No. 12-17046

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Valle del Sol. et al., Plaintiffs-Appellants, v. Michael B. Whiting, et al., Defendants-Appellees, and State of Arizona and Janice K. Brewer, Intervenor Defendants-Appellees.	No. 12-17046 No. 2:10-cv-01061-PHX-SRB District of Arizona

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR AN INJUNCTION PENDING APPEAL

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(ii) The nature of the emergency is as follows:

In April 2010, Arizona enacted a sweeping state immigration scheme, Senate Bill 1070, 49th Leg., 2nd Reg. Sess., Ch. 113 (Az. 2010), as amended by Arizona House Bill 2162, 49th Leg., 2nd Reg. Sess., Ch. 211 (Az. 2010) ("SB 1070"). Plaintiffs and the United States brought separate pre-enforcement challenges to this Arizona law. As a result of these challenges, the four most problematic sections of SB 1070—§§ 2(B), 3, 5(C), and 6—were enjoined based on preemption in the federal government's case and have never gone into effect.

On June 25, 2012, the Supreme Court ruled in the United States' challenge that §§ 3, 5(C), and 6 are preempted by federal law, roundly rejecting Arizona's bid to create its own immigration regime. *Arizona v. United States*, 132 S. Ct. 2492 (2012). However, the Supreme Court found that the United States had not established that § 2(B) should be enjoined, because based on the record and

claims before the Court, it was possible that § 2(B) could be interpreted to avoid preemption problems. The Supreme Court thus reversed on § 2(B) and remanded for further proceedings. The Supreme Court only considered a preemption challenge to SB 1070's four sections, including § 2(B), because that was the only issue before it on appeal.

After receiving a mandate from this Court on the Supreme Court's ruling, the district court has now ordered the United States and Arizona to propose an order implementing the Supreme Court's ruling by September 17, 2012. Order, *United States v. Arizona*, No. 2:10-cv-01413-PHX-SRB (D. Ariz. Sept. 5, 2012), Ex. 6. The existing injunction against § 2(B) could be lifted as soon as the parties submit their proposal or proposals—*i.e.*, on September 17 or possibly even earlier. Whatever the precise timing, it appears that § 2(B) will go into effect imminently unless a new injunction issues.

Noting that the Supreme Court had explicitly preserved the possibility that § 2(B) could be enjoined in another case, on July 23, 2012, Plaintiffs filed the preliminary injunction motion that is the subject of this appeal. Plaintiffs' motion sought to preliminarily enjoin § 2(B) based on evidence and legal theories that were not before the Supreme Court in *Arizona*.

The district court rejected Plaintiffs' request to preliminarily enjoin § 2(B) without addressing the merits of any of their new claims or evidence, reading the Supreme Court's decision as "clear direction . . . that [§] 2(B) cannot be challenged further on its face before the law takes effect." Order Granting in Part & Denying in Part Pls.' Mot. for P.I. (hereinafter "Order") at 5. But that question was not before the Supreme Court, which nowhere stated that the district court lacked authority to entertain a pre-enforcement challenge, and which did not address any Equal Protection or Fourth Amendment claims at all.

The district court was simply wrong in holding that the Supreme Court's

decision forecloses consideration of the merits of Plaintiffs' motion. This is true most obviously as to Plaintiffs' Equal Protection challenge, which does not rely on the manner in which § 2(B) is interpreted and applied. But it is also true as to Plaintiffs' Fourth Amendment and preemption challenges, which are based on a record of how the law will be applied that was not before the Supreme Court.

Based on the district court's demonstrably faulty reasoning, § 2(B) will likely go into effect within days unless this Court issues an injunction pending appeal. Plaintiffs filed a motion for an injunction pending appeal with the district court on September 13, 2012. However, to date the court has not acted on that motion and, as explained above, the current injunction of § 2(B) in the federal case may be terminated imminently. There is no question that Plaintiffs and others similarly situated face imminent and irreparable harm in the absence of an injunction against § 2(B), including being deprived of constitutional rights and being subjected to racial profiling, police scrutiny, and prolonged detention.

In contrast, Defendants face minimal, if any, harm from an additional injunction pending appeal that further suspends for a brief period a provision that has been enjoined for more than two years and has never been in effect, so that this Court may properly assess the constitutional claims raised in Plaintiffs' appeal.

(iii) Counsel for respondents were notified of this emergency motion on September 14, 2012, as set forth in the accompanying Declaration of Karen Tumlin. Counsel have been served with this motion by email on September 14, 2012.

