

Case No. 10-16645

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

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. 2:10-cv-01413-SRB,
The Honorable Susan R. Bolton, District Judge

**BRIEF FOR *AMICI CURIAE* NATIONAL COUNCIL OF LA RAZA,
UNITED STATES HISPANIC CHAMBER OF COMMERCE, THE
HISPANIC NATIONAL BAR ASSOCIATION AND LOS ABOGADOS
HISPANIC BAR ASSOCIATION IN SUPPORT OF APPELLEE'S BRIEF
AND UPHOLDING THE DISTRICT COURT'S DECISION**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* the National Council of La Raza, the United States Hispanic Chamber of Commerce, the Hispanic National Bar Association, and Los Abogados Hispanic Bar Association of Arizona state that they are nonprofit corporations. They do not have parent corporations and no publicly held company owns any part of them.

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INTEREST OF THE *AMICI CURIAE*

Amici National Council of La Raza *et al.* submit this brief in support of Appellee's position as they are in full agreement with Appellee's constitutional argument that the district court's preliminary injunction should be upheld. By this brief, *amici*, three pre-eminent national Latino organizations and the Latino bar association for Arizona, seek to demonstrate how the enjoined provisions of S.B. 1070,¹ if implemented, will have a devastating impact on Latinos, who constitute 72% of foreign nationals in Arizona,² as well as on other foreign nationals in the State. If implemented, S.B. 1070 will disrupt the federal scheme to provide essential services to non-citizens without respect to immigration status, foster discriminatory animus against Latinos and subject Arizona's Latino community to repeated civil rights violations, particularly racial profiling.³ The preliminary injunction against specific provisions of S.B. 1070 should therefore be upheld.

¹ S.B. 1070 as used herein refers to S.B. 1070 as amended by H.B. 2162.

² United States Census Bureau, 2008 American Community Survey 1-Year Estimates (Sept. 30, 2010), http://factfinder.census.gov/servlet/CTTable?_bm=y&-context=ct&-ds_name=ACS_2008_1YR_G00_&-mt_name=ACS_2008_1YR_G2000_B06004I&-tree_id=308&-redoLog=true&-_caller=geoselect&-geo_id=04000US04&search_results=01000US&dataitem=ACS_2008_1YR_G2000_B05011.B05011_1_EST|ACS_2008_1YR_G2000_B06004I.B06004I_4_EST|ACS_2008_1YR_G2000_B06004I.B06004I_5_EST&-subj_keywd=foreign&-format=&-_lang=en.

³ Accordingly, this brief demonstrates that three of the criteria for a preliminary injunction are satisfied here: (1) the Plaintiffs will suffer irreparable harm, (2) the equities favor the Plaintiffs and (3) an injunction is in the public interest. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

ARGUMENT

As noted in Appellee's brief, "S.B. 1070, in effect, makes unlawful presence in the United States a state crime," something it is not under federal law. (Appellee Brief at 32.) Nor is there any question but that S.B. 1070 targets Arizona's Latino immigrant community.⁴ Thus, many Latinos likely feel that their mere presence in the state is criminalized by S.B. 1070. At the same time, many anti-Latino activists may feel that their sentiments are given legal sanction by S.B. 1070, and they may be encouraged to take action against Latinos. These concerns are particularly valid with regard to the provisions enjoined by the district court, and if those provisions are implemented, the consequences could be devastating for the State and the nation.

A. Overturning the Preliminary Injunction of Specific Provisions of S.B. 1070 Will Exacerbate the Chilling Effect S.B. 1070 Is Already Having on Undocumented Latino Immigrants, Dissuading Them from Sending Their Children to School or Accessing Essential Benefits to Which They Are Entitled

Lifting the injunction against Sections 2,⁵ 3,⁶ 5⁷ and 6⁸ of S.B. 1070 will have a

⁴ Jan Brewer, Governor of Arizona, Statement Upon Signing S.B. 1070 (Apr. 23, 2010), http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf ("We cannot delay while the destruction happening south of our international border creeps its way north.").

⁵ The provision of Section 2 of S.B. 1070 (Ariz. Rev. Stat. (hereafter "A.R.S.") § 11-1051(B)) that was enjoined is the portion requiring an officer "for any lawful stop, detention or arrest" to make a "reasonable attempt... to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released."

⁶ The provision of Section 3 of S.B. 1070 (A.R.S. § 13-1509) that was enjoined is the portion creating a crime for the "willful failure to complete or carry an alien registration document."

profound chilling effect on the ability of certain Latino children to obtain an education, a benefit that *amici* provide. These sections respectively require police to investigate the immigration status of stopped or detained persons they suspect to be in the United States unlawfully, require immigrants to keep registration papers on their person, make it illegal for undocumented immigrants to seek employment and authorize the warrantless arrests of persons suspected of having committed an offense that would make them removable from the United States. Even prior to S.B. 1070 taking effect, some Latino families had already begun to fear that these provisions would lead teachers, school administrators and police officers assigned to patrol schools to verify the immigration status of students and their parents.⁹ Parents of students in the

(cont'd from previous page)

⁷ The provision of Section 5 of S.B. 1070 (A.R.S. § 13-2928(C)) that was enjoined is the portion creating a crime for “an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.”

⁸ The provision of Section 6 of S.B. 1070 (A.R.S. § 13-3883(A)(5)) that was enjoined is the portion authorizing the warrantless arrest of a person where there is probable cause to believe the person “has committed any public offense that makes the person removable from the United States.”

