

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Valle del Sol, et al., )  
 )  
 Plaintiffs, )  
 ) CV10-1061-PHX-SRB  
 vs. ) Phoenix, Arizona  
 ) August 21, 2012  
 ) 10:02 a.m.  
 Michael B. Whiting, et al., )  
 )  
 Defendants. )  
 )  
 )  
 )

BEFORE: THE HONORABLE SUSAN R. BOLTON, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

Official Court Reporter:  
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## P R O C E E D I N G S

(Called to the order of court at 10:02 a.m.)

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

THE CLERK: Civil case 10-1061. *Valle del Sol and others v. Michael Whiting and others*. Time set for hearing regarding Plaintiffs' Motion for Temporary Injunction.

Counsel, please announce your presence for the record.

MS. TUMLIN: Good morning. May it please the Court, Karen Tumlin, National Immigration Law Center for the Plaintiffs Valle del Sol.

MR. JOAQUIN: Linton Joaquin also with NILC for the Plaintiffs.

MR. JADWAT: Omar Jadwat of ACLU for the Plaintiffs.

MR. COX: Justin Cox with the ACLU for the Plaintiffs.

MR. VIRAMONTES: Good morning, Your Honor. Victor Viramontes with the Plaintiffs.

MS. KEANEY: Melissa Keaney with the National Immigration Law Center for the Plaintiffs.

MR. ESPIRITU: Nicholas Espiritu with MALDEF for the Plaintiffs.

MR. HUERTA: Alvaro Huerta with NILC for the Plaintiffs.

1 MS. PRECIADO: Your Honor, Nora Preciado with the  
2 National Immigration Law Center for the Plaintiffs.

3 MR. POCHODA: Dan Pochoda from the ACLU of Arizona  
4 for the Plaintiffs.

5 MR. BOUMA: John Bouma from Snell & Wilmer on behalf  
6 of the Governor and the State.

7 MR. HENRY: Good morning, Your Honor. Bob Henry from  
8 Snell & Wilmer on behalf of the Intervenor Defendants,  
9 Governor Brewer and the State.

10 MS. KSZYWIENSKI: Kelly Kszywienski from  
11 Snell & Wilmer on behalf of the Intervenor Defendants.

12 MR. SCIARROTTA: Good morning, Your Honor. Joe  
13 Sciarrotta with Governor Brewer's Office for Governor Brewer  
14 and the State of Arizona.

15 MR. TRYON: Good morning, Your Honor. Michael Tryon  
16 from the Attorney General's Office for the State.

17 MR. BERGIN: Good morning, Your Honor. Brian Bergin  
18 for Cochise County Sheriff Larry Dever.

19 MS. LONGO: Anne Longo for Maricopa County Attorney  
20 and Sheriff.

21 MR. ROLL: Chris Roll from the Pinal County  
22 Attorney's Office on behalf of the Pinal County Defendants and  
23 Yavapai County Defendants.

24 THE COURT: This is the time set for oral argument on  
25 the Plaintiffs' Motion for Preliminary Injunction. Who will

1 be arguing this morning on behalf of the Plaintiffs?

2 MS. TUMLIN: I will, Your Honor.

3 THE COURT: Ms. Tumlin, you may come forward.

4 MS. TUMLIN: Good morning, Your Honor. I understand  
5 the Court has set an hour total for the motion this morning.

6 THE COURT: Yes.

7 MS. TUMLIN: I would like to reserve five minutes of  
8 rebuttal time.

9 THE COURT: Thank you.

10 MS. TUMLIN: Plaintiffs have brought the present  
11 motion to seek to enjoin Section 2(B) of SB 1070, as well as a  
12 portion of Section 5, codified at A.R.S. 13-2929.

13 In Plaintiffs' briefing we have presented compelling  
14 evidence of why the Court can and should enjoin Section 2(B),  
15 even in light of the Supreme Court's decision in *Arizona v.*  
16 *United States*.

17 Specifically, and importantly, the Plaintiffs have  
18 shown that Section 2(B) will be implemented in a manner that  
19 runs afoul of basic preemption principles outlined in *Arizona*  
20 *v. United States* and will lead to unconstitutional detentions  
21 under the Fourth Amendment.

22 By and large the Defendants have not presented  
23 evidence contesting the heart of this matter. Instead, they  
24 have made some claims around the edges, but have failed to  
25 show that 2(B) will be implemented in a fashion that does not

1 extend detention solely for the purpose of civil immigration  
2 violations.

3 THE COURT: With respect to preemption, why didn't  
4 the Supreme Court preclude a facial challenge to preemption  
5 when they made the decision in the related *Arizona v. United*  
6 *States* case?

7 And the specific sentence written by Justice Kennedy  
8 says:

9 "This opinion does not foreclose other preemption and  
10 constitutional challenges to the law as interpreted and  
11 applied after it goes into effect."

12 When I read that, it doesn't seem to me to leave me a  
13 lot of room to say, well, I am just going to assume they  
14 didn't think through this and didn't think that maybe there  
15 was some other facial challenge that could be made before the  
16 law goes into effect.

17 MS. TUMLIN: Absolutely. I think the Supreme Court  
18 did think through it. And there are several -- that sentence,  
19 of course, is important, but there are several other  
20 indications in the opinion regarding Section 2(B) that make it  
21 quite clear that the Court was not ruling out even a  
22 pre-enforcement challenge on a different record.

23 At several times the Court says that there's a basic  
24 uncertainty at this stage, and I quote, this record before the  
25 court. The record now before this Court is entirely different

1 than it was before the Supreme Court.

2 As a very basic matter, there was, in fact, no Fourth  
3 Amendment challenge before the United States Supreme Court.  
4 And separately, there was not evidence from up to 70 percent  
5 of the jurisdictions that will be implementing Section 2(B)  
6 showing that the chief law enforcement officials are poised to  
7 implement 2(B) in precisely the manner that the Supreme Court  
8 warned about, number one, as a preemption matter poised to  
9 implement 2(B) that calls for detentions based on suspected  
10 civil immigration violations without oversight and  
11 consultation from the federal government.

12 THE COURT: But you rely on -- if it weren't a  
13 preliminary injunction proceeding, what would otherwise be  
14 inadmissible evidence for a substantial part of what you're  
15 claiming is the evidence of the intent to enforce Section 2(B)  
16 in an unconstitutional fashion.

17 MS. TUMLIN: As Your Honor notes, of course, it is a  
18 preliminary injunction and we are relying on the kinds of  
19 evidence that are routinely presented at a preliminary  
20 injunction.

21 THE COURT: But I also have discretion when it comes  
22 to considering otherwise inadmissible evidence to make sure  
23 that it has some reliability.