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EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs-Appellants move for an injunction pending appeal to prevent the implementation of § 2(B) of Arizona's SB 1070.[1] In a ruling on September 5, 2012, the district court refused to preliminarily enjoin § 2(B)—which is unconstitutional and immediately harmful to Plaintiffs and the public interest—without addressing the substance of the arguments and evidence that Plaintiffs presented in support of their request. The district court reached this result based on a mistaken reading of the Supreme Court's decision in a related case as precluding pre-enforcement challenges that were not before the high Court. Because of this error, the district court never analyzed the likelihood that Plaintiffs will succeed on the merits of their claims. The district court's ruling was plainly legally erroneous, and Plaintiffs are highly likely to succeed in the instant appeal.

Unless this Court acts, in a matter of days § 2(B) will take effect, causing severe harm to Arizona's Latino and other minority communities. In order to preserve the status quo, and to ensure that the district court's legal error does not result in irreparable injury and harm to the public interest, Plaintiffs respectfully urge this Court to enjoin § 2(B) pending appeal.

I. BACKGROUND

SB 1070 creates new Arizona state law crimes relating to immigration as well as various new state law enforcement procedures and mandates relating to immigration. The district court originally enjoined four provisions of SB 1070: § 3, which authorizes the arrest and punishment of persons whom the State determines to be in violation of the federal alien registration statute; § 5(c), which

[1] Unless otherwise indicated, all references herein to SB 1070 refer to that bill as amended by HB 2162.

creates state criminal penalties for "unlawfully present" individuals who work or attempt to solicit work; § 6, which allows for the warrantless arrest of individuals who have committed a public offense that makes them removable; and § 2(B), which requires any police officer who has conducted a "lawful stop, detention or arrest . . . in the enforcement of any other law or ordinance of a county, city or town of [the State of Arizona]" to make a "reasonable attempt" to determine the immigration status of the person who has been stopped, detained, or arrested, whenever "reasonable suspicion exists that the person is an alien and is unlawfully present." A.R.S. § 11-1051(B). This Court upheld the district court's injunction on all grounds. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011). The Supreme Court affirmed this Court's injunction with respect to 3 of the 4 provisions, but found that an injunction was not appropriate as to § 2(B) on the record before it. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

Following the Supreme Court decision, Plaintiffs filed a new preliminary injunction motion in the district court seeking, among other things, to enjoin § 2(B) based on additional claims and evidence beyond what the Supreme Court had before it in *Arizona*. The motion sought a preliminary injunction against § 2(B) on the following grounds:

1. Equal Protection. Plaintiffs set forth extensive evidence in each of the categories enumerated in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), demonstrating that racial and national origin discrimination was a motivating factor in the enactment of SB 1070. This claim does not turn in any way on the manner in which § 2(B) is interpreted, and was not before the Supreme Court in *Arizona*.

2. Fourth Amendment. The Supreme Court did not have before it a Fourth Amendment challenge in *Arizona*. However, the Court did state that if police extend detentions for status verification or other immigration purposes under

§ 2(B), that would "raise constitutional concerns," citing Fourth Amendment precedent. *Arizona*, 132 S. Ct. at 2509. Plaintiffs submitted evidence demonstrating that, even after the Supreme Court's decision, under § 2(B) Arizona law enforcement agencies will extend detentions for immigration purposes.

3. Preemption. Although the Supreme Court rejected the United States' request for a preliminary injunction on preemption grounds in *Arizona*, the Court explained that extending detentions for immigration investigations would "disrupt the federal framework." *Id.* The Court declined to "assume" that § 2(B) would result in such detentions based on the record before it. *Id.* at 2510. However, as noted above, Plaintiffs submitted additional evidence showing that § 2(B) will be implemented in precisely the manner that the Supreme Court deemed unconstitutional.

The district court did not engage with the new claims and new evidence that Plaintiffs brought in their preliminary injunction motion. Rather, the district court found that the Supreme Court's decision forecloses *all* of the claims Plaintiffs raise—Equal Protection, Fourth Amendment, and preemption—simply because they are raised in a pre-enforcement context. The court reached this conclusion even though the Supreme Court did not have before it any Fourth Amendment or Equal Protection claims, or evidence demonstrating that the police would implement § 2(B) in the same manner the Supreme Court found would be unconstitutional in the preemption context. The district court also rejected Plaintiffs' request that it certify the construction of § 2(B) to the Arizona Supreme Court, stating that "[g]iven the [U.S.] Supreme Court's ruling, the Arizona Supreme Court would be faced with the same issue that bars this Court's consideration of Plaintiffs' facial challenges," and that the certification process

"would not be productive of any answer that the [district court] does not already know." Order at 6 (citation omitted).

