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17 UNITED STATES DISTRICT COURT
18 FOR THE DISTRICT OF ARIZONA

20 Valle Del Sol, *et al.*,

21 Plaintiffs,

22 v.

23 Michael B. Whiting, *et al.*,

24 Defendants.

CASE NO. CV-10-01061-PHX-SRB

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
IN EVENT INJUNCTION IN *United
States v. Arizona* IS TO BE DISSOLVED**

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1 Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Valle del Sol, *et al.*,
2 hereby move for a temporary restraining order to prevent the implementation of § 2(B) of
3 SB 1070, Ariz. Rev. Stat. § 11-1051(B).

4 1. Plaintiffs bring this motion solely as a protective matter in the event the
5 Court is unable to rule on their contemporaneously-filed Motion for Preliminary
6 Injunction before the preliminary injunction the Court entered against § 2(B) in the related
7 case of *United States v. Arizona*, No. CV-10-1413-PHX-SRB, is to be dissolved. In that
8 event, the Court should enter a TRO for the reasons discussed below.

9 On June 25, 2012, the U.S. Supreme Court issued a decision in *Arizona v. United*
10 *States*, No. 11-182, ___ U.S. ___ (June 25, 2012) (slip op. available at
11 <http://www.supremecourt.gov/opinions/11pdf/11-182b5e1.pdf>), which addressed this
12 Court's preliminary injunction in Case No. CV 10-1413-PHX-SRB that suspended, on
13 preemption grounds, four provisions of SB 1070. *Arizona*, slip op. at 1–2. The Supreme
14 Court affirmed this Court with respect to three sections of SB 1070—§§ 3, 5(C), and 6.
15 *Id.* at 8–19, 25. The Supreme Court found that an injunction was not appropriate with
16 respect to § 2(B) based on the record in that case, but explicitly preserved the possibility
17 that the provision could be enjoined in another action. *Id.* at 19–24. In particular, the
18 Court found that if police detain people to verify their immigration status under § 2(B),
19 that will “raise constitutional concerns” and “disrupt the federal framework.” *Id.* at 22.
20 “[T]he program put in place by Congress does not allow state or local officers to adopt this
21 enforcement mechanism.” *Id.*

22 The Supreme Court remanded the case to the Ninth Circuit. *Id.* at 25. The
23 Supreme Court's mandate will not issue until at least July 20. *See* Attachment 1 to
24 contemporaneously-filed Motion to Shorten Time. It is unclear precisely when after July
25 20 the Ninth Circuit will act, and whether it will do so by dissolving this Court's
26 preliminary injunction as to § 2(B) or by remanding to this Court. But it is certain that at
27 some point the Ninth Circuit or this Court will be called upon to dissolve the current
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1 injunction prohibiting enforcement of § 2(B).

2 This action involves additional claims and additional evidence beyond what the
3 Supreme Court had before it in the case the United States brought. Indeed, statements by
4 Arizona law enforcement officials since the Supreme Court issued its decision show that
5 they interpret § 2(B) in a manner that is unconstitutional based on the Supreme Court's
6 guidance. Plaintiffs have accordingly filed their new Motion for Preliminary Injunction.

7 If the Court is able to decide that motion before its injunction in Case No. CV-10-
8 1413-PHX-SRB is to be dissolved, then the Court need not address this conditional request
9 for a TRO, which Plaintiffs seek solely in the event it is necessary to prevent the law from
10 going into effect for a short time so that the Court is able to consider their Motion for
11 Preliminary Injunction. A TRO in these circumstances makes eminent sense under any
12 scenario. It would be extremely disruptive for § 2(B) to go into effect for a few days and
13 then to be preliminarily enjoined. Conversely, if the Court were to decline to enter the
14 preliminary injunction, a delay in enforcement of a few days would be of little moment,
15 particularly given the length of time that the provision has already been enjoined.

16 2. In their Motion for Preliminary Injunction, Plaintiffs extensively discuss the
17 reasons why the Court should enjoin § 2(B) on preemption, Fourth Amendment, and equal
18 protection grounds. (Plaintiffs also seek a preliminary injunction of A.R.S. § 13-2929,
19 enacted by another section of SB 1070; but are not seeking a TRO with respect to that
20 section, which is not currently enjoined.)

