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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FRIENDLY HOUSE *et al.*, Plaintiffs, vs. MICHAEL B. WHITING *et al*, Defendants.	No. CV-10-01061-SRB PROPOSED *AMICUS CURIAE* BRIEF BY ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMARY INJUNCTION Hon. Susan R. Bolton

Come now, David J. Euchner, Louis S. Fidel, Matthew H. Green and Adam N. Bleier, counsel for *Amicus Curiae* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE and submit the following brief in support of Plaintiffs' motion for preliminary injunction.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Amicus curiae Arizona Attorneys for Criminal Justice ("AACJ") is a not-for-profit membership organization representing over 400 criminal defense lawyers licensed to practice in the State of Arizona, law students, and other associated professionals, which is dedicated to protecting the rights of the criminally accused in the courts and the legislature. AACJ supports Plaintiffs' motion for preliminary injunction because SB 1070 (and its "corrective" legislation, HB 2162), set to take effect on July 29, 2010, will have significant deleterious effects on all people's right to be free from unreasonable seizures. This law requires police officers to conduct complete investigations of immigration status of anyone appearing to be unlawfully present in the United States, and it gives a private right of action to sue government to citizens who feel that the law is not being enforced with sufficient vigor. The law provides no substantial guidance to officers in the field who will be expected to enforce it, thereby entrusting officers with unbridled discretion.

SB 1070 is an exceptional law because its very language, while paying lip service to the constitutional ban on racial profiling, essentially requires unconstitutional racial profiling, detentions, and arrests by officers who are sworn to uphold it. SB 1070 casts such a wide net over the entire Hispanic population in Arizona (as well as those traveling through this State) that it will be impossible for the laws to be enforced in a racially-neutral manner. Inevitably, police will stop persons without reasonable suspicion and arrest persons without probable cause. When considering that enormous segments of the population are Hispanic and speak a language other than English at home,[1] officers will be unable to detect immigration status based on typical observations. Additionally, police officers will be required to read *Miranda* warnings in every interrogation to detainees suspected of violating the new state law of being unlawfully present in this country.

[1] According to the U.S. Census Bureau, as of 2008, 30.1% of people in Arizona are of Hispanic / Latino origin, and 25.9% speak a language other than English at home. Those numbers are higher in neighboring states: in New Mexico, 44.9% are Hispanic and 36.5% speak a non-English language at home, and in California, 36.6% are Hispanic and 39.5% speak a non-English language at home. http://quickfacts.census.gov/qfd/states/ (last accessed 6/19/10).

Plaintiffs meet this circuit's standard for granting preliminary injunctions. *See Taylor v. Westly*, 488 F.3d 1197, 2000 (9th Cir. 2000) Countless people will suffer irreparable harm if this law is allowed to take effect. Inevitably, people lacking any criminal history will be taken into custody and booked into jail based solely on officers' hunches that they *might* be in the country illegally combined with their inability to prove the opposite. In communities with large populations of people who are unlawfully present in this country, witnesses to crimes will hesitate to come forward for fear of deportation. If a criminal defendant subpoenas such a person, the State will inevitably discover that person's unlawful status and prosecute the witness under SB 1070.

This Court must consider the balance of harms to the parties if injunctive relief is given or denied. *Nelson v. NASA*, 568 F.3d 1028 (9th Cir. 2009). Plaintiffs and others who are lawfully present in the United States will suffer the substantial harm and indignity of arrest without probable cause. Particularly since the motion for preliminary injunction requests this Court only to maintain the *status quo* (rather than order specific conduct of defendants), the balance of harms tips decidedly in favor of Plaintiffs and against Defendants and intervenors. For these reasons, AACJ asks this Court to grant Plaintiffs' motion for a preliminary injunction.

I. FIFTH AMENDMENT AND *MIRANDA* RIGHTS

The Fifth Amendment requires police officers to advise persons, prior to commencing custodial interrogation, of the right to remain silent, that any statements can be used against them, and of the right to presence of an attorney prior to conducting any interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S.Ct. 1602 (1966). *Miranda* is triggered when a person is *in custody* of law enforcement, a standard that does not require a full arrest. *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517 (1983). A person is *in custody* if, based on the totality of the circumstances, a reasonable person in a similar position would feel his freedom of movement had been restrained to the degree associated with a formal arrest. *Id*. Even informal questioning by officers may be an interrogation that requires advisement of *Miranda* rights. An interrogation consists of "words or actions on the part of police … that the police should know are reasonably

likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S.Ct. 1682 (1980).

