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15 UNITED STATES DISTRICT COURT
16 DISTRICT OF ARIZONA

18 Friendly House; et al.,
19
20 Plaintiffs,
21
22 v.
23 Michael B. Whiting; et al.,
24 Defendants.

No. CV 10-1061-PHX-SRB

**BRIEF OF AMICUS CURIAE
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

25 **PRELIMINARY STATEMENT**

26 Because freedom of movement is essential to a smoothly functioning federal
27 system, the right to travel has long been recognized as a fundamental constitutional right.
28 States cannot create "patchworks" of regulation that infringe that right, particularly in an

1 area such as immigration, that is already regulated by the federal government. Yet Senate
 2 Bill 1070 (“S.B. 1070”) does just that. It creates flawed presumptions, which are unique
 3 to Arizona and have no precedent in any state or federal law, regarding whether
 4 individuals are “not unlawfully present” in the United States. As a result, United States
 5 citizens, most notably (but not exclusively) citizens residing in New Mexico (with which
 6 Arizona shares a lengthy border), will not be presumed to be “not unlawfully present” in
 7 the United States if they are stopped, arrested or detained by Arizona law enforcement.
 8 The practical effect of this legislation is that certain groups of citizens will be forced to
 9 either carry additional documentation to prove their legal presence in their own country
 10 or face the risk of a lengthy detention (a risk not faced by other citizens). Because S.B.
 11 1070 burdens the right of citizens to travel in and through Arizona, it cannot stand.

12 **ARGUMENT**

13 **I. STATE ACTION THAT HINDERS FREE MOVEMENT BETWEEN** 14 **STATES IMPLICATES THE FUNDAMENTAL RIGHT TO TRAVEL.**

15 “‘The constitutional right to travel from one State to another . . . occupies a
 16 position fundamental to the concept of our Federal Union. It is a right that has been
 17 firmly established and repeatedly recognized.’” *Shapiro v. Thompson*, 394 U.S. 618, 630
 18 (1969) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)), *overruled on other*
 19 *grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). The “right to travel” is rooted in
 20 multiple sources, including the Commerce Clause, the Privileges and Immunities Clause
 21 of Article IV § 2, the Equal Protection Clause, and the Privileges and Immunities Clause
 22 of the Fourteenth Amendment. *Att’y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 902-
 23 05 (1986) (plurality opinion).

24 One component of the right to travel is the right to free interstate movement.
 25 *Saenz v. Roe*, 526 U.S. 489, 500-01 (1999). Article IV of the Articles of Confederation
 26 explicitly provided that “the people of each State shall have free ingress and regress to
 27 and from any other State.” *United States v. Guest*, 383 U.S. at 758. The right to travel
 28

1 among the states is “so elementary [that it] was conceived from the beginning to be a
2 necessary concomitant of the stronger Union the Constitution created.” *Id.*

3 Because the right to travel is fundamental, any statute placing limits on it “must be
4 judged by the stricter standard of whether it promotes a *compelling* state interest.”
5 *Shapiro*, 394 U.S. at 638 (emphasis added). Further, the means the State uses to promote
6 its interest must be narrowly tailored and the “heavy burden of justification is on the
7 State.” *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). Budgetary justifications (*Saenz*,
8 526 U.S. at 506; *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262-263 (1974)),
9 and minimizing fraud and encouraging early entry into the labor force (*Shapiro*, 394 U.S.
10 at 634-39) do not satisfy this heavy burden.

11 The right to travel protects against inconsistent regulation by states of areas that
12 are exclusively or primarily areas of federal concern. *See, e.g., Edwards v. California*,
13 314 U.S. 160, 172-73 (1941). In *Edwards*, for example, the Supreme Court rooted the
14 right to travel in the Commerce Clause and held that California’s Indigent Act, which
15 criminalized the knowing transportation of out-of-state indigents into California, was an
16 “unconstitutional barrier to interstate commerce” because it prevented free movement of
17 citizens across California’s borders. *Id.* In so holding, the Court noted that “[t]he
18 prohibition against transporting indigent non-residents into one State is an open invitation
19 to retaliatory measures” and that “it would be a virtual impossibility for migrants and
20 those who transport them to acquaint themselves with the peculiar rules of admission of
21 many States.” *Edwards*, 314 U.S. at 175-76. S.B. 1070 raises similar concerns.

