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9
10 UNITED STATES DISTRICT COURT
11 DISTRICT OF ARIZONA

12 ANGEL LOPEZ-VALENZUELA and
13 ISAAC CASTRO-ARMENTA,

14 Plaintiffs,

15 v.

16 MARICOPA COUNTY; JOE ARPAIO,
Maricopa County Sheriff, in his official
17 capacity; ANDREW THOMAS, Maricopa
County Attorney, in his official capacity;
18 and BARBARA RODRIGUEZ
MUNDELL, Presiding Judge, Maricopa
19 County Superior Court, in her official
20 capacity,

21 Defendants.

No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND
PETITION FOR WRIT OF HABEAS
CORPUS**

CLASS ACTION

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18 *Application for admission *pro hac vice* forthcoming

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Plaintiffs bring this proposed class action for declaratory, injunctive, and *habeas* relief, challenging the constitutionality of an Arizona state constitutional amendment known as Proposition 100 and its implementing statute and rules. Plaintiffs and proposed class members are awaiting trial on criminal charges in Maricopa County and are being held in custody without an individualized bail hearing as a result of the Proposition 100 laws. The Proposition 100 laws mark an unprecedented departure from other state and federal bail provisions by making criminal defendants categorically ineligible for bail based solely upon their alleged immigration status. As a result of the Proposition 100 laws, Plaintiffs and countless other similarly situated individuals have been deprived of their freedom without individualized judicial determinations as to whether their pretrial detention is necessary to guard against flight risk or danger to the community. This lawsuit does not seek release of Plaintiffs from detention, but rather would require that an individualized, fact-based, procedurally fair judicial determination of the need for pretrial detention be made for Plaintiffs and those who are similarly situated, just as is done for other criminal defendants.

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1. In November 2006, Arizona state voters approved a ballot measure known as “Proposition 100,” which amended the bail provision of the Arizona Constitution, Article II, Section 22. Prior to passage of Proposition 100, Article II, Section 22 established a general presumption, subject to enumerated exceptions targeting particularly serious offenses or other indicia of dangerousness, that all persons charged with criminal offenses shall be eligible for bail. Proposition 100 amended the Arizona Constitution to provide that the state courts shall not set bail “[f]or serious felony offenses as prescribed by the legislature if the person charged *has entered or remained in the United States*

1 *illegally* and if the proof is evident or the presumption great as to the present charge”
2 (emphasis added).

3 2. The individual Plaintiffs are all persons who have been deprived of their
4 liberty based upon a finding of categorical ineligibility for bail under Proposition 100 and
5 its implementing statutes and rules (collectively, “Proposition 100 laws”). Each of the
6 Plaintiffs has been jailed without any individualized determination as to whether pretrial
7 detention is necessary based upon flight risk or a danger to the community.

8 3. Through this action, Plaintiffs seek an individualized bail hearing at which
9 they may be considered for release, taking into account particularized facts about whether
10 or not release would pose an unacceptable risk of flight or danger to the community.
11 Plaintiffs also seek declaratory and injunctive relief as representatives of a class of
12 similarly situated individuals who, like Plaintiffs, have been held categorically ineligible
13 for pretrial release and deprived of an individualized bail hearing by the Proposition 100
14 laws.

15 4. The Proposition 100 laws are not narrowly tailored and do not serve any
16 compelling – or, indeed, legitimate – state interest. Defendants have a recognized interest
17 in pretrial deprivation of liberty only to the extent that such deprivation is necessary to
18 protect the integrity of the judicial process (i.e., guarding against a genuine risk of flight)
19 or to protect the safety of the public (i.e., guarding against the release of a defendant who
20 is likely to harm people). An ordinary bail hearing allows a judicial officer to determine
21 whether these interests outweigh the right of a criminal defendant – charged but presumed
22 innocent – to remain at liberty pending trial. In making this determination, the judicial
23 officer weighs the facts known about the individual defendant before the court as they
24 pertain to whether release of that individual is likely to pose an unacceptable risk of flight
25 or danger. This is precisely the determination that would be made for Plaintiffs and those
26 they seek to represent, but for operation of the Proposition 100 laws.

1 5. Under the Proposition 100 laws, however, no such individualized judicial
2 determination is made. Rather, the Proposition 100 laws require the court to *disregard*
3 whether pretrial release is or is not warranted under the circumstances of the case. For
4 criminal defendants subject to the Proposition 100 laws, judicial officers are required to
5 ignore a host of relevant facts, such as longstanding, close family and community ties,
6 employment history, history of appearances, severity of the offense charged, and criminal
7 history or lack thereof. By way of example, under the Proposition 100 laws, an individual
8 with no criminal history who is a long-time Arizona resident, employed, and the parent of
9 U.S.-citizen children can be the subject of mandatory pretrial detention though charged
10 with a nonviolent offense such as shoplifting or perjury, while a repeat offender not
11 subject to Proposition 100 but charged with a far more serious crime is given a bail
12 hearing and the possibility of release.