21 The standards for issuing a TRO and a preliminary injunction are substantially the
22 same. *Stuhlberg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir.
23 2001). Plaintiffs summarize below the reasons to enter a TRO.

24 a. Based on the record before it, the Supreme Court found it "inappropriate to
25 assume §2(B) will be construed in a way that creates a conflict with federal law." *Id.* at 24
26 (emphasis added). The record in this case, however, including statements by law
27 enforcement officials after the Supreme Court decision, demonstrates that law enforcement
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1 agencies in Arizona will implement § 2(B) in a way that crosses the line the Supreme
2 Court drew.

3 Tucson's Police Chief has submitted a declaration stating that individuals who
4 would ordinarily be cited and released will instead be detained at the roadside or even
5 arrested if § 2(B) goes into effect, and stating that in general police will detain individuals
6 under § 2(B) while police await responses to their status verification requests from federal
7 authorities. In press reports, the Pima County Sheriff will hold people for "a reasonable
8 amount of time" for Border Patrol. The Santa Cruz County Sheriff explained that § 2(B)
9 "may result in detention of people while citizenship is clarified." Other Arizona law
10 enforcement officials made similar statements. *See* P.I. Brief at 5-8.

11 These statements show that Plaintiffs have at least a likelihood of success of
12 prevailing on the merits of their preemption claim. Plaintiffs do not "assume" that § 2(B)
13 will be construed to violate federal law. Rather, the evidence demonstrates that law
14 enforcement officials will implement the provision in a way that will allow for detention
15 solely for immigration verification, which means that § 2(B) is preempted. *See Arizona*,
16 slip op. at 22.

17 b. For similar reasons, Plaintiffs have a likelihood of success on their Fourth
18 Amendment claim. Under the Fourth Amendment, "detention must . . . last *no longer* than
19 is necessary to effectuate the *purpose of the stop*." *Florida v. Royer*, 460 U.S. 491, 500
20 (1983) (emphases added). Because "the usual predicate for an arrest is absent" where
21 detention is "based on nothing more than possible removability," *Arizona*, slip op. at 16,
22 detaining individuals solely for immigration investigation violates the Fourth Amendment.
23 *See* PI Br. at 9-10.

24 c. Finally on the merits, Plaintiffs are likely to succeed in demonstrating that §
25 2(B) violates the Equal Protection Clause under the analysis set forth in *Village of*
26 *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252
27 (1977). A number of factors that *Arlington Heights* identified (*see* 429 U.S. at 266-68)
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1 support Plaintiffs' claim here and demonstrate that unlawful discrimination was "a
2 'substantial' or 'motivating' factor behind enactment" of § 2(B). *Hunter v. Underwood*,
3 471 U.S. 222, 228 (1985) (citation omitted).

4 First, the legislative history of SB 1070 demonstrates discriminatory intent. *See* P.I.
5 Br. at 13-26. Though supporters tried to avoid singling out Latinos publicly, that does not
6 shield them from equal protection scrutiny. "[O]fficials acting in their official capacities
7 seldom, if ever, announce on the record that they are pursuing a particular course of action
8 because of their desire to discriminate against a racial minority." *Smith v. Town of*
9 *Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). Thus, courts examine whether public
10 officials have "camouflaged" invidious intent by using language that raises the inference
11 of a discriminatory purpose. *See, e.g., id.* at 1066. The legislative debate on SB 1070 was
12 marked by just such camouflaged language, for instance discussing the need to "protect"
13 against "foreign invasion." Testimony of Sen. Gould, Final Reading of SB 1070 in
14 Senate, Apr. 19, 2010 (Ex. C-6 to Motion for Preliminary Injunction at 17). Supporters
15 also invented false "facts" to justify the law, and repeatedly conflated Latinos, individuals
16 of Mexcian origin, and/or U.S. citizens who have undocumented parents with "illegals,"
17 both in public and private. For instance, a member of Senator Karen Johnson's staff
18 conflated "Hispanics" and "illegals" in an email sent to Senator Russell Pearce, the
19 sponsor of the bill, about workers cutting grass and clean up the park: "Yesterday there
20 were two men who were obviously NOT Hispanic—very white and very American
21 looking—like college kids. Hooray? It looks like the illegals are starting to depart."
22 Email to Sen. Pearce dated July 6, 2007 (Ex. E-20 to Motion for Preliminary Injunction).

