No. 11-182

IN THE
Supreme Court of the United States

STATE OF ARIZONA AND JANICE K. BREWER,
GOVERNOR OF THE STATE OF ARIZONA,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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The National Association of Criminal Defense Lawyers ("NACDL") and Arizona Attorneys for Criminal Justice ("AACJ") respectfully submit this *amici curiae* brief in support of Respondent.

INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae NACDL is a nonprofit association of lawyers who practice criminal law before virtually every state and federal bar in the country. NACDL has more than 10,000 affiliate members who include private criminal defense attorneys, public defenders, and law professors. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel.

Amicus curiae AACJ, the Arizona state affiliate of NACDL, was founded in 1986 in order to give a voice to the rights of the criminally accused. AACJ represents 400 criminal defense lawyers, law students and associated professionals dedicated to protecting the rights of the criminally accused in the courts and the legislature, promoting excellence in the practice of criminal law through education, training, and mutual assistance, and fostering public

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

STATEMENT OF THE CASE

Senate Bill 1070 created new criminal offenses and new authorizations for police officers in Arizona to detain and arrest persons suspected of being in the United States illegally. Section 2 modified Ariz. Rev. Stat. § 11-1051(B) so that officers would be required to determine the immigration status of a person stopped, detained, or arrested, if there is a reasonable suspicion that the person is unlawfully present in the United States, and officers would be required to verify the immigration status of any person arrested prior to releasing the person. Section 3 created a new statute, Ariz. Rev. Stat. § 13-1509, creating a crime for the failure to apply for or carry alien registration papers. Section 5 created a new statute, Ariz. Rev. Stat. § 13-2928(C), creating a crime for an unauthorized alien to solicit, apply for, or perform work. Section 6 modified Ariz. Rev. Stat. § 13-3883(A)(5) to authorize warrantless arrest of a person where there is probable cause to believe the person has committed a public offense that makes the person removable from the United States. All of these portions of SB 1070 were enjoined by the District Court,[2] and that order was affirmed by the United States Court of Appeals for the Ninth Circuit.

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[2] The District Court also noted that it "is cognizant of the potentially serious Fourth Amendment problems with the inevitable increase in length of detention while immigration status is determined, as raised by the plaintiffs in *Friendly*

SUMMARY OF ARGUMENT

SB 1070 cannot be enforced without racially profiling Latinos in violation of the Fourth Amendment's protection against unreasonable searches and seizures and the Fourteenth Amendment's guarantee of equal protection of the laws. Recognition of this fact by some Arizona police chiefs but not others has in fact led to disparate treatment of Latinos in Arizona depending on the jurisdiction in which they are located at the time of police contact.

In particular, Maricopa County Sheriff Joe Arpaio has been under investigation by the United States Department of Justice's Civil Rights Division for more than three years for civil rights abuses of Latino citizens, suspects, and arrestees. On December 15, 2011, the Department of Justice released a twenty-two page letter detailing the abuses discovered in that investigation that have been perpetrated not only by individual deputies but by the Sheriff himself as part of a scheme to deprive Latinos of their civil rights. [3] Among the systematic abuses include the operation of "immigration sweeps," where the Sheriff and his deputies conduct a dragnet operation over large groups of people of Latino heritage and arrest first and ask questions later. Sheriff Arpaio and his deputies are defendants

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House, et al. v. Whiting, et al." *United States v. Arizona*, 703 F.Supp.2d 980, 995 n.6 (D. Ariz. 2010).

[3] http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf (last accessed March 9, 2012).

in countless lawsuits alleging civil rights deprivations arising out of such racial profiling.

Particularly at a time when the governments of the United States and Mexico are working to find common ground in law enforcement along the border, SB 1070 has served to drive a wedge between Arizona and Mexico, even though it has been enjoined. This brief will show that border communities that already bear significant costs due to illegal immigration will suffer immeasurably if legal immigrants and others who appear to be immigrants must be harassed in the course of execution of this law.