13 6. The Proposition 100 laws require pretrial detention of persons who pose no
14 risk of flight or danger and who would be eligible for release pending trial were an
15 ordinary bail hearing held. The Proposition 100 laws do not serve a constitutionally
16 permissible interest in pretrial detention and are unnecessary and excessive in relation to
17 any legitimate governmental purpose.

18 7. The categorical detention imposed by the Proposition 100 laws is, in intent
19 and effect, unlawful punishment.

20 8. The Proposition 100 laws are an unconstitutional attempt by state and
21 county government to regulate immigration. Under the U.S. Constitution, the federal
22 government has the exclusive power to determine whether a person has violated
23 immigration laws and to establish the consequences of such violations. Regulating
24 immigration violations – real or perceived – is not a legitimate function of the state
25 government of Arizona or of county governments in Arizona.
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1 9. Moreover, on information and belief, the Proposition 100 laws result in the
2 incarceration of persons who are lawfully in the United States because of erroneous
3 determinations by state and county officers of questions of federal immigration law. The
4 Proposition 100 laws require Arizona state courts to make determinations as to past and
5 present immigration status, which are complex questions of federal law under the
6 Immigration and Nationality Act and immigration regulations.

7 10. The Proposition 100 laws require state court commissioners to make those
8 determinations about immigration status at very preliminary stages of a state criminal
9 prosecution, during a brief initial appearance. In Maricopa County, a criminal defendant
10 is not appointed counsel for purposes of the initial appearance despite the presence of and
11 advocacy by prosecuting attorneys seeking no-bail orders under the Proposition 100 laws.
12 Plaintiffs and members of the proposed class have been detained for an extended period of
13 time based solely upon the finding of non-eligibility at the initial appearance.

14 11. The Proposition 100 laws are based upon an unfair intent to discriminate
15 between one disfavored group and all others similarly situated. The Proposition 100 laws
16 violate the U.S. Constitution in numerous respects. By making persons who have
17 “entered or remained in the United States illegally” categorically ineligible for bail, the
18 Proposition 100 laws violate the Due Process Clause of the Fourteenth Amendment of the
19 U.S. Constitution, the Excessive Bail Clause of the Eighth Amendment, the Fifth
20 Amendment prohibition against compelled self-incrimination, and the Sixth Amendment
21 right to counsel.

22 12. In addition, the Proposition 100 laws should be struck down under the
23 Supremacy Clause, U.S. Const. art. VI. The Proposition 100 laws are inconsistent with
24 the statutory and regulatory system of federal immigration law, conflict with federal
25 immigration law, and unconstitutionally infringe on the federal government’s exclusive
26 authority over immigration.

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1 for the appointment of counsel for indigent criminal defendants at initial appearance
2 proceedings.

3 18. Defendant Joe Arpaio is the Sheriff of Maricopa County, Arizona. As such,
4 he is the custodian of Plaintiffs and members of the proposed class. In his official
5 capacity, Defendant Arpaio is responsible for implementation of the Proposition 100 laws
6 by Maricopa County Sheriff's Department deputies and other officers. Defendant Arpaio
7 is sued in his official capacity.

8 19. Defendant Andrew Thomas is the County Attorney for Maricopa County,
9 Arizona. In his official capacity, he is responsible for the enforcement of the Proposition
10 100 laws within Maricopa County, where Plaintiffs and other members of the proposed
11 class are being detained pursuant to those laws. Defendant Thomas is sued in his official
12 capacity.

13 20. Defendant Barbara Rodriguez Mundell is the Presiding Judge of Maricopa
14 County Superior Court. In her official capacity, she has supervisory authority over the
15 Maricopa County pretrial services agency, which is responsible for interviewing criminal
16 defendants and otherwise gathering information relevant to bail eligibility for the
17 Maricopa County courts. In her official capacity, Defendant Mundell also has
18 responsibility for establishing rules and procedures for the pretrial services agency and for
19 the Maricopa County Superior Court. Defendant Mundell, therefore, is responsible for
20 aspects of implementing the Proposition 100 laws. Defendant Mundell is sued in her
21 official capacity as an administrator and supervisor of the Maricopa County court system,
22 and not in her judicial capacity.

