EXHIBIT A

NO. 10-16645

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The United States of America, Plaintiff-Appellee, vs. **The State of Arizona; and Janice K. Brewer, Governor of the State of Arizona, in her official capacity,** Defendants-Appellants.	On Appeal from the United States District Court for the District of Arizona, Phoenix Division Case No. CV 10-1413-PHX-SRB, The Honorable Susan R. Bolton, District Judge

COCHISE COUNTY SHERIFF LARRY A. DEVER'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS STATE OF ARIZONA AND JANICE K. BREWER, GOVERNOR OF THE STATE OF ARIZONA

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INTRODUCTION--ARIZONA'S DISMAL STATUS QUO

Cochise County is located in southern Arizona and shares 84 miles of border with Mexico. Amicus Curiae Larry Dever has spent his life on the border and has proudly served as Cochise County's Sheriff for the last 14 years. The years he has given to Cochise County have allowed Sheriff Dever to observe, encounter, and undergo the challenges faced only by border county residents and the law enforcement officers charged with protecting their lives, families, animals, and property.

Sheriff Dever, like all other sheriffs, has an obligation to enforce the law and protect the people within his jurisdiction, notwithstanding whether they are legally present in Cochise County. Unfortunately, his ability to carry out his duties has been increasingly compromised by the Federal government's ongoing refusal to secure the border and enforce its own immigration law.

The Sonoran Desert is unforgiving. The emergency rooms are often populated with women and children who were left to die by the "coyotes" who took their money and promised to shepherd them across the border. Southern Arizona's morgues swell with illegal immigrants—some who looked for a better life, and others who looked to fill our streets with drugs. It does not take long to expire in 118 degree heat with no food, water, or shelter.

The criminals drawn to the border are even more brutal than the desert. Narco-terrorists crash through the border and race through dark community roads with their lights off. Local law enforcement officials receive threats from Mexican gangs. Hordes of men, women, and children have been kidnapped, trafficked, tortured, and even murdered as drug runners battle over territory in southern Arizona.

Every rancher victimized, every drug-related kidnapping, every home invasion, every "safe house" discovered, and every stranded, dying, victim of human smuggling rescued, testifies to the consequences of the government's inexcusable neglect. That is, and has been, the status quo in Cochise County.

Sheriff Dever is unwilling to accept the status quo. Local law enforcement needs action and the Federal government has offered little more than lip service and window dressing.

The Arizona legislature has sought to assist Sheriff Dever and other law enforcement to combat the problems associated with border crime through SB 1070.

Instead of participating in the solution, the Federal government filed this lawsuit against Arizona, claiming that local law enforcement action is unconstitutional and interferes with the Federal government's role of policing

immigration – a role the government so clearly has neglected and willingly ignored.

The Obama administration's approach has sent a clear message to Sheriff Dever and the people of Arizona – we're not going to protect you and do not try to protect yourself. This is unacceptable and intolerable.

Sheriff Dever deserves better. He has spent his professional life protecting all people present in Cochise County, and will continue to do so. His hope is that the State of Arizona will be allowed to follow through with its answer to Cochise County's cry for help.

1. Summary of Section 2(B) And Issue of This Amicus Brief.

The provisions of SB 1070 that this amicus brief is concerned with are the first two sentences in section 2(B).

The first sentence of 2(B) states:

> For any lawful contact stop, detention or arrest made by [an Arizona] law enforcement official or...law enforcement agency... in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien who and is unlawfully present in the united states, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation.

The second sentence states:

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

On July 28, 2010, the district court enjoined these provisions.

Law enforcement officers may verify the status of persons they reasonably suspect are illegally present in the United States. Section 2(B) of SB 1070 requires all Arizona law enforcement to do so. The district court held that Section 2(B) is likely preempted because it will unreasonably burden legally present aliens and federal resources. This conclusion was based on the improper interpretation of Section 2(B) and the failure to properly consider the facts and circumstances that show that this Section will not burden legally present aliens or federal resources.

ARGUMENT

2. The District Court Improperly Interpreted The Second Sentence Of Section 2(B) Of SB 1070; It Is Not Preempted.

In its analysis, the district court first dealt with the second sentence of Section 2(B). Sheriff Dever does the same here.