ARGUMENT

I. SB 1070 is repugnant to the Fourth Amendment's protection against unreasonable searches and seizures and the Fourteenth Amendment's guarantee of equal protection of the laws.

This Court's Fourth Amendment jurisprudence has dictated three premises that control the outcome of the question whether SB 1070 mandates police officers to conduct unreasonable seizures. First, in order to effectuate an investigatory detention in the first place, officers must have objectively reasonable suspicion of criminal conduct that is individualized and particularized. Second, even if the initial detention is lawful, it may become unlawful if prolonged. Third, laws that require individuals to identify themselves to police, without any other basis for the demand, are unconstitutional.

Regardless of the protestations of the Governor, racial profiling under this law is inevitable. The two

primary characteristics of persons who will be investigated under this law, Hispanic appearance and speaking Spanish instead of English, are shared by countless citizens and lawful resident aliens in Arizona. This law would require all such persons to prove, to the officer's satisfaction, their lawful presence in the United States, or else be taken to jail, even in the absence of any other basis for detention or arrest. Such a "stop-and-identify" statute casts such a wide net over an entire ethnicity – as it was designed to do – that it amounts to racial profiling in violation not only of the Fourth Amendment but of the Equal Protection Clause of the Fourteenth Amendment.

A. Investigatory stops versus policing by hunch

The Fourth Amendment applies to all seizures of the person, including those that are limited to a brief detention or investigatory stop of persons or vehicles. *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (Ariz. 1996). Passengers in a vehicle subject to an investigatory stop are likewise "seized" under the Fourth Amendment for the duration of the stop. *Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *Brendlin v. California*, 551 U.S. 249, 255 (2007); *Whren v. United States*, 517 U.S. 806, 809-10 (1996).

Because of the limited intrusion of an investigatory stop, this Court has explained that an investigatory stop only requires "reasonable suspicion," a lesser quantum of cause than the probable cause necessary to effect an arrest under

the Fourth Amendment. *Terry*, 392 U.S. at 20. However, "the concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

In *Terry*, this Court first set forth the objective concept of "reasonable suspicion," explaining that, to justify an investigatory stop, law enforcement "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21. Reasonable suspicion must arise before the stop, and the police may not stop individuals or pull over vehicles on a "hunch," rather they must be able to articulate specific facts to justify the stop. *Id*. The Arizona Supreme Court similarly has banned policing by "hunch," holding that the assessment of reasonable suspicion "does not include a weighing of the officer's 'unparticularized suspicions' or 'hunches' about a suspect or situation." *State v. Graciano*, 134 Ariz. 35, 38-39, 653 P.2d 683, 686-87 (Ariz. 1982). Stops must be based upon a "particularized" or "founded" suspicion by the officer, who must be able to state an "articulable reason" for the stop. *Id*. at 37, 653 P.2d at 685.

An investigatory stop, however brief, must still be justified by some objective manifestation that the person stopped is engaged in criminal activity, or is about to become so engaged. *Cortez*, 449 U.S. at 417; *United States v. Arvizu*, 534 U.S. 266, 272-73 (2002); *Gonzalez-Gutierrez*, 187 Ariz. at 120, 927 P.2d at 780. Thus, police may not detain a person "even momentarily without reasonable, objective grounds

for doing so." *Florida v. Royer*, 460 U.S. 491, 498 (1983). Subjective impressions are never enough to transform innocent behavior into suspicious activity. *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1445-48 (9th Cir. 1994). Absent any particularized suspicion of noncompliance of the law based on officers' observations, officers may not pull over vehicles just to see if drivers are in compliance with the law. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). Officers do not have unbridled discretion in making a stop. *Id.* at 661.

B. Seizure that is lawful at inception can become unlawful if prolonged

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

Furthermore, "[t]he scope of the detention must be carefully tailored to its underlying justification … [A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. A lawful seizure "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."

