

<sup>3</sup> While this motion focuses on Section 2(B)’s discriminatory intent and disproportionate

1 by members of the legislature, evidences discrimination; (2) “the historical background” or  
2 “sequence of events leading up to the challenged decision” evidences discrimination; (3)  
3 the challenged decision has a disproportionate impact on a protected group; and (4) there  
4 were substantive or procedural departures from usual decision making criteria. *Id.*; *see*  
5 *also Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 703 (9th  
6 Cir. 2009). These factors are neither exhaustive nor mandatory, and courts consider them  
7 as a whole in determining whether discrimination was a motivating factor for enactment of  
8 the challenged law. *See Arlington Heights*, 429 U.S. at 268; *Tsombanidis v. West Haven*  
9 *Fire Dep’t*, 352 F.3d 565, 580 (2d Cir. 2003). It is not necessary to establish each factor to  
10 prevail on a discrimination claim. *Cent. Alabama Fair Hous. Ctr. v. Magee*, 835 F. Supp.  
11 2d 1165, 1186 (M.D. Ala. 2011).

12 The *Arlington Heights* factors support a finding of intentional discrimination here.  
13 *Cf. Magee*, 835 F. Supp. 2d at 1197 (finding discriminatory intent motivated Alabama law  
14 resembling S.B. 1070). Discriminatory animus permeated the sequence of events leading  
15 up to the passage of S.B. 1070, informed legislators’ views of the law, and ultimately  
16 suffused the entire legislation with anti-Latino and anti-Mexican bias. Key legislators  
17 relied on invented “facts” about the costs and dangers of “illegal immigration,” conflated  
18 Latinos generally or certain U.S. citizen children with “illegal aliens,” and used thinly  
19 veiled code words that, in context, plainly reveal a discriminatory motive. In operation, §  
20 2(B) will disproportionately affect persons of color and especially Latinos and individuals  
21 of Mexican origin, as population estimates make clear.<sup>3</sup> And, the legislature intended §  
22 2(B) to implement state-wide Maricopa County practices that had repeatedly resulted in  
23

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24 <sup>3</sup> While this motion focuses on Section 2(B)’s discriminatory intent and disproportionate  
25 impact on Latinos and individuals of Mexican national origin, Plaintiffs maintain that §  
26 2(B) also discriminates against other communities of color in Arizona, including its  
27 diverse Asian American population that is fast growing and currently makes up about 3.3  
28 percent of the state’s population. U.S. Census Bureau, Arizona QuickFacts (Ex. F-6).  
Plaintiffs will continue to advance their equal protection claim on behalf of all  
communities of color as the evidence in the case develops.

1 racial profiling complaints and investigations. Moreover, Arizona’s decision to enact S.B.  
2 1070 substantively departed from the legislature’s usual decision-making on public safety  
3 issues by restricting police discretion and by enacting an unprecedented private citizen  
4 cause of action against police departments regarding their allocation of enforcement  
5 resources. Plaintiffs therefore seek a preliminary injunction of § 2(B) on equal protection  
6 grounds.

7 **1. The Legislative History of S.B. 1070 Demonstrates a Discriminatory Intent.**

8 As the Supreme Court stated in *Arlington Heights*, “contemporary statements by  
9 members of the decisionmaking body” constitute “highly relevant” circumstantial  
10 evidence of discriminatory intent. 429 U.S. at 267. Thus, virtually every case considering  
11 an equal protection challenge to a legislative act considers the contemporaneous  
12 statements of public officials, be they in legislative debates, statements to the press, or  
13 campaign materials. *See Magee*, 835 F. Supp. 2d at 1187 n.17 (noting that  
14 “contemporaneous statements by individual decisionmakers are relevant to determining  
15 whether race was a motivating factor for the decision,” and, in fact, that “where the court’s  
16 inquiry centers on finding an improper purpose, looking into legislators’ motives and  
17 comments . . . is now the norm, not the exception” (collecting cases)). Plaintiffs need not  
18 show discriminatory motivation by every member, or by a majority, of the decision-  
19 making body. *See Hunter*, 471 U.S. at 228. And statements made by the sponsor or  
20 author of a law carry particular weight in establishing legislative intent. *Brock v. Pierce*  
21 *County*, 476 U.S. 253, 263 (1986); *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S.  
22 548, 564 (1976).

23 The legislative history of S.B. 1070, and in particular the statements by its  
24 cosponsors, Senator Pearce and Representative Melvin, demonstrate that racial and  
25 national origin discrimination was a motivating factor for the enactment of S.B. 1070 and  
26 § 2(B) specifically.  
27  
28

1                   **i. Legislators routinely relied on false or misleading evidence in**  
2                   **promoting S.B. 1070, strongly suggesting that their stated reasons**  
3                   **were pretext for unlawful discrimination.**

4                   Courts routinely consider misleading statements as evidence of invidious  
5                   discrimination, as it demonstrates that the stated justifications for legislation are mere  
6                   pretext. *See, e.g., Doe v. Village of Mamaroneck*, 462 F. Supp. 2d 520, 549, 552  
7                   (S.D.N.Y. 2006) (holding that exaggerated, factually unsupported claims regarding the  
8                   number and problems caused by targeted day laborers were “negative and stigmatizing,”  
9                   providing “some evidence of racism”); *Greater New Orleans Fair Hous. Action Ctr.*, 648  
10                  F. Supp. 2d 805, 814-19 (E.D. La. 2009) (evaluating the city’s proffered justifications for  
11                  its actions, finding them factually unsupported, and concluding that the challenged  
12                  governmental action therefore was pretextual and an invidious motive could be inferred)  
13                  (“*GNOFHAC II*”).

14                  Legislative supporters of SB 1070 cited false or misleading information about  
15                  undocumented immigrants to justify passage of the law. In support of S.B. 1070,  
16                  legislators relied on assertions about the purported criminality or the alleged costs to  
17                  Arizona due to undocumented immigration. But, as explained below, those legislators  
18                  lacked any factual support for those assertions and indeed, some of these legislators’  
19                  statements were based on information that had been widely discredited.<sup>4</sup>

20                  During the legislative debates, Senator Pearce and others routinely cited fabricated  
21                  “statistics”—particularly about the alleged criminality of undocumented immigrants—to  
22                  justify the need for S.B. 1070, though they knew that the data was misleading at best, and,  
23                  in several instances, outright false. Senator Pearce, for example, claimed that “Phoenix  
24                  number two in the world in kidnappings . . . the home invasion, carjacking, [and] identity  
25                  \_\_\_\_\_

26                  <sup>4</sup> Other Arizona public officials, including Governor Jan Brewer, have similarly relied on  
27                  alleged “facts” in order to support their positions on immigration. *See* Brad  
28                  Knickerbocker, Jan Brewer Corrects the Record on Headless Bodies in the Desert,  
                Christian Science Monitor, Sept. 4, 2010 (discussing Gov. Brewer’s discredited claim that  
                headless bodies had been found in the Arizona border) (Ex. B-28).

1 theft capital of the nation.” Test. of Sen. Pearce, Debate on S.B. 1070 in H. Military  
2 Affairs and Pub. Safety Comm., Mar. 31, 2010 (Ex. C-3 at 11).<sup>5</sup> The claim about  
3 kidnapping had been made before, but as Senator Pearce knew,<sup>6</sup> there was no factual basis  
4 for it. *See, e.g.,* McCain Says Phoenix is the Second Kidnapping Capital in the World, St.  
5 Petersburg Times, June 27, 2010 (investigating the claim in depth, and finding “no  
6 evidence that it’s accurate, or even close”) (Ex. B-30). Similarly, the claims about home  
7 invasions, carjackings and identity theft were factually unsupported and factually  
8 unsupportable—which Senator Pearce also knew. *See* Phil Gordon, Op-Ed., Time to End  
9 Sen. Pearce’s Reckless Misstatements, Ariz. Republic, June 27, 2009 (Ex. B-32)  
10 (responding to a Pearce op-ed, and stating: “I know how it works for you, senator. If you  
11 told people the real numbers—verified by the FBI—you’d have no ‘hot-button issue’ and  
12 would risk losing your political base. But Arizonans expect and trust their elected officials  
13 to speak the truth.”).

14           Legislators also used false statistics about murders committed by undocumented  
15 immigrants, with Senator Pearce claiming that “60 % of the homicides in Phoenix involve  
16 illegal aliens,” Test. of Sen. Pearce, Debate on S.B. 1070 in H. Military Affairs and Pub.  
17 Safety Comm., Mar. 31, 2010 (Ex. C-3 at 9-10); and that “‘67 percent’ of law enforcement  
18 officers killed in ‘the last few years’ have been murdered by illegal aliens.”<sup>7</sup> *Id.* Senator  
19 Huppenthal made a similar claim at the press conference to introduce S.B. 1070, stating  
20

21 <sup>5</sup> Although Arizona’s legislative debates are not officially transcribed, these are archived in  
22 video form on the Arizona Legislature’s website. *See* Ariz. Legislature’s Live  
23 Proceedings, [http://azleg.granicus.com/ViewPublisher.php?view\\_id=17](http://azleg.granicus.com/ViewPublisher.php?view_id=17). Plaintiffs have  
24 had selected portions of these official videos professionally transcribed and true and  
25 accurate copies of those transcriptions are provided as exhibits to this filing.

26 <sup>6</sup> *See* E.J. Montini, *Is Phoenix Really the ‘Kidnapping Capital’?*, Ariz. Republic, July 12,  
27 2009 (noting that the author had “left word with Pearce asking where he got his statistics  
28 [about the kidnapping claim] but he hasn’t gotten back to me”) (Ex. B-29). *See also*  
Russell Pearce, Op-Ed., *Let’s Put an End to Illegal-Migrant Catch and Release*, Ariz.  
Republic, June 25, 2009 (“Phoenix runs second in the world in kidnappings and third in  
the United States for violence. Arizona has become the home-invasion, carjacking,  
identity-theft capital of the nation. These are not statistics Arizona should be famous  
for.”) (Ex. B-31).

<sup>7</sup> *See also* Stephen Lemons, Russell Pearce Scores Another Win Against Hispanics, Most  
Local Activists Are No-Shows, Only Daniel Patterson Shines, Phoenix New Time Blogs,  
Feb. 25, 2010 (Ex. B-33).

1 that that undocumented immigrants “ha[ve] murdered over 50 percent of [Arizona’s]  
 2 police officers.”<sup>8</sup> As the senators knew, their claims were unsupported,<sup>9</sup> inflammatory,  
 3 and could not have been drawn from actual data because neither the Phoenix police  
 4 department nor the FBI collects information on the immigration status of alleged  
 5 perpetrators<sup>10</sup>—a fact Senator Pearce explicitly acknowledged. *See* Email from Sen.  
 6 Pearce dated Oct. 23, 2009 (concluding email by stating that “NO GOVERNMENT  
 7 AGENCY TRACKS CRIMES BY ILLEGALS – NOT EVEN ATTACKS ON POLICE”)  
 8 (Ex. E-13).

9 Senator Pearce also claimed that “a congressional report out called ‘Drawing a Line  
 10 in the Sand’ by Congressman King” indicated that “9,000 Americans each year [are] killed  
 11 at the hands of illegal aliens. 25 a day, 12 by stabbing and shooting [and] 13 might be  
 12 DUI-related crimes.” *Test. of Sen. Pearce, H. Military Affairs and Pub. Safety Comm.,*  
 13 *Mar. 31, 2010 (Ex. C-3 at 5).* The report Senator Pearce was apparently referencing,<sup>11</sup>  
 14 however, makes no mention of any statistics even remotely resembling those cited. These  
 15 statistics, moreover—which Pearce frequently cited<sup>12</sup>—are implausible on their face, as  
 16 has been pointed out by the former deputy administrator of the Department of Justice’s  
 17 Office of Juvenile Justice and Delinquency Prevention. Robin Lubitz, *Op-Ed., Expert*  
 18 *Questions Pearce’s Numbers, Ariz. Republic, June 26, 2009 (Ex. B-36)* (“[N]obody knows  
 19 how many crimes are committed by illegal aliens because the information is not tracked. . .  
 20

21 <sup>8</sup> Stephen Lemons, *The MCSO Retaliates Against a Guadalupe Activist; Plus, John*  
 22 *Huppenthal Spews Bogus Stats During a Prejudice Party at the Arizona Capitol, Phoenix*  
 23 *New Time Blogs, Oct. 29, 2009 (Ex. B-34).*

24 <sup>9</sup> *See, e.g.,* Lemons, *Russell Pearce Scores Another Win, supra* note 7 (noting that when  
 25 asked to substantiate his claim, Pearce “could offer no source”); Lemons, *MCSO*  
 26 *Retaliates, supra* note 8 (noting that when asked to substantiate the statistic, Senator  
 27 Huppenthal was unable to do so).