On September 13, 2012, Plaintiffs filed a notice of appeal with the district court appealing the court's September 5th order. The same day, Plaintiffs simultaneously filed a motion for an injunction pending appeal with the district court. All of the grounds advanced in support of the instant motion were also submitted in the motion for an injunction pending appeal in the district court.

II. LEGAL STANDARD

An injunction pending appeal requires a party to show "either a combination of probable success on the merits and the possibility of irreparable harm or that serious questions are raised and the balance of hardships tips sharply in his favor." *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs.*, 472 F.3d 1097, 1100 (9th Cir. 2006) (quotation marks omitted). *See also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) (reaffirming the alternative "serious questions" test formulation); *Haggard v. Curry*, 631 F.3d 931, 935 (9th Cir. 2010) (per curiam) (identifying "the most important factor" as whether the appealing party "has made a strong showing of likely success on the merits of its appeal of the district court's decision"). Both tests are satisfied here.

III. ARGUMENT

A. Plaintiffs Are Likely To Succeed On the Merits

The district court's ruling is legally incorrect. The district court disposed of Plaintiffs' Fourth Amendment, Equal Protection, and preemption claims, as well as Plaintiffs' certification request, in three double-spaced pages. The district court did not address the substance of the claims because it viewed the Supreme

Court's ruling as establishing broadly "that Subsection 2(B) cannot be challenged further on its face before the law takes effect"—on any ground. Order at 5.

That reading of the Supreme Court's decision is unsupportable. The Supreme Court rejected only the specific preemption claim that was before it. The Court found narrowly that "the *United States* cannot prevail in its *current challenge*" because "there is a basic uncertainty about what the law means and how it will be enforced." *Arizona*, 132 S. Ct. at 2510 (emphases added). Specifically, it was "not clear *at this stage and on this record* that the verification process would result in prolonged detention." *Id.* at 2509 (emphasis added). Thus, the Supreme Court concluded, "[a]t this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a *conflict with federal law*," by extending detentions for immigration verification purposes or because of "other consequences that are adverse to federal law and its objectives." *Id.* at 2509-10 (emphasis added). Nothing in this reasoning addresses other legal claims that were not before the Court, or even preemption claims that can dispel the "basic uncertainty" that the Court identified or otherwise demonstrate that "§ 2(B) will be construed in a way that creates a conflict with federal law." *Id.* at 2510.

The Court underlined the limited nature of its ruling by expressly stating that its "opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect." *Id.* The district court took this statement to mean the inverse—that the opinion *does* foreclose *all* other preemption and constitutional challenges to the law *before* it goes into effect. But that is not what the Court said. Indeed, whether other pre-enforcement challenges were foreclosed was not even before the Court, and a ruling on that question would have amounted to a purely advisory opinion about

the viability of claims not before it.[2] For the district court to hold that it—and by extension this Court—has no authority to entertain a pre-enforcement challenge on legal issues and a record that were not before the high Court is simply wrong.

The error is particularly acute with respect to Plaintiffs' Equal Protection claim. Plaintiffs sought a preliminary injunction against § 2(B) because racial and national origin discrimination was a motivating factor in its enactment. That claim is fundamentally different from the preemption claim at issue in *Arizona*. It does not turn at all on the scope of permissible detentions under § 2(B) or whether the section extends detentions solely to verify immigration status. Instead, it focuses on the intent of the legislature in enacting the law—an event that was complete long ago. There is simply no need to wait to see how § 2(B) will be implemented before adjudicating Plaintiffs' request for a preliminary injunction on this basis.

The district court was also mistaken in viewing the Supreme Court's decision as either barring or obviating certification to the Arizona Supreme Court for a definitive construction of the statute. First, if the district court regarded the Supreme Court's decision as barring any pre-enforcement construction of the statute by the Arizona Supreme Court, *see* Order at 6 ("Given the [U.S.] Supreme Court's ruling, the Arizona Supreme Court would be faced with the same issue that bars this Court's consideration of Plaintiffs' facial challenges"), it was clearly wrong. There is simply nothing in the Supreme Court's decision that

[2] "[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (citation omitted, alteration in original); *see also Denver Area Educational Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 756 (1996) (stating that the Court "cannot . . . decide . . . a matter not before [it]"); *Walls Industries, Inc. v. United States*, 958 F.2d 69, 71 (5th Cir. 1992).

purports to or could be read as any obstacle to pre-enforcement certification, or to the Arizona courts' authority to construe Arizona statutes.