Illinois v. Caballes, 543 U.S. 405, 407 (2005); *United States v. Jacobsen*, 466 U.S. 109, 124 (1984). Generally, a lawful roadside stop ends when the police have no further need to detain the individuals further, and inform the driver and passengers they are free to leave. *Brendlin*, 551 U.S. at 258. As soon as the original justification for the stop has dissipated, therefore, police must have reasonable suspicion of another sort if the detention is to be further prolonged.

If an officer extends the duration of the stop or alters the nature of the stop with inquiries into matters unrelated to the justification for the traffic stop, including questioning about immigration status, the seizure becomes unlawful. *Johnson*, 555 U.S. at 333; *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005); *United States v. Place*, 462 U.S. 696, 709 (1983); *Dunaway v. New York*, 442 U.S. 200, 212 (1979); *see also United States v. Holt*, 264 F.3d 1215, 1240 (10th Cir. 2001) (Murphy, J., concurring in part and dissenting in part) ("*Terry*'s scope requirement … prevents law enforcement officials from fundamentally altering the nature of the stop by converting it into a general inquisition about past, present and future wrongdoing, absent an independent basis for reasonable articulable suspicion or probable cause").

Although officers are free to approach and question individuals in public places and at random, they cannot convey the message that compliance is required. *Florida v. Bostick*, 501 U.S. 429, 435 (1991). No reasonable suspicion is required for such questioning so long as a reasonable person would feel free "to disregard the police and go about his

business." *Id.* at 434; *Royer*, 460 U.S. at 498; *California v. Hodari D.*, 499 U.S. 621, 628 (1991); *I.N.S. v. Delgado*, 466 U.S. 210, 220-21 (1984); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

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

C. "Stop-and-identify" statutes are unconstitutional

The freedom to ignore police questioning and walk away has been challenged by "stop-and-identify" statutes that criminalize the refusal to produce identification upon police demand. *Brown v. Texas*, 443 U.S. 47 (1979); *Kolender*. In *Brown*, this Court invalidated a conviction under a Texas statute

criminalizing the failure to produce identification upon police demand, where the police had no reason to stop the individual except to ascertain his identity. 443 U.S. at 52-53. In *Kolender*, this Court struck down as unconstitutionally vague a California statute that criminalized the failure to produce "credible and reliable" information upon demand after an otherwise lawful stop. 461 U.S. at 361. Although the *Kolender* holding was not based on the Fourth Amendment, the statute at issue violated Fourth Amendment protections, as acknowledged in Justice Brennan's concurrence. 461 U.S. at 362. Justice Brennan reasoned that "States may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer … [m]erely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes." *Id*. Justice Brennan stated that *Brown* "held squarely that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion." *Id*. at 368.

In upholding Nevada's stop-and-identify statute in *Hiibel v. Sixth Judicial Dist.*, this Court emphasized that the officer had reasonable suspicion to question Hiibel initially, thus satisfying *Brown*, and that the statute was not challenged on vagueness grounds as that in *Kolender*. 542 U.S. 177, 184 (2004). Once the officer had reasonable suspicion for the initial detention, this Court held that it was permissible to require the suspect to give his name, which was all that was required by the statute. *Id*. at 181, 185 ("As we understand it, the statute does not require a suspect to give the officer a driver's license or any other document."). *Hiibel* reiterated that

"[u]nder these principles, an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." *Id*. at 188. The demand to produce documents, therefore, is still unreasonable.

D. SB 1070 is an unconstitutional "stop-and-identify" law that converts detentions into de facto arrests where officers rely on impermissible factors in assuming that a person is in the country illegally

SB 1070 bears closest resemblance to the law that was struck down in *Kolender* that required persons to provide "credible and reliable" information of their identity. Officers conducting an immigration status check on an individual need more information than the person's name; such a check requires identification and other federal documents proving one's legal status. Even this much assumes that the detained person is actually admitted to the country as a lawful permanent resident or on a visa; United States citizens are not required to have such paperwork at all. While an Arizona driver's license would suffice as evidence that the person is here legally, it cannot be said enough that there is no requirement that any person have a driver's license, or that a person who is a passenger or pedestrian carry a driver's license. Mere inability to prove one's lawful presence in the country cannot rise to the level of reasonable suspicion or probable cause to believe the person is in the country illegally.