28 <sup>10</sup> *See* Stephen Lemons, *Russell Pearce Spews Bogus Crime Stats on CNN; SB 1070 Goes*  
 to Final Read Monday, *Phoenix NewTimes Blog, Apr. 16, 2010 (Ex. B-35).*

<sup>11</sup> Majority Staff of H. Comm. on Homeland Sec. Subcomm. on Investigations, *109th*  
 Cong., *A Line in the Sand: Confronting the Threat at the Southwest Border, Oct. 2006,*  
 available at [http://www.house.gov/sites/members/tx10\\_mccaull/pdf/Investigaions-Border-Report.pdf](http://www.house.gov/sites/members/tx10_mccaull/pdf/Investigaions-Border-Report.pdf).

<sup>12</sup> *See, e.g.,* Pearce, *Let’s Put an End to Illegal-Migrant Catch and Release, supra* note 16  
 (citing the same statistics, but without attributing them to any source).

1 . Pearce’s statement that illegal aliens commit 12 murders each day by ‘stabblings and  
2 shootings’ would mean that they are responsible for over one-fourth of all homicides  
3 committed in the United States. This is an amazing assertion, which leads one to suspect  
4 that Pearce is either making up data or relying on non-objective studies from biased  
5 interest groups.”).

6 Senator Pearce also cited specious statistics regarding the number of undocumented  
7 immigrant sex offenders contained in a self-published, non-peer reviewed “study” by  
8 Violent Crimes Institute. Test. of Sen. Pearce, H. Military Affairs and Pub. Safety  
9 Comm., Mar. 31, 2010 (Ex. C-3 at 5). *See also* Deborah Schurman-Kauflin, *The Dark*  
10 *Side of Illegal Immigration: Nearly One Million Sex Crimes Committed by Illegal*  
11 *Immigrants in the United States* (2006) (Ex. B-45). Here again, the implausibility of these  
12 “statistics”—which have been thoroughly debunked<sup>13</sup>—are obvious, and justifying any  
13 legislation on such grounds demonstrates pretext.

14 **ii. Legislators repeatedly conflated Latinos, Spanish-speaking**  
15 **individuals, and the children of unauthorized immigrants with**  
16 **“illegal aliens,” thereby demonstrating that their attempts to**  
17 **punish and harass “illegal aliens” were also directed at these**  
18 **larger groups**

19 Particularly relevant is evidence that, in discussing the need for the challenged  
20 action, the legislative body conflated the protected group (such as Latinos or Mexicans or  
21 U.S.-citizen children of undocumented immigrants) with the ostensible target  
22 (undocumented immigrants) of the legislation. In *Magee*, for example, the court found it  
23

24 <sup>13</sup> *See, e.g.*, Gustavo Arellano, Heard Mentality, Phoenix New Times, vol. 32, issue 285  
25 June 14, 2009 (“Schurman-Kauflin’s based her findings on a 2005 Government  
26 Accountability Office survey that showed 2 percent of illegals in federal, local or state  
27 prisons had committed a sex crime. She then applied that percentage to the illegal  
28 immigrant population at large—voilà! Instant endemic perversity! This statistical sleight-  
of-hand, however, withers by employing the very stats she uses. GAO data for 2003 (the  
most recent year available) showed about 308,000 criminal aliens (legal as well as illegal  
immigrants) were in American prisons; they constitute about 3 percent of the nation’s 12  
million illegal immigrants. If only 2 percent of incarcerated illegals committed a sex  
crime, then it’s intellectually misleading to arrive at the 240,000 figure.”) (Ex. B-37).

1 probative that one of the chief sponsors of the challenged legislation “conflated race and  
2 immigration status,” and that such conflation was racial code supporting a finding of  
3 discriminatory intent. 835 F. Supp. 2d at 1192; *see also id.* (discussing how other  
4 supporters of the challenged legislation “frequently conflated illegal immigration and  
5 Hispanics when discussing the ills to be remedied by [the law]”).

6 During the legislative proceedings on S.B. 1070, legislators frequently conflated  
7 “Hispanic” or “Mexican” with “undocumented,” as if members of one of the former two  
8 groups were necessarily members of the last. During a committee hearing, for example,  
9 Senator Pearce asserted that Officer Martin had been murdered by undocumented  
10 immigrants, and in an email Senator Pearce claimed that Officer Eggle had been killed by  
11 undocumented immigrants. *See* Test. of Sen. Pearce, H. Military Affairs & Pub. Safety  
12 Comm., Mar. 31, 2010 (Exs. C-3 at 4, E-14). Although there is evidence that Eggle was  
13 killed by Mexicans, and Martin by a Latino, there is *no* basis to conclude that the  
14 perpetrators were undocumented immigrants. *See* Huerta Decl. (Ex. G). Senator Pearce  
15 made the same and other race- and national origin-based assumptions in asking his fellow  
16 legislators to support SB 1070. *Compare* Email from Sen. Pearce dated June 30, 2009  
17 (asserting that various individuals had been killed by undocumented immigrants) (Ex. E-  
18 14) *with* Huerta Decl. (explaining that there is no evidence that several of the alleged  
19 perpetrators mentioned by Senator Pearce were undocumented) (Ex. G).

20 Similarly, a draft letter to be signed by Senators Pearce and Karen Johnson, decried  
21 “a huge protest march by 20,000 Hispanics,” asserting without any basis other than the  
22 marchers’ race that “[m]ost of the protestors are not legal citizens, legal residents, or even  
23 legal visitors in our country. They are illegal. They have no right to request or demand  
24 anything.” Email from Sen. Pearce dated Apr. 6, 2006 (Ex. E-15)<sup>14</sup>. Pearce repeated his  
25 race-based assumption several times over the years. *See, e.g.*, Email from Sen. Pearce

26  
27 <sup>14</sup> *See* Yvonne Wingett and Susan Carrol, 20,000 in Phoenix Rally for Migrants, Ariz.  
28 Republic, Mar. 25, 2006 (“Tens of thousands of Latinos marched up and down 24th Street  
on Friday, protesting federal legislation that would criminalize undocumented  
immigrants.”) (Ex. B-38).



1 dated May 26, 2009 (emailing an article about the arrests of Hispanic gang members with  
2 the subject line: “Hundreds of Hispanic gang members arrested in L.A. for targeting Black  
3 people (worse, is most of these Hispanic gang members are ILLEGAL aliens) Welcome to  
4 the new United States of Mexico”) (Ex. E-16); Email from Sen. Pearce dated Feb. 15,  
5 2009 (asserting that “vast majority” of Hispanic protesters were “illegal aliens”) (Ex. 17);  
6 Email from Sen. Pearce dated June 20, 2006 (same) (Ex. E-18). In another email, Senator  
7 Pearce asserted, *inter alia*: “I’m a racist because . . . I don’t want to be taxed to pay for a  
8 prison population comprised of mainly Hispanics, Latinos, Mexicans or whatever else you  
9 wish to call them . . . I object to having to pay higher sales tax and property tax to build  
10 more schools for the illegitimate children of illegal aliens. . . [I] want to deny citizenship  
11 to all anchor babies born in this country pre 2006 and here after . . . I object to corporation  
12 and municipalities spending billions to translate everything in Spanish.” Email from Sen.  
13 Pearce dated Dec. 14, 2006 (Ex. E-20).

14 An email from a member of Senator Karen Johnson’s staff to Senators Pearce and  
15 Johnson is especially blatant in conflating race and “illegal” status: it reported that  
16 “yesterday (Thursday) was the day that the landscapers come into my subdivision to cut  
17 the grass and clean up the park. The crew has always been totally Hispanic. Yesterday  
18 there were two men who were obviously NOT Hispanic –very white and very American  
19 looking—like college kids. Hooray! It looks like the illegals are starting to depart.”  
20 Email to Sens. Pearce & Johnson dated Jul. 6, 2007 (Ex. E-20).

21 Another example of this discriminatory conflation is the repeated claim of Senator  
22 Al Melvin, who co-sponsored the bill, that “education, incarceration and medication” for  
23 undocumented immigrants cost Arizona taxpayers \$2 billion per year, referring to “well  
24 documented” information on the Federation for American Immigration Reform’s  
25 (“FAIR”) website.<sup>15</sup> See Test. of Sen. Melvin, Final Reading of S.B. 1070, Sen. Floor,  
26 Apr. 19, 2010 (Ex. C-6 at 15); Test. of Sen. Melvin, S. Pub. Safety & Human Serv.

27  
28 <sup>15</sup> Senator Pearce made a similar claim. See Email from Sen. Pearce to Legislators dated  
June 30, 2009 (Ex. E-14).

1 Comm., Jan. 20, 2010 (Ex. C-1 at 9). But Senator Melvin did not acknowledge or explain  
2 what had been pointed out publicly by others:<sup>16</sup> that many of the “undocumented  
3 immigrants” he blamed for costing Arizona taxpayers billions are in fact native-born  
4 United States citizens. Indeed, the costs associated with educating U.S.-citizen children  
5 constitute the majority of the total educational costs (60 percent of the total) Senator  
6 Melvin cited.<sup>17</sup> See Jack Martin & Eric A. Ruark, Fed’n for Am. Immigration Reform,  
7 The Fiscal Burden of Illegal Immigration on United States Taxpayers 45 (2010).  
8 Moreover, Senator Melvin’s statistics also assume, without support, that a large majority  
9 of English as a Second Language (“ESL”) students “may be assumed to be children of  
10 either legal or illegal immigrants with a predominance of children of illegal aliens”—at  
11 least in part because the fact that the native language of most ESL students is Spanish.<sup>18</sup>  
12 See Jack Martin, Fed’n for Am. Immigration Reform, *Limited English Proficiency*  
13 *Enrollment and Rapidly Rising Costs* 2 (2007); Martin & Ruark, *supra*, at 48.<sup>19</sup> Thus, the  
14 alleged “cost” of illegal immigration Melvin presented was premised, in significant part,  
15 on assumptions about the immigration status of Spanish speakers, their parents, and the  
16 cost of educating U.S. citizens.

17 As has been the case elsewhere, “the combination of a lack of evidence [supporting

18 \_\_\_\_\_  
19 <sup>16</sup> See, e.g., Jim Small, Arizona State Senator Russell Pearce: Stemming Illegal  
20 Immigration is Arizona’s Top Priority, *Ariz. Capitol Times*, Oct. 21, 2009 (Ex. B-39); see  
21 also Terry Greene Sterling, Russell Pearce and Other Illegal-Immigration Populists Rely  
22 on Misleading, Right-Wing Reports to Scapegoat Immigrants and to Terrify Penny-  
23 Pinched Americans, *Phoenix New Times*, Dec. 2, 2010 (Ex. B-40).

24 <sup>17</sup> FAIR has produced multiple reports on the alleged costs of undocumented immigrants  
25 to Arizona over the last several years. See, e.g., <http://www.fairus.org/issue/the-costs-to-local-taxpayers-for-illegal-aliens>; <http://www.fairus.org/publications/the-costs-of-illegal-immigration-to-arizonans-2004> (posting 2010 and 2004 reports). Each of these documents  
26 includes the costs associated with citizen children in costs of undocumented immigration.

27 <sup>18</sup> This attack on the use of Spanish supports the inference that the Arizona legislature  
28 considered Spanish to be a proxy for illegal immigrants and, by extension, Latinos. See  
29 *Hernandez v. New York*, 500 U.S. 352, 371-72 (1991); *Garcia v. Gloor*, 618 F.2d 264, 268  
30 (5th Cir. 1980); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523,  
31 539-40 (6th Cir. 2002).

32 <sup>19</sup> The conflation of U.S.-born children of undocumented immigrants with undocumented  
33 immigrants themselves suggests discriminatory intent against not just undocumented  
34 immigrants, but also against a category of U.S. citizens based largely on their national  
35 origin or ethnicity.

