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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

NATIONAL COALITION OF LATINO CLERGY AND CHRISTIAN LEADERS ("CONLAMIC"), PHOENIX, ARIZONA, ET AL., Plaintiffs, v. STATE OF ARIZONA, ET AL., Defendants.	**CASE NO. 2:10-CV-00943-SRB** **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT SHERIFF ARPAIO'S MOTION TO DISMISS AMENDED COMPLAINT**

Plaintiffs, by and through undersigned counsel, hereby file this Response in Opposition to Defendant Sheriff Arpaio's Motion to Dismiss (DE 26), filed July 15, 2010. Defendant's Motion is a virtually verbatim copy of the Motion to Dismiss he filed in related Case No. 2:10-CV-01061-SRB (see DE 205) and should be denied in its entirety.

INTRODUCTION

Plaintiff National Coalition of Latino Clergy and Christian Leaders ("CONLAMIC"), joined by Latino parishioners, small business owners and other members of the Arizonan Latino community, brings this action to challenge the legality of Arizona's recently-enacted immigration law, commonly known as "S.B.1070." In the Amended Complaint, Plaintiffs allege that S.B. 1070 violates the Supremacy Clause, is preempted by federal law, and will lead to discrimination and civil rights violations on the basis of race, national origin and alienage. Plaintiffs allege that the imminent enforcement of S.B.1070 has already caused them economic and other harm, as countless Latino individuals and families have begun to leave the State of Arizona out of fear of the law's implementation. Plaintiffs seek injunctive and declaratory relief.

On July 28, 2010, this Court preliminarily enjoined portions of S.B.1070 in the related case of United States of America v. State of Arizona, et al., CV10-1413-PHX-SRB. The Court ruled that sections of the statute are likely preempted by federal law and thus unconstitutional. (See DE 27) (Hereafter "PI Order").)

STANDARD FOR MOTION TO DISMISS

The Federal Rules of Civil Procedure require only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2); Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248 (9th Cir.1997). "[A] complaint need not contain detailed factual allegations; rather, it must plead 'enough facts to state a claim to relief that is plausible on its face.'" Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir.1994). All reasonable inferences must also be drawn in the non-moving party's favor. al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

I. PLAINTIFFS HAVE STANDING

Defendant Sheriff Arpaio first argues that this case should be dismissed for lack of standing, arguing that Plaintiffs have not alleged a personal stake or harms sufficient to establish a justiciable controversy. (Deft's Mot. at 3-5.) Defendant's argument is without merit.

To have standing under Article III, a plaintiff must suffer an "injury in fact," defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). There also must be a causal connection between the injury and the complained of conduct, and the injury must be redressable by a favorable decision. Id. at 561. Plaintiffs who challenge a statute on its face, however, "do[] not have to await the consummation of threatened injury to obtain preventive relief." Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298 (U.S. 1979) (citation and internal quotation marks omitted).. Rather, they need only "demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." Id. See also Bland v. Fessler, 88 F.3d 729, 736-37 (9th Cir. 1996). Moreover, "an alleged constitutional infringement will often alone constitute irreparable harm." Monterey Mech. Co. v. Wilson, 125 F.3d 702, 715 (9th Cir. 1997) (citation and internal quotation marks omitted); see also United States v. Arizona, Order on Plaintiffs' Motion for a Preliminary Injunction ("PI Order") at 33-34 (discussing harm inherent in threatened enforcement of a preempted state law).

Where there are multiple plaintiffs in an action, standing is satisfied so long as at least one named plaintiff meets the requirements. Breiner v. Nevada Dept. of Corrections, --- F.3d ----, 2010 WL 2681730, at *3 (9th Cir. 2010) (citing Bates v. UPS, Inc., 511 F.3d 974, 985 (9th Cir.2007) (en banc)). In this case, Plaintiffs have alleged sufficient facts to establish they have standing to challenge the legality of S.B. 1070.