24 And citing columns in newspapers, what other people  
25 said somebody said, is not the kind of reliable information.



1 I mean, you have certain things that appear to be more  
2 reliable, like a transcript of what someone said, even though  
3 it's not admissible, but, you know, relying on what this  
4 newspaper article says someone said or this columnist said or  
5 this reporter said on the radio or television doesn't seem to  
6 me to be the kind of thing that I should take as evidence even  
7 on a preliminary injunction.

8 MS. TUMLIN: So maybe we can talk a little bit about  
9 the evidence.

10 So to start with, Plaintiffs have submitted a  
11 Declaration of Chief Villasenor, Chief in Tucson. And at  
12 paragraph 10 of his Declaration he makes it very clear that he  
13 will instruct his officers that under 2(B) which he considers  
14 a mandate, when they arrest someone, even once the underlying  
15 state law basis for that arrest or detention has concluded, if  
16 they are still awaiting results from federal immigration  
17 officials, that they must keep that individual detained.

18 That's not a newspaper quote. It's the direct  
19 testimony of the Chief of Police on how, after reading the  
20 AzPOST materials post-dating the Supreme Court, and after the  
21 Supreme Court decision, he intends to instruct his police  
22 officers.

23 Second, as Your Honor referenced, we have again, one  
24 month following the Supreme Court's decision, the testimony of  
25 Maricopa County officers, including Sheriff Arpaio himself,

1 stating that both before -- that before they were already  
2 subjecting individuals to precisely this kind of detention.  
3 Those two, just alone, make up an enormous amount of the  
4 jurisdictions that will be enforcing Section 2(B).

5 Then we should turn to the e-mails and the  
6 instructions that have been circulated by AzPOST following the  
7 Supreme Court decision. In that instruction, which this is  
8 the body whose job it is to instruct law enforcement officers  
9 on how to interpret and to apply Section 2(B), there is no  
10 clear statement that precisely the kind of detention the  
11 Supreme Court was concerned about, that detention which  
12 extends beyond the point that the under law -- state law basis  
13 is prohibited.

14 Instead, they simply say: Implement it consistent  
15 with the Fourth Amendment principles.

16 THE COURT: Well, don't we tell police officers every  
17 day to act in accordance with the constitution in the way the  
18 Supreme Court has interpreted the constitution?

19 MS. TUMLIN: We do, Your Honor. But there's  
20 substantial evidence here, both from the practices that were  
21 in place in the major jurisdictions predating the Supreme  
22 Court decision, that the kind of detention that the Supreme  
23 Court has now said is impermissible and would lead to, quote,  
24 constitutional concerns, is exactly what they have been doing  
25 and intend to do.

1           If the instructions from the AzPOST to implement  
2 consistent with the Fourth Amendment was sufficient  
3 instructing information, we would not have the incident that  
4 Plaintiffs have documented in the Escobedo Declaration that we  
5 have produced in our reply, which is having a Phoenix officer  
6 conducting precisely this kind of extra detention solely for  
7 the purposes of Section 2(B).

8           THE COURT: Well, actually, I read with interest  
9 Exhibit K. And I'm not sure I know why the Defendants want to  
10 strike it, because other than the fact that I don't know  
11 whether 35 minutes is a long time to be detained, everything  
12 else that that officer did was not the result of any racial  
13 profiling.

14           He obviously had reasonable suspicion that Hugo was  
15 in the country illegally, because the first thing he presented  
16 instead of a driver's license was an expired visa. And the  
17 detention that ultimately occurred was detention by  
18 Immigration and Customs Enforcement, not detention by a state  
19 officer to determine his immigration status before he was  
20 released.

21           And so the only thing that I thought could be  
22 questioned from his affidavit as to whether or not there was  
23 anything wrong constitutionally with what happened to him was  
24 that he said, that he was on the side of the street doing  
25 whatever was being done for 35 minutes.

1 I don't know if that's too long or not. I don't know  
2 how long it typically takes to give someone the tickets that  
3 he was being given. And I can't assume that 35 minutes under  
4 the circumstances was an unreasonable period of detention.

5 But everything that happened after that seemed to me  
6 to show the proper implementation of 2(B). He was released.  
7 Information was apparently received from ICE. And ICE  
8 apparently told the officer that they wanted this young man to  
9 be put into custody.

10 The officer went, picked him up, took him to ICE, and  
11 for reasons that have nothing to do with the state or the  
12 Phoenix Police Department, ICE kept him for some number of  
13 hours which, whether they had the right to do that or not, is  
14 certainly not before us today.

15 MS. TUMLIN: A few responses to that, Your Honor.

16 Mr. Escobedo's Declaration in terms of what is the  
17 detention that is problematic. So I think that Your Honor has  
18 raised a couple of distinct questions.

19 One is what's permissible or what's reasonable for  
20 the original traffic stop.

21 That is less of our concern, particularly in terms of  
22 Mr. Escobedo's case, and let me explain why. What is  
23 reasonable for a traffic stop is completely fact-dependent.  
24 It varies on the facts of the situation, whether Mr. Escobedo  
25 or someone else was stopped for let's say a broken taillight

1 and that stop was lawful and there was the requisite  
2 reasonable suspicion.

3 The officer may in the course of investigating that  
4 original stop develop reasonable suspicion for something  
5 totally separate and that may take what originally might be a  
6 15-minute stop, which would be reasonable, and turn it into a  
7 50-minute stop.

8 That's really not the question before the Court. The  
9 question has more to do with at the instant that the  
10 underlying state law basis for this stop ceases. So let's  
11 assume that all the state law stops are reasonable and that  
12 they don't extend beyond the time that is reasonable that  
13 would be justified by the original basis or subsequent basis  
14 that developed in the course of that proper inquiry.

15 Once that ceases and then the detention that occurs  
16 solely for the purposes of either getting verification back  
17 from the federal government or invoking a new round of  
18 questioning as to immigration status, that is constitutionally  
19 impermissible under *Arizona v. United States*.

20 And so for Mr. Escobedo, the point at which it was  
21 clearly unconstitutional was when the officer went to his  
22 house later. The original stop for squealing tires, et  
23 cetera, it was over. It had concluded. He had been released.

24 But when the officer came to his home, at that  
25 juncture, solely to enforce what he believed he was required

1 to do under 2(B), that's the constitutionally impermissible  
2 part and that piece also --

3 THE COURT: But I don't know that. I don't know what  
4 Immigration and Customs Enforcement told the officer to do.  
5 And I know that the officer has statutory authority to detain  
6 somebody and transport them to ICE.

7 And if ICE got back to him and said:

8 Oh, yes, this person is in the country illegally. He  
9 overstayed his visa. Would you go pick him up for us?

10 And the officer said:

11 Yes, I will.

12 And he went to his house and he essentially picked  
13 him up.

14 MS. TUMLIN: It appears from the facts in  
15 Mr. Escobedo's Declaration that the communications with ICE  
16 occurred after the officer had produced himself at Mr.  
17 Escobedo's house. And so that kind of direction, oversight,  
18 control by the federal government appeared to happen after the  
19 second intervention by the officer.

