

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Valle Del Sol, et al.,

Plaintiffs,

v.

Michael B. Whiting, et al.,

Defendants,

and

Douglas A. Ducey and the State of Arizona,

Intervenor Defendants.

No. CV-10-01061-PHX-SRB

**ORDER**

At issue are Plaintiffs' and Intervenor Defendants' ("Arizona") motions for partial summary judgment. (*See* Doc. 1215, Intervenor Defs.' Mot. for Summ. J. re: Counts One, Two, Four, Five, Six, and Seven of the FAC ("Arizona's Mot."); Doc. 1223, Pls.' Mot. for Partial Summ. J. and for Permanent Inj. ("Pls.' Mot.") & Doc. 1223-1, Pls.' Mem. of Points and Authorities in Supp. of Mot. and Permanent Inj. Req. ("Pls.' Mem.").

**I. BACKGROUND**

This case is a facial challenge to the Arizona law commonly known as S.B. 1070, a set of statutes and statutory amendments enacted in 2010 to address immigration-related issues in Arizona. (*See* Doc. 447, Oct. 8, 2010 Order at 1-4 (summarizing S.B. 1070's historical background and provisions)); *United States v. Arizona*, 703 F. Supp. 2d 980, 985-91 (D. Ariz. 2010) (same), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part, rev'd in*

1 *part*, 132 S. Ct. 2492 (2012).<sup>1</sup> The enactment of S.B. 1070 led to this suit and the related  
 2 pre-enforcement facial challenge in *United States v. Arizona*, in which the United States  
 3 filed suit to enjoin S.B. 1070 as preempted. (*See Arizona*, No. 10-CV-01413-PHX-SRB,  
 4 Doc. 1, Compl.) The *Arizona* case is now resolved. Plaintiffs' challenge to S.B. 1070  
 5 includes, but is not limited to, preemption theories. (*See* Doc. 511, First Am. Compl. for  
 6 Declaratory and Injunctive Relief ("FAC") ¶¶ 177-82 (Count One – Supremacy Clause),  
 7 183-88 (Count Two – Equal Protection Clause), 189-91 (Count Three – First  
 8 Amendment), 192-96 (Count Four – Fourth Amendment), 197-200 (Count Five – Article  
 9 II, § 8 of the Arizona Constitution), 201-04 (Count Six – Due Process Clause), 205-08  
 10 (Count Seven – 42 U.S.C. § 1981).) (The federal constitutional claims are brought under  
 11 42 U.S.C. § 1983.)

12 Five years of rulings in these cases has narrowed the unresolved issues concerning  
 13 S.B. 1070's facial validity. In *Arizona*, the Supreme Court held that although Section 3 of  
 14 S.B. 1070 was field preempted and that Sections 5(C) and 6 were conflict preempted,  
 15 Section 2(B) was not preempted on its face. *See Arizona v. United States*, 132 S. Ct.  
 16 2492, 2501-10 (2012). The Court permanently enjoined Sections 3, 5(C), and 6. (*See*  
 17 *Arizona*, Doc. 180, Sept. 18, 2012 Order.)<sup>2</sup> The Court later permanently enjoined Section  
 18 4, which amended the crime of human smuggling under A.R.S. § 13-2319. (*See id.*, Doc.  
 19 215, Nov. 7, 2014 Order.) Like the United States, Plaintiffs moved to enjoin various  
 20 provisions of S.B. 1070. The Court preliminarily enjoined the portions of Section 5  
 21 codified under A.R.S. § 13-2929, which created a separate crime for certain smuggling  
 22 activities. (Doc. 757, Sept. 5, 2012 Order); *Valle del Sol v. Whiting*, 2012 WL 8021265  
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24 <sup>1</sup> The Court refers to Senate Bill 1070 and House Bill 2162 collectively as "S.B.  
 25 1070," describing the April 23, 2010 enactment as modified by the April 30, 2010  
 amendments.

26 <sup>2</sup> Section 3 made the failure to comply with federal alien registration requirements  
 27 a state misdemeanor. A.R.S. § 13-1509. Section 5(C) made it a misdemeanor for an  
 28 unauthorized alien to seek or engage in work in Arizona. A.R.S. § 13-2928(C). Section 6  
 authorized the warrantless arrest of a person where there was probable cause to believe  
 the person had committed any public offense that made the person removable from the  
 United States. A.R.S. § 13-3883(A)(5).

(D. Ariz. Sept. 5, 2012), *aff'd*, 732 F.3d 1006 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1876 (2014). A.R.S. § 13-2929 is now permanently enjoined after the United States and Arizona reached a stipulation in *Arizona*. (*See Arizona*, Doc. 200, June 9, 2014 Order.) The Court also preliminarily enjoined the portions of Section 5 codified under A.R.S. § 13-2928(A) and (B) involving day labor prohibitions. (Doc. 604, Feb. 29, 2012 Order); *Friendly House v. Whiting*, 846 F. Supp. 2d 1053 (D. Ariz. 2012), *aff'd sub nom. Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013). The portions of S.B. 1070 that are not enjoined are now in effect.

The parties filed motions for partial summary judgment after the close of discovery. *See* Fed. R. Civ. P. 56(a). Together the partial summary judgment motions cover all counts in the First Amended Complaint. Arizona moves for summary judgment on each count except for Plaintiffs' First Amendment challenge to the day labor provisions (Count Three). (*See Arizona's Mot. at 2.*) Plaintiffs move for summary judgment on their First Amendment challenge to the day labor provisions and their preemption challenge to Section 2(D) (Count One). (*See Pls.' Mot. at 1; Pls.' Mem. at 5-29.*) Plaintiffs ask the Court to permanently enjoin these provisions. (*Id.*)<sup>3</sup>

## II. LEGAL STANDARDS AND ANALYSIS

Under Federal Rule of Civil Procedure 56, summary judgment is properly granted when: (1) there is no genuine dispute as to any material fact; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). A fact is "material" when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute of material fact arises if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In considering a motion for summary judgment, the court

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<sup>3</sup> Because the Section 5 smuggling provisions are already unenforceable due to the permanent injunction order in *Arizona*, the Court denies as moot Plaintiffs' other request to permanently enjoin A.R.S. § 13-2929. (*See Pls.' Mot. at 1; Pls.' Mem. at 29-33.*)

1 must regard as true the non-moving party's evidence if it is supported by affidavits or  
 2 other evidentiary material, and "all inferences are to be drawn in the light most favorable  
 3 to the non-moving party." *Eisenberg*, 815 F.2d at 1289; *see also Celotex*, 477 U.S. at 324.  
 4 The non-moving party may not merely rest on its pleadings; it must produce some  
 5 significant probative evidence tending to contradict the moving party's allegations,  
 6 thereby creating a material question of fact. *Anderson*, 477 U.S. at 256-57 (holding that  
 7 the plaintiff must present affirmative evidence to defeat a properly supported motion for  
 8 summary judgment); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289  
 9 (1968).