1 legislative assertions] and an assumption of unlawfulness applied to Latinos that is not  
2 applied to other groups, especially when buttressed against evidence of the conflation of  
3 Latino and ‘illegal immigrant,’ supports an inference of discrimination.” *Magee*, 835 F.  
4 Supp. 2d at 1194 n.21.

5 **iii. Legislators’ use of camouflaged racial language during the S.B.**  
6 **1070 debate is evidence of discriminatory intent.**

7 Comments by legislators directly expressing animus based on protected status are,  
8 of course, rare, as “officials acting in their official capacities seldom, if ever, announce on  
9 the record that they are pursuing a particular course of action because of their desire to  
10 discriminate against a racial minority.” *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064  
11 (4th Cir. 1982). Courts therefore examine whether public officials have “camouflaged”  
12 invidious intent by using code words from which, in context, one can infer a  
13 discriminatory purpose. *See, e.g., id.* at 1066 (finding that statements about  
14 “undesirables,” and concerns about personal safety due to “new” people were  
15 “camouflaged racial expressions”); *GNOFHAC II*, 648 F. Supp. 2d at 811 (public officials  
16 cited “influx of crime” and preserving “shared values” at public hearings, terms the court  
17 held to be “camouflaged racial expressions”); *Atkins v. Robinson*, 545 F. Supp. 852, 874  
18 (E.D. Va. 1982) (finding statement that she “feared the projects ‘would degenerate to  
19 slum-like conditions, with an abundance of crime’” to be a veiled reference to race).<sup>20</sup> The  
20 Ninth Circuit, too, has noted that references to crime, “unless properly limited and  
21 factually based, can easily serve as a proxy for race or ethnicity.” *United States v.*  
22 *Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000).

23 The legislative debate on S.B. 1070 was replete with racially coded language.  
24 Senator Ron Gould, for example, spoke of the need to “protect” against “foreign

25 <sup>20</sup> *See also Rivera v. Inc. Vill. of Farmingdale*, 784 F. Supp. 2d 133, 148-49 (E.D.N.Y.  
26 2011) (mayoral candidate’s campaign materials blamed day laborers, a predominately  
27 Latino group, for “increased gang activity,” and “overcrowding”); *Mamaroneck*, 462 F.  
28 Supp. 2d at 549 (government officials stigmatized day laborers in public announcements,  
asserting without any basis in fact that they were not residents and accusing them of  
engaging in criminal activity).

1 invasion.”<sup>21</sup> Test. of Sen. Gould, Final Reading of S.B. 1070, S. Floor Sess., Apr. 19,  
2 2010 (Ex. C-6 at 17); *see also* Email from Sen. Pearce dated Jan. 17, 2006 (urging  
3 recipients to “[p]lease forward ... to all of your elected officials,” a column that asserts,  
4 among other things, that Mexico President Vicente Fox is “more dangerous to America  
5 than Saddam Hussein” because “Fox engineers the greatest invasion of another country  
6 ever seen in the 20th and 21st centuries—without firing a shot.”) (Ex. E-21); Email from  
7 Sen. Pearce dated Jan. 29, 2007 (“One look at Los Ang[e]les with its Mexican-American  
8 mayor shows you Vicente Fox’s general Varigossa [sic] commanding an American city.”)  
9 (Ex. E-8). Email from Sen. Pearce dated May 22, 2007 (email to fellow legislators,  
10 inviting them to join him “in a coalition of Legislators for ‘Legal Immigration,’” and  
11 including a “[g]ood article” that warns of “[a]n immigrant invasion of the United States  
12 from the Third World, as America’s white majority is no longer even reproducing itself”)  
13 (Ex. E-22).

14 Senator Huppenthal, for his part, asserted that “[w]e have seen parts of our  
15 neighborhoods nuclear bombed by the effects of illegal immigration.” Test. of Sen.  
16 Huppenthal, Final Reading of S.B. 1070, S. Floor Sess., Apr. 19, 2010 (Ex. C-6 at 11), *see*  
17 *also* Email from Sen. Pearce dated Mar. 3, 2006 (forwarding an article that argued that  
18 “Our sovereign nation is facing an overwhelming illegal alien invasion by an Hispanic  
19 ‘migrant army’ that has defied our immigration laws and sovereignty. The invasion of  
20 America now totals 20 -23 million and rising. Of that number, 90% are Hispanics who  
21 balkanize our cities and towns, and arrogantly corrupt our unifying national language  
22 while actively disrespecting our culture, society and country! All this is being  
23 accomplished while our complicit government shamelessly stands by blatantly ignoring  
24 the anarchy, by allowing Mexico’s human tsunami of illegal aliens to lawlessly overrun  
25

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26 <sup>21</sup> Leading up to S.B. 1070’s passage, Senator Gould also routinely spoke in the media  
27 about immigration to Arizona as a “foreign invasion” or an “attack.” *See, e.g.*, Alia Beard  
28 Rau & Ginger Rough, *Ariz. Lawmakers Pass Toughest Illegal Immigration Law in U.S.*,  
*Ariz. Republic*, Apr. 19, 2010 (Ex. B-41).

1 America.”) (Ex. E-23).

2 Representative John Kavanagh, another sponsor of S.B. 1070, also spoke in racial  
3 code when talking about the need for the day labor provisions. Specifically, he referred to  
4 what he perceived to be the threat and discomfort of Arizona residents from seeing  
5 “strange men” “walking around” to solicit work and likened day laborers to “hookers.”  
6 Ariz. Capitol Television, Capitol Forum: Rep. Kavanagh Talks About SB 1070, June 21,  
7 2010, *available at* <http://vimeo.com/12740392> (“It causes massive disruption not only to  
8 the street but to the communities. . . . Women were afraid to walk down the street. All  
9 these strange men walking around. It’s a real problem. . . . I think most people recognize  
10 that most of these people are illegal aliens. Legal residents don’t have to solicit labor on  
11 the street like hookers.”).

12 **iv. Statements of legislators who opposed S.B. 1070 further support a**  
13 **finding of discriminatory intent.**

14 Statements of legislators who opposed S.B. 1070—and the reactions of proponents—  
15 are also relevant in assessing the discriminatory intent of the legislature. *See, e.g., Greater*  
16 *New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 570 (E.D.  
17 La. 2009) (“*GNOFHAC P*”) (chairperson “who voted against the ordinance, said the  
18 ordinance was racially motivated and was clearly intended to preserve the nearly all-  
19 Caucasian demographic of the parish.”). During the debate on S.B. 1070, several  
20 legislative opponents expressed strong views that S.B. 1070 would lead to racial profiling  
21 and targeting of Latinos. *See* Test. of Rep. Patterson, Debate on S.B. 1070 in House, Apr.  
22 13, 2010 (“We have many families in Arizona who are legal American citizens who speak  
23 Spanish, who may not look American to some people in Arizona. This could lead to  
24 profiling and it likely will in a way that I think could be very damaging to the very  
25 relationships between the communities and law enforcement.”) (Ex. C-4 at 19); Test. of  
26 Sen. Rios, Final Reading of S.B. 1070 in the Senate, Apr. 19, 2010, (stating that the bill  
27 would “scapegoat a race of people”) (Ex. C-6 at 31); Test. of Sen. Aboud, Final Reading  
28

1 of S.B. 1070 in the Senate, Apr. 19, 2010 (discussing the disproportionate burden on  
2 Latinos who are likely to be targeted by S.B. 1070) (Ex. C-6 at 31-32); Test. of Sen.  
3 Lopez, Final Reading of S.B. 1070 in the Senate, Apr. 19, 2010 (stating that SB 1070  
4 “actually legalizes racial profiling” because law enforcement officers will rely on the  
5 “color of that person’s skin and say ‘I have reasonable suspicion that this person is here  
6 illegally’”) (Ex. C-6 at 33-34); *see also* Roberto Miranda, Ariz. Law Unfair to Latinos,  
7 Hispanics, Daily 49er, May 2, 2010 (quoting Senator Richard Miranda as stating that S.B.  
8 1070 “leads to a greater possibility of racial profiling. This is not just if you are Latino or  
9 Hispanic—anyone of color may be subject to racial profiling”) (Ex. B-42).

10 **v. Discriminatory statements by constituents and the public**  
11 **influenced the legislative process and support a finding of**  
12 **discriminatory intent.**

13 Racially charged or racially coded statements made by constituents in the media or  
14 during public hearings may also help to establish discriminatory intent, if there is evidence  
15 that those statements influenced legislators. While “[p]rivate biases may be outside the  
16 reach of the law, . . . the law cannot, directly or indirectly, give them effect. ‘Public  
17 officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing  
18 to the hypothetical effects of private racial prejudice that they assume to be both widely  
19 and deeply held.’” *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (citation omitted); *see*  
20 *also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (“It is plain that  
21 the electorate as a whole, whether by referendum or otherwise, could not order city action  
22 violative of the Equal Protection Clause, and the [governmental body] may not avoid the  
23 strictures of that Clause by deferring to the wishes or objections of some fraction of the  
24 body politic.”) (citation omitted). Courts therefore consider relevant evidence that the  
25 decision-making body considered and acted in response to discriminatory statements by  
26 private individuals; here, too, courts will look for racially camouflaged statements. *See,*  
27 *e.g., Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 144 (3d Cir. 1977) (inferring improper  
28

1 racial motivation from city's "sudden shift in . . . position from passive acceptance [of a  
2 low-income housing project] to active opposition, in the face of protests by demonstrators  
3 manifesting racial bias"); *Rivera v. Inc. Vill. of Farmingdale*, 784 F. Supp. 2d 133, 147-48  
4 (E.D.N.Y. 2011) (finding that plaintiffs established a prima facie case of intentional  
5 discrimination in part based on citizens' comments on Internet and public meetings  
6 denigrating immigrants and blaming them for increased crime).<sup>22</sup>

7  
8 There is ample evidence that S.B. 1070 was enacted in response to the  
9 discriminatory demands of private individuals. During a public hearing on S.B. 1070, a  
10 constituent who testified claimed that S.B. 1070 was necessary because Arizona was  
11 suffering from an "invasion" of "illegal immigrants" and that unchecked immigration was  
12 "importing a culture of corruption. It's time to stop it. Enough is enough." Test. of Rob  
13 Haney, Maricopa Cty. Republican Party Chairman, Debate on S.B. 1070 in S. Pub. Safety  
14 & Human Serv. Comm., Jan. 20, 2010 (Ex. C-1 at 38); *see also* Email from Sen. Pearce  
15 dated Jan. 29, 2007 (email with subject line, "INVASION USA," rebutting the "myth" that  
16 "Mexico's people love the USA, respect our language and the laws of our country" by  
17 arguing "[c]orruption is a mechanism by which Mexico operates. Its people spawn more  
18 corruption wherever they go because it is their only known way of life.") (Ex. E-8).

19 Arizona legislators, supporters of S.B. 1070, also received constituent emails  
20 around the time of the law's consideration and passage urging them to take action to  
21 reduce the growing Latino population in Arizona. Many of these emails to S.B. 1070's  
22 chief sponsor, Senator Pearce, also spoke in terms of an "invasion" of "illegals" or of a  
23 "Mexican invasion." *See, e.g.*, Email to Sen. Pearce dated Mar. 16, 2011 (Ex. E-29);

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24 <sup>22</sup> *See also GNOFHAC II*, 648 F. Supp. 2d at 811-12 (finding public comments about  
25 increased crime and preserving "shared 'value system'" "to be nothing more than  
26 camouflaged racial expressions"); *Anderson Gr., LLC v. City of Saratoga Springs*, 557 F.  
27 Supp. 2d 332, 341 (N.D.N.Y. 2008) (holding that discriminatory intent may be reasonably  
28 inferred from evidence that governmental decision makers "bow[ed] to public opinion"  
and "discriminatory animus" of their constituents); *Cnty. Hous. Trust v. Dep't of  
Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 227 (D.D.C. 2003) (finding  
challenged decision "tainted with discriminatory intent" due to reliance on discriminatory  
citizen complaints).