Second, to the extent that the district court found that there was no point in certifying the question because the Supreme Court had already indicated that certain interpretations of the statute would be unconstitutional, *see id.* at 6 (certification "would not be productive of any answer that the [district court] does not already know"), it failed to focus on what the Supreme Court actually did and what the state supreme court could do on certification. The Supreme Court did not construe the statute; it simply indicated if the state courts construed the statute in certain ways, the statute would be unconstitutional. The point of certification is to obtain the "definitive interpretation from the state courts" that was missing in *Arizona* and thus to be able to say clearly what § 2(B) does and does not allow. *Arizona*, 132 S. Ct. at 2510. If, as the district court apparently expects, the Arizona Supreme Court were to construe § 2(B) definitively as not authorizing any independent or additional detention, that would bind Arizona law enforcement officials and would dispose of any facial challenge to § 2(B) on that ground. That is a significantly different situation than the current one, where § 2(B) does not prohibit such extended detentions and police officials read that section to require them.

Thus, certification resulting in an interpretation barring these detentions would not be pointless; rather, it would provide a much-needed resolution of important questions and avoid serious constitutional violations. For that reason, and in order to expedite matters, Plaintiffs respectfully request that the motions panel itself certify the question to the Arizona Supreme Court. *See* A.R.S. § 12-1861 (providing for certification by "a court of appeals of the United States"); *International Soc. for Krishna Consciousness of California Inc. v. City of Los Angeles*, 530 F.3d 768, 771 (9th Cir. 2008) (noting certification request to

motions panel); *Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 378 & n.2 (9th Cir. 1992) (same).

For these reasons, the district court's ruling is plainly legally erroneous and is likely to be reversed. Below, Plaintiffs briefly outline their Equal Protection, Fourth Amendment, and preemption challenges to § 2(B). A fuller discussion of these claims is found in Plaintiffs' preliminary injunction briefing, attached as Exhibits 1 and 3.

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

Plaintiffs are likely to succeed in demonstrating that § 2(B) violates the Equal Protection Clause under the analysis set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). Plaintiffs presented evidence under each of the factors that *Arlington Heights* identified, *see id.* at 266–68, to support their claim that unlawful discrimination was "a 'substantial' or 'motivating' factor behind enactment" of § 2(B). *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (citation omitted); *see also Arlington Heights*, 429 U.S. at 265 (explaining that plaintiffs need not prove that "the challenged action rested solely on racially discriminatory purposes. . . . or even that a particular purpose was the 'dominant' or 'primary' one").

First, the legislative history of SB 1070 demonstrates discriminatory intent in a number of ways. *See* P.I. Br. at 13-26, Ex. 1. In explaining the need for SB 1070, legislators repeatedly relied on wildly exaggerated and outright false "facts," particularly regarding the alleged criminality of undocumented immigrants, which strongly suggests that their stated reasons for passing the legislation were pretext for unlawful discrimination. *See id.* at 13-17. Relatedly, legislators consistently conflated Latinos, Spanish-speaking individuals, Mexicans, and the children of undocumented immigrants with "illegal aliens,"

demonstrating that the legislative target was not defined by immigration status. *See* P.I. Br.. at 17-21;[3] *see also Cent. Alabama Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1192 (M.D. Ala. 2011) (Thompson, J.) (holding that "conflat[ing] race and immigration status" supports a finding of discriminatory intent).

The legislative debate on SB 1070, moreover, was replete with racially coded language about crime, "invasion[s]," and comments about "these people," *see* P.I. Br. at 21-23, Ex. 1, which are precisely the types of statements from which courts routinely infer a discriminatory purpose. *See, e.g., United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) (en banc) (noting that references to crime, "unless properly limited and factually based, can easily serve as a proxy for race or ethnicity"); P.I. Br. at 21, Ex. 1 (collecting cases). Discriminatory statements of constituents advocating for SB 1070 and its unsuccessful predecessor bills also reflect clear racial and national origin animus. *See id.* at 23-26; *see also* P.I. Reply at 13, Ex. 3 (Doc. 739); Second Decl. of Justin Cox (Doc. 739-6) (reflecting multi-year effort by S.B. 1070 supporters to enact its provisions in predecessor legislation).