⁹ Pat Kossan, *Schools See Immigrant Families Departing*, The Arizona Republic, May, 28, 2010, at A1; Sadie Jo Smokey, *Residents Demand That District Defy Migrant Law*, The Arizona Republic, May 8, 2010, at B1; Meena Hartenstein, *Arizona Hispanics Flee State in Droves Before New Immigration Law S.B. 1070 Takes Effect in July*, N.Y. Daily News, June 11, 2010, http://www.Nydailynews.com/news/national/2010/06/11/2010-06-11_arizona_hispanics_flee_state_before_new_immigration_law_takes_effect_in_july.html; Sergio Quintana, *Immigrants Might Leave Arizona But Not The Country*, NPR (Aug. 27, 2010), <http://www.npr.org/templates/story/story.php?storyId=129400993> (noting that many immigrants are fleeing to surrounding states such as New Mexico, which is seeing an increase in driver's license applications).

Phoenix Union High School District, for example, asked that the district prohibit police officers assigned to patrol its schools from complying with S.B. 1070's provisions.¹⁰

Additionally, public schools are required to document the residence and educational history of each new student, and, in fact, some state officials have recently gone so far as to set up checkpoints to check the residency of students before they are allowed to board school buses.¹¹ If this information reveals that the student's family recently immigrated from Mexico or a Latin American country, it could be viewed as evidence that the student or someone in her family is undocumented. The student or her family would be left in a state of uncertainty as to whether they would be detained, investigated or even arrested under the enjoined provisions of S.B. 1070's Sections 2, 3 or 6. Further, a separate provision of S.B. 1070 that was not enjoined makes it illegal for any governmental entity, such as a public school, to prohibit the transfer of immigration information to law enforcement agencies if permitted by federal law.¹² Latinos will know that the information obtained from schools could ultimately provide the basis to deport the student or someone in her family if the preliminary injunction of

¹⁰ Smokey, *supra* note 9 (noting that 193 schools in 63 districts have police officers, known as "school-resource officers," assigned to them with the help of federal funding).

¹¹ Craig Harris, *Ajo Students Must Prove Arizona Residency*, The Arizona Republic (Aug. 22, 2010), <http://www.azcentral.com/news/articles/2010/08/22/20100822ajo-schools-arizona-tom-horne.html#ixzz0xRXrHvgi>.

¹² Section 3 of S.B. 1070 (A.R.S. § 11-1051(F)) (subject to limitations, providing that "officials or agencies of this state and counties, cities, towns and other political subdivisions of this state may not be prohibited or in any way be restricted from sending, receiving or maintaining information relating to the immigration status").

the other sections is lifted.¹³ This risk could dissuade some Latino families from enrolling their children in school altogether, and Arizona schools already trail the national average in graduation rate.¹⁴

In fact, parents are already withdrawing their children from school. The Mesa School District has seen a drop of over 2,000 students compared to last year's enrollment.¹⁵ A charter school in Arizona run by NCLR affiliate Luz Social Services saw four Latino students withdraw early last summer because of S.B. 1070, while Balsz Elementary District lost 70 students in the month prior to the signing of S.B. 1070, an attrition rate that school officials say is unprecedented.¹⁶ Similarly, Alhambra elementary schools reported that the statute would drive out 200 to 300 students over

¹³ The Family Educational Rights and Privacy Act of 1974 ("FERPA") (codified at 20 U.S.C. § 1232g) establishes privacy guidelines for the education records of schools that receive federal funding. FERPA prohibits schools from releasing so-called "directory information," which includes the student's place of birth and the last educational institution attended by the student, without the student's consent. *See* 20 U.S.C. § 1232g(a)(5); 34 C.F.R. § 99.3. Even so, a newly enrolled Latino student's refusal to disclose this information to law enforcement agencies could be viewed as evidence that the student or one of her parents may be in this country without permission.

¹⁴ Eugene Scott, *Arizona High-School Graduation Rate Rises, but Trails U.S.*, *The Arizona Republic* (June 21, 2010), <http://www.azcentral.com/community/nephoenix/articles/2010/06/21/20100621-arizona-high-school-graduation.html>.

¹⁵ Michelle Reese, *Mesa School District Begins Discussion on How to Handle 2,400-Student Loss*, *East Valley Tribune* (Sept. 15, 2010), http://www.eastvalleytribune.com/local/article_a25e098c-bdcf-11df-8209-001cc4c03286.html (superintendent estimated that about two-thirds of the student loss may be associated with S.B. 1070).

¹⁶ Hartenstein, *supra* note 9.

this past summer.¹⁷

Administrators warn that this precipitous decline in enrollment will reduce the amount of funding these schools receive, without a commensurate reduction in fixed costs.¹⁸ These administrators are gravely concerned that this attrition will so exacerbate recent budget cuts that schools will be unable to provide basic educational services, such as tutoring and maintaining class sizes at appropriate levels.¹⁹ S.B. 1070 will reduce the resources available to all students remaining in these schools.