22 **II. SENATE BILL 1070 VIOLATES THE CONSTITUTIONAL RIGHT TO** 23 **TRAVEL.**

24 **A. Senate Bill 1070 Creates Flawed Presumptions Regarding Whether** 25 **Citizens Are “Not Unlawfully Present” in the United States.**

26 S.B. 1070 (as modified by H.B. 2162), requires that, during “any lawful stop,
27 detention or arrest” in the enforcement of any “law or ordinance of a county, city or town
28 or this state,” law enforcement officers with a “reasonable suspicion” that an individual is
unlawfully present in the United States must determine the immigration status of that

individual. S.B. 1070 § 2, as modified by H.B. 2162 § 3, Ex. 1 to Plaintiffs' Compl. (Dkt. # 1-2). A presumption that a person is "not unlawfully present" is afforded to those individuals who can provide one of the following four forms of identification:

- a valid Arizona driver's license;
- a valid Arizona identification card;
- a "valid tribal enrollment card or other form of tribal identification"; or
- "[i]f the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification." *Id.*

S.B. 1070 is silent as to what happens when an individual receives the benefit of a presumption; the extent to which a law enforcement officer can further investigate immigration status in those circumstances is unknown.

Equally troubling is S.B. 1070's silence as to what happens to those individuals who do not get the benefit of the presumption. Although the law requires a law enforcement officer to make a "reasonable attempt . . . when practicable" to determine immigration status, the statute says nothing about the standards and practices to be used. Because federal law contains no analogous "presumptions" and Arizona is unique among states in creating such "presumptions," no guidance exists as to how the law will be enforced or interpreted. Someone who does not have documentation of legal status is subject to the discretion of the particular law enforcement officer.¹ In any event, those without the enumerated forms of identification will receive additional, and undoubtedly inconsistent, scrutiny during any stop, detention or arrest.

¹ It is no answer for Defendants to promise that the burden on such individuals will be minimal because law enforcement officers will act reasonably. *See United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

B. Not All Driver's Licenses or Tribal Identification Cards Establish Proof of Legal Presence.

Not all driver's licenses will entitle a citizen to the presumption that he or she is "not unlawfully present" because not all states require proof of legal presence to issue a license. Nevertheless, a driver's license is the primary form of identification for most people and is usually the only form of identification that a person carries. It is an acceptable form of identification for air travel in all 50 states. [Transportation Security Administration, *ID Requirements for Airport Checkpoints*, available at http://www.tsa.gov/travelers/airtravel/acceptable_documents.shtm (Barr Ex. 1)²] S.B. 1070, however, produces the absurd situation in which certain groups of citizens have sufficient identification to permit them to fly throughout the United States (including to and from Arizona), but, upon arriving in Arizona, have insufficient identification to establish their lawful presence in the United States.

As set forth in Plaintiff's Motion (at 25-26 (Dkt # 70)), New Mexico and Washington do not require proof of legal presence to obtain a driver's license.³ N.M. Stat. Ann. § 66-5-9(B); N.M. Admin. Code § 18.19.5.12(D); Wash. Rev. Code 46.20.035(3). Individuals from those states who are stopped, detained or arrested in Arizona will—unlike residents of any other state—be unable to avail themselves of the presumption that they are "not unlawfully present" despite having valid driver's licenses.

Similarly, there are no uniform requirements for issuance of tribal identification cards. Each tribe (whether federally recognized or not) establishes its own enrollment criteria and sets its own standards for issuance of tribal identification. [Dep't of Interior, *Tribal Enrollment Process*, available at <http://www.doi.gov/tribes/enrollment.cfm>]

² Exhibits attached to the Declaration of Counsel Daniel C. Barr (dkt. # 163) are referred to as "Barr Ex. ____."

³ Utah issues a special document, a "Driving Privilege Card," which acts as authorization to drive (but not legal identification) for those individuals who are unable to provide proof of legal presence. Utah Code Ann. § 53-3-207(7)(a). Utah's Driving Privilege Card is visually distinct from its regular licenses. *Id.*

renderforprint=1& (Barr Ex. 2)] As just two examples from the hundreds of tribes in the United States:

- The Karuk Tribe of California requires only that members fill out a basic form (including name, address, date of birth, and physical description) to obtain a tribal identification card. [Karuk Tribe of California, *Instructions for Obtaining Tribal ID Cards*, available at, <http://www.karuk.us/karuk2/departments/tribal-enrollment> (Barr Ex. 3)]
- The Nipmuc Nation of Massachusetts (which is not federally-recognized) allows tribal identification cards for individuals under age 18 to be issued simply upon submission of a letter from the legal, custodial parent. [Nipmuc Nation, *Tribal ID Cards*, available at http://www.nipmucnation.org/index.php?option=com_content&view=article&id=67:tribal-id-cards&catid=60&Itemid=57 (Barr Ex. 4)]

S.B. 1070 grants *anyone* with a tribal identification card (including, based on the lack of any limiting language in the statute, international visitors with tribal identification) the benefit of the presumption, regardless of the proof that must be shown to receive such a card.