23 FACTS

24 The Proposition 100 Laws

25 21. The Arizona Constitution provides that all persons who are charged with a
26 crime are eligible for bail, subject to certain exceptions. Ariz. Const. art. II § 22 ("Section

22"). Prior to November 2006, Section 22 provided that bail should be denied only if "the proof [was] evident or the presumption great as to the present charge" and the charged crime fell under one of three categories: (1) "capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age"; (2) "felony offenses committed when the person charged [had] already [been] admitted to bail on a separate felony charge"; or (3) "felony offenses if the person charged pose[d] a substantial danger to any other person or the community, [and] if no conditions of release which may be imposed [would] reasonably assure the safety of the other person or the community[.]" Ariz. Const. art. II § 22(A)(1)-(3).

22. On November 7, 2006, Arizona voters approved Proposition 100, a ballot measure that amended Section 22 of the Arizona Constitution to define a new group of persons categorically ineligible for bail. Section 22, as amended, does not permit an individualized bail hearing for any person charged with a "serious felony offense" if the person "has entered or remained in the United States illegally" and "the proof is evident or the presumption great as to the present charge." Ariz. Const. art. II § 22(A)(4). For such persons, Section 22 categorically denies bail without regard to whether a judicial officer would find that pretrial custody is necessary due to an individual's risk of flight or danger to the community, the two constitutionally permissible bases for subjecting an individual to pretrial detention.

23. Following the passage of Proposition 100, the Arizona legislature amended the state bail statute, A.R.S. § 13-3961, to provide that for purposes of the new no-bail provision, a "serious felony offense" includes "any class 1, 2, 3 or 4 felony or any violation of § 28-1383." A.R.S. § 13-3961(A)(5)(b). This definition encompasses an extremely large number of offenses, including many non-violent and even relatively minor charges, such as shoplifting with a device, A.R.S. § 13-1805 (entering an establishment with a container or device intended to facilitate shoplifting); theft, A.R.S. §

1 13-1802(E) (theft of property or services with a value of \$3000 but less than \$4000);
2 forgery, A.R.S. § 13-2002 (using fraudulent identification documents); perjury, A.R.S. §
3 13-2702 (making a false sworn statement believing it to be false); and simple possession
4 or use of a narcotic, A.R.S. § 13-3407. As a result of the Proposition 100 laws, bail is
5 categorically denied in cases in which bail would normally be granted.

6 24. On June 18, 2007, the Arizona legislature passed Senate Bill 1265, a further
7 amendment to A.R.S. § 13-3961, lowering the standard of proof required for the finding
8 that a defendant “has entered or remained in the United States illegally.” As amended,
9 Section 13-3961 provides that the State need only prove that the defendant “has entered or
10 remained in the United States illegally” under a probable cause standard. A.R.S. § 13-
11 3961(A)(5). Prior to enactment of Senate Bill 1265, the Arizona Supreme Court had
12 issued an administrative order requiring the State to prove that a defendant had “entered or
13 remained in the United States illegally” by a higher “proof evident, presumption great”
14 standard.

15 25. The effect of Proposition 100 and A.R.S. § 13-3961, as amended, is to make
16 a person whom a county commissioner determines to “ha[ve] entered or remained in the
17 United States illegally” subject to mandatory pretrial detention in a far greater category of
18 cases, and for far less serious charges, than a person who is determined not to meet that
19 definition. In Arizona, therefore, the critical decision as to whether a person is released on
20 bail, or is instead required to defend against charges while detained, often hinges upon a
21 state probable cause determination of past or present immigration status. As a result of
22 Proposition 100’s categorical prohibition on bail, persons who pose no flight risk and no
23 danger to the community are detained pending trial, at great cost to taxpayers and to the
24 extreme detriment of those persons and their families, simply because of their alleged
25 immigration status.

1 26. Prior to passage of Proposition 100, the Arizona bail statute already
2 accounted for the legitimate state governmental interests that may be considered in
3 making bail determinations. The statute explicitly states that in making custody
4 determinations, a judicial officer should be guided by three considerations: (1) assuring
5 the appearance of the accused; (2) protecting against the intimidation of witnesses; and (3)
6 protecting the safety of the victim, any other person, or the community. A.R.S. § 13-
7 3961(B).

8 27. In contrast, Proposition 100 categorically denies bail based on nothing more
9 than a probable cause determination of a person's past or present immigration status.
10 Arizona state officials who supported Proposition 100 made it clear that their intent was to
11 target what they deemed to be "illegal immigration," to punish perceived immigration
12 violations and to regulate immigration, a field of law enforcement that is committed to the
13 federal government under the U.S. Constitution and federal statutes. For example, the
14 chief sponsor of Proposition 100, Arizona House Representative Russell Pearce, stated
15 that Proposition 100 would "keep more violent criminals in jail, make our homes and
16 communities safer, and send a powerful message to illegal aliens that their crimes will not
17 go unpunished." One Arizona gubernatorial candidate stated publicly that Proposition
18 100 would "address[] one area that needs to be resolved in this fight to secure our borders
19 and reduce the level of crime in our neighborhoods."