Plaintiff National Coalition of Latino Clergy and Christian Leaders ("CONLAMIC"), for example, meets the requirements for organizational standing. An organizational plaintiff has standing when it can show that a challenged statute frustrates the organization's goals and requires it to divert resources it would otherwise spend in other ways. Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 607 F.3d 1178, 1183 (9th Cir. 2010) (citations omitted). CONLAMIC Arizona is a non-profit organization devoted to promoting the interests of its members, which includes more than 300 Arizona pastors working to spread the gospel of Jesus Christ and Christian values. (See, e.g., Am. Compl. ¶¶ 39-42.) As a result of S.B. 1070, however, CONLAMIC has been forced to divert resources away from its religious objectives and

instead redirect them to combating hostility toward, and fear within, Arizona's Latino community caused by the new immigration law. (Id. ¶ 41.)

The individually named plaintiffs, most of whom are CONLAMIC members or constituents, have also alleged sufficient facts to satisfy standing.[1] Several individual plaintiffs, for example, risk arrest for violating the new state crime created by Section 3 of S.B. 1070 for "willful failure to complete or carry an alien registration document." These include Plaintiffs Carmen Galindo, Laura Madera, and John Doe 2, all of whom are lawful permanent residents of Latino origin who may not be able to produce a registration document if asked to do so by local law enforcement. (Am. Compl. ¶¶ 18, 19, 28, 30, 33.) Plaintiff John Doe 2 in particular alleges he has lost his lawful permanent resident card, and therefore will not be unable to produce a registration document if asked to do so by local law enforcement. (Id. ¶ 33.) Jane Doe 2, who is also Latina, fears arrest because although she is a U.S. Citizen, her only documentation is a Social Security Card and she therefore would have no document to prove her citizenship if asked to produce one by law enforcement. (Id. ¶ 35.) Plaintiff John Doe, who also appears Latino, has been granted refugee status, a lawful immigration status that does not come with any sort of "alien registration document." (Id. ¶ 32.) John Doe therefore is also subject to arrest if he is asked to produce such a document because he will not be able to do so.

Others of the individual plaintiffs risk arrest for violating Sections 5 of S.B. 1070, which creates a new state crime for transporting unauthorized aliens. Specifically, Plaintiffs Manuel Siguenza and Joe Rivera, small business owners, allege that they regularly transport clients from one locale to another without regard for their clients' immigration status. (Id. ¶¶ 20, 21. 22, 24.) Also, although not explicitly alleged in the Amended Complaint, churches and their members

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[1] Thus, in addition to having organizational standing in its own right, CONLAMIC also has standing to sue on behalf of its member churches and pastors throughout the State of Arizona. An organization has standing to sue on behalf of its members if (1) its members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to its purposes; and (3) neither the claim asserted nor relief requested requires the participation of individual members in the litigation. White Tanks Concerned Citizens, Inc. v. Strock, 563 F.3d 1033, 1038 (9th Cir. 2009) (citations omitted). (See Am. Compl. ¶¶ 40-44.)

regularly transport parishioners to services and other events without checking the immigration status of their passengers. Under S.B. 1070, however, these Arizona residents now face the very real danger of arrest and prosecution for transporting clients or church members that are unauthorized aliens. Although the provision limits its application to those who are "in violation of a criminal offense," the predicate offense could very well be failure to carry alien registration documents as required by the new law, and with which some plaintiffs would not be able to comply despite their lawful status.

As a final illustration, each individual plaintiff who appears to be Latino, and/or speaks English with a Spanish-language accent, faces the injury of being stopped, questioned and arrested by local law enforcement based on immigration inquiries or status under Sections 2, 3, and 6 of S.B. 1070. Defendant appears to argue that because S.B. 1070 "come[s] into play" only after there has been a lawful stop, and because Plaintiffs are "not associated by the common experience of illegal activity or lawful stops by police agencies," Plaintiffs will not be "adversely affected" by the new law. (Deft's Mot. at 4.) However, many law-abiding citizens commit minor infractions (for example, traffic violations) that would justify a lawful stop (such as failing to signal before turning) and trigger S.B. 1070's immigration enforcement provisions. As S.B. 1070 requires any such interaction---no matter how minor the infraction---to result in the individual's detention until his or her immigration status is ascertained, virtually all Arizonans and particularly those of Latino origin or appearance are at risk of unlawful detention.

Plaintiffs have thus alleged sufficient facts to establish their standing to challenge the legality of S.B. 1070.

