

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL LOPEZ-VALENUELA and ISAAC
CASTRO-ARMENTA,

Plaintiffs-Appellants,

v.

MARICOPA COUNTY, et al.,

Defendants-Appellees.

No. 11-16487

U.S. District Court No. 2:08-
CV-660-SRB

**BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL
JUSTICE IN SUPPORT OF PETITION FOR REHEARING**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
AMICUS CURIAE’S IDENTITY, INTEREST, AND AUTHORITY TO FILE BRIEF	1
AUTHORSHIP AND FUNDING OF BRIEF	2
ARGUMENT	2
I. Proposition 100 Was Intended to Punish Immigrants	2
II. Proposition 100 Is Used to Punish Immigrants	6
A. The Legislature Defined “Serious” Crime to Target Immigrants	7
B. Prosecutors Use Proposition 100 to Target Immigrants	10
1. Guadalupe Garcia de Rayos.....	11
2. Luz Ruiz-Rascon.....	12
3. Martha Espinoza-Lopez.....	12
4. Solaguahire Zenil Cordero.....	13
5. Briseira Torres	14
6. Rafael Lavallade-Gonzalez.....	14
CONCLUSION	16
CERTIFICATE OF COMPLIANCE	17
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

Page

Cases

Arizona v. Inter Tribal Council of Ariz., 133 S.Ct. 2247 (June 17, 2013)..... 3

Martinez-Medina v. Holder, 673 F.3d 102 (9th Cir. 2011) 4

Ortega Melendres v. Arpaio, CV-07-02513-PHX-GMS at 10
(May 24, 2013)..... 5

State v. Alvaraez, CR2012-159069 15

State v. Bockarie, CR2012-158172..... 11, 15

State v. Bonilla-Funes, CR2012-157660 15

State v. Espinoza-Lopez, CR2013-000871..... 12

State v. Garcia de Rayos, CR2008-136210 11

State v. Ramirez-Beltran, CR2012-155072..... 15

State v. Rodriguez, CR2012-007664..... 15

State v. Ruiz-Rascon, CR2012-142368 12

State v. Rafael Lavallade-Gonzalez, CR2012-142368 14

State v. Solaguahire Zenil Cordero, CR2012-149764..... 13

United States v. Arizona, 132 S.Ct. 2492 (2012)..... 5

United States v. Salerno, 481 U.S. 739 (1987)..... 6

We Are America/Somos America v. Maricopa Cnty. Bd. of Sup’rs,
D. Ariz. No. CV-06-2816-PHX-RCB..... 4

Statutes

A.R.S. § 13-105(22)(b)-(c)..... 8

A.R.S. § 13-702(D) 8

A.R.S. § 13-706(A) 7
A.R.S. § 13-706(F)(1)(a)-(l)..... 7
A.R.S. § 13-751(J) 7
A.R.S. § 13-901.01 8
A.R.S. § 13-1804..... 9
A.R.S. § 13-1805(I)..... 9
A.R.S. § 13-1819 9
A.R.S. § 13-2008(A) 9
A.R.S. § 13-2309 9
A.R.S. § 13-2319(F)(3) 9
A.R.S. § 13-3410(D)(1) 7
A.R.S. § 13-3961(A)(5)(b)..... 8
A.R.S. § 13-4802..... 9
A.R.S. § 28-5921(A)(4) 9

Rules

Federal Rules of Appellate Procedure 29 1
Federal Rules of Appellate Procedure 35 1
Federal Rules of Appellate Procedure 40 1

Other Authorities

“Arizona Prop 100 Upheld,” James R. Edwards, Center for Immigration
Studies, Apr. 9, 2011 6
“Migrant Foe Tied to Racism,” Byron Wells, East Valley Tribune,
Aug. 16, 2004..... 3

“Pearce Calls on ‘Operation Wetback’ for Illegals,” Sarah Lynch,
East Valley Tribune, Sept. 29, 2006 5

*A Woman Was Held in Jail Because Authorities Thought She Was
Illegal*, Stephen Lemons, Phoenix New Times, August 9, 2012..... 14

Arizona Sheriff Uses Anti-Smuggling Law to Target Illegal Immigrants,
William La Jeunesse and the Associated Press, FoxNews.com,
May 11, 2006 4

Arizona Taxpayer and Citizen Protection Act, Proposition 200 3

Assistant Attorney General Thomas E. Perez, Letter to Maricopa County
Attorney Bill Montgomery Regarding Findings of the Civil Rights
Division’s Investigation, Dec. 15, 2011 10