#### 10 **A. Arizona's Motion**

11 Arizona contends that after the rulings in this case and in *Arizona* Plaintiffs'  
 12 remaining claims are that: Section 2 of S.B. 1070 violates the Supremacy Clause, the  
 13 Equal Protection Clause, and 42 U.S.C. § 1981; Section 2(B) violates the Fourth  
 14 Amendment, the Due Process Clause, and Article II, § 8 of the Arizona Constitution; and  
 15 the Section 5 day labor provisions codified under A.R.S. § 13-2928(A) and (B) violate  
 16 the First Amendment. (Arizona's Mot. at 2.) Arizona argues that Plaintiffs' First  
 17 Amendment challenge is the only claim that involves triable issues that cannot be  
 18 resolved on summary judgment. (*Id.*) Plaintiffs do not dispute Arizona's contentions  
 19 about what claims remain against S.B. 1070, except Plaintiffs contend that their claims  
 20 alleging violations of the Equal Protection Clause and 42 U.S.C. § 1981 are not limited to  
 21 Section 2 but challenge S.B. 1070 in its entirety. (*See* Doc. 1252, Pls.' Memo. of Law in  
 22 Opp'n to Arizona's Mot. ("Pls.' Opp'n") at 9.) Plaintiffs note that the Court allowed  
 23 these claims to proceed past the pleading stage in ruling on Arizona's motion to dismiss.  
 24 (*Id.* at 9-10; *see* Oct. 8, 2010 Order at 15-18.) Plaintiffs acknowledge the Court's prior  
 25 statement that it cannot "declare an entire statute unconstitutional if the constitutional  
 26 portions can be severed from those which are unconstitutional," but Plaintiffs argue  
 27 "there will be nothing to sever if [they] ultimately prove that discriminatory intent was a  
 28 motivating factor for the law in its entirety." (Pls.' Opp'n at 10 n.12 (citing Oct. 8, 2010

Order at 2 n.2).<sup>4</sup>

# **1. Section 2(B) (Counts One, Four, Five, and Six)**

Arizona argues that the Supreme Court’s opinion in *Arizona* prevents further facial challenges to Section 2(B). (*See Arizona’s Mot.* at 9-12.) Arizona moves for summary judgment on the counts challenging Section 2(B), which include part of Count One (Supremacy Clause) and all of Counts Four (Fourth Amendment), Five (Article II, § 8 of the Arizona Constitution), and Six (Due Process Clause). (*Id.*; *see* FAC ¶¶ 177-82, 192-204; Joint Proposed Case Management Plan at 3-4 (clarifying that Plaintiffs’ claims alleging violations of the Fourth Amendment and Due Process Clause are based on Section 2(B)).<sup>5</sup> Section 2(B) requires state law enforcement officers or agencies to make a “reasonable attempt . . . to determine the immigration status” of any person they stop, detain, or arrest on some other legitimate basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.” A.R.S. § 11-1051(B). The law also provides that “[a]ny person who is arrested shall have the person’s immigration status determined before the person is released.” *Id.*

In *Arizona*, the Supreme Court held that Section 2(B) was not preempted on its face. *See Arizona*, 132 S. Ct. at 2507-10. After holding that “the mandatory nature of the status checks” under Section 2(B) did not interfere with federal immigration law, the

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<sup>4</sup> Plaintiffs have also alleged that S.B. 1070 in its entirety violates the Supremacy Clause, but in *Arizona*, the Court refused “to enjoin S.B. 1070 as an integrated statutory enactment with interlocking provisions” on preemption grounds and “evaluate[d] the constitutionality of the individual provisions of S.B. 1070 challenged by the United States.” *Arizona*, 703 F. Supp. 2d at 992-93; (*see also* FAC ¶ 180; Doc. 799, Joint Proposed Case Management Plan at 2.) (In addressing Arizona’s motion to dismiss, the Court “d[id] not address Plaintiffs’ claim alleging a violation of the [S]upremacy [C]lause as the Court already thoroughly addressed this issue in the [*Arizona*] Order.” (Oct. 8, 2010 Order at 14 n.6.)) Consistent with *Arizona*, the Court must evaluate Plaintiffs’ preemption challenges in terms of “the individual provisions of S.B. 1070 challenged by Plaintiffs.” (*See id.* at 2 n.2.) Plaintiffs’ pleadings and papers have only identified Section 2(B) and Section 2(D) as being preempted.

<sup>5</sup> Although the Joint Proposed Case Management Plan does not mention the claim under Article II, § 8 of the Arizona Constitution, this claim, like Plaintiffs’ Fourth Amendment challenge, is based on allegations that S.B. 1070 authorizes unconstitutional warrantless seizures and arrests. (*See* FAC ¶¶ 192-96); Ariz. Const. Art. II, § 8 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”).

1 Supreme Court addressed the second “constitutional concern” of “prolonged detention  
 2 while the checks are being performed.” *Id.* at 2508-09. The opinion described the ways  
 3 by which Arizona courts could interpret Section 2(B) to avoid the “constitutional  
 4 concern” that “state officers will be required to delay the release of some detainees for no  
 5 reason other than to verify their immigration status.” *Id.* at 2509 (“The state courts may  
 6 conclude that, unless the person continues to be suspected of some crime for which he  
 7 may be detained by state officers, it would not be reasonable to prolong the stop for the  
 8 immigration inquiry.”) (“State courts may read [the second sentence of Section 2(B)—  
 9 that ‘[a]ny person who is arrested shall have the person’s immigration status determined  
 10 before [he] is released’—]as an instruction to initiate a status check every time someone  
 11 is arrested, or in some subset of those cases, rather than as a command to hold the person  
 12 until the check is complete no matter the circumstances.”). The Supreme Court reasoned  
 13 that “if [Section] 2(B) only requires state officers to conduct a status check during the  
 14 course of an authorized, lawful detention or after a detainee has been released, the  
 15 provision likely would survive preemption—at least absent some showing that it has  
 16 other consequences that are adverse to federal law and its objectives.” *Id.* The Supreme  
 17 Court did not address “whether reasonable suspicion of illegal entry or another  
 18 immigration crime would be a legitimate basis for prolonging a detention, or whether this  
 19 too would be preempted by federal law.” *Id.* The opinion advised that “[t]he nature and  
 20 timing of this case counsel[ed] caution in evaluating the validity of [Section] 2(B).” *Id.* at  
 21 2510. Noting the “basic uncertainty about what the law means and how it will be  
 22 enforced” at this stage, the opinion did not “foreclose other preemption and constitutional  
 23 challenges to the law as interpreted and applied after it goes into effect.” *Id.*