The second sentence of Section 2(B) states, "[A]ny person who is arrested shall have the person's immigration status determined before the person is released." Without any real analysis, the district court held that this sentence must mean that "every" person arrested within the State of Arizona must have his or her immigration status verified prior to release. *See* Order at p. 15:9-10. Based on this interpretation, the district court held that the United States was likely to succeed on the merits on its claim that the second sentence of Section 2(B) is preempted

because mandatory immigration status verification of *all* arrestees in the State of Arizona would: (1) impose substantial burdens on lawful immigrants; and (2) burden federal agencies resources as to impede the agencies' function.

The alternative interpretation—set forth by the State of Arizona—is that the second sentence of Section 2(B) is qualified by the first sentence, and means that reasonable suspicion of unlawful presence is required for verification of immigration status of arrestees and that the second sentence does not in any way eliminate the reasonable suspicion requirement. The district court—again without any real analysis—rejected this interpretation.

Once Section 2(B)'s second sentence is properly interpreted to mean that the immigration status of arrestees must be verified only when reasonable suspicion exists that the arrestee is an unlawfully present alien, it is clear that United States is unlikely to prevail on the merits. Thus, the preliminary injunction was improper. If the district court applied the proper interpretation, it would have acknowledged that enforcement would not unnecessarily burden legally present aliens or federal resources.

2.1 Proper Statutory Interpretation.

The district court incorrectly interpreted the second sentence of Section 2(B). Federal courts must apply Arizona's rules of statutory construction in interpreting the state statute at issue. *In re First T.D. & Inv., Inc.*, 253 F.3d 520,

527 (9th Cir. 2001). The district's court interpretation violated Arizona rules of statutory construction because: (A) it is inconsistent with legislative purpose and intent and is not in harmony with the remainder of the statutory scheme; (B) it renders portions of the first sentence of Section 2(B) meaningless; (C) it leads to absurd and unreasonable results; and (D) it encouraged, rather than discouraged, unconstitutionality.

A. The district court's interpretation is inconsistent with the legislative purpose and intent.

The general rule is: where part of a statute is susceptible to two constructions the court should adopt that which is consistent with the general import of the statute, that is harmonious with the statutory scheme, and to gives effect to the legislature's intent *State v. Pinto*, 179 Ariz. 593, 596, 880 P.2d 1139, 1142 (Ariz. Ct. App. 1994); *see also Mayor and Common Council of City of Prescott v. Randall*, 67 Ariz. 369, 377, 196 P.2d 477, 482 (Ariz. 1948); *Arizona Dept. of Economic Sec. v. Superior Court in and for County of Mohave*, 186 Ariz. 405, 408, 923 P.2d 871, 874 (Ariz. Ct. App. 1996); *Saenz v. State Fund Workers' compensation Ins.,* 189 Ariz. 471, 474, 943 P.2d 831, 834.

The district court's interpretation eliminating the reasonable suspicion requirement for verification of status for arrestees is contrary to the plainly stated purpose of the Arizona legislature in enacting SB 1070—"*the legislature finds that there is a compelling interest in the cooperative enforcement of federal*

immigration laws." *See* SB 1070 at Section 1 (emphasis added). Enforcing federal immigration law clearly does not include the verification of every person arrested; especially ones that are clearly United States citizens or legal aliens. Such an interpretation is not harmonious with Section 1, the remainder of Section 2(B), and does not give effect to the legislature's intent.

However, federal immigration law does include the verification of an arrestee's status when a law enforcement officer has reasonable suspicion that an arrestee is unlawfully present. Therefore, the proper interpretation is the latter because it gives effect to the stated purpose of SB 1070. The district court's interpretation is improper because it ignores that purpose.

B. The district court construed the second sentence of Section 2(B) as to render the word "arrest" in the first sentence meaningless.

Under Arizona rules of statutory construction, courts generally have "a duty to interpret statutes in a manner that does not render the statute meaningless" and should "avoid rendering any of its language mere surplusage." *John C. Lincoln Hospital and Health Corp. v. Maricopa County*, 208 Ariz. 532, 541, 96 P.3d 530, 539 (Ariz. Ct. App. 2004); *In re Aaron M.*, 204 Ariz. 152, 154, 61 P.3d 34, 36 (Ariz. Ct. App. 2003).

