

# **Exhibit A**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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David Salgado and Chicanos )  
Por La Causa, Inc., )  
                               )  
Plaintiffs, )  
                               )  
                               ) **CV10-00951-PHX-SRB**  
                               ) Phoenix, Arizona  
vs.                           ) July 15, 2010  
                               ) 9:59 a.m.  
Jan Brewer, individually and )  
in her capacity as Governor )  
of Arizona, and the City of )  
Phoenix, an Arizona municipal )  
corporation, )  
                               )  
Defendants. )  
                               )  
                               )

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**BEFORE: THE HONORABLE SUSAN R. BOLTON, JUDGE**

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

**MOTION HEARING**

Official Court Reporter:  
Elizabeth A. Lemke, RDR, CRR, CPE  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
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Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

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## PROCEDINGS

(Called to the order of court at 9:59 a.m.)

THE COURT: Good morning, ladies and gentlemen.

Please be seated.

THE CLERK: *Civil case 10-951. David Salgado and others v. Jan Brewer and others.* Time set for hearing regarding Plaintiffs' Motion for Preliminary Injunction and Defendant Brewer's Motion to Dismiss.

Counsel, please announce your presence for the record.

MR. MONTOYA: Good morning, Your Honor. Stephen Montoya here with my co-counsel Augustine Jimenez, Richard Martinez, and Erica Gonzalez. Thank you.

THE COURT: Good morning, Mr. Montoya.

MR. BOUMA: Good morning, Your Honor. John Bouma on behalf of Governor Brewer.

THE COURT: Good morning, Mr. Bouma.

According to the schedule that I issued, the first motions to be heard this morning --

I'm sorry. Please proceed.

MR. VERBURG: Sorry. Gary Verburg on behalf of the Defendant City of Phoenix with co-counsel Elaine Cardwell.

THE COURT: Good morning.

-- were the Defendant Brewer's two Motions to Dismiss. But since the time that I set both of those motions

1 for hearing, it became apparent to me that the Motion to  
2 Dismiss Governor Brewer in her individual capacity is  
3 unopposed.

4 Do you agree, Mr. Montoya?

5 MR. MONTOYA: Yes, Your Honor.

6 THE COURT: And this case then proceeds only against  
7 Governor Brewer in her official capacity.

8 Mr. Bouma, you may proceed, if you are arguing the  
9 motion.

10 MR. BOUMA: Thank you, Your Honor.

11 I would like to start by just noting a couple of  
12 points that I think are indisputable.

13 First, it's well established that state and local law  
14 enforcement officers have the authority to investigate and  
15 make arrests for violations of federal immigration laws.  
16 Vasquez-Alvarez discusses that at some length and cites a  
17 number of cases that hold to that effect.

18 Second, where federal and local enforcement have  
19 identical purposes, preemption does not occur.

20 Now, with those in mind, it's important to understand  
21 what has been happening in Arizona with respect to cooperation  
22 between the federal, state, and local authorities in enforcing  
23 the federal immigration laws and the basis upon which the  
24 decision was made to make assisting the federal government in  
25 enforcing the immigration laws a matter of state policy rather

1 than just local option.

2           In arriving at the decision that the State's  
3 resources should be directed at assisting in enforcing the  
4 federal immigration law, the Legislature considered a lot of  
5 evidence and testimony, some of which is attached to our  
6 papers, but it's clear that they had concern about human  
7 smuggling, drug trade, coyotes, various crimes associated with  
8 that, the serious crimes committed by illegal aliens, the fact  
9 that the largest, most violent gangs in America are made up of  
10 illegal aliens.

11           They also considered that some police departments had  
12 abandoned proactive policies on immigration enforcement and  
13 resisted cooperation with ICE, Immigration and Customs  
14 Enforcement.

15           So 1070 is the Support Our Law Enforcement and Safe  
16 Neighborhoods Act. It has 14 sections which are designed to  
17 address the issues which the Legislature considered. And in  
18 their Amended Complaint, the plaintiffs take issue with four  
19 provisions of 1070, and those provisions are contained in  
20 Section 2 and Section 6 of the Act.

21           The first provision at issue is Section A of 11-1051.  
22 It's part of Section 2. That prohibits governmental officials  
23 and agencies from limiting or restricting the enforcement of  
24 immigration laws to less than the full extent permitted by  
25 federal law.

1                   The second provision at issue is also part of Section  
2 and it requires that law enforcement officers make a  
3 reasonable attempt when practicable to determine the  
4 immigration status of an individual during a lawful stop,  
5 detention, or arrest when there is also reasonable suspicion  
6 that the individual is an alien and is unlawfully present in  
7 the country.

8                   And at that point the individual's status is then  
9 determined by federal law enforcement officers or their  
10 authorized agents.

11                  The third provision at issue is Section H of 1051,  
12 which is still part of Section 2. That allows persons to  
13 bring actions challenging policies that limit or restrict the  
14 enforcement of federal immigration laws to less than the full  
15 extent permitted by federal law.

16                  And then the final issue in the Amended Complaint,  
17 final provision, is from Section 6 and that gives law  
18 enforcement officers the permission to arrest the person  
19 without a warrant where the officer has probable cause to  
20 believe the person to be arrested has committed any public  
21 offense that makes the person removable from the United  
22 States.

23                  So to summarize, what we're talking about here today  
24 from the Amended Complaint, at least, is the first and third  
25 provisions, A and H, pertaining to the sanctuary city concern,

1 the cities or other jurisdictions who have limited or  
2 restricted, tied the hands of their law enforcement officers  
3 with respect to reporting or communicating with ICE.

4 The second and fourth provision give those law  
5 enforcement officers clear permission to assist with federal  
6 enforcement, to communicate with ICE, to report to ICE.

7 And we're going to touch on both of these concepts in  
8 greater detail in a moment. First, though, I would like to  
9 turn to the topic of standing.

10 I'm sure we all know that a plaintiff must satisfy  
11 the threshold requirement imposed by Article III of the  
12 Constitution by alleging an actual case or controversy. And  
13 to have standing here or anywhere else, a plaintiff must  
14 allege facts that demonstrate an injury, in fact, an invasion  
15 of a legally-protected interest which is concrete and  
16 particularized, actual or imminent, and not conjectural or  
17 hypothetical.

18 Now, Officer Salgado originally alleged four bases  
19 upon which he claimed he would suffer actual or imminent  
20 injury if 1070 went into effect. Two of them, I guess, have  
21 been abandoned. His remaining argument seemed to deal with  
22 dealing with Section 2 that he has got a possibility of civil  
23 liability if he enforces the law and he has a possibility of  
24 discipline if he decides he isn't going to enforce the law.

25 And, you know, that would be what the Ninth Circuit

1 and other courts would call the Hobson's Choice when they talk  
2 about these things. So then -- but the Ninth Circuit has  
3 squarely addressed this same argument, essentially the same  
4 Hobson's Choice in the *City of South Lake Tahoe*. And they  
5 addressed it in 1980. Made the same analysis about the  
6 difficulties or the question about doing something a public  
7 official was against, possibly the constitutional rights of  
8 others, enforcing a statute that that individual wasn't sure  
9 was constitutional, or on the other hand, in that instance,  
10 criminal liability.

11 And the court looked at it and said that there was no  
12 standing. A public official in that position doesn't have  
13 standing. They're just seeking an advisory opinion and no  
14 standing.

15 So here, even beyond the facts in *South Lake Tahoe*,  
16 under Subsection H, there are no penalties for individual  
17 officers for enforcing the Act.

18 Under Subsection K, Officer Salgado would be  
19 indemnified if somebody did sue him, unless he acted in bad  
20 faith. But there is the always-present Qualified Immunity  
21 Doctrine. The plaintiffs have cited a line of cases that  
22 includes *Babbitt* where there was a real and immediate  
23 possibility that the statutes the plaintiffs were challenging  
24 would be enforced against the plaintiff. And then the  
25 plaintiffs have also cited a couple of cases involving a

1 Hobson's Choice where situations where the plaintiffs were  
2 faced with choosing between a violation of their  
3 constitutional rights or a job loss.

4 In this instance, the statute is not going to be  
5 enforced against Officer Salgado and he is not being  
6 threatened with the loss of his constitutional rights. So  
7 just in short, I think Officer Salgado does -- simply doesn't  
8 have standing.

9 With respect to Chicanos Por La Causa, now I think  
10 their arguments are equally flawed. The sole injury that  
11 Chicanos Por La Causa originally alleged arose out of its  
12 claim that if it reported child abuse or abuse to any of its  
13 students or anything, its students would be threatened with  
14 unlawful interrogation, detention, and arrest if they cannot  
15 quickly prove that they are lawfully in the United States on  
16 one hand.

17 On the other hand, if the organization does not  
18 report any such suspicions, it would be in violation of  
19 Arizona law.

20 But the argument simply misconstrues the Act.  
21 There's nothing in 1070 that begins to permit an investigation  
22 into the immigration status of victims. 1070 only provides  
23 for investigations of individuals who are being investigated  
24 or detained because they violated the law and we haven't heard  
25 anything from the plaintiffs recently to dispute that.

1                   Now, in their response, however, they come up with  
2 two new theories. First, they argue that the enforcement of  
3 1070 would disrupt the educational process at its schools and  
4 diminish the size and growth of its student bodies.

5                   Now, beyond being pure speculation, the argument is  
6 misplaced, because this Act is not directed at schools and it  
7 does not incentivize the students to go elsewhere.

8                   Secondly, or their second argument is that Chicanos  
9 Por La Causa relies on its close relationship to its students  
10 to allow it to assert these claims on a student's behalf. The  
11 primary problem with that is that the students themselves must  
12 have standing before someone standing in their position can  
13 have standing.

14                   I would like to move on to the 12(b)(6) portion,  
15 failure to state a claim, Your Honor. I'm trying to save a  
16 few minutes for rebuttal.

17                   THE COURT: I'll let you know when you hit fifteen  
18 minutes, Mr. Bouma.

19                   MR. BOUMA: Thank you very much.

20                   Plaintiffs didn't respond to the 12(b)(6) arguments  
21 in the motion. They kind of referred us off to their Motion  
22 for Preliminary Injunction. And even then, they have not  
23 addressed at all a fatal flaw in their entire argument, which  
24 is the facial challenge issue.

25                   The Supreme Court tells us that a plaintiff can only

1 succeed in a facial challenge by establishing that no set of  
2 circumstances exists under which the Act would be valid.  
3 Well, that's simply not the case here.

4 We also learned from the Supreme Court that "When  
5 considering a facial challenge, the court must be careful not  
6 to go beyond the statute's facial requirements and speculate  
7 about hypothetical or imaginary cases."

8 Moving on to preemption, in their Amended Complaint,  
9 the plaintiffs allege that three federal statutes preempt the  
10 cooperation and assistance provisions in 1070 that we talked  
11 about earlier.

12 First place we know that federal preemption can be  
13 either express or implied; and certainly it's not express. So  
14 that leaves us with implied. And then implying the preemption  
15 in the immigration context exists if one of three things  
16 happen.

17 First, the state law is a, quote, regulation of  
18 immigration. This one clearly isn't. It is not determinative  
19 who should or should not be admitted into the country or the  
20 conditions under which a legal entrant may remain. So that's  
21 not even argued here.

22 The second possibility for implied preemption is  
23 federal law occupies the field. And the plaintiffs haven't  
24 argued that here either.

25 And the third possibility is that the state

1 regulation conflicts with federal law. And that's the one  
2 that the plaintiffs assert. But conflict preemption is only  
3 present when compliance with both state and federal law is  
4 impossible or when the state law stands as an obstacle to the  
5 accomplishment and execution of the full purposes and  
6 objectives of Congress.

7 This is clearly not the situation here, as every  
8 provision plaintiffs point to is consistent with assisting the  
9 enforcement of federal immigration laws; clearly within the  
10 intent of Congress.