24 The issue of whether the *Arizona* opinion forecloses Plaintiffs’ facial challenges to  
 25 Section 2(B) is not new. The Court addressed this issue when it denied Plaintiffs’ request  
 26 to preliminarily enjoin Section 2(B) on preemption, Fourth Amendment, and Equal  
 27 Protection grounds. (*See* Sept. 5, 2012 Order); *Valle del Sol*, 2012 WL 8021265.<sup>6</sup>

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28 <sup>6</sup> Plaintiffs initially appealed the denial of their preliminary injunction request, but



1 Plaintiffs argued that the *Arizona* opinion did not foreclose their facial challenges to  
2 Section 2(B) because the Supreme Court did not have before it the record that exists in  
3 this case. *Valle del Sol*, 2012 WL 8021265, at \*2. Plaintiffs interpreted their evidence to  
4 show that state officials would implement Section 2(B) in the same manner the Supreme  
5 Court deemed unconstitutional. *Id.* The Court rejected this argument and refused to  
6 “ignore the clear direction in the *Arizona* opinion that [Section] 2(B) cannot be  
7 challenged further on its face before the law takes effect.” *Id.* at \*3 (“As the Supreme  
8 Court stated, Plaintiffs and the United States may be able to challenge the provision on  
9 other preemption and constitutional grounds ‘as interpreted and applied after it goes into  
10 effect.’” (quoting *Arizona*, 132 S. Ct. at 2510)). The Court denied Plaintiffs’ request to  
11 certify “a question to the Arizona Supreme Court as to whether [Section] 2(B) authorizes  
12 additional detention beyond the point a person would otherwise have been released, in  
13 order to determine that person’s immigration status.” *Id.* The Court explained that  
14 “[g]iven the Supreme Court’s ruling, the Arizona Supreme Court would be faced with the  
15 same issue that bars this Court’s consideration of Plaintiffs’ facial challenges to [Section]  
16 2(B). Without a set of as-applied facts, the Supreme Court has held that it would be  
17 speculative to decide as a matter of law that [Section] 2(B) will be enforced in an  
18 unconstitutional manner.” *Id.*; (see also Doc. 1233, Apr. 6, 2015 Order at 1-4 (denying a  
19 second certification motion regarding Section 2(B) because it was an untimely motion for  
20 reconsideration of the preliminary injunction request denial).)

21 In responding to Arizona’s motion, Plaintiffs have not addressed the Court’s prior  
22 interpretation of the *Arizona* opinion. Plaintiffs generally make the same arguments the  
23 Court has already considered and rejected in the preliminary injunction stage. (See Pls.’  
24 Opp’n at 1-3.) Plaintiffs narrowly interpret the *Arizona* opinion to address only whether  
25 the United States could prevail in its facial challenge to Section 2(B). (*Id.* at 2.) As in the

26  
27 later withdrew their Ninth Circuit appeal. Arizona cross-appealed the Court’s grant of a  
28 preliminary injunction against the Section 5 smuggling provisions, A.R.S. § 13-2929. The  
Ninth Circuit affirmed on grounds that A.R.S. § 13-2929 was void for vagueness and  
preempted. See *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1019-29 (9th Cir. 2013),  
*cert. denied*, 134 S. Ct. 1876 (2014).

1 preliminary injunction stage, Plaintiffs argue that the Supreme Court could not determine  
 2 Section 2(B)'s constitutionality based on the record at the time. (*Id.* at 5.) Plaintiffs  
 3 interpret their evidence to show that Section 2(B) authorizes law enforcement officers to  
 4 detain and arrest individuals solely to verify their immigration status. (*Id.* at 7-8 (citing  
 5 Arizona Peace Officer Standards and Training Board ("AZ POST") training materials, a  
 6 2010 Arizona Legislative Council legal opinion, former Arizona State Senator Russell  
 7 Pearce's testimony and statements, and three county sheriffs' interpretations of Section  
 8 2(B)); *see* Doc. 1253, Pls.' Resp. to Intervenor Defs.' Statement of Material Undisputed  
 9 Facts in Supp. of Mot., and Pls.' Statement of Additional Facts Precluding Summ. J.  
 10 ("Pls.' Resp. and Statement of Additional Facts") ¶¶ P1-18.)

11 The Court will not depart from its prior analysis. Plaintiffs are attempting to  
 12 challenge a law that is not preempted on its face and could be interpreted to avoid the  
 13 constitutional concerns mentioned in the *Arizona* opinion, including potential violations  
 14 of the Fourth Amendment and the privacy protections in Article II, § 8 of the Arizona  
 15 Constitution. *See Arizona*, 132 S. Ct. at 2509-10 (explaining that Arizona courts could  
 16 interpret Section 2(B) on its face to avoid the "constitutional concern" that "state officers  
 17 will be required to delay the release of some detainees for no reason other than to verify  
 18 their immigration status"). The Supreme Court held there is a "basic uncertainty about  
 19 what the law means and how it will be enforced . . . [, and] without the benefit of a  
 20 definitive interpretation from the state courts, it would be inappropriate to assume  
 21 [Section] 2(B) will be construed in a way that creates a conflict with federal law." *Id.* at  
 22 2510; *see also City of L.A. v. Patel*, 135 S. Ct. 2443, 2450 (2015) ("[C]laims for facial  
 23 relief under the Fourth Amendment are unlikely to succeed when there is substantial  
 24 ambiguity as to what conduct a statute authorizes: Where a statute consists of  
 25 'extraordinarily elastic categories,' it may be 'impossible to tell' whether and to what  
 26 extent it deviates from the requirements of the Fourth Amendment." (quoting *Sibron v.*  
 27 *New York*, 392 U.S. 40, 59-60 & n.20 (1968))).<sup>7</sup> If state law enforcement agencies

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28 <sup>7</sup> The parties dispute how the standards in *United States v. Salerno*, 481 U.S. 739



1 implement policies or practices that raise constitutional concerns, the *Arizona* opinion  
 2 contemplates as-applied challenges to Section 2(B) now that the law is in effect, not  
 3 additional facial challenges. *See Arizona*, 132 S. Ct. at 2510.

4 The Court grants summary judgment in favor of Arizona on Count One  
 5 (Supremacy Clause) to the extent the count challenges Section 2(B) and Counts Four  
 6 (Fourth Amendment), Five (Article II, § 8 of the Arizona Constitution), and Six (Due  
 7 Process Clause).