20 28. Supporters of Proposition 100 did not point to any evidence that persons
21 "who have entered or remained in the United States illegally" pose a greater flight risk or
22 danger to the community than persons who do not fit that definition. There were no
23 legislative hearings or expert witnesses that examined the suppositions of the law's
24 supporters.

25 29. In fact, studies have shown that non-U.S. citizens are no more likely than
26 U.S. citizens to commit crimes. *See, e.g., Michael Kiefer, Migrant Rate of Crime Even*

1 with Numbers, Ariz. Republic, Feb. 25, 2008 (“Despite public perception and stepped up
2 enforcement of immigration laws in recent months in Maricopa County, undocumented
3 immigrants are not charged with a disproportionate number of crimes in Maricopa
4 County.”).

5 30. Studies have also shown that non-U.S. citizens do not pose a greater flight
6 risk than U.S. citizens in criminal cases. See Vera Institute of Justice, *Testing Community*
7 *Supervision for the INS: An Evaluation of the Appearance Assistance Program* (Aug. 1,
8 2000), available at [http://www.vera.org/publications/publications_5.asp?](http://www.vera.org/publications/publications_5.asp?publication_id=12)
9 [publication_id=12](http://www.vera.org/publications/publications_5.asp?publication_id=12).

10 31. The Proposition 100 laws cover an unprecedented number of criminal
11 offenses including many non-violent crimes, do not limit the period of pretrial
12 incarceration that may result from their application, and do not provide for basic
13 procedural protections for the criminal defendants.

14 **The Impact of the Proposition 100 Laws on Criminal Proceedings**

15 32. The Proposition 100 laws result in violations of the U.S. Constitution at
16 several stages of criminal proceedings in Arizona including but not limited to: arrest,
17 booking, interviews conducted by pretrial services officers prior to the initial appearance
18 of a defendant in court, the initial appearance itself, and throughout the period of pretrial
19 detention.

20 33. After a Plaintiff class member is arrested, law enforcement officers are
21 required to complete a document known as “Form 4” or the “Release Questionnaire”
22 during the booking process. Pursuant to the Proposition 100 laws, the booking officer
23 must include information on the Form 4 as to whether the arrestee has “entered or
24 remained in the United States unlawfully.” In order to complete the form, Arizona law
25 enforcement officers—including police officers and sheriff’s deputies—interrogate
26 arrested, in-custody members of Plaintiff class about their immigration status without

1 providing the admonition that they have a right to remain silent or to consult with an
2 attorney.

3 34. After booking, criminal defendants remain in custody and are interviewed
4 by a pretrial services officer prior to appearing before a commissioner for an initial
5 appearance. Based upon the interview, the pretrial services officer provides the
6 commissioner with information concerning whether the defendant should be released on
7 bail. Pursuant to Defendants' policies and practices implementing the Proposition 100
8 laws, county pretrial services officers under the supervision of Defendant Mundell are
9 required to question the accused about immigration status prior to the initial appearance at
10 which the bail determination is made. Criminal defendants are in custody during the
11 pretrial interview. Pretrial officers do not advise these members of the Plaintiff class that
12 they have a right to remain silent or a right to consult with counsel prior to answering
13 questions.

14 35. The questionnaire used by pretrial services officers in Maricopa County
15 demonstrates that the state law procedures implementing Proposition 100 are flawed by a
16 fundamental misunderstanding of federal immigration law. Pretrial services officers are
17 directed to ask a defendant, including members of the Plaintiff class, whether he or she is
18 a U.S. citizen. In the event that a defendant responds in the negative, the pretrial services
19 officer then asks the defendant to choose from the following immigration status
20 categories: "Undocumented"; "Current Valid Immigrant Visa"; "Current Valid Non-
21 immigrant Visa"; and "Other." The category "Undocumented" is not defined, nor is it a
22 term of art within the Immigration and Nationality Act ("INA"). Pretrial services officers
23 are given no training on the definition of the various immigration status categories in the
24 INA or in the questions they are required to ask. Moreover, immigration status involves
25 complex questions of federal law, is highly fact-dependent, and can change over time;
26 thus, an individual's self-reported status may be inaccurate.