23 Second, § 2(B) will have a disparate impact. *See* P.I. Br. at 26-30. Approximately
24 two-thirds of Arizona's foreign-born population is from Latin America and around 60
25 percent of undocumented immigrants in the United States are from Mexico. Preciado
26 Decl. ¶¶ 5, 8, Ex. F to Motion for Preliminary Injunction. There can be no question that
27 Latinos (as well as other racial minorities) will be disproportionately affected by § 2(B).
28

1 In addition, the legislature intended § 2(B) to preserve and extend statewide the
2 immigration enforcement tactics of the Maricopa County Sheriff’s Office, which it knew
3 had resulted in numerous reports, complaints, and investigations of racial profiling.

4 Third, discriminatory animus permeated the sequence of events leading up to the
5 passage of SB 1070. *See* P.I. Br. at 30-34. Approximately five years before its passage,
6 the Arizona Legislature enacted a bill that would have made English the official language
7 of the state and “protect[ed] the rights of persons who use English” in the state.¹ Although
8 vetoed by then-Governor Janet Napolitano, the measure was approved by the Arizona
9 electorate as Proposition 103.² Then, the same year as it enacted SB 1070, the Legislature
10 enacted H.B. 2281, a law that financially penalizes primary and secondary schools if they
11 provide classes that “are designed primarily for pupils of a particular ethnic group” or
12 “advocate ethnic solidarity instead of the treatment of pupils as individuals.”³

13 Fourth, § 2(B) markedly departed from the Legislature’s usual deference to law
14 enforcement—removing discretion from officers in the field by requiring them to
15 investigate immigration status and enacting an unprecedented provision allowing private
16 citizens to sue police over the allocation of law enforcement resources. Villaseñor Decl. ¶
17 6, Ex. D to Motion for Preliminary Injunction; *see* P.I. Br. at 34-36.

18 3. As to the remaining factors governing temporary injunctions, Plaintiffs and
19 members of Plaintiff organizations face irreparable harm, including the harms of detention
20 and arrest under § 2(B), if that provision is allowed to take effect. *E.g.*, Harris Decl.,
21 *United States v. Arizona*, No. 10-1413, ¶ 7 (Doc. 27-10); Gascón Decl. ¶¶ 18–20 (Doc.
22 235-6); *see* P.I. Br. at 43-45.

23 This Court has already found that Plaintiffs have alleged a “‘realistic danger of
24 sustaining a direct injury as a result of . . . [the] operation or enforcement’ of [Section
25 2(B)] because of their appearance and limited English-speaking ability.” Order, May 29,
26

27 ¹ [Http://www.azsos.gov/election/2006/info/pubpamphlet/english/Prop103.htm](http://www.azsos.gov/election/2006/info/pubpamphlet/english/Prop103.htm).

28 ² *Id.*

³ [Http://www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf](http://www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf).

1 2012, at 11 (*quoting Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979)).

2 There is no harm to Defendants from maintaining the status quo whereby § 2(B) is
3 enjoined while the Court decides whether to grant the Motion for Preliminary Injunction.
4 That provision has already been enjoined for two years, and a TRO that would be in effect
5 for a few days is insignificant. Because the irreparable harms facing Plaintiffs are
6 overwhelming and the harm to Defendants nonexistent, the balance of equities tips sharply
7 in favor of the grant of a preliminary injunction.

8 The public interest will likewise be served by the suspension of provisions that
9 embody racial animus and would violate constitutional rights.

10 **CONCLUSION**

11 For the above reasons, the Court should grant the requested TRO if necessary to
12 preserve the status quo pending a decision on Plaintiffs' Motion for Preliminary
13 Injunction.

14 DATED this 17th of July 2012.

Respectfully submitted,

15
16
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25 MEXICAN AMERICAN LEGAL DEFENSE
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CERTIFICATE OF SERVICE

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I hereby certify that on _____, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System which will send notification of such filing to all counsel of record.