Courts have frequently cited the danger of officers using "hunches" as stand-ins for racial

prejudice. *See, e.g., Terry*, 392 U.S. at 27. This danger is recognized in case law replete with instances of skin color, accents, or other stand-ins for race or national origin being used improperly as a factor in the reasonable suspicion analysis, particulary in the southwestern region of the country. *See, e.g., United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) ("Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required."); *United States v. Roberson*, 90 F.3d 75, 79-80 (3d Cir. 1996) (no reasonable suspicion to conduct stop where police relied solely on anonymous tip identifying black man in certain location as drug dealer and observed no distinctive conduct themselves); *United States v. Rias*, 524 F.2d 118, 121 (5th Cir. 1975) (no reasonable suspicion to stop two black men driving a Chevrolet where sole justification for stop was fact that men fitting description were suspects in robbery two to four weeks prior to stop). Similarly, the Ninth Circuit has cautioned to "be watchful for mere rote citations of factors which were held, in some past situations, to have generated reasonable suspicion, leading [the court] to defer to the supervening wisdom of a case not now before" the court. *Montero-Camargo*, 208 F.3d at 1129 n.9 (quoting *United States v. Rodriguez*, 976 F.2d 592, 594 (9th Cir. 1992)).

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

Court similarly stated, in the context of *federal* immigration law enforcement, that "enforcement of immigration laws often involves a relevant consideration of ethnic factors." *Graciano*, 134 Ariz. at 39 n.7, 653 P.2d at 687 n.7 (citing *State v. Becerra*, 111 Ariz. 538, 534 P.2d 743 (Ariz. 1975)).

Yet, *Brignoni-Ponce* and its progeny recognize the danger of allowing law enforcement to rely primarily on this factor to find reasonable suspicion. This Court held that Hispanic appearance alone "would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens." *Brignoni-Ponce*, 422 U.S. at 886-87. In *Gonzalez-Gutierrez*, 187 Ariz. at 120, 927 P.2d at 780, the Arizona Supreme Court interpreted *Brignoni-Ponce* and considered "observations that may lead to lawful immigration stops." Although the case involved a defendant who was prosecuted under state law for transportation of marijuana, the initial detention was by a U.S. Border Patrol agent, "whose primary responsibility was the detection and apprehension of illegal aliens." *Id*. at 118, 927 P.2d at 778.

In determining whether the agent had reasonable suspicion to detain Gonzalez-Gutierrez, in furtherance of his specific responsibilities in immigration law enforcement, the court held that "Mexican ancestry alone, that is, Hispanic appearance, is not enough to establish reasonable

cause, but if the [suspect's] dress or hair style are associated with people currently living in Mexico, such characteristics may be sufficient. *Id*. at 120, 927 P.2d at 780. But "many thousands of citizens and legal residents of Mexican ancestry reside in close proximity to Tucson. The only characteristic that might have set defendant apart from others – his Hispanic origin – is, standing alone, an improper reason to stop a motorist." *Id*. at 121, 927 P.2d at 781. In this case, the agent relied on the defendant's Mexican appearance plus his demeanor plus the agent's intuition regarding "scratching one's head, a slouched passenger, or a firm grip on the steering wheel," which "substantially resembles the description of vast numbers of law-abiding citizens." *Id*. "To [validate this stop] would do injustice to principles of fundamental fairness established under the Constitution for the protection of all citizens, including our minority citizens." *Id*.