Should the enjoined sections of S.B. 1070 be allowed to take effect, Arizona's district and charter schools will likely see an even greater exodus of Latino students. This will affect the entire community, as the families that remain will see friendships severed, school sports teams bereft of players and other school activities deprived of participants. Indeed, parents at Balsz Elementary District report that their community is already unraveling because many Latino parents are afraid to participate in regular school activities, such as acting as crossing guards—a situation that jeopardizes the safety of all students who walk to school.²⁰ Moreover, this exodus may not be limited to students who are undocumented immigrants, for it will likely include students who are themselves U.S. citizens, but who have a parent or sibling who is undocumented. This result undermines the Supreme Court's ruling in *Plyler v. Doe*, where it held that states may not bar children from public schools solely because of their immigration

¹⁷ *Id.*

¹⁸ Kossan, *supra* note 9 (school administrators note that losing 10 students at one grade level will not necessarily reduce fixed costs, such as saving a teacher's salary or reducing the district's property maintenance costs); Ronald Hansen, *Will SB 1070 Help or Hurt Economy?*, The Arizona Republic, July 11, 2010, at A1.

¹⁹ Kossan, *supra* note 9.

²⁰ Kossan, *supra* note 9.

status or that of their parents.²¹

This chilling effect could extend to other public benefits that are provided regardless of immigration status. Congress has made certain essential federal public benefits available to non-citizens without respect to immigration status, benefits that *amici* help Latino immigrants obtain.²² For example, federal law entitles non-citizens, regardless of their immigration status, to receive emergency Medicaid assistance, participate in immunization programs and school breakfast and lunch programs, receive testing and treatment for communicable diseases and to receive certain forms of disaster relief.²³ Moreover, federal law makes certain additional benefits, such as Section 8 housing assistance, available to households that include undocumented immigrants.²⁴ In providing these benefits, Congress intended to prevent needless suffering and offer certain limited protections to all immigrants. But the chilling effect that S.B. 1070 is already having on Latino students could well extend to Latino families in desperate need of these congressionally authorized benefits if the preliminary injunction were reversed.

Additionally, despite statutory assurances, some Latinos simply will not report crimes to the police for fear of facing inquiries about their own immigration

²¹ 457 U.S. 202 (1982).

²² In passing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Congress made certain public benefits available to all U.S. residents, regardless of immigration status. *See* Pub. L. No. 104-193, § 411(b), 110 Stat. 2105.

²³ 8 U.S.C. §§ 1611(b)(1)(D), 1621(b)(1-4).

²⁴ *See* 24 C.F.R. § 5.520 (assistance for mixed households that include members who are ineligible for benefits is prorated according to the number of eligible members).

background.²⁵ This includes those here legally who may fear interacting with the police because they do not have proper documentation required by Section 3 of S.B. 1070. They may fear being detained and investigated under Section 2 of the law. They may even think that the police naturally view them as a suspicious or quasi-criminal class due to their ethnicity. Additionally, as the district court noted in its opinion, even those who are here legally may face erroneous warrantless arrest by police officers where the officer has a misunderstanding and lack of training regarding immigration laws.

Mistrust due to S.B. 1070 has already hampered police efforts and aided criminals. In one case, two men were bound, gagged and kidnapped from a Phoenix home in full view of a woman and a small child.²⁶ Fearing an inquiry into her immigration status, the woman delayed calling the police for over two hours and no witnesses were willing to cooperate in the investigation into the crime. The Phoenix Police Department has experienced at least a half dozen instances where victims have been reluctant to come forward and report a serious crime, such as kidnapping or rape, including some instances where victims have gone to California to report a crime instead of reporting the crime to Arizona law enforcement.²⁷ The resulting harm to the general public, and Latino neighborhoods in particular, cannot be exaggerated. If a large portion of the population fears and distrusts the police, the essential relationship between the police and those they are meant to protect is distorted and a valuable investigative tool is eliminated.

²⁵ Rudabeh Shahbazi, *Victims Reluctant to Help in Investigations Due to S.B. 1070*, ABC15 (Sept. 15, 2010), http://www.abc15.com/dpp/news/region_phoenix_metro/central_phoenix/victims-reluctant-to-help-in-investigations-due-to-sb-1070.

²⁶ *Id.*

²⁷ *Id.*

By effectively excluding certain Latino children from schools (and thereby from school lunch programs), by effectively denying certain impoverished Latinos access to emergency medical treatment and creating a rift between one ethnic group and the police, the enjoined provisions of S.B. 1070 would place the health and welfare of some of the Latino community's most vulnerable members at risk. In addition, by denying some portions of the Latino community access to public immunization programs and treatment for communicable diseases and effectively deterring reports of crime, these provisions of S.B. 1070 pose an acute risk to the health and safety of all Arizona residents—indeed, to the health and safety of all U.S. residents.

B. Lifting the Preliminary Injunction Against the Implementation of the Enjoined Provisions of S.B. 1070 Will Foster Discriminatory Animus Against Latinos, Drive Them out of the State and Disrupt Latino Businesses

Perhaps the most troubling aspect of S.B. 1070 is how it legitimizes, and will thus foster, discrimination against Latinos. As noted above, there is no question that S.B. 1070 targets Arizona's Latino immigrant community,²⁸ and it is clear the institutionalized racism embodied by S.B. 1070 has already had a significant polarizing effect.²⁹ This divisive influence will be sharpened if the enjoined provisions of S.B. 1070 take effect by creating the inference, and perhaps the expectation, that Latinos are here illegally because these provisions were

²⁸ Jan Brewer, Governor of Arizona, Statement Upon Signing S.B. 1070 (Apr. 23, 2010), http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf ("We cannot delay while the destruction happening south of our international border creeps its way north.").