## 8 **2. Equal Protection Clause and 42 U.S.C. § 1981 (Counts Two and** 9 **Seven)**

10 Arizona moves for summary judgment on Plaintiffs' claims alleging violations of  
 11 the Equal Protection Clause and 42 U.S.C. § 1981. (*See Arizona's* Mot. at 12-17.) These  
 12 claims are based on allegations that S.B. 1070 "was enacted with the purpose and intent  
 13 to discriminate against racial and national origin minorities, including Latinos, on the  
 14 basis of race and national origin...[and] impermissibly and invidiously targets  
 15 Plaintiffs[,] who are racial and national origin minorities." (FAC ¶¶ 185-86; *see also id.*  
 16 ¶ 208.) "The Equal Protection Clause of the Fourteenth Amendment commands that no  
 17 State shall 'deny to any person within its jurisdiction the equal protection of the laws,'  
 18 which is essentially a direction that all persons similarly situated should be treated alike."  
 19 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Title 42 U.S.C.  
 20 § 1981 prohibits discrimination under color of state law based on race, "ancestry[,] or  
 21 ethnic characteristics." *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987); *see*  
 22 *also Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-90 (1982)

23  
 24 (1987), apply to Plaintiffs' Section 2(B) facial challenges. (*See* Pls.' Opp'n at 3-5; Doc.  
 25 1264, Intervenor Defs.' Reply in Supp. of Mot. ("Arizona's Reply") at 4); *see United*  
 26 *States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of  
 27 course, the most difficult challenge to mount successfully, since the challenger must  
 28 establish that no set of circumstances exists under which the Act would be valid."); *Sprint*  
*Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 579 n.3 (9th Cir. 2008) (en  
 banc) ("The Supreme Court and this court have called into question the continuing  
 validity of the *Salerno* rule in the context of First Amendment challenges. In cases  
 involving federal preemption of a local statute, however, the rule applies with full force."  
 (citations omitted)). The Court does not need to find that *Salerno* precludes Plaintiffs'  
 Section 2(B) facial challenges when the *Arizona* opinion already does that.

1 (purposeful discrimination that violates the Equal Protection Clause will also violate 42  
2 U.S.C. § 1981).

3 Arizona argues it is entitled to summary judgment because Plaintiffs cannot  
4 establish that S.B. 1070, on its face, will have a discriminatory effect. (Arizona's Mot. at  
5 12-15.) Arizona also argues that there is a lack of admissible evidence that S.B. 1070 was  
6 enacted with a discriminatory purpose. (*Id.* at 16-17; *see also* Doc. 927, Dec. 11, 2013  
7 Order at 5 (explaining that "[t]o succeed on their Equal Protection challenge, Plaintiffs  
8 will have to show, among other things, '[p]roof of racially discriminatory intent or  
9 purpose' in the enactment of S.B. 1070" (second alteration in original) (quoting *Arlington*  
10 *Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977))).) Arizona's argument on  
11 discriminatory purpose is based on a discovery dispute ruling that precludes Plaintiffs  
12 from opposing the summary judgment motion with facts that were not part of their  
13 interrogatory responses. (Arizona's Mot. at 16-17; *see* Doc. 1192, Feb. 2, 2015 Minute  
14 Order at 1-2.) Arizona contends that because Plaintiffs provided only conclusory  
15 allegations without supporting facts, the ruling precludes all of Plaintiffs' factual support  
16 involving the discriminatory purpose element. (Arizona's Mot. at 16-17.) If the evidence  
17 supporting these facts is admissible, Arizona does not argue that it is insufficient to create  
18 triable issues. (*See* Arizona's Reply at 5-6.)

19 It is undisputed that S.B. 1070 is a facially neutral law. Plaintiffs contend that S.B.  
20 1070 will have a disparate impact on Latinos in Arizona based on evidence that people  
21 from Mexico and Latin America comprise more of the foreign-born and undocumented  
22 immigrant population than other races. (*See* Pls.' Opp'n at 12-13 (citing Doc. 1217, Decl.  
23 of Stephanie Elliott in Supp. of Arizona's Mot., Ex. C, Pls.' Third Supplemental Resp.  
24 and Objections to Intervenor Defs.' Interrogs. at 7-8 (stating that S.B. 1070 was expected  
25 and intended to have a disparate impact on, *inter alia*, Mexicans and Latinos)); Pls.'  
26 Resp. and Statement of Additional Facts ¶¶ P19-22 (citing evidence estimating that  
27 29.9% of all Arizona residents are Latino; that 64.7% of its foreign-born population is  
28 from Latin America; and that over 90% of undocumented immigrants in Arizona are

1 from Mexico).) Plaintiffs argue that this evidence, paired with their evidence under the  
 2 discriminatory purpose element, is sufficient to raise triable issues under the *Arlington*  
 3 *Heights* analysis to preclude summary judgment on their Equal Protection and 42 U.S.C.  
 4 § 1981 claims. (*See* Pls.’ Opp’n at 12-13.)

5 Under the discriminatory effect element of an Equal Protection claim, the parties  
 6 dispute whether Plaintiffs must identify a “similarly situated” group that will be treated  
 7 differently under S.B. 1070—i.e., Plaintiffs must demonstrate that state law enforcement  
 8 officials will enforce the law differently for Latinos than a similarly situated person of  
 9 another race or ethnicity. (*See id.* at 11; Arizona’s Reply at 8.) Plaintiffs argue that  
 10 Arizona is attempting to import irrelevant concepts from “selective prosecution” or  
 11 “selective enforcement” cases to their claims. (*See* Pls.’ Opp’n at 11); *see United States v.*  
 12 *Armstrong*, 517 U.S. 456, 465 (1996) (“The requirements for a selective-prosecution  
 13 claim draw on ordinary equal protection standards. . . . To establish a discriminatory  
 14 effect in a race case, the claimant must show that similarly situated individuals of a  
 15 different race were not prosecuted.” (citations and internal quotation marks omitted)).  
 16 However, none of the authority Plaintiffs cite supports their argument that they do not  
 17 have to show that a similarly situated group will be treated differently under S.B. 1070.  
 18 *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1106 (9th Cir. 2012) (“To state an equal  
 19 protection claim of any stripe, . . . a plaintiff must show that the defendant treated the  
 20 plaintiff differently from similarly situated individuals.”).

