UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

_____

Friendly House, et al., Plaintiffs, vs. Michael B. Whiting, et al., Defendants.	**CV10-1061-PHX-SRB** Phoenix, Arizona July 22, 2010 9:58 a.m.

BEFORE: THE HONORABLE SUSAN R. BOLTON, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

Official Court Reporter:
Elizabeth A. Lemke, RDR, CRR, CPE
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC. 34
Phoenix, Arizona 85003-2150
(602) 322-7247

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

A P P E A R A N C E S

For the Plaintiffs:

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
By: **Omar C. Jadwat, Esq.**
Lucas Guttentag, Esq.
125 Broad Street, 18th Floor
New York, New York 10004

NATIONAL IMMIGRATION LAW CENTER
By: **Linton Joaquin, Esq.**
Karen C. Tumlin, Esq.
3435 Wilshire Boulevard, Suite 2850
Los Angeles, California 90010

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
By: **Nina Perales, Esq.**
Ivan Espinoza-Madrigal, Esq.
110 Broadway Street, Suite 300
San Antonio, Texas 78205

ASIAN PACIFIC AMERICAN LEGAL CENTER, a member
of Asian American Center for Advancing Justice
By: **Julie A. Su, Esq.**
1145 Wilshire Boulevard, Suite 200
Los Angeles, California 90017

MUNGER, TOLLES & OLSON LLP
By: **Bradley S. Phillips, Esq.**
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560

For the Defendants:

SNELL & WILMER LLP
By: **John J. Bouma, Esq.**
Robert A. Henry, Esq.
Kelly Kszwienski, Esq.
One Arizona Center
400 East Van Buren Avenue
Phoenix, Arizona 85004-2202

OFFICE OF THE GOVERNOR - STATE OF ARIZONA
By: **Joseph A. Kanefield, Esq.**
1700 West Washington, 9th Floor
Phoenix, Arizona 85007

MARICOPA COUNTY OFFICE OF
SPECIAL LITIGATION SERVICES
By: **Thomas P. Liddy, Esq.**
Maria R. Brandon, Esq.
234 North Central Avenue, Suite 4400
Phoenix, Arizona 85004

MARICOPA COUNTY ATTORNEY'S OFFICE
By: **Anne C. Longo, Esq.**
222 North Central Avenue, Suite 1100
Phoenix, Arizona 85004-2206

PINAL COUNTY ATTORNEY'S OFFICE
By: **Joe A. Albo, Esq.**
P.O. Box 887
Florence, Arizona 85132

PIMA COUNTY ATTORNEY'S OFFICE
By: **Daniel Jurkowitz, Esq.**
32 North Stone Avenue, Suite 2100
Tucson, Arizona 85701

SANTA CRUZ COUNTY ATTORNEY'S OFFICE
By: **Sean Bodkin, Esq.**
2150 North Congress Drive, Suite 201
Nogales, Arizona 85621

COCHISE COUNTY ATTORNEY'S OFFICE
By: **Brian M. Bergin, Esq.**
Kenneth M. Frakes, Esq.
P.O. Drawer CA
Bisbee, Arizona 85603

P R O C E E D I N G S

(Called to the order of court at 9:58 a.m.)

THE COURT: Good morning, ladies and gentlemen. Please sit down.

THE CLERK: Civil case 10-1061. ***Friendly House and others v. Michael Whiting and others***. Time set for hearing regarding Plaintiffs' Motion for Preliminary Injunction and Defendants' Motions to Dismiss.

Counsel, please announce your presence for the record.

MS. PERALES: Good morning, Your Honor. For the plaintiffs, Nina Perales and also arguing with me this morning is Mr. Omar Jadwat.

MR. GUTTENTAG: Lucas Guttentag for the plaintiffs as well.

MR. JOAQUIN: Linton Joaquin for the plaintiffs.

MR. ESPINOZA-MADRIGAL: Ivan Espinoza-Madrigal for the plaintiffs.

THE COURT: All right. For lawyers, you need to have louder voices than that. I know there's no microphones for you, but I can't hear.

MR. ESPINOZA-MADRIGAL: Ivan Espinoza-Madrigal for plaintiffs.

THE COURT: Thank you.

MS. SU: Julie Su with the Asian Pacific American

Legal Center.

MR. PHILLIPS: Brad Phillips, Munger, Tolles & Olson.

MS. TUMLIN: Karen Tumlin, National Immigration Law Center.

THE COURT: Mr. Bouma?

MR. BOUMA: John Bouma for Governor Brewer and the State.

MR. KANEFIELD: Joseph Kanefield for Governor Brewer and the State of Arizona, Your Honor.

MR. ALBO: Joe Albo, Deputy County Attorney for the Pinal County defendants.

MR. LIDDY: Tom Liddy, Your Honor, for the Maricopa County Sheriff Joe Arpaio.

MR. JURKOWITZ: Daniel Jurkowitz on behalf of the Pima County Attorney Barbara LaWall and Pima County Sheriff Clarence Dupnik.

MS. LONGO: Anne Longo for Rick Romley, Maricopa County Attorney.

MR. BERGIN: Brian Bergin and Ken Frakes for Cochise County Sheriff's Office.

MR. BODKIN: Sean Bodkin for Santa Cruz County Attorney George Silva and Santa Cruz County Sheriff Tony Estrada.

THE COURT: The first motions that we are going to hear are the motions to dismiss that were filed by the State

of Arizona along with Pinal County Attorney and Sheriff -- and Maricopa County Sheriff.

I specified the amount of time for argument, but not the order in which it's to be made. I assume that the defendants that are arguing have made some agreements, so whoever wishes to go first may proceed.

And is the agreement, Mr. Bouma, also that you'll each take seven minutes, or has there been a different time allocation?

MR. BOUMA: Your Honor, Pinal County has ceded their seven minutes, unless you have some questions of them that you would like to ask.

Maricopa County wishes to retain their seven minutes so I will endeavor to speak for the defendants.

THE COURT: So did Pinal County give you all seven or did they give a few minutes to Maricopa?

MR. BOUMA: We have the seven.

THE COURT: Okay.

MR. BOUMA: I'm going to try to save four of my fourteen, so if the Court will let me know, I would appreciate it.

THE COURT: I will.

MR. BOUMA: As you know, our motion involves 12(b)(1) standing issues and 12(b)(6) failure to state a claim issues.

I'm first going to address standing and then I want

to address for a moment why under the principles of statutory construction and common sense the detention portion of Section 2 does not state a claim, reserving the other portions for later argument.

But with respect to standing, there's a lot of plaintiffs involved here and we certainly don't have the time in the time allotted to address each of them individually. There are different standing problems for the individuals and for the entities, but they all do have to meet the one test. They have to show actual and imminent harm, concrete and particularized, and it cannot be conjectural or hypothetical.

And, Your Honor, the declarations are just rife with conjecture and hypotheticals. A lot of "mays," a lot of "likely to," a lot of "likely ifs."

People say what they fear will happen, what they believe will happen. And the issue with respect to standing, of course, is is there injury, in fact?

With respect to the Organizational Plaintiffs, the *Havens Realty* case tends to tell us that the test is that the mission has to be perceptibly impaired with a consequent drain on the organization's resources.

For the most part these plaintiffs have not identified any mission perceptively impaired or any particular resources that would be divergent as a direct consequence of the operation of the statute.

And then too, when you look at the mission statements and the statements of purpose of the organizations, education and assistance to their members and their clients is basically what their mission statements are. And that's what they're doing here, and that's pretty well in line with what their organizational goals are, the reason they exist, for a friendly purpose. For instance, Friendly House, on its web, notes that it provides immigration services and general information and services.

So I guess providing information and assistance really isn't a change in their mission or diversion of their resources.

Valle del Sol was the example that was used in the plaintiffs' response is a plaintiff that had standing, but it's alleged the statute will deter clients from seeking the organization's services because of the client's fear of interrogation, detention, and arrest.

And then they also noted a staff concern because the organization's name is Spanish. There is no declaration to support that. If you look at the ***Havens Realty*** case, that would certainly fall within the areas that they claim they can prove in the abstract. We just don't think they do have standing, because nothing in the statute itself requires a diversion or causes a significant impairment of their resources.

With respect to the individuals, they fear unlawful stops and, of course, that's the racial profiling argument. And, you know, I guess the answer to that is this law expressly prohibits racial profiling. The statute by its operation doesn't require that fear.

The individuals also fear wrongful criminal prosecution. That's the other thing they say. They believe that they're going to be prosecuted under 1070. But again, you know, in terms of standing, that's what they call "generalized fear." And to have standing, an individual must show a genuine threat of imminent prosecution. A fear or belief that you just might be prosecuted is not enough.

Now, with respect to Section 2 on the cooperation assistance laws, over conversations the other day, I know you are well familiar with Section A, the sanctuary city provision, and Section B.

And we talked about the first and second sentences and noted that the first sentence basically provides that Arizona law enforcement officers, if in the course of a lawful stop, detention, or arrest, and if they have reasonable suspicion that an individual is an alien and unlawfully in the country and that it's not impracticable or doesn't interfere with investigation, they can attempt to verify them.

The second sentence then goes on and says any person who is arrested shall have the person's immigration status

determined before the person is released.

Now, we had this talk about whether that required everybody to have their immigration status verified. And I tried to explain that wasn't the way we interpreted the statute, but I don't know if I did it well, so I would like to just start out on a little different tact and see if I can do a more complete job of it.

When you look at the situation and you start with the proposition that the United States citizen does not have an immigration status, there is no where in the INA that the federal law ascribes an immigration status in any category of the United States citizen.

So accordingly, it seems the only interruption -- interpretation of the second sentence that is plausible is that the "person" referred to refers to the first sentence. So "the person" should be read "such person," namely the "person" would be the aliens referred to in the first sentence where the reasonable suspicion exists that the alien is unlawfully present in the United States.

So the State would interpret that section to read that if there's the normal lawful stop, detention, or arrest, and everything practicable and so on, and there's the reasonable suspicion, you go ahead and check out that reasonable suspicion if it's practicable and so on.

But if you arrest them, there's more of a demand that

you go ahead and do that and so a lot less of the "practicable" business. But you're still talking about the person about whom there is a reasonable suspicion that they are an alien and unlawfully in the country.

THE COURT: And so would that mean that if there is this reasonable suspicion and the person is going to be cited for one of those misdemeanor or petty offenses for which there usually is no further detention other than wherever they are, and then they sign and they go, that they can't do that? That they'll have to take whatever time is necessary to make sure that they've checked their immigration status?

MR. BOUMA: You know, we talked about traffic stops too. Without benefit of a traffic stop myself, I did investigate that through some of the statements of people we have. And what actually happens out there on the road when you get stopped is they take your driver's license or my driver's license or anybody else's driver's license or any other identification and run it through.