1 36. In questioning members of the Plaintiff class regarding their immigration
2 status pursuant to the Proposition 100 laws, Arizona state officers – including Maricopa
3 County arresting and booking Sheriff deputies, and pretrial services officers – are likely to
4 elicit incriminating information with regard to both federal and state criminal law. For
5 example, questioning about immigration status could elicit statements admitting violations
6 of federal criminal law such as 8 U.S.C. § 1325 (illegal entry) or 8 U.S.C. § 1326 (illegal
7 re-entry). Officers’ questions about immigration status are also likely to elicit
8 incriminating statements under Arizona state criminal laws, including laws under which
9 the person is being charged. Indeed, Defendants Arpaio and Thomas have arrested and
10 charged persons with human smuggling for “smuggling” themselves, A.R.S. § 13-2319,
11 forgery for using allegedly fraudulent identification documents, A.R.S. § 13-2002, and
12 possession of a weapon by a “prohibited person,” which includes persons not lawfully in
13 the United States. A.R.S. § 13-3102. A defendant’s immigration status is an element of
14 all of these offenses.

15 37. The decision to hold members of the Plaintiff class categorically ineligible
16 for bail under the Proposition 100 laws is first made at the initial appearance (“IA”). This
17 appearance occurs within 24 hours after a defendant is arrested and booked and is
18 presided over by a county commissioner, who is not a state court judge.

19 38. Under the Proposition 100 laws and relevant court rules, a member of the
20 Plaintiff class is not entitled to appointed counsel for the IA. Maricopa County expressly
21 prohibits the use of public funds for this purpose, despite knowing that most of the
22 affected class members are indigent and the importance of the determination of bail status
23 at this critical stage of the proceedings. Defendant Thomas, however, uses public funds to
24 have a prosecuting attorney present and to argue for detention based on the Proposition
25 100 laws. A class member may be held ineligible for bail pursuant to the Proposition 100
26 laws solely based on the representations of an attending deputy county attorney.

1 39. Because criminal defendants, including proposed class members, typically
2 do not meet with appointed counsel before their formal arraignment, such persons will
3 often be detained for more than a week before they are even represented by counsel.
4 Moreover, members of the proposed class who are held ineligible for bail under the
5 Proposition 100 laws at the IA are not advised of their right to request a full evidentiary
6 hearing challenging the commissioner's decision to hold them without bond.
7 Consequently, members of the proposed class effectively lack the ability to challenge their
8 detention for a prolonged period.

9 40. The initial bail determination during the IA is a critical stage in the criminal
10 case for members of the Plaintiff class, given the serious consequences of a finding of
11 non-eligibility for bail pursuant to the Proposition 100 laws. Pretrial detention has been
12 found to adversely affect case dispositions. Several empirical studies indicate that pretrial
13 detention leads to a higher likelihood that a defendant will be convicted. *See* Stephanos
14 Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004);
15 Stevens H. Clarke & Susan T. Kurtz, *Criminology: The Importance of Interim Decisions*
16 *to Felony Trial Court Dispositions*, 74 J. CRIM. L. & CRIMINOLOGY 476, 502-05 (1983);
17 Patricia Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.
18 L. REV. 631, 632 (1964). Indeed, the Supreme Court has recognized that "[t]here is
19 statistical evidence that persons who are detained between arrest and trial are more likely
20 to receive prison sentences than those who obtain pretrial release." *Barker v. Wingo*, 407
21 U.S. 514, 533 n.35 (1972).

22 41. Pursuant to Defendants' policies and practices implementing the Proposition
23 100 laws, even when a criminal defendant is represented by retained counsel at the initial
24 appearance, defense counsel is not permitted to confer with his or her client prior to the
25 pretrial services interview. Nor is defense counsel permitted to cross-examine prosecution
26 witnesses or to engage in any adversarial testing of the prosecution's position at IA on

1 whether the defendant “has entered or remained in the United States illegally.” Thus,
2 even when a criminal defendant has retained counsel for IA, a right provided under the
3 Arizona Rules of Criminal Procedure, defense counsel is prevented under the Proposition
4 100 laws from protecting his or her client from being held ineligible for bail if the
5 prosecuting attorney alleges the client “has entered or remained in the United States
6 illegally.”

7 42. Under current Arizona law, in making the probable cause determination of
8 whether a defendant “has entered or remained in the United States illegally,” “a magistrate
9 judge or judicial officer at the time of the person’s initial appearance” is to consider:

10 (i) [w]hether a hold has been placed on the arrested person by
11 the United States immigration and customs enforcement; (ii)
12 [a]ny indication by a law enforcement agency that the person
13 is in the United States illegally; (iii) [w]hether an admission
14 by the arrested person has been obtained by the court or a law
15 enforcement agency that the person has entered or remained in
16 the United States illegally; (iv) [a]ny information received
17 from a law enforcement agency pursuant to § 13-3906; (v)
18 [a]ny evidence that the person has recently entered or
19 remained in the United States illegally; (vi) [a]ny other
20 relevant information that is obtained by the court or that is
21 presented to the court by a party or any other person.