1 Email to Sen. Pearce dated July 6, 2010 (Ex. E-25); Email to Sen. Pearce dated Apr. 28,  
2 2010 (Ex. E-26); Email to Sen. Pearce dated Aug. 28, 2009 (Ex. E-27); Email to Sen.  
3 Pearce dated Apr. 25, 2007 (Ex. E-28). Several of these emails used explicitly  
4 discriminatory language. *See, e.g.*, Email to Sen. Pearce dated Mar. 16, 2011 (“I do not  
5 want to see our state and nation turned into a third world country”) (Ex. E-29); Email to  
6 Sen. Pearce dated July 29, 2010 (“The country is at stake, in 50 years there will be no  
7 white people living here, this is an out[ri]ght assault against white people”) (Ex. E-30);  
8 Email to Sen. Pearce dated July 2, 2010 (“If this invasion continues, it is just a matter of  
9 time before . . . we will become a state in Mexico. . . . The filth, corruption disease and  
10 death will become our heritage.”) (Ex. E-31); Email to Sen. Pearce dated Apr. 28, 2010  
11 (“Our country is slowing [sic] dying and a new MEXICAN place is being born. Going  
12 into J.C. Penny’s, K-Mart and even Wal-Mart and hearing Mexican music playing just  
13 brings my blood to a boil.”) (Ex. E-26); Email to Sen. Pearce, Rep. Judy Burges, Rep.  
14 Tom Boone, Sen. Jack Harper dated Apr. 22, 2010 (“Is this the United States of America  
15 or Mexico? The opposition to SB 1070 by illegals is an outrage. . . . We want our country  
16 back.”) (Ex. E-32); Email to Sen. Pearce dated Apr. 20, 2010 (“[T]he City is turning into  
17 Mexico . . . . I remember when Phoenix felt clean-Now it is dirty giving the appearance of  
18 MEXICO big time!”) (Ex. E-33).

19 **2. S.B. 1070’s Discriminatory Adverse Impact on Latinos and Mexican**  
20 **Nationals Weighs in Favor of a Finding of Discriminatory Intent**

21 “[I]mpact of an official action is often probative of why the action was taken in the  
22 first place since people usually intend the natural consequences of their actions.” *Reno v.*  
23 *Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) (citing *Arlington Heights*, 429 U.S. at  
24 266); *see, e.g., Comm. Concerning Cmty. Improvement*, 583 F.3d at 703-04 (relying on  
25 Census data to conclude that plaintiffs presented evidence creating inference of  
26 discriminatory intent); *Magee*, 835 F. Supp. 2d at 1188 (finding a disproportionate impact  
27 of a similar anti-immigrant law in Alabama on Latinos who were over-represented in the  
28



1 state’s non-citizen and undocumented populations). Courts also routinely consider the  
2 foreseeability that the challenged action would have a discriminatory impact in  
3 determining whether the legislature acted based on a discriminatory intent. *United States*  
4 *v. City of Birmingham*, 538 F. Supp. 819, 828 (E.D. Mich. 1982) (“Courts will consider  
5 evidence that a decision-making body took [a] certain action[] knowing it would have a  
6 discriminatory effect.”), *aff’d as modified*, 727 F.2d 560 (6th Cir. 1984).

7 In passing S.B. 1070, legislators could foresee that enforcement of § 2(B) would  
8 disproportionately harm Latinos and Mexican nationals in Arizona because both groups  
9 make up a disproportionate share of the state’s foreign-born population and the state’s  
10 undocumented population. According to the latest U.S. Census figures, approximately  
11 67.5 percent of Arizona’s foreign-born population is from Latin America, and 29 percent  
12 of the state’s total population is Latino. Preciado Decl. ¶¶ 3, 5 (Ex. F). The Department of  
13 Homeland Security estimates that 59 percent of undocumented persons nationwide are  
14 from Mexico. *Id.* ¶ 8. The Pew Hispanic Center estimates that in 2008 over 90 percent of  
15 unauthorized immigrants in the state were from Mexico. *Id.* ¶ 10.

16 In addition, there is clear evidence that the legislature enacted § 2(B) with the  
17 understanding that it would not be applied in a racially neutral way. The legislature  
18 enacted S.B. 1070 in the face of testimony and evidence that § 2(B)’s standard—  
19 “reasonable suspicion” of unlawful presence—would lead to the profiling of Latinos and  
20 those who appear Mexican. *See* Test. of Sen. Aboud, Final Reading of S.B. 1070 in the  
21 Senate, Apr. 19, 2010 (Ex. C-6 at 31-32) (discussing the disproportionate burden on  
22 Latinos who are likely to be targeted by S.B. 1070); Test. of Sen. Lopez, Final Reading of  
23 S.B. 1070 in the Senate, Apr. 19, 2010 (stating that S.B. 1070 “actually legalizes racial  
24 profiling” because law enforcement officers will rely on the “color of that person’s skin  
25 and say, ‘I have reasonable suspicion that this person is here illegally’”) (Ex. C-6 at 33-  
26 34); *see also* Villaseñor Decl. ¶¶ 3-7 (Ex. D) (law enforcement expert stating that § 2(B)  
27 will force officers to rely on race and ethnicity and lead to accusations of racial profiling);  
28

1 Gascón Decl. ¶¶ 18-20 (Doc. 235-6) (law enforcement expert stating that § 2(B) will  
2 inevitably lead to lead to racial profiling); Gonzales Decl. ¶¶ 16-17 (Doc. 235-8) (same);  
3 Granato Decl. ¶ 15 (Doc. 236) (same).

4           Moreover, the legislature explicitly intended § 2(B) to codify the practices of  
5 Maricopa County Sheriff Joe Arpaio and to require every other law enforcement agency in  
6 the state to replicate his model of immigration enforcement. At the press conference held  
7 on October 21, 2009 to introduce S.B. 1070, Senator Pearce—the law’s author and  
8 principal sponsor—explained, together with Sheriff Arpaio himself, that S.B. 1070 would  
9 restore Arpaio’s authority to enforce civil immigration law after the Department of  
10 Homeland Security revoked its § 287(g) task force agreement with MCSO. *See* Press  
11 Release, Sen. Pearce Demands End to Sanctuary City, ‘Catch and Release’ Policies, Oct.  
12 21, 2009 (“Pearce points to the federal government and Secretary of Homeland Security  
13 Janet Napolitano for trying to erode the progress made in Arizona with our tough and  
14 effective laws.”) (Ex. B-12); *id.* (“Sheriff Joe Arpaio stated, ‘This new legislation is very  
15 important given the fact that the federal government has moved to restrict my authority to  
16 enforce illegal immigration laws. Their recent action in doing so makes this legislation  
17 even more critical to ensure that state laws are in place so I can continue to do my job.”);  
18 *see also* Matthew Benson, Immigration Foes Pledge New Bill, Voter Initiative, Ariz.  
19 Republic, Oct. 22, 2009, at B1 (Ex. B-13). Senator Pearce also held up Sheriff Arpaio’s  
20 agency “as a model for what law enforcement should be doing.” Editorial, Resist  
21 Stampede to State Mandates for Immigration Enforcement, Trib. (Mesa, Ariz.), Oct. 23,  
22 2009 (Ex. B-14). Senator Pearce similarly, and repeatedly, linked S.B. 1070 with the  
23 Arpaio approach to immigration enforcement in emails seeking the support of his fellow  
24 legislators.<sup>23</sup>

25  
26 \_\_\_\_\_  
27 <sup>23</sup> For example, in a June 30, 2009 email asking his fellow legislators to support his  
28 forthcoming legislation, Senator Pearce held up Sheriff Arpaio and the MCSO as a model,  
personally thanking “Sheriff Joe” and asserting that Arpaio and MCSO “have a proven  
track record of enforcing our immigration laws and not caving in to political correctness.”

1 Yet as Senator Pearce and the entire Arizona legislature knew, Arpaio’s actions—  
 2 particularly his immigration enforcement initiatives, which S.B. 1070 was designed to  
 3 preserve and expand statewide—had spawned numerous federal investigations,<sup>24</sup>  
 4 lawsuits,<sup>25</sup> and countless complaints and media stories<sup>26</sup> regarding racial profiling and  
 5

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6 Email from Sen. Pearce dated June 30, 2009 (Ex. E-14). Around the same time, Pearce  
 7 sent another email that again praised the MCSO, this time to rebut the charge that his bill  
 8 could lead to racial profiling. *See also* Email to Sen. Pearce dated July 14, 2009  
 9 (forwarding an email written or forwarded by Pearce) (Ex. E-6) (arguing that the citizen  
 10 suit provision contained in what became SB 1070 § 2(H) was necessary “to hold elected  
 11 officials personally accountable for their continued refusal to cooperate with federal  
 12 immigration laws,” and asserting that Sheriff Arpaio would not object to that provision,  
 13 “because he DOES enforce immigration laws under the 287(g)”). As a result of Senator  
 14 Pearce’s lobbying—which, as mentioned, explicitly invoked “Sheriff Joe” as a model—26  
 15 state representatives and 11 state senators acceded to his request to endorse S.B. 1070. *See*  
 16 Press Release, Sen. Pearce Demands End to Sanctuary City, “Catch and Release Policies,”  
 17 Oct. 21, 2009 (Ex. B-12).

18 <sup>24</sup> *See, e.g.*, Daniel Gonzalez, *Feds Investigate Arpaio*, *Ariz. Republic*, Mar. 11, 2009  
 19 (“The U.S. Justice Department has launched a civil-rights investigation of the Maricopa  
 20 County Sheriff’s Office after months of mounting complaints that deputies are  
 21 discriminating in their enforcement of federal immigration laws.”) (Ex. B-15); Paul Giblin  
 22 & Ryan Gabrielson, *Third Federal Probe Launched into Sheriff’s Office: ICE to Audit*  
 23 *Immigration Enforcement Efforts*, *Trib. (Mesa, Ariz.)*, Sept. 12, 2008 (Ex. B-16) (“ICE  
 24 joins the Government Accountability Office and the FBI in examining the sheriff’s  
 25 immigration enforcement practices.”); *see also* Press Release, Dep’t of Justice,  
 26 Department of Justice Releases Investigative Findings on the Maricopa County Sheriff’s  
 27 Office (Dec. 15, 2011) (reporting that the DOJ “found reasonable cause to believe that  
 28 [MCSO engaged in a] pattern or practice of unconstitutional conduct and/or violations of  
 federal law, including: Discriminatory policing practices including unlawful stops,  
 detentions and arrests of Latinos; . . . [and] Discriminatory jail practices against Latino  
 inmates with limited English proficiency”) (Ex. B-17); Press Release, Dep’t of Justice,  
 Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa  
 County Sheriff’s Office, and Sheriff Joseph Arpaio (May 11, 2012) (Ex. B-18).

<sup>25</sup> *See, supra* note 5.

<sup>26</sup> *See, e.g.*, Stephen Lemons, *One Mother’s Suffering, Joe Arpaio’s Bigotry, and Stories*  
 of *Racial Profiling by the MCSO*, *Phoenix New Times Blog*, Oct. 15, 2009 (introducing “a  
 sequence of online profiles” of those racially profiled by the MCSO’s Office) (Ex. B-19);  
 Ryan Gabrielson & Paul Giblin, *Reasonable Doubt—Tribune Investigates Sheriff’s*  
*Immigration Campaign: At What Cost?*, *Trib. (Mesa, Ariz.)*, July 9, 2008 (reporting, as  
 part of a five-day investigative report, that “[t]he sheriff’s ‘saturation’ patrols and ‘crime  
 suppression/anti-illegal immigration’ sweeps in Hispanic neighborhoods are done without  
 any evidence of criminal activity, violating federal regulations intended to prevent racial  
 profiling.”) (Ex. B-20); *Civil-Rights Panel Aims at Sheriff*, *Ariz. Republic*, Dec. 27, 2008,  
 at B1 (“[The Arizona Civil Rights Advisory Board] is recommending that, because of  
 racial-profiling complaints, the Maricopa County Board of Supervisors end a contract with  
 the federal government that allows the county Sheriff’s Office to enforce immigration  
 laws.”) (Ex. B-21).