They do that to see if there's warrants outstanding or any kind of problem. If you don't have -- and then they can cite you. If you have identification, they know who you are, where you are, they can cite and release.

But if you don't have some kind of identification, I mean, you may have a social security number they can run through, you may have any number of different kinds of

information. But if you are a lawful alien, you would have a registration number, many of whom have memorized them. They can run that through.

But let's say they -- if they can't identify you, if you don't have a way that they can identify you and know -- the test is do they know who you are? And is there a reasonable probability that you will show up for whatever you're citing?

Otherwise, they do not cite and release. If they can't identify you and you don't have some ties to the community or somewhere where they have reason to believe you will show up, under their current practice, they do not cite and release. They do not release.

So in your instance, if they can identify themselves as a citizen with a driver's license and so on, they don't have a problem. If it's somebody who did not have a driver's license or other identification, then they could run them -- they would run them through ICE. As a matter of practice, that's what's done. And if they can't identify them, then they do not release them; but they wouldn't release you or me if they couldn't identify us.

THE COURT: Okay. Thank you, Mr. Bouma. We're out of -- well, you have your four minutes left.

MR. BOUMA: Well, I wanted to address the length of detention for just a moment, but maybe I can just do that

later. Thank you.

THE COURT: Thank you. Mr. Liddy?

MR. LIDDY: Your Honor, Thomas Liddy for Maricopa County Sheriff Joe Arpaio.

Sheriff Arpaio will enforce the law of the land whatever it is. We ask that this Court guard against political actors who earnestly wish to change the United States' immigration laws but have heretofore been unable to muster the political support to do so and, therefore, arrive at federal court masquerading as harmed plaintiffs seeking remedies.

The challenge of these political actors is to demonstrate to the Court that they do, in fact, have the requisite standing and have suffered actual and a genuine threat of imminent harm.

This is the challenge that the plaintiffs have failed to overcome. The complaints are replete with references to fear; fear of speculative harm that may occur at some point in the future; fear, I might add, that is often stoked in no small part by the hyperbole of plaintiffs themselves and their ideological kindred spirits, some in media, some in academia, some other politically active associations, and more recently, foreign governments, albeit all friends and important partners of the United States and Arizona.

One plaintiff even went so far as to issue a travel

warning, Your Honor, designed to incite fear in the hearts of families who might choose to visit the Grand Canyon State.

The proper forum for these plaintiffs is the United States Congress. The proper forum for these foreign governments is the Department of State.

The Article III power of this Court to de facto veto the properly enacted legislation under which the people of Arizona have chosen to govern themselves is an awesome power, indeed, Your Honor, and we'd ask that it be wielded with great care. We ask that this Court bear in mind the political autonomy of the people of Arizona when contemplating the arguments of outside political groups and their representatives of foreign governments.

Plaintiffs speculate that the actions of law enforcement in enforcing SB 1070 will deprive citizens, residents, and visitors of their civil liberties. But where is the fear and where are the lawsuits against the federal government which routinely uses much more intrusive procedures to investigate violations of immigration laws?

There are more than 30 interior checkpoints in California, New Mexico, Texas, and Arizona. The investigative procedures used by the federal government are much more intrusive than anything that could be done under SB 1070.

They routinely stop vehicles that transit through the checkpoints and the Supreme Court has already ruled in the

United States v. Martinez-Fuentes that those much more intrusive law enforcement actions are permissible.

And in the *U.S. v. Brignoni-Ponce* the Supreme Court has ruled that law enforcement officers in roving patrols may stop vehicles when there are specific articulable facts that give rise to a suspicion of illegal immigration status.

Under SB 1070, the Arizona law enforcement will not establish interior checkpoints and it will not stop vehicles to investigate any specific articulable facts. SB 1070 does not even come into effect until after there has already been a stop for another law enforcement purpose, and then only when practicable.

SB 1070 is much less intrusive than the law enforcement practices that have already been vetted by the Supreme Court.

THE COURT: Well, what do you think the sentence in 1051(B) means when it says immediately after the discussion of "reasonable suspicion" and "practicable determination of immigration status" that "Any person who is arrested shall have the person's immigration status determined before the person is released"?

MR. LIDDY: Your Honor, first the Sheriff would not presume to speak for other law enforcement agencies in the State, but I would not read that alone in the statute. I would have to read that in terms of the portion of the law

that says what must be practicable.

In the instance where there might be -- or the law enforcement agency might perceive that inquiring about law enforcement status might interfere with a criminal investigation, it would, therefore, be impracticable, so the "shall" in that legislation would have to be read in that regard, Your Honor.

If I may also add, Your Honor, that there can be no preemption unless the Arizona statute conflicts with federal immigration laws. In analyzing whether there was a conflict, the Court must look to the federal immigration laws as enacted by the United States Congress and not by the policies and practices of any particular federal administration that may refuse to enforce federal immigration law for whatever political or foreign policy purpose it chooses.

Furthermore, it is settled law that state and local law enforcement have the inherent authority without SB 1070 to investigate and make arrests for violations of federal immigration law under the ***United States v. Vasquez-Alvarez.***

SB 1070 does not change anything in that regard. SB 1070 may not parallel the political policies of the current administration, but it mirrors the federal law. And for the purposes of analyzing the appropriateness of the invocation of the Preemption Doctrine, the Court must scrutinize SB 1070 against the federal law as enacted by Congress and not the

political priorities of any administration.

I will reserve the balance of my time for any rebuttal.

THE COURT: The balance of your time is probably less than one minute, Mr. Liddy.

MR. LIDDY: I will concede it to the State then, Your Honor.

THE COURT: Thank you.

MS. PERALES: Good morning again.

I would like to begin with a brief introduction to the challenged statute on a whole, and then move quickly to focus on Defendants' arguments regarding the lack of standing and failure to state a claim.

SB 1070, as amended by HB 2162 which I will refer to as SB 1070, contains interrelated provisions that establish a separate and distinct immigration scheme from that of the federal government, one that is based on the stated goal of attrition through enforcement and that does not balance the federal considerations of humanitarian relief, trade with foreign countries, equitable treatment of foreign nationals, or peaceful international relations.

First, SB 1070 compels and maximizes police questioning of individuals regarding their immigration status. In fact, the original SB 1070 was amended after being signed into law in order to broaden the mandate to conduct

immigration inquiries to encompass stops for even minor offenses such as civil traffic violations.

Second, SB 1070 reclassifies noncitizens that the federal government allows to be present in the United States into a new type of undocumented alien who can be detained, arrested, and even convicted.

Third, SB 1070 establishes a scheme to prosecute and convict noncitizens for what is essentially the state crime of being undocumented, and that is the failure to carry registration documents in Section 3, even if the federal government would consider those individuals as having a transitional status or if the federal government would have permitted them to remain in the United States by adjusting their immigration status.

SB 1070 also criminalizes activity by noncitizens that the federal government has decided should remain noncriminalized, such as employed work by immigrants who are not work authorized and casual labor by persons who are not work authorized.

Thus, SB 1070 creates a new punishment scheme for immigrants with its own set of procedures, grounds for investigation, and sanctions.

This new state punishment scheme purports to rely on the federal government to confirm an immigration status, but then does not rely on the federal immigration system to

process and determine what should happen to the immigrants detained by state or local police. According to Defendant Sheriff Arpaio who released the following written statement on June 9th:

"When the new state law goes into effect, my deputies will no longer have to turn illegal aliens over to the federal government when they suspect they are in the country illegally. They will be taking them straight to jail once they confirm the immigration status."

The State's investigation and punishment scheme centered on fines and jail sentences for those present or working without immigration authorization is intended to sanction, deter, and expel noncitizens the State decides should not be here.

I would like to move now, Your Honor, to standing.

Governor Brewer's Motion to Dismiss argues plaintiffs lack standing because the claim of harm is too attenuated. This case features the distinct posture of plaintiffs as affected individuals, organizations whose members are affected individuals, and organizations who are affected themselves in their mission and with respect to the use of their resources.

Plaintiffs have met the standard for Article III standing, showing an injury in fact that is concrete and particularized, imminent in this case, and fairly traceable to the actions of the defendants.

THE COURT: Could we take a few examples? We have, I think, at least one, maybe two plaintiffs who are residents of New Mexico.

MS. PERALES: Yes, Your Honor.

THE COURT: And they have provided declarations about how they're going to be stopped and questioned and they'll present this New Mexico driver's license that I didn't know, but now we all know, does not require proof of legal residence in order to get one.

MS. PERALES: Yes, Your Honor.

THE COURT: But why should anything in this new statute make it any more likely that she would be the subject of a traffic stop than she would have been the subject of a traffic stop without this statute? She still has to do something that causes her to be stopped.

But it seems that her complaint and some of the others are based on this assumption that there is something in this law that gives law enforcement the authority to make stops they otherwise would not have been permitted to make.

MS. PERALES: Your Honor, the statute does work in interrelated provisions to compel exactly that, an increase in the number of stops of persons for even minor offenses for the purpose of enforcing this law.

So Section 2, which hanging together, including the provision in 2(H) which exposes officers, whether or not

they're indemnified, and agencies to lawsuits if they don't fully enforce the law, we believe puts an enormous amount of pressure on law enforcement to get out there and enforce this law to its maximum capacity.

And we have seen now that traffic stops are being used routinely at this point to sweep in individuals for the purpose of immigration questioning.

And we also know under Section 2 that once the stop has been made, which we believe more stops are compelled, once this stop is made, then it's a very quick step all the way to asking people about their immigration status.

So if I understand Your Honor's question correctly, it's whether the Plaintiffs have shown a realistic danger that the Act will injure them, whether they will be brought in in the scope of this Act by police stopping them.

And we believe, Your Honor, looking at cases like *Virginia v. American Booksellers Association* in which booksellers who hadn't specifically been threatened were found to have standing to challenge the statute prohibiting the display of certain books because they knew that as soon as the law went into effect they were going to be subject to its enforcement.

And the state -- the court found in that case that the state had not suggested that the law would not be enforced and the court didn't assume otherwise. *San Francisco County*

Democratic Central Committee also found a right of controversy, and also *Abbott Laboratories*.

The facts that we would point to, Your Honor, that support the imminence of the harm is that many law enforcement agencies already are ramping up traffic stops and relying on them for immigration checks.

So, for example, a June 8th press release from Sheriff Arpaio states:

"Just within the last several hours Sheriff's Deputies apprehended 31 illegal aliens during traffic stops that were turned over to ICE."

Also April 30, referring to a two-day crime suppression illegal immigration operation that netted 93 arrests through traffic stops.