11 In trying to come up with the conflicts, since they  
12 are relying on conflict preemption, they first argue that  
13 1252c federal statutes, the deported felon provision, which  
14 authorizes state and local arrest of illegal aliens that have  
15 previously been convicted of a felony in the United States and  
16 deported, preempts portions of Section 2 and 6.

17 The fact is that the Tenth Circuit has already  
18 addressed this at length in the *United States v.*  
19 *Vasquez-Alvarez*. And after considering both the statutory  
20 language, its Congressional history, and all the cases on the  
21 subject, it held that to interpret 1252c as preempting state  
22 law "would both contradict the plain language of 1252c and  
23 give the statute an interpretation and effect that Congress  
24 clearly did not intend."

25 THE COURT: Mr. Bouma, you have hit your 15-minute

1 mark.

2 MR. BOUMA: Okay. Thank you, ma'am.

3 Beyond that, it's -- let's talk then for a moment  
4 about 8 U.S.C. 1304. They claim that that statute which  
5 requires aliens 18 and over to carry their registration  
6 documents preempts subsection B of Section 2 on the theory  
7 that the Arizona statute requires persons under 18 to carry  
8 ID.

9 The truth of it is that nothing anywhere in the  
10 Arizona Act requires any person to carry any registration  
11 documents that the federal law does not require.

12 With respect to 1357(g), their third argument that  
13 authorizes the Attorney General to enter into agreements with  
14 state and local enforcement officers through which officers  
15 are essentially deputized, the fact is that no case has ever  
16 held that that preempts the law, state and local action. 1070  
17 does not attempt to address 1357 training or enforcement  
18 issues.

19 And third, in any event, 1357(g)(10) expressly  
20 permits the cooperation 1070 mandates. It says specifically  
21 that, "Nothing in this subsection shall be construed to  
22 require an agreement under this section in order for an  
23 officer or employee of a State or political subdivision of a  
24 state to cooperate with the Attorney General in the  
25 identification, apprehension, detention, or removal of aliens

1 not lawfully present."

2                   So in short, we believe that they have simply not  
3                   alleged the requisite real and immediate threat to harm, they  
4                   have not alleged that the Act is unconstitutional in all of  
5                   its applications, and they have not alleged a legitimate basis  
6                   for preemption.

7                   Thank you.

8                   THE COURT: Thank you, Mr. Bouma.

9                   Mr. Montoya.

10                  MR. MONTOYA: Thank you, Your Honor.

11                  Your Honor, I think everyone can fairly agree that  
12                  the federal courts are uniform in concluding that if an  
13                  individual is faced with a genuine threat of enforcement of a  
14                  statute that imposes criminal liability or civil liability in  
15                  the form of sanctions and other penalties, that individual has  
16                  standing to challenge that statute.

17                  That's what every Supreme Court case has said.

18                  That's what every Ninth Circuit case has said. "Is there a  
19                  genuine threat?"

20                  Now, let's talk about the facts --

21                  THE COURT: Is there a genuine threat?

22                  MR. MONTOYA: Absolutely, Your Honor. It might not  
23                  seem genuine now on the 15th, because the 29th ain't here yet,  
24                  but the federal courts have spoken about that. The federal  
25                  courts have, in fact, allowed plaintiffs to bring cases months

1 before the effective date of the challenged Act.

2 THE COURT: The cases that you're talking about, I  
3 agree, that's what they say -- but don't they have to do with  
4 individuals who have some identifiable person or entity from  
5 whom they're facing that threat as opposed to plaintiff  
6 Salgado in this case saying, "If I do these things that I'm  
7 supposed to do under new A.R.S. 11-1051 someone might sue me"?

8 MR. MONTOYA: Let me talk about that, Judge. We are  
9 directing this case against specific entities. Let's start  
10 with Officer Salgado's employer, the City of Phoenix.

11 The City of Phoenix is already training its officers  
12 to enforce this law. There's no question that if this Court  
13 does not preliminarily or permanently enjoin the enforcement  
14 of this law, that the City of Phoenix is going to commence  
15 enforcement. They have already started to train their forces.

16 Second of all, in document 47 filed before Your  
17 Honor, the City of Phoenix tells Your Honor very plainly "The  
18 City is ready, willing, and able to comply with SB 1070."

19 Your Honor, the City of Phoenix who is here this  
20 morning has not suggested to Your Honor in any way that they  
21 don't intend to enforce this law. To the contrary, they have  
22 told Your Honor in writing that they intend to enforce the law  
23 and they also expect their employees to obey the law.

24 THE COURT: All right. But they are not going to sue  
25 Officer Salgado. He's not threatened with civil or criminal

1 liability from the City of Phoenix.

2 MR. MONTOYA: Correct, Your Honor. They don't have  
3 to sue him. *Stormans v. Selecky*. They can fire him. That's  
4 enough.

5 The United States Supreme Court, starting with the  
6 *Pierce v. Society of Sisters* case, but going on and on, you  
7 don't have to be thrown in jail in order to have a First  
8 Amendment claim. The Supreme Court's *Virginia-Booksellers*  
9 case, Your Honor --

10 THE COURT: But Officer Salgado doesn't have a First  
11 Amendment claim.

12 MR. MONTOYA: Well, Your Honor, you don't have to  
13 have any type of claim in order -- he has a claim to his job  
14 and he also has a federal right not to discriminate against  
15 minorities. And he credibly believes that this statute  
16 requires exactly that.

17 And guess what? The Arizona Supreme Court indicates  
18 that something that the Ninth Circuit has described as  
19 "discriminatory" is required under the law too. In *State v.*  
20 *Graciano* the Arizona Supreme Court said that race, among other  
21 factors, could be used in determining either a reasonable  
22 suspicion to stop someone or probable cause to arrest someone.

23 On the other hand, as you know, the Ninth Circuit has  
24 concluded that you cannot consider race at all, at least in  
25 the southwestern part of the United States and California.

1                   So he does have a real threat, Your Honor. And in  
2 the last treatment of standing by the United States Supreme  
3 Court, *Holder v. Humanitarian Law Project*, here is what the  
4 court said:

5                   "The Government has not argued to this Court that  
6 plaintiffs will not be prosecuted if they do what they say  
7 they wish to do."

8                   That's true in this case too, Your Honor. Have you  
9 noticed that Governor Brewer has not said that if Officer  
10 Salgado does not comply with the law, they are going to let  
11 him slide?

12                  To the contrary. Your Honor, in writing, submitted  
13 to this Court, in Exhibit B to our Reply in Support of our --  
14 well, actually in our Response to the Motion to Dismiss,  
15 Exhibit B is a statement by Governor Brewer in which she  
16 writes:

17                  "I will ensure the immigration laws we pass are  
18 vigorously defended all the way to the Supreme Court of the  
19 United States is necessary."

20                  But, more importantly, Your Honor, in a letter that  
21 Governor Brewer wrote to President Obama, also submitted to  
22 this Court in our response, it's Exhibit B, page 7:

23                  "I am one hundred percent committed to fair and just  
24 enforcement of the new Arizona law," period.

25                  Mr. Bouma doesn't talk about those things, Your

1 Honor. There is no question that as a Phoenix police officer,  
2 if Officer Salgado does not enforce this law on the 29th, if  
3 it goes into effect, excuse me, he could be disciplined. He  
4 could be terminated, like the plaintiffs in the *Stormans* case.

5 Does he have a constitutional right --

6 THE COURT: The plaintiffs in the *Stormans* case had a  
7 constitutional First Amendment right that was in conflict,  
8 according to them, with the law.

9 The only thing that Officer Salgado has said is "I  
10 think the law is unconstitutional; therefore, I will violate  
11 my oath to uphold and defend the United States Constitution if  
12 I enforce that."

13 And that's the same argument that was made and  
14 rejected in the *South Lake Tahoe* case.

15 MR. MONTOYA: Well, Your Honor, the *South Lake Tahoe*  
16 case was decided 30 years ago. A lot of water has passed  
17 under the Ninth Circuit bridge since that time.

18 For example, the case of *Yniguez v. Mofford* was  
19 decided by this District Court at 730 F.Supp. 309, page 312.

20 You have a state employee who sues against Arizona's  
21 English-only law as a state employee. The District Court  
22 found there was standing. The Ninth Circuit agreed.

23 Your Honor, it is our contention in this case that  
24 the State of Arizona cannot order its employees to violate  
25 federal law. For example, let's choose an extreme case.

1                   The State of Arizona -- and this is not  
2 unprecedented -- the State of Arizona -- at least in American  
3 constitutional history. States have ordered their employees  
4 to violate federal law. States -- and the employees don't  
5 have to do it, Your Honor.

6                   The state employees have the right not to violate  
7 federal law. We said that very plainly in our response. For  
8 example, the State of Arizona could not tell Officer Salgado  
9 to go to south Phoenix and start arresting green people. If  
10 they ordered him to do so, in our view, he could come to this  
11 court and challenge that as unconstitutional, even though  
12 Officer Salgado is not green. He is Hispanic. But the State  
13 of Arizona cannot order its employees to violate federal law.

14                  And, Your Honor, Governor Brewer has characterized  
15 this as a philosophical dispute. It's not a philosophical  
16 dispute at all. Your Honor, the government of the United  
17 States, the entity that this law claims that it's assisting,  
18 has said formally to Your Honor that this law is  
19 unconstitutional. That's another distinction between the  
20 *South Tahoe* case. In this case the government of the United  
21 States agree that's this law cannot be enforced.

22                  Now, Your Honor, to tell a law enforcement officer  
23 that he has to enforce a state law that the federal government  
24 has said in a filing before Your Honor is unconstitutional is  
25 unprecedented.

1                   If, in fact, Officer Salgado does try to enforce this  
2 law, he could be sued and, in fact, other officers have been  
3 sued for attempting to enforce federal immigration law in this  
4 very District. So that is an injury. Officer Salgado has a  
5 legal right not to enforce state statutes that violate the  
6 law.

7                   Let's talk about CPLC a little bit, Your Honor. CPLC  
8 runs fifteen schools, hundreds of students, hundreds of  
9 Hispanic students. CPLC interacts with law enforcement  
10 officers in the City of Phoenix and elsewhere regularly. It  
11 has to. Most educators do.

12                  For example, Your Honor, I would ask that you take  
13 judicial notice of an affidavit that was filed by the Chief of  
14 Police of the City of Phoenix, Mr. Jack Harris, in the *United*  
15 *States v. Arizona* case. It's right here on page 3. It's  
16 Exhibit 10. Chief Harris states:

17                  "School resource officers are Phoenix police officers  
18 assigned to local schools. If a school resource officer is  
19 investigating a student for allegations of criminal activity  
20 at school (i.e. assaulting another student, theft) and the  
21 officer develops reasonable suspicion the student is an  
22 unlawful alien, pursuant to SB 1070, the officer must make a  
23 'reasonable attempt' to contact ICE and verify the student's  
24 immigration status, unless the officer applies one of the  
25 limited discretionary exceptions. More troubling is when a

1 student is the victim of a violent crime and is scared to come  
2 forward for fear the officer will take immigration enforcement  
3 action or inquire further about the student's family's  
4 immigration status. Once again, my officers -- Chief Harris'  
5 -- officers are placed in a losing situation."

6 Your Honor, Chief Harris thought that was a real  
7 enough possibility to write Your Honor about this possibility  
8 in an affidavit. That is something very real.

9 And remember what the burden of proof is in this  
10 case, Judge? We don't have to prove it will certainly result  
11 in irreparable injury to Officer Salgado or CPLC. All we have  
12 to show that it's likely, that it's probable. Chief Harris  
13 thinks it's probable.

14 Now, Your Honor, I don't -- I've asked Mr. Verburg to  
15 address this with the Court. Does the City not intend to  
16 sanction Officer Salgado if he doesn't enforce the law?