20 THE COURT: But without talking to the officer, we  
21 don't know.

22 MS. TUMLIN: Does Your Honor wish to talk about that  
23 in terms of the evidence submitted?

24 THE COURT: I mean, that's another issue.

25 I mean in terms of asking me to grant a preliminary

1 injunction, what we have in this one instance is one side of  
2 the story. We don't know, except what communications were  
3 going on when the communications resulted in an instruction to  
4 pick this young man up. We don't know that because we  
5 don't -- nobody has talked to the officer and nobody has  
6 talked to the person he talked to.

7 MS. TUMLIN: Right. And in this situation where we  
8 still are, indeed, in a pre-enforcement challenge to Section 2  
9 which should not be in effect anywhere in the state, we  
10 shouldn't even have anything that resembles Mr. Escobedo's  
11 Declaration.

12 And, of course, the Court has before it the  
13 cumulative weight of the evidence of multiple statements by  
14 law enforcement officials that we presented, whether they are  
15 in press accounts or in declaratory form, as well as this one  
16 instance.

17 And in addition, there really is a clear failure on  
18 the part of the State or AzPOST to articulate and to delineate  
19 clear limits on that detention; that, despite the fact that  
20 the Supreme Court is rather clear that if there was any kind  
21 of detention that goes on that's not clearly directed by the  
22 federal government after the state law basis has ceased, that  
23 that would be constitutionally impermissible, both as a  
24 preemption matter and as a Fourth Amendment matter.

25 THE COURT: Did the Eleventh Circuit say anything

1 yesterday that causes you to think that perhaps your argument  
2 has been weakened by their rather easy affirmance of  
3 preemption under their equivalent, which is very similar to  
4 2(B)?

5 MS. TUMLIN: Your Honor, no, and here is why. Let me  
6 explain why.

7 What the Eleventh Circuit said in both the *U.S. v.*  
8 *Alabama* as well as the *GLAHR* case, the Georgia case, is that  
9 in considering the 2(B)-like equivalence, it considered it  
10 premature at this time to rule on a pre-enforcement challenge.  
11 And it said that that was the result that it felt was dictated  
12 by Arizona.

13 We believe that that's a bit overstated. Again,  
14 drawing specifically on what the Supreme Court said in their  
15 2(B) analysis, they said that on this record at this stage  
16 there was a basic uncertainty about how 2(B) would be  
17 implemented, and for that reason they would not enjoin.

18 But they demarcated quite clearly what would amount  
19 to a preemption problem or a Fourth Amendment problem.

20 THE COURT: The Eleventh Circuit did say a few things  
21 about 2929 that you agree with?

22 MS. TUMLIN: It did. And let me just say one more  
23 thing, which is in the Eleventh Circuit, there was not the  
24 kind of record evidence that has been presented before this  
25 Court.



1 THE COURT: Thank you.

2 MS. TUMLIN: If Your Honor would like to turn to  
3 13-2929, we could do that.

4 THE COURT: I don't know if you actually want to  
5 spend time on that. I was more interested in finding out if  
6 the Defendants have a way to suggest that the Eleventh  
7 Circuit's case is not at least persuasive authority for  
8 Arizona and that you might want to address that in reply.

9 MS. TUMLIN: That sounds great, Your Honor. And I  
10 will be happy to save that for rebuttal.

11 I would simply note that like the Arizona 13-2929,  
12 the Georgia law issue did also have a separate criminal  
13 predicate offense requirement. So that the laws are quite  
14 comparable, and therefore, the analysis is similar.

15 If the Court is interested, I would like to talk  
16 briefly about the equal protection challenge to Section 2(B).

17 THE COURT: Yes.

18 MS. TUMLIN: So separately, the Plaintiffs have  
19 presented substantial evidence and are likely to prevail on  
20 their claim that Section 2(B) should be enjoined because it  
21 violates the equal protection clause.

22 And just to start as an initial matter, because  
23 there's been some confusion among the parties, the claim that  
24 we are advancing is that it's not the run-of-the-mill equal  
25 protection claim.

1           This is not a claim of a criminal provision or a  
2 civil ordinance that's in effect where we're saying that a  
3 protected group is disproportionately being prosecuted under  
4 the offense. That's a separate body of equal protection case  
5 law.

6           This is a claim that is premised on the notion that  
7 if a motivating factor for the passage of Section 2(B) was  
8 discriminatory, was based on race or national origin, that the  
9 passage then of that law is poisoned or is infected by that  
10 discriminatory intent and under equal protection must be  
11 enjoined.

12           THE COURT: And assuming for the purposes of argument  
13 that you've presented evidence that some individuals, whether  
14 they were voting people or people who were encouraging a law  
15 like this to be passed, were motivated by discriminatory  
16 intent, how many people does it have to be in order for this  
17 act to become law?

18           It had to be voted on by a majority of the Arizona  
19 State House, the Arizona State Senate, and signed by the  
20 Governor. And there's clearly no evidence that those  
21 majorities had a discriminatory intent.

22           MS. TUMLIN: Right. So it's a really important  
23 question. It's one that we addressed in our briefing, but let  
24 me recap briefly.

25           The central tenant of equal protection law, its

1 predominant feature, is that if race is a motivating or  
2 substantial factor, it's tainted and it can't be allowed to  
3 proceed.

4           There's no magic number on the number of legislators.  
5 And, of course, all the cases in this area, *Arlington Heights*,  
6 the *Central Fair Housing Act case v. McGee*, all recognize that  
7 passage of law is a complex act. There are always multiple  
8 motives in the passage of law.

9           What the equal protection case law says is if  
10 Plaintiffs can prove that a motivating factor, not the  
11 dominant one, not the one that takes over, not a substantial  
12 factor, but that it played a role in the passage, that is  
13 sufficient and it must be enjoined.

14           THE COURT: Is it too complex to be decided on  
15 hearsay?

16           MS. TUMLIN: It's not. And the evidence -- not at  
17 all.

18           THE COURT: And without judging anyone's credibility?

19           MS. TUMLIN: Your Honor, again, several responses to  
20 that.

21           It's a difficult determination. Most people aren't  
22 comfortable talking about race in the modern day, and  
23 certainly it is difficult and a complex determination to  
24 isolate the role of race in the passage of law.

25           But again, the best thing to do is to look at the

1 guiding principles, the types of evidence that the Plaintiffs  
2 have presented. The evidence that legislators, when speaking  
3 both in the legislature itself or in e-mail communications, et  
4 cetera, used racially-coded language in talking about the need  
5 for the passage of SB 1070, when they were talking about what  
6 the so-called nondiscriminatory reasons for its passage, were  
7 using false or misleading information at best, suggesting that  
8 that was the pretextual motivation.