The district court's interpretation of the second sentence of Section 2(B) violates this rule. Requiring law enforcement officers verify the immigration status of each and every arrestee renders the word "arrest" in the first sentence

meaningless and is pure surplusage because the first sentence clearly provides that reasonable suspicion of unlawful presence is required for verification of an arrestee's immigration status. However, reading the second sentence to mean that reasonable suspicion is required and that verification must only be completed prior to the release of the arrestee does in fact give meaning to all the words (specifically "arrest") in both the first and second sentences of Section 2(B). Therefore, the district's court interpretation was improper and the proper interpretation is that the second sentence must be read in conjunction with the first.

C. The district court's construction is unreasonable and leads to an absurd result.

Under Arizona law, when a statute is subject to different interpretations, the court must adopt an interpretation that is reasonable and avoids absurd consequences. *Employment Sec. Comm. of Arizona v. Fish*, 92 Ariz. 140, 142, 375 P.2d 20, 200 (Ariz. 1962); *City of Phoenix v. Superior Court in and for the County of Maricopa*, 101 Ariz. 265, 267, 419 P.2d 49, 51 (Ariz. 1966).

The district court's construction is unreasonable and leads to an absurd result. Application of the district court's construction leads to the unreasonable result that Arizona law enforcement must determine the immigration status of *every person* arrested within the State, even when there is no reasonable suspicion that the arrestee is in Arizona illegally. This is absurd. If a Cochise County Police Officer arrested the President of the United States he obviously would not be

required to verify the President's immigration status. *Everyone knows that the President must be a United States citizen.* If reasonable suspicion is indeed required—as it would be if the first sentence qualifies the second—this absurd result would not occur.

D. The district court's construction encourages unconstitutionality.

Arizona courts construe statutes to avoid rendering them unconstitutional and to avoid unnecessary resolution of constitutional issues. *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 272-73, 872 P.2d 668, 676-77 (Ariz. 1994).

The district court encouraged, rather than discouraged, resolution of constitutional issues and unconstitutionality of the second sentence of Section 2(B). As further discussed below, if reasonable suspicion of unlawful presence is required for verification of arrestees' immigration status—that is reading the second sentence of Section 2(B) in conjunction with the first sentence—verification will not unreasonably burden lawfully present aliens or impermissibly extend federal resources to impede their ability to carry out federal priorities.

2.2 When the second sentence of Section 2(B) is properly interpreted, this Court will conclude that preemption is unlikely.

In order to demonstrate the United States is likely to succeed on the merits on this facial challenge to SB 1070, it must show that no set of facts or circumstances exist under which Section 2(B) could be constitutionally applied.

United States v. Salerno, 481 U.S. 739, 745 (1987). Furthermore, the court may not speculate about hypothetical or imaginary cases or results. *United States v. Raines*, 362 U.S. 17, 22 (1960).

The district court concluded that "*all arrestees* will be required to prove their immigration status to satisfaction of state authorities, thus increasing the intrusion of police presence into the lives of legally-present aliens (and even U.S. Citizens), *who will necessarily be swept up by this requirement.*" Order, p.16.

However, once the second sentence of Section 2(B) is properly interpreted to mean that Arizona law enforcement need not verify the immigration status *of every person arrested*, but only those for which reasonable suspicion of unlawful presence exits, and its breadth and scope sufficiently narrowed, it is clear that the requirements of this provision *do not necessarily* sweep up legally present aliens and citizens alike. Indeed, with the reasonable suspicion qualification, it is likely that there will be no additional police intrusion on lawfully present aliens.

Along those same lines, the district court concluded that the second sentence of 2(B) will unreasonably burden federal resources because there will be "an increase in the number of requests for determinations of immigration status." See Order, p. 17:12-16. Again, this conclusion is based on the improper statutory interpretation that all arrestee's immigration status must be verified. With the

reasonable suspicion qualification read into the second sentence, however, there is no evidence that federal agencies will be unreasonably burdened.