17 And look at it this way, Judge. If Officer Salgado  
18 doesn't enforce 1070 because he thinks it's unconstitutional,  
19 he'll be fired or he will be disciplined by the City of  
20 Phoenix. And once he is disciplined, then clearly under --  
21 even under the Governor's theory, he will be able to come to  
22 court.

23 Your Honor, Article III is interested in prevention  
24 just as much as it is in correction. I don't think anyone is  
25 saying that this is a statute that won't be used. To the

1 contrary, the City of Phoenix says it will enforce it.

2 Governor Brewer says she's going to enforce it a hundred  
3 percent.

4 The cases where standing has not been found are cases  
5 in which there has been no threat of enforcement, Your Honor.

6 In this particular case we have two written threats  
7 of enforcement, one by the City of Phoenix filed in a pleading  
8 before your Court on the 21st of last month and the other one  
9 filed by the Governor to the President of the United States  
10 promising one hundred percent enforcement.

11 Your Honor, if anyone has standing to challenge this  
12 law, it's the officers who are called upon to enforce it. If  
13 they do enforce it, they're going to be sued by civil rights  
14 lawyers like me. I have sued police officers before for  
15 attempting to enforce federal immigration law and we will do  
16 it again. The ACLU, as you know, has a major case pending  
17 against Sheriff Joe Arpaio before your colleague Judge Snow  
18 claiming that Sheriff Joe Arpaio is illegally enforcing  
19 federal immigration law.

20 That's a very real threat. If he says, "I'm not  
21 going to enforce this law," the City of Phoenix admits by  
22 not -- not by saying it's going to enforce the law -- that he  
23 will be terminated. He could also lose his license with  
24 Arizona POST and the Governor has something to do with that.

25 It's of record that the Governor issues Executive

1 Orders to Arizona POST and Arizona POST obeys those orders,  
2 Your Honor. And there's a case that we cited, it's the *Bland*  
3 case in our paper, our response, that stands for the  
4 proposition if the defendant is going to enforce the law, then  
5 there's standing; or if the defendant is going to urge others  
6 to enforce the law, there's standing.

7 We have two direct threats in this case and the  
8 defendants are not saying that they don't intend to enforce  
9 the statute or it doesn't apply the way that Officer Salgado  
10 believes it's going to apply.

11 To the contrary, Your Honor, he is put in the  
12 classic -- to use Mr. Bouma's terminology -- Hobson's Choice.  
13 Who is Officer Salgado going to obey, Your Honor, when he's  
14 trying to enforce this law? The Arizona Supreme Court that  
15 says that race can be one factor of several? Or is he going  
16 to obey the Ninth Circuit which says that race cannot be  
17 considered across the board? Who does he obey?

18 If he is sued in federal court, we know what Your  
19 Honor is going to do. She's going to follow the Ninth  
20 Circuit. But, yeah, if he obeys the Ninth Circuit, he's not  
21 obeying the Arizona Supreme Court.

22 Your Honor, he is -- you don't need a constitutional  
23 right in order to ask the Court for equitable relief even in  
24 the form of a declaratory judgment.

25 Another point, Your Honor, as Your Honor knows, if

1 one plaintiff has standing, all of the plaintiffs have  
2 standing. We ask that Your Honor consider the issue of  
3 standing in these seven cases jointly. If one plaintiff in  
4 any of these seven cases has standing, Your Honor, they all  
5 have standing.

6 THE COURT: Let's just say six for the time being.

7 MR. MONTOYA: Okay. We ask that you consider the  
8 issue of standing jointly. All of these cases are arguing the  
9 same thing. There is a genuine threat of enforcement.

10 Your Honor, I read in the paper early this morning  
11 that the sponsor of this bill, Russell Pearce, has moved to  
12 intervene in this Court to defend this law.

13 Do you think for a moment, Your Honor, that if  
14 Officer Salgado refuses to enforce the law, that Russell  
15 Pearce or one of the many partisans of this law will not sue  
16 him to enforce the law? The City of Phoenix must discipline  
17 him if he refuses to enforce the law.

18 THE COURT: Can he be sued for refusing to enforce  
19 the law? Or doesn't the statute suggest that that right of  
20 action is an action brought against the official or entity  
21 that has the policy-making ability to adopt a policy, not to  
22 enforce the law, the so-called -- or as the Governor's counsel  
23 referred to it as, the sanctuary city concerns.

24 MR. MONTOYA: Yeah. And, Your Honor, as Your Honor  
25 knows, IIRIRA passed by Congress in 1996 banned statutorily

1       sanctuary cities. There is a provision in IRA, as you know,  
2       that says that no entity can order anyone not to inform the  
3       federal government of some immigration violation.

4           So the so-called sanctuary city issue is not really  
5       an issue at all. The federal government took care of that 13  
6       years ago.

7           In answer to Your Honor's question, Judge, the  
8       statute says that officers can be sued. It even says -- I  
9       think it's --

10           THE COURT: Officers can be sued for civil rights  
11       violations.

12           MR. MONTOYA: They can be sued under the statute too  
13       and the statute actually says so, Judge. It says if they are  
14       sued as a defendant, based upon their relationship to a law  
15       enforcement agency, and they incur costs, including attorneys'  
16       fees, that if they proceed in good faith -- Who determines  
17       that? -- they will be indemnified.

18           Mr. Bouma admitted to Your Honor moments ago that an  
19       officer can be sued for failing to enforce this statute and  
20       they won't incur any liability at all as long as they haven't  
21       proceeded in bad faith. Remember his statements regarding  
22       qualified immunity? Officers who proceed in good faith are  
23       entitled to qualified immunity. If a jury or judge agrees  
24       that they proceeded in good faith, they are entitled to that.

25           But in the meantime, Your Honor, they're defendants

1       in civil actions. If they couldn't be sued under the statute,  
2       Your Honor, the statute wouldn't require their indemnification  
3       in the event that they are sued and they have proceeded in  
4       good faith. And I guess the Department would make the  
5       preliminary decision as to whether or not they will be  
6       reimbursed. But it also doesn't say when they will be  
7       reimbursed, Your Honor.

8               If an officer is sued for engaging in a policy of  
9       non-enforcement, when will the officer be reimbursed? Does  
10       the officer have to hire his own lawyer? And then only  
11       after --

12               THE COURT: Well, you know as well as I do,  
13       Mr. Montoya, that typically the way this indemnification works  
14       is that the defense is also provided.

15               MR. MONTOYA: I do -- Your Honor, that's right. I do  
16       know that. But you know what I also know? That the City of  
17       Phoenix -- and Mr. Verburg will confirm this -- if they think  
18       that the officer has proceeded in bad faith, if they think  
19       that any penalties or liabilities are imposed against the  
20       officer for proceeding in bad faith, like punitive damages,  
21       for example, they don't have to indemnify them.

22               The City of Phoenix has a policy of claiming that it  
23       has no obligation to indemnify officers when they proceed in  
24       bad faith. If Your Honor or a state court judge found that  
25       Officer Salgado proceeded in bad faith by not -- by adhering

1 to a policy of not enforcing 1070, he could be liable for  
2 attorneys' fees and costs and not subject to indemnification.

3                   And, Your Honor, for a working person that is a  
4 substantial threat. But, Your Honor, remember, for purposes  
5 of a Motion to Dismiss, you have to take the well-pled facts  
6 in Officer Salgado's and CPLC's Complaint as true.

7                   He has said to Your Honor in his Complaint that he  
8 doesn't intend to enforce 1070 unless Your Honor says that  
9 it's lawful. There is no question that if he doesn't enforce  
10 1070, the City of Phoenix will discipline him for failing to  
11 enforce the law. There's no question that defendant Brewer  
12 intends to enforce the law one hundred percent. He will be  
13 penalized for that.

14                   There's also no question --

15                   THE COURT: Mr. Montoya, your time is up.

16                   MR. MONTOYA: Thank you, Your Honor.

17                   THE COURT: Thank you very much.

18                   Mr. Bouma, I think you have about two or three  
19 minutes and I want to start with a question.

20                   MR. BOUMA: Yes, ma'am?

21                   THE COURT: At the time you filed the motion, one of  
22 the things that was stated in connection with the standing  
23 issue is that Officer Salgado's opinion that the law is  
24 unconstitutional isn't sufficient to give him standing.

25                   Mr. Montoya has suggested that when the Justice

1       Department weighed in with its opinion, that that may change.  
2       Officer Salgado's view may be given more credence and may give  
3       him standing.

4           Has the fact that the United States has taken the  
5       position in this court that various provisions of SB 1070 are  
6       unconstitutional raised Officer Salgado's standing argument  
7       such that he should have it?

8           MR. BOUMA: Well, Your Honor, that's one more  
9       opinion. The fact that they brought the claim doesn't mean  
10       that they are correct. The fact that Jack Harris who's a  
11       sanctuary proponent has filed an affidavit in another case  
12       doesn't make a difference.

13           The fact is that the *South Lake Tahoe* court drilled  
14       this down perfectly when it said "to confer standing on public  
15       officials because they wish not to enforce a statute due to  
16       private constitutional predilections, or because their  
17       decision not to enforce the statute may result in criminal  
18       liability, would convert all officials charged with executing  
19       statutes into potential litigants, or attorneys general, as to  
20       laws within their charge."

21           And that's right on point. They didn't have  
22       criminal. They didn't have the indemnification. The fact  
23       they put "indemnification" in to protect police officers  
24       doesn't mean they are allowed to sue them. It's just a  
25       recognition that anybody can be sued any time in these days

1 and ages.

2                   And they were protecting the police officers and the  
3 people with the boots on the ground. They were giving them  
4 that kind of protection. And there is certainly nothing in  
5 there that authorizes suits against anybody other than the  
6 people who set the policy.

7                   And I recognize I have just a couple of minutes, so I  
8 will try to speak a little bit more than sound bites, but the  
9 *Holder* case, they were preventing the plaintiff's conduct in  
10 that case. Actually, this case -- hearing all those  
11 hypotheticals that were just thrown out is the perfect example  
12 of why the law is -- that constitutional challenges are a  
13 problem under the facial rule.

14                   That if there's a set of circumstances under which  
15 the law can be legitimately enforced, then a facial challenge  
16 is inappropriate and it's inappropriate to strike it down on  
17 its constitutional basis.

18                   As we noted, he could be sued -- any police officer  
19 could be sued at any time. But besides the protection that is  
20 built into this statute, there is the situation for qualified  
21 immunity.

22                   You know, I just don't think you can get to standing  
23 by standing here and saying -- referring to a bunch of other  
24 things that are not in the record at all but going so far as  
25 to say that he may be sued -- and that's exactly what they

1       were saying in *South Lake Tahoe* -- and there hasn't been any  
2       decision that the plaintiffs have cited.

3           And the affidavit of Jack Harris with respect to  
4       Chicanos Por La Causa, I mean, that he incorporated hereto,  
5       doesn't change the fact that the statute says that the people  
6       that are being investigated under the statute are the people  
7       who are accused of a crime. And only then, when there is  
8       reasonable suspicion that they are unlawful or they are alien  
9       and they are unlawfully in the country, the fact that they are  
10       even accused of a crime doesn't get the investigation.

11          They have to be also a reasonable suspicion that they  
12       are an alien and they are unlawfully in the country.

13          Now, how that gets to an investigation of some kid  
14       that is being reported because he's been abused, I don't know,  
15       but we see that through all these cases. We have all these  
16       people with all of these worst-of-all-world situations, most  
17       of whom don't even appear to have read the statute, so I can't  
18       field all of them and that's why I guess I go back to the  
19       facial challenge rule.

20           THE COURT: Thank you, Mr. Bouma.

21           Let's turn to the motion for preliminary injunction.  
22       Will you be arguing this also, Mr. Montoya?

23           MR. MONTOYA: Yes, Your Honor.

24       May I proceed?

25           THE COURT: Yes. I want to start though with a

1 comment and a question. The comment is this.