Bill Montgomery Fails to Convict an Innocent Man, Stephen Lemons,
Phoenix New Times, February 14, 2013 15

House Floor Meeting on S.B. 1265, June 13, 2007, 48th Leg.,
1st Regular Sess. (Ariz. 2007) 4

Maricopa County Attorney Opinion 2005-002, Sept. 29, 2005..... 3

Senate Judiciary Committee Meeting on H.B. 2389, Mar. 28, 2005,
47th Leg., 1st Regular Sess. (Ariz. 2005)..... 7

Arizona Attorneys for Criminal Justice (“AACJ”) respectfully files this brief as amicus curiae in support of Plaintiffs-Appellants’ petition for rehearing en banc or panel rehearing pursuant to Federal Rules of Appellate Procedure 35 and 40.

**AMICUS CURIAE’S IDENTITY, INTEREST, AND
AUTHORITY TO FILE BRIEF**

AACJ is an Arizona statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature. AACJ’s mission is to protect and ensure by rule of law those individual rights guaranteed to all people by the Arizona and federal Constitutions, and to resist all efforts made to curtail such rights.

The experience of AACJ members, who work every day representing people affected by Proposition 100, offers valuable context showing that the measure was conceived of and is being used as an impermissible punishment. AACJ thus offers in this brief information about the ways Proposition 100 is affecting criminal defendants and the criminal justice system.

AACJ sought the consent of the parties to file this amicus brief. Defendants-Appellees refused to consent to the filing of the brief, and AACJ has thus filed a motion for leave to file this brief pursuant to FRAP 29.

AUTHORSHIP AND FUNDING OF BRIEF

No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. Nor did any other third party contribute money to fund the preparation or submission of this brief.

ARGUMENT

Proposition 100 was passed as part of a multi-pronged nativist campaign waged by former Arizona State Senator Russell Pearce, former Maricopa County Attorney Andrew Thomas, and current Maricopa County Sheriff Joe Arpaio. The legislative history of Proposition 100 cannot be separated from that of other anti-immigrant measures passed during the mid-2000s in Arizona. Since it became law, local officials have used the law to detain people based on their immigration status – even people who would not otherwise be jailed or deported.

Because Proposition 100 was conceived of and is being used as a means of punishing people based on their immigration status, the Court should grant rehearing.

I. Proposition 100 Was Intended to Punish Immigrants

During the mid-2000s in Arizona, Russell Pearce, Joe Arpaio, and Andrew Thomas led a crusade to demean, dehumanize, and punish out-of-status immigrants that eventually morphed into a campaign against Latinos generally. Proposition

100 was part of this coordinated campaign, and the Court should view the measure's legislative history in the context of those larger efforts.

In 2004, Arizona voters passed Proposition 200, which required the state to verify immigration status before confirming a person's voter registration or providing certain state benefits.¹ The organization that gathered signatures for Proposition 200, Protect Arizona Now, was led by Virginia Abernathy, a self-described racial "separatist" who believes in segregation because "ethnic groups are more comfortable with their own kind."² The Supreme Court struck down the voter registration provisions of Proposition 200 as preempted by the National Voter Registration Act of 1993.³ In 2005, the Arizona legislature passed the notorious human-smuggling law, which makes it a felony for someone to transport for a commercial purpose anyone that he or she "knows or has reason to know" is not a citizen or otherwise "lawfully in this state."⁴ Then-County Attorney Andrew Thomas promptly issued a legal opinion concluding that people who are smuggled could be prosecuted under this law for conspiring to smuggle themselves.⁵ Sheriff

¹ See Arizona Taxpayer and Citizen Protection Act, Proposition 200, available at <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.htm>.

² See "Migrant Foe Tied to Racism," Byron Wells, East Valley Tribune, Aug. 16, 2004, available at http://www.eastvalleytribune.com/news/article_bb6cb865-a006-5636-915d-89e501942701.html.

³ See *Arizona v. Inter Tribal Council of Ariz.*, 133 S.Ct. 2247 (June 17, 2013).

⁴ A.R.S. § 13-2319(F)(3).