II. PLAINTIFFS' CLAIMS ARE RIPE FOR ADJUDICATION

Defendant Sheriff Arpaio next claims that Plaintiffs' claims are not ripe for adjudication. This argument, too, fails. To begin, Defendant erroneously states that "all seven counts" of Plaintiffs' Complaint are brought under the Civil Rights Act, 42 U.S.C. § 1981. (Deft's Mot. at 5.) In actuality, none of the counts in Plaintiffs' Amended Complaint are brought under § 1981. Rather, the Complaint's six counts allege violations of substantive due process under the Fourteenth Amendment (Counts I and V), the Supremacy Clause (Counts II and IV), the First

Amendment (Count III), and procedural due process under the Fourteenth Amendment (Count VI).[2] Based on his misreading of the Amended Complaint, Sheriff Arpaio then argues that "[t]he Complaint is based entirely on projecting into the future and the possibility that future civil rights deprivations might occur," and that dismissal is appropriate because these deprivations have not yet occurred. (Deft's Mot. at 5-6.)

Plaintiffs' Amended Complaint, however, raises a facial challenge to a statute Plaintiffs allege is unlawful and unconstitutional by its very terms. This is perhaps most evident in Plaintiffs' position that S.B. 1070 violates the Supremacy Clause (in which case Arizona would lack the legal authority to have enacted the law in the first place) and should therefore never take effect. As shown above, plaintiffs who challenge a statute on its face "do[] not have to await the consummation of threatened injury to obtain preventive relief." Babbitt, 442 U.S. at 298. Rather, they need only "demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." Id. See also Bland, 88 F.3d at 736-37. Plaintiffs' claims are therefore ripe for adjudication.

To the extent that Defendant Sheriff Arpaio argues that the "balance of equities" weighs in favor of allowing the law to take effect (Deft's Mot. at 7), this argument goes to the merits of Plaintiffs' request for relief, and is not a basis on which to advance dismissal of the complaint. In any event, in the related case of United States v. Arizona this Court ruled that the burdens to legal resident aliens and federal immigration policy imposed by sections of S.B. 1070 outweigh the state's interest in enforcing provisions that are likely preempted. (PI Order at 35.) Defendant's argument should therefore be rejected.

III. S.B. 1070 IS PREEMPTED BY FEDERAL LAW

Defendant Sheriff Arpaio's third argument is that S.B. 1070 is not preempted by federal law. This Court, however, has now ruled that several provisions of the statute likely are preempted. (See PI Order at 4 (enjoining Sections 3 and 6, and portions of Sections 2 and 5).)

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[2] Section 1981 is mentioned in the preliminary statement, which asserts that S.B. 1070 will lead to discrimination. (Am. Compl. at 3.)

As to the remaining provisions, since the Court's ruling was only preliminary it does not foreclose Plaintiffs' challenges to the rest of the statute. Defendant's motion should therefore be denied in its entirety.

Defendant's broad argument is based on the fundamentally erroneous premise that preemption applies "only when a state law conflicts with federal law." (Deft's Mot. at 7-9.) In reality, there are several circumstances under which federal law preempts state law. Under the well-established principles of federal preemption, a state law must be invalidated where it would (1) exercise an exclusively federal power; (2) burden or conflict in any manner with federal law; or (3) constitute even harmonious state regulation in a field that Congress has intended to occupy. DeCanas v. Bica, 424 U.S. 351, 354, 358 n.5 (1976). See also United States v. Arizona, PI Order at 10-11 (discussing different types of federal preemption).

Although the court need not reach the merits of Plaintiffs' allegations that virtually all provisions of S.B. 1070 are preempted by federal law at this early stage of the litigation, Plaintiffs have sufficiently stated a claim for purposes of Defendant's motion to dismiss.

A. Section 1 - State Legislature's Intent to Regulate Immigration is Preempted

Section 1 of S.B. 1070, for example, expresses the statute's intent partly as "to discourage and deter the unlawful entry and presence of aliens" in the United States. The power to regulate immigration, however, "is unquestionably exclusively a federal power." DeCanas, 424 U.S. at 354. It involves "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." Id. at 355. Any state statute that aims to regulate immigration is preempted by the Supremacy Clause. Id. at 354. In this case, Arizona's express intent to affect whether, when and how aliens may enter and remain in the United States intrudes on the federal power to regulate immigration and is therefore invalid under the Supremacy Clause.