Mr. Shee -- first, before I move to Mr. Shee, the organizations that are in this case have members numbering in the thousands. And the possibility that they will be stopped, given the increase in the number of stops during these sweeps, is very, very likely.

I will point the Court to Mr. Shee who has already been subjected to two recent traffic stops. With respect to the question whether somebody has to do something purposeful, for example, to violate a law, I don't plan to go out and speed, so what is my chance of being pulled over in one of these traffic stops? The question I think is much bigger than

that.

Somebody can do something completely inadvertent and be pulled over for a traffic stop under this law. So, for example, driving with a broken taillight where sometimes we find out that a taillight is broken on our car and we didn't know it ahead of time until we're pulled over, being a passenger in a car that's stopped because of something that the driver did and not something that you, the passenger, did, being involved in a fender bender, being a witness to a crime or an accident where the officer has stopped you and asked you to remain so that he can take your statement, this is also a valid stop under Section 2.

Being a victim of a crime or even being involved in a *Terry* stop can all be situations where you haven't done anything particularly offensive or criminal, but you find yourself in one of these Section 2(A) lawful detentions or stops.

And a great example is Mr. Shee who was pulled over because he received a text message on his telephone while he was driving to his birthday party. He pulled over and as a result a police officer came over as well and stopped him and asked him for his papers and did not cite him and then let him go.

Mr. Shee was also subsequently stopped a second time within the past few months. So in our papers you will see,

Your Honor, references to people being stopped for traffic situations where they haven't done anything particularly offensive or criminal.

And with respect to our New Mexico plaintiffs, once this rather inevitable stop occurs -- and it maybe will be tomorrow, maybe it will be a week from now, something will happen where one of our clients comes into contact with a police officer in a lawful stop for a detention -- the folks with the New Mexico driver's licenses are not going to be able to dispel a reasonable suspicion that the officer has formed with respect to an immigration status. And that, we believe, Your Honor, is the imminence of the harm facing plaintiffs.

If I might move on to the failure to state a claim, unless the Court has questions.

THE COURT: Go right ahead.

MS. PERALES: We'd love any questions the Court would have.

THE COURT: I think I'll have more when we get to the second motion.

MS. PERALES: The Plaintiffs have properly pled all claims in the Complaint by setting forth sufficient factual matter. Plaintiffs have more than met that standard that the Complaint plead enough facts to state a claim for relief that is plausible on its face.

The Complaint contains sufficient allegations to

allow the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. And we know at this stage of litigation that all allegations of material fact are taken as true.

The Complaint identifies the legal claims that are presented and connects the claims to sufficient factual matter by explaining how the various sections of SB 1070 violate the Constitution.

To the extent that Defendants argue they will prevail on the merits, that question is not before the Court in a 12(b)(6) motion, because there is a cause of action available and the Plaintiffs have properly pleaded the claims and they are not foreclosed by any law. Plaintiffs have satisfied the standard under Rule 12(b)(6).

Plaintiffs have properly pleaded a preemption claim under the Supremacy Clause, both with respect to the statute being invalid on the whole as well as with respect to specific provisions of SB 1070 being preempted.

So, for example, we have specific allegations regarding preemption of Section 2, Section 2(H), Section 3, Section 5, Section 6, and Sections 1, 4, and 10 are properly alleged to be preempted in those portions of the Complaint that challenge the statute on the whole.

With respect to the right to travel --

THE COURT: But what do you want me to do with 7, 8

and 9?

MS. PERALES: Seven, 8 and 9 are part of the statute, but we are not specifically challenging them. And if the Court were inclined to give a more limited injunction, we would be very pleased with one that enjoined Sections 1 through 6 and 10.

Ten is part and parcel, although standing alone, it's a fairly small provision regarding impoundment of vehicles. It connects back.

THE COURT: Right. Ten connects back to 5.

MS. PERALES: Yes.

THE COURT: Without 5, 10 doesn't have any meaning.

MS. PERALES: I agree, Your Honor. We all agree, Your Honor, yes.

With respect to the right to travel, we have already covered the allegations that we have made with respect to the Plaintiffs and we have properly pleaded a right to travel claim under the Privileges and Immunities Clause and have set forth the facts that we believe support Plaintiffs' claim and standing.

Under the Fourteenth Amendment due process clause we have allegations properly pleaded that Sections 2, 5, and 6 lack minimal procedural protections, and that Section 5 with respect to transporting and harboring contains terms that are unconstitutionally vague and that there are specific

unconstitutionally vague terms that appear in various sections of SB 1070. And we talk about those terms in the Complaint, paragraphs 206 through 208.

With respect to the equal protection claim, Your Honor, plaintiffs have properly pleaded an equal protection claim under the Fourteenth Amendment. We have set forth sufficient factual material. Our standard here, which we have met in the pleading, is that race discrimination was a substantial or motivating factor in the enactment of SB 1070.

We have properly pleaded that SB 1070 violates the Equal Protection Clause by discriminating on the basis of race. And also, that SB 1070 violates the Equal Protection Clause by discriminating between classes of noncitizens who are authorized to be in the United States.

And I wanted to point out that the Defendants misapprehend the nature of our Fourteenth Amendment equal protection alienage claim. The claim, in fact, is that Section 3 impermissibly discriminates between classes of noncitizens who have permission to be in the United States.

Section 3 does not recognize that people with transitional status who are permitted to live in the United States but who can't get registration documents are still entitled to be here.

And the way that Section 3 operates is to deny them the same equal protection of the laws as another type of

noncitizen, such as a legal permanent resident who can show a registration document.

So, for example, Jane Doe 1 who is an asylum applicant, a survivor of sexual abuse and police mistreatment in her home country, is here in the process of applying for asylum. She has an application pending. The federal government knows where she is. And she's not in any kind of removal proceedings. The federal government is not moving to either detain her or to remove her from the country.

However, because she's an asylum applicant, she does not have a registration document. And the day that this law goes into effect, Your Honor, on July 29th, she will be reclassified by Section 3 of this statute into somebody who is at this point now without registration documents somebody who is subject to arrest and detention and prosecution for failure to carry that registration document under Section 3.

She would not be so treated by the federal government within the federal immigration system, but she will be treated that way under Section 3, Your Honor. Her standing is particularly compelling because of the imminence of the harm facing her.

Others who are in the same position as she are Andrew Anderson, who is also here with the knowledge of the government. He has already been through proceedings in the federal system and was granted withholding of removal. He

does not have a registration document.

Jane Doe 2, who has relief under the Violence Against Women Act, similarly does not have a registration document. And the very day this law goes into effect, their mere presence in Arizona will subject them to some very heavy sanctions, including a jail term.

Is my time up, Your Honor?

THE COURT: Well, no, but feel free to finish anyway.

MS. PERALES: I will.

And if I could, Your Honor, I don't know if it's possible under the Court's order to cede my time to Mr. Jadwat, who I believe is going to have more questions from the Court. Thank you.

THE COURT: Thank you very much.

Mr. Bouma, you have got a couple of minutes.

MR. BOUMA: Your Honor, speaking about both the asylum and the other individuals, counsel recently -- I was just discussing, I would like to point out Section F of Section 3, paragraph F:

"This section does not apply to a person who maintains authorization from the federal government to remain in the United States."

THE COURT: Well, won't that be a little late after the person is arrested and charged for the State to find all that out?

MR. BOUMA: Well, I think first they have to get arrested. And then before they can get arrested, there has to be some kind of reasonable suspicion that they have been guilty of some kind of crime.

THE COURT: Well, among the many things I have read, I read some police officer's declaration saying that, well, you know, I often just ask people, "Are you in the country legally?" And they often say, "No."

I mean, one of the things that happen that, I guess, is lucky for law enforcement officers is that people tend to answer their questions, even if it tends to incriminate them.

And so you could very well have a person who has a consensual encounter with the police and freely says to them, "Yeah, I don't have any papers to be in the United States. I'm hoping to be able to get legal permission to be here, but I don't have any papers now."

MR. BOUMA: Well --

THE COURT: And they can get arrested and charged and then I don't know when the State might find out, hopefully before they're convicted, that they don't have any papers because the federal government hasn't given them any papers, even though the federal government knows they're here and knows they're illegal because they have something pending before Immigration to adjust their status, to grant them asylum, to grant them some type of legal permission to be

here.

MR. BOUMA: Your Honor, if they don't have to be registered, the statute simply can find that if they don't have to be registered --

THE COURT: Yeah, but how are you going to know before they are charged with a crime?

MR. BOUMA: Well, now that takes us right into all the hypotheticals and the chamber of horrors. And you're getting right away from the presumption that police officers are going to exercise their job in a constitutional manner and probably a very common sense manner.

But if they don't have -- I mean, is the idea the police are just going to haul people down, throw them in jail, and then sit around and wait and see what happens with ICE?

THE COURT: The police are going to believe everybody when they say, "I don't have any papers to be here, but that's okay because ICE knows about it and they're going to let me stay anyway"?

MR. BOUMA: In the first place, as the affidavits show, they get pretty quick responses from ICE if they want to check that out. They usually get a response within ten minutes.

THE COURT: Is that part of the response?

MR. BOUMA: Is that part of what?

THE COURT: I thought you called up ICE and ICE told

you based on their A number if they were here legally or here illegally.

Do they know all of that detail at the Law Enforcement Service Center?

MR. BOUMA: I understand that those people who are in that particular category normally get a number, and normally know what this number is, but I would be the last person to stand here and tell you I know the intricacies of the immigration law.

That's my understanding that most people like that -- you know, when they have been processed, when they're waiting for something from the government, the government gives them some kind of number or something and then ICE can identify them and ICE has a pretty substantial directory of that.

THE COURT: And ICE can also identify almost every single person who has been deported or removed from the United States because they get the number too.

I mean, legal and illegal residents get the number if they have had any encounters with Immigration and Customs Enforcement or with Citizenship and Immigration Services.

MR. BOUMA: I think, Your Honor, that that's the problem dealing with a facial challenge. I mean, we have heard all this about all the stops, the stops that we both know that pretextual stops are unconstitutional right now. And we now hear counsel saying, Well, there will be more

people stopping out there. This statute requires more stops. There is nothing in the statute that requires more stops.

There's an affidavit from Officer Glover. There's an affidavit that I will discuss a little bit later about the fact that he tells what happens when you get somebody with a New Mexico driver's license. And believe it or not, they just don't run them down and throw them in jail and hope somebody will tell them some day that they shouldn't be in jail.

There's -- then she mentioned the *Booksellers* case and tried to show some standing there. In that particular instance the plaintiff was affected by the direct operation of the statute. And I think that's been the problem with most of the plaintiffs, in fact all of them here, is they're not affected by the direct operation of the statute. They may be impacted -- some of the people may be impacted by their fear of prosecution, but again, that's a generalized fear. It's not a specific fear and it's insufficient.