Second, Plaintiffs presented compelling evidence that § 2(B) will have a discriminatory impact on Latinos and Mexican nationals. *See id.* at 26-30. Approximately two-thirds of Arizona's foreign-born population is from Latin America and around 60% of undocumented immigrants in the United States are

[3] For instance, a member of Senator Karen Johnson's staff conflated "Hispanics" and "illegals" in an email sent to Senator Johnson and Senator Russell Pearce, the sponsor of the bill, about workers cutting grass and cleaning up a park: "Yesterday there were two men who were obviously NOT Hispanic—very white and very American looking—like college kids. Hooray! It looks like the illegals are starting to depart." Email to Sen. Pearce dated July 6, 2007 (Ex. E-20 to Mot. for P. I.) (Doc. 719-6).

from Mexico. Preciado Decl. ¶¶ 5, 8, Ex. F to Mot. for P.I. (Doc. 719-7).[4] Unquestionably Latinos (as well as other racial minorities) will be disproportionately affected by § 2(B). The legislature also enacted S.B. 1070 in the face of testimony and evidence that § 2(B)'s standard—"reasonable suspicion" of unlawful presence—would lead to the profiling of Latinos and those who appear Mexican, *see* P.I. Br. at 27-28 (Ex. 1), especially in light of the legislature's decision not to appropriate a dime to train the state's law enforcement officers on their sweeping new mandate. Finally, the legislature explicitly intended § 2(B) to preserve, codify, and extend statewide the immigration enforcement tactics of the Maricopa County Sheriff's Office, which, as the legislature knew, had resulted in numerous reports, complaints, lawsuits, and investigations of widespread racial profiling. *See id.* at 28-30.

Third, discriminatory animus permeated the sequence of events leading up to the passage of SB 1070. *See id.* at 30-34. For example, approximately five years before its passage, the Arizona Legislature enacted a bill that would have made English the official language of the state and "protect[ed] the rights of persons who use English" in the state.[5] Although vetoed by then-Governor Janet Napolitano, the measure—which was intended to target the "problem" of growing Spanish usage—was approved by the Arizona electorate as Proposition 103. *See id.* at 31-32; *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (explaining that "for certain ethnic groups and in some communities, [] proficiency in a particular language, like skin color, should be treated as a surrogate for race" under a discriminatory intent analysis). Then, the same year

[4] For the Court's convenience, Plaintiffs have included a full set of Plaintiffs' exhibits submitted in their preliminary injunction briefing. These exhibits use the same lettering scheme as the Plaintiffs used in the court below.

[5] Http://www.azsos.gov/election/2006/info/pubpamphlet/english/Prop103.htm.

as it passed SB 1070, the Legislature enacted H.B. 2281, a law intended to eliminate Mexican-American Studies programs by financially penalizing primary and secondary schools if they provide classes that "are designed primarily for pupils of a particular ethnic group" or "advocate ethnic solidarity instead of the treatment of pupils as individuals."[6] *See id.* at 32-33.

Fourth, § 2(B) markedly departed from the Legislature's usual deference to law enforcement—removing discretion from officers in the field by requiring them, upon pain of civil lawsuits and penalties, to investigate civil violations of federal administrative law, redirecting their efforts away from an area the legislature generally prioritizes: investigating crimes, particularly those that threaten public safety. *See id.* at 34-36. Such a radical departure from longstanding practice and priorities are evidence of discriminatory intent. *Arlington Heights*, 429 U.S. at 267.

Even without the benefit of discovery, Plaintiffs made out a prima facie case that anti-Latino and/or anti-Mexican animus was "a 'substantial' or 'motivating' factor" in § 2(B)'s enactment. *Hunter*, 471 U.S. at 228. The burden therefore shifts to Defendants "to demonstrate that the law would have been enacted without this factor." *Id.* Defendants wholly failed to carry their burden. Thus, based on the record before the Court, Plaintiffs are likely to succeed on the merits of their intentional discrimination claim.

2. Plaintiffs Are Likely to Prove That § 2(B) Will Result In Extended Detentions

Under the Supreme Court's § 2(B) analysis, if the provision allows detention for immigration status verification, it is preempted by federal law. *Arizona*, 132 S. Ct. at 2509-10. The Supreme Court also noted that such

[6] http://www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf.

detention would raise other constitutional concerns—under the Fourth Amendment, at a minimum. *See id*. The Supreme Court found, however, that "§ 2(B) could be read to avoid these concerns," because "state courts may conclude that, unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong [a] stop," and the second sentence of § 2(B) could also be read "as an instruction to initiate a status check every time someone is arrested, or in some subset of those cases, rather than as a command to hold the person until the check is complete no matter the circumstances." *Id*. at 2509. As noted above, the Court found that "at [the] stage and on [the] record" before the Court, there was a "basic uncertainty" about whether § 2(B) would in fact be implemented in a way that avoided such concerns. *Id.* at 2509-10.