22 A.R.S. § 13-3961(C), (A)(5)(a) (as amended by Senate Bill 1265). These criteria are
23 vague and permit the categorical denial of bail based on nothing more than a bald
24 assertion at the initial appearance by a county prosecutor or law enforcement officer that
25 the defendant has “entered or remained in the country illegally.”

26 43. As interpreted by an intermediate state appellate court, the Arizona Rules of
Criminal Procedure, as revised on an emergency basis to implement Proposition 100,
permit either a prosecutor or a criminal defendant to request an evidentiary hearing on bail
subsequent to a no-bail decision at the IA. Ariz. R. Crim. P. 4.2(a)(7), 7.2(b), 7.4(a). The
rules provide that such a hearing must take place within seven days of the request. Ariz.
R. Crim. P. 7.4. However, despite these rules providing for an evidentiary hearing,

1 criminal defendants are effectively detained for prolonged periods of time under a no-bail
2 ruling made during the IA without benefit of counsel or an opportunity to cross-examine
3 and present evidence. Pursuant to Defendants' policies and practices, the commissioner at
4 the IA does not inform criminal defendants of their right to seek an evidentiary hearing.
5 Nor do the Arizona Rules of Criminal Procedure require a criminal defendant to be so
6 informed. In Maricopa County, indigent criminal defendants usually do not meet with
7 appointed counsel, who could inform them of the right to an evidentiary hearing, until
8 arraignment, which often takes place up to seven days after the IA. Thus, Defendants'
9 policies and procedures deprive criminal defendants of the ability to seek an evidentiary
10 hearing for an extended period of time following the IA. Upon meeting with counsel, the
11 defendant may be required to wait up to an additional seven days before having an
12 opportunity to challenge the State's evidence relating to immigration status during an
13 evidentiary hearing.

14 **CLASS ALLEGATIONS**

15 44. Plaintiffs bring this action on behalf of themselves and all other persons
16 similarly situated pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2). The
17 class, as proposed by Plaintiffs, consists of:

18 All persons who have been or will be held ineligible for
19 release on bond by an Arizona state court in Maricopa County
20 pursuant to Section 22(A)(4) of the Arizona Constitution and
Ariz. Rev. Stat. § 13-3961(A)(5).

21 45. Plaintiffs seek class certification because there are countless similarly
22 situated individuals in Maricopa County jails who are also being held in pretrial detention
23 without an individualized hearing under the Proposition 100 laws. Because of the
24 inherently transitory nature of pretrial detention and the logistical difficulties incarcerated
25 persons would face in bringing federal civil rights litigation, it is highly unlikely that
26

1 individual lawsuits would be successful in obtaining judicial review of the constitutional
2 claims being brought in this action.

3 46. The requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2) are
4 met in that the class is so numerous that joinder of all members is impracticable.
5 Plaintiffs are informed and believe that there are hundreds of persons each year who are or
6 will be found ineligible for bail pursuant to the Proposition 100 laws. Individual lawsuits
7 challenging the constitutionality of the Proposition 100 laws would create an enormous
8 demand on federal judicial resources and could result in conflicting outcomes.

9 47. There are questions of law and fact common to the proposed class that
10 predominate over any questions affecting only the individually named Plaintiffs, including
11 but not limited to: whether the Proposition 100 laws as written, and as implemented by the
12 Defendants' policies and practices, violate the rights of the proposed class under the Due
13 Process Clause of the Fourteenth Amendment, the excessive bail prohibition of the Eighth
14 Amendment, the Fifth Amendment self-incrimination clause, and the Sixth Amendment
15 guarantee of the right to counsel; and whether the Proposition 100 laws are preempted by
16 federal immigration law and should be struck down under the Supremacy Clause.

17 48. The claims of the named Plaintiffs are typical of the claims of the proposed
18 class. The named Plaintiffs, like all class members, have been held not to be eligible for
19 bail pursuant to the Proposition 100 laws, and are therefore subject to pretrial detention
20 pending resolution of their criminal cases, based solely upon a finding of probable cause
21 that they have "entered or remained in the United States illegally" and without regard to
22 whether there are individual equities militating in favor of or against release on conditions
23 based on flight risk or danger to the community.

24 49. The named Plaintiffs will fairly and adequately represent the interests of all
25 members of the proposed class because they seek relief on behalf of the class as a whole
26 and have no interests antagonistic to other members of the class.

1 50. Defendants have acted on grounds generally applicable to the class, thereby
2 making appropriate final injunctive relief with respect to the class as a whole.