THE COURT: All right. Thank you, Mr. Bouma.

Let's move to the Motion for Preliminary Injunction.

MR. JADWAT: Good morning, Your Honor.

THE COURT: Good morning. Could you tell me your name again, please?

MR. JADWAT: Omar Jadwat, J-A-D-W-A-T, for the ACLU Immigrants' Rights Project.

THE COURT: You may proceed.

MR. JADWAT: Thank you, Your Honor.

Just before I begin, I would like to reserve ten minutes for rebuttal, if possible.

THE COURT: I'll keep my eye on the clock.

MR. JADWAT: Okay. Thanks.

Your Honor, SB 1070 is an unconstitutional and a dangerous law.

THE COURT: Oh, I'm sorry that I'm interrupting you after your first sentence, but I want to talk about this very specifically. And you may have gotten a little hint about when I asked about 7, 8, and 9.

People refer, and the Plaintiffs in this case, you talk about SB 1070. Enjoin SB 1070. SB 1070 somebody called it a "statute."

It's not. SB 1070 is an enactment by the Arizona Legislature that does adopt some new statutes and that amends some existing statutes. And one of the other paragraphs that we haven't talked about or sections, rather, is the section that contains the Severability Clause. And the Severability Clause isn't section-by-section but provision-by-provision.

And so when you say enjoin the enforcement of SB 1070, isn't that really not true? That you're not asking me to do that, because you're not asking me to enjoin 7, 8 and 9. You're not asking me, as far as I could tell, to enjoin Section 4. At least I didn't see a single word in your brief

about what was wrong with Section 4.

And so shouldn't we be talking about it section-by-section and provision-by-provision and talk about what it is that you want me to enjoin, because it's not SB 1070?

MR. JADWAT: I'm happy to talk about the statute provision-by-provision and --

THE COURT: That's what we're going to do, because are you asking me to enjoin SB 1070? And if so, we're going to have a discussion about 7, 8, 9, 11 and 12 and 4 and I don't think you want to talk about those sections.

MR. JADWAT: Well, I certainly don't want to waste the limited time I have here talking about those sections.

THE COURT: So are you asking me to enjoin SB 1070 or are you asking me to enjoin certain sections and/or provisions of SB 1070?

MR. JADWAT: Just to be clear, Your Honor, our request on our Motion for Preliminary Injunction was that the entirety of SB 1070 be enjoined.

THE COURT: What about the Severability Clause? Don't I have to give that effect?

MR. JADWAT: And I understand there's a Severability Clause, but there's also a clause at the outset of SB 1070. The Purpose and Intent section says that these provisions are meant to work together to achieve the purpose of instituting a

state policy of attrition through enforcement, a policy that conflicts with federal law, and that we think would justify an injunction as to the entire statute.

But, Your Honor --

THE COURT: Well, I can't enjoin their intent either. Their intent -- you may not like their intent, the Arizona Legislature's Section 1, but I can't enjoin their intent. Their intent is their intent.

Now, clearly, putting an "intent" in a statute or in a Bill which is not required does give the Court some guidance as to how it should be interpreted. But when there are minor changes, 7, 8, and 9 and 4 --

MR. JADWAT: Yes. And again, I don't want to spend too much time talking about this, because our view is that the operative sections of the statute, the ones that really make a difference, are Sections 2, 3, 5 --

THE COURT: Six.

MR. JADWAT: Six and 10.

THE COURT: We don't have to talk about 10.

MR. JADWAT: I think if we talk about the second part of 5, we've talked about 10 as well.

THE COURT: I agree.

MR. JADWAT: So as my colleague said, an injunction running to those sections would grant us substantially the same relief as an injunction running through the entire

statute -- or rather the entire Act.

THE COURT: Well, my view is, unless you have some authority that -- because I didn't see a single word. I may have missed it because there were a lot of words -- but I didn't see a single word about "severability" and how I could ignore the Severability Clause.

And unless you want to tell me something that persuades me that I can totally ignore the Severability Clause, I believe that I have to give it effect. And by giving it effect, I have to analyze this enactment by the Arizona Legislature section-by-section and provision-by-provision. And therefore, what we'll talk about is whether or not Sections 2, 3, 5, and 6, or provisions within those sections should be enjoined.

MR. JADWAT: Yes, that's fine.

THE COURT: Okay.

MR. JADWAT: I just want to point out at the outset that we will be talking about this section-by-section, provision-by-provision, but the Severability Clause doesn't mean that the Court has to ignore the way that the provisions are designed to operate together.

So that the -- the meaning of the statute -- of each section or each statute that's created by SB 1070 is naturally informed by the other sections of which -- you know, of which the particular provision was a part. But that will become

clearer, I think, in the course of our discussion. And again --

THE COURT: Okay. Let's talk about Section 2 then, because that seems to be the section of most interest to the plaintiffs.

MR. JADWAT: Your Honor, Section -- and let's start by talking about Section 2(B) in particular.

Section 2(B) we believe is preempted for -- or is unconstitutional for several reasons. First, it uses an improper classification scheme that is a state-specific classification scheme that does not comport with federal law.

Second, it creates a state immigration enforcement mechanism that goes beyond the limits imposed on state officers by federal law in terms of what sort of enforcement they can undertake.

Third, it unilaterally burdens the federal government and it upsets the balances that are struck both in the federal statute and in the federal enforcement scheme that has been created pursuant to federal statute.

Fourth, it violates the right to travel. And that's obviously not a preemption claim, but I'm not going to discuss it and that's why.

So to go through each of those in turn, on the classifications, this has been discussed to some extent already by my colleague, but Section 2(B) turns on this

determination that an individual is somebody who is not lawfully present in the United States. That term is not defined for any relevant purpose in federal law, and the State has not explained how they intend to apply that term, in particular, to individuals like Jane Doe 1 and the thousands of other individuals who are in a transitional status in the United States.

Jane Doe 1 has no immigration status right now. And if asked, the federal government could not say that she has a lawful immigration status. So Arizona would then be treating her as an unlawfully present alien for the purposes of Section 2(B), and also, of course, for Section 3 and possibly for the transportation provisions in Section 5(B).

The State has no authority to create its own immigration classifications and that's precisely what it's done by employing this term, this undefined term, in Section 2(B).

Secondly, with respect to the enforcement, the presumption that's embedded in the statute that the police can actually hold people for -- well, I think there are two assumptions about the authority of the police to hold people for immigration-related reasons.

The first is the assumption that they can hold people based on reasonable suspicion that they are, quote, unlawfully present.

The second is the assumption that the police or the State can hold individuals without any suspicion whatsoever pending a determination or verification of their status. That's the -- I think it's the third sentence in 2(B), but the sentence that provides that no person shall be released until their immigration status is determined.

I would point out with respect to that section that the re-interpretation of that section that's being offered here today is different from the interpretation that the State has provided in its training materials to the AzPOST materials.

And the AzPOST materials specifically say that an agency is free to adopt the reading of the statute that "any person" actually doesn't mean "any person" and that no one shall be released until their immigration status is determined.

So for the State to now say in this Court that that is an absurd interpretation that couldn't possibly have been meant by the legislature when it passed the statute is, I think, not consistent with what they have already said in the training materials that they have provided.

So to go back to the question of what authority the police have to hold people based on suspected violations of immigration law, the State's entire position on this rests on a Tenth Circuit case, *Vasquez-Alvarez*, which did indicate that

there is broad authority to make such arrests and to do such detention.

But that is not the law of this circuit. The law of this circuit is *in Gonzalez v. Peoria* which said that it would not approve civil -- enforcement of civil immigration violations. That issue was revisited by the Ninth Circuit in *Muehler v. Mena* which said even more strongly that such enforcement was not allowed, although that case was obviously subsequently reversed by the Supreme Court on other grounds.

So the law in this Circuit is not that state police have general authority to enforce civil violations of immigration law, which are clearly the primary grounds, and that understanding is what undergirds the procedures established in Section 2(B). And so Section 2(B) is additionally unlawful because it goes beyond those limits.

Again, the federal government has authorized enforcement of immigration law by state and local police narrowly in four places in the federal statute; Section 1252c, Section 1357(G) which is more commonly known as 2867(G), and Section 1324, and in a rarely, if ever used, Section 1103(a)(10) which deals with a mass influx.

For the State to -- the idea that there is some free floating authority beyond those specific grants of authority rests on the idea -- or renders those specific grants meaningless.

Congress would not have authorized local enforcement in 1252c if they thought there was a preexisting floating right to enforce such laws in the absence of 1252c.

So I think that -- and *Vasquez-Alvarez*, actually the case on which the State relies, again a Tenth Circuit case, actually acknowledges that it leaves 1252c with no real meaning.

That is not an appropriate means of statutory interpretation, and I think the law is fairly clear that there is not the authority in this circuit to make the kinds of arrests or extended detentions that are at the heart of what 2(B) represents.

THE COURT: Well, 2(B) doesn't purport to allow arrests for immigration status. It says -- I mean, I'm assuming they're going to hold them for ICE, if ICE wants them.

And then if the person's already arrested, they were arrested for something else. I mean, the second sentence, however one ultimately interprets it, that person has already been arrested by the law enforcement officer.

And in addition, there's reasonable suspicion by the law enforcement officer that the person may not be lawfully present in the United States and so the statute says you've got to check their status.

But they already got arrested, and so they're already

going to be subject to the detention that exists upon arrest.

MR. JADWAT: We're talking now about the second part of 2(B)?

THE COURT: Yes.

MR. JADWAT: Where they say that you won't be released until your status is determined? That part?

THE COURT: That part.

MR. JADWAT: And obviously, there's a disagreement whether that can be fairly read, that the words "any person" can be fairly read to actually refer only to people as to where there's a reasonable suspicion, which is the State's position. We disagree with that. We think "any person" means "any person."

But with Section -- that part of Section 2(B), I think, clearly envisions the extension of the person's detention for the purpose of making that determination.

Otherwise, they would just be released when they were released. Section 2(B) says you can't release them presumably when you otherwise would in order to make this immigration determination.

And so that is actually far beyond anything that's even contemplated in federal law or that I think could comport with the Fourth Amendment, although we're not moving on Fourth Amendment grounds here, but that makes any real sense that you would be able to just hold people for no other purpose but to

determine their immigration status.

But that's what the language in 2(B) and that part of 2(B), I think, says and we think it should be enjoined because that result would be, you know, manifestly illegal.

The other part of 2(B), to move back to the "reasonable suspicion" portion, obviously doesn't depend on an arrest happening. It could be any lawful stop or detention or arrest. And again, the purpose of 2(B) and I think the understanding of 2(B) is that you make that inquiry. And that if it extends the period of the stop, that that's okay. That that's -- you know, you're required to make the inquiry.