On the record established in Plaintiffs' motion, however, there is no longer a "basic uncertainty" regarding the implementation of § 2(B). Plaintiffs presented evidence establishing that multiple law enforcement agencies in the state—that together cover 70% of Arizona's population, *see* P.I. Reply at 3, Ex. 1—intend to enforce § 2(B) in a way that crosses the line the Supreme Court drew. Evidence not in the record in *Arizona* shows that § 2(B) will extend detentions and Plaintiffs are, accordingly, substantially likely to prevail on their claims that § 2(B) violates the Fourth Amendment and is preempted.

Plaintiffs presented the statements of multiple Arizona law enforcement officials, made after the Supreme Court's ruling, indicating that they understand § 2(B) to require officers to detain individuals for immigration status verification when they would not otherwise have been detained.[7] These statements include

[7] Indeed, both the district court, in *United States v. Arizona*, 703 F. Supp. 2d 980, 993-98 (D. Ariz. 2010), and this Court, in *United States v. Arizona*, 641 F.3d 339, 346-52 (9th Cir. 2011), found that to be a natural interpretation of the statute.

public remarks of department heads and the declaration of the Chief of Police of Arizona's second-largest city. *See* P.I. Mot. at 5-8, Ex. 1. The record also contains the state's newly reissued guidance and training materials on SB 1070, which conspicuously fail to clearly prohibit detentions under § 2(B), including detentions pending immigration verification responses. *See* P.I. Reply at 2-3, Ex. 3; Ex. A to Defs.' Opp'n to Mot. for Prelim. Inj. (Doc. 731-2). Finally, the Plaintiffs presented sworn testimony of the Maricopa County Sheriff stating that extended detentions were already the norm, a problem to be exacerbated by § 2(B). *See* P.I. Reply at 4, Ex. 3; Ex. J to Pls.' Mot. for P.I.. (Doc. 739-3).

Because the district court wrongly understood the Supreme Court's ruling to foreclose any pre-enforcement challenge to § 2(B), it disregarded this evidence and failed to recognize that Plaintiffs are likely to succeed on their Fourth Amendment and preemption claims.

a. **Fourth Amendment**

As noted above, the Supreme Court could not issue any preclusive ruling on Fourth Amendment grounds because the issue was not before the Court. Rather than precluding any Fourth Amendment challenge, the Supreme Court stated that any interpretation of § 2(B) which would allow detention solely for immigration status verification "would raise constitutional concerns." The Court then cited two Fourth Amendment cases, *Arizona v. Johnson*, 555 U.S. 323, 333 (2009), and *Illinois v. Caballes*, 543 U.S. 405, 407 (2005), and quoted the latter's holding that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Arizona*, 132 S. Ct. at 2509.

As the Supreme Court's statement regarding "constitutional concerns" suggests, detaining individuals under § 2(B) solely for immigration verification

would violate bedrock Fourth Amendment principles. An initially lawful "seizure becomes unlawful when it is 'more intrusive than necessary.'" *Ganwich v. Knapp*, 319 F.3d 1115, 1122 (9th Cir. 2003) (quoting *Florida v. Royer*, 460 U.S. 491, 504 (1983)). Accordingly, "[t]he scope of a detention must be carefully tailored to its underlying justification," *id.* (internal quotation marks omitted), and a "detention must . . . last *no longer* than is necessary to effectuate the *purpose of the stop*." *Royer*, 460 U.S. at 500 (emphases added); *accord Johnson*, 555 U.S. at 333 (inquiries into matters unrelated to the legitimate justification for a stop may not "measurably extend the duration of the stop"); *Caballes*, 543 U.S. at 407; *United States v. Sharpe*, 470 U.S. 675, 686 (1985). Because "the usual predicate for an arrest is absent" where detention is "based on nothing more than possible removability," *Arizona*, 132 S. Ct. at 2505, detaining individuals solely for immigration investigation violates the Fourth Amendment.

b. **Preemption**

Because, as explained above, § 2(B) will allow detention solely for immigration verification, *Arizona* explains that it "disrupt[s] the federal framework" and is not allowed by "the program put in place by Congress," 132 S. Ct. at 2509; in other words, it is preempted. The Supreme Court's disapproval of extended detention for verification under § 2(B) flows directly from its analysis sustaining the injunction against § 6, SB 1070's warrantless arrest provision. In its § 6 analysis, the Supreme Court explained that because ordinarily "it is not a crime for a removable alien to remain present in the United States," "the usual predicate for an arrest is absent" if the arrest is based on "nothing more than possible removability." *Id.* at 2505; *see also Martinez-Medina v. Holder*, 673 F.3d 1029, 1036 (9th Cir. 2011) (explaining that "an alien who is illegally present in the United States . . . [commits] only a civil violation")

(citation omitted, alteration in original). Furthermore, federal law both "instructs when it is appropriate to arrest an alien during the removal process" and "specifies limited circumstances in which state officers may perform the functions of an immigration officer." *Arizona*, 132 S. Ct. at 2505-06 (citing 8 U.S.C. §§ 1357(g)(1), 1103(a)(10), 1252c, & 1324(c)). In authorizing arrest for commission of "a public offense that makes the person removable," § 6 does not fall within any of those authorizations and "violates the principle that the removal process is entrusted to the discretion of the Federal Government." *Id*. at 2506.