²⁹ *State Must Find Way to Bridge Its Ethnic Divide*, The Arizona Republic (June 7, 2010), <http://www.azcentral.com/php-bin/clicktrack/email.php/9355456>.

intended to authorize and even require law enforcement to pursue immigration enforcement against a class of persons who are largely Latino.³⁰ Enforcement of these provisions will likely give rise to regular media reports of investigations, raids and arrests of Latinos, which will reinforce the stereotype that most Latinos lack lawful immigration status. These reports may further embolden anti-immigrant advocates, such as the Mohave County Minutemen,³¹ encouraging them to engage in their own citizen investigations against suspected undocumented immigrants.³²

³⁰ United States Census Bureau, *supra* note 2.

³¹ The Mohave County Minutemen's website describes the group as: "a neighborhood [sic] watch with the only goal to watch and report to our local, state and federal authorities every Illegal alien's activities in our communities. . . . Our weapons of choice are . . . cameras . . . and of course 'smoking' cell phones to turn the Illegals in! We are also a political action group. That means we are active in supporting good politicians who are against illegal alien invaders. Let's not call them illegal immigrants, please. And we will do everything we can . . . to make the political life miserable for the politician traitors on the payroll of foreign countries like Mexico." *See* Mohave Minutemen: What We Are and Are Not, <http://mohaveminutemen.com/whatweare.htm>. (emphasis added).

³² S.B. 1070, § 2, 2010 Ariz. Legis. Serv. Ch. 113 (to be codified at Ariz. Rev. Stat. § 11-1051(H)) ("A person who is a legal resident of this state may bring an action in superior court to challenge any official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy or practice that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law."). While this section was not enjoined and is not part of this appeal, the likely combined effect of the enforcement of the enjoined provisions and this section is problematic.

Section 5,³³ which was also enjoined by the district court, creates a potential employment burden for any person of Latino descent; specifically, needing to overcome the inference that he or she is attempting to work in violation of the law. Further, job applications could become the mechanism for investigations into whether the law has been violated.

The statute also fosters an insidious method of harassment. The provision of Section 2 of S.B. 1070 enjoined by the district court requires law enforcement agencies to investigate the immigration status of anyone subject to a "lawful stop, detention, or arrest" when these agencies are enforcing local ordinances, provided a reasonable suspicion exists that the detained individual is "unlawfully present."³⁴ This provision could transform the routine enforcement of local ordinances into carefully targeted immigration raids. For instance, a simple complaint to the police—whether legitimate or not—that a homeowner or business owner of Latino descent has violated local ordinances regarding excessive noise or parking restrictions could trigger an investigation into the owner's immigration status. The individual filing the original complaint can easily ensure that the investigating officers will be compelled to inquire into the owner's immigration status by making a few carefully selected allegations—again, whether legitimate or not—such as that the supposed violator recently arrived from Mexico, rarely speaks English or seems afraid to go out in public. Overturning the injunction as to this provision of S.B. 1070 will thus arm anti-immigrant advocates with a powerful weapon of intimidation and harassment, allowing them to report their Latino neighbors and co-workers—or anyone of Latino descent they happen to dislike—to the police.

³³ The provision of Section 5 of S.B. 1070 A.R.S. § 13-2928(C) that was enjoined is the portion creating a crime for an unauthorized alien to solicit, apply for, or perform work.

³⁴ S.B. 1070 § 2 (to be codified at Ariz. Rev. Stat. § 11-1051(B)).

The fear of such harassment is already severely hampering Arizona's Latino-owned businesses.³⁵ These businesses have recently seen a sharp decline in revenues because many in the Latino community are choosing either to flee the state altogether or just stay at home rather than risk being harassed by police every time they venture out to go shopping or dine at a restaurant. The impact of this decline in Latino business will be substantial. The 2004 total economic output attributable to immigrant workers was about \$44 billion (\$15 billion for naturalized workers and \$29 billion for non-citizens).³⁶ This already dire situation will likely

³⁵ Tim Gaynor, *Arizona Immigration Law Hits Latino Businesses*, Reuters (May 11, 2010), <http://www.reuters.com/article/idUSTRE64A4EY20100511> (noting that business at one Latino restaurant fell 40 percent after the law was signed, and that a car dealer is worried he will go out of business because Latinos are reluctant to drive cars out of fear they will be pulled over and interrogated about their immigration status); Emanuella Grinberg, *Latino Businesses Feel Pinch of New Immigration Law*, CNN (April 28, 2010), <http://www.cnn.com/2010/US/04/28/arizona.immigration/index.html?hpt=C1> (noting impact of S.B. 1070 on local businesses and including quote from taco shop owner Hector Manrique that on the Friday that S.B. 1070 was signed, "the streets just went empty. Usually on Friday, Saturday, and Sunday, we're packed. But this weekend was empty like I'd never seen it before"); Emanuella Grinberg, *Specter of Arizona Immigration Law Slowly Drains Economy*, CNN (July 28, 2010), http://articles.cnn.com/2010-07-28/us/arizona.immigration.economy_1_immigration-law-unemployment-rate-industrial-warehouse?_s=PM:US (noting that one owner of a seafood business catering to Latinos believes that the decrease in business is a result of the fact that Latinos have "effectively gone into hiding amid concerns that they may have to leave the state as soon as the bill becomes law").