2 We're all referring to SB 1070, but I think we can  
3 all agree that we are referring to SB 1070 as amended by House  
4 Bill 2162.

5 MR. MONTOYA: That is absolutely, one hundred percent  
6 correct.

7 THE COURT: The question is this. The Motion For  
8 Preliminary Injunction and a lot of the discussion that has  
9 ensued refers to declaring SB 1070 unconstitutional or  
10 preempted by federal immigration law and enjoining its  
11 enforcement.

12 However, SB 1070, as Governor's counsel points out,  
13 is fourteen different sections. Some of them are new sections  
14 of the Arizona Revised Statutes, specifically, 11-1051 -- I'm  
15 sorry -- 11 A.R.S. 1051, and the others are amendments to  
16 preexisting statutory sections. And your motion addresses  
17 only four of the many provisions of SB 1070.

18 Would you agree or disagree that you're not seeking  
19 to have SB 1070 enjoined from enforcement, but seeking to have  
20 the specific sections that you addressed in your motion  
21 enjoined from going into effect on July 29, 2010?

22 MR. MONTOYA: That is correct, Your Honor. And I  
23 can't specify -- you're right.

24 Your Honor, SB 1070 as amended by HB 2162 enacted a  
25 few statutes and amended a few others. It's not a cohesive

1 whole and we're only attacking part of 1070 and I can actually  
2 specify them to you, if you would like, as we have done in our  
3 brief.

4 THE COURT: So for purposes of the rest of this  
5 argument, we will be talking not about enjoining the  
6 enforcement or the effectiveness of SB 1070, but your request  
7 that I enjoin the enforcement of specific new or amended  
8 statutory sections?

9 MR. MONTOYA: That's correct.

10 THE COURT: And they are which ones?

11 MR. MONTOYA: Your Honor, they are A.R.S. 11-1050 in  
12 its entirety. It has subsections; A.R.S. 13-5009; A.R.S.  
13 13-2319; A.R.S. 13-2929; and A.R.S. 13-3883. That's the  
14 arrest without a warrant amendment.

15 THE COURT: And it's the added subsection of that  
16 existing statute that had about four previous warrantless  
17 arrest provisions.

18 MR. MONTOYA: You're exactly correct. It's  
19 subsection 5 that we're challenging and that's the only new  
20 part of the statute, Your Honor.

21 So Your Honor is correct in her recitation of her  
22 understanding.

23 THE COURT: All right. You may proceed. Do you want  
24 me to tell you when your time is at a certain point?

25 MR. MONTOYA: I would really appreciate it if you

1 could tell me when I have expended the twenty minutes so I can  
2 reserve ten.

3 THE COURT: All right. I will do.

4 MR. MONTOYA: Your Honor, I have been studying your  
5 opinions.

6 THE COURT: Did I say something I'm going to regret?

7 MR. MONTOYA: No, Your Honor. You said something I  
8 found very edifying, but I didn't find it novel, because I  
9 think it's replete throughout the federal case law, and that  
10 is specifically cited or stated in the case of *Kobar v.*  
11 *Novartis* that you decided, Your Honor, approximately five  
12 years ago in June of 2005.

13 And in that case, Your Honor, you are examining the  
14 preemption challenge to a punitive damage claim brought by a  
15 plaintiff asserting a products liability claim for some cold  
16 medication that apparently made the plaintiff very ill.

17 And in that case, Your Honor, you indicate correctly,  
18 and this is not a controversial proposition that:

19 "In determining whether federal law preempts state  
20 law, a court's sole task is to ascertain the intent of  
21 Congress."

22 That is absolutely correct, Your Honor, and the  
23 Supreme Court and the Ninth Circuit have said over and over  
24 again the way to determine the intent of Congress in reference  
25 to preemption claims and every other claim is to read the

1 statute.

2 You only read the legislative history if the statute  
3 is somehow ambiguous. And some Justices of the United States  
4 Supreme Court, for example, Justice Scalia, have said that you  
5 can never look at the legislative history, because legislators  
6 have an incentive to manipulate that history to try to  
7 persuade judges in the future. So the statutes, the language  
8 of the statutes, that's what counts.

9 Your Honor, 1070, these various provisions that we  
10 have discussed of 1070, conflict with four federal statutes as  
11 indicated in our various briefs. Your Honor, there is -- and  
12 all of these are in Title 8, Section 1103. That's the one  
13 that says, hey, if the Attorney General of the United States  
14 thinks we're going to be invaded by a bunch of immigrants at  
15 the border, the Attorney General has the authority to deputize  
16 state and local law enforcement officers to protect the United  
17 States.

18 But, Your Honor, the premise of 1103 is that it takes  
19 federal action to allow states to enforce federal immigration  
20 law. If states could automatically enforce the immigration  
21 law, like the State of Arizona has claimed to this Court it  
22 can, there would be no need to 1103. So, Your Honor, the  
23 plain language of 1103 is rendered meaningless by 1070.

24 THE COURT: I thought the State just wanted to assist  
25 federal law enforcement in doing the task that they have not

1 been entirely successful in doing.

2 MR. MONTOYA: Well, Your Honor, that would be an  
3 interesting case, indeed. That, however, is not this case.

4 To the contrary, you really can't make that argument  
5 with a straight face when the government of the United States  
6 has taken the extraordinary measure of actually suing you in  
7 federal court to enjoin the law that you claim is designed to  
8 assist the federal government.

9 Your Honor, the federal government doesn't want this  
10 assistance and it's unequivocal in its not wanting that  
11 assistance in the form of its lawsuit. So I think, Your  
12 Honor, that argument -- the best response to that argument  
13 after the federal government sued is to laugh. The Department  
14 of Homeland Security doesn't have to take the State of  
15 Arizona's help. And the Department of Homeland Security also  
16 can say: We'll take Arizona's help under certain  
17 circumstances, which is what it has done.

18 Another point I would like to make, Your Honor, you  
19 know, there's a lot of hullabaloo that the State is going to  
20 be in danger without 1070. Your Honor, as you know, local law  
21 enforcement officers, first of all, they can arrest anyone who  
22 is committing a crime under state law.

23 Second of all, they can arrest -- if immigrants are  
24 invading the United States, under 1103 they can ask the  
25 Attorney General to deputize them; and if it's a real threat,

1 the Attorney General might do so. Your Honor, under 1252,  
2 that's the felony reentry; that's another statute.

3 Your Honor, that statute is rendered meaningless by  
4 1070. Why would Congress and the President sign an Act saying  
5 local law enforcement officers can enforce federal immigration  
6 law if the person is a felon, has voluntarily left the United  
7 States, been deported from the United States, and has  
8 unlawfully reentered, if the State of Arizona could enforce  
9 federal immigration law no matter what? That statute is  
10 rendered meaningless. The one case that supports Mr. Bouma's  
11 position *United States v. Vasquez-Alvarez* admits that they  
12 have rendered the statute meaningless.

13 Now, Your Honor, there's an important principle of  
14 statutory construction that is not very controversial, and  
15 that's judges aren't supposed to negate statutes. Judges are  
16 supposed to follow the plain meaning of the statute. If an  
17 interpretation of the statute renders the statute itself or  
18 part of the statute superfluous or nugatory, that is not the  
19 interpretation this Court is to adopt. But 1070 would, in  
20 fact, negate all of these statutes.

21 Your Honor, back in 1952 when the INA was initially  
22 passed, Congress was concerned about alien smuggling and  
23 transporting and concealing. It's a great concern of  
24 Congress. 1952 it was addressed definitively. Congress said:  
25 State and local law enforcement officers, if they catch

1 someone smuggling or concealing or harboring undocumented  
2 immigrants, they can arrest them.

3 So there was this first statute passed in 1952.  
4 That's 1324 regarding smuggling where Congress authorized  
5 local law enforcement officers to directly enforce immigration  
6 law. Decades passed. Come to 1996, three more statutes were  
7 passed; two of them part of IIRIRA; and another part of the  
8 effective Death Penalty and Anti-Terrorism Act, also of 1996  
9 also passed by the same Congress. That one is the 1252. That  
10 was passed as part of the effective Death Penalty Act, but the  
11 codifiers who codified the public law cited dealt with  
12 immigration, so they put it in Title 8, 1357.

13 Your Honor, the State of Arizona, Governor Brewer  
14 comes to you and says: Oh, Your Honor, we're at our wit's  
15 end. We want to help the federal government.

16 Your Honor, if the State of Arizona wants to help the  
17 federal government to enforce federal immigration law, it can  
18 do so.

19 1357(g), commonly known under its public law section  
20 287(g), if the State of Arizona wants to enforce federal  
21 immigration law, it should apply to the Department of Homeland  
22 Security or ICE to get a 1357(g) Memorandum of Understanding.  
23 Under the CFRs it's called a Memorandum of Agreement. They  
24 can get one if they follow this.

25 Your Honor, if you look at the language of the

1 statutes, Congress is saying and limiting state and local law  
2 enforcement officers' ability to enforce federal immigration  
3 law. And, Your Honor, that has always been the case. Cited  
4 perhaps, in some people's opinion, ad nauseam in our briefs,  
5 God, Judge, this really brings up legal history.

6 In looking case after case from the United States  
7 Supreme Court, starting from right after the Civil War in  
8 1875, *Chy Lung v. Freeman*, the Supreme Court of the United  
9 States flat out declaring the supremacy inclusive -- and  
10 exclusivity of federal law in the area of immigration, all the  
11 way back to *Toll v. Moreno* decided in 1982. Once again, the  
12 Supreme Court of the United States announcing the supremacy  
13 and exclusivity of the federal government's power to regulate  
14 immigration.

15 Your Honor, the Supreme Court case law that says that  
16 only the federal government can govern matters of immigration  
17 is extremely extensive and extremely longstanding. This law  
18 violates all of that precedent, Your Honor, and actually would  
19 negate four Congressional statutes. We're asking you to  
20 enjoin some statutes. That's a serious thing.

21 Your Honor isn't reluctant to -- well, I would say  
22 that Your Honor is reluctant to do that, but Your Honor has  
23 done that when Your Honor thought it was appropriate. And,  
24 Your Honor, we do not lightly ask you to enjoin a state  
25 statute. We live in this state. We love this state as much

1 as the defendants, but, Your Honor, we also love the United  
2 States.

3 And if Your Honor has a choice of either enjoining a  
4 state statute or negating four acts of Congress signed by the  
5 President, then Your Honor has to negate the state statute  
6 that violates the specific language of those laws.

7 And, Your Honor, I don't think there can be any  
8 reasonable doubt that -- that the particular sections of 1070  
9 that we're challenging, they do render these four acts of  
10 Congress meaningless.

11 THE COURT: Well, let's be -- I want to be specific.

12 MR. MONTOYA: Please.

13 THE COURT: You agree that in at least two explicit  
14 provisions of the federal statute Congress has given state and  
15 local law enforcement the ability to arrest individuals who  
16 are violating federal law in the area of individuals who were  
17 previously deported after a felony conviction and are found in  
18 the United States again, and in the instance of individuals  
19 who are transporting, harboring, or smuggling.

20 MR. MONTOYA: Yes, Your Honor.

21 THE COURT: When I then look at 1051(A), it simply  
22 says that "no official or agency of Arizona or any city, town,  
23 county, or other political subdivision may limit or restrict  
24 the enforcement of federal immigration laws to less than the  
25 full extent permitted by federal law."

1                   Doesn't that say, for example, no political  
2 subdivision of the State can have as their policy that they  
3 will not arrest individuals who are committing the federal  
4 violation that they're authorized to arrest them for? And so  
5 that doesn't seem to be a conflict. It seems to be  
6 prohibiting the refusal of a political subdivision for  
7 whatever reason to not enforce those provisions of federal law  
8 that expressly have been authorized to be enforced by state  
9 and local law enforcement.