⁵ See Maricopa County Attorney Opinion 2005-002, Sept. 29, 2005. The policy of arresting and prosecuting people for conspiring to smuggle themselves

Arpaio seized on Thomas's interpretation of the human-smuggling statute and stated to the press, "It's a violation of the law, and I'm going to put tents up from here to Mexico if I have *to to* [sic] *keep these illegals incarcerated*."⁶ In 2006, Proposition 100 was passed. While its supporters paid lip service to the notion that it focused on the flight risks posed by out-of-status immigrants, they simultaneously made clear that their intent was to punish. Typical is a statement by Representative John Kavanaugh, who said, "I therefore support this bill as a first step to what we should be really doing and that's deporting anybody here illegally."⁷ After the passage of Proposition 100, the campaign against immigrants in Arizona only gained steam, as Arpaio created the Human Smuggling Unit ("HSU") within his Illegal Immigration Interdiction Unit. The acknowledged purpose of this unit was to arrest people for being out-of-status.⁸ As he described it at the time, the HSU was created "to go after illegals, not the crime first, that they happen to be illegals. My program, my philosophy is a pure program. You go

has been challenged in federal court. *See We Are America/Somos America v. Maricopa Cnty. Bd. of Sup'rs*, D. Ariz. No. CV-06-2816-PHX-RCB.

⁶ *See Arizona Sheriff Uses Anti-Smuggling Law to Target Illegal Immigrants*, William La Jeunesse and the Associated Press, FoxNews.com, May 11, 2006, available at <http://www.foxnews.com/story/2006/05/11/arizona-sheriff-uses-anti-smuggling-law-to-target-illegal-immigrants> (emphasis added).

⁷ *House Floor Meeting on S.B. 1265*, June 13, 2007, 48th Leg., 1st Regular Sess. (Ariz. 2007).

⁸ Being out-of-status is not a crime, and local law enforcement agencies have no authority to detain people for civil immigration violations. *See Martinez-Medina v. Holder*, 673 F.3d 1029, 1036 (9th Cir. 2011).

after illegals. I'm not afraid to say that. And you *go after them and you lock them up*.”⁹ Arizona's anti-immigrant campaign culminated in the passage of SB 1070, an effort to criminalize civil immigration violations through state law, which was largely struck down by the Supreme Court two years later.¹⁰

The legislative history of Proposition 100 is inseparable from the campaign waged by Pearce, Thomas, and Arpaio generally.¹¹ This campaign included repeated statements favoring detention or mass deportation of people based on their immigration status.¹² Proponents of Proposition 100 have always known that its purpose is to jail undocumented immigrants. After all, the Center for Immigration Studies, a supporter of the law, issued an article after the District Court's decision in this very case describing the measure favorably as “Arizona's

⁹ See *Ortega Melendres v. Arpaio*, CV-07-02513-PHX-GMS at 10 (D. Ariz. May 24, 2013). Arpaio's program was later found to violate both the Fourth and Fourteenth Amendments by detaining people without probable cause and using Hispanic appearance as a factor in determining whether officers have reasonable suspicion to conduct a stop. See *id.*

¹⁰ See *United States v. Arizona*, 132 S.Ct. 2492 (2012).

¹¹ Thomas resigned his office in 2010 and was disbarred in 2012. Pearce was recalled from office in 2011. Arpaio remains in office.

¹² Pearce, for example, publicly favored re-introducing “Operation Wetback,” a mass deportation program from 1953. See “Pearce Calls on ‘Operation Wetback’ for Illegals,” Sarah Lynch, East Valley Tribune, Sept. 29, 2006, available at http://www.eastvalleytribune.com/article_256f912f-3d93-5f5e-a4b9-ecbd130fc0e1.html.

law to keep criminal aliens behind bars.”¹³ The measure’s legislative history thus shows that it was designed to constitute “impermissible punishment.”¹⁴

II. Proposition 100 Is Used to Punish Immigrants

As approved by voters, Proposition 100 requires that only those charged with a “serious felony offense” should be denied bail based on their immigration status. Once the measure became law, however, the legislature crafted a new definition of “serious” offense for use *only* with Proposition 100 that included dozens of less serious offenses, including mandatory-probation offenses. Significantly, the new law defined violations of the human-smuggling law, forgery, and identity theft – all charges that are used by local law enforcement to target out-of-status immigrants – as “serious” offenses. None of these crimes is defined as a “serious” offense anywhere else in Arizona law.

The results have been predictable – and just as proponents of Proposition 100 intended. Dozens, if not hundreds, of non-violent offenders who pose little or no flight risk have been held without bail for months, awaiting trial on charges such as using another person’s social security number to obtain work. These defendants include people brought to the United States as children who would otherwise qualify for the Department of Homeland Security’s Deferred Action for

¹³ See “Arizona Prop 100 Upheld,” James R. Edwards, Center for Immigration Studies, Apr. 9, 2011, available at <http://www.cis.org/edwards/prop-100-upheld>

¹⁴ See *United States v. Salerno*, 481 U.S. 739, 747 (1987).