3 **DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS**

4 51. An actual and substantial controversy exists between Plaintiffs and
5 Defendants as to their respective legal rights and duties. Plaintiffs contend that
6 Defendants' actions violate the constitutional rights of Plaintiffs and the proposed class.

7 52. In violating Plaintiffs' rights under the U.S. Constitution and federal
8 statutes, Defendants are acting under color of law.

9 53. The Proposition 100 laws, and Defendants' policies, practices and
10 procedures implementing them, have caused and will continue to cause irreparable injury
11 to Plaintiffs and the proposed class.

12 54. Plaintiffs and the proposed class have no plain, speedy and adequate remedy
13 at law against the Proposition 100 laws and Defendants' policies, practices and procedures
14 implementing them.

15 **CAUSES OF ACTION**

16 **COUNT ONE**
17 **VIOLATION OF SUBSTANTIVE DUE PROCESS**
18 **FOURTEENTH AMENDMENT**

19 55. The foregoing allegations are repeated and incorporated as though fully set
20 forth herein.

21 56. Plaintiffs and the proposed class have a liberty interest in being free from
22 detention absent a criminal conviction. Specifically, Plaintiffs and the proposed class
23 have a liberty interest in being eligible for release on bond pending resolution of the
24 criminal charges against them.

25 57. The Proposition 100 laws and Defendants' policies, practices and
26 procedures implementing them violate substantive due process because they are not
narrowly tailored and do not serve a compelling governmental interest.

58. The Proposition 100 laws and Defendants' policies, practices and procedures implementing them result in an impermissibly punitive regime of pretrial detention in violation of substantive due process.

COUNT TWO
VIOLATION OF PROCEDURAL DUE PROCESS
FOURTEENTH AMENDMENT
USE OF PROBABLE CAUSE STANDARD

59. The foregoing allegations are repeated and incorporated as though fully set forth herein.

60. Defendants' policies, practices, and procedures in implementing the Proposition 100 laws result in no-bond decisions against Plaintiffs and the proposed class based solely on a state court commissioner's finding that there is probable cause to believe that they have "entered or remained in the United States illegally." Use of the "probable cause" standard in this context violates the Due Process Clause.

COUNT THREE
VIOLATION OF PROCEDURAL DUE PROCESS
FOURTEENTH AMENDMENT
PROCEDURAL VIOLATIONS DURING INITIAL APPEARANCE

61. The foregoing allegations are repeated and incorporated as though fully set forth herein.

62. Due process requires basic procedural protections at pretrial detention hearings to ensure an accurate determination as to whether an individual criminal defendant should be granted bail, including the right to counsel, the opportunity to testify and to present evidence, the opportunity to cross-examine opposing witnesses, and the requirement that the prosecution make a sufficient showing that release on bail is not warranted. Defendants' policies, practices and procedures implementing the Proposition 100 laws do not comport with these due process requirements.

63. As implemented through Defendants' policies, practices, and procedures, the Proposition 100 laws resulted in an initial no-bond decision against Plaintiffs and members of the proposed class based solely on presentation of arguments and evidence during an initial appearance.

64. Defendants have a policy, practice and procedure of conducting initial appearances in criminal cases without participation of defense counsel. Thus, Plaintiffs and members of the proposed class are held to be ineligible for bail pursuant to the Proposition 100 laws without benefit of representation, in violation of the Due Process Clause.

65. Immigration status is a complex issue governed by federal statutes and regulations and is determined in federal administrative proceedings with myriad procedural protections, as guaranteed by the Due Process Clause of the Fifth Amendment. Plaintiffs were found ineligible for release on bond on the basis of a state court probable cause determination that they "entered or remained in the United States illegally." That determination was made without any of the procedural protections required under federal immigration law.

COUNT FOUR
VIOLATION OF RIGHT AGAINST SELF-INCRIMINATION
FIFTH AMENDMENT

66. The foregoing allegations are repeated and incorporated as though fully set forth herein.

67. Defendants have a policy, practice and procedure of interrogating criminal defendants in custody, including Plaintiffs and other members of the proposed class, about their immigration and nationality status pursuant to the Proposition 100 laws without advising Plaintiffs of their right to counsel. Those interrogations elicit incriminating information from the accused.

1 68. Defendants then introduce Plaintiffs' statements against them during bond
2 proceedings and hold them without bond pursuant to the Proposition 100 laws.

3 69. In addition, custodial interrogations carried out pursuant to Defendants'
4 policies and practices under the Proposition 100 laws may be used against criminal
5 defendants such as Plaintiffs in their substantive criminal trials, where immigration status
6 is implicated in the elements of the charged offense.