³⁶ Judith Gans, *Immigrants in Arizona: Fiscal and Economic Impacts*, at 3, Udall Center for Studies in Public Policy, University of Arizona, (June 2008), <http://udallcenter.arizona.edu/immigration/publications/impactofimmigrants08.pdf> (this 2004 study also specifically notes that consumer spending in Arizona was about \$6.1 billion by naturalized citizens and \$4.4 billion by undocumented households).

deteriorate even more if the enjoined provisions of S.B. 1070 are permitted to take effect. When the Maricopa County Sheriff's Office ("MCSO") engaged in a three-day immigration raid in 2009, the city of Mesa became a "ghost town," as businesses were forced to close because workers "stayed home to avoid being pulled over and questioned for documents."³⁷ Nor are these economic consequences limited to businesses that rely on immigrants because, in fact, immigrants represent a net financial benefit to the state's economy in general.³⁸ As a result, permitting the enjoined provisions of S.B. 1070 to go into effect could severely disrupt Arizona's economy at a time when Arizona's residents can ill afford it.

At some point, Latinos targeted by frivolous complaints and harassment may yield to the pressure and leave the State, if only to avoid harassment, and this result cannot be squared with the doctrine of preemption.³⁹ In fact, press reports indicate that

³⁷ Valeria Fernández, *Profiling Persists Despite Revamped Guidelines*, Inter Press Service (July 30, 2009), <http://www.ipsnews.org/news.asp?idnews=47894>.

³⁸ Gans, *supra* note 37 (stating that "the total state tax revenue attributable to immigrant workers was an estimated \$2.4 billion (about \$860 million for naturalized citizens plus about \$1.5 billion for non-citizens). Balanced against incremental fiscal costs of \$1.4 billion for education, health care, and law enforcement, immigrants in Arizona generated a net 2004 fiscal contribution of about \$940 million toward services such as public safety, libraries, road maintenance, and other areas. Because the incremental costs incurred by immigrants in these areas are difficult to measure directly, they are not included in this report.")

³⁹ Similarly, the Third Circuit recently held that the federal government preempts city housing provisions where the purpose of the provisions is to ensure that undocumented immigrants reside somewhere other than the city enacting the provisions. The rationale behind this holding is that the provisions seek to prohibit residency based on immigration status. *Lozano v. City of Hazleton*, __F.3d__, No. 07-3531, 2010 WL 3504538, at *14 (3d Cir. Sept. 9, 2010).

both legal and undocumented Latinos are already leaving Arizona.⁴⁰ If the enjoined provision of Section 2 of S.B. 1070 takes effect, Latinos will live in an Orwellian world, fearful that every minor dispute with a neighbor, co-worker or acquaintance could trigger a report to the police or other law enforcement agency. If the enjoined provisions of Sections 3 and 6 take effect, Latinos will likely fear walking in the streets without their papers and wonder whether they will unjustly face warrantless arrest by police who are untrained in the complexities of immigration law. Lastly, if the enjoined provision of Section 5 takes effect, then every job application submitted could be the catalyst for an investigation into whether a Latino has violated state law.

Of course, the consequences of these provisions are burdens that Latinos alone will bear. The approximately 500,000 Canadian "snowbirds"⁴¹ who spend their winters in Arizona each year certainly will not be subjected to the demeaning stops, arrests and inquiries Latinos will endure if the enjoined provisions of S.B. 1070 takes effect.

⁴⁰ Alan Gomez, *Hispanics Flee Arizona Ahead of Immigration Law*, USA TODAY, June 9, 2010, http://www.usatoday.com/news/nation/2010-06-08-immigration_N.htm ("figures, reports from school officials, businesses and individuals indicate worried Hispanics — both legal and illegal — are leaving the state in anticipation [of S.B. 1070]"); Gaynor, *supra* note 36 (noting that many Latinos have left the state, leading some Latino business owners to consider doing the same); Quintana, *supra* note 9 (noting that states surrounding Arizona have seen an influx of illegal immigrants).

⁴¹ Kerry Fehr-Snyder, *Exchange Rate Treating Canadians Kindly*, The Arizona Republic, Jan. 25, 2008, at 4 (reporting that, in 2006, more than 495,000 Canadians spent their winter in Arizona; these individuals are known colloquially as "snowbirds").

C. Lifting the Preliminary Injunction and Implementing the Enjoined Provisions of S.B. 1070 Will Subject Latinos to Racial Profiling and Other Civil Rights Violations

Prior experience teaches that it is often a "disastrous and expensive" mistake to involve local police in immigration enforcement because such efforts may foster widespread racial profiling and other civil rights violations.⁴² Recent history even provides significant evidence for why the provisions enjoined by the district court will inevitably lead to instances of discrimination if they are implemented. The fact is that even under the best of circumstances and with federal oversight and training, some errors still occur. For example, the Immigration and Nationality Act § 287(g) allows the U.S. Attorney General to delegate immigration enforcement functions to specified state and local law enforcement agencies.⁴³ A recent report by the Department of Homeland Security's ("DHS") Office of the Inspector General found that many state and local agencies enrolled in the 287(g) program are being investigated or sued for civil rights violations.⁴⁴ In fact, two such lawsuits have been filed against the

⁴² Craig E. Ferrell, Jr., *Immigration Enforcement: Is It a Local Issue?*, 71 *The Police Chief*, No. 2, Feb. 2004; *see also* ACLU of North Carolina and UNC Chapel Hill Immigration & Human Rights Policy Clinic, *The Policies and Politics of Local Immigration Enforcement Laws—287(g) Program in North Carolina*, 43-47 (Feb. 2009), <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>; Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, 4-5 (Sept. 2009), http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf (finding "compelling evidence" of "aggressive" racial profiling of Hispanics by Irving, TX police officers after they began participating in the criminal alien program).

⁴³ 8 U.S.C. § 1357(g).