Childhood Arrival program, and people who are the parents of United States citizens and who pose no risk of flight to Mexico. In some more egregious cases, people have been detained without bail for months only to later prove that they are American citizens or are not guilty of the crime for which they were charged.

A. The Legislature Defined “Serious” Crime to Target Immigrants

Arizona law divides felony offenses into six classes. Before the passage of Proposition 100, there were three definitions of “serious” offense under Arizona law. Twelve crimes are defined as “serious offenses” for the purpose of its three-strikes law,¹⁵ thirteen are defined as “serious offenses” for purposes of aggravating prior convictions under the capital-punishment statute,¹⁶ and six are defined as “serious drug offenses” for sentencing purposes.¹⁷ Each of the “serious” offenses under these statutes is a class 1, 2, or 3 felony. The legislators debating Proposition 100 understood “serious” offense to mean a class 1, 2, or 3 felony, as shown by the comments of Senator Jack Harper, who stated, “Illegal aliens shouldn’t be able to get bond for anything let alone *a Class 1, 2, or 3 felony.*”¹⁸

Throughout Arizona law, class 4, 5, and 6 felonies are treated differently than more serious offenses. For example, the sentencing ranges above the

¹⁵ See A.R.S. § 13-706(A), (F)(1)(a)-(l)

¹⁶ See A.R.S. § 13-751(J).

¹⁷ See A.R.S. § 13-3410(D)(1).

¹⁸ *Senate Judiciary Committee Meeting on H.B. 2389*, Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005) (emphasis added).

presumptive term for class 4, 5, and 6 felonies are significantly narrower than those for class 2 and 3 felonies, regardless of whether the offenses are repetitive or dangerous.¹⁹ Similarly, a defendant is charged with a “historical prior conviction” – and may therefore be subject to an increased sentence – if he has been convicted of a class 4, 5, or 6 felony within five years, or of a class 2 or 3 felony within ten years.²⁰

The drafters of Proposition 100, however, created an arbitrary definition of “serious felony offense” that includes many crimes previously not considered “serious” and which specifically targets immigration-related offenses.²¹ While the broadest definition of “serious” offense under existing law included thirteen enumerated offenses, the definition of “serious” offense that applies *only* to Proposition 100 includes one hundred ninety-eight separate crimes.

Dozens of relative minor offenses are now defined as “serious” offenses under Proposition 100. Possession of an illegal drug (excluding marijuana) for personal use is a class 4 felony, even though first- and second-time offenders *must* be sentenced to probation.²² Shoplifting is a class 4 felony if the defendant has

¹⁹ See A.R.S. § 13-702(D) (sentencing ranges for nondangerous, nonrepetitive felony offenses).

²⁰ See A.R.S. § 13-105(22)(b)-(c).

²¹ See A.R.S. § 13-3961(A)(5)(b).

²² See A.R.S. § 13-901.01.

committed two other shoplifting offenses within five years.²³ Under the new definition of “serious” offense, people who cannot prove that they are legally present in the United States are not eligible for bail if they are charged with bribing the participants of an amateur dog race,²⁴ possessing a cloned cell phone,²⁵ or evading motor fuel taxes.²⁶

Most significantly, the new definition of “serious” offense includes two statutes that local law enforcement has used to target out-of-status immigrants: the identity-theft statute, which is used to prosecute immigrants who use a social security number that is not their own to gain work,²⁷ and the human-smuggling statute, under which out-of-status immigrants are prosecuted for conspiring to smuggle themselves.²⁸ Proposition 100’s definition of “serious” crime therefore not only denies bond to nonviolent offenders, some of whom are guaranteed probation, it specifically targets immigration-related offenses.

²³ See A.R.S. § 13-1805(I). In addition, the legislature recently passed a statute criminalizing “organized retail theft,” a charge that is indistinguishable from shoplifting but is defined as a class four felony for a first offense. Compare A.R.S. § 13-1819, with A.R.S. § 13-1804.

²⁴ See A.R.S. § 13-2309.

²⁵ See A.R.S. § 13-4802.

²⁶ See A.R.S. § 28-5921(A)(4).

²⁷ See A.R.S. § 13-2008(A).

²⁸ See A.R.S. § 13-2319(F)(3).