1 other forms of discrimination against Latinos. Indeed, the revocation of MCSO’s 287(g)  
2 task force agreement—the very development that S.B. 1070 was intended to supersede—  
3 followed the federal Department of Justice’s opening of an investigation into racial  
4 profiling by MCSO and DHS’s determination that “the manner in which [MCSO]  
5 conducted those sweeps was not consistent with good coordination and cooperation within  
6 the communities they were operating within.” Jeremy Duda, Immigration and Customs  
7 Enforcement: If Sheriff Arpaio Continues Sweeps, It will be Under State, Not Federal,  
8 Law, Ariz. Capitol Times, Oct. 16, 2009 (Ex. B-22). Thus, there is substantial evidence  
9 not only that S.B. 1070, and § 2(B) in particular, will have a discriminatory impact, but  
10 that it was also enacted with knowledge and intent that it would operate in a  
11 discriminatory manner.

12 **3. The Historical Background and Events Leading Up to the Passage of**  
13 **S.B. 1070 Demonstrate Its Racial and Anti-Mexican Animus.**

14 A historical background of discriminatory conduct against a protected group helps  
15 to establish discriminatory intent, “particularly if it reveals a series of official actions taken  
16 for invidious purposes.” *Arlington Heights*, 429 U.S. at 267; *Mamaroneck*, 462 F. Supp.  
17 2d at 548 (village had been historically tolerant of day laborers until laborer population  
18 shifted from Caucasian to Latinos); *Greater New Orleans Fair Hous. Action Ctr. v. St.*  
19 *Bernard Parish*, No. 06cv7185, 2011 WL 4915524, at \*3 (E.D. La. Oct. 17, 2011)  
20 (predominantly Caucasian Parish took multiple measures over six years to prevent the  
21 development of multi-unit housing).<sup>27</sup>

22  
23 <sup>27</sup> See also *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 207 (1973) (“The prior doing of other  
24 similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility  
25 that the act in question was done with innocent intent.” (internal quotation omitted));  
26 *White v. Regester*, 412 U.S. 755, 765-67 (1973) (holding that the “totality of  
27 circumstances,” including Texas’s long history of discrimination against African-  
28 Americans and Latinos in the political process, demonstrated that the election scheme was  
“used invidiously” to dilute minority voting strength); *GNOFHAC II*, 648 F. Supp. 2d at  
809-10 (citing specific councilmembers previous introduction of ordinances that would  
have had or did have a racially disparate impact and that apparently were motivated, at  
least in part, by racial animus, as demonstrated by the pretextual justifications given for  
those measures). Although some of the cases cited herein brought intentional  
discrimination claims under the Fair Housing Act, rather than the Equal Protection Clause,

1 S.B. 1070 was one of numerous recent bills introduced in the Arizona legislature  
2 that target Latinos and individuals of Mexican origin. All of these efforts have been led by  
3 Senator Pearce, the chief architect and sponsor of S.B. 1070.<sup>28</sup> In 2005, the legislature  
4 passed S.B. 1167, which would have made English the official language of the state and  
5 “protect[ed] the rights of persons in [Arizona] who use English.”<sup>29</sup> Although vetoed by  
6 then-Governor Janet Napolitano, Pearce was successful in placing the measure on the  
7 ballot, where it was approved by the Arizona electorate. *See* Ariz. Dep’t of State, 2006  
8 Ballot Propositions - Proposition 103, *available at*  
9 <http://www.azsos.gov/election/2006/info/pubpamphlet/english/Prop103.htm>.

10 The English-only measure was aimed at one particular language: Spanish. *See*  
11 Daniel Gonzalez, Study Rebuts Perceptions of Migrants’ English Use, Ariz. Republic,  
12 Dec. 9, 2008 (“[Senator Pearce] said he believes a surge of Spanish-speaking immigrants  
13 threatens to turn Arizona into a bilingual state.”) (Ex. B-23).<sup>30</sup> As courts have long  
14 recognized, actions targeting Spanish can be a pretext for discrimination due to the “close  
15 connection between the Spanish language and a specific ethnic community.” *Farm Labor*  
16 *Org. Com. v. Ohio State Highway Patrol*, 308 F.3d 523, 539-40 (6th Cir. 2002); *see also*  
17 *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (explaining that “for certain ethnic  
18 groups and in some communities, proficiency in a particular language, like skin color,  
19 should be treated as a surrogate for race” under a discriminatory intent analysis); *Gloor*,  
20 618 F.2d at 268 (“Language may be used as a covert basis for national origin  
21

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22 the same factors are used to assess either claim. *See, e.g., Magee*, 835 F. Supp. 2d at  
23 1185-94.

24 <sup>28</sup> *See* Email from Pearce dated May 17, 2011 (“I am State Senator Russell Pearce the  
25 author of SB1070 and almost every other bill in this state to deal with ‘illegal’  
26 immigration and am a national leader in this issue.”) (Ex. E-7).

27 <sup>29</sup> S.B. 1167, 47 Leg., Sess. (Ariz. 2005), *available at*  
28 [azleg.state.az.us/legtext/47leg/1r/bills/sb1167h.htm](http://azleg.state.az.us/legtext/47leg/1r/bills/sb1167h.htm).

<sup>30</sup> Proposition 103 was Arizona’s second attempt to target Spanish speakers. In 1988, the  
voters passed Proposition 106, a constitutional amendment establishing English as the  
official state language and requiring state employees to use English only in their jobs. In  
1998, the Arizona Supreme Court struck down Proposition 106 as violative of the First  
Amendment and the Equal Protection Clause of the Fourteenth Amendment. *See Ruiz v.*  
*Hull*, 191 Ariz. 441, para. 70 (1998).

1 discrimination.”). Moreover, there is direct evidence that the Arizona legislature  
2 generally, and Senator Pearce specifically, targeted the use of Spanish as a surrogate for  
3 race and national origin. *See* Email from Sen. Pearce dated Jan. 29, 2007 (rebutting the  
4 “myth” that “Mexico’s people . . . respect our language” and comparing the importation of  
5 Spanish speakers to “importing leper colonies and hop[ing] we don’t catch leprosy”) (Ex.  
6 E-8); *cf.* Email from Sen. Pearce dated Apr. 24, 2006 (sharing an article that asserts part of  
7 “destroy[ing] America” are celebrating bilingualism, with the aim of turning the United  
8 States into “an ‘Hispanic Quebec’”) (Ex. E-9).

9 In 2010, during the same session in which S.B. 1070 was passed, the Arizona  
10 legislature passed HB 2281, a bill that financially penalizes primary and secondary schools  
11 if they provide “any courses or classes that ‘promote resentment toward a race or class of  
12 people,’ ‘are designed primarily for pupils of a particular ethnic group,’ or ‘advocate  
13 ethnic solidarity instead of the treatment of pupils as individuals.’”<sup>31</sup> Although worded  
14 neutrally, the so-called “ethnic studies ban” was aimed at one course: the Mexican-  
15 American Studies program of the Tucson Unified School District. *See* Nicole Santa Cruz,  
16 Arizona Ethnic Studies Ban OKd as Law, L.A. Times, May 12, 2010 (indicating that then-  
17 state Superintendent Horne said the intent of the bill was to target the Mexican American  
18 studies program) (Ex. B-24); Marc Lacey, Rift in Arizona as Latino Class is Found Illegal,  
19 N.Y. Times, Jan. 7, 2011 (same) (Ex. B-25); Mary Jo Pitzl, Ban on Ethnic Studies Passes,  
20 Arizona Republic, May 1, 2010 (same) (Ex. B-28). State Superintendent John  
21 Huppenthal—who served as a state senator until the beginning of 2011 and voted for HB  
22 2281’s passage—admitted that the law’s target was the Mexican American studies  
23 program in Tucson, and further admitted that this program is the only one to have been  
24 investigated for violation of HB 2281 by his department during his term as Superintendent.  
25 Huppenthal Dep. at 11, 13, *Acosta v. Huppenthal*, No. 4:10-cv-00623-AWT (D. Ariz.  
26 filed Dec. 14, 2011) (ECF No. 125-1).

27  
28 <sup>31</sup> H.B. 2281, 48th Leg., 2d Reg. Sess. (Ariz. 2010), *available at*  
[www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf](http://www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf).

1 As Senator Pearce explained in an email responding to a constituent complaint  
2 about the then-pending measure, the “ethnic studies ban” was necessary to prevent “tax  
3 dollars . . . being used to teach hateful anti American rhetoric in our American publicly  
4 funded schools.” Email from Sen. Pearce dated Dec. 21, 2008 (Ex. E-10). Senator Pearce  
5 enclosed in his email an overtly jingoistic article warning that Mexican American studies  
6 programs are a slippery slope toward the realization of Atzlán—i.e., the retaking (or  
7 “Reconquista”) of the American Southwest by Hispanics, particularly Mexicans. *Id.*  
8 (“[T]he Mexican government has embraced the concept of ‘demographic warfare,’ a  
9 reconquering of the southwestern United States through unchecked illegal immigration  
10 and by exporting its ‘surplus poverty’ to regain control.”). The anti-Latino and anti-  
11 Mexican animus animating HB 2281 is deep and self-evident.

12 Arizona’s anti-Mexican and anti-Latino animus is not new; the state, unfortunately,  
13 has a long history of such discrimination. *See* Mary Romero & Marwah Serag, Violation  
14 of Latino Civil Rights Resulting from INS and Local Police’s Use of Race, Culture and  
15 Class Profiling: the Case of the Chandler Roundup in Arizona, 52 Clev. St. L. Rev. 75  
16 (2004). Indeed, this history of discrimination against Latinos in Arizona has been  
17 established in recent federal court litigation. *See Gonzalez v. Arizona*, 677 F.3d 383 (9th  
18 Cir. 2012) (en banc) (noting that the district court found, in the context of a claim under  
19 Section 2 of the Voting Rights Act, “that Latinos had suffered a history of discrimination  
20 in Arizona that hindered their ability to participate in the political process fully, that there  
21 were socioeconomic disparities between Latinos and whites in Arizona, and  
22 that Arizona continues to have some degree of racially polarized voting.”).<sup>32</sup> This history

23  
24 <sup>32</sup> As Judge Pegerson notes, this history includes: “de jure discrimination against Latinos  
25 in Arizona [that] existed during most of the twentieth century. Just prior to 1910, Arizona  
26 voters passed a literacy law that explicitly targeted Mexicans and disqualified non-English  
27 speakers from voting in state elections. As late as the 1960s, these literacy requirements  
28 were a precondition for voting in Arizona. After Arizona attained statehood in 1912, the  
new state government engaged in an anti-immigrant campaign characterized by a series of  
proposals aimed at restricting the political rights of Mexican immigrants’ and limiting their  
right to work. The new Arizona constitution restricted non-citizens from working on  
public projects. In 1914, the Arizona legislature enacted the “eighty percent law,” which  
stated that eighty percent of the employees in businesses that had five or more employees

1 is also relevant to the *Arlington Heights* analysis. *See White*, 412 U.S. at 765-69 (holding  
 2 that the “totality of circumstances,” including Texas’s long history of discrimination  
 3 against African-Americans and Latinos in the political process, demonstrated that the  
 4 election scheme was “used invidiously” to dilute minority voting strength); *Hunter*, 471  
 5 U.S. at 229 (considering evidence that “the Alabama Constitutional Convention of 1901  
 6 was part of a movement that swept the post-Reconstruction South to disenfranchise  
 7 blacks”). It is especially relevant here because Senator Pearce, in advocating for his anti-  
 8 immigrant measures, has explicitly invoked that history of discrimination, for example, by  
 9 calling for a reinstatement of the controversial “Operation Wetback” program, which  
 10 targeted Mexicans for deportation. *See Sarah Lynch, Pearce Calls for Deportations: Mesa*  
 11 *Policymaker Advocates ‘50s Policy for Dealing with Illegals, Mesa Trib., Sept. 29, 2006*  
 12 *(Ex. B-27)*.<sup>33</sup>

#### 13 **4. S.B. 1070 Departs Substantively from Established Practice.**

14 Under *Arlington Heights*, the Court should consider whether S.B. 1070 constituted  
 15 a substantial departure from established practice; such departures are evidence of  
 16 discriminatory intent. “Substantive departures exist when ‘factors usually considered  
 17 important by the decision-maker strongly favor a decision contrary to the one reached.’”  
 18 *Magee*, 835 F. Supp. 2d at 1186 (quoting *Arlington Heights*, 429 U.S. at 267). Evidence  
 19 that a decision-making body’s challenged conduct does not further its own interests  
 20 supports a finding of discriminatory intent. *GNOFHAC I*, 641 F. Supp. 2d at 574.