21 In *Arlington Heights*, the issue was whether the defendants acted with proscribed  
 22 discriminatory intent. *Arlington Heights* involved allegations that the plaintiffs had  
 23 allegedly suffered discriminatory treatment through the denial of a zoning permit request,  
 24 but the absence of discriminatory purpose “end[ed] the constitutional inquiry,” making it  
 25 unnecessary for the Supreme Court to address whether the challenged ordinance had “a  
 26 discriminatory ‘ultimate effect.’” *See Arlington Heights*, 429 U.S. at 271; *see also Hunter*  
 27 *v. Underwood*, 471 U.S. 222, 227 (1985) (invalidating a provision of the Alabama  
 28 Constitution under the *Arlington Heights* analysis because it was enacted with a

1 discriminatory purpose and it had a discriminatory effect by disenfranchising African-  
 2 Americans at a higher rate than whites convicted of certain non-felony offenses).  
 3 Plaintiffs also rely on the recent Ninth Circuit decision in *Arce v. Douglas*, 793 F.3d 968  
 4 (9th Cir. 2015), in which the court applied the *Arlington Heights* analysis to a law that  
 5 eliminated a Mexican American Studies program in the Tucson public schools. (*See* Doc.  
 6 1269, Not. of Supp. Authority.) Plaintiffs claim it is instructive that the Ninth Circuit  
 7 relied on the fact that “sixty percent of all [Tucson Unified School District] students [are]  
 8 of Mexican or other Hispanic descent, but also ninety percent of students in the [Mexican  
 9 American Studies, or ‘MAS’] program were such.” (*Id.* at 1 (alteration in original)  
 10 (quoting *Arce*, 793 F.3d at 978).) Plaintiffs compare these statistics to their own evidence.  
 11 (*Id.* at 1-2.) Critically, however, the law’s enactment and enforcement had a  
 12 discriminatory effect on similarly situated students, namely Mexican-American students  
 13 as opposed to other students. *Arce*, 793 F.3d at 978.<sup>8</sup>

14 Because Plaintiffs have admittedly not produced any evidence that state law  
 15 enforcement officials will enforce S.B. 1070 differently for Latinos than a similarly  
 16 situated person of another race or ethnicity, the Court grants summary judgment in favor  
 17 of Arizona on Counts Two (Equal Protection Clause) and Seven (42 U.S.C. § 1981). The  
 18 Court does not address Arizona’s alternative argument for summary judgment on these  
 19 claims.<sup>9</sup>

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20  
 21 <sup>8</sup> Plaintiffs also cite *Pacific Shores Properties, LLC v. City of Newport Beach*, 730  
 22 F.3d 1142 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 436 (2014), which involved a  
 23 challenge to an ordinance that “had the practical effect of prohibiting new group homes  
 24 from opening in most residential zones.” *Pacific Shores*, 730 F.3d at 1147. *Pacific Shores*  
 25 involved disparate treatment claims based on statutory laws. *Id.* at 1158 (“[Plaintiffs] who  
 allege disparate treatment under statutory anti-discrimination laws need not demonstrate  
 the existence of a similarly situated entity who or which was treated better than the  
 plaintiffs in order to prevail.”). That case did not purport to change the usual standards of  
 proof for Equal Protection claims.

26 <sup>9</sup> Plaintiffs move to strike the responsive statement of facts Arizona filed with its  
 27 reply. (Doc. 1280, Pls.’ Mot. to Strike Intervenor Defs.’ Resps. and Objections to Pls.’  
 28 Statement of Additional Facts Precluding Summ. J. (“Pls.’ Mot. to Strike”); *see* Doc.  
 1265, Arizona’s Resps. and Objections to Pls.’ Statement of Additional Facts Precluding  
 Summ. J.) Plaintiffs argue the filing violates the local rules. (Pls.’ Mot. to Strike at 1-2);  
*see* LRCiv 7.2(m)(2) (“Any response to an objection [in an opposing party’s  
 controverting statement of facts] must be included in the responding party’s reply

**B. Plaintiffs' Motion**

Plaintiffs move for summary judgment on their First Amendment challenge to the Section 5 day labor provisions, A.R.S. § 13-2928(A)-(B), and their preemption challenge to Section 2(D). (*See* Pls.' Mot. at 1; Pls.' Mem. at 5-29.) Plaintiffs ask the Court to permanently enjoin these provisions. (*Id.*) In addition to prevailing on the merits, a plaintiff seeking a permanent injunction must show: "(1) that [he or she] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

**1. Section 5 – A.R.S. § 13-2928(A) and (B) (Count Three)**

Plaintiffs argue that the day labor provisions under A.R.S. § 13-2928(A) and (B) impose impermissible content-based restrictions on First Amendment protected speech and are not narrowly tailored to promote Arizona's interest in traffic safety. (*See* Pls.' Mem. at 5-20.) Plaintiffs contend that the record is virtually unchanged from when the Court preliminarily enjoined the day labor provisions. (*Id.* at 5; *see* Feb. 29, 2012 Order); *Friendly House*, 846 F. Supp. 2d 1053. The Ninth Circuit affirmed the preliminary injunction order. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013).

A.R.S. § 13-2928(A) makes it unlawful for an occupant of a motor vehicle that is stopped on a street, roadway, or highway and is impeding traffic to attempt to hire a person for work at another location. A.R.S. § 13-2928(B) provides that it is unlawful for a person to enter a motor vehicle in order to be hired if the vehicle is stopped on a street, roadway, or highway and is impeding traffic. In the preliminary injunction stage, the Court and Ninth Circuit analyzed the day labor provisions as content-based commercial

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memorandum for the underlying motion and may not be presented in a separate responsive memorandum."). The Court denies the motion as moot. None of the dispositive issues involving Arizona's partial summary judgment motion required the Court to consider the objections Arizona raised in the responsive statement of facts when the reply fully addressed those issues.