SB 1070 creates a scenario that will require officers to read *Miranda* warnings before asking any questions about national origin. The purpose of any questioning about nationality or country of origin would obviously be to elicit responses incriminating the suspect of a crime (unlawful presence in the country), and any time an individual is in custody of a law enforcement, he must be advised of his rights prior to being questioned.

II. FOURTH AMENDMENT GENERALLY

Investigatory stops; ban on policing by "hunch"

The Fourth Amendment applies to all seizures of persons or vehicles, including those limited to a brief detention or investigatory stop. *Terry v. Ohio*, 392 U.S. 1, 16-19, 88 S.Ct. 1868 (1968); *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690 (1981); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776 (1996). Accordingly, individuals have Fourth Amendment protection as they walk and drive the streets of Arizona.[2] *Terry*, 392 U.S. at 9. Due to their limited scope and intrusion, investigatory stops require reasonable suspicion, a lesser quantum of cause than the probable cause necessary for arrest.

"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, 109 S.Ct. 1581 (1989) (cites omitted). However, officers do not have unbridled discretion in making a stop. *Nicacio v. I.N.S.*, 797 F.2d 700, 705 (9th Cir. 1985), *overruled in part on other grounds in Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999). It is well settled that an investigatory stop, however brief, must 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; *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319 (1983); *Gonzalez-Gutierrez*, 187 Ariz. at 120. Officers "must be able to point to specific and articulable facts which, taken together with rational inferences from those

[2] Passengers in a vehicle subject to an investigatory stop are likewise "seized" under the the Fourth Amendment for the duration of the stop. *Arizona v. Johnson*, 129 S.Ct. 781, 784 (2009).

facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. Police may not stop individuals or pull over vehicles based on a "hunch." *Id.*; *State v. Graciano*, 134 Ariz. 35, 38-39, 653 P.2d 683 (1982). Subjective impressions simply 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).

Terry scope requirement; seizure lawful at inception can become unlawful if prolonged

"The 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, 125 S.Ct. 834 (2005); *Dunaway v. New York*, 442 U. S. 200, 212, 99 S.Ct. 2248 (1979). A lawful roadside stop ends when police have no further need to continue the detention and inform driver and passengers they are free to leave. *Brendlin v. California*, 551 U.S. 249, 258, 127 S.Ct. 2400 (2007).

Officers may approach and question people in public places, but they cannot convey that compliance is required and a person must feel free "to disregard the police and go about his business." *Florida v. Bostick*, 501 U.S. 429, 434-35, 111 S.Ct. 2382 (1991). If an officer stops a person on one matter and questions on other matters, it must be done in a way such that reasonable persons would believe they could refuse to answer. *Id*. at 431; *Royer*, 460 U.S. at 498 ("[R]efusal to listen or answer does not, without more, furnish [reasonable suspicion]."); *Kolender v. Lawson*, 461 U.S. 352, 366-67 103 S.Ct. 1855 (1983) (Brennan, J., concurring) (states "cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a *Terry* encounter.").

III. UNCONSTITUTIONALITY OF SB 1070

For the following three reasons, SB 1070 cannot be enforced without violating the Fourth Amendment: (1) it makes it a crime for individuals to refuse to answer police questions and produce identification during an investigatory stop; (2) regardless of the

"lip service" to the constitution in HB 2162 that prohibits racial profiling, it is impossible to obtain reasonable suspicion of unlawful presence without relying primarily on race and national origin; and (3) it requires police to detain individuals longer than what is permissible to inquire about and verify immigration status.

SB 1070 is an impermissible "stop-and-identify statute

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. In *Brown v. Texas*, 443 U.S. 47, 52-53, 99 S.Ct. 2637 (1979), the 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. In *Kolender*, the Court struck down as unconstitutionally vague a California statute that criminalized the failure to produce "credible and reliable" identification upon demand after an otherwise lawful stop. 461 U.S. at 361.[3]

The Supreme Court recently upheld Nevada's stop-and-identify statute in *Hiibel v. Sixth Judicial Dist.*, 542 U.S. 177, 124 S.Ct. 2451 (2004). In upholding the statute, the Court emphasized that the officer had reasonable suspicion to question Hiibel initially, satisfying *Brown*, and that the statute was not challenged on vagueness grounds as that in *Kolender*. *Id*. at 184. Once the officer had reasonable suspicion for the initial detention, the Court held that it was permissible to require the suspect to give his name, which is all that is 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."). The *Hiibel* Court 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." 542 U.S. at 188. The demand to produce documents remains unreasonable under *Brown* and *Kolender*.