21 Section 2(B) radically departs from the legislature’s usual deference to law  
 22 enforcement—removing discretion from officers in the field by requiring them to  
 23 investigate immigration status rather than focusing on criminal violations that threaten  
 24 public safety. Section 2(B) is unprecedented. No previous statute has required law  
 25

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26 had to be “native-born citizens of the United States.” *Gonzalez v. Arizona*, 677 F.3d 383  
 27 (9th Cir. 2012) (Pregerson, J. concurring and dissenting in part).

28 <sup>33</sup> Constituent emails to Arizona government officials have also suggested a new  
 “Operation Wetback.” *See, e.g.*, Email to Gov. Brewer & Sen. Pearce dated Apr. 21, 2010  
 (Ex. E-11); Email to Sen. Pearce dated Jul. 9, 2007 (Ex. E-12).



1 enforcement officers to consider any particular fact or status about individuals whom they  
2 stop or detain in the regular course of their duties. Villaseñor Decl. ¶ 6 (Ex. D). Doing so  
3 conflicts with Arizona’s general policy of providing law enforcement an appropriate  
4 measure of discretion in investigating and enforcing Arizona’s laws. *Id.* Indeed, not only  
5 does S.B. 1070 limit law enforcement’s discretion generally, it redirects their efforts away  
6 from areas that the legislature generally prioritizes for law enforcement: investigating and  
7 dealing with crimes under Arizona law, particularly those that threaten public safety. *Id.* ¶  
8 2. *See also* Villaseñor Decl. ¶¶ 2, 5-6, Ex. 9 to Plf’s Mot. for Prelim. Inj., *United States v.*  
9 *Arizona*, No. CV10-1413-PHX-SRB (D. Az. July 6, 2010); Jack Harris Decl. ¶¶ 2, 5, Ex.  
10 10 to Plf’s Mot. for Prelim. Inj., *Arizona* (D. Az. July 6, 2010); Tony Estrada Decl. ¶ 5,  
11 Ex. 8 to Plf’s Mot. for Prelim. Inj., *Arizona*, (D. Az. July 6, 2010).

12 Moreover, the Arizona legislature took the additional radical step of authorizing the  
13 state’s residents to enforce S.B. 1070 through civil lawsuits. S.B. 1070 § 2(H). To  
14 Plaintiffs’ knowledge, there is no comparable cause of action against law enforcement  
15 officials for failing to enforce a state-law provision in any other Arizona statute, and this  
16 provision will further impinge on law enforcement’s ability to apply their own  
17 professional judgment to situations they encounter in the field. Indeed, law enforcement  
18 officers have reacted particularly strongly to this provision, expressing significant  
19 concerns about the potential for lawsuits and the nearly impossible task of defending  
20 against assertions that their officers acted improperly in not finding requisite “reasonable  
21 suspicion” to trigger the immigration status check required by § 2(B). Villaseñor Decl. ¶¶  
22 4,5,7 (Ex. D); *see also* Tim Gaynor, *Arizona Police See “Difficulties” Enforcing*  
23 *Immigration Law*, Reuters, Jun. 26, 2012 (“[P]olice chiefs in Arizona are concerned that  
24 requiring officers to make a ‘reasonable’ attempt to determine a suspect’s status could lead  
25 to potentially ruinous litigation from both supporters and opponents of the law.”) (Ex. B-  
26 43).

27 Relatedly, the potential fines that could result from such litigation threaten law  
28

1 enforcement agencies' ability to control their own purses. A representative and lobbyist  
2 for the Arizona Association of Police Chiefs has stressed that "the fallout from such a fine  
3 could be financially devastating for smaller municipalities." *See, e.g.*, Mike Sakal, Police  
4 Unions: Immigration Bill Taxes Officers, Tribune (Mesa, Ariz.), Apr. 18, 2010 ("[S.B.  
5 1070] also allows people to file lawsuits against police agencies they believe are lax in  
6 enforcing their immigration obligations to the fullest extent permitted by federal law.  
7 Municipalities also could be fined between \$1,000 to \$5,000 per day") (Ex. B-44);  
8 Villaseñor Decl., filed July 6, 2010, ¶ 8 (noting that because the clock on SB 1070's  
9 \$5,000 per day fee begins upon a lawsuit's filing, and because in Arizona, a lawsuit may  
10 be served up to 120 days after filing, a city could incur \$600,000 in fines before even  
11 being served).

12 \* \* \*

13 As discussed above, the evidence on this motion establishes that racial and national  
14 origin discrimination was a "substantial" or "motivating" factor behind the enactment of  
15 the S.B.1070, and § 2(B) in particular, and it is likely that Plaintiffs will be able to prevail  
16 on this claim at trial, after merits discovery. Of course, the Court can also issue a  
17 preliminary injunction based on equal protection if it finds Plaintiffs have raised "serious  
18 questions going to the merits," and have demonstrated that a balance of hardships tips  
19 sharply in their favor. *See Alliance for the Wild Rockies*, 632 F.3d at 1135 (citation  
20 omitted). Under either standard, a preliminary injunction of § 2(B) on equal protection  
21 grounds is warranted.

22 **C. Plaintiffs Are Substantially Likely to Prevail on Their Claim That**  
23 **A.R.S. § 13-2929 Is Preempted by Federal Law**

24 In *Arizona*, the Supreme Court struck down both state criminal provisions of S.B.  
25 1070 that were before the Court: the § 3 state registration crime and the § 5(C) state crime  
26 penalizing unauthorized work. Slip op. at 11, 15. Plaintiffs address here another provision  
27 of § 5, A.R.S. § 13-2929, that likewise creates a new state crime based on alleged  
28

1 violations of federal immigration law—specifically 8 U.S.C. § 1324, the federal harboring  
2 statute. Although this Court previously declined to enjoin A.R.S. § 13-2929 in the federal  
3 government’s case, the federal government’s challenge was based only on the dormant  
4 commerce clause and the claim that § 13-2929 amounts to a regulation of immigration.<sup>34</sup>  
5 Moreover, at the time that it ruled on the federal motion, the Court did not have the benefit  
6 of the Supreme Court’s subsequent elucidation of the relevant preemption doctrine when it  
7 decided the motion.

8 Plaintiffs now respectfully request that the Court preliminarily enjoin § 13-2929 on  
9 the grounds of field and conflict preemption. The Supreme Court’s ruling in *Arizona* and  
10 other precedents make it clear that § 13-2929 is invalid on these grounds.<sup>35</sup> Indeed, after  
11 the Court dismissed the United States’ challenge to § 13-2929 on other grounds, but before  
12 the *Arizona* decision, three separate federal district courts have preliminarily enjoined  
13 similar state transporting and harboring laws on the bases of conflict and/or field  
14 preemption. *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317,  
15 1336 (N.D. Ga. 2011 (hereinafter, “GLAHR”), *appeal pending*, No. 11-13044-FF (11th  
16 Cir.); *United States v. Alabama*, 813 F. Supp. 2d 1282, 1336 (N.D. Ala. 2011), *appeal*  
17 *pending*, Nos. 11-14532, 11-14674 (11th Cir.); *United States v. South Carolina*, Nos. 2:11-  
18 cv-2958, 2:11-cv-2779, 2011 WL 6973241, at \*22 (D.S.C. Dec. 22, 2011), *appeal*  
19 *pending*, No. 12-1096 (4th Cir.).

20 The Court should enjoin A.R.S. § 13-2929 because—like § 3—it intrudes in a field  
21 that the federal government has fully occupied, and because—like § 5(c)—it conflicts  
22 with the purposes and objectives of the relevant federal law, criminalizes more conduct  
23

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24 <sup>34</sup> See *United States v. Arizona*, 703 F. Supp. 2d 980, 1002-04 (D. Ariz. 2010) (finding  
25 United States was unlikely to succeed in arguing that § 13-2929 was an impermissible  
26 regulation of immigration or that it violated the dormant commerce clause). The  
27 preemption challenges that Plaintiffs present here are fundamentally distinct from the  
28 government’s challenge. Plaintiffs raise separate preemption challenges—that A.R.S. §  
13-2929 impermissibly legislates in a field that has been fully occupied by Congress, and  
that it conflicts with the federal statutes concerning transporting and harboring. *Opp. to*  
*Mot. to Dismiss* at 19-21 (Doc. 314).

<sup>35</sup> The legality of A.R.S. § 13-2929 was not before the Supreme Court in *Arizona*.

1 than its federal counterpart, and imposes additional penalties beyond those approved by  
2 the federal scheme.

3 **I. A.R.S. § 13-2929 Is Field Preempted**

4 The Supreme Court struck down § 3 of S.B. 1070 because federal law occupies the  
5 alien registration field. *Arizona*, slip op. at 9-11. Similarly, Congress has occupied the  
6 alien harboring field by enacting 8 U.S.C. § 1324, which is an integral part of Congress's  
7 comprehensive immigration law. *GLAHR v. Deal*, 793 F. Supp. 2d 1317, 1336 (N.D. Ga.  
8 2011) (finding that a similar provision under Georgia's law "imposes additional criminal  
9 laws on top of a comprehensive federal scheme"); *South Carolina*, 2011 WL 6973241, at  
10 \*13 (8 U.S.C. § 1324 is part of federal scheme "so pervasive that it left no room in this  
11 area for the state to supplement it.").

12 Congress has enacted "a uniform, comprehensive scheme of sanctions," both "for  
13 those who unlawfully enter the United States" and "for third parties who aid the entry and  
14 stay of those who unlawfully enter." *Alabama*, 813 F. Supp. 2d at 1330-31 (citing and  
15 summarizing 8 U.S.C. §§ 1323, 1324, and 1327). These provisions prohibit the knowing  
16 attempt to bring a person into the United States "at a place other than a designated port of  
17 entry or place other than as designated by the [Secretary of Homeland Security]," 8 U.S.C.  
18 § 1324(a)(1)(A)(i), and impose criminal penalties on anyone who, "knowing or in reckless  
19 disregard of the fact" that a person has unlawfully entered or remained in the United  
20 States, attempts to "transport or move" the person within the United States "in furtherance  
21 of such violation of law." 8 U.S.C. § 1324(a)(1)(A)(ii).

22 The provisions of 8 U.S.C. § 1324 have broad preemptive effect. *See South*  
23 *Carolina*, 2011 WL 6973241, at \*13; *Villas at Parkside Partners v. City of Farmers*  
24 *Branch*, 701 F. Supp. 2d 835, 858-59 (N.D. Tex. 2010) (holding that § 1324 preempts city  
25 ordinance forbidding rental of housing to unauthorized immigrants), *aff'd*, 675 F.3d 802  
26 (5th Cir. 2012); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1056 (S.D. Cal. 2006)  
27 (same).  
28

1           The Supreme Court recognized that Congress authorized state and local  
2 involvement in immigration enforcement only in specific, limited circumstances, including  
3 through 8 U.S.C. § 1324(c), which provides “authority to *arrest*” for violations of the  
4 federal harboring statute. *Arizona*, slip op. at 17 (emphasis added). The Court made clear,  
5 however, that states may not exceed such specific authorizations. *Id.* at 19; *see also*  
6 *Alabama*, 813 F. Supp. 2d at 1333-34 (noting that in this area there is no savings clause  
7 that might authorize state activity such as the one at issue in *Chamber of Commerce of*  
8 *U.S. v. Whiting*, 563 U.S. \_\_\_, 131 S. Ct. 1968 (2011)). In A.R.S. § 13-2929 Arizona goes  
9 well beyond what Congress authorized with respect to harboring—arrest for the *federal*  
10 crime—by creating its own state criminal scheme.

11           *Arizona* explains that a state law allowing states to prosecute and punish alleged  
12 federal immigration violations fundamentally conflicts with Congress’s reservation of  
13 “broad discretion” over immigration enforcement to federal officials. Slip op. at 4-5. As  
14 with alien registration, in the area of the inducement, transportation, and harboring of  
15 noncitizens, the “federal statutory directives provide a full set of standards” that were  
16 “designed as a ‘harmonious whole.’” *Id.* at 10 (quoting *Hines*, 312 U.S. at 72). And as in  
17 the registration field, “[p]ermitting the State to impose its own penalties for the federal  
18 offenses here would conflict with the careful framework Congress adopted.” *Id.* at 11.  
19 “[T]he State would have the power to bring criminal charges against individuals for  
20 violating a federal law even in circumstances where federal officials in charge of the  
21 comprehensive scheme determine that prosecution would frustrate federal policies.” *Id.*

22           For these reasons, even if A.R.S. § 13-2929 were identical to the federal harboring  
23 law, which it is not, it would be field preempted.