9 And last, that there is a conflation that you see,  
10 similar to what the court found in *McGee*, where the chief  
11 proponents of this bill conflated undocumented immigrants with  
12 Latinos or with Mexican Nationals, showing that though there  
13 was an articulation that the intent was to regulate  
14 undocumented immigration, that actually, part of the  
15 underlying motivation was greater and was to target and single  
16 out a particular ethnic group or national origin group.

17 THE COURT: Thank you.

18 MS. TUMLIN: Thank you, Your Honor.

19 THE COURT: Good morning.

20 MR. BOUMA: Good morning.

21 THE COURT: I'm going to start with a question.

22 I assume you did some last-minute reading after the  
23 Eleventh Circuit issued its three opinions yesterday?

24 MR. BOUMA: I did some.

25 THE COURT: Did you, like I, focus on their

1 equivalent to 2929?

2 MR. BOUMA: I was really getting more of a kick out  
3 of focusing on their equivalent of 2(B).

4 THE COURT: Well, I knew that would be the case, but  
5 2929, why should that not be persuasive authority on this  
6 Court on the issue of preemption of 2929?

7 MR. BOUMA: Well, I think one reason -- I would  
8 really appreciate an opportunity to submit a supplemental  
9 brief on this point, if we could, because I think there is  
10 some cases that do really bear upon it, but the --

11 THE COURT: I'm not inclined to allow any  
12 supplemental briefing from either side.

13 MR. BOUMA: Okay. Well, the Eleventh Circuit relied  
14 substantially on its finding that the federal courts have  
15 exclusive jurisdiction over the federal statute. That was  
16 basically their decision.

17 They didn't go back and demonstrate that Congress had  
18 taken over the field. They didn't -- in passing and comparing  
19 it with Section 3, our Section 3 of the registration thing,  
20 but certainly nothing in the Supreme Court decision, none of  
21 the language in the Supreme Court decision about why Section 3  
22 showed that the area that was preempted, that the field was  
23 full, applies to this particular area, the area of  
24 transporting and harboring.

25 So they didn't get into that. They talked about

1 conflict some, but again, their analysis was relatively quick  
2 on that. They basically went into the fact that it was not  
3 supported -- that they -- that the federal courts have  
4 exclusive jurisdiction over the federal statute.

5 And we think that is probably not supported by the  
6 text of the statute which is 8 U.S.C. 1329 and is contrary to  
7 the Supreme Court authority we cited, including *Tafflin* and  
8 the RICO litigation that the federal court -- that statute  
9 does not say that the federal courts have exclusive  
10 jurisdiction over the federal statute.

11 The fact that the federal courts have jurisdiction  
12 does not mean it's exclusive and we think the Eleventh Circuit  
13 went off without a thorough analysis on that. I have somebody  
14 sitting at the table who could explain that in much greater  
15 depth.

16 THE COURT: But you agree that if I follow the  
17 Eleventh Circuit, that dooms 2929?

18 MR. BOUMA: I'm sorry?

19 THE COURT: If I follow the Eleventh Circuit, that  
20 2929 is preempted?

21 MR. BOUMA: Well, that would -- that's pretty close  
22 to 2929.

23 I do think though that that would also be recognized  
24 that in terms of conflict, preemption, and field preemption,  
25 that this statute really is not an attempt to assist the

1 federal government and really doesn't interfere with it  
2 enforcing its immigration laws.

3 It really deals with people who assist in illegal  
4 activity such as the coyotes and the human smugglers and --

5 THE COURT: Well, you know, I agreed with you in a  
6 related case, but I didn't have the benefit of a higher court  
7 at that time.

8 MR. BOUMA: Well, that's the Eleventh Circuit.

9 THE COURT: Not binding, but respectable.

10 MR. BOUMA: Well, as I say, I think that they've  
11 concentrated then on the statute that gives the federal courts  
12 jurisdiction and that statute does not give the federal courts  
13 exclusive jurisdiction.

14 THE COURT: Okay. I'll ask you the question that you  
15 want me to ask, which is, did the United States Supreme Court  
16 preclude any facial challenge to 2(B)?

17 MR. BOUMA: I don't know how they could have said it  
18 much clearer.

19 They -- and not just preemption. I mean, they  
20 haven't said "preemption" and "constitutional" and they were  
21 clearly aware that there were other constitutional issues.  
22 They noted when they talked about some and they cited a  
23 Fifth -- a Fourth Amendment case. You know, they knew they  
24 were there and they said "preemption" and "constitutional"  
25 so -- and they were pretty specific.

1           I took some of the language, but I'm sure you looked  
2 at it pretty carefully yourself and you don't need me to read  
3 it -- but they made it particularly true where they noted that  
4 this was a suit against a sovereign state to challenge a state  
5 law before it even had an opportunity to even go into effect.

6           And because it was a pre-enforcement posture, it  
7 would be inappropriate to assume that it would be construed in  
8 a way that conflicts with federal law.

9           THE COURT: I forgot to ask Ms. Tumlin this and I  
10 will ask her about this in her final argument and that --  
11 something that she has suggested, that I certify a question to  
12 the Arizona Supreme Court, but I wanted to talk more  
13 generally.

14           One of the things that the United States Supreme  
15 Court said is that the Arizona Supreme Court in the first  
16 instance should have the opportunity to interpret Section  
17 2(B), and in particular, the sentence that says nobody who's  
18 arrested can be released until their immigration status is  
19 checked, which could raise some significant Fourth Amendment  
20 concerns.

21           MR. BOUMA: To paraphrase.

22           THE COURT: To paraphrase.

23           And I can't figure out how that issue will ever get  
24 to the Arizona Supreme Court. I have tried to posit different  
25 scenarios and I can't figure out a way that the Arizona courts



1 will ever be in a position to construe it.

2 And so I wondered if Arizona and the Governor had  
3 given any thought to how the Arizona Supreme Court will get a  
4 case to tell us how that state law should be interpreted.

5 MR. BOUMA: Well, I guess I'm not remembering that  
6 they specifically referred to the Arizona Supreme Court. I  
7 was under the impression they were talking about Arizona  
8 courts.

9 THE COURT: Well, state courts, I think, is what they  
10 were specifically talking about, and I can't figure out how  
11 the case gets there unless I send it to them.

12 MR. BOUMA: Well, why wouldn't the --

13 THE COURT: Well, if somebody gets arrested --

14 MR. BOUMA: Right.

15 THE COURT: -- they get prosecuted.

16 The issue is whether they were detained too long in  
17 violation of the Fourth Amendment. I don't know how that  
18 comes up in a criminal case. It wouldn't result in a  
19 suppression of the evidence. I just can't see how the case  
20 will present itself in the state court under Section 2(B) to  
21 interpret what it means.