C. S.B. 1070 Imposes An Unconstitutional Burden on Interstate Travel.

All citizens of the United States who are present in Arizona for any reason—regardless of their state of residence—are entitled “to be treated as a welcome visitor rather than an unfriendly alien when temporarily present” in Arizona. *Saenz*, 526 U.S. at 500. S.B. 1070 creates two classes of United States citizens—those who are entitled to the presumption that they are not unlawfully present and those who are not entitled to that presumption. Those who are not entitled to the presumption will be treated not as “welcome visitors,” but as “unfriendly aliens.”

S.B. 1070 cannot withstand strict scrutiny. Its stated purpose is to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” S.B. 1070 § 1 (Dkt. # 1-2). Even assuming that

1 this is a compelling state interest, the law is not narrowly tailored to its stated purpose.
2 The classification created by S.B. 1070 penalizes this country's own citizens, who by
3 definition cannot be "unlawfully present" in the United States. Under S.B. 1070, *no one*
4 who presents a New Mexico or Washington driver's license to a law enforcement officer
5 is entitled to the presumption that he or she is "not unlawfully present" in the United
6 States, even though many (if not most) of these individuals will be citizens.

7 Even more perplexing, S.B. 1070 grants the presumption of being "not unlawfully
8 present" to *anyone* presenting a tribal identification card. This means that Arizona will
9 grant a presumption to Canadian or Mexican nationals simply for presenting any tribal
10 identification card while denying that presumption to certain United States citizens.⁴ The
11 State cannot seriously argue that such absurd results are narrowly tailored to "discourage
12 and deter" illegal immigration in Arizona.

13 What is discouraged and deterred by S.B. 1070 is free movement in and through
14 Arizona by United States citizens. Arizona's law is unique among all states in the burden
15 it imposes on certain out-of-state residents. As such, it creates the beginnings of a
16 "patchwork" of state regulation of illegal immigration that not only infringes the right to
17 travel, but also (as Plaintiffs' Motion makes clear) raises serious concerns about
18 preemption. *Cf. Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008)
19 (state law that would "easily lead to a patchwork of state service-determining laws, rules,
20 and regulations" expressly preempted).

21 The harm that befalls a citizen who does not receive the benefit of the presumption
22 is severe and far outweighs any potential government interest. The City of Tucson has
23

24 ⁴ *Amicus* is aware that, pursuant to the Jay Treaty of 1794 and under Section 289
25 of the Immigration and Nationality Act, American Indians born in Canada can travel
26 freely across the United States borders. The point here is the absurdity of the
27 classification created by S.B. 1070, which grants the benefit of the presumption of being
28 "not unlawfully present" to a foreign national with a tribal identification card but not to a
United States citizen with a valid driver's license from New Mexico or Washington.

1 averred that S.B. 1070 will force it to “requir[e] additional proof of citizenship or lawful
 2 status upon persons from New Mexico and other states.” [*City of Tucson v. Arizona*, No.
 3 10-CV-249 (D. Ariz. May 26, 2010) (Ans. and Cross-Claim at 12, ¶ 50) (Boyd Decl. Ex.
 4 20, Dkt. # 109-1)] However, most people do not routinely carry additional proof of
 5 citizenship, such as birth certificates, social security cards, or passports. [Decl. of Vicki
 6 Gaubeca at ¶ 7 (Dkt. # 113); Decl. of Jesus Cuauhtemoc Villa at ¶ 5 (Dkt. # 125)]

7 Consequently, any New Mexico or Washington resident who is stopped by a law
 8 enforcement officer in Arizona could be detained until immigration status can be
 9 determined.⁵ If those individuals are arrested, S.B. 1070 *requires* that they be detained
 10 pending determination of their immigration status. S.B. 1070 § 2.

11 Because the determination of immigration status takes time, a New Mexico or
 12 Washington resident could be detained for hours or even days, when an otherwise
 13 similarly-situated Arizona resident would not be subject to a lengthy detention. Federal
 14 Immigration and Customs Enforcement officials “will not be able to respond with an
 15 immediate verification of the immigration status of every person who receives a criminal
 16 misdemeanor citation” and “federal verifications may take days or weeks.” [*City of*
 17 *Tucson*, Ans. and Cross-Claim at 12, ¶¶ 44-45 (Boyd Decl. Ex. 20, Dkt. # 109-1)]
 18 Federal verification of immigration status is “particularly difficult for *natural born*
 19 *citizens* who do not have a passport or other record with federal immigration agencies.”
 20 [*Id.* ¶ 45 (emphasis added)] A law that permits (and in some instances requires) the
 21 detention of certain U.S. citizens—simply because of their state of residence—cannot
 22 pass constitutional muster.