1 speech restrictions under the four-prong test the Supreme Court set out in *Central*  
 2 *Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557  
 3 (1980). *Friendly House*, 846 F. Supp. 2d at 1056-58; *Valle Del Sol*, 709 F.3d at 818-20.  
 4 The *Central Hudson* test first evaluates “whether the affected speech is misleading or  
 5 related to unlawful activity. If not, the government bears the burden of showing that it has  
 6 a substantial interest, that the restriction directly advances that interest and that the  
 7 restriction is not more extensive than necessary to serve the interest.” *Valle Del Sol*, 709  
 8 F.3d at 816 (citations omitted).<sup>10</sup> It is undisputed that the day labor provisions are subject  
 9 to First Amendment scrutiny as restrictions on lawful, non-misleading speech and that  
 10 Arizona has a substantial interest in traffic safety. (See Pls.’ Mem. at 8-9; Doc. 1245,  
 11 Arizona’s Resp. in Opp’n to Pls.’ Mot. (“Arizona’s Resp.”) at 2); *Valle Del Sol*, 709 F.3d  
 12 at 823. Even if the day labor provisions directly advance Arizona’s substantial interest in  
 13 traffic safety—an issue the parties disputed in the preliminary injunction stage and  
 14 dispute now on summary judgment—the restrictions “‘must not be more extensive  
 15 than . . . necessary to serve’ a substantial government interest—i.e., [they] should not be  
 16 *overinclusive*.” *Valle Del Sol*, 709 F.3d at 825 (quoting *World Wide Rush, LLC v. City of*  
 17 *L.A.*, 606 F.3d 676, 684 (9th Cir. 2010)); see also *Posadas de Puerto Rico Assocs. v.*  
 18 *Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986) (“The last two steps of the *Central*  
 19 *Hudson* analysis basically involve a consideration of the ‘fit’ between the legislature’s  
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21  
 22 <sup>10</sup> The Court applied the standards in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653  
 23 (2011), to the day labor provisions, a case the Court interpreted as modifying *Central*  
 24 *Hudson*’s fourth prong to impose more demanding requirements on the state. *Friendly*  
 25 *House*, 846 F. Supp. 2d at 1057-58 (“[I]f a ban on commercial speech is content-based,  
 26 *Sorrell* instructs that it must be ‘drawn to achieve’ ‘a substantial governmental interest,’  
 27 whereas the *Central Hudson* test requires that the regulation not be ‘more extensive than  
 28 is necessary to serve that interest.’”). The Ninth Circuit declined to address “[w]hether  
*Sorrell* intended to make the commercial speech test more exacting for the state to  
 meet . . . because . . . [P]laintiffs [we]re likely to succeed even under *Central Hudson*’s  
 formulation of the standard and [the Ninth Circuit] cases interpreting it.” *Valle Del Sol*,  
 709 F.3d at 825; see *id.* at 821 (“[We] defer extended discussion of *Sorrell* for a more  
 appropriate case with a more fully developed factual record.”). The Ninth Circuit still has  
 had no occasion to clarify the application of *Sorrell* through an extended discussion;  
 however, in this current posture, the day labor provisions are still deficient under the pre-  
*Sorrell Central Hudson* standards.



ends and the means chosen to accomplish those ends.”).<sup>11</sup> Because the day labor provisions are not narrowly tailored to serve Arizona’s substantial interest in traffic safety, it is unnecessary to address whether Arizona’s evidence is sufficient to create genuine issues of material fact about whether the day labor provisions directly advance that traffic safety interest. This finding is consistent with the Ninth Circuit’s analysis addressing the preliminary injunction order on appeal.

The Ninth Circuit held that “[P]laintiffs [we]re likely to succeed on the merits of their claim that the day labor provisions are overinclusive because they restrict more speech than necessary to serve Arizona’s interest in traffic safety.” *Valle Del Sol*, 709 F.3d at 827 (emphasis omitted). Arizona had not produced evidence that existing laws or other potential laws were insufficient to address “the traffic problems that may attend in-street employment solicitation.” *Id.* (emphasis omitted). The opinion listed specific examples of traffic laws from the Ninth Circuit decision in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (en banc), “that were broad enough to address the traffic concerns attending in-street employment solicitation without implicating speech.” *Id.* (listing California traffic laws from *Redondo Beach* that “prohibit[ed] jaywalking, stopping in traffic alongside a red-painted curb, stopping a car so as to obstruct the normal movement of traffic, standing in a roadway if

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<sup>11</sup> As in the preliminary injunction stage, Arizona identifies several other substantial interests beyond traffic safety, including crime reduction, economic development, and protecting the aesthetics of its communities, but does not argue that the day labor provisions are narrowly tailored to achieve them. (See Arizona’s Resp. at 6-7.) The Court will therefore not consider these interests in the analysis. See *Valle Del Sol*, 709 F.3d at 823 n.4 (declining to address these proffered interests for the same reason).

Regarding *Central Hudson*’s third prong, the Court previously found that the day labor provisions, while “underinclusive to some degree,” still banned enough traffic-blocking solicitation that they directly advanced Arizona’s interest in traffic safety. *Friendly House*, 846 F. Supp. 2d at 1059. Although most of the evidence in the record was “nonprobative” on the issue of whether the particular traffic problems caused by day laborer solicitation were “more acute than the traffic safety concerns caused by other types of roadside communication,” “[o]ne officer did, however, represent that day laborer interactions require the parties to negotiate multiple terms, and so take longer than other types of in-street solicitation.” See *Valle Del Sol*, 709 F.3d at 824-25. The Ninth Circuit called this evidence “weak,” but concluded that the Court’s finding was not an abuse of discretion. *Id.* at 825.

1 such action interferes with the lawful movement of traffic and standing or stopping  
 2 except as near as is physically possible to the building line or the curb line” (internal  
 3 quotation marks omitted)). The Ninth Circuit found “[n]othing in the record show[ing]  
 4 that Arizona could not effectively pursue its interest in traffic safety by enforcing or  
 5 enacting similar kinds of speech-neutral traffic safety regulations.” *Id.*

6 The Ninth Circuit also held that “[t]he day labor provisions are a poor fit with  
 7 Arizona’s interest in traffic safety because, in this context, they are also underinclusive.”  
 8 *Id.* at 827-28 (“That the day labor provisions are underinclusive is . . . relevant . . . to  
 9 whether they satisfy *Central Hudson*’s no-more-extensive-than-necessary prong.”). The  
 10 Ninth Circuit explained that the Court properly “emphasized S.B. 1070’s purposes  
 11 clause,<sup>12</sup> the fact that the day labor provisions provide penalties drastically out-of-  
 12 proportion to those for other traffic violations[,] and the legislative record”—“factors all  
 13 support[ing] the [C]ourt’s conclusion that the day labor provisions are underinclusive  
 14 because they are ‘structured to target particular speech rather than a broader traffic  
 15 problem.’” *Id.* at 828. The Ninth Circuit concluded the analysis by noting that

16 Arizona could have advanced its interest in traffic safety directly, without  
 17 reference to speech. The availability of such obvious and less-restrictive  
 18 alternatives makes the day labor provisions overinclusive. They are also  
 19 underinclusive because they draw content-based distinctions that appear  
 motivated by a desire to eliminate the livelihoods of undocumented  
 immigrants rather than to address Arizona’s interest in traffic safety.

20 *Id.*

21 Arizona argues that there are factual disputes about whether Arizona traffic laws  
 22 sufficiently address the “unique safety concerns” arising from in-street employment  
 23 solicitation. (Arizona’s Resp. at 7-8.) Arizona lists a number of state traffic laws and  
 24 relies exclusively on one officer’s declaration about the purported shortcomings of these  
 25 laws to “address the hazards of in-street employment solicitation.” (*Id.*; see Doc. 1246,

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 27 <sup>12</sup> The purposes clause in Section 1 of S.B. 1070 states that “the intent of [S.B.  
 28 1070] is to make attrition through enforcement the public policy of all state and local  
 government agencies in Arizona” and that “[t]he provisions of this act are intended to  
 work together to discourage and deter the unlawful entry and presence of aliens and  
 economic activity by persons unlawfully present in the United States.”