22 MR. BOUMA: I'm not a criminal law specialist, so I  
23 wouldn't be able to tell you.

24 THE COURT: And I can't even think of a civil way  
25 that --

1           MR. BOUMA: Well, I suppose somebody could bring a  
2           declaratory judgment just as easy as not in the state court  
3           rather than in the federal court.

4           And I suppose somebody could sue any one of the law  
5           enforcement agencies on the proposition that they were  
6           arrested pursuant to the statute that they believe to be  
7           unenforceable or unconstitutional under the state and the  
8           federal constitution. That could be handled in state court.

9           I mean, I don't see that there is a -- you know about  
10          as well as I do many lawyers have great imaginations and I  
11          don't think there's any limit to the number of people who can  
12          figure out a way to get there.

13          THE COURT: Yeah, well, except no obvious case comes  
14          to mind. And maybe it does for Ms. Tumlin, but I thought that  
15          might be why she suggested that I certify a question to the  
16          Arizona Supreme Court, something that I have never done, and  
17          think should only be done in a circumstance where that  
18          determination of that issue is important to allow the case to  
19          go forward.

20          MR. BOUMA: Why would the declaratory judgment action  
21          be appropriate?

22          THE COURT: Because you need a case or controversy.  
23          Something would have already had to have happened.

24          MR. BOUMA: Well, that will undoubtedly happen. It's  
25          not going to take very long for the Plaintiffs' people hanging

1 right outside the door to grab them.

2 THE COURT: So what do you think about certifying a  
3 question to the Arizona Supreme Court to try to get them to  
4 tell us how Section 2(B) can be interpreted?

5 MR. BOUMA: Well, I imagine that the Supreme Court  
6 will -- you know, there's a presumption that they're going to  
7 enforce the law in a way to make it constitutional. And so  
8 there certainly wouldn't be a basis for enjoining the  
9 operation of 2(B) while it goes through the Supreme Court,  
10 because the court's already said that absent some declaration  
11 or determination by that, you know, we ought to wait to do  
12 that before we try to stop the statute.

13 THE COURT: Would you like to address the issue of  
14 discriminatory intent?

15 MR. BOUMA: Yes. I would also like to note, if I  
16 could, that just on the issue of the preliminary injunction,  
17 that the Plaintiffs haven't demonstrated irreparable harm.

18 And, you know, there's cases out there that say that  
19 the fact that you've demonstrated that you have standing for  
20 purposes of -- that you have -- made allegations sufficient  
21 for standing, that it is not sufficient for the proposition to  
22 issue a preliminary injunction.

23 And the one that comes to mind that's very much in  
24 point is the Ninth Circuit decision and it's *Hodgers v. Durgin*  
25 where the two individual plaintiffs had been each stopped by

1 Border Patrol -- separate Border Patrol agents and they claim  
2 it was a violation of their Fourth Amendment rights as  
3 unreasonable seizures and they wanted an injunction against  
4 systemic violations of the Fourth Amendment.

5 And the Ninth Circuit held, which I think is  
6 appropriate with what we have here, because you have already  
7 said for purposes of standing it's sufficient, you know, their  
8 unsworn allegations are sufficient.

9 The Ninth Circuit held:

10 "Even if we assume that plaintiffs have asserted  
11 sufficient likelihood of future injury to satisfy the 'case or  
12 controversy' requirement of Article III standing to seek  
13 equitable relief, we find that plaintiffs are not entitled to  
14 equitable relief because" ... "there is no showing of any real  
15 or immediate threat that the plaintiffs will be wronged  
16 again."

17 There's no likelihood of substantial and irreparable  
18 injury to the plaintiffs and that's the situation here. In  
19 our papers we have gone through their depositions. We have  
20 talked about it. Showed that they really don't stand any  
21 likelihood and no peril.

22 Plaintiffs didn't address that. In their reply they  
23 simply said, well, even if -- and then they went to a backup  
24 argument that, well, we're harmed by the very existence of  
25 2(B).

1           And the *United States v. Hays* deals with that in an  
2 equal protection context and it says that the court dismissed  
3 the plaintiffs' equal protection challenge to a redistricting  
4 plan because the plaintiffs failed to demonstrate that they  
5 personally have been subjected to a racial classification.

6           So we don't even have to get to a lot of this.  
7 They're not entitled to equitable relief here; probably on  
8 either of them, either statutes, because none of them are --  
9 have demonstrated any facts at all that make them subject to  
10 the possibility of irreparable harm, immediate threat,  
11 substantial and immediate irreparable injury.

12           Secondly, now going back to your question if I may, I  
13 would say that the Plaintiffs have kind of been moving around  
14 on the standard here. They have got to -- you know, they have  
15 kind of accused us of misrepresenting the law and so on.

16           But I think that it's fair to say that they have been  
17 misrepresenting the applicable standard. They have to  
18 demonstrate that it's both a discriminatory purpose and a  
19 discriminatory effect. There's no question about that. You  
20 know, you can start with *U.S. v. Armstrong*, go to *U.S. v.*  
21 *Bass*, both Supreme Court cases, *U.S. v.* -- I mean *Rosenbaum v.*  
22 *City of San Francisco*, Ninth Circuit in 2007.

23           THE COURT: But what about *Arlington Heights*?

24           MR. BOUMA: What? *Arlington Heights* is a good one  
25 because that's the one they wanted to talk about. But they

1 didn't want to address these others. And *Arlington Heights*,  
2 if you look at it, starts with the proposition that there was  
3 immediate -- I mean, there was discriminatory effect. They  
4 just started out with that.

5 THE COURT: Well, but we have a situation -- I think  
6 they called it "impact."

7 And we have a situation here where the one thing that  
8 I think both sides can agree on is that the implementation of  
9 Section 2(B) will have a disproportionate impact on people  
10 from Mexico and Central America in Arizona by virtue of the  
11 fact that -- somebody's statistics said sixty-some percent of  
12 people that are in Arizona without legal authorization to be  
13 here are from Mexico and Central America.

14 So the impact will be disproportionate on that ethnic  
15 group because that ethnic group is disproportionately  
16 represented among unauthorized immigrants in the State of  
17 Arizona.

18 Isn't that the same situation that there was in  
19 *Arlington Heights*?

20 MR. BOUMA: I couldn't disagree more. I mean read  
21 *Bass. U.S. v. Bass. U.S. v. Armstrong*. They come in with  
22 98 percent of the people that were charged were Black.

23 And then they -- one of the others was that 64, 70  
24 percent -- we have it in our brief -- of the people who are  
25 prosecuted for crossing the border illegally were Hispanics.