7 70. These policies, practices and procedures violate the against self-
8 incrimination under the Fifth Amendment of the U.S. Constitution.

9
10 **COUNT FIVE**
11 **VIOLATION OF RIGHT TO COUNSEL**
12 **SIXTH AMENDMENT**
13 **DENIAL OF RIGHT TO COUNSEL DURING INITIAL APPEARANCE**

14 71. The foregoing allegations are repeated and incorporated as though fully set
15 forth herein.

16 72. Defendants have a policy, practice, and procedure of denying Plaintiffs and
17 other members of the proposed class the right to counsel during the initial appearance in
18 criminal proceedings, where findings as to immigration status under the Proposition 100
19 laws are made.

20 73. Initial appearances are a critical stage of criminal proceedings in Maricopa
21 County, as a holding of non-eligibility for bail under the Proposition 100 laws results in
22 irretrievable loss of rights.

23 74. The foregoing policies, practices and procedures violate Plaintiffs' right to
24 counsel under the Sixth Amendment of the U.S. Constitution.

25 **COUNT SIX**
26 **VIOLATION OF EXCESSIVE BAIL CLAUSE**
 EIGHTH AMENDMENT

 75. The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive
bail shall not be required." The Supreme Court has held that under the excessive bail

1 clause, a court may not impose bail conditions or impose pretrial conditions to punish a
2 criminal defendant for past acts. Bail may be imposed in order to ensure a defendant's
3 presence at trial.

4 76. By denying bail categorically to all persons who "have entered or remained
5 in the United States illegally," without regard to whether an individual person poses an
6 unacceptable flight risk, the Proposition 100 laws violate the Eighth Amendment
7 excessive bail clause.

8 77. The Proposition 100 laws constitute a blanket prohibition on bail for a far
9 greater range of offenses than any other state or federal bail statute. The Proposition 100
10 laws result in a categorical prohibition of bail for relatively minor offenses for which bail
11 would normally be set. This violates the Eighth Amendment principle that categorical
12 denial of bail is permitted only for "the most serious of crimes."

13
14 **COUNT SEVEN**
VIOLATION OF THE SUPREMACY CLAUSE

15 78. The foregoing allegations are repeated and incorporated as though fully set
16 forth herein.

17 79. The power to regulate immigration is an exclusively federal power that
18 derives from the Constitution's grant to the federal government of the power to "establish
19 a uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4., and to "regulate
20 Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. In addition, the Supreme
21 Court has held that the federal government's power to control immigration is inherent in
22 the nation's sovereignty. The Proposition 100 laws and the Defendants' policies, practices
23 and procedures implementing them usurp the federal government's exclusive power under
24 the U.S. Constitution to define the status of immigrants who are in the United States and
25 the legal consequences of being in any given status.
26

80. The Proposition 100 laws are preempted by federal law because the federal government has occupied the field of immigration by enacting a comprehensive statutory and regulatory scheme governing immigration, including the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.* (“INA”).

81. The Proposition 100 laws are preempted by federal law because they conflict with federal laws, regulations, policies and objectives defining the legal status of immigrants and non-citizens and establishing the legal consequences of any given status.

82. The Proposition 100 laws, therefore, exceed the Defendants' lawful police powers and violate the Supremacy Clause, U.S. Const. art. II, § 2.

PRAYER FOR RELIEF

WHEREFORE, in light of the foregoing facts and arguments, Plaintiffs request that the Court:

- a. Assume jurisdiction over this matter;
- b. Grant the petition for a writ of *habeas corpus*;
- c. Order that Plaintiffs shall immediately be presented for a bail hearing before an Arizona state court with proper jurisdiction, at which the provisions of the Proposition 100 laws shall not apply;
- d. Certify a class as described above, pursuant to Plaintiffs' forthcoming motion for class certification;
- e. Declare that the Proposition 100 laws are unconstitutional under the self-incrimination clause of the Fifth Amendment, the Sixth Amendment's clause establishing a right to counsel in criminal proceedings, the excessive bail clause of the Eighth Amendment, and the Due Process Clause of the Fourteenth Amendment;
- f. Declare that the Proposition 100 laws are preempted by federal law and the plenary power of Congress to regulate immigration;

- 1 g. Enjoin Defendants from enforcing the Proposition 100 laws;
2 h. Grant Plaintiffs' reasonable attorneys' fees, costs, and other expenses
3 pursuant to 42 U.S.C. § 1988; and
4 i. Grant such other relief as the Court may deem appropriate.

5 Dated: April 4, 2008

**ACLU FOUNDATION
IMMIGRANTS' RIGHTS PROJECT**

**MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND**

**ACLU FOUNDATION OF ARIZONA
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