And LESC, the federal declarations, indicate that the average response time from LESC is 88 minutes. It could, in fact, take longer in certain cases with respect to U.S. citizens. The answer is often that there is no match, which is presumably the same thing they would say about somebody who has never hit the immigration system at all because they have come illegally into the country.

So we're talking about if holding people for that 88 minutes or maybe much more is going to be lawful. It has to be lawful because there's some authority, some authority in the state and local police to enforce those laws. Otherwise, they would just be holding people for no legitimate law enforcement purpose whatsoever.

So that's why the cases relating to arrest authority

do play into the analysis of Section 2(B).

Moving on to the third prong of Section 2, which is the unilateral burden it places on the federal government, and of course, the federal government can talk more about this later this afternoon, but the analysis of this Court, I think, in the *Kobar* case and in the Supreme Court in *Buckman* is highly relevant here.

The fact that a state would, for what appear perhaps to be legitimate reasons that maybe makes sense in the abstract, say that we're going to take this specific approach -- we're going to mandate, in fact, through 2(H) and 2(A), an approach that requires all of these inquiries to be made all of the time whenever there is an arrest, whenever there's a detention, whenever there's a stop -- will, as the declarations have indicated, will necessarily impact the ability of the federal government to implement the priorities that it has to implement because they don't have unlimited resources.

And the Congress has created a system that imbues federal -- the federal administrative agencies and federal actors with significant discretion in terms of how they prioritize enforcement of the immigration laws and how they make prosecutorial decisions in any particular case.

THE COURT: But they say they have to answer the questions.

MR. JADWAT: They have to -- yes.

THE COURT: They have to provide the information.

MR. JADWAT: If they have it. I mean, one of the issues --

THE COURT: I mean, they have to respond to the state and local law enforcement request for immigration status.

MR. JADWAT: Right.

THE COURT: That's what the statute says. It's mandatory. It doesn't say that the Department of Homeland Security can decide which ones to give an answer to and which ones not, or that they could exclude some groups and say, Well, unless you're suspecting this person of a felony, we're not going to give you the information.

They have to give you the information.

MR. JADWAT: That's -- we don't dispute that that's what the statute says.

What the statute also says is that they have to respond to inquiries that are authorized by law. The statute doesn't actually amount to an authorization in its own right of, for example, a mandatory inquiry provision the way that we have in Arizona here.

The question of whether that mandatory inquiry provision interferes with the proper administration of federal statute and the federal government's ability to administer that statute properly is not answered by the fact that 1373

and 1644 say that if there's a legally-authorized question, you should answer it.

Finally, the last thing I would like to say with respect to Section 2 focuses -- or Section 2(B) focuses on the right to travel.

The right to travel claim is fairly straightforward, and I think the dispute between the parties is whether or not the statute -- the Section 2(B) actually operates in a way that impacts the right to travel of individuals from other states, including New Mexico and Utah, that -- Utah might be wrong -- but the inquiry of New Mexico --

THE COURT: Utah and Washington were both cited, along with New Mexico. Whether there's others, I don't know.

MR. JADWAT: Whether it actually impacts the ability of individuals from those states to travel into and within Arizona.

And I think that by saying essentially to residents of those states that you are going to be subjected, if stopped, you are going to be subjected to a greater degree of scrutiny than people from any other state or people from Arizona, it clearly both punishes and burdens the ability of those individuals to travel freely into Arizona.

And I would point out that plaintiff Villa has already been harmed by this or will be imminently harmed if SB 1070 goes into effect by the operation of the statute,

because he has indicated that he will curtail his trips and his family's trips to Arizona because he wishes to avoid, to the extent that he can, the additional scrutiny that will be focused upon him by SB 1070.

I would like to move on to Section 3.

THE COURT: No. I want to move on to provision 1051 -- I'm just going to pick one of the favorites, which is the private right of action.

MR. JADWAT: Okay.

THE COURT: G -- well, let's see.

MR. JADWAT: H now, I think.

THE COURT: It's now H.

If the State of Arizona wants to give its citizens the right to sue officials and agencies who adopt policies or restrict the enforcement of federal immigration laws to the extent it's legal to enforce immigration laws, who am I to tell the State of Arizona that they can't do that?

And do you really argue that there's anything unconstitutional about that section?

MR. JADWAT: In concert with Section 2(B) and Section 3, yes, Your Honor, because I think Section 2(B) and Section 3 embody, as I tried to explain earlier -- I'm sure we'll talk about it more -- embody an understanding of what is authorized by federal immigration law that's wrong. It's incorrect and itself is unconstitutional.

And so allowing for -- or mandating --

THE COURT: So this will just be encouraging unconstitutional behavior by police officers because they are going to be afraid they are going to be sued?

But if you didn't have Section B -- let's say B was out -- what's wrong with this to say we want to stop, as the state says, sanctuary cities -- that's their term, not mine -- that may have adopted policies different from other cities or counties in Arizona saying we are going to specifically direct our law enforcement people not to make immigration checks, not to run people through the LESC before they are released from jail, not notify ICE that we know this person is in the United States illegally, can't Arizona adopt as a policy that all of their law enforcement officers, all of their cities and counties, will do that as opposed to make a decision whether they should or shouldn't do it?

MR. JADWAT: I mean leaving aside Section 1373 --

THE COURT: Pretend B isn't there.

MR. JADWAT: I think that --

THE COURT: And Section 3, that's gone too.

MR. JADWAT: If the whole rest -- I mean --

THE COURT: No. Just B and Section 3.

MR. JADWAT: No. I mean because I think Section 6 also embodies an understanding of police authority to enforce immigration law, that's incorrect.

THE COURT: Okay. Six is out too just for purposes of this question.

MR. JADWAT: I wish it was.

THE COURT: Can't Arizona say, "We need uniform enforcement of federal immigration laws to the extent that our state and local police can do it. And we don't think that things should be different in Maricopa County than they are in Pima County or Gila County versus La Paz County.

And so in order to incentivize or perhaps disincentivize these policies that may exist or may be considered, we're going to say if you have such a policy in your county or in your agency, we're giving a private right of action to our citizens to say you've got that policy and we're suing you because you're not doing the things that the federal law permits you to do, to check immigration status and to report immigration status to ICE.

MR. JADWAT: I think that if -- again, if the operative -- if the other operative sections of SB 1070 didn't exist, that standing alone 2(A) and (H) probably would not have that problem.

THE COURT: Okay.

MR. JADWAT: But again, I don't think that that's the situation we are in today.

THE COURT: Now you can move on to Section 3.

MR. JADWAT: Okay. So Section 3 is the alien

registration scheme. And I think at the outset, at a minimum, what Section 3 amounts to is an attempt to complement federal law and to enforce its own regulations regarding the registration of aliens and that is precisely what the Supreme Court in ***Hines*** said was illegal, that it would preempt it.

And it would subject noncitizens in Arizona to precisely the sorts of harms that the Supreme Court was seeking to avoid when it established the rule in ***Hines***.

The Supreme Court was particularly concerned about the idea of questioning and harassment of noncitizens by law enforcement officials, state law enforcement officials, Pennsylvania law enforcement officials in that particular case. And I think all of those concerns are equally present in this case.

I would also point out that in turn, the federal law, which is a law designed to allow the federal government to maintain information about people's whereabouts, their status, et cetera, change that information collection law to one that's designed instead to create a basis to arrest and punish people who the State finds are in the country illegally. The focus of the State's registration scheme is to criminalize unlawful presence, as the State uses that term.

Both the statements of Sheriff Arpaio that my colleague cited earlier and the statement of the legislative sponsor who indicated that this law was designed to give --

this is Exhibit 17 to the Boyd declaration -- who indicated that the purpose of the law was to give state officials an option to hold people who ICE didn't want to pick up, merely, I think, demonstrate that it's designed not only for a different purpose but specifically to provide the State an end run around the federal process.

And I think it's important, again, to think about how Section 3 works in concert with Section 2; that somebody about whom they make an inquiry under Section 2(B) and they come back with a result that, well, this person doesn't have -- as they would in the case of Jane Doe 1 -- this person doesn't have a current immigration status, doesn't have registration documents, but you know, we're not concerned about it.

The State can then charge her under Section 3 and hold her under Section 3 for violating the state registration scheme. That is one of the examples of how these are interlocking provisions and that we need to think about the effect of the entirety of the law as it relates to the federal immigration scheme, again, which puts Jane Doe 1 and thousands of other people in precisely this intermediate transitional status for sound reasons that are consistent -- not only consistent with but dictated by Congress.

Congress has required that the federal government provide a means for people to obtain humanitarian relief of various kinds, including asylum, including protection under

the Violence Against Women Act, including protection for victims of crime and on and on and on, so --

THE COURT: I'm going to tell you you only have ten minutes left and we haven't talked about Section 5 or 6. But 5 is kind of a big one. But you still only have ten minutes left.

MR. JADWAT: Okay. Well, perhaps I can take two minutes of my rebuttal time to start to talk about 5 and then we can see where we are when I come back.

So Section 5 has both an employment and a transporting provision. I think I'm probably only going to have time right now to talk about the employment provision which specifically -- which is preempted by federal law, conflicts with federal law for two main reasons.

The first reason is that it criminalizes conduct that Congress specifically chose not to make criminal.

THE COURT: Well, you know, that's the big question. Did Congress specifically make it not criminal? Or did they just not deal with it?

MR. JADWAT: Well, you know, the Ninth Circuit addressed this question to a certain extent in the CIR -- I'm not sure what the "C" stands for -- something -- Immigrants Rights case that we cite in our papers and then the Ninth Circuit has found that that was a conscious choice by Congress.

THE COURT: Well, it was a conscious choice by Congress not to punish employers who hire independent contractors or casual workers. But where does it say that we expressly don't want to punish the employee?

MR. JADWAT: I think that they -- I mean, it certainly doesn't say expressly that, you know, we have chosen not to punish the employee.

THE COURT: And I will be talking about this more this afternoon, but we know that Congress knows how to preempt expressly, because in that very statute they have a section called "Preemption" and specifically said what they intended to preempt as it related to sanctions.

And they could easily have said something about preempting any sanctions on the unauthorized worker, but they didn't.

MR. JADWAT: They could have, Your Honor, but I think the law is clear that the existence of an express preemption clause and the limits of that express preemption clause don't obviate the need for the Court to engage in a conflict preemption analysis as well.

And I would point out that as far as I'm aware, there were no statutes before IRCA that actually punished workers. The reason perhaps that the Court specifically was concerned about employer sanctions is because there were existing laws that kind of point to that effect.