Under the Supreme Court's analysis, detention solely for the purpose of immigration verification under § 2(B) is even more clearly preempted than arrest under § 6 (which required at least probable cause of removability). *See id*. at 2509 (citing § 6 portion of ruling and concluding that detention under § 2(B) for status verification is barred by "[t]he program put in place by Congress"). Because the evidence in this case, which was not before the Supreme Court, shows that Arizona officials intend to enforce § 2(B) in a way that extends detentions solely for verification purposes, Plaintiffs are substantially likely to prevail on their preemption claim against § 2(B).

3. Plaintiffs Face Irreparable Harm If SB 1070 § 2(B) Is Not Enjoined

Plaintiffs face a substantial likelihood of irreparable harm if SB 1070 § 2(B) is not enjoined pending appeal. *Winter v. Natural Resources Defense Counsel, Inc.*, 555 U.S. 7, 20 (2008) (injunction appropriate where irreparable harm "likely"). Deprivation of a constitutional right is alone sufficient to establish irreparable injury from § 2(B). *See* 11A Charles A. Wright *et al*., Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *see also Jolly v. Coughlin*, 76 F.3d

468, 482 (2d Cir. 1996) ("[I]t is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm.") (granting preliminary injunction for plaintiff alleging Eighth Amendment claims against prison officials) (emphasis in original); *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1019 (C.D. Cal. 2011) (finding irreparable harm based on likelihood of establishing violations of Fourth Amendment and Fourteenth Amendment due process rights, and noting that "[t]he Ninth Circuit has held that 'an alleged constitutional infringement will often alone constitute irreparable harm'") (citations omitted). In addition, courts have repeatedly recognized that the enforcement of a preempted law can constitute irreparable harm, particularly where, as here, more than monetary interests are at stake. *See, e.g.*, *United States v. Arizona*, 641 F.3d at 366; *Georgia Latino Alliance For Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1340, *aff'd in relevant part*, ___ F.3d ____, 2012 WL 3553612, at *13 (11th Cir. Aug. 20, 2012) ("*GLAHR*"); *United States v. South Carolina*, 840 F. Supp. 2d 898, 924 (D.S.C. 2011); *U.S. v. Alabama*, 813 F. Supp. 2d 1282, 1336 (N.D. Ala. 2011), *aff'd in relevant part*, ___ F.3d ____, 2012 WL 3553503, at *23 (11th Cir. Aug. 20, 2012); *see also Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992).

Even beyond the irreparable injury inherent in the constitutional violations raised here, the record establishes that Plaintiffs will suffer irreparable injury from § 2(B) in numerous other ways. Section 2(B) puts Plaintiffs at risk of unlawful detention and interrogation based on an individual officer's "reasonable suspicion" that they are "unlawfully present in the United States." A.R.S. § 11-1051(B). Plaintiffs will be subject to racial profiling, additional police scrutiny, prolonged detention, and possible arrest if § 2(B) is implemented. *See* Jack Harris Decl., *United States v. Arizona*, No. 10-1413, ¶ 7 (Doc. 27-10); George Gascón Decl. ¶¶ 18–20 (Doc. 235-6); Eduardo González Decl. ¶¶ 16–17 (Doc.

235-8); Samuel Granato Decl. ¶ 16 (Doc. 236). Indeed, the district court previously found that Plaintiffs alleged a "realistic danger of sustaining a direct injury as a result of . . . [the] operation or enforcement' of [§ 2] because of their appearance and limited English-speaking ability." Order Denying Motion to Dismiss, May 29, 2012 (Doc. 682), at 11 (*quoting Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979)). The district court further found that "[b]ecause § 2 applies during every lawful stop, detention, or arrest, the Individual Plaintiffs will be subject to the allegedly unconstitutional immigration investigations even if they are stopped only for suspicion of a minor traffic violation and even if they have not actually committed any crime." *Id.* at 8-9.