[3] Although *Kolender* was not based on the Fourth Amendment, the statute at issue violated Fourth Amendment protections, as Justice Brennan acknowledged in his concurring opinion. 461 U.S. at 362 (Brennan, J., concurring) ("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.").

SB 1070 closely resembles the law struck down in *Kolender* requiring persons to provide "credible and reliable" information of their identity. Officers conducting an immigration status check need more information than a 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 admitted to the country as a lawful permanent resident or on a visa; citizens are not required to have such paperwork at all. While an Arizona driver's license suffices to show the person is present legally, only people driving a vehicle are required to carry a driver's license. Passengers, pedestrians, and any one else are not so required.

Not only does Arizona seek to criminalize the failure to produce identification, but the failure to answer questions about immigration status could be used as a basis for further detention. Mere inability to prove one's lawful presence cannot rise to the level of reasonable suspicion to believe the person is in the country illegally. For this reason, SB 1070 is facially overbroad and unconstitutional.

The language of SB 1070 makes unconstitutional racial profiling an inevitability

Courts have noted the danger of officers using "hunches" as stand-ins for racial prejudice. *Terry*, 392 U.S. at 27. This danger is recognized in caselaw 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. *See, e.g., Gonzalez-Rivera v. I.N.S.*, 2 F.3d 1441 (9th Cir. 1994); *United States v. Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975). In *United States v. Brignoni-Ponce*, the Supreme Court held that while race could not represent the lone justification for a stop, it was a permissible facor 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. 873, 886-87, 95 S.Ct. 2574 (1975). 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 (Ariz. 1982) (citing *State v. Becerra*, 111 Ariz. 538, 534 P.2d 743 (1975)).

Brignoni-Ponce and its progeny recognize the danger of allowing police to rely primarily on this factor to find reasonable suspicion. 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." *Id.* at 886-87.

In Arizona specifically, where hundreds of thousands of citizens, and legal residents, and visitors embrace their Hispanic heritage in their dress, appearance, and language, reliance on those factors as the basis for reasonable suspicion all but guarantees a constitutional violation. See *Nicacio*, 797 F.2d at 703. There, the Ninth Circuit Court of Appeals addressed a class action suit against the INS for engaging in a pattern of unlawful stops to interrogate persons of Hispanic appearance. The Court specifically noted that appearance and dress factors were characteristics "shared by citizens and legal aliens in the area, as well as illegals," and were indicative more of socioeconomic status than of any criminal activity. *Id.* at 704. *see also Montero-Camargo* (holding that where a majority of people share certain characteristics, "that characteristic is of little or no probative value in [the reasonable suspicion] analysis." 208 F.3d at 11320; *Graciano*, 134 Ariz. at 38 (finding no reasonable suspicion where skin color used as factor); *United States v. Rodriguez-Sanchez*, 23 F.3d 1488, 1492 (9th Cir. 1994) (holding that reasonable suspicion cannot be based "on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped"); *United States v. Rodriguez*, 976 F.2d 592, 596 (9th Cir. 1992) (the "profile tendered by the agents to justify their 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"); *Gonzalez-Gutierrez*, 187 Ariz. at 120 (the defendant's Mexican appearance combined with other factors that "substantially resembles the description of vast numbers of law-abiding citizens" could not validate his detention. To hold otherwise

"would do injustice to principles of fundamental fairness established under the Constitution for the protection of all citizens, including our minority citizens.")

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. However, as seen in decades of case law, officers 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, our attorneys see cases filed by law enforcement officers of all jurisdictions where the initial stop was based on the driver's demeanor. Included in the list of factors to be used for determining reasonable suspicion include 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.