⁴⁴ The report describes how one state agency improperly engaged in "random street operations" to target "minor offenses and violations of local ordinances," even though the 287(g) program does not allow state and local agencies to

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MCSO,⁴⁵ which led DHS to strip the MCSO of its authority to conduct immigration screenings in the field.⁴⁶

Even the intensive federal training and oversight that law enforcement agencies are required to undergo when they join the 287(g) program clearly did not prevent the MCSO from engaging in racial profiling.⁴⁷ Nor did it prevent several other local law enforcement agencies that participated in the 287(g) program from doing the same.⁴⁸

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perform such operations. In addition, the report found incidents of immigrants being arrested for federal immigration violations without prior arrests on state or local charges, which is prohibited under the 287(g) program. See U.S. Department of Homeland Security, Office of Inspector General, *The Performance of 287(g) Agreements* (Mar. 2010), http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_10-63_Mar10.pdf.

⁴⁵ J.J. Hensley, *Arpaio May Lose Some Immigrant Authority*, The Arizona Republic, Oct. 3, 2009, at 1. One of the lawsuits filed against the MCSO was brought by Manuel Nieto, Jr., a U.S. citizen who was detained in front of his family's auto repair shop after police heard him listening to music with Spanish lyrics. See Daphne Eviatar, *Feds Fail to Prevent Police Abuse*, The Washington Independent (Mar. 9, 2009), <http://washingtonindependent.com/32926/scrutiny-of-immigration-policy-finds-wide-spread-abuse>.

⁴⁶ *Id.*

⁴⁷ The 287(g) program currently requires local law enforcement officers to receive four weeks of training from Immigration and Customs Enforcement officers on immigration law and procedures. The U.S. Immigration and Customs Enforcement Academy sets standards and testing for the program, as well. See U.S. Department of Homeland Security, Office of Public Affairs, *Section 287(g) Immigration and Nationality Act Fact Sheet*, 3 (Aug. 2, 2010), http://www.ice.gov/pi/news/factsheets/section287_g.htm.

⁴⁸ Jennifer M. Chacon, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 Duke L.J. 1563, 1618 (2010) ("[R]acial profiling . . . has a long history of surfacing when local law enforcement becomes engaged in immigration enforcement."); Tennessee

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None of this is to suggest that the 287(g) program is necessarily unworkable, and since these incidents occurred, the federal agency has undertaken corrective efforts, but these incidents demonstrate the vital importance of training and continuous oversight by federal authorities to ensure that local law enforcement agencies do not abridge core constitutional protections when they attempt to enforce immigration laws. Yet, if the enjoined provisions of S.B. 1070 are allowed to take effect, then Arizona law enforcement personnel will dive into the area of immigration enforcement without federal oversight, training or control.

Nor is the Appellant's counterargument persuasive. They contend in their brief that the true focus of the statute is on "illegal aliens" and that those here legally will not be burdened, but merely having a singular goal is not enough to pass judicial review. (Appellant Brief at 28-9.) In fact, that singular focus raises the specter that the state will upset the balance created by Congress. As the Third Circuit recently found in the immigration and employment context, states attempting to enforce federal immigration policies often fall into "[r]egulatory 'cherry picking,'" focusing on one aspect of congressional intent, but ignoring the "federal government's careful balancing of

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Immigrant and Refugee Rights Coalition, *Arrests for No Drivers License by Ethnicity and Race: A Comparison of May-July 2006 to May-July 2007*, 1 (July 31, 2007), <http://tirrc.bondwaresite.com/photos/File350.pdf> (noting a 50 percent increase in arrests of Latinos for driving without a license after implementation of 287(g) program); Daniel C. Volk, *Police Join Feds to Tackle Immigration*, Stateline.org (Nov. 27, 2007), <http://stateline.org/live/details/story?contentId=259949> (58 percent of motorists stopped by 287(g)-trained officers were Latino even though Latinos make up less than two percent of the local population); Andria Simmons, *Is Sheriff a Hero or Racial Profiler?*, Atlanta J. & Const., Oct. 12, 2009, at 1A (noting numerous accounts of racial profiling by Atlanta officers).

objectives."⁴⁹ Such a haphazard approach "is not constitutionally permitted," not even in areas where states have enjoined traditional enforcement authority, such as employment.⁵⁰ The misguided results often lead to discrimination and frustration of congressional purpose.⁵¹ This illustrates the need for federal guidance and oversight of state immigration enforcement programs and not, as some in Arizona law enforcement have proposed, "immigration posses" composed of armed citizens.⁵² Without the appropriate training and oversight "the federal government's careful balancing of objectives" will be upset and violations of individual rights will result. Indeed, Arizona's law enforcement agencies have already admitted that such violations are all but unavoidable.⁵³

⁴⁹ *Lozano v. City of Hazleton*, __F.3d__, No. 07-3531, 2010 WL 3504538, at *39-40 (3d Cir. Sept. 9, 2010).

⁵⁰ *Id.* *Hazleton* is also a useful guide for state attempts to regulate immigration using employment laws, such as Section 5, which was enjoined by the district court.

⁵¹ *Id.*

⁵² Aurelia Fierros, *Arpaio Will Hunt Down Illegals Helped by Armed Civilians*, Examiner (Sept. 16, 2010), <http://www.examiner.com/border-and-immigration-in-los-angeles/arpaio-will-hunt-down-illegals-helped-by-armed-civilians> (discussing how the MCSO "will implement a plan for a volunteer armed force of citizens to help with enforcement of illegal immigration and human smuggling laws").