In Arizona specifically, reliance on race, language, and dress as the basis for reasonable suspicion used to justify a seizure all but guarantees a constitutional violation. In a class action against the Immigration and Naturalization Service for engaging in a pattern of unlawful stops to interrogate persons of Hispanic appearance, the Ninth Circuit held that Hispanic appearance and presence in an area where illegal aliens travel is not enough to justify a stop. *Nicacio v. I.N.S.*, 797 F.2d 700, 703 (9th Cir. 1985), *overruled in part on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999). In that case, the government also used the manner of dress as a factor in the reasonable suspicion analysis. The court rejected that factor, noting that such "characteristics were shared

by citizens and legal aliens in the area, as well as illegals. As the district court found, the appearance and dress factors relied upon by the agents 'are a function of the individual's socioeconomic status.'" *Id.* at 704. *See also Graciano*, 134 Ariz. at 38, 653 P.2d at 686 (finding no reasonable suspicion where skin color used as factor); *Montero-Camargo*, 208 F.3d at 1132 (where a majority of people share certain characteristics, "that characteristic is of little or no probative value in [the reasonable suspicion] analysis."); *Rodriguez*, 976 F.2d at 596 (noting that the "profile tendered by the agents to justify the stop of Rodriguez is calculated to draw into the law enforcement net a generality of persons unmarked by any really articulable basis for reasonable suspicion").

The scheme employed by SB 1070 pays lip service to the constitution by stating that race cannot be the sole factor for making a stop. As seen in decades of case law, however, officers who patrol areas near the Mexican border routinely use race as the primary basis for a stop and cite "rote" factors as described in *Rodriguez* or "profiles" of driving behavior such as those described in *Gonzalez-Gutierrez* that do not distinguish criminal activity from innocent activity. All too often, criminal defense attorneys in Arizona see cases filed by law enforcement officers where the initial stop was based on the driver's demeanor. For example, included in the list of factors to be used for determining reasonable suspicion include both the driver looking at an officer in a parked vehicle as he passes and the driver not looking at the officer. SB 1070 requires state and local officers to investigate a status offense for which they have no objective basis to investigate

except for the race or language of the individual. Such investigatory detentions are clear violations of the Fourth Amendment.

Ariz. Rev. Stat. § 11-1051(B) directs a local law enforcement officer to prolong an otherwise brief detention whenever "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States," and that the officer must, when practicable, make a reasonable attempt to "determine the immigration status of the person." In doing so, the statute claims that a law enforcement officer may not consider race, color, or national origin "except to the extent permitted by the United States or Arizona Constitution." This language that permits race, color, or national origin to be considered in a reasonable suspicion analysis is highly problematic, since such considerations are only approved in the context of *federal* immigration law enforcement, "whose primary responsibility [is] the detection and apprehension of illegal aliens." *Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778.

SB 1070, on the other hand, does not merely authorize local law enforcement officers to take on the role of federal immigration law enforcement officers in situations where they detain someone on reasonable suspicion of violating any state law, no matter how minor. SB 1070 actually *requires* local law enforcement officers to effect prolonged detentions of Latinos who embrace Mexican culture in their "dress or hair style." That such detentions are compelled by SB 1070 is made clear in the mandate of Ariz. Rev. Stat. § 11-1051(A) for all local law enforcement officers to enforce "federal

immigration laws to the extent permitted by federal law."

"Unlawful presence" is a highly technical term, meant to describe the status of individuals who are present in the United States without the proper government authorization. As with citizenship, it cannot be determined by physical appearance or language, rather, it is established by operation of law. The failure to possess immigration documents does not mean that someone is unlawfully present in the United States. Although SB 1070 establishes, pursuant to Ariz. Rev. Stat. § 11-501, a presumption that a person who can produce an Arizona driver's license is not unlawfully present, this provision is meaningless to persons who are not driving an automobile and therefore are not required to possess a driver's license. There are no outwardly visible signs or easily identifiable factors for reasonable suspicion of unlawful presence that do not rely on skin color, language, or other stand-ins for race and national origin, such as language and dress.