10                  MR. MONTOYA: Your Honor, I think that would be a  
11 good point if subsection A, the section that you have just  
12 recited, existed by itself in a vacuum, but it does not.

13                  The fact that it's (A) indicates that there is a (B).  
14 And, in fact, the (B) is extremely important, because the (B)  
15 proceeds to expand on the right of local and state law  
16 enforcement officers, not the right. In fact, it mandates,  
17 because it uses the word "shall." A reasonable attempt shall  
18 be made to ascertain if there's a reasonable suspicion, et  
19 cetera. Your Honor, you're right if --

20                  THE COURT: Well, I agree with you that (B) goes well  
21 beyond those explicit enforcement provisions, but there's  
22 nothing wrong with (A) by itself. I mean, when we're talking  
23 about an injunction and we agree we're not talking about -- at  
24 least for purposes of your motion -- enjoining all of the  
25 sections of SB 1070, why wouldn't I look at it on a

1 section-by-section basis? This (A) is one of the so-called,  
2 by Governor's counsel, sanctuary city provisions.

3 MR. MONTOYA: Two reasons, Your Honor. First of all,  
4 the so-called sanctuary issue has already been solved by  
5 Congress when it passed IIRIRA.

6 THE COURT: But that, I think, has a totally  
7 different focus, the sanctuary -- the anti-sanctuary provision  
8 of IIRIRA. This basically says it's the policy and law now of  
9 the State of Arizona that local law enforcement agencies can't  
10 use their discretion to decide not to make arrests in those  
11 areas where federal law permits the arrest.

12 MR. MONTOYA: Your Honor, we believe that 11-1050 is  
13 an integrated whole, and that subsection A is only meaningful  
14 in reference to the other subsections.

15 THE COURT: Okay. Fair enough.

16 MR. MONTOYA: And, Your Honor, I would note that I  
17 think that your -- I think that -- I respect Your Honor's  
18 argument, but it's not one that can be found in any of the  
19 Governor's papers. In fact, Your Honor, the Governor, nor the  
20 City, they have not addressed trying to save any part of this  
21 statute at all, especially the subsections of 11-1051.

22 So we believe that that statute stands as a whole.  
23 And if one part of it fails, all of it fails. And we also  
24 believe that, Your Honor, Governor Brewer has waived that  
25 argument by not making that contention in the voluminous

1 papers that she's filed before Your Honor.

2 And we also believe that the heart of Your Honor's  
3 concern was addressed 13 years ago in IIRIRA when Congress  
4 itself banned sanctuary cities. Any Phoenix police officer  
5 can contact ICE and no one can stop them and they're not  
6 contending to the contrary.

7 THE COURT: Okay. Let's talk about the most  
8 controversial provision of 1051, which is 1051(B) and the one  
9 that has received the most attention.

10 MR. MONTOYA: Yes, Your Honor.

11 THE COURT: And that is the provision that says that  
12 if there's any lawful stop or detention that -- and reasonable  
13 suspicion exists that the person is an alien unlawfully  
14 present in the United States, it requires law enforcement when  
15 practicable to make an inquiry of the federal law  
16 enforcement -- I think it's Service Center is who they would  
17 inquire of -- or anyone else who is authorized to determine  
18 immigration status to do that. And then it also requires that  
19 any person who is arrested not be released until the person's  
20 immigration status has been verified with the relevant federal  
21 authority.

22 MR. MONTOYA: Your Honor, that is, in my opinion, the  
23 heart of 1070. That's certainly what all the attention has  
24 been directed to appropriately, because that specifically  
25 renders those four statutes that I mentioned -- and, Your

1 Honor, the four statutes should be considered in unison,  
2 because as you know, if there's a comprehensive regulatory  
3 scheme, that is preempted.

4 This violates federal law. This says that, you know,  
5 when -- okay. Suppose I violate an ordinance. Your Honor,  
6 parking illegally, there is a city ordinance against that. If  
7 a police officer sees me and the little red thing is flashing,  
8 the officer could actually stop and say, "Hey, is that your  
9 car?" and then ask me my immigration status. And, Your Honor,  
10 that is broader than anything imagined under federal law,  
11 especially those four specific statutes that we have  
12 repeatedly cited Your Honor.

13 And, Your Honor, that might be Arizona's law, but  
14 that's not New Mexico's law; that's not Utah's law; that's  
15 certainly not California's law. Your Honor, the true evil of  
16 1070, it's divisive. The United States is a nation. It can  
17 only have one foreign policy. Immigration law is a subset of  
18 foreign policy. Your Honor, we can't have 50 immigration  
19 laws. Your Honor, we can't have hundreds of immigration laws,  
20 because as Your Honor is aware, some of these cases arise in a  
21 municipal context. So not only are we going to have 50 state  
22 immigration laws, we're going to have hundreds of immigration  
23 laws, unless Your Honor enforces the Supremacy Clause.

24 And, Your Honor, in the *Kobar* case, one of the  
25 reasons why Your Honor struck down that Arizona statute as

1 being preempted by federal law is because Your Honor said,  
2 hey, drug manufacturers shouldn't have to operate in a  
3 50-state tort regime, and that is absolutely true.

4                   But, Your Honor, that is infinitely more true in the  
5 realm of immigration law. A drug manufacturer shouldn't have  
6 to face 50 state tort regimes. But, Your Honor, as you know  
7 better than I do, tort law has always been the realm of state  
8 law. So 50 tort regimes is something that we've lived with to  
9 a certain extent.

10                  Your Honor, we have never lived with 50 or more  
11 immigration laws. And that is exactly what the Supremacy  
12 Clause was made to prevent. And that's why the framers of our  
13 constitution is unequivocally demonstrated in the Federalist  
14 papers. Look at the case of *Hines v. Davidowitz* said  
15 immigration law is part of foreign policy. It is an area of  
16 national concern and the states cannot contradict federal  
17 immigration law.

18                  THE COURT: But hasn't the Supreme Court also defined  
19 rather narrowly what regulating immigration means as deciding  
20 who comes in, deciding the conditions under which they stay  
21 here, and deciding if they have to go?

22                  MR. MONTOYA: Yeah, Your Honor. And this interferes  
23 with the last two, the conditions in which immigrants live in  
24 the United States. If I'm an immigrant without my green card  
25 or my registration card but here lawfully, now the State of

1       Arizona can arrest me and prosecute me under a state law and  
2       keep me -- and find me and keep me in jail for 20 days.

3               Your Honor, that's interfering with the conditions in  
4       which immigrants find themselves in Arizona, even though that  
5       wouldn't be true in New Mexico and California and we're  
6       supposed to have one immigration law.

7               Another thing, Your Honor, arresting someone and  
8       subjecting them to a mandatory sentence that cannot be  
9       commuted, that is pure immigration law. They're not being  
10      incarcerated for violating any other state law.

11              Suppose I spit on the sidewalk. That violates an  
12      ordinance. It turns out I'm undocumented and I don't have a  
13      registration card because the federal government doesn't give  
14      those out anymore. I have to stay in jail no more than 20  
15      days, but it could be the full 20 days under Arizona law, not  
16      federal law.

17              Your Honor, the whole argument that this is only  
18      assisting the Feds enforce federal immigration law is just not  
19      true. This creates a state immigration law with attendant  
20      criminal penalties. There's more than one penalty, Your  
21      Honor, and we have challenged each one. It's already against  
22      the law to smuggle undocumented immigrants, but the State of  
23      Arizona has also made it a state law and they have appended  
24      additional state penalties onto that -- onto a federal  
25      violation.

1                   And, Your Honor, the federal government cannot do --  
2                   the state government cannot do that. The federal government  
3                   says so. The United States Supreme Court says so in *Hines v.*  
4                   *Davidowitz*. And, Your Honor, *Hines v. Davidowitz* is probably  
5                   one of the most cited cases in the preemption area. It's  
6                   cited all the time. It was cited twice in the Ninth Circuit  
7                   in preempting state laws. It's still valid law. We have only  
8                   one nation. We could only have one immigration law.

9                   In the federal lawsuit, ICE officials have already  
10                  indicated that this law will undermine their ability to  
11                  enforce federal immigration law.

12                  Your Honor, what the government is asking you to do  
13                  in this case is to nullify four federal statutes, to render  
14                  them meaningless. There's no way you can reconcile 11-1051(B)  
15                  with any of those four federal statutes. It renders a mockery  
16                  of them. And, Your Honor, even though the State of Arizona  
17                  believes that Congress is not very competent and is inept, the  
18                  State of Arizona, nevertheless, has to live with the laws of  
19                  Congress.

20                  And, Your Honor, we will suffer irreparable harm if  
21                  this is passed. Forcing people to enforce an unconstitutional  
22                  law in and of itself is irreparable harm.

23                  Your Honor, if one child is arrested under this law,  
24                  that is irreparable harm and it's likely that will happen.  
25                  Jack Harris, the Chief of Police --

1                   THE COURT: I'm going to interrupt you for a second,  
2 because I forgot to tell you when you had ten minutes left,  
3 which actually passed a few minutes ago. But I will tell you  
4 right now that you can have ten more minutes now, however you  
5 wish to use them.

6                   MR. MONTOYA: Your Honor, thank you.

7                   THE COURT: Thank you. Mr. Bouma.

8                   MR. BOUMA: Your Honor, never let it be said that  
9 Arizona thinks Congress is really inept.

10                  THE COURT: I'm not going to comment.

11                  MR. BOUMA: I don't know where counsel got that. The  
12 fact of the matter is we think Congress has done a pretty good  
13 job with respect to the immigration laws. We think the people  
14 that administer it have shown a substantial degree of  
15 ineptness. And maybe it's better to say that the people who  
16 fail to administer what Congress has told them to administer,  
17 the policies that Congress has set, and the people who want to  
18 say, hey, we're not doing anything but we preempted the field  
19 so you can.

20                  So I'm not intending to argue all the cases here  
21 today, but this constant reference to things outside the  
22 record -- let me just go back to what we're talking about here  
23 today in this case, if I might.

24                  We have a plaintiff who is seeking a preliminary  
25 injunction and we know that he has to establish that he's

1 likely to succeed on the merits, that he's likely to suffer  
2 irreparable harm in the absence of the preliminary relief,  
3 that the balance of equities tips it in his favor, and that  
4 the injunction is in the public interests.

5 So, you know, we've talked about the likelihood of  
6 them succeeding on the merits and I will discuss that a little  
7 bit more in a moment, but in their Motion for Preliminary  
8 Injunction, the plaintiffs have raised three new challenges to  
9 1070 that they didn't have in their Amended Complaint and  
10 such, and then they also raised the new argument that they  
11 didn't have in their Amended Complaint. And I'm going to go  
12 ahead and deal with those since they are at least so far in  
13 the case, but I would note in passing that they keep adding  
14 things to this.

15 And attached to their reply with respect to the  
16 Motion for Preliminary Injunction is an exhibit that purports  
17 to have portions -- or that has portions of statutes. I would  
18 say that those portions have been selectively edited. There  
19 is no foundation for it. We have reviewed it. They're not  
20 entirely accurate in all respects. I would suggest that  
21 that's not something where you place much reliance and ask the  
22 Court not to look at it because there is no foundation for it  
23 at all.

24 Now, with respect to Section 3, they brought up  
25 Section 3, that's 1509(A) which precisely conforms to federal

1 law. It says:

2                    "In addition to any violation of federal law, a  
3 person is guilty of willful failure to complete or carry an  
4 alien registration document if a person is in violation of the  
5 United States Code, Section 1304(e) or 1306(a)."