⁵³ Michael Sheridan, *Cops: Arizona's Anti-Illegal Immigration Law Mandates 'Racial Profiling'*, N.Y. Daily News (May 18, 2010), http://www.nydailynews.com/news/national/2010/05/18/2010-05-18_police_arizonas_antiillegal_immigration_law_mandates_racial_profiling.html (noting that Phoenix Police Chief Jack Harris has stated "[w]hen you get a law that leads a state down this path, where the enforcement is targeted to a particular segment of the population, it's very difficult not to profile"); Forrest Carr & Steve Nunez, *The Dupnik Rebellion: Pima's Top Cop Says 'No' to SB*

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The enjoined provisions of S.B. 1070 also threaten Arizona's Latino residents with a heightened risk of physical violence. Studies demonstrate that hate crimes against immigrants tend to rise sharply when anti-immigrant laws like S.B. 1070 are enacted.⁵⁴ For example, a dramatic increase in violence against Latinos occurred following passage of California's Proposition 187.⁵⁵ Evidence that S.B. 1070 is having similar effects is already beginning to emerge. Two men wearing camouflage outfits shot at and wounded several Latino immigrants near Rio Rico,⁵⁶ and the murder of a third-generation, native-born American Latino man in Phoenix has been linked to S.B. 1070's passage.⁵⁷ Allowing the enjoined provisions to take effect would exacerbate

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1070, KGUN-ABC News (Apr. 27, 2010), <http://www.kgun9.com/Global/story.asp?S=12386648> (noting officers will inevitably resort to racial profiling).

⁵⁴ Leadership Conference on Civil Rights, *Cause for Concern: Hate Crimes in America* (1997), http://www.empowermentzone.com/hate_rpt.txt.

⁵⁵ *Id.* California Proposition 187 was a 1994 ballot initiative designed to create a state-run citizenship screening system in order to prohibit illegal immigrants from using health care, public education, and other social services in California. The law was struck down. See *LULAC v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997).

⁵⁶ Brian Pryor, *Group of Illegal Immigrants Shot at, 1 Wounded Near Rio Rico*, KGUN9 (June 14, 2010), <http://www.kgun9.com/Global/story.asp?S=12648810>.

⁵⁷ Michael Ferraresi, *Slain Hispanic's Family Wants Case Called Hate Crime*, *The Arizona Republic*, May 15, 2010, at B3. The Southern Poverty Law Center, an organization that tracks and exposes hate crimes, has noted a general increase in violence against Latinos during the summer of 2010. Larry Keller, *Anti-Latino Hate Crimes Seen from Baltimore to Arizona*, *HateWatch* (Aug. 23, 2010), <http://www.splcenter.org/blog/2010/08/23/anti-latino-hate-crimes-seen-from-baltimore-to-arizona/> ("In June, the Maricopa County Attorney's Office in Phoenix said that the murder of a Mexican-American man a month earlier was a hate crime. Gary Thomas Kelley is charged with second-degree murder in the

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these problems by encouraging the cultural belief that all Latinos are undocumented immigrants and criminals.

CONCLUSION

Overturing the preliminary injunction of the relevant portions of Sections 2, 3, 5 and 6 of S.B. 1070 will impose irreparable harm on Arizona's Latino community by denying them access to essential benefits, subjecting them to pervasive harassment and racial profiling and threatening their physical safety. The untested nature and pernicious effects of these provisions pose too great a risk to Arizona's Latino community to be allowed to take effect without full judicial review. *Amici* therefore respectfully request that the district court's preliminary injunction be upheld on appeal.

Respectfully submitted,

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killing of Juan Varela. He also is charged with menacing Varela's brother with a gun. 'Hurry up and go back to Mexico or you're gonna die,' Kelley shouted at Varela before shooting him in the neck, police said. The dead man was a third-generation, native-born American.").

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, that the attached amicus brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word count feature of the word processing program used to prepare this brief, contains 3,273 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

Dated September 30, 2010

S/ STEPHANIE FLEISCHMAN CHERNY
STEPHANIE FLEISCHMAN CHERNY
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2010, I electronically filed a copy of the foregoing Brief *Amici Curiae* using the ECF System for the Court of Appeals for the Ninth Circuit, which will send notification of that filing to all counsel of record in this litigation.

Dated September 30, 2010

S/ STEPHANIE FLEISCHMAN CHERNY
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Case No. 10-16645

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

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. 2:10-cv-01413-SRB,
The Honorable Susan R. Bolton, District Judge

**MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* OF
NATIONAL COUNCIL OF LA RAZA, UNITED STATES HISPANIC
CHAMBER OF COMMERCE, THE HISPANIC NATIONAL BAR
ASSOCIATION AND LOS ABOGADOS HISPANIC BAR ASSOCIATION
IN SUPPORT OF APPELLEE'S BRIEF AND UPHOLDING THE
DISTRICT COURT'S DECISION**

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[†] NOT ADMITTED TO PRACTICE IN THIS JURISDICTION

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Circuit Rule 29(b), Movants, National Council of La Raza, United States Hispanic Chamber of Commerce, The Hispanic National Bar Association and Los Abogados Hispanic Bar Association respectfully move the Court for leave to participate as *amici curiae* and file the accompanying brief in support of Appellee, the United States of America.