Importantly, Arizona's stated policy also actually conflicts with the federal government's immigration policy and priorities. Section 1 describes Arizona's immigration policy as "attrition through enforcement" against anyone considered "unlawfully present" in the United States. The federal government's immigration policy, however, is to focus on "criminal aliens who pose a

public safety threat and employers who knowingly hire illegal labor." See DHS Statement on Arizona Immigration Law Ruling (July 28, 2010) (available at http://www.ice.gov/pi/nr/1007/100728washington.htm). In addition, Arizona's policy aims to criminalize "unlawful presence" without regard to factors deemed important to the federal government when enforcing immigration law, including eligibility for various forms of relief from deportation, humanitarian considerations (victims of trafficking or other crimes; refugees seeking political asylum; unaccompanied minors) and contributions to law enforcement (such as informants or witnesses to crimes). By adopting a monolithic immigration policy that resembles more a sledgehammer than a scalpel, the state's policy burdens and conflicts with the federal government's programs and priorities.

B. Sections 2, 3 and 6 - State "Immigration Enforcement" Is Preempted

In Sections 2, 3 and 6 of the statute, the Legislature grants local law enforcement powers over enforcement of federal immigration law, including the power to interrogate, arrest and detain aliens relative to their immigration status. These provisions, however, are preempted by federal law because the power to enforce federal immigration law is exclusively the province of federal authorities, as Congress has demonstrated through comprehensive legislation occupying the field of immigration enforcement. See 8 U.S.C. § 1357(g).

In Section 2, for example, Arizona requires local law enforcement officers "to determine the immigration status" of any person who is arrested. Officers are required to determine the person's immigration status "before the person is released" from local law enforcement custody, meaning that local officers are now given the power to continue detaining an individual solely based on the State's investigation into the person's federal immigration status—regardless of whether the officer would have authority to continue detaining the person under state law.

Section 3 creates a misdemeanor for not carrying certain immigration papers based on an arcane federal immigration provision, and Section 6 gives local law enforcement officers the

power to arrest without warrant those who have committed misdemeanors. Together, these provisions grant local law enforcement the power to arrest without warrant any individual believed not to be carrying immigration papers. Section 6 further authorizes local law enforcement to arrest individuals who have committed an offense "that makes the person removable from the United States," a complex determination under federal immigration law that is not defined in the state statute.

However, the powers to question an individual about his or her immigration status, to detain an individual pending a determination of immigration status, and to arrest those in violation of immigration laws are powers that Congress has expressly conferred to federal immigration officers and their agents. See 8 U.S.C. § 1226 (apprehension and detention of aliens); id. § 1231 (detention and removal of aliens ordered removed); id. § 1357(a)(1)-(2) (power of authorized immigration officers to interrogate and arrest aliens).

Arizona's attempt to confer these powers on local law enforcement cannot stand because it burdens and conflicts with federal law, and regulates the field of immigration law enforcement which Congress has plainly intended to occupy. DeCanas, 424 U.S. at 358 n. 5 (even when the Constitution itself does not preclude state regulation, federal regulation also preempts state regulation where "the nature of the regulated subject matter permits no other conclusion, or . . . the Congress has unmistakably so ordained."). See also United States v. Arizona, PI Order at 16-17, 18-20, 32-33 (finding that Section 2(B) would burden lawfully present aliens and U.S. Citizens as well as federal immigration enforcement and priorities; that Section 3 would stand as an obstacle to the uniform federal regulatory scheme; and that Section 6 would burden lawful residents and interfere with uniquely federal determinations).

C. INA Section 287(g) Demonstrates that Congress Has Occupied the Field of Immigration Law Enforcement

Moreover, Congress has expressly extended immigration law enforcement powers only to "officer[s] or employee[s] of the Service authorized under regulations prescribed by the Attorney General" and to no one else. 8 U.S.C. § 1357(a). Congress further enacted specific safeguards to be followed which do not appear in Arizona's statute, including, for example, that anyone detained for being in the United States in violation of any law or regulation "be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States." Id. § 1357(a)(2). Similarly, the power to request that an individual in local law enforcement custody remain detained pending a determination of the person's immigration status is limited to those charged with violating controlled substances laws, id. § 1357(d), and further limited by regulation to a period of 48 hours. 8 C.F.R. § 287.7(d). Given that the State's broad legislation does not conform to these safeguards and limitations, it burdens and conflicts with federal law. DeCanas, 424 U.S. at 358 n.5 ("[T]he Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties.")