So I think that -- but leaving that aside, I just wanted to make it clear that there's two -- you know there's both the question about whether it reaches sorts of employment that are specifically exempted in the federal scheme, and about whether it criminalizes people who aren't criminal under the federal scheme.

And I think under the criminalization piece, I do want to point out that Congress, when it created IRCA, did impose sanctions on workers, but very limited sanctions, very limited civil sanctions for particular sorts of work-related violations.

And so I think that is some evidence that Congress thought about, well, you know, we're going to create a system. We're going to concentrate on employers rather than employees. To the extent we do deal with employees, we're going to create these particular sanctions. And I don't think that Arizona's criminalization of work, which is something that, you know, Congress has never decided to do, would be a sea change in employment regulations consistent with having a uniform federal regulation of employment --

THE COURT: You're down to five minutes.

MR. JADWAT: Okay. I'm going to -- I do need to save some time for rebuttal.

THE COURT: Okay. Thank you, Mr. Jadwat. Mr. Bouma?

MR. BOUMA: All this discussion of racial profiling

and how everybody is going to be around picking up everybody that has a Hispanic or other look, kind of, you know, if we were in Iowa, you and I can probably understand that, because they maybe have sufficient resources to do it.

In Arizona we have a tremendous Hispanic heritage. And you can't -- I mean, to say that anybody that's Hispanic is going to be stopped and questioned, that this is the police function is to go out and find anybody who looks Hispanic and try to question them, just kind of defies reality.

And again that's why we ought to be talking about the fact that this is a facial challenge. If somebody's got all of these bad hypotheticals, if they actually do come to pass, if somebody waited and nabbed somebody with a New Mexico driver's license and throw them in jail, then that person has every opportunity to come in and prove under those particular facts they shouldn't have stopped her for whatever they stopped her for, and that they shouldn't have thrown her in jail just because she had a New Mexico driver's license.

But as Officer Glover would tell you, and has told us, that from a police officer's perspective, Plaintiffs' interpretation is not based in reality. If I stopped a person who presented me with a New Mexico driver's license, it would not be a factor that I would consider in making a reasonable suspicion determination.

In fact, I would do the same thing I would do with an

Arizona driver's license, which is to run the license through the computer to see what information I could learn about the person. The information that I typically learn by running the license through the computer would likely reduce and eliminate any reasonable suspicion that I'm interacting with somebody who is unlawfully present.

The fact is, if they don't have I.D., if they weren't right now without the statute or further law -- without the law, the change -- that if they get -- if somebody gets picked up without I.D., they're going to get run -- they're going to get run through some kind of identification process, including ICE. And it doesn't make any difference whether the government wants them in the country, whether they have come in here for whatever reason, they're going to get run by ICE.

Then there's going to be a determination of what to do with them. And ICE may say they want them. ICE may say we don't have a record of them and then whatever it is. But that's happening right now.

And if they're arrested and that's what we're talking about, arrests for a crime, they can't cite and release them under current practice, because they don't have an identification and they don't have a relationship with a community, and if they don't, they will fear to respond to the offense.

So all this hypothetical about we're going to go out

and arrest everybody that looks Hispanic, look around. That would be impossible.

Anyway, if I can go on to -- get, back to Section 2 that I was talking about just before we -- before I had to quit for the Motion to Dismiss, I also wanted to talk about the issue of the length of detention, because you asked about that last time.

And, you know, contrary, I think, to what counsel just said, the stuff from the Arizona training operation, instead of telling you you have to hold people indefinitely, it tells you to check with your lawyer because it hasn't been ruled upon. This position hasn't been ruled upon yet. And that's one of the things I'm here to try to clarify is we believe, as I said last time, that the -- you don't have indefinite detention. That's clearly silly.

The only detention you can have clearly is the detention -- reasonable detention pursuant to the Fourth Amendment. And then *in the Zadvydas* case, ***Zadvydas v. Davis***, 533 U.S. 678, they talked about the fact -- the United States Supreme Court talked about the fact that you have to construe statutes to preserve constitutionality and to be consistent with the legislature's intent.

And in that particular instance, the statute there that they were looking at appeared to allow them to hold unauthorized illegal aliens indefinitely past the time when it

would ordinarily take to return them to their country.

And the U.S. Supreme Court said no, it's not going to be indefinite. We are going to construe this to contain an implicit reasonable time limitation.

And in that same respect, I would note that this particular provision 2 expressly provides that, "This section shall be implemented in a manner consistent with federal laws regulating immigration, protecting the constitutional rights of all persons."

So I guess if that helps answer the Court's question about detention, that was my purpose at least.

With respect to Section 2, the cooperation and assistance portion, the police have been enforcing these federal immigration laws, law enforcement officers all across the country. That's talked about in *Vasquez-Alvarez*. The federal government in their brief can -- I think, I'm pretty sure -- they concede -- and, yes, they do -- they concede that the state and local officers have had authority. We have a variety of different law enforcement officers that have been doing it all over Arizona for years. We have submitted the declarations of Officer Vasquez who is a Gila River police officer, a Mr. Cramer, who is an individual that's been employed by the INS for over 25 years in a whole variety of positions, Mr. Bolton, Phoenix law enforcement instructor who is also a retired police officer --

THE COURT: May I just say that we are not related.

MR. BOUMA: You are not what?

THE COURT: Levi Bolton, whoever he is, is no relation of mine.

MR. BOUMA: Detective Glover, a Mesa Police Department detective, and Officer Gafvert is a Mesa Police Department patrol officer. They can tell you how -- you know, it's important that you know exactly what people have been doing out there all these years and the federal government recognizes and the federal government has encouraged.

All these people have been trained about racial profiling. It's been drilled into them from the time they even start as a police officer. All their training deals with it and they're certainly going to get additional training in those training materials that were prepared in connection with 1070.

You can find reason to find at least the three statutes that mandate and encourage cooperation and, beyond those, where you have 8 U.S.C., 1357(g) which authorize state and local law enforcement officers to even act as the federal agents. That's pursuant to the contract and the extra training. And those, incidentally, are the people that most people go to to do the immigration check.

Rather than going to ICE a lot of time they can do it locally without imposing on the ICE facilities, because those

folks have the capacity themselves.

There is 8,1373(a) which prohibits restrictions on communications. That's the federal policy against the sanctuary cities that the federal government has failed to do much about and then there is 8 U.S.C., 1373(c) which requires, requires, ICE to provide the information upon request.

And all three statutes demonstrate Congress' intent to encourage cooperation. So another one, Section 2, is interpreted in a common sense manner. The inquiries -- they mentioned all the inquiries that's going to happen at ICE and I don't know that that's these Plaintiffs' problems. I think we'll probably end up discussing more about that this afternoon.

But the fact is that if you're not calling about every arrest, if you're not calling about -- if you're only calling when you're having reasonable suspicion that they are an alien and unlawfully in the country, and you recognize that they're already doing the significant -- to a significant extent in this state already that what we're trying to do -- what the State's trying to do is get everybody doing it. You can recognize that this suggestion that they're going to melt down ICE is a little unusual.

And actually, there's affidavits in there talking about the capacity of ICE. Talking about --

THE COURT: Did you really just say "melt down ICE"?

MR. BOUMA: I wondered if you were paying attention.

THE COURT: I checked my running transcript and that's what it says.

Let me go back and ask you about the sentence that we seem to have difficulty interpreting, which is the arrest, check everybody who is arrested before they're released.

It did not escape my attention that in the materials that you submitted was the AzPOST training materials that specifically acknowledged that they don't know what this sentence means and that it could be interpreted the way that I have questioned about and it could be interpreted the way you have suggested and that it will just be left up to each agency to decide what that sentence means.

I mean, how can we leave it up to each agency to decide what that sentence means?

Doesn't that suggest that maybe this sentence is -- can't be interpreted -- is not subject to an appropriate constitutional interpretation?

MR. BOUMA: Well, I think that the sentence does need clarification, and that's why I have tried to clarify it. But in that same respect that --

THE COURT: Well, you tried to clarify it for me, but AzPOST is distributing this video to all the police agencies in the state and saying: We don't know what it means.

MR. BOUMA: And I would anticipate that the Court

would clarify it in connection with its ruling which the Court has every opportunity to do.

We have a United States Supreme Court decision in *United Savings Association of Texas v. Timbers* which says:

Statutory construction is a holistic endeavor. The court should not construe the statute so as to create a result the legislature could not possibly have intended.

The principles of statutory construction require this sentence to be construed in a manner that preserves its constitutionality.

That last one is a quote from *Arizona Downs*.

If you look at the Section 1 of the statute -- of 1070, it says:

"The provisions of this Act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."

That would indicate that it's not the legislature's intention to require -- I mean, what does the legislature gain by requiring everybody to be run through ICE?

THE COURT: Every person who is arrested which, you know, is a small segment of our community.

MR. BOUMA: Well, whether it's arrested or not, if you're arrested for some reason, they're not going to find anything if they run you through ICE. So why do they require

it? There's no reason. There's not a logical -- it's not a good sentence. There's no question about that.

I think I used the term last time "inartful," but it may be worse than that.

THE COURT: But I can see where this could be the intent of the legislature.

What if somebody is arrested for a minor misdemeanor and there is no reasonable suspicion that they're in the country illegally. But if they run them through ICE before they release them, they might find out some really bad things about this person, the very type of person that ICE may want to come and take into their custody.

MR. BOUMA: Well, I guess at that point my question would be then: What is so unconstitutional about that? I mean, they can do it. There is nothing unconstitutional about that.

THE COURT: Well, because it may result in the arrest of tens of thousands of people, according to one of the declarations I read, who would actually be detained for some significant period of time, but might otherwise have been able to be cited and released if this means everybody who is arrested has their immigration status checked to see whether they're legal, illegal, or citizens.

MR. BOUMA: If everybody who was arrested --

THE COURT: Arrested.

MR. BOUMA: -- had their immigration status checked, what would happen?

THE COURT: Well, according to some other police officer whose name I don't recall, there are in Tucson or Pima County -- I can't remember if it's Tucson or Pima County alone -- 36,000 people every single year who are arrested and released on the spot and never booked into jail.

All of those people then would be subject to 88 minutes or maybe it would increase to more if we started calling LESC 36,000 more times a year.

MR. BOUMA: Well, in the first place, everybody that actually is out in the field here says it's a whole lot less than that. It's a lot closer to ten minutes.

But secondly, I guess I still kind of -- I'm missing why it is that if you are arrested they would run you through ICE. I mean, even on your theory that --

THE COURT: Well, because it says here:

Any person who is arrested shall have the person's immigration status determined before the person is released.

MR. BOUMA: Well, I mean, if you're not an immigrant, you don't have much of an immigration status.