1 Arizona's Controverting Statement of Facts and Supplemental Statement of Undisputed  
 2 Material Facts ¶¶ 26-31 (citing Doc. 553-3, Second Decl. of Daniel Boyd).) This  
 3 declaration was part of the record in the preliminary injunction stage and not all of the  
 4 statements in it specifically address "*the traffic problems* that may attend in-street  
 5 employment solicitation." See *Valle Del Sol*, 709 F.3d at 827 ("The question is . . . not  
 6 whether existing laws are sufficient to deal with in-street employment solicitation, but  
 7 rather whether existing laws are sufficient to deal with *the traffic problems* that may  
 8 attend in-street employment solicitation."). Even if existing traffic laws are insufficient to  
 9 address the traffic problems in-street employment solicitation may cause, there is no  
 10 evidence that Arizona could not effectively pursue its interest in traffic safety by enacting  
 11 other speech-neutral traffic safety regulations. *Id.* ("[O]ur consideration is not limited to  
 12 Arizona's actual traffic safety regulations, but includes any potential or actual traffic  
 13 safety regulations that are obviously available."). As the Ninth Circuit explained, "[the]  
 14 government must consider pursuing its interests through conduct-based regulations  
 15 before enacting speech-based regulations." *Id.* The Court must find "that the day labor  
 16 provisions are overinclusive because they restrict more speech than necessary to serve  
 17 Arizona's interest in traffic safety." See *id.* The Court does not need to address if Arizona  
 18 has offered sufficient controverting evidence to create factual issues about whether the  
 19 day labor provisions are underinclusive.

20 Arizona does not dispute that the other permanent injunction requirements are met.  
 21 See *id.* at 828-29 (affirming the preliminary injunction findings that Plaintiffs would  
 22 suffer irreparable harm without an injunction, the equities favored Plaintiffs, and an  
 23 injunction was in the public's interest); see also *Winter v. Natural Res. Def. Council, Inc.*,  
 24 555 U.S. 7, 32 (2008) (citing case law for the rule that issuing a permanent injunction is  
 25 essentially the same as for issuing a preliminary injunction except for the requirement to  
 26 show actual success on the merits instead of a likelihood of success). The Court grants  
 27 summary judgment in favor of Plaintiffs on Count Three (First Amendment) and  
 28 permanently enjoins the Section 5 day labor provisions, A.R.S. § 13-2928(A)-(B).

1                                   **2.      Section 2(D) (Count One)**

2           Section 2(D) of S.B. 1070 provides:

3           Notwithstanding any other law, a law enforcement agency may securely  
4           transport an alien who the agency has received verification is unlawfully  
5           present in the United States and who is in the agency's custody to a federal  
6           facility in this state or to any other point of transfer into federal custody that  
7           is outside the jurisdiction of the law enforcement agency. A law  
8           enforcement agency shall obtain judicial authorization before securely  
9           transporting an alien who is unlawfully present in the United States to a  
10          point of transfer that is outside of this state.

11          A.R.S. § 11-1051(D). Plaintiffs argue that Section 2(D) is conflict and field preempted  
12          based on their interpretation that the law authorizes state officials to detain and transport  
13          individuals based on civil removability without federal direction and supervision. (*See*  
14          Pls.' Mem. at 21-29); *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2011) ("The  
15          federal preemption doctrine stems from the Supremacy Clause, U.S. Const. art. VI, cl. 2,  
16          and the fundamental principle of the Constitution that Congress has the power to preempt  
17          state law." (alteration incorporated) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530  
18          U.S. 363, 372 (2000))), *rev'd on other grounds*, 132 S. Ct. 2492 (2012).<sup>13</sup> Because  
19          Plaintiffs compare Section 2(D) to the conflict preempted Section 6 provisions, and their  
20          preemption challenge centers on whether the law conflicts with the federal removal  
21          system, it is appropriate to consider this challenge under the conflict preemption analysis,  
22          not the field preemption analysis. (Pls.' Mem. at 21); *see Chicano Por La Causa, Inc. v.*  
23          *Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009) (explaining that conflict preemption  
24          occurs "when either 'compliance with both federal and state regulations is a physical

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25                   <sup>13</sup> The United States did not challenge Section 2(D) in *Arizona*. *See Arizona*, 703  
26          F. Supp. 2d at 986 ("[T]he United States has not made any argument to preliminarily  
27          enjoin . . . A.R.S. § 11-1051(C)-(F)[,] requiring that state officials work with federal  
28          officials with regard to unlawfully present aliens[.]"). The Court previously dismissed  
29          Plaintiffs' claim that Section 2(D) violated the Fourth Amendment by authorizing state  
30          law enforcement agencies to "transport individuals into federal custody," but did not  
31          address whether Plaintiffs could state a claim against Section 2(D) under a preemption  
32          theory. (*See* Oct. 8, 2010 Order at 14 n.6, 32 ("Plaintiffs do not address this [dismissal]  
33          theory in their Response and cite no authority stating that state law enforcement agencies  
34          may not transport a lawfully-detained person in their custody.")) The Court will not  
35          consider Plaintiffs' untimely and procedurally improper request for reconsideration of the  
36          dismissal. (*See* Pls.' Mem. at 25 n.14); LRCiv 7.2(g)(2).

1 impossibility,’ or where ‘state law stands as an obstacle to the accomplishment and  
 2 execution of the full purposes and objectives of Congress.’” (quoting *Fid. Fed. Sav. &*  
 3 *Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982))), *aff’d sub nom. Chamber of*  
 4 *Commerce of U.S. v. Whiting*, 563 U.S. 582 (2011).

5 The general rule is that “it is not a crime for a removable alien to remain present in  
 6 the United States. If the police stop someone based on nothing more than possible  
 7 removability, the usual predicate for an arrest is absent.” *Arizona*, 132 S. Ct. at 2505  
 8 (citation omitted). In *Arizona*, Section 6 was held to be conflict preempted because the  
 9 law authorized state officials to make arrests for civil immigration violations, which  
 10 would have “provide[d] state officers even greater authority to arrest aliens on the basis  
 11 of possible removability than Congress . . . g[ave] to trained federal immigration  
 12 officers.” *Id.* at 2506; *see also* A.R.S. § 13-3883(A)(5) (authorizing the warrantless arrest  
 13 of a person “if the officer ha[d] probable cause to believe . . . [t]he person to be arrested  
 14 ha[d] committed any public offense that ma[de] the person removable from the United  
 15 States”).<sup>14</sup> The law did this by authorizing “officers who believe[d] an alien [wa]s  
 16 removable by reason of some ‘public offense’ . . . [to] arrest on that basis regardless of  
 17 whether a federal warrant [w]as issued or the alien [wa]s likely to escape. This state  
 18 authority could be exercised without any input from the Federal Government about  
 19 whether an arrest [wa]s warranted in a particular case.” *Arizona*, 132 S. Ct. at 2506.