B. Prosecutors Use Proposition 100 to Target Immigrants

Once the legislature gave them the power to target out-of-status immigrants for arrest and detention using Proposition 100, law enforcement and prosecutors were not shy about using it. The United States Department of Justice has already noted that Maricopa County's use of the identity theft statute (a class 4 felony and therefore subject to Proposition 100) may constitute a civil-rights violation, writing to County Attorney Montgomery that:

MCSO's Criminal Employment Squad ("CES") deputies, tasked with interdicting undocumented persons by enforcing state forgery and identity theft statutes, routinely raid businesses in a manner that harms innocent Latino workers. Specifically, CES's deputies typically detain and investigate the immigration status of all employees at a raided worksite, whether or not the employees are listed in the warrant authorizing the raid. The CES targets worksites where most, if not all, of the employees are Latino.²⁹

After these raids, the Maricopa County Attorney's Office ("MCAO") charges undocumented workers with multiple forgery offenses (one for every document in the employee's file). The MCAO typically leverages Proposition 100 to secure a plea – defendants are offered the Hobson's Choice between pleading guilty to a relatively short sentence or being incarcerated for months without bail before

²⁹ Assistant Attorney General Thomas E. Perez, Letter to Maricopa County Attorney Bill Montgomery Regarding Findings of the Civil Rights Division's Investigation, Dec. 15, 2011.

having the opportunity to mount a defense.³⁰ A sampling of cases in which people were charged with forgery and identity theft shows that Proposition 100 is being used against low-level offenders who are often not deported even after they are turned over to immigration authorities.

1. **Guadalupe Garcia de Rayos**

Guadalupe Garcia de Rayos came to the United States when she was only fourteen years old. She lives in Phoenix with her husband and their two children, who are both United States citizens. She is an active member of her church and was even commissioned as a Special Minister of Holy Communion in order to serve as a Eucharistic Ministry at Sunday Mass.

Garcia de Rayos was arrested on identity-theft charges at her workplace.³¹ She was detained without bail under Proposition 100, and eventually pleaded guilty. Immigration and Customs Enforcement (“ICE”) did not detain her during her subsequent immigration hearings, and, even though she was not in custody, she appeared for every hearing. She was recently granted a stay of deportation for one year and still resides with her family in Phoenix.

³⁰ See, e.g., *State v. Bockarie*, CR2012-158172. Mabel Bockarie was charged with forgery when she was found with an unauthorized social security card after a traffic stop. Held without bail pursuant to Proposition 100, she pled guilty to criminal impersonation, a class six felony that carried a 90-day sentence.

³¹ See *State v. Garcia de Rayos*, CR2008-136210.

2. Luz Ruiz-Rascon

Luz Ruiz-Rascon was arrested following a raid on a General Nutrition Center warehouse in Phoenix and charged with six class 4 felonies involving identity theft and forgery.³² She was held without bond under Proposition 100, during which time her two children – both United States citizens – were without the care of their mother. One of her children suffers from leukemia, and Ruiz-Rascon must stay in Maricopa County to oversee medical treatment, making her an extremely low flight risk. Ruiz-Rascon eventually pleaded to a misdemeanor and was released from immigration custody shortly after.

3. Martha Espinoza-Lopez

Martha Espinoza-Lopez was arrested during a raid of Sportex Apparel in Maricopa County. She was charged with taking the identity of another, forgery, and aggravated taking the identity of another.³³ Espinoza-Lopez is a 62-year-old grandmother who stands just under five feet tall. Although she was held without bond under Proposition 100 during her criminal proceedings, immigration authorities subsequently determined that her case was such a low priority that her removal proceedings were dismissed.

³² See *State v. Ruiz-Rascon*, CR2012-142368.

³³ See *State v. Espinoza-Lopez*, CR2013-000871.

4. Solaguahire Zenil Cordero

Solaguahire Zenil Cordero was brought to the United States when she was five years old.³⁴ On April 22, 2012, Arizona Department of Public Safety Officer Seth Turken initiated a traffic stop because Zenil Cordero made a right turn on a red light at an intersection where a “no right on red” sign was posted.³⁵ When Zenil Cordero produced her Mexican consular identification card, Officer Turken began questioning her about her immigration status.³⁶ After discovering she worked at a local clothing store, Officer Turken initiated a personal investigation into her immigration status, during which he contacted ICE to ask about Zenil Cordero and requested her employment records from the store where she worked.³⁷ When the employer refused to provide the records, Officer Turken obtained a grand jury subpoena for Zenil Cordero’s I-9 and W-2 forms and confronted her at her place of employment.³⁸

Zenil Cordero was arrested and held without bail under Proposition 100 for 187 days. On the day of her trial, she pleaded guilty to a misdemeanor when it was

³⁴ There is no exception under Proposition 100 for those eligible for the Department of Homeland Security’s Deferred Action for Childhood Arrival program.