In addition, under the Congressional statutory scheme, it is federal immigration agencies that decide whether to take an individual from state custody into immigration custody, not the other way around. S.B. 1070, however, requires local law enforcement agencies to transfer aliens to federal facilities and federal custody on their own initiative. See A.R.S. § 11-1051.D. This is tantamount to the State commandeering limited federal resources for its own purposes, and therefore conflicts with, and burdens, federal programs and priorities. If states were permitted to flood the immigration system based on their own immigration policies, the federal system would be overwhelmed and distracted from its priority of identifying and removing dangerous, criminal

aliens. The state's policies would undermine the federal government's ability to focus limited resources on national priorities.

Congress' intent to occupy the field of immigration law enforcement is manifested by its express, narrow delegation of some powers to State officers only under the authorization, direction and supervision of the federal agencies charged with enforcing the nation's immigration laws. See 8 U.S.C. § 1357(g). Hillsborough County, Fla. v. Automated Medical Laboratories, 471 U.S. 707 (1985) (even "in the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.") (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); E.P. Paup Co. v. Director, Office of Workers Compensation, 999 F.2d 1341, 1348 (9th Cir. 1993) ("Preemption may occur when Congress has expressly precluded state legislation, an expression of such intent can be inferred from the structure and purpose of the federal statute, or when state law conflicts with federal law or stands as an obstacle to achieving federal objectives.") (citation omitted)).

Under the statutory program commonly known as 287(g), a State entity may exercise federal immigration powers only where the Attorney General [or the Secretary of the Department of Homeland Security]:

- Determines the local entity is "qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States";
- Enters into a written agreement with the local entity authorizing that entity to exercise certain federal immigration powers, and specifying which powers may be exercised and by whom; the duration of the authorization; and which federal official will supervise and direct the State entity's exercise of these powers; and

- Ensures that the local officers have received training and are knowledgeable about enforcing federal immigration law.

8 U.S.C. § 1357(g)(1)-(3), (5).[3] Notably, Section 287(g) also provides that any local law enforcement officer "acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting *under color of Federal authority* for purposes of determining the liability, and immunity from suit . . . ." Id. § 1357(g)(8) (emphasis added).

D. Sections 5, 7-9 — State's New Crimes Targeting Immigrant Workers

In Sections 5 and 7-9 of S.B. 1070, Arizona criminalizes certain acts related to the employment of immigrant workers. Section 5, for example, criminalizes the hiring of day laborers, a predominantly if not exclusively immigrant population of workers. A.R.S. § 13-2928.A.-B. State regulation aimed at reducing employment opportunities based on alienage, however, are unconstitutional. See Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (invalidating state law banning aliens ineligible for citizenship from obtaining commercial fishing licenses). That targeting immigrant workers was the state's intent is plain from its own statement in Section 1, identifying the purpose of the statute's provisions as intended "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."

Section 5 also imposes criminal liability on any "unauthorized alien " who seeks employment, and would define "unauthorized alien" as one not permitted under federal law to

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[3] Just last year U.S. Immigration and Customs Enforcement withdrew some of the federal authority previously extended to Defendant Sheriff Arpaio under the 287(g) program in response to numerous civil rights complaints about the manner in which his office exercised those delegated powers. See Phoenix Business Journal, Federal rule change could nix Sheriff Arpaio's immigrant sweeps; he calls move 'amnesty', July 10, 2009 (available at http://www.bizjournals.com/phoenix/stories/2009/07/06/daily79.html) (last accessed July 26, 2010).

work in the United States. A.R.S. § 13-2928.C. An individual seeking employment without authorization, however, is conduct that is not criminal under federal law. Instead, Congress elected to impose criminal liability only on employers who knowingly hire unauthorized workers, and to impose civil, not criminal, penalties on unauthorized workers. See 8 U.S.C. § 1324a (imposing criminal liability on employers only); see also, e.g., id. § 1255(c) (rendering ineligible for adjustment of status to permanent resident any alien who has been employed without authorization). As these provisions burden and conflict with federal law, they are preempted and therefore cannot stand. DeCanas, 424 U.S. at 358 n.5. See also United States v. Arizona, PI Order at 27 ("Congress has comprehensively regulated in the field of employment of unauthorized aliens.").