24           **a. A.R.S. § 13-2929 Is Conflict Preempted**

25           Within the past year, three federal courts have enjoined state harboring, inducing,  
26 and transporting statutes similar to § 13-2929 on conflict preemption grounds. *Alabama*,  
27 813 F. Supp. 2d at 1334-36; *South Carolina*, 2011 WL 6973241, at \*13; *GLAHR*, 793 F.  
28

1 Supp. 2d at 1335-36. A.R.S. § 13-2929 is similarly conflict preempted. Specifically,  
2 A.R.S. § 13-2929 undermines the congressional scheme by adding additional penalties to  
3 existing federal crimes; relocating decision-making regarding the interpretation and  
4 prosecution of these crimes from the federal government to the state without ensuring  
5 uniformity; and criminalizing conduct the federal government chose not to sanction.

6 Arizona's harboring provisions are enforced by state police and prosecutors and  
7 interpreted by state judges, not by their federal counterparts, and decisions about when to  
8 charge a person or what penalty to seek are no longer under federal control. A.R.S. § 13-  
9 2929 permits the state to prosecute and impose additional penalties on individuals whom  
10 the federal government has elected not to charge, or those who have already been federally  
11 charged and sentenced by a federal court. Thus, A.R.S. § 13-2929 authorizes state officers  
12 to "use an iron fist where the President has consistently chosen kid gloves." *Am. Ins.*  
13 *Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003). The Supremacy Clause of the Constitution  
14 does not permit states to make that decision. *See Arizona*, slip op. at 11 ("Permitting the  
15 State to impose its own penalties for the federal offenses here would conflict with the  
16 careful framework Congress adopted"). Such state regulation would "disrupt this  
17 comprehensive federally controlled immigration enforcement scheme by placing state  
18 prosecutors in control of enforcement efforts under [the South Carolina provisions] and  
19 permitting state judges to interpret the harboring and transporting statutes." *South*  
20 *Carolina*, 2011 WL 6973241, at \*12.

21 Of particular relevance here, in *Arizona* the Supreme Court rejected as  
22 "unpersuasive on its own terms" the argument that a "provision [that] has the same aim as  
23 federal law and adopts its substantive standards" must survive preemption. Slip op. at 10-  
24 11; *see also id.* at 15 ("Although § 5(C) attempts to achieve one of the same goals as  
25 federal law . . . it involves a conflict in the method of enforcement"); *see also Crosby v.*  
26 *Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000) (even if a state law shares the  
27 same goals as the federal law, "[t]he fact of a common end hardly neutralizes conflicting  
28

1 means”). Under A.R.S. § 13-2929, Arizona may decide to charge an individual over  
2 whom the federal government has exercised its discretion not to prosecute. Likewise,  
3 Arizona prosecutors may pile additional penalties on top of a federal sentence under 8  
4 U.S.C. § 1324, effectively increasing the penalty carefully calibrated by Congress and the  
5 federal justice system. “[T]his state framework of sanctions creates a conflict with the  
6 plan Congress put in place.” *Arizona*, slip op. at 11 (citing *Wisc. Dept. of Indus., Labor &*  
7 *Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986), for the proposition that  
8 “conflict is imminent whenever two separate remedies are brought to bear on the same  
9 activity” (internal quotation marks omitted)). By imposing different and additional  
10 penalties, A.R.S. § 13-2929 impermissibly “undermines the congressional calibration of  
11 force.” *Crosby*, 530 U.S. at 380.

12 In addition, *Arizona* emphasizes that a small inconsistency between federal and  
13 state laws relating to immigration creates additional conflicts. Slip op. at 11 (SB 1070 § 3  
14 conflicts because it creates “an inconsistency between [state] and federal law with respect  
15 to penalties” by ruling out probation and pardon). A.R.S. § 13-2929 presents an even  
16 more severe conflict than the Arizona criminal provisions considered by the Supreme  
17 Court because, in addition to potentially imposing different penalties, it prohibits a  
18 different (and broader) range of *conduct* than the federal harboring law. A.R.S. § 13-2929  
19 punishes encouraging or inducing undocumented individuals to come to, enter, or reside in  
20 the state of Arizona whether or not individuals enter Arizona from another state or another  
21 country. The federal statute, in contrast, does not criminalize actions with respect to  
22 entering Arizona from another state. See *GLAHR*, 793 F. Supp. 2d at 1334 (noting  
23 Georgia’s provision was not identical to federal law because the state law prohibited  
24 “knowingly inducing, enticing, or assisting illegal aliens to enter Georgia” whereas  
25 “[o]nce in the United States, it is not a federal crime to induce an illegal alien to enter  
26 Georgia from another state”); *Alabama*, 813 F. Supp. 2d at 1334 (same).

27 Additionally, federal criminal harboring sanctions are not directed at unlawfully  
28

1 present individuals themselves or at incidental or innocent contact, while A.R.S. § 13-2929  
2 permits Arizona to target such persons and behavior for prosecution and imprisonment.<sup>36</sup>  
3 Congress chose not to penalize unauthorized immigrants' presence or movement within  
4 the country or across state lines unless other factors are present, and the federal  
5 immigration laws do not penalize transportation of these individuals in such situations.  
6 *See Alabama*, 813 F. Supp. 2d at 1334 (noting that “the corresponding federal provision in  
7 8 U.S.C. § 1324(a)(1)(A)(ii) . . . does not extend to the smuggled or transported alien.”);  
8 *South Carolina*, 2011 WL 6973241, at \*15 (finding that state law making it a crime for  
9 “an unlawfully present person to allow himself or herself to be ‘transported or moved’  
10 within the state or to be harbored or sheltered to avoid apprehension or detection” was  
11 preempted in part because “[t]here is no comparable federal statute, and it appears that this  
12 provision is unique in American law.”). Thus, A.R.S. § 13-2929 is broader than its federal  
13 counterpart because it criminalizes more activity than the federal statute intended, in clear  
14 conflict with federal objectives.

15 While in one sense the Arizona statute is narrower than its federal counterpart  
16 because prosecution requires that the person must already be in violation of a separate  
17 criminal offense, *see U.S. v. Arizona*, 703 F. Supp. 2d at 1002 n.18, that alone does not  
18 cure A.R.S. § 13-2929's fundamental conflict preemption problem. As this Court has  
19 recognized, the relevant predicate offense can be something as mundane as a traffic  
20 violation or a violation of the federal harboring and transporting statute, 8 U.S.C. § 1324,  
21 itself. Order, May 29, 2012 (Doc. 682) (noting tha “[w]hile it is not clear what type of  
22 criminal violation will trigger [A.R.S. § 13-2929] it is possible that traffic violations or the  
23 violation of the federal alien smuggling statute could be sufficient to give rise to a  
24 violation of § 13-2929”); *see also GLAHR*, 793 F. Supp. 2d at 1333 n.12 (finding  
25

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26 <sup>36</sup> Arizona could prosecute undocumented persons for “being harbored” by reading A.R.S.  
27 § 13-2929 together with A.R.S. § 13-1003 (conspiracy), in much the same way that it  
28 already prosecutes undocumented persons for “being smuggled” by reading A.R.S. § 13-  
2319 (smuggling) together with § 13-1003.



1 Georgia’s transporting and harboring law preempted in part because a violation of the  
2 federal statute could be the predicate offense).

3 Arizona’s statute presents yet another conflict with federal law by failing to exempt  
4 certain individuals from prosecution, making its reach wider than that of its federal  
5 counterpart. 8 U.S.C. § 1324(a)(1)(C) exempts from prosecution ministers or missionaries  
6 of religious denominations, while A.R.S. § 13-2929 provides no such exemption and  
7 would allow prosecution of such individuals. *See* A.R.S. § 13-2929(E) (exempting only  
8 child protective services personnel and first responders acting in their official capacity).  
9 This inconsistency also supports a finding of conflict preemption. *See South Carolina*,  
10 2011 WL 6973241, at \*13 (“the inconsistent safe harbor provisions of state and federal  
11 law result in conflict preemption.”); *Alabama*, 813 F. Supp. 2d at 1331 (finding harboring  
12 and transporting state statute preempted because it “actually prohibits conduct allowed  
13 under federal law and criminalizes conduct that is lawful under federal law.”); *Geier v.*  
14 *Am. Honda Motor Co., Inc.*, 529 U.S. 861, 899 (2000) (recognizing that “a federal statute  
15 implicitly overrides state law . . . when state law is in actual conflict with federal law.”)  
16 (internal quotations and citations omitted).

17 Like Georgia, Alabama, and South Carolina’s enjoined counterparts, A.R.S. § 13-  
18 2929 is preempted because, although it is “superficially similar to [the relevant federal  
19 statute, 8 U.S.C.] § 1324, state prosecutorial discretion and judicial interpretation will  
20 undermine federal authority to ‘establish immigration enforcement priorities and  
21 strategies’” and undermine federal purposes and objectives. *GLAHR*, 793 F. Supp. 2d at  
22 1335 (quoting *U.S. v. Arizona*, 641 F.3d 339, 352 (9th Cir. 2011); *Alabama*, 813 F. Supp.  
23 2d at 1335-36; *South Carolina*, 2011 WL 6973241, at \*21. For all of these reasons,  
24 Plaintiffs are likely to succeed on their claim that A.R.S. § 13-2929 conflicts with federal  
25 law and is preempted.

26 **II. Plaintiffs Will Suffer Irreparable Harm if the Preliminary Injunction Is Not**  
27 **Granted**  
28

1 Plaintiffs and putative class members will suffer irreparable harm if an injunction is not  
2 granted. *Winter*, 555 U.S. at 20 (injunction appropriate where irreparable harm “likely”).  
3 The alleged deprivation of their constitutional rights are alone sufficient to establish  
4 irreparable injury from § 2(B) and A.R.S. § 13-2929. 11A Charles A. Wright et al.,  
5 Federal Practice & Procedure § 2948.1 (2d ed. 1995) (“When an alleged deprivation of a  
6 constitutional right is involved, most courts hold that no further showing of irreparable  
7 injury is necessary.”); *see also Jolly v. Coughlin*, 76 F.3d 468, 472 (2d Cir. 1996) (“[I]t is  
8 the *alleged* violation of a constitutional right that triggers a finding of irreparable harm.”)  
9 (granting preliminary injunction for plaintiff alleging Eighth Amendment claims against  
10 prison officials); *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1019 (C.D. Cal.  
11 2011) (“The Ninth Circuit has held that ‘an alleged constitutional infringement will often  
12 alone constitute irreparable harm.’”) (finding irreparable harm based on likelihood of  
13 establishing violations of Fourth Amendment and Fourteenth Amendment due process  
14 rights) (citations omitted). In addition, courts have repeatedly recognized that the  
15 enforcement of a preempted law may constitute irreparable harm, particularly where, as  
16 here, more than monetary interests are at stake. *See, e.g., United States v. Arizona*, 641  
17 F.3d at 366; *GLAHR*, 793 F. Supp. 2d at 1340; *South Carolina*, 2011 WL 6973241, at  
18 \*21; *Alabama*, 813 F. Supp. 2d at 1336; *see also Morales v. Trans World Airlines*, 504  
19 U.S. 374, 381 (1992).