Because § 11-1051(B) requires verification of legal immigration status before police can terminate a detention or release an arrestee, SB 1070 would subject individuals to *de facto* arrests absent adequate constitutional protections. SB 1070 proposes to substitute "reasonable suspicion" for the well-established requirement that an arrest must be justified by probable cause to believe a violation has occurred. Even in cases where an investigative stop by police is justified by reasonable suspicion, it is possible for police to exceed the permissible scope of the stop and convert an investigative detention into a *de facto* arrest, and SB 1070 seeks to do just that.

Dunaway, 442 U.S. at 12 (quoting *Brignoni-Ponce*, 422 U.S. at 881-82) ("The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent or probable cause*.") (emphasis added).

In *State v. Winegar*, 147 Ariz. 440, 443, 711 P.2d 579, 582 (Ariz. 1985), the Arizona Supreme Court examined the detention of a murder suspect who was walking on the street. Police had no probable cause to arrest Winegar, so they "asked" her to accompany them to City Hall across the street and later she was told to accompany them for interrogation at the county sheriff's office more than twenty miles away. *Id*. After determining that Winegar was not free to leave, the court ruled that the transportation of Winegar by police car to another location caused her to be under arrest, regardless of the words used by the officers at the scene. *Id*. at 446, 711 P.2d at 585.

A person's immigration status is not something that can be determined by state and local law enforcement officers, or even by federal immigration officers, in the context of a brief investigatory detention. *See United States v. Arizona*, 703 F.Supp.2d 980, 1005-06 (D. Ariz. 2010) (quoting *Padilla v. Kentucky*, __ U.S. __, 130 S.Ct. 1473, 1488 (2010) (Alito, J., concurring), and citing declarations of Santa Cruz County Sheriff and Tucson Police Department Chief). Instead, persons seized will be subject to a prolonged detention, for which the Fourth Amendment demands a finding of probable cause. SB 1070, however, permits this prolonged detention without the requisite finding of probable

cause that the person is unlawfully present in the United States.

Federal immigration law is a complex, nuanced statutory scheme that cannot be addressed quickly or in a cursory fashion. Due to the myriad complexities and the sheer volume of cases, federal authorities themselves simply are unable to address all immigration cases that arise. Instead, they have chosen to prioritize and address only the most serious crimes. Historically, Arizona's local law enforcement officers have similarly prioritized their contacts due to overwhelming volume. In 2009, for example, the Tucson Police Department alone recorded 36,821 instances were people were arrested and immediately released in the field rather than being taken into custody. The same pattern of prioritization is apparent with regard to local law enforcement contacts with individuals who pose immigration concerns. Of all contacts made by more than 12,000 local law enforcement officers in Arizona, only 1,283 cases were referred to a unit of Immigration and Customs Enforcement designed specifically to respond to requests for assistance from local law enforcement officers.

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

This statutory scheme flies in the face of current state and federal practices that have been shaped by decades of case law and practical considerations. State authorities, who are already required to release many persons following arrest, will be forced to take into custody a veritable flood of people with immigration concerns while they await checks by federal authorities. *See United States v. Arizona*, 703 F.Supp.2d at 995 (district court found that the liberty of lawfully-present aliens will be unconstitutionally restricted by mandatory immigration status checks). In turn, federal authorities, who are trained specifically to address immigration issues, and are already unable to process all arrests, would be inundated with many more cases. *Id*. These same federal authorities have already made clear that they would not be able to handle all cases that would be referred to them if SB 1070 went into effect. *Id*. The procedure mandated by SB 1070 requires a far lengthier detention than is constitutionally permitted by this Court for investigatory detentions. *Id*. The District Court correctly noted that the inevitable and substantial increase in duration of detentions would create "serious Fourth Amendment problems." *Id*. at 995 n.6.