Similarly, Section 5's prohibition on the transportation, harboring and inducement of aliens to enter or reside in Arizona (A.R.S. § 13-2929) intrudes on federal law already criminalizing that conduct under the circumstances and in the manner deemed appropriate by Congress. 8 U.S.C. § 1324(a)(1)(A)(ii)-(iv). Although the Court declined to preliminarily enjoin this provision in United States v. Arizona (PI Order at 29-30), the Court has not foreclosed the parties' challenge to that provision at the merits stage of the litigation. Plaintiffs here submit that this provision too will be shown to be preempted by federal law. Just as Section 3 of S.B. 1070 "aim[s] to create state penalties and lead to state prosecutions for violation of the federal law" related to alien registration (PI Order at 22), this provision of Section 5 aims to do the same with regard to the federal law on transportation and harboring of aliens.

Again, although the state provision limits its application to those who are "in violation of a criminal offense" (see also PI Order at 27, n. 18), the predicate offense could very well be the failure to carry alien registration documents as required by the new law, and with which some

plaintiffs would not be able to comply despite their lawful status.

As to a provision not yet enjoined by the Court, the predicate offense could also be S.B. 1070's prohibition on picking up a laborer in a manner that obstructs traffic, in violation of A.R.S. § 13-2928.A.-B. These provisions, considered in tandem, intrude on the federal government's comprehensive regulation of the field of employment of unauthorized aliens by permitting criminal prosecutions of co-workers or employers for picking up day laborers to drive them to a work site. The proviso that this activity "impede the normal movement of traffic" is so vague and overbroad as to make any driver who stops to pick someone up susceptible to prosecution.

D. Section 10 — State's New Crimes for Transportation and Harboring

As a final example, Section 10 also prohibits and imposes additional penalties on anyone who attempts to provide transportation to, or to "conceal, harbor or shield from detection," an alien in a vehicle "if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law." A.R.S. § 28-3511.A.4.-5. While paragraph A.4. (transportation) requires that the act be committed "in violation of a criminal offense," paragraph A.5. (conceal, harbor or shield) does not.

These provisions are vague and overbroad. For example, pastors could be prosecuted for knowingly transporting or harboring an immigrant who entered the country unlawfully but subsequently acquired legal status, such as political asylum, and was therefore not in the country illegally when he or she was transported or harbored. The provisions also intrude on federal law already criminalizing transportation and harboring of aliens under the circumstances and in the manner deemed appropriate by Congress. 8 U.S.C. § 1324(a)(1)(A)(ii)-(iii). Section 10 further conflicts with federal law by not providing any exemption for churches that the parallel federal

law does. Id. § 1324(a)(1)(C). Thus, Plaintiff churches and their members risk prosecution for harboring or providing transportation to parishioners who may lack legal status, or who may have lacked status at the time of entry but subsequently legalized.

Based on the above, it is plain that Plaintiffs have raised a substantial challenge to S.B. 1070 as preempted by federal law. Plaintiffs have therefore stated a claim on which relief can be granted and Defendant's motion should therefore be denied

IV. CLASS ACTION DESIGNATION

Lastly, Defendant Sheriff Arpaio argues that this action should not be designated as a class action. (Deft's Mot. at 9-10.) Defendant's argument on this point is premature, as Plaintiffs have not yet moved for class certification.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the court deny Defendant Sheriff Arpaio's Motion to Dismiss (DE 26) in its entirety. In the alternative, should the court identify deficiencies in Plaintiffs' Amended Complaint, Plaintiffs respectfully request leave to amend to cure those deficiencies. See Doe v. United States, 58 F.3d 494, 497 (9th Cir.1995) (if a complaint is dismissed for failure to state a claim, the court should grant leave to amend unless it determines that pleading could not possibly be cured by the allegation of other facts).

Dated: July 29, 2010

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2010 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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