6                    Section 3 also imposes the same misdemeanor penalties  
7 as federal law does, and we believe that the federal statute  
8 does not preempt this section because it's long been settled  
9 that the same act may offend the laws of both the state and  
10 the federal government and may be prosecuted and punished by  
11 both --

12                  THE COURT: Well, that commonly occurs. For example,  
13 drug crimes. Almost all drug crimes are violations of both  
14 state and federal law, because both the states and the federal  
15 government have interests in preventing the traffic -- in  
16 particular the trafficking, but also the possession,  
17 manufacture, et cetera, of illegal drugs.

18                  There have been times in the past when states have  
19 attempted to adopt alien registration laws and those laws have  
20 been overturned. So that we know that Arizona can't adopt an  
21 alien registration law, unlike a drug law where they can adopt  
22 a drug law. It can be different. It can have lesser  
23 punishments or harsher punishments than the federal law for  
24 the same exact conduct.

25                  This basically though says it's a violation of

1 Arizona law to violate federal law. Because we can't make it  
2 a violation of Arizona law on its own, we'll say it's a  
3 violation of Arizona law to violate federal law.

4 Isn't that really just an attempt to get around the  
5 fact that Arizona can't have its own alien registration law?

6 MR. BOUMA: Well, the case that would say that  
7 Arizona can't have its own registration law is *Hines*. And  
8 you'll remember in that the Pennsylvania legislature had  
9 passed an alien registration statute and then the federal  
10 government later passed one.

11 THE COURT: They occupied at least that aspect of the  
12 field.

13 MR. BOUMA: Yes, ma'am.

14 And there was a difference. I mean, the Pennsylvania  
15 law was different and tougher and it required, among other  
16 things, yearly renewal. It required payments of fees and  
17 such. And an interesting Supreme Court decision, because  
18 there was a lot of discussion about exactly what all was  
19 intended there, but the majority ended up saying that the  
20 decision -- that what the Congress really wanted was one  
21 uniform national system, and that's what they held and they  
22 struck down the Pennsylvania law.

23 It makes good sense. We don't want every state  
24 having different requirements. But we have one uniform  
25 national system. The fact that Arizona has adopted that law

1 doesn't change anything for anybody in terms of any documents  
2 they need to have, any registration. They don't have to have  
3 any different registration. They don't have to pay any fees.  
4 They don't have to do anything monthly, yearly, annually, or  
5 whatever. So it's one system. There's nothing that is said  
6 that Arizona couldn't have -- couldn't adopt the federal law  
7 as long as they haven't changed it.

8 As a matter of fact, in *De Canas* the United States  
9 Supreme Court held that the INA does not preclude harmonious  
10 state legislation. *De Canas* was 35 years after *Hines* and has  
11 been -- I don't know how many years, almost that many years  
12 since *De Canas*, and Congress has not moved to say that we're  
13 preempting this law, this area.

14 Congress has had plenty of opportunities to step up  
15 and say: No, no, we don't want anybody copying our  
16 registration. We want to be the only people that can  
17 prosecute people for violation of our law.

18 Everything you see from Congress says we want help in  
19 our -- in the prosecution and the enforcement of our  
20 immigration laws. There's little out there where Congress  
21 says we don't want help.

22 So I don't see that the fact that Arizona has adopted  
23 a law which is harmonious state legislation which is identical  
24 and relates specifically to the federal law imposes no new  
25 requirements, that's giving help.

1                   THE COURT: I think we will talk more next week about  
2 whether the Executive Branch wants help on this particular  
3 part of the statute.

4                   MR. BOUMA: I think we all know that this particular  
5 legislative branch doesn't. They like doing it their own way,  
6 but we will talk more about it next week.

7                   With respect to Section 4, Your Honor, that was the  
8 statute that makes it unlawful for a person to intentionally  
9 engage in the smuggling of human beings for profit or  
10 commercial purpose.

11                  As you noted that this simply added the phrase that  
12 "notwithstanding any other law in the enforcement of this  
13 section, a peace officer may lawfully stop any person who is  
14 operating a motor vehicle if the officer has reasonable  
15 suspicion to believe that the person is in violation of any  
16 civil traffic law."

17                  You know, there's nothing in the legislation --

18                  THE COURT: I thought they already could do that.

19                  MR. BOUMA: I'm sorry?

20                  THE COURT: I thought they could already do that.

21                  MR. BOUMA: I think they can. This is one of these  
22 things that -- you know, this statute was put in, in effect,  
23 in other things to give the police officer so there's no  
24 question but what they have the authority to do this, so their  
25 superiors, whatever you want to call them, their city

1                   officials, can't tell them they can't be doing these things.

2                   They want the authority. They want to know they've  
3                   got the authority. You know, the Police Officers Union has  
4                   suggested that they would like to get involved in the case and  
5                   they would be happy to tell you --

6                   THE COURT: They should have made that suggestion a  
7                   little sooner.

8                   MR. BOUMA: I know, but at least for these purposes.  
9                   But they do want get in, I think, a little later, because I  
10                   think what they want to tell you is this statute was enacted  
11                   for their protection too. They want it. They need it. They  
12                   want the protection from and they want the ability to check  
13                   out people who they arrest to find out if they have had felony  
14                   murders in Guatemala or we have instances like that that  
15                   you'll see in some of the other affidavits.

16                   And I'm referring to affidavits in other cases where  
17                   if the police had had the opportunity to check out an  
18                   individual they arrested, an alien, they had been able to  
19                   check it out with ICE, they would have found out he was wanted  
20                   for murder in Guatemala or some country like that.

21                   That's the individual that had been stopped two or  
22                   three times and ended up killing -- or at least shooting a  
23                   Phoenix police officer because of its sanctuary policy.

24                   So when you talk about the fact why is this in here,  
25                   the reason is the police want the opportunity to do something.

1                   THE COURT: Let me ask you briefly about Section 6.  
2     This is the addition to warrantless arrest. And I'm having  
3     trouble figuring out who gets arrested that couldn't have been  
4     arrested before.

5                   It says that you can make a warrantless arrest for  
6     someone who has -- the police officer has probable cause to  
7     believe committed a public offense that makes the person  
8     removeable from the United States. And I ask it in this  
9     context: The first four sections already gave officers the  
10    ability to make warrantless arrests for felonies and for  
11    misdemeanors, so it's not clear to me what they're going to be  
12    making arrests for.

13                  MR. BOUMA: Well, they -- let's take the ordinary  
14    police stop, that situation. You get stopped for a traffic  
15    violation.

16                  THE COURT: I might be going too fast now that they  
17    turned the cameras off -- oh, not until midnight, sorry. It  
18    might be tomorrow that I'm going too fast since they turned  
19    the cameras off, but not fast enough to commit a criminal  
20    traffic violation.

21                  MR. BOUMA: All right. And then -- and let's hope  
22    that you have your driver's license with you, but of course,  
23    you don't have to. Of course, you didn't have to have your  
24    driver's license with you this morning, none of us did, but we  
25    couldn't have gotten in here without it or something like

1 that.

2           Well, either you have it or you don't. And they say:  
3 Tell me your name. Whatever. What do they do? You know what  
4 they do. They run you through the police computer to see if  
5 there is any outstanding warrants or anything like that. But  
6 now if they have reasonable suspicion to believe that you are  
7 an alien, if they have reasonable suspicion you're an alien  
8 and you're in the country illegally, they can call ICE and  
9 check it out with ICE.

10           Now, ICE may tell then, you know, this guy is wanted  
11 for murder in Guatemala; hold him; we want him. That's where  
12 this comes into effect. Now this police officer has a reason  
13 to arrest this person. Because the police officers only have  
14 the authority to make arrests that the State gives them and  
15 this does away with any doubt whether under those  
16 circumstances if the felony has not been committed or whatever  
17 it was -- has not been committed, did not occur in this police  
18 officer's presence, he doesn't have any issue at all. He can  
19 hold that individual for ICE.

20           THE COURT: What about the part that makes the person  
21 removable from the United States? How do they make that  
22 determination?

23           MR. BOUMA: The Phoenix Police Department -- or  
24 nobody is going to determine that other than ICE. The federal  
25 authorities determine that. This is somebody --

1                   THE COURT: Because --

2                   MR. BOUMA: -- that ICE has said we want.

3                   THE COURT: I may be confused about whether that  
4 argument is raised in this case or one of the others, but the  
5 determination of what kind of an offense makes a person  
6 removeable from the United States seems to me to be a  
7 determination that only the federal authorities can make.

8                   It's very complicated and ever-changing, not with  
9 respect to murder, but with respect to many, many other types  
10 of criminal felony and misdemeanor offenses.

11                  So it is not the position of the Governor that this  
12 allows police officers, state and local law enforcement, to  
13 make determinations that the public offense they have probable  
14 cause to believe the person committed makes them removeable?

15                  MR. BOUMA: I don't think anybody can make that  
16 decision but the federal authorities, but this gives the  
17 police officer the opportunity to hold onto the people that  
18 the federal authorities say we want you to hold onto.

19                  So with respect to the smuggling of humans, you know,  
20 that case has been handled twice here in even Arizona. And  
21 just two days ago the Ninth Circuit affirmed the case and,  
22 basically, the case said that there was nothing in this --  
23 this is the Arizona case -- said that -- the District Court  
24 case -- said that nothing in the language of the legislative  
25 history of the INA indicates Congress intended to preclude

1 harmonious state regulations touching upon the smuggling of  
2 illegal aliens.

3 So this particular statute has been upheld several  
4 times right here in the Federal District Court and there's  
5 certainly nothing in the clause that was added that would make  
6 that unconstitutional.

7 And as a practical matter, plaintiff really doesn't  
8 address those cases or explain why this Court should reach a  
9 contrary result.

10 With respect to Section 5, the challenge that the  
11 statute makes it unlawful for a person found in violation of a  
12 criminal offense to transport or move aliens in furtherance of  
13 the alien's illegal presence or to conceal, shield, or harbor  
14 aliens who are in violation of the federal immigration laws or  
15 to encourage an alien to come to this state if a person knows  
16 or recklessly disregards that doing so would be a violation of  
17 law --

18 THE COURT: This is another one that I have a hard  
19 time coming up myself with an example because of this rather  
20 awkward language that a person already in violation of a  
21 criminal offense then is committing some other crime,  
22 apparently, if they're transporting aliens in furtherance of  
23 their illegal presence.

24 And I wondered if you have an example of what that  
25 predicate "in violation of a criminal offense" means.

1                   MR. BOUMA: Well, I think the -- there's all these  
2 people out there that want to say how broad this law is. The  
3 fact of the matter is we know that the United States Supreme  
4 Court has held that, you know, you don't need to have  
5 reasonable suspicion that somebody is an alien or from -- in  
6 the country illegally in order to question them about their  
7 immigration status. I mean, I've got the case -- I have the  
8 case right here.

9                   THE COURT: Well, this is -- I mean let's deal with a  
10 citizen, I mean, because this is a crime that a citizen can be  
11 committing.

12                  MR. BOUMA: Right -- my point being when I got  
13 interrupted by my looking for the statute or for the case, but  
14 I can get it if you're interested -- they said "while in  
15 violation of a criminal offense."

16                  They put a predicate on this that, you know, the  
17 State has put a predicate that you have to stop them for a  
18 criminal offense. And then if you learn that they're  
19 transporting or moving aliens in violation of the immigration  
20 law, you can do something. But they have said you've got to  
21 stop them for a violation of a criminal offense first.

22                  THE COURT: Because in terms of transport, typically  
23 we're thinking about transport in a vehicle, and there are not  
24 a lot of criminal -- well, let's just say the overwhelming  
25 majority of stops of vehicles aren't criminal offenses at all.

1 They are civil traffic violations.

2 So are you saying an officer pulled somebody -- me,  
3 again -- for going a little too fast. I can't be convicted of  
4 this crime because I was not already in violation of a  
5 criminal offense?