1 And the court said, well, so what. I mean, those are the  
2 people who cross it most. And those are the people who are  
3 most involved with crack.

4 You've got to show -- you've got to identify a  
5 similarly-situated class for which the Plaintiffs' class can  
6 be compared. What is the similarly-situated class? Who else  
7 is coming across the border like the Hispanics? And where do  
8 you have any evidence that the Hispanics are being charged  
9 inappropriately and disproportionately to the number of other  
10 peoples coming across the border?

11 I don't recall anything in this whole record of  
12 somebody similarly situated that was treated differently.

13 So the fact that they have the most border crossers  
14 and that they're the ones impacted by a law against border  
15 crossers doesn't mean that's discriminatory. I mean, that's  
16 so plain from both *Bass* and *Armstrong* that it's pitiful.

17 THE COURT: That's why I used the word  
18 "disproportionate."

19 MR. BOUMA: Disproportionate.

20 Okay. Did I miss something there?

21 THE COURT: No. That was part of the *Arlington*  
22 *Heights* analysis that the impact of the law, regardless of its  
23 motivation, was going to impact in that case racial minority  
24 greater than it would impact anyone else.

25 And so they started with the proposition that it

1 would disproportionately impact a racial minority to be  
2 able to disproportionately impact --

3 MR. BOUMA: Okay. You're talking --

4 THE COURT: -- illegal immigrants from --

5 MR. BOUMA: You're talking a housing case.

6 THE COURT: Right.

7 MR. BOUMA: You're talking a zoning case.

8 We've cited -- despite what they say about we've only  
9 cited one -- we have cited nine cases that deal with --

10 THE COURT: I think they said they dealt with  
11 selective prosecution, which had a different test.

12 MR. BOUMA: Yeah. Selective prosecution.

13 And then there's a case that the -- the name of it --  
14 the *Farm Labor* case basically says that it doesn't make any  
15 difference whether you're talking about selective prosecution  
16 or selective enforcement, that both cases are totally  
17 applicable.

18 They're much more applicable than *Rosenbaum* -- I  
19 mean, than the *Arlington Heights* case.

20 *Arlington Heights* starts with the fact that there was  
21 an impact and goes on and discusses the various elements of  
22 how you find intent. But it was very clear that you have to  
23 have both impact and intent. There was not any big analysis  
24 in there about impact.

25 But it was a housing case. That's altogether



1 different than a selective prosecution case or a selective law  
2 enforcement case. And all the selective law enforcement  
3 cases -- they cite one, actually, that they -- and it's the  
4 *Rodriguez* case, I think -- and they rely on this -- they put  
5 it in their rely.

6 They rely on *Rodriguez*, which is about the only case  
7 we could find holding that discriminatory intent is sufficient  
8 to state an equal protection claim. All the others say you  
9 both have to have the impact and intent.

10 And the *Rodriguez* is a 2000 District Court case and  
11 it's out of California and it's certainly been superseded by a  
12 couple of them, one of them being *Rosenbaum*, which is a 2007  
13 decision of the Ninth Circuit. And it's also been superseded  
14 by one other right out of the Ninth Circuit I mentioned a  
15 little earlier. It's *Birmingham* which is Ninth Circuit 2003,  
16 which was allegedly a pretext or traffic stop. *Rosenbaum* was  
17 alleged a pretextual search and patdown by customs  
18 officials -- no, I'm sorry -- *Rosenbaum* is a claim of the City  
19 of San Francisco police officers on the evenly enforced  
20 municipal noise ordinance.

21 So those are the cases that are on point. *Arlington*  
22 *Height* isn't. *Arlington Heights* is simply a discussion of the  
23 things you look at for the second element, which you really  
24 don't even get to here because the truth is they haven't  
25 established a discriminatory impact in an appropriate way in

1 the selective prosecution or selective enforcement case.

2 THE COURT: Thank you.

3 MR. BOUMA: And this statute is enforcement. It's  
4 not housing.

5 THE COURT: And do you then suggest that the other  
6 factors are also irrelevant, like whether it was a statute  
7 that had an unusual provision in it that one doesn't find in  
8 other statutes like the attempt to take away or to coerce the  
9 enforcement of 2(B) by conditioning on it citizen's suits  
10 against individual police officers or cities or towns that  
11 don't fully implement Section 2(B)?

12 I mean, you have to admit that that is not something  
13 that you see in a lot of statutes directed at law enforcement.

14 MR. BOUMA: Well, the fact of the matter is you can  
15 argue that two ways. One is that there are other statutes --  
16 and we've cited them -- where police officers are directed  
17 that they have to do certain things, so -- and secondly --

18 THE COURT: On pain of civil remedies? Monetary --

19 MR. BOUMA: Police officers --

20 THE COURT: -- enforcement.

21 MR. BOUMA: Police officer aren't subject to civil  
22 remedies here. The police officer's only exposure here is if  
23 they violate somebody's constitutional rights. Police  
24 officers don't have any exposure under that. The  
25 municipalities do, but the police officers don't.

1 THE COURT: Okay.

2 MR. BOUMA: And they do have exposure for violating  
3 their civil rights certainly, and they do have exposure under  
4 the Title 8 and things like that, but they don't have exposure  
5 here.

6 You know, that law is directed to the cities to do  
7 away with the sanctuary things here. And that's something  
8 that I think you tend to miss sometimes when you get into this  
9 discussion is this law is about illegal immigration and  
10 there's good reasons to be concerned about illegal  
11 immigration. You even noted them in your first opinion.

12 And there's nothing wrong with the legislature trying  
13 to deal with illegal immigration. The fact that a lot of the  
14 people who are the illegal immigrants are Hispanic takes you  
15 right back to the Supreme Court decision about the discussion  
16 of why are people looking at people of Muslim descent in  
17 connection with the September 11th problem, and the Supreme  
18 Court basically says: What would you expect?

19 And that's what these -- the other three Supreme  
20 Court cases I mentioned to you say. Is if they are the people  
21 that are involved in this, if they are the people that are  
22 doing the crack cocaine and there's a much higher proportion  
23 of Blacks than anybody else, then they're going to end up  
24 affecting a higher proportion of the Blacks.

25 That does not have a discriminatory impact. It

1 doesn't have a discriminatory impact at all. It has an impact  
2 on the people that are doing it. And the sanctuary policy  
3 here is to tell the cities, you know, we're interested in  
4 giving these officers the opportunity. That's -- the plea  
5 came in.

6           If you look at the legislative history, the plea came  
7 in and said, We're not getting an opportunity to find out who  
8 some of these people we arrest are. Even though we know they  
9 are bad guys and they've crossed the border -- we suspect they  
10 have crossed the border illegally -- you have a policy that  
11 says we can't find out who they are. And our people are at  
12 risk because of it and that's why we want this statute.