INTEREST OF THE MOVANTS

The National Council of La Raza

The National Council of La Raza ("NCLR")—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations ("CBOs"), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico and the District of Columbia. NCLR works through two primary, complementary approaches: (1) capacity-building assistance to support and strengthen Hispanic CBOs, especially those that serve low-income and disadvantaged Latinos; and (2) applied research, policy analysis, and advocacy to encourage adoption of programs and policies that equitably serve Hispanics. NCLR's seventeen Arizona affiliates (the "Affiliates") will be adversely

affected by the provisions of Arizona Senate Bill 1070 ("S.B. 1070")¹ enjoined by the district court in numerous ways. First, it will create and/or exacerbate barriers to the Affiliates' efforts to provide essential health, education and social services to Hispanics, particularly to the citizens and lawful residents of Arizona who happen to reside in households that include undocumented persons. Second, it will require the Affiliates to divert resources from their core programs to educate and assist individuals affected, or put at risk, by the enjoined provisions of S.B. 1070. Third, NCLR will be required to divert scarce resources both to create new educational materials and policy analysis regarding these provisions of S.B. 1070, and to assist the Affiliates in developing and implementing programs to educate and assist those affected by the law.

The United States Hispanic Chamber of Commerce

Founded in 1979, the United States Hispanic Chamber of Commerce ("USHCC") actively promotes the economic growth and development of Hispanic entrepreneurs and represents the interests of nearly 3 million Hispanic-owned businesses in the United States that generate nearly \$400 billion annually. It also serves as the umbrella organization for more than 200 local Hispanic chambers in the United States and Puerto Rico. The USHCC understands the frustration over a broken immigration system, but fears that the enjoined provisions of S.B. 1070, by

¹ S.B. 1070 as used herein refers to S.B. 1070 as amended by H.B. 2162.

encouraging racial profiling of Latinos, will jeopardize community safety and the speedy recovery of our economy. The USHCC is particularly concerned about the added burdens that our merchants and entrepreneurs will face in the course of doing business when forced to defend their right to contribute to our society.

Hispanic National Bar Association

The Hispanic National Bar Association ("HNBA") is a nonprofit, non-partisan, national professional association that represents the interests of all attorneys, judges, law professors, legal assistants and law students of Hispanic descent in the United States and Puerto Rico. The HNBA has 39 affiliated bars in various states across the country, including Arizona. The HNBA's continuing mission is to improve the study, practice and administration of justice for all Americans by ensuring the meaningful participation of Hispanics in the legal profession. The HNBA was founded in 1972 to promote equal justice for all Americans by advancing the participation of Hispanics in the legal profession. While it is a voluntary bar association and not a civil rights organization, the HNBA also serves as the voice of the broader Hispanic community on issues that significantly affect Latinos' interactions with the legal system. As such, the HNBA has a vested interest in the equal opportunity of Latinos to be free from unlawful discrimination and harassment.

Members of the HNBA and our Arizona affiliate organization, Los Abogados Hispanic Bar Association, who practice in Arizona, fear that if the enjoined provisions of S.B. 1070 are implemented, it will inhibit them from fully serving clients and vindicating their clients' legal rights. By causing many individuals of Hispanic descent to flee the State, these provisions of S.B. 1070 will cause cases to be either delayed, held in abeyance or left unprosecuted, thereby denying HNBA's clients a timely adjudication of their claims and rights.

Los Abogados Hispanic Bar Association of Arizona

Los Abogados Hispanic Bar Association of Arizona ("Los Abogados") is the Hispanic Bar Association of the State of Arizona. The primary purposes of Los Abogados are: (1) to enhance the quality of legal services provided to the community; (2) to educate the Hispanic community regarding its rights and remedies, as well as the availability of legal services; (3) to receive and administer funds for the promotion and advancement of the Hispanic legal profession within the State of Arizona; and (4) to aid in gathering, exchanging and disseminating facts and information relating to the business methods within the Hispanic legal profession. Los Abogados pursues these goals with a view of promoting the business of the Hispanic legal profession within the State of Arizona. Los Abogados has a particular interest in this lawsuit because its members represent Latinos in the State of Arizona whose lives and legal representation are directly

affected by the enjoined provisions of S.B. 1070.

**THE *AMICUS* BRIEF IS DESIRABLE AND PRESENTS MATTERS
RELEVANT TO THE DISPOSITION OF THE CASE**

Amici wish to bring to the Court's attention additional legal arguments and factual perspectives to buttress Appellee's arguments that the district court's preliminary injunction of provisions of S.B. 1070 should be upheld on appeal. The proposed brief demonstrates that, if allowed to take effect, the enjoined provisions of S.B. 1070 will severely disrupt the federal scheme to provide essential services to undocumented immigrants, including emergency medical care and school lunch programs for children. Perhaps more importantly, the proposed brief demonstrates how the enjoined provisions of S.B. 1070 will deprive undocumented Latino children—as well as Latino children who are themselves citizens or legal residents, but whose parents are undocumented—of a primary and secondary education, in violation of the Supreme Court's holding in *Plyler v. Doe*, 457 U.S. 202 (1982). The proposed brief further demonstrates that reversing the district court's injunction of provisions of S.B. 1070 will foster discriminatory animus against and harassment of Latinos, will threaten the physical safety of Latinos residing in Arizona, and will subject Arizona's Latino community to racial profiling and other civil rights violations.

CONCLUSION

NCLR *et al.* seek leave to provide the Court with these additional perspectives on the harm that the enjoined provisions of S.B. 1070 will impose if they are allowed to take effect.

Dated: September 30, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users.

Dated September 30, 2010

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