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

4. The Public Interest Favors an injunction Pending Appeal

The interests of Plaintiffs and of the public are aligned in favor of this Court's enjoining SB 1070 § 2(B) pending appeal. The same violations that would irreparably harm Plaintiffs would harm the public interest. In fact, § 2(B) is likely to result in widespread discrimination against racial and ethnic minorities, for the same reasons that the Plaintiffs themselves will be subject to such treatment.

To make matters worse, Arizona law enforcement officials risk being sued by private parties who believe that Arizona city and county officials have not enforced the law strictly enough. *See* A.R.S. § 11-1051(H). This provision sends a clear directive of maximum enforcement to local officials and provides an added incentive to engage in racial profiling and illegal detention. *See* Roberto Villaseñor Decl. ¶¶ 4, 5, 7, Ex. D to Pls.' P.I. Mot. (Doc. 719-5). Given the near certainty of these irreparable harms, it is unquestionably in the public interest to prevent these widespread constitutional violations. *See Murillo v. Musegades*, 809 F. Supp. 487, 498 (W.D. Tex. 1992) (the "public interest will be served by protection of Plaintiffs' constitutional rights" in cases where the majority of the Hispanic population would be subjected to "illegal stops, questioning, detentions, frisks, arrests, searches, and further abuses" by law enforcement).

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

Moreover, the public interest is served when unconstitutional state laws are blocked by courts. *See Arizona*, 641 F.3d at 366 ("[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law . . . . In such circumstances, the interest of preserving the Supremacy Clause is paramount.") (internal quotation omitted)); *see also South Carolina*, 840 F. Supp. 2d at 924 (finding that a preliminary injunction of provision of state immigration law is in the public interest); *Alabama*, 813 F. Supp. 2d at 1336 (same), *aff'd in relevant part*, 2012 WL 3553503, at *23; *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 925 (S.D. Ind. 2011) ("'[T]he public has a strong interest in the vindication of an individual's constitutional rights.'" (quoting *O'Brien v. Town of Caledonia*, 748 F.2d 403, 408 (7th Cir. 1984))); *GLAHR*, 793 F. Supp. 2d at 1340 (same), *aff'd in relevant part*, 2012 WL 3553612, at *13.

Finally, § 2(B) would also harm the federal government's international relations priorities, and particularly the relationship between the United States and Mexico. Abraham F. Lowenthal Decl. ¶¶ 10–11 (Doc. 236-3). Strained diplomatic ties have far-reaching adverse effects on the nation's economy, federal and state governments' ability to collaborate with foreign governments on important issues, and the ability of the United States to maintain peaceable relations with its neighbors. Preserving diplomatic relations with foreign governments is plainly in the public's interest. *See Republic of Panama v. Air Panama Internacional, S.A.*, 745 F. Supp. 669, 675 (S.D. Fla. 1988) (concluding that "buttress[ing] the foreign policy of the United States" serves the public interest).

For the foregoing reasons, the public interest weighs heavily in favor of an injunction pending appeal.

5. The Balance of Hardships Tips Sharply In Favor of Enjoining SB 1070 § 2(B)

Any harm to the Defendants from the grant of an injunction pending appeal is minimal because Plaintiffs ask only for the status quo to be maintained while this appeal is underway. As described above, the irreparable harms facing Plaintiffs are overwhelming, and courts frequently have found that the equities favor an injunction to preserve the status quo in just such a situation. *See, e.g.*, *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 743 F.2d 1365, 1368 (9th Cir. 1984) (agreeing with district court's conclusion that irreparable harm to plaintiffs outweighed harm to government from delay in implementing regulation); *AFL v. Chertoff*, 552 F. Supp. 2d 999, 1006-07 (N.D. Cal. 2007) (same). Indeed the preservation of the status quo in the face of potential widespread and significant irreparable harm is precisely the purpose of a preliminary injunction. *See Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Section 2(B) has never taken effect and has been enjoined for two years. Plaintiffs merely seek a short further delay to prevent Defendants from implementing a law that is constitutionally suspect and to prevent broad irreparable harm to Plaintiffs and to the public while this Court considers an expedited preliminary injunction appeal. Thus, the equities tip sharply in favor of an injunction pending appeal.

IV. CONCLUSION

Appellants respectfully request that this Court enjoin SB 1070 § 2(B) pending appeal.

DATED this 14th day of September 2012.

/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

/s/ Jonathan Weissglass
ALTSHULER BERZON LLP

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 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. Thereafter, my office's Senior paralegal provided courtesy copies to all counsel of record for Defendants and Intervenor Defendants via email.

/s/ Karen C. Tumlin
NATIONAL IMMIGRATION
LAW CENTER