13           And that's why I will tell you this statute might  
14 have gone forward. There's no reason to believe it wouldn't,  
15 even with or without Russell Pearce. No question but what  
16 Russell Pearce was pushing it. But there is also, you if you  
17 look at what all the other people have said, including  
18 Hispanics that were in the legislature, there was support for  
19 this statute. There was discussion about illegal immigration  
20 and the problems that result from it.

21           And to think that the suggestion that Arizona is  
22 full -- the legislature and the Governor and that are full of  
23 a bunch of people who are racially motivated when all you have  
24 to do is walk out there and walk around the offices and see  
25 that all their staff -- or at least a significant part of

1 their staff -- is of Hispanic background is -- you know, the  
2 fact that they would even suggest that is just offensive.

3 THE COURT: Well, there are some offensive things in  
4 some of the e-mails that were attached to the Plaintiffs'  
5 motion that certainly suggested some discriminatory animus.

6 MR. BOUMA: I would agree that there were some awful  
7 e-mails -- there was some awful thoughts in there. You know,  
8 you can't deal with people in that respect.

9 But to suggest that the people who are interested in  
10 solving the problem of illegal immigration were all of that  
11 same mind or that the officers, all these professionals -- I  
12 hope you'll take the time to read the statements by the  
13 professional officers.

14 We have the head of the DPS here with us. We have  
15 Larry Debus -- Larry Dever here with us from Cochise County.  
16 You know, yeah, read what professionals say about what they  
17 devoted their lives to and they have been arresting people as  
18 necessary. They understand probable cause. They understand  
19 reasonable suspicion. Or they can tell you about the hundreds  
20 of people that have been investigated and sent off to ICE.  
21 And you're not going to find hardly any, any complaints of  
22 racial profiling.

23 And yet these people come in here and make the  
24 proposition that these are a bunch of bozos just looking for  
25 the opportunity to go out and racially profile and

1 discriminate after they have been able to do law enforcement  
2 all these years in a very professional way without doing any  
3 of that.

4 THE COURT: Okay. Thank you, Mr. Bouma.

5 Before you start the comments that you want to make,  
6 I want to go back to the thing I forgot to ask you about.

7 MS. TUMLIN: Of course, Your Honor.

8 THE COURT: You asked me to certify a question to the  
9 Arizona Supreme Court and you specifically proposed this  
10 question.

11 Does Section 2(B) -- I'll paraphrase -- authorize law  
12 enforcement to detain individuals, including extending their  
13 detention beyond the point that they would otherwise be  
14 released, in order to determine or verify the individual's  
15 immigration status.

16 And that -- I don't need the Arizona Supreme Court to  
17 tell me that the answer to that question is "No."

18 The United States Supreme Court has already said the  
19 answer to that question is "No."

20 So the question that you asked me to ask the Arizona  
21 Supreme Court would not be productive of any answer that I  
22 don't already know the answer to. Any question that I don't  
23 already know the answer to.

24 And the reason one would take -- a District Judge  
25 would pursue the highly unusual -- even though authorized

1 procedure of certifying a question -- was to get the answer to  
2 an important question of state law to which I didn't have the  
3 answer and there wasn't any state authority that would inform  
4 me as to what the answer should be.

5 So this question I know the answer to and so I  
6 wouldn't ask the Arizona Supreme Court to confirm that no, of  
7 course it can't without violating the United States  
8 Constitution and probably the Arizona Constitution also.

9 MS. TUMLIN: I think, of course, that the Court has  
10 the discretion to modify the question. And of course, what  
11 we're -- what we would be seeking for certification is a  
12 definitive statutory construction of Section 2(B) by the  
13 Arizona Supreme Court.

14 THE COURT: But can they do it without any facts?  
15 Can they do it without a circumstance or two that presented  
16 itself? Can they do it without allowing the law to go into  
17 effect and having it as an applied challenge?

18 MS. TUMLIN: Of course, they can. If they could not,  
19 then individuals would be subject to the unconstitutional  
20 harms of a construction that permits over-detention under the  
21 Fourth Amendment or impermissible detention under preemption  
22 principles. And the Supreme Court made very clear that it  
23 thought state courts needed to be the ones to interpret the  
24 question.

25 THE COURT: Can you think of a way it gets into the

1 state court?

2 MS. TUMLIN: We can't. We quite agree. And that's  
3 why we had also asked for the unusual procedure of  
4 certification.

5 And it's simply because there is enough substantial  
6 evidence on the record now pre-enforcement that waiting at all  
7 and allowing Section 2(B) to play out is going to lead to  
8 harms and inconsistent interpretations.

9 And we would flag, of course, that we have pointed  
10 out the significant irreparable injury to Plaintiffs and  
11 others in the state.

12 THE COURT: I wanted to talk about irreparable injury  
13 under 2929 --

14 MS. TUMLIN: Okay.

15 THE COURT: -- because A.R.S. 13-2929 has actually  
16 been in effect for more than two years now.

17 We don't know of any instance, because I'm sure if  
18 there had been one, somebody in this room would have brought  
19 it to my attention, where anybody has been arrested, let alone  
20 charged, under that statute.

21 Should that in any way impact my irreparable harm  
22 analysis that would differ from what the Eleventh Circuit had  
23 to say on that subject?

24 MS. TUMLIN: No, of course not. There were no  
25 instances of either Georgia's law or Alabama's equivalent



1 provisions being enforced because they were enjoined  
2 pre-enforcement.

3 And the critical question which the Court has  
4 answered in a couple of different places with respect to the  
5 irreparable injuries of our Plaintiff, and particularly Lu  
6 Santiago and now the Class Members, for the harboring and  
7 transporting provision, is whether or not individuals are  
8 likely to be at risk or threatened prosecution.

9 The fact that maybe prosecution has not occurred  
10 under 13-2929, we don't know that, but perhaps that is the  
11 case, doesn't mean that the likelihood or the imminent threat  
12 to those individuals who engage in the activities that are  
13 criminalized under 13-2929 don't face that imminent risk of  
14 irreparable harm.

15 THE COURT: Okay. Those were my questions.

16 Now, whatever points you wish to make on rebuttal.

17 MS. TUMLIN: Okay. So just to conclude on the  
18 certification question, certainly the Court can modify the  
19 question so that what we're getting is parameters by the  
20 state's ultimate adjudicator and interpreter of state law.

21 And, of course, what the Supreme Court said was and  
22 what -- to paraphrase, as we have been doing -- it said, hum,  
23 seems like we might need to do some constitutional avoidance  
24 in interpreting Section 2(B).

25 And they said rather clearly that it's the state

1 courts who have that role to decide whether there needs to be  
2 an interpretation that avoids the constitutional problems.