"Unlawful presence," like citizenship, cannot be determined by physical appearance or language. Both are highly technical terms established by operation of law. The absence of immigration documents does not mean that someone is unlawfully present in the United States. There are no outwardly visible signs or easily identifiable factors for reasonable suspicion of unlawful presence that do not rely on skin color, appearance, language or other stand-ins for race and national origin, such as language and dress. A.R.S. § 11-1051(B) directs local law enforcement officers 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." *Id*. But every person of "Mexican ancestry" or "Hispanic appearance" who is subject to the mandatory prolonged detention sanction of A.R.S. § 11-1051(B) will not have been initially detained by a law enforcement officer "whose primary responsibility

[is] the detection and apprehension of illegal aliens." *Gonzalez-Gutierrez*, 187 Ariz. at 118. SB 1070 *requires* local law enforcement officers to effect prolonged detentions of Hispanics who embrace Mexican culture in their "dress or hair style." *Id.* at 121. The prolonged detention requirement of A.R.S. § 11-1051(B) violates the rights of every U.S. citizen in Arizona of Mexican ancestry or Hispanic appearance.

SB 1070 poses an immediate and irreparable harm in that it compels the unlawful detention of U.S. citizens and others who are lawfully present in this country until they prove their innocence. That HB 2162 adds a subsection disclaiming racial profiling provides no relief to the multitudes of legally-present individuals who inevitably will be unconstitutionally subjected to racial profiling.

SB 1070 transforms investigatory stops into *de facto* arrests without probable cause

SB 1070 requires police to verify immigration status before releasing a detainee. However, a person's immigration status is not something that can be determined even by federal immigration officers during a brief investigatory detention. State and local police officers, left to make such determinations, will be forced to subject individuals to *de facto* arrests, for which the Fourth Amendment demands a finding of probable cause.

Due to the complexities of immigration law and the volume of cases, federal authorities prioritize their cases and address immigration issues associated with only the most serious of crimes. (Motion for Injunction, p. 7-8). Arizona police officers similarly prioritize their contacts due to volume.[4] This pattern of prioritization is particularly apparent where local law enforcement intersects with federal immigration enforcement. In all of Arizona, only 1,283 cases were referred to an ICE unit designed specifically to respond to requests for assistance from local law enforcement officers. (Motion for Injunction, p.23 n.16). SB 1070 demands far more from federal and local law enforcement officers than they have traditionally been able to provide. It *requires* that local law enforcement officers check the immigration status of *every* person with whom

[4] In 2009, the Tucson Police Department alone recorded 36,821 instances where people were arrested and field-released rather than being booked into jail. *See* Cross-Claim of City of Tucson, filed in this Court in *Escobar v. Brewer, et al.*, No. 10-CV-249-DCB on May 26, 2010, ¶ 38.

they come into contact when there is reasonable suspicion to believe the person is unlawfully present in the United States. A.R.S. §11-1051(b). Furthermore, any person arrested may not be released until his immigration status is determined. *Id*.

If SB 1070 takes effect, State authorities will be forced to book into jail a veritable flood of people while awaiting immigration checks. In turn, federal authorities, already unable to process all requests, would be inundated with many more cases, adding a burden they are not equipped to handle. (See Petition for Injunction, pp.7, 33 n.30). Clearly this will require far lengthier seizures than an investigatory detention would allow. Such an institutional logjam will inevitably violate the constitutional rights of all persons seized under SB 1070. The Fourth Amendment permits limited seizures based on the reduced standard of reasonable suspicion, but probable cause is still required to justify a *de facto* arrest. Accordingly, the justification of mere reasonable suspicion contemplated by SB 1070 is facially inadequate, and the law is unconstitutional.

In Arizona, when officers transfer suspects from the field to holding cells pending further investigation, the initial stop is transformed into a *de facto* arrest. *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985) (transferring a suspect from one location to another transforms investigatory detention into arrest requiring probable cause). Even where the suspect remains in the field, officers may exceed the permissible scope of an investigatory detention and convert it into a *de facto* arrest. *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*."). SB 1070 seeks to permit prolonged detentions without the requisite finding of probable cause that the person has committed an offense. Instead, SB 1070 proposes to substitute reasonable suspicion as the basis for the *de facto* arrest.

IV. CONCLUSION

For these reasons, AACJ requests that this Court grant Plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 13th day of July, 2010

/s/ David J. Euchner
David J. Euchner

/s/ Louis S. Fidel
Louis S. Fidel

/s/ Matthew H. Green
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/s/ Adam N. Bleier
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CERTIFICATE OF SERVICE

We hereby certify that on July 13, 2010, we electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and transmittal of a Notice of Electronic Filing to all ECF registrants.

COPY sent with Notice of Electronic Filing, via U.S. Mail, on this date, to:

The Honorable Susan R. Bolton
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