6 MR. BOUMA: I think that's right.

7 Now, that's how they wrote it and that, you know --  
8 and going back to the other issue about the fact that you have  
9 to have reasonable suspicion before you can go ahead and ask  
10 about their -- whether or not they -- you know, ask about  
11 their nationality, you want to see their papers, whatever, you  
12 have to have reasonable suspicion that they're an alien and  
13 unlawfully in the country.

14 That is a whole lot higher standard than the federal  
15 courts -- than the Customs and Immigration people need or  
16 federal agents. Anybody -- the Supreme Court says you can ask  
17 people without reasonable suspicion for their identification  
18 and for their nationality and about whether or not they are  
19 appropriately in the country. So this statute has built in  
20 some protections that people are pretty quick to rush by when  
21 they discuss this.

22 I don't know if I answered your question. I have  
23 tried to, but I think they have -- in this instance they have  
24 limited. The only time -- and this mirrors the federal law in  
25 terms of the offense. The transporting in furtherance of

1 illegal presence, that's not taking them to church or anything  
2 like that. That's in furtherance of their illegal presence  
3 and concealing and shielding and harboring them. Those are  
4 different things.

5 THE COURT: Can we talk for a few minutes now about  
6 the section or subsection (B), the main section of 1051, the  
7 one that has received the most attention in terms of the  
8 briefing of that particular aspect of SB 1070. This is the  
9 stop-detain-arrest.

10 The first one I want to talk about is the third, the  
11 "arrest." This is going to change what presumably many local  
12 law enforcement agents do because there are many, many people  
13 who are arrested and then pretty much immediately released,  
14 people that -- we're not talking about felons, but many, many  
15 people that might be arrested for a misdemeanor that are  
16 booked and released, booked and released. They're just not  
17 typically detained for any significant period of time.

18 With respect to felons, people that are booked into  
19 jail and then have bond set or something, I mean, those have a  
20 lot longer detention. And I can see that the concerns about  
21 the length of detention for somebody who's been charged or has  
22 been arrested for a felony are probably not the ones that are  
23 of concern here since those individuals don't usually get out  
24 real quickly.

25 But now we're talking about people that are charged

1 with misdemeanors for which they're ordered to appear in  
2 municipal court, justice court. Now all of them are going to  
3 have to be detained for some period of time until their  
4 immigration status has been determined.

5                   Does that have the potential to violate other  
6 constitutional provisions on the reasonableness of detention?

7                   MR. BOUMA: I think that the better way to read that,  
8 Your Honor, is that "arrest" is part of the preceding sentence  
9 too and before, you know, I need to get into that, that if you  
10 are arrested, you still need before you go to the next step,  
11 if you are determining that, that there be reasonable cause to  
12 believe that there is -- that they are an alien --

13                  THE COURT: Well, maybe I'm misreading it, but I'm  
14 reading it as follows:

15                  If somebody is lawfully stopped or detained and,  
16 while they're stopped or detained, the officer develops some  
17 reasonable suspicion that the individual might be in the  
18 country illegally, they are required then to make the call to  
19 determine their immigration status through ICE.

20                  MR. BOUMA: If practicable and all the rest.

21                  THE COURT: Yes, if practicable. Obviously, there  
22 could be situations if they could call and they say, sorry,  
23 we're backed up, it's going to take three days, and you've  
24 pulled somebody over for their taillight out. You can't hold  
25 them for three days at the side of the road.

1                   But it goes on and says everybody that's arrested  
2 doesn't get released until their immigration status is  
3 determined. That's how I read it, at least.

4                   MR. BOUMA: Well, I can see how it can be read that  
5 way, but the fact is that you still have the constitutional  
6 requirements that you don't unreasonably detain people for an  
7 unreasonable time. Again, referring to several of the  
8 affidavits you'll see in other cases from police officers,  
9 highway patrol, tribal officials, people that will all tell  
10 you they don't have a lot of problem.

11                  You know, we have some people saying, Well, ICE is  
12 going to now -- you know, it will take them forever, that they  
13 can't get to and then it takes a long time to get responses.  
14 All these people tell you they get responses fairly quickly.

15                  But the fact is the statute itself says that this  
16 section shall be implemented in a manner consistent with  
17 federal laws regulating immigration protecting the civil  
18 rights of all persons and respecting the privileges and  
19 immunities of the United States citizens.

20                  And so, you know, that builds in the concept of that  
21 it has to be a reasonable period of time, a reasonable  
22 detention. If ICE can't get to you, by the way, then you  
23 can't hold them. You may have stopped them. You may have run  
24 their name to ICE. But you're going to have to turn them  
25 loose. Now, ICE may come back around later and be interested

1 about the fact of their name or address or whatever, somebody  
2 ICE really wants to do something about, that's great. ICE may  
3 not want to do anything.

4 ICE in its wisdom may decide that, you know, these  
5 people haven't done anything that is going to cause ICE to put  
6 them on a priority list to send them back to wherever they  
7 come from.

8 So I understand where you're coming from on it  
9 because of the sentence there. And I don't know that it's the  
10 most artful way of writing that. But the fact is I do think  
11 that because the prior sentence says that if you're -- that  
12 includes "arrest" --

13 THE COURT: Well, I think the prior sentence says  
14 that if you develop this reasonable suspicion of somebody  
15 who's stopped, detained, or arrested, then when practicable  
16 you can determine the immigration status of the person.

17 But then it goes on and says:

18 "Any person who is arrested shall have the person's  
19 immigration status determined before the person is released."

20 That seems to not require that reasonable suspicion  
21 that they're in the United States illegally, because with  
22 respect to arrest, obviously immigration status could be their  
23 status is that they are a legal alien, a documented alien  
24 allowed to live in the United States, but then again, they may  
25 have just been arrested for a serious felony that if convicted

1 could result in their loss of that status.

2                   But it seems to me that sentence is not that closely  
3 tied to the previous part about what happens often on the side  
4 of the road where the call is made and there is an answer  
5 given and ICE says: "They're fine" or "I don't have a record"  
6 or "We have a record and they're illegal, but let them go  
7 because we don't have the resources to come pick them up" or  
8 "We'll come pick them up."

9                   But this says any person who's arrested and doesn't  
10 seem to have anything to do with their suspicion about their  
11 citizenship, legal or illegal residency.

12                  MR. BOUMA: Well, I guess first the question would be  
13 is that constitutional? The United States Supreme Court says  
14 it is.

15                  You can ask people about their nationality and  
16 require their identification and all that, whether or not  
17 there's reasonable suspicion. But then the question is under  
18 those circumstances, how long can you hold them? I mean  
19 that's what you really get down to.

20                  THE COURT: Exactly.

21                  MR. BOUMA: And that's why talking about these facial  
22 challenges is kind of difficult, because you know, you and I  
23 both know you're going to have police officers out there that  
24 pick up somebody for a driver's license or, you know, you  
25 suggested a taillight and I don't think you can arrest them

1 for a taillight.

2 THE COURT: I don't think you can arrest them.

3 MR. BOUMA: How about criminal speeding? Forty mile  
4 an hour over the speed limit.

5 THE COURT: I hate to tell you, I think it's only  
6 twenty.

7 MR. BOUMA: Okay. Well, so they arrest him for that.  
8 Then the policeman has to make a determination now you're in  
9 the --

10 THE COURT: Well, the police then can decide whether  
11 to arrest them or not arrest them. I think they could still  
12 just cite them.

13 MR. BOUMA: And let's go back to the fact that our  
14 police officers are not a bunch of dummies. You know, they  
15 have been trained. We have attached to the papers what is  
16 necessary for these police officers to become certified as  
17 police officers to be qualified. They have all kinds of  
18 training, which includes all kinds of racial profiling.

19 You know, these people -- you've got to presume that  
20 the public officials are going to do their job in an  
21 appropriate manner. An appropriate manner is in a  
22 constitutional way. This particularly says you have to do it  
23 in accordance with the constitution.

24 So the thought that people are going to arrest people  
25 and then hold them as distinguished from perhaps checking it

1 out. But when they check out most people, you're going to  
2 check out, if you're going to have any kind of identity, it's  
3 going to check out. And if you don't have identity and if  
4 there's reason to believe that you're an alien and you're in  
5 the country unlawfully, or maybe even, according to, as you  
6 suggest, you don't have reason to believe that, then you run  
7 it through ICE and either -- or you call down to headquarters  
8 and have them run it through ICE.

9                   But it's kind of hard to believe that our  
10 professionals are going to start hauling everybody like that  
11 down to jail or -- I mean, that's the same old chamber of  
12 horrors that everybody has been happy to put in their  
13 affidavits about how bad it's going to be, acting like we have  
14 a bunch of slugs out there on the road that don't have any  
15 idea of their constitutional obligations.

16                   THE COURT: Your time is about up, Mr. Bouma, if you  
17 want to sum up or you can just sit down. Up to you.

18                   MR. BOUMA: Okay. Well, if I could have just a  
19 couple minutes, Your Honor, about the merits of the  
20 preliminary injunction.

21                   You know, we talked about the likelihood of success  
22 and we've talked about whether there have been any harm. So  
23 now let's talk about for a moment the fact of whether the  
24 balance of equities tips in our favor. And we do have a law  
25 that says that injunctive relief is an extraordinary remedy

1 that may be awarded only upon a clear showing that a plaintiff  
2 is entitled to such relief.

3 This is even more the case when the parties seek an  
4 injunction that would impose upon the sovereignty of a state  
5 in the exercise of its police power or law enforcement efforts  
6 that comes from the United States Supreme Court. Here the  
7 balance of equities, we believe, tip sharply in Arizona's  
8 favor.

9 Plaintiffs have not established the actual harm. The  
10 harm -- the claim is at best speculative. They have not  
11 submitted a shred of evidence. There's no evidence at all  
12 that it's irreparable harm.

13 In balancing the equities, it's the plaintiff's  
14 purported harm weighed against Arizona's interest in enhancing  
15 and protecting the health, safety, and welfare of all of our  
16 citizens and that interest is critical to the Court's  
17 analysis.

18 The Supreme Court made clear the courts of equity  
19 should pay particular regard to the public consequences in  
20 employing the extraordinary remedy of injunction. That's in  
21 the *Winter* case.

22 The Supreme Court's also made it clear that states  
23 judicially have had great latitude under their police powers  
24 to legislate as to the protection of the lives, limbs, comfort  
25 and quiet of all persons. That language is particularly

1 appropriate with what we have going on right here in Arizona.

2                   The Supreme Court tells us that courts must give due  
3 weight to the serious consideration of the public interest  
4 that has already been undertaken by state officials in passing  
5 1070, and the public interest in having federal courts respect  
6 the independence of state government in carrying out their  
7 policies is crucial.

8                   Now, the legislature has clearly determined that the  
9 Act was necessary to address serious problems. We've talked  
10 about a few. There's the serious violence against the Phoenix  
11 police officers by illegal aliens, the failure of the  
12 government to protect the border, President Obama has already  
13 said it's out of control -- well, let me get the exact quote  
14 here.

15                   But the -- there's the cost in terms of education,  
16 incarceration, and healthcare. So when you balance the harm  
17 the plaintiffs are talking about, to the extent they have any  
18 at all, against the harm to Arizona, I think we can make a  
19 legitimate argument that it tilts definitely toward Arizona.

20                   You know, the status quo, just leaving the status quo  
21 causes Arizona citizens and the economy irreparable harm every  
22 day. Just leaving it be isn't good enough. There's no reason  
23 Arizona should stand by and suffer the consequences of a  
24 broken system -- and that is the quote, the system's broke --  
25 when Arizona has 15,000 well-trained, capable law enforcement

1 officers who can try to help the federal government fix it.

2 And that's exactly what the intent of 1070 is, for  
3 those 15,000 well-trained and capable law enforcement officers  
4 to help protect us by helping enforce the statutes that  
5 Congress has passed.