3 Second, I would point out that on the other side of  
4 the ledger to the harm, significant harms the Plaintiffs have  
5 articulated if 2(B) is allowed to go into effect, for example,  
6 pending certification from the Arizona Supreme Court, there is  
7 a de minimus harm to the State from keeping enjoined a  
8 provision that has already been enjoined for over two years  
9 now in order to get the significant question resolved.

10 To conclude briefly on 13-2929, in the Eleventh  
11 Circuit opinion, in the two cases, in addition, of course,  
12 there's a South Carolina District Court opinion that equally  
13 finds a similar provision of both conflict and field  
14 preemption and there's no contrary precedent in this area.

15 As the Eleventh Circuit --

16 THE COURT: Well, except my other decision.

17 MS. TUMLIN: Right.

18 And as the Court acknowledged, that was not done with  
19 the benefit of the evolving case law and certainly not done  
20 with the recent guidance from the Supreme Court.

21 The Eleventh Circuit says that the courts -- the  
22 Supreme Court's analysis in Arizona, in Section 3 in  
23 particular, is an instructive analogy.

24 We think that's the case. And I would underscore  
25 also both the Eleventh Circuit's analysis as well as the

1 Supreme Court's analysis in Arizona that even if you're  
2 ultimately, completely parallel to the federal law, the  
3 doubling-up of penalties is inappropriate and is preempted, as  
4 is the vesting in state officials and state prosecutors the  
5 decision of when to prosecute and how much to prosecute. That  
6 leads to the preemption problems.

7 "Equal protection" I would like to discuss a bit.

8 THE COURT: Well, the Defendants say that basically  
9 selective prosecution cases are the type of case we should  
10 look at for this statute, because this has to do with law  
11 enforcement targeting individuals for detention, arrest, or at  
12 least holding them for another sovereign.

13 MS. TUMLIN: Those cases are inapposite.

14 And, yes, if Section 2 takes effect down the road,  
15 individuals could bring selective prosecution-type of cases  
16 against Section 2(B).

17 But we're talking about a fundamentally different  
18 animal here. We're talking about a challenge, an equal  
19 protection challenge, which we have alleged in our complaint  
20 to the statute overall.

21 We're only moving today on Section 2(B) that says  
22 race and national origin were a motivating factor in the  
23 passage of Section 2(B).

24 And an analysis from *Arlington Heights*, *Hunter v.*  
25 *Underwood* is a very instructive case for the Court. The *Fair*

1     *Housing Act* cases that we have cited and *McGee* all say that  
2     when plaintiffs produce evidence that race played a motivating  
3     role, under the *Arlington Heights* factors, that must be  
4     stopped, that law must be blocked.

5             And that's what we're talking about in the selective  
6     prosecution cases are off point and require a different  
7     showing.

8             The Court asked earlier is the question of  
9     discriminatory intent too difficult to determine on hearsay?

10            And I just want to flag that a huge bulk of  
11     Plaintiffs' evidence is the legislature's own statements,  
12     whether in e-mails or in the legislative debate themselves.  
13     Obviously, there aren't credibility and hearsay issues with  
14     those statements.

15            I wanted to talk a bit because it came up  
16     significantly in the State's argument about the discriminatory  
17     impact prong and starting specifically with the Court's  
18     questions and the back-and-forth regarding the aggregate  
19     statistics.

20            Number one, it is routine in these type of *Arlington*  
21     *Heights* cases that courts look to statistical analysis of  
22     whether or not there would be a disproportionate impact of the  
23     law on a particular group. And that's what we presented.

24            And the reason why the courts look to that is it is,  
25     of course, a known fact in Arizona that if you were trying to

1 target undocumented immigration, you are disproportionately  
2 going to be affecting Mexican Nationals and Latinos generally.

3 That's something the legislators would have known  
4 when they were legislating. And equal protection case law  
5 says when you should have know that you would be harming a  
6 protected group, we consider that.

7 It's not the only -- it's not the only consideration.  
8 That's why *Arlington Heights* is a multi-factored test, but it  
9 is a concern.

10 And I would add that the aggregate statistics is not  
11 Plaintiffs' only evidence of discriminatory impact. We have  
12 presented police chief declarations showing that they believe  
13 in their expert opinion that the law would be implemented in a  
14 way that inappropriately considers race.

15 And in addition, the language of 2(B) itself --

16 THE COURT: Can't the law be implemented in such a  
17 way that it doesn't consider race?

18 I mean, why should I assume that police officers will  
19 ignore their obligations under state law and the constitution  
20 and racially profile?

21 MS. TUMLIN: And to be clear, Your Honor, a finding  
22 that Plaintiffs are likely to cede on their equal protection  
23 claim here does not require the Court to find that law  
24 enforcement officers will racially profile.

25 What it requires a finding of is that race was a

1 motivating factor and that legislators knew and were aware  
2 that there would be an impact on a protected group. And so  
3 the finding of "I assume that law enforcement officers will  
4 racially profile" is not a finding that the Court has to make  
5 here.

6 I would note that the text of 2(B) itself where --  
7 and this is language that the State has pointed out to you  
8 several times -- where it says that race, national origin, or  
9 color shall only be considered, quote, except to the extent  
10 permitted by the United States or Arizona constitution,  
11 actually supports Plaintiffs' discriminatory impact claim and  
12 here is why.

13 It's crystal clear under Ninth Circuit case law and  
14 it's crystal clear in the material that the AzPOST has put out  
15 that race in a border state, in effectuating a stop, race  
16 cannot be a factor whatsoever, except in the caveat when you  
17 are looking for a specific suspect in a particular racial  
18 group.

19 So this language itself that implies or suggests that  
20 maybe sometimes race is an appropriate factor also gives more  
21 credibility to Plaintiffs' argument that the legislators had  
22 race in mind and that it was a motivating factor.

23 I have shuffled my notes inappropriately, which  
24 sometimes happens, and just in sum, I would remind the Court  
25 that on the equal protection claim, the Plaintiffs have

1 presented under each of the *Arlington Heights* factors  
2 substantial evidence.

3 We talked about discriminatory impact already. We  
4 talked some about the statements, the legislators' own  
5 statements. There are many more in the record showing  
6 misleading statements suggesting pretext for the  
7 nondiscriminatory reasons, racially-coded language, and  
8 language specifically that conflates being undocumented with  
9 being Latino.

10 But in addition, we have also shown the substantial  
11 departures from regular practice which the Court asked the  
12 State about. And it's the -- and also a very extensive  
13 history of the historical background of legislation in Arizona  
14 that targets and singles out Spanish speakers, Latinos, and  
15 Mexicans for discrimination.

16 THE COURT: Thank you, Ms. Tumlin.

17 It is ordered taking this matter under advisement.

18 Court is in recess.

19 (Proceedings adjourned at 11:08 p.m.)

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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 24th day of August, 2012.

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