By transporting suspects to jail for extended investigation of the person's immigration status, local law enforcement officers would necessarily be conducting arrests that require probable cause. Yet SB 1070 permits these arrests to be justified when officers merely have reasonable suspicion of an immigration violation. Without guaranteed immediate assistance from federal agents on every case where the detainee is suspected of being in the country unlawfully, it is inevitable that local police

officers will falsely arrest countless persons who are unable to satisfy the officer of their lawful presence in the country. This level of certainty of the inevitability of violations of the Fourth Amendment renders SB 1070 facially unconstitutional.

E. Regardless of HB 2162's modifying language, SB 1070 cannot be implemented without racially profiling Latinos, in violation of the Equal Protection Clause of the Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment "commands that no State shall deny to any person … the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Under the Equal Protection Clause, classifications based on race, alienage, and national origin are subject to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *Id.* at 440. Classifications that appear neutral on their face but are a pretext for racial discrimination are also subject to strict scrutiny. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). "[W]hen the adverse consequences of a law upon an identifiable group are … inevitable … a strong inference that the adverse effects were desired can reasonably be drawn." *Id.* at 279 n.25.

The political climate in which SB 1070 was passed by the Arizona legislature and signed by Governor Brewer demonstrates that the bill was aimed directly at Latinos. The bill's sponsor, former

State Senate President Russell Pearce (since recalled), publicly stated that the purpose of the law was to remove Latinos by attrition. That bill was slightly modified by House Bill 2162 and the modification was signed one week later by the Governor. Though both Governor Brewer's signing statements emphatically assert that racial profiling will not be tolerated anywhere in Arizona, the very text of the legislation requires improper racial profiling in order for police to carry out the mandate of the law.

While Sheriff Arpaio celebrated the passage of this new legislation, that sentiment was not universal among Arizona law enforcement officers. Pima County Sheriff Clarence Dupnik, whose jurisdiction includes Tucson, the second-largest city in Arizona, called SB 1070 "unwise, stupid, and racist" and announced that the law could not be constitutionally enforced and would result in lawsuits whether he enforced it or not.[4] Among the lawsuits brought in the wake of the bill's passage was one brought by Tucson Police Department Officer Martin Escobar seeking injunctive relief that would allow him to refuse to enforce the new law. Santa Cruz County Sheriff Tony Estrada, whose jurisdiction includes the city of Nogales, the largest port-of-entry in Arizona, and former Phoenix Police Department Chief Jack Harris both filed declarations on behalf of the United States in this litigation stating that the

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[4] http://www.kvoa.com/news/pima-county-sheriff-speaks-out-against-sb-1070/#!prettyPhoto/0/ (last accessed March 9, 2012).

law will increase the risk of civil rights violations, create mistrust between police and the community, and cause crimes to go unreported due to witnesses' fear of being deported. Sheriff Estrada noted the damage that has already been done to his county's relationship with its neighbors to the south in Sonora.

Sheriffs Arpaio, Dupnik, and Estrada all agree on one thing: this legislation was designed to drag a net over the Latino community and subject all Latinos in Arizona to invasive and abusive investigation. That Sheriffs Dupnik and Estrada acknowledged that their deputies could not possibly enforce this law in a constitutional manner speaks most clearly for the unconstitutionality of the law under the Equal Protection Clause.

II. Criminal defense lawyers have an important interest in ensuring that the rights not only of citizens but also of foreign nationals are adequately protected and in an evenhanded manner.

In his concurring opinion, Judge Noonan correctly gets to the heart of this case by emphasizing "the intent of the statute and its incompatibility with federal foreign policy." *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) (Noonan, J., concurring). Judge Noonan properly read each operative section of the law in the context of Section 1, the legislative purpose, which is "to make attrition through enforcement the public policy of all state and local government agencies in Arizona." The Arizona legislature has set out its own immigration policy that is separate and distinct from that of the federal

government; and, as shown above, Arizona's policy shows little regard for the constitutional rights of Arizonans.