23
 24 ⁵ New Mexico’s U.S. Senator, Jeff Bingaman, has asked U.S. Attorney General
 25 Eric Holder to examine S.B. 1070 because of his concern that his constituents will have
 26 to carry additional documentation of legal status or be subject to detention pending
 27 verification of that status. [Office of Senator Jeff Bingaman, *Bingaman Asks Attorney*
 28 *General Holder to Examine How New Arizona Law Could Affect New Mexicans* (Apr. 29,
 2010), *available at* <http://bingaman.senate.gov/news/20100429-03.cfm?renderforprint=1>
 (Barr Ex. 5)]

1 The harms imposed by S.B. 1070 are far from theoretical. New Mexico residents
 2 frequently travel to and within Arizona. [*See, e.g.*, Gaubeca Decl. ¶¶ 3-4 (Dkt. # 113);
 3 Villa Dec. ¶¶ 3, 8 (Dkt. # 125)] Following are just some examples of the extensive
 4 contacts that New Mexico residents have with Arizona:

- 5 • In 2008, New Mexico residents constituted 3% of the 26.1 million domestic
 6 leisure tourists who had overnight stays in Arizona. [Arizona Office of
 7 Tourism, *2008 Arizona Visitor Profile, Total Domestic Overnight, Leisure*
 8 *v. Business*, at 1, 3 (Barr Ex. 6)]
- 9 • In 2008, New Mexico residents constituted 2.9% of the 6.3 million people
 10 who had overnight stays in Arizona for business purposes. [*Id.*]
- 11 • In FY2009, 7,050 New Mexico residents visited Arizona's Painted Cliffs
 12 Welcome Center, located near the Arizona/New Mexico border. [Arizona
 13 Office of Tourism, *Fiscal Year 2009 Annual Report*, at 31 (Barr Ex. 7)]
- 14 • There are currently 862 New Mexico residents enrolled in Arizona's
 15 university system. Of those, 145 are enrolled at Arizona State University,
 16 365 are enrolled at Northern Arizona University, and 352 are enrolled at the
 17 University of Arizona. [Decl. of Dan Anderson, ¶ 2 (Barr Ex. 8)]
- 18 • 2,763 alumni of Arizona State University are New Mexico residents.
 19 [Decl. of Jennifer Holsman, ¶ 2 (Barr Ex. 9)]
- 20 • 606 New Mexico residents participated in P.F. Chang's 2010 Rock 'n' Roll
 21 Arizona Half Marathon (*available at* [http://results.active.com/pages/](http://results.active.com/pages/searchform.jsp?rsID=88865)
 22 [searchform.jsp?rsID=88865](http://results.active.com/pages/searchform.jsp?rsID=88865) (Barr Ex. 10))⁶, and 186 New Mexico residents
 23 participated in the full Marathon (*available at* [http://results.active.](http://results.active.com/pages/searchform.jsp?rsID=88864)
 24 [com/pages/searchform.jsp?rsID=88864](http://results.active.com/pages/searchform.jsp?rsID=88864)) (Barr Ex. 11))⁷

25 _____
 26 ⁶ This website allows you to search the half marathon results for a list of
 27 participants from each state. Barr Ex. 10 contains the list of New Mexico residents that
 28 results from such a search.

⁷ *See supra* note 6. Barr Ex. 11 contains the list of New Mexico residents that
 results from a search of this website.

- Between 2000 and 2009, the number of people flying into Arizona from New Mexico each year has ranged from 104,500 to 148,200. In 2009, 104,500 people flew into Arizona from New Mexico. [Dean Runyon Associates Inc., *Arizona Air Traffic Analysis: Tracking visitors to Arizona who arrive by air*, available at <http://www.deanrunyan.com/AZAirTraffic/AZAirTraffic.html> (Barr Ex. 12)⁸]

If the Court permits S.B. 1070 to take effect, each one of these individuals will risk being detained just by entering Arizona. S.B. 1070's creation of two classes of citizens unquestionably violates the constitutional right to travel. The law cannot stand.

CONCLUSION

For the foregoing reasons, *amicus curiae* Lawyers' Committee for Civil Rights Under Law requests that the Court grant Plaintiffs' Motion for Preliminary Injunction and enjoin all Defendants from enforcing Arizona Senate Bill 1070.

Dated: July 6, 2010.

Respectfully submitted,

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⁸ The "Visitor Volume" tab on this webpage allows you to obtain data on air travel between states by selecting an "origin state" and a "destination state." Barr Ex. 12 contains the data produced when the "destination state" is Arizona and the "origin state" is New Mexico.

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2010, I electronically transmitted the above document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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