THE COURT: Well, that would be the answer, I guess, that you would get from LESC is that they're not here, so they're either citizens or we've never encountered them before.

MR. BOUMA: Well, I think again, and I will go back to the --

THE COURT: And this happens in many -- when people are booked into certain jails, this is another declaration. Mesa City Jail. They have one of these 387(g) officers. When they're booked into Maricopa County Jail they have a 387(g) officer who has access to the Immigration and Customs Enforcement computers and they check everybody, because they don't want to release somebody who may be subject to being detained by ICE.

MR. BOUMA: And if the truth were known, and we may never know, the statute -- when the legislature was doing this, they were thinking about people that were booked, because they were going to be detained anyway and then --

THE COURT: That's what they should have said then.

MR. BOUMA: Well, no, I don't know -- I was at least trying to construe it within the two sentences with the holistic approach suggested by the United States Supreme Court.

But, you know, we as lawyers talk about arrests in an entirely different way than a lot of other people do. And a lot of people think when you are arrested, they're talking about booking, and that makes sense, clearly, because that's the practice right now.

But the other half of it is the practice right now is

if you don't have I.D., they're going to run you through ICE anyway. That's what we talked about earlier. That's the practice out there. They're going to I.D. people they get as best they can. They want to know if they have any warrants -- unless you are a sanctuary city -- but they want to know if there's warrants. They want to know any number of other things. They want to know whether you have a concealed weapon permit. There's all those things they run you through for. They want to know about outstanding tickets.

So, you know, probably you wouldn't be far along if you were to interpret the statute in terms of "booked." I was trying to keep it more within the language as it was written.

Either way, it doesn't make sense on a holistic, common sense, or any other theory that suggests that everybody has to be run through ICE. And it doesn't make sense that it was the intention of this state legislature to cause all that time and expense for everybody, including their own communities and counties.

Was there another particular --

THE COURT: I think we'll talk --

MR. BOUMA: Anything that you wanted to talk about?

THE COURT: Well, I would like to just talk about some section other than 2.

MR. BOUMA: Do you have a preference?

THE COURT: Three would be nice.

MR. BOUMA: I figured you would say that.

THE COURT: We can skip 4, 7, 8, 9, and 10.

MR. BOUMA: Well --

THE COURT: 11 and 12.

MR. BOUMA: Well, let me talk about 3 for a moment. You know, that's the willful failure statute. It mirrors the federal statute.

THE COURT: It does. It mirrors the federal statute, but many years ago, sometime in the '40s, I think, the United States Supreme Court talked specifically about preemption in connection with alien registration. And it said that these issues, the issues of registration are preempted.

Does that mean punishing failure to register is preempted? Because all this is is a punishment of failing to register as the law requires.

MR. BOUMA: All it really is is taking advantage of the statute that Congress passed for the benefit of all of us and that people have failed to administer. That's what it really amounts to.

THE COURT: But hasn't the Supreme Court suggested that the states are preempted to make any type of regulation or enforcement on registration?

MR. BOUMA: I don't think *Hines* can be read that broadly -- *I think Hines* -- that's the one you're talking about, I assume?

THE COURT: I am.

MR. BOUMA: That dealt with a Pennsylvania statute. And it -- the statute was there before the federal statute. The statute required additional registration. Registration requirements beyond what the federal did required registration every year, it required payments of fees, and actually, the Supreme Court shut that down and said that, you know, the national policy was preeminent and preempted that.

THE COURT: Wouldn't the national policy also include whether or not there are prosecutions for failing to comply with the national registration requirements?

MR. BOUMA: You know, Congress is the one that says these are what you do and they made it a crime not to do it. Right?

And so all we've got is the state saying Congress isn't doing it. But Congress hasn't told us we can't do it. They have said they wanted one uniform national system. That was the decision in ***Hines***. And they have one uniform national system. You have to be in violation of the federal law before you can be prosecuted under this.

THE COURT: Well, I agree that this is one where the legislature was very careful in their drafting, but that doesn't answer the question of preemption. If we have a national system and sanctions and requirements and sanctions in a national system, does that really allow the State the

right to impose additional sanctions?

MR. BOUMA: Well, there are cases that say that the same act may offend the laws of both state and federal government.

THE COURT: But in view of what *Hines* said about preemption, because we are talking now about a circumstance where there is an explicit holding of the United States Supreme Court that preemption applies to at least some aspects of registration, as opposed to the consistent state laws, and then therefore, there is no conflict preemption.

MR. BOUMA: I didn't have the feeling that I persuaded you last week either.

THE COURT: We could talk about Section 5 and 6.

MR. BOUMA: With respect to 5, I heard you talk to counsel about the fact that the -- when Congress looked at the labor area, they chose to deal with employers. They did not choose to deal with employees. They did not -- they have since gone back and even in the -- and in the employer area that they made it clear that Congress knows how to preempt the field.

They put in a very limited -- in very limited area in which states can deal with employers. They put it very specifically in the statute. They haven't in all these years, even knowing that the states -- at the time they passed this, they were familiar with the fact that states were -- talked

about regulating employees. They didn't then and they haven't at any time since, even when they went back and put in some preemption stuff with respect to the employer, have they ever put in any preemption stuff on the employee.

And as a matter of fact, the thing they mentioned in their reply brief where they got off on the fact that there is a statute that says you can't get -- that's my point. The statute says that an employer can't get around the federal law by going out and hiring an independent contractor who will then use people who are not permitted to work.

And so they tried to parse independent contractors and laborers. They twisted the meaning and confused it at least.

Congress has not done anything to stop states from dealing with the subject of employment. And we do have *DeCanas* and the other cases that recognize that employment is a matter of legitimate state concern.

We have the affidavit from the individual from the Kennedy School of Economics about how illegal employment in the State of Arizona has reduced the wages and caused unemployment, the effects over the last number of years. It's an affidavit in the file about the fact and *DeCanas* recognizes that employment is a very legitimate state concern and went in and said that.

So that's my point is they haven't been preempted and

Congress certainly knows how to preempt them if they what to, you want.

What do we talk about now? The right of travel. I just find that difficult. The law --

THE COURT: No. Let's talk about the transporting, harboring, or encouraging people to come to Arizona illegally.

MR. BOUMA: Could we have that one?

THE COURT: That's Section 5, 2929. That's the one that has that awkward wording of "if you're already in violation of a criminal offense."

MR. BOUMA: Okay.

THE COURT: "Then it's illegal for you to transport harbor, shield, or encourage."

And last week I was having difficulty with that. And I'm not quite sure why you have to be committing one crime before you can be found guilty of the other crime.

But I take it that that's the interpretation that the State offers on the addition in Section 5 of 13-2929, "Unlawful transporting, moving, concealing, harboring or shielding of unlawful aliens" and then vehicle impoundment.

The one that has the exception for the Child Protective Service workers and emergency workers.

MR. BOUMA: Right.

THE COURT: The one that's going to make taxi drivers not pick up anybody anymore or they'll make bus companies not

let people get on buses.

MR. BOUMA: Well, what this really -- the reason that they're talking about that it be originally in violation of a criminal offense is I don't think they're trying to get the situation where people take their mother who may not be lawfully in the United States to church or to school or take the kids to school or something.

They're talking about people who have committed -- who are in violation of a criminal offense. That's the people they're looking for. They're looking for the people that move people around in furtherance of illegal presence.

THE COURT: But it says -- it doesn't say it's unlawful for a person to transport, move, or attempt to do those in furtherance of illegal presence.

It says a person who is in violation of a criminal offense can't do this. And that's the part that mystifies me.

And the example that I think was given -- I don't remember if it was this response or this afternoon's response is, Well, if the police were executing a warrant to arrest somebody for a drug offense and they went to their house and found out they were shielding illegal aliens, that's how they would run afoul of 13-2929.

Or I suppose if you pulled over somebody and they were driving while under the influence of alcohol and their car had illegal aliens in it, then they could be cited -- or

then they could be arrested for transportation.

But this sounds very unusual to me.

MR. BOUMA: If was in furtherance of an illegal presence, they could.

THE COURT: But why do they have to first be committing some other crime?

MR. BOUMA: It's my understanding, and far be it from me to tell you what the legislature thinks on everything, that the idea was that this is not for the ordinary person.

You know, contrary to the idea that this is a big scheme, in this particular instance they're looking for the criminals. They're looking for people. They need probable cause in order to stop -- to get involved with somebody in violation of a criminal offense to begin with.

So it isn't a matter they can just stop -- this prevents them from just stopping everybody driving along the road and trying to see if they are carrying an illegal alien.

But this does give you the opportunity to stop people who may be carrying illegal aliens if they're doing it with the idea of transporting them, moving them in furtherance of the illegal presence.

THE COURT: Now, the federal government already has a law that mirrors this one pretty closely and criminalizes transportation, harboring, and encouraging or inducing aliens to come and reside in the United States.

Have they preempted state regulation of this same conduct?

MR. BOUMA: We've talked before about that. The statutes are basically -- if the aims of the statutes are consistent and one does not interfere with the other, then there is nothing wrong with having the two statutes.

This does not interfere with any federal statute in any way. How could it possibly be wrong that the state can have a statute that allows them, if they stop somebody in the commission of a crime and find that they are transporting aliens in the state in furtherance of their illegal presence, how can that be contrary to any federal policy? That is, there is certainly no -- Congress certainly hasn't said we don't want you to do that.

I haven't heard that from any of the federal authorities. I haven't heard that from ICE that, you know, we're not interested in finding people who are being illegally transported for purposes --

THE COURT: We may hear it this afternoon. They don't like Section 5 either; the federal government.

Could we talk about Section 6?

MR. BOUMA: Warrantless arrests?

THE COURT: What?

MR. BOUMA: Warrantless arrests?

THE COURT: Yes. This is another place where

apparently AzPOST and I are a bit mystified as to what it means. AzPOST in their training video said, well, this doesn't really add anything.

I mean, I'm paraphrasing.

You can just ignore this because you already have the authority to arrest people for crimes, so this doesn't mean a thing.

MR. BOUMA: Well, there's a lot of truth to that. The fact is that the -- first, you and I talked the last time about the fact that the decision about whether they're removable has to be made by the federal government.

THE COURT: Right.

MR. BOUMA: So --

THE COURT: So how could a police officer in the course of making a warrantless arrest have some probable cause to believe that the person committed a public offense that makes him removeable since only immigration judges can make that determination?

MR. BOUMA: In the Ninth Circuit in ***Gonzalez v. Peoria***, and then again in the opinion, the 2002 opinion by the Department of Justice where they talked about the authority, they recognized that the state/local officers had the authority to make arrests.