6 And I'm short of time, but I would otherwise have  
7 gone through the Congressional intent and the various statutes  
8 that Congress has passed that basically encourage local --  
9 state and local assistance on the enforcement of federal  
10 immigration law. But I will rely on our briefs on that.

11 Thank you very much.

12 THE COURT: Thank you, Mr. Bouma.

13 Mr. Montoya, you may have an additional ten minutes.

14 MR. MONTOYA: Thank you, Your Honor. I appreciate  
15 that.

16 Your Honor, we have been here a long time. Haven't  
17 heard one word from the City of Phoenix saying they're not  
18 going to fire or otherwise discipline Officer Salgado if he  
19 doesn't enforce 1070. The Governor has a lot of lawyers here  
20 this morning. Not one of them has said that she's not going  
21 to make sure that Officer Salgado is not punished if he  
22 refuses to enforce 1070 like it says in his Complaint.

23 Mr. Bouma just told you we haven't adduced any  
24 evidence. Guess what, Your Honor? As you know, in a Motion  
25 to Dismiss we don't adduce evidence. This is not an

1 evidentiary hearing. This is a Motion to Dismiss.

2 THE COURT: Well, this is the Motion For a  
3 Preliminary Injunction.

4 MR. MONTOYA: And -- but his challenge issue, his  
5 challenge to the standing is a Motion to Dismiss. Therefore,  
6 you have to, in our opinion, accept the well-pled facts in his  
7 Complaint as true, namely that he will suffer termination or  
8 other discipline if he doesn't enforce it. The City still  
9 hasn't disagreed.

10 Your Honor, I think it's telling that in everything  
11 that the Governor has filed, she's doesn't ever talk about  
12 those four statutes. Even this morning he says he will talk  
13 about them at the end, but time is out.

14 Your Honor, they filed voluminous briefs. They don't  
15 analyze the language of any of those four statutes at all.  
16 They talk about legislative history. Your Honor, we cited the  
17 legislative history to you in Exhibit 1 of our Reply in  
18 Support of our Motion for Preliminary Injunction.

19 Your Honor, the legislative history is clear.  
20 Congressman after congressman state that those laws were  
21 passed because, quote -- this is John Doolittle in reference  
22 to 1252c passed in 1996. Representative Doolittle, he was  
23 from California. He was a Republican:

24 "In fact, the federal government has tied the hands  
25 of our state and local enforcement officials by actually

1 prohibiting them from doing their job of protecting public  
2 safety."

3 That's why Congress passed 1252.

4 Here's what he also says, Your Honor:

5 "Mr. Chairman, by way of summary, I would like to  
6 allay fears or concerns that members may have about the scope  
7 of my amendment. My amendment is very narrow and only covers  
8 situations in which the state or local officer encounters  
9 criminal aliens within his routine duties. Only confirmed  
10 criminal aliens are at risk of being taken into custody."

11 That's the legislative history of Section 1252. Your  
12 Honor, that flies in the face of 11-1051(B) where they can  
13 haul you off to jail and keep you there until they prove  
14 you're an American citizen.

15 If you've let your lawn grow too high, because that  
16 violates a civil city ordinance, or you spit on the sidewalk,  
17 another ordinance, Your Honor, in reference to 1324, they  
18 specifically took out the words "law enforcement officers of  
19 the United States."

20 "Of the United States." They took that out so that  
21 local and state law enforcement officers would enforce the law  
22 because they wanted it broadly enforced, contradicted by  
23 11-1051.

24 And then, Your Honor, in 1357(g), 287(g),  
25 Representative Thomas Latham, a Republican from Iowa says:

1                   "There is legally nothing that a state or local law  
2 enforcement agency can do about a violation of immigration law  
3 other than calling the local INS officer to report the case.  
4 My amendment will allow state and local law enforcement  
5 agencies to enter into voluntary agreements with the  
6 Department of Justice to give them the authority to seek,  
7 apprehend, and detain those illegal aliens."

8                   That's 1357(g). That's why Congress passed these  
9 Acts, Your Honor.

10                  Another point, Your Honor, they say that -- they  
11 mentioned the *De Canas* case about how Justice Brandon speaking  
12 for the United States Supreme Court let California penalize  
13 state employers for hiring undocumented immigrants. That was  
14 before IRCA was passed in I think 1986 that has an express  
15 preemption clause, as Your Honor is aware, but also has a  
16 saving clause that allows employers to sanction employees --  
17 employers who hire undocumented immigrants through licensing  
18 laws. That's before the Supreme Court right now.

19                  But, Your Honor, remember, the regulation of  
20 employment is something that states traditionally do.  
21 Regulating immigration is not something that states  
22 traditionally do. *Hines v. Davidowitz*, quote, page 68:

23                  "Our conclusion is that appellee is correct in his  
24 contention that the power to restrict, limit, regulate, and  
25 register aliens as a distinct group is not an equal and

1 continuously existing concurrent power of state and nation,  
2 but whatever power a state may have is subordinate to the  
3 supreme law."

4 Your Honor, our -- the registration provisions of  
5 1070, they don't change the registration provisions but they  
6 jack up the penalties.

7 THE COURT: Well, aren't the penalties consistent  
8 with the penalties that federal law provides more --

9 MR. MONTOYA: No.

10 THE COURT: -- or less?

11 MR. MONTOYA: No. I don't think they are, Your  
12 Honor, and I will tell you why.

13 If the federal government says that if I don't have  
14 my alien registration card, I go to jail for six months; and  
15 the State of Arizona says I go to jail for another six months.  
16 That's another six months in jail. And the Supreme Court of  
17 the United States has already said that you cannot add to  
18 federal immigration law. The federal government decided how  
19 much they wanted to punish someone for it and no more. The  
20 State of Arizona cannot go beyond that.

21 Now, Your Honor, you also heard Mr. Bouma say that  
22 states have concurrent power. That's not what Your Honor  
23 found. In *Kobar v. Novartis* in a case that wasn't as  
24 compelling as this, Your Honor wrote:

25 "The Court opted against preemption as policing fraud

1 against federal agencies is hardly a field which states have  
2 traditionally occupied."

3 Because in that case, in *Kobar*, the plaintiff tried  
4 to argue, hey, this is what states have always done, Your  
5 Honor. So there's a presumption against preemption.

6 Your Honor says, no, the states haven't traditionally  
7 policed the perpetration of alleged frauds against federal  
8 agencies. Usually, if you violate a federal agency's laws or  
9 regulations, it's the Feds who come after you.

10 Another point that Mr. Bouma makes, oh, there's  
11 concurrent jurisdiction. Your Honor, why is it the City of  
12 Phoenix Police Department doesn't arrest people who violate  
13 the federal tax laws? Why is it that the State doesn't  
14 prosecute people for federal tax fraud? Why is it that the  
15 State of Arizona doesn't prosecute people for federal  
16 antitrust violations?

17 Your Honor, the courts of Arizona -- can you think of  
18 one case that you adjudicated or that you knew of when you  
19 were a state court judge that involved whether or not someone  
20 was unlawfully in the United States?

21 Your Honor, in addition to ignoring the language of  
22 these four federal statutes, they also ignored the language of  
23 1070.

24 Your Honor is correct. 1070 is written very clearly:  
25 "Any person who is arrested shall have the person's

1 immigration status determined before the person is released."

2                   What if that person was my grandmother, Judge? My  
3 grandmother was born in the United States of America on a  
4 ranch far away from civilization. She didn't have a driver's  
5 license. She didn't have a birth certificate. She was  
6 absolutely an American.

7                   She's to be held in jail until she can produce a  
8 birth certificate that she never had? Until she can produce  
9 an Arizona driver's license when she doesn't even know how to  
10 drive? That's what this law says.

11                  Now, Your Honor, in reference to the arrest  
12 provisions, it's clear. A peace officer without a warrant may  
13 arrest a person if the officer has probable cause to believe  
14 the person to be arrested has committed any public offense  
15 that makes the person removable from the United States.

16                  What if somebody is stopped for spitting on the  
17 sidewalk and then the officer asks him, hey, well where are  
18 you from anyway?

19                  Well, I'm from Mexico.

20                  Well, you got any I.D.?

21                  Don't have an Arizona driver's license. Don't have  
22 an Arizona identification card. Don't have a green card.

23                  You don't have a green card and you're from Mexico?  
24 Are you here illegally?

25                  Yes.

1                   Your Honor, under 1070 that person is to be arrested  
2 and a call to ICE, as Mr. Bouma envisions, isn't spoken of.  
3 It doesn't stay that. Even though other parts of the law say  
4 you should contact federal authorities to determine like the  
5 "reasonable suspicion" part, you can contact an ICE agent or a  
6 287(g) certified law enforcement officer. This doesn't say  
7 that. Your Honor, that is facially unconstitutional.

8                   Your Honor, you started out by asking me whether or  
9 not we're attacking 1070 in its entirety. No. We're only  
10 attacking specific sections. But those specific sections,  
11 Your Honor, are preempted by federal law and those specific  
12 sections cannot be lawfully enforced in any situation because  
13 they are the -- the very fact that they are preempted by  
14 federal law.

15                   Therefore, the specific sections that we have  
16 challenged, Your Honor, are subject to a facial  
17 pre-enforcement challenge. It happens all the time. You  
18 don't have to wait until you're being penalized. Justice  
19 Scalia has written that. Judge Easterbrook of the Seventh  
20 Circuit has written that. And the reason why I mentioned  
21 those two judges in particular is because they have  
22 reputations of being very conservative. This case is not a  
23 political case, Judge.

24                   Most of the cases we have cited were authored by  
25 allegedly conservative judges: Judge Easterbrook. Justice

1 Scalia.

2 Your Honor, this law is preempted by federal law.

3 Governor Brewer has not suggested that she's not going to  
4 enforce it. The City of Phoenix has indicated on the record  
5 that it intends to enforce it. At this stage, Your Honor,  
6 we're not in a Motion for Summary Judgment. We're not in a  
7 trial on the merits. At this stage we have established  
8 standing. We also have established irreparable harm.

9 The United States Supreme Court, as cited in our  
10 brief, has said that someone who has to live under a  
11 preemptive law has established irreparable injury.

12 The public interests. Your Honor, law enforcement  
13 officers have all the tools they need under those four  
14 statutes and under state law to bust the bad guys as it  
15 stands.

16 The Arizona -- the State of Arizona will not perish  
17 if you put this law on hold while we -- until we can have  
18 either a trial on the merits or a Motion for Summary Judgment  
19 that will resolve the case.

20 This law was just recently passed, Your Honor, and it  
21 was going to become effective in 60 days.

22 Putting it on hold for another 30 days to give us  
23 time to have a trial on the merits isn't going to hurt Arizona  
24 in any way for the very reason that Mr. Bouma stated; that we  
25 have about 1500 or maybe 1700, depending upon what source you

1 read, law enforcement officers.

2 THE COURT: Thousand.

3 MR. MONTOYA: My clients are among them who will  
4 enforce the law.

5 THE COURT: Thousand. Fifteen thousand.

6 MR. MONTOYA: Fifteen thousand. Okay. Thank you.

7 THE COURT: Thank you very much, Mr. Montoya.

8 Thank you very much, ladies and gentlemen. These  
9 matters are under advisement.

10 Court is adjourned.

11 (Proceedings adjourned at 12:02 p.m.)

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## C E R T I F I C A T E

4 I, ELIZABETH A. LEMKE, do hereby certify that I am  
5 duly appointed and qualified to act as Official Court Reporter  
6 for the United States District Court for the District of  
7 Arizona.

8 I FURTHER CERTIFY that the foregoing pages constitute  
9 a full, true, and accurate transcript of all of that portion  
10 of the proceedings contained herein, had in the above-entitled  
11 cause on the date specified therein, and that said transcript  
12 was prepared under my direction and control.

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