Furthermore, the district court and the United States ignored the convincing evidence in the record:

- evidence that Mr. Palmatier's findings were in error as he failed to recognize that the largest law enforcement agencies in Arizona already have certified 287(g) officers with direct access to federal immigration databases. *See* Vaughn Declaration at ¶¶ 54-56.

- evidence of the State of New Jersey's executive order that requires similar verification duties of SB 1070 and that the upon implementation of the policy, the number of LESC inquires doubled (which is also inconsistent with Mr. Palmatier's findings that the number of Arizona inquires would increase from 80,000 to 560,000 annually). *Id.* at ¶ 47.

- evidence that LESC embraced and welcomed the extra inquiries and hired 10 additional staff. *See Id.* at ¶¶ 47, 52; *see e.g.* Declaration of Brendan P. Doherty, Exhibit E of Defendants' Response to Motion for Preliminary Injunction.

Thus, the district court improperly enjoined the second sentence of 2(B). As shown above, its conclusion was founded on hypothetical and imaginary cases forged in the furnace of an improper statutory construction. The district court further erred by ignoring the evidence in the record showing that enforcement of the law will not result in an impermissible burden on legally present aliens, citizens, or federal resources.

3. The district court also abused its discretion in concluding that the first sentence of Section 2(B) is likely to be found unconstitutional.

The first sentence of Section 2(B) requires Arizona law enforcement, when lawfully stopping, detaining, or arresting a person for a violation of a state law or local ordinance, to make a reasonable attempt, when practical, to verify the immigration status of such person when "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States," except if the determination may hinder or obstruct an investigation. *See* SB 1070, Sec. 2(B). The district court concluded that the United States met its burden in demonstrating that no set of facts or circumstances existed that would permit this statute to be constitutionally applied. *Salerno*, 481 U.S. at 745.

The district court also abused its discretion in finding that the first sentence was likely unconstitutional because it impermissibly burdens lawful aliens and extends federal resources so as to impede ability to achieve top federal priorities.

In finding that the first sentence of Section 2(B) impermissibly burdens lawfully present aliens, the district court primarily relied on the possible effect on certain specialized categories of aliens that have applied for, but may not have obtained, documentation of legal presence, including those who have: (1) applied for asylum; (2) have temporary protected status; (3) U and T visa applicants; and (4) who have petitioned for relief under the Violence Against Women Act ("VAWA"). *See* Order at p. 18:20-22, 19:1:6.

Yet, the court again ignored clear evidence in the record of the following:

- this specialized group of individuals "would represent no more than about 0.2 % of the total illegal alien population at the time." Vaughn Declaration at ¶ 19.

- during his 13 year tenor as an Agent, that a current Border Patrol Agent, has not once stopped an alien claiming lawful presence under one of these specialized categories. *See* Declaration of Brandon L. Judd, Exhibit 6 to Defendants' Response to Motion for Preliminary Injunction at ¶ 15.

The United States undoubtedly did not meet its burden in demonstrating that no set of facts or circumstances existed where lawful aliens would not be burdened by SB 1070 when it offered evidence that only 0.2% of aliens in the specialized categories would be burdened. With so little support in the record, the considerations relied upon by the district court are more akin to the hypothetical and conjectural situations about which it is not permitted to speculate. *See Raines*, 362 U.S. at 22.

The district court offered no additional support for the likelihood of unconstitutionality of the first sentence of Section 2(B) as impermissibly burdening federal agencies and their resources except that which was offered in support of likelihood of unconstitutionality of the second sentence. *See* Order at p. 20:16-21. As thoroughly explained above regarding the impact upon federal resources imposed by the second sentence, the district court's conclusions cannot be upheld and constituted an abuse of discretion.

4. Conclusion.

For the above stated reasons, this Court should reverse the district court's ruling and lift the preliminary injunction as it relates to Section 2(B).

Respectfully submitted this 2nd day of September, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, I certify that this Amicus Curiae Brief is proportionately spaced, has a typeface of 14 points or more and contains 3,045 words (according to the word count feature Microsoft Word, excluding the tables, the statement of related cases and this certificate.)

Dated this 2nd day of September, 2010.

ROSE LAW GROUP, PC

/s/ Brian M. Bergin
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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2010, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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