But what they did do was presumed that the states had conferred the power on the police to make the arrests for the

federal immigration law. This statute simply assures that authority, you know, and it's used primarily so a police officer is able to -- well, a law enforcement officer is able to detain an illegal alien if ICE requests them to do that.

So they -- ICE -- they come up with something for ICE. ICE says they want them detained, perhaps like the individual they didn't catch from El Salvador because he was wanted for murder there and --

THE COURT: Well, but I don't see the definition of "public offense" in the state criminal code to include arresting people who you have been told committed a crime outside the United States.

MR. BOUMA: That's the authority here. That's what it is. If a person has committed any offense, it makes the person removeable from the U.S.

THE COURT: Well, no, the term is "public offense," which is specifically defined to mean the commission of a crime -- I'll just use the word "crime." It's more specific than that. The commission of a crime in another state that would also be a crime in this state.

I mean, I'm not aware of any law that would allow local law enforcement to arrest people who they think committed a crime in another country unless there was a warrant that had been somehow issued and perfected in this country. This says, "Probable cause to believe the person has

committed a public offense."

MR. BOUMA: Well, let's start with the proposition that the individual who we're talking about has been stopped for some reason and there has been a determination with a reasonable suspicion that they're an alien and they're not lawfully in the country, so they're contacted by ICE.

ICE says they want them held. You then have to permit them -- or almost committed or if they attempted -- they're wanted for attempted murder in El Salvador or attempted murder in Mexico.

THE COURT: But what does that have to do with probable cause to believe a person has committed a public offense?

MR. BOUMA: Well, you're getting that from ICE that there is something that this individual has done that caused them --

THE COURT: No, but I'm saying that public --

MR. BOUMA: -- that they are removable and they wanted them.

THE COURT: But this is a criminal statute subject to the definitions in the criminal code for "public offense" which doesn't confer any authority -- "public offense" isn't, hey, this guy is suspected of committing a crime outside the United States.

MR. BOUMA: What if we moved it to New Mexico?

THE COURT: I think we should pick on a different state than New Mexico.

MR. BOUMA: Okay. What if we moved it to Nevada?

THE COURT: Okay.

MR. BOUMA: ICE says this guy has been a problem. He's wanted for murder. We want you to hold him.

THE COURT: Is that probable cause?

MR. BOUMA: That's what this gives them authority -- this gives them authority. If the person to be arrested has committed any public offense that makes the person removable from the United States, ICE says he's removable, he's committed a felony and we're going to ship him out, hold onto him. We now can not only hold onto him, we can drive him over there.

And this is exactly the authority that both the Department of Justice in its 2002 opinion and the Ninth Circuit in *Gonzalez v. Peoria* talked about. And by the way, *Gonzalez v. Peoria* isn't quite as limited as is suggested, because as indicated in *Martinez* -- *Medina v. Holder* in the Ninth Circuit, they noted that the United States Supreme Court had cast doubt on that criminal/civil distinction.

THE COURT: You've got two minutes.

MR. BOUMA: Well, do you want to talk for a moment about the First Amendment challenge?

THE COURT: Only if you want to.

MR. BOUMA: I just -- Your Honor, I would just say then that --

THE COURT: I don't think we will be talking about that this afternoon. I don't think that was in the Department of Justice's motion.

MR. BOUMA: Well, I guess the point I would make is that it's a broad category and that the *ACORN* case specifically states that it's not all that clear that the First Amendment applies to streets. And they use the phrase that there's substantial differences between the sidewalks and parks, which involves citizen expression and public discourse, and city streets, which may be continually filled with pulsing traffic.

In closing then, Your Honor, I would simply like to note that again, we're talking about extraordinary remedy. We're talking about imposing upon the sovereignty of the state in the exercise of its police powers and law enforcement efforts.

We believe the balance of the equities tips in Plaintiffs' favor, particularly on a facial challenge when we're talking about all these things. "What if?"

Arizona has a significant interest in enhancing and protecting the health, safety, and welfare of all of its citizens and that outweighs the Plaintiffs' lack of possible harm.

And I mentioned last time, Your Honor, our legislature has determined public policy of Arizona. We have 15,000 well-trained, capable law enforcement officers and should be trying to help the federal government fix a broken system, and Congress has said so too.

And the system, people are being impacted on a daily basis. The status quo is not acceptable and there is no possible way that an injunction could be viewed possibly in the public interests, and therefore, we think one should not be entered. And thank you for your attention.

THE COURT: Thank you, Mr. Bouma.

Mr. Jadwat, I do want to talk to you about the First Amendment and in connection with the likelihood of success on the merits.

It may not be final, the mandate may not have issued, but doesn't the *City of Redondo Beach* compel me to say that you do not have a likelihood of success on the merits on the day labor provisions? And they would be the provisions in Section 5 adding 13-2928, subsections -- I think it's (a) and (b) or (1) and (2).

MR. JADWAT: Your Honor, in light of *Redondo Beach*, we would withdraw our First Amendment P.I. request with respect to subsections (a) and (b) at this time.

THE COURT: That's a good answer. Thank you.

MR. JADWAT: Thank you, Your Honor.

However, I would like to talk about subsection (c) and that is in no way foreclosed by *Redondo Beach*. Subsection (c) --

THE COURT: Oh, I agree with you. *Redondo Beach* did not address in any respect the issuance of subsection (c) and that is, I think, purely an issue of preemption.

MR. JADWAT: No, Your Honor. I think there's also -- not only the fact that we have made a separate First Amendment claim --

THE COURT: Maybe I should say "primarily an issue of preemption."

MR. JADWAT: It is certainly a preemption claim with respect to 5(c), but there is a separate and independent First Amendment claim with respect to 5(c) which very briefly is that it is a content-based restriction.

It restricts words of speech. It talks about verbal and nonverbal communication. It's not aimed at acts of solicitation in the way that *Redondo Beach* was.

THE COURT: Is there a First Amendment right to solicit illegal employment?

MR. JADWAT: There is a -- first of all, the employment -- subsection (c) sweeps to include lawful employment, employment which is not barred under the federal scheme. So --

THE COURT: That's assuming I buy your argument that

when they decided not to criminalize casual work and independent contractor work for employers, that that legitimized people who don't have the authority to be employed in the United States to take these kinds of jobs?

MR. JADWAT: Yes, Your Honor. I mean, in brief, Congress specifically excluded from employment regulation those categories of work. And so in our view they're not illegal.

THE COURT: They said from employer sanctions, not employment regulation in the statute.

MR. JADWAT: Well, but the IRCA is a comprehensive regulation of employment. You know, Congress took a very long look at the issue and decided to address the entire issue of aliens' employment in the United States through this particular set of sanctions and procedures.

And so the fact that these are excluded, I think, is indicative.

THE COURT: But what about the presumption against preemption that *DeCanas* and the more recent case involving the Legal Arizona Worker's Act discuss as regards the State's interest in the regulation of employment?

MR. JADWAT: The more recent case is up before the Supreme Court right now.

THE COURT: Once again, likelihood of success on the merits.

MR. JADWAT: But I would say that on the presumption against preemption, ultimately we believe that the preemption issues here are sufficiently clear that regardless of whether a presumption in favor of or against preemption is applied, we would still prevail.

Now, I would point out that the more we're talking about immigration regulation, the less basis there would be to apply any presumption against -- or rather any presumption in favor of preemption, because that is, of course, an area that traditionally is not occupied by the states and is entirely occupied by the federal government.

If I may, Your Honor, I would just like to address a few points in rebuttal.

THE COURT: Well, I wanted to talk to you about Section 6 though, because we didn't get a chance to talk about that before.

MR. JADWAT: Well, you know, I --

THE COURT: What do you think it's authorizing?

MR. JADWAT: I think that what Section 6 authorizes is the warrantless arrest of any individual who the officer believes has committed some offense that makes them removeable under immigration law.

I think it gives the cop on the beat the authority to make an instantaneous judgment on a very, very complex issue of civil federal immigration law and to make an arrest on the

basis of his own resolution of that question.

And I think that there's nothing in federal law that would authorize that. And there is nothing -- in fact, even the State has acknowledged that that would be an inappropriate decision for the officer to make.

And so they're asking the Court to rewrite the statute in a way that I think doesn't actually resemble the words of the statute at all.

What the State's version, if I understand their most recent submission correctly, the State would like the Court to read the statute not as a warrantless -- or rather to provide for warrantless arrests of any individual who ICE tells the police they would like to have.

And I don't think that the words of the statute can be squared with that interpretation. But even if they could, that would raise different concerns, because the federal law provides for arrest warrants to be issued in certain cases and detainers to be issued in certain other cases.

To the extent of what the State is imagining, this state law would allow for warrantless arrests with no exigency, by definition, of people who were previously identified by the federal government. That would raise, you know, additional concerns about whether it comports with the federal scheme and it comports with basic limitations on warrantless arrests generally.

THE COURT: Okay. Take two minutes to tell me what points you wanted to raise in rebuttal.

MR. JADWAT: The State has indicated that even its lawyers who are representing it here are not versed in the intricacies of immigration law. And repeatedly, I think, the State has attempted to gloss over the considerable complexities in immigration law, in the immigration system, which is an integrated system both of statute and regulation and administrative activity that Congress created.

So with respect to immigration status, there is again no answer for how the state is going to take into account the intricacies of immigration status under the federal law.

With respect to IRCA, there is no explanation for how the State is going to deal with the fact that there is certain exceptions under IRCA to the employer's sanctions provisions and to the regulation generally of employment.

With respect to the authorization to engage in immigration enforcement, the State says, well, yeah, there are these specific provisions which allow for certain kinds of cooperative enforcement and we're going to take that to mean that they allow us to make any decisions we want to make and to implement any policies we wish to make as long as we think they are generally consistent with the purposes of immigration law.

That's like -- it's completely overreading and

ignoring these careful balanced decisions that are embodied in the federal statute.

And I think that taking in total, again, although I appreciate that we have been talking about the statute on a section-by-section basis, that when you look at the interaction of Section 2, Section 3, Section 6, and Section 5, that we have had -- or what we are facing here is an attempt by the State to create an integrated system of immigration laws that displace federal discretion and that ignore the complexities of federal law in the State of Arizona.

And to allow the State to impose additional conditions on aliens' residence here in that manner does violate the constitutional ban on regulation of immigration by the states.

THE COURT: Thank you, Mr. Jadwat.

It's ordered taking this matter under advisement. Thank you very much, ladies and gentlemen.

Court is in recess until 1:30.

(Proceedings adjourned at 12:10 p.m.)

* * *

C E R T I F I C A T E

I, ELIZABETH A. LEMKE, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 23rd day of July, 2010.

s/Elizabeth A. Lemke
ELIZABETH A. LEMKE, RDR, CRR, CPE