³⁵ April 17, 2013 Under Advisement Ruling, *State v. Solaguahire Zenil Cordero*, CR2012-149764, (Maricopa Cty. Sup. Ct.). Turning right on a red light is ordinarily legal in Arizona.

³⁶ *Id.* at 2

³⁷ *Id.* at 3

³⁸ *Id.*

discovered that the state possessed evidence that the social security number she used for work actually belonged to her and was not forged. She was released from immigration custody shortly after.

5. Briseira Torres

Briseira Torres was arrested and charged by the MCAO with three counts of forgery, each a class 4 felony, making her ineligible for bail under Proposition 100. She was held in Estrella Jail for four-and-a-half months before it was proven that she was a United States citizen, born in Arizona.³⁹ All of the allegedly forged documents in fact belonged to her and had been issued by the government.

6. Rafael Lavallade-Gonzalez

Rafael Lavallade-Gonzalez, a frail 70-year-old diabetic with white hair, was incarcerated for 186 days after he was arrested on four counts of forgery and using the identity of another for employment.⁴⁰ Lavallade-Gonzalez posed a particularly low flight risk because of his age, his health, and the fact that his wife, children, and friends all lived in Phoenix. His grown children, both of whom hold degrees from Arizona State University, came to his trial every day, as did his wife, his

³⁹ See *A Woman Was Held in Jail Because Authorities Thought She Was Illegal*, Stephen Lemons, Phoenix New Times, August 9, 2012, available at <http://www.phoenixnewtimes.com/2012-08-09/news/a-woman-was-held-in-jail-because-authorities-thought-she-was-illegal>, last visited August 8, 2013.

⁴⁰ *State v. Rafael Lavallade-Gonzalez*, CR2012-142368.

priest, and dozens of other family and friends.⁴¹ After being held in jail for more than six months and on trial for a week, Gonzalez was acquitted when it was shown that his employer had used corrective fluid to doctor his employment records.⁴²

The above cases are not outliers – they are typical of the cases brought under the identity-theft and forgery statutes, which were specifically designated as “serious” offenses so that Proposition 100 could be used to deny bail to people targeted based on their immigration status. The Office of the Maricopa County Public Defender has identified numerous other cases in which Proposition 100 has been used to deny bail to people charged with identity theft or forgery based on documents used to obtain employment in the United States.⁴³ In practice, local law enforcement agencies rely on Proposition 100 as part of Sheriff Arpaio’s stated

⁴¹ See *Bill Montgomery Fails to Convict an Innocent Man*, Stephen Lemons, Phoenix New Times, February 14, 2013, available at <http://www.phoenixnewtimes.com/2013-02-14/news/wasted-days-tk/>, last visited August 8, 2013.

⁴² *Id.*

⁴³ See, e.g., *State v. Bockarie*, CR2012-158172 (forgery charge for false social security card found during routine traffic stop); *State v. Rodriguez*, CR2012-007664 (forgery charge for using false documentation to gain employment at a sandwich shop; defendant was brought to the United States at age 3 and was supporting her entire family, including her ailing mother); *State v. Bonilla-Funes*, CR2012-157660 (forgery charge against woman working at a pizza parlor; arrest stemmed from call to police by her husband, whom she had fled to escape abuse); *State v. Alvaraez*, CR2012-159069 (forgery charge for presenting valid Mexican driver’s license that local law enforcement officer doubted); *State v. Ramirez-Beltran*, CR2012-155072 (forgery charge for using false identification to gain employment).

strategy regarding undocumented immigrants: “you go after them and you lock them up.”

CONCLUSION

The experience on the ground in Arizona with Proposition 100 shows that it was conceived to punish immigrants based on their status and is being used to do just that. The law was enacted as part of a years-long campaign against immigrants, and key terms of the law have been altered to extend its punitive power over immigrants. The AACJ respectfully asks the court to grant en banc review or panel rehearing of this case.

Dated: August 12, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief contains 3,533 words.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:
 this brief has been prepared in a proportionally spaced typeface using Word 2007 with 14 point, Times New Roman font, or

Dated this 12th day of August, 2013.

/s/ Kathleen E. Brody

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 12, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 12, 2013.

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