20 Even if this Court did not find that irreparable injury exists on the basis of the  
21 constitutional violations raised here, ample evidence exists of the irreparable harm  
22 Plaintiffs will suffer from § 2(B) and A.R.S. § 13-2929. Section 2(B) puts Plaintiffs and  
23 class members at risk of unlawful detention and interrogation based on little more than an  
24 individual officer’s “reasonable suspicion” that they are “unlawfully present in the United  
25 States.” A.R.S. § 11-1051(B). Plaintiffs will be subject to racial profiling, additional  
26 police scrutiny, prolonged detention, and possible arrest if § 2(B) is implemented. *See*  
27 *Harris Decl.*, *United States v. Arizona*, No. 10-1413, ¶ 7 (Doc. 27-10); George Gascón  
28

1 Decl. ¶¶ 18–20 (Doc. 235-6); Eduardo González Decl. ¶¶ 16–17 (Doc. 235-8); Samuel  
2 Granato Decl. ¶ 16 (Doc. 236). Indeed, the Court already found that Plaintiffs have  
3 alleged a “realistic danger of sustaining a direct injury as a result of . . . [the] operation or  
4 enforcement’ of [§ 2] because of their appearance and limited English-speaking ability.”  
5 Order, May 29, 2012, at 11 (*quoting Babbitt v. United Farm Workers*, 442 U.S. 289, 298  
6 (1979)). The Court further found that “[b]ecause § 2 applies during every lawful stop,  
7 detention, or arrest, the Individual Plaintiffs will be subject to the allegedly  
8 unconstitutional immigration investigations even if they are stopped only for suspicion of  
9 a minor traffic violation and even if they have not actually committed any crime.” *Id.* at 8-  
10 9.

11 In addition, Plaintiffs, and many putative class members, will curtail their public  
12 activities if § 2(B) is allowed to take effect out of fear that they will be subject to arrest  
13 and detention by law enforcement officials due to their appearance and limited English-  
14 speaking ability. *See* Vargas Decl. ¶ 7 (Doc. 236-10); C.M. Decl. ¶ 5 (Doc. 331-5); Tupac  
15 Enrique Decl. ¶ 3 (Doc. 236-9). Members of plaintiff organizations will also reduce going  
16 out in public and attending organizational events out of fear that contact with law  
17 enforcement officials could lead to interrogation and detention under § 2(B). Joseph  
18 Hansen Am. Decl. ¶ 6 (Doc. 314-2); Eliseo Medina Decl. ¶ 6 (Doc. 236-9). Plaintiffs will  
19 also be fearful of having any contact with law enforcement, including reporting crimes or  
20 serving as witnesses. *See* Ibarra Decl. ¶ 12 (Doc. 236-2) (“SB 1070 will cause many of  
21 our clients or prospective clients to not report that they are victims of crime out of fear that  
22 contact with Arizona state law enforcement will subject them to detention, arrest and  
23 possible deportation.”); *see also* Medina Decl. ¶ 7 (Doc. 236-9); Gascón Decl. ¶¶ 9–10  
24 (Doc. 235-6); Gonzalez Decl. ¶¶ 12–13 (Doc. 235-8), 18; Granato Decl. ¶¶ 9–10 (Doc.  
25 236).

26 Moreover, Plaintiffs and putative class members are at risk of criminal prosecution  
27 under A.R.S. § 13-2929. The Court has already found that Plaintiff Luz Santiago “has  
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1 alleged a ‘realistic danger of sustaining a direct injury as a result of the . . . operation or  
2 enforcement’ of A.R.S. § 13-2929.” Order, May 29, 2012, at 4. As the pastor of her  
3 church, Plaintiff Santiago fears that she will face criminal sanctions because she frequently  
4 provides transportation, food, and shelter to members of her congregation who may not be  
5 authorized to remain in the United States. Santiago Dep. at 20-21, 24-25 (Doc. 655-11).  
6 For example, Santiago has stated that she frequently drives members of her congregation  
7 to church retreats and to shop for groceries. *Id.* at 20-21. She also provides shelter to  
8 individuals in need. *Id.* at 24. Under A.R.S. § 13-2929, it is likely that Santiago would be  
9 found to do so “in reckless disregard” of the fact that some of those congregation members  
10 and individuals may be unlawfully present. Order, May 29, 2012, at 16; *see also* Santiago  
11 Dep. at 30-31, 33. If A.R.S. § 13-2929 is not enjoined, Santiago will continue to face the  
12 “reasonable likelihood” of criminal charges. *See* Order, May 29, 2012, at 16. Because  
13 Santiago intends to continue to provide transportation and shelter to members of her  
14 congregation without regard to their immigration status, *see* Santiago Dep. 58-59, she will  
15 suffer irreparable harm if A.R.S. § 13-2929 is not enjoined. *See San Diego Gun Rights*  
16 *Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996); *see also GLAHR*, 793 F. Supp. 2d  
17 at 1340 (finding that plaintiffs would suffer irreparable harm under similar harboring  
18 provisions because they would be “subject to criminal penalties under laws that are  
19 allegedly preempted”); *Alabama*, 813 F. Supp. 2d at 1332 (same).

20 Organizational Plaintiffs will also suffer direct harm in the form of resource  
21 diversion, the frustration of their core mission activities, and the possibility of criminal  
22 prosecution of staff or volunteers under A.R.S. § 13-2929. Organizational Plaintiffs have  
23 already diverted significant resources toward educating their members about the effects of  
24 S.B. 1070, including A.R.S. § 13-2929. Jennifer Allen Decl. ¶ 12 (Doc. 314-1); Alison J.  
25 Harrington Decl. ¶¶ 8, 23 (Doc. 314-4). A.R.S. § 13-2929 will also hinder the  
26 organizational Plaintiffs’ ability to retain and recruit members because those members will  
27 curtail their own travel and participation in organizational events in order to avoid being  
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1 charged with violating A.R.S. § 13-2929. Allen Decl. ¶¶ 13-14. This Court has already  
2 found that “[t]he alleged harm to the organizational Plaintiffs will occur if S.B. 1070  
3 [including A.R.S. § 13-2929] goes into effect, regardless of how it is enforced or applied.”  
4 Order, Oct. 8, 2010, at 9.

5 In addition, Organizational Plaintiffs will suffer irreparable harm if their staff or  
6 volunteers are prosecuted under A.R.S. § 13-2929. For example, staff from Plaintiff  
7 Border Action Network (“BAN”) regularly bus members to events and organizational  
8 functions. Allen Decl. ¶ 9. Because BAN does not inquire into the citizenship or  
9 immigration status of the members it transports and some of these members are persons  
10 without authorization to be in the United States, “BAN staff are concerned that this could  
11 subject them to investigation under the new immigration law.” *Id.*; *see also* Pl. Ariz.  
12 South Asians for Safe Families’ Answers to Intervenor Def. Governor Brewer’s First Set  
13 of Interrogs. at 6-7 (indicating that ASASF volunteers often transport citizen and non-  
14 citizen domestic violence victim members to medical and legal appointments) (Ex. H).  
15 Similarly, organizational Plaintiff Southside Presbyterian Church will be irreparably  
16 harmed if its leaders, staff, parishioners, and volunteers are subjected to criminal  
17 prosecution under A.R.S. § 13-2929 for “performing work that is central to [their] faith”  
18 by providing assistance to the homeless or to immigrants in distress in the desert, or by  
19 transporting parishioners and community members to activities and medical facilities.  
20 Harrington Decl. ¶¶ 9-12, 21 (Doc. 314-4).

### 21 **III. The Balance of Equities Tips Sharply In Favor of Plaintiffs**

22 Any harm to the Defendants from the grant of a preliminary injunction is minimal  
23 because Plaintiffs ask only for the status quo to be maintained while the significant  
24 constitutional challenges to § 2(B) are resolved. As described above, without a  
25 preliminary injunction, the irreparable harms facing Plaintiffs are overwhelming, and  
26 courts frequently have found that the equities favor an injunction to preserve the status quo  
27 in just such a situation. *See, e.g., Nat’l Ctr. for Immigrants’ Rights, Inc. v. INS*, 743 F.2d  
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1 1365, 1368 (9th Cir. 1984) (agreeing with district court’s conclusion that irreparable harm  
2 to plaintiffs outweighed harm to government from delay in implementing regulation); *AFL*  
3 *v. Chertoff*, 552 F. Supp. 2d 999, 1006-07 (N.D. Cal. 2007) (same). Indeed the  
4 preservation of the status quo in the face of potential widespread and significant  
5 irreparable harm is precisely the purpose of a preliminary injunction. *See Sierra On-Line,*  
6 *Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Plaintiffs merely seek  
7 to prevent Defendants from implementing a law that is constitutionally suspect in order to  
8 prevent broad irreparable harm to Plaintiffs and to the public. Thus, the equities tip  
9 sharply in favor of the grant of a preliminary injunction.

#### 10 **IV. The Preliminary Injunction Will Serve the Public Interest**

11 The interests of Plaintiffs and the public are aligned in favor of a preliminary  
12 injunction. The same violations that would irreparably harm Plaintiffs would concurrently  
13 harm the public interest. In fact, § 2(B) is likely to result in widespread discrimination  
14 against racial and ethnic minorities, because law enforcement would be required to assess,  
15 without sufficient training and guidance, whether there is “reasonable suspicion” that an  
16 individual is unlawfully present.

17 The fact that law enforcement officials risk being sued by private parties, who  
18 believe that Arizona city and county officials have not enforced the law strictly enough,  
19 increases the likelihood that racial profiling will be employed. *See* A.R.S. § 11-1051(G);  
20 *see also* Villaseñor Decl. ¶¶ 4, 5, 7 (Ex. D). This provision sends a clear directive of  
21 maximum enforcement to local law enforcement officials. As a result, Plaintiffs and  
22 members of the public are at a substantial risk of being deprived of their constitutional  
23 rights to liberty and due process, with “no meaningful procedural safeguards against  
24 erroneous deprivations of liberty.” Order, Oct. 8, 2010, at 23. Given the near certainty of  
25 these irreparable harms, it is unquestionably in the public interest to prevent these  
26 widespread constitutional violations. *See Murillo v. Musegades*, 809 F. Supp. 487, 498  
27 (W.D. Tex. 1992) (the “public interest will be served by protection of Plaintiffs’  
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1 constitutional rights” in cases where the majority of the Hispanic population within a  
2 geographic area would be subjected to “illegal stops, questioning, detentions, frisks,  
3 arrests, searches, and further abuses” by local law enforcement).

4 Section 2(B) will, as noted above, also deter individuals from interacting with law  
5 enforcement, thus compromising public safety. González Decl. ¶¶ 12–13, 18 (Doc. 235-  
6 8); Granato Decl. ¶¶ 9–10 (Doc. 236); Gascón Decl. ¶¶ 9–10 (Doc. 235-6). Section 2(B)  
7 will undermine trust between the police and community members, for whom a routine  
8 encounter with law enforcement will become a lengthy detention. This increased fear of  
9 local law enforcement in immigrant communities will threaten the safety of all Arizona  
10 communities, as well as the safety of police officers.

11 Moreover, the public interest is served best when unconstitutional and preempted  
12 state laws are blocked by courts. *See Arizona*, 641 F.3d at 366 (“[I]t is clear that it would  
13 not be equitable or in the public’s interest to allow the state . . . to violate the requirements  
14 of federal law . . . . In such circumstances, the interest of preserving the Supremacy  
15 Clause is paramount.” (internal quotation omitted)); *see also South Carolina*, 2011 WL  
16 6973241, at \*21 (finding that a preliminary injunction of similar harboring provisions is in  
17 the public interest); *Alabama*, 813 F. Supp. 2d at 1336 (same); *Buquer*, 797 F. Supp. 2d at  
18 925 (“the public has a strong interest in the vindication of an individual’s constitutional  
19 rights . . . .” (quoting *O’Brien v. Town of Caledonia*, 748 F.2d 403, 408 (7th Cir. 1984)));  
20 *GLAHR*, 793 F. Supp. 2d at 1340 (same). As described above, § 2(B) and A.R.S. § 13-  
21 2929 are preempted by federal law. For the foregoing reasons, the public interest weighs  
22 in favor of a preliminary injunction.

## 23 CONCLUSION

24 The Court should grant the requested injunction.

25 DATED this 17th day of July 2012.

26 Respectfully submitted,

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/s/ Karen C. Tumlin

NATIONAL IMMIGRATION LAW  
CENTER

/s/ Omar C. Jadwat

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION IMMIGRANTS' RIGHTS  
PROJECT

/s/ Victor Viramontes

MEXICAN AMERICAN LEGAL DEFENSE  
AND EDUCATIONAL FUND



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**CERTIFICATE OF SERVICE**

I hereby certify that on July 17, 2012, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System which will send notification of such filing to all counsel of record.

/s/ Karen C. Tumlin