The intent of SB 1070 is best reflected in the addition of Ariz. Rev. Stat. § 11-1051(G)-(L), which would create a private right of action permitting private citizens to sue police officers and agencies that are not enforcing immigration law to the satisfaction of the particular citizen and collect money damages. The intent of this provision is clear: the legislature sought to intimidate law enforcement agencies that were otherwise reluctant to get into the business of enforcing immigration law to do so or else face lawsuits for damages from supporters of the law.

Under 8 U.S.C. § 1357(g), Congress has authorized the Attorney General of the United States to enter into cooperative agreements with state and local law enforcement officers and agencies for the purpose of identifying and detaining persons in this country unlawfully, so long as the state and local officials operate under the supervision and direction of the Attorney General. Those agreements are administered through the Department of Homeland Security through the "Secure Communities" program. These "287(g) agreements" allow local law enforcement agencies to have access to federal databases that may provide useful information on the immigration status of arrestees who are brought to jail.

As described in the Summary of Argument, *supra*, the Justice Department's investigation of the Maricopa County Sheriff's Office resulted in a scathing report detailing abuses perpetrated on Latinos not only by deputies but by the Sheriff

himself and his high command. On the same day as the issuance of the report (and as a result of it), the Department of Homeland Security terminated its 287(g) agreement with MCSO. These agreements remain in place in other jurisdictions in Arizona that do not share MCSO's brand of immigration enforcement. Nonetheless, MCSO's policies have created what one deputy told DOJ investigators is a "wall of distrust" between MCSO and the Latino community.

Many of these civil rights violations directly affect the rights of Mexican nationals in MCSO custody. For example, the DOJ report detailed incidences where Latino inmates who do not speak English are told to sign forms written in English for voluntary removal from the country, and inmates who request forms in Spanish are punished and even abused by detention officers. Also, Mexican nationals arrested in Arizona are often denied the opportunity to speak with a consular official prior to and during questioning.

Furthermore, Sections 3, 5, and 6 of SB 1070 involve significant reliance on knowledge of existing federal law, not only for police officers inexperienced in enforcing such laws but also for prosecutors, defense attorneys, and judges in Arizona courts inexperienced in litigating that area of law. As demonstrated by the disparate treatment of Latinos in various Arizona counties absent enforcement of SB 1070, it is inevitable that some police agencies will exercise greater caution in arresting persons who may or may not be unlawfully present in the United States, while other agencies, most notably the Maricopa County Sheriff's Office, will eagerly and

energetically enhance the "immigration sweeps" and fill jails with more innocent persons whose only crime was to have a darker skin tone. The federal government has an important interest in ensuring a steady and even application of the law, particularly concerning a state law aimed solely and directly at foreign nationals. Latinos should be protected from arbitrary and capricious enforcement of a local law that results from the simple act of crossing a county line.

Criminal defense lawyers are expected to advise their clients of possible immigration consequences of a guilty plea or a conviction at trial, *see Padilla*, but they are not expected to appear in immigration court to fight deportation of those clients unless retained to do so. Violators of enjoined Section 3 will be charged with felony level offenses if any of several circumstances apply. Ariz. Rev. Stat. § 13-1509(H). In Arizona, all defendants charged with felony offenses are guaranteed representation of competent counsel. Most court-appointed counsel in Arizona are employed by county public defender offices, whose attorneys have no experience interpreting federal immigration law and therefore will likely render ineffective assistance. And since, as described above, this law will be unevenly applied across Arizona, there will be not only wrongful arrests but also wrongful convictions as a result of failure to understand federal law by county and city public defenders who have never been expected to know it.

There is a substantial interest not only for the United States but for criminal defense lawyers and their clients to ensure both that the law is evenly applied and that those who are entrusted to apply the

law have a sufficient understanding of it that they can uphold their oaths to faithfully execute the laws. Because SB 1070 requires public officials to detain, arrest, and criminally charge Latinos based on inevitable faulty understanding of federal immigration law, SB 1070 must be struck down as unconstitutional.

CONCLUSION

For the foregoing reasons, *amici* request that this Court affirm the opinions of the District Court and the Court of Appeals.

Respectfully submitted,

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