20 Plaintiffs argue that Section 2(D) operates like Section 6 to authorize the detention  
 21 and transportation of individuals to federal immigration facilities for civil immigration  
 22 violations. (Pls.’ Mem. at 21.) Plaintiffs interpret the phrase “[n]otwithstanding any other  
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24 <sup>14</sup> The opinion summarized the removal system Congress created and the  
 25 circumstances in which an individual can be arrested and detained during the removal  
 26 process. *See Arizona*, 132 S. Ct. at 2505-06. “[T]he Attorney General can exercise  
 27 discretion to issue a warrant for an alien’s arrest and detention pending a decision on  
 28 whether the alien is to be removed from the United States, . . . [a]nd if an alien is ordered  
 removed after a hearing, the Attorney General will issue a warrant.” *Id.* (internal  
 quotation marks omitted) (citing 8 U.S.C. § 1226(a) and 8 CFR § 241.2(a)(1)). “If no  
 federal warrant has been issued, . . . [federal officers] may arrest an alien for being in the  
 United States in violation of any immigration law or regulation, for example, but only  
 where the alien is likely to escape before a warrant can be obtained.” *Id.* (citing 8 U.S.C.  
 § 1357(a)).

1 law” in Section 2(D) as instructing state officials to discard all state or federal limitations  
 2 on their authority, and argue the only limitation on state officials’ authority occurs when  
 3 an individual is transported out of Arizona. (*Id.* at 22.) Plaintiffs support their  
 4 interpretation with evidence from many of the same sources they relied on in the earlier  
 5 Section 2(B) analysis, including the AZ POST training materials and interpretations of  
 6 the law from state law enforcement officials, including county sheriffs. (*Id.* at 23-24; *see*  
 7 Doc. 1224, Pls.’ Statement of Facts in Supp. of Mot. ¶¶ 179-90.) Plaintiffs read too much  
 8 into the law.

9 Section 2(D) requires that verification of an individual’s unlawful presence in the  
 10 country be obtained and that the person be in state custody before being transported to a  
 11 federal facility. A.R.S. § 11-1051(D). Unlike the preempted Section 6 provisions, which  
 12 expanded the statutory list of offenses for which state officials were authorized to make a  
 13 warrantless arrest, Section 2(D) addresses circumstances after an individual is already in  
 14 custody. The law is not a source for state officials’ arrest or detention powers, consistent  
 15 with its placement with other so-called cooperation provisions in Section 2. *See* A.R.S. §  
 16 11-1051(C)-(F); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)  
 17 (“A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme  
 18 and fit, if possible, all parts into an harmonious whole.” (citations and internal quotation  
 19 marks omitted)). Whether state officials have legal custody is determined by laws outside  
 20 of Section 2(D). The introductory phrase “[n]otwithstanding any other law” in Section  
 21 2(D) cannot mean that all other applicable laws are displaced. Section 2(D) cannot be  
 22 read on its face as authorizing detention for civil immigration violations.

23 Plaintiffs also argue that Section 2(D) is preempted because it authorizes state  
 24 officials to transport individuals to federal facilities without federal direction or  
 25 supervision. (Pls.’ Mem. at 25-26.) Putting aside the inherent authority that state officials  
 26 have to enforce federal criminal immigration laws, *see Gonzales v. Peoria*, 722 F.2d 468,  
 27 475-76 (9th Cir. 1983) (concluding that Arizona officers have authority to enforce the  
 28 criminal provisions of federal immigration law), *overruled on other grounds, Hodgers-*



1 *Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999), federal law authorizes state and  
 2 local officials to perform immigration enforcement duties under cooperation agreements  
 3 and in other circumstances, *see, e.g.*, 8 U.S.C. § 1357(g)(1) (authorizing the federal  
 4 government to enter into formal agreements with states and municipalities under which  
 5 their officers may perform certain duties of a federal immigration officer); *id.* § 1252c  
 6 (authorizing arrest and detention of previously removed aliens convicted of a felony); *id.*  
 7 § 1324(c) (authorizing arrests for violations of the federal smuggling statute); *accord*  
 8 *Arizona*, 132 S. Ct. at 2506 (citing these statutes). These duties can include transporting  
 9 detainees. *See* 8 U.S.C. § 1357(g)(1) (noting that delegated state officials are “qualified to  
 10 perform a function of an immigration officer in relation to the investigation,  
 11 apprehension, or detention of aliens in the United States (including the transportation of  
 12 such aliens across State lines to detention centers)”). Plaintiffs acknowledge the  
 13 circumstances in which state officials can enforce federal immigration law, but their  
 14 argument presumes that Section 2(D) must be read to exclude them. The verification and  
 15 transport process the law recognizes is consistent with state officials’ enforcement actions  
 16 taken under cooperation agreements and as authorized under the federal statutes listed  
 17 above.<sup>15</sup> Like Section 2(B), if state law enforcement agencies implement policies or  
 18 practices based on Section 2(D) that raise constitutional concerns, that enforcement can  
 19 be challenged in an as-applied case; however, the law is not facially preempted by federal  
 20 immigration law.<sup>16</sup>

21 Because Plaintiffs cannot prevail on their preemption claims against Section 2(B)

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23 <sup>15</sup> The verification process in Section 2(D) contemplates cooperation agreements  
 24 between Arizona and the federal government. *See* A.R.S. § 11-1051(E)(1) (“[A]n alien’s  
 25 immigration status may be determined by . . . [a] law enforcement officer who is  
 authorized by the federal government to verify or ascertain an alien’s immigration  
 status.”).

26 <sup>16</sup> This analysis also applies to Plaintiffs’ argument that Section 2(D) authorizes  
 27 state officials to unilaterally act without federal direction. (*See* Pls.’ Mem. at 24 (relying  
 28 on several state officials’ interpretations of Section 2(D)).) Because Section 2(D) can be  
 interpreted to cover situations in which federal officials request state officials’  
 assistance—a situation that does not implicate the constitutional concerns Plaintiffs  
 identify—the law is not facially preempted.

1 and Section 2(D), the Court grants summary judgment in favor of Arizona on Count One  
 2 (Supremacy Clause). Plaintiffs have not identified any other provision of S.B. 1070 they  
 3 are challenging under Count One that is not enjoined. *See supra* n.4.

### 4 **III. CONCLUSION**

5 Arizona is entitled to summary judgment on the remaining claims in Counts One  
 6 (Supremacy Clause), Two (Equal Protection Clause), Four (Fourth Amendment), Five  
 7 (Article II, § 8 of the Arizona Constitution), Six (Due Process Clause), and Seven (42  
 8 U.S.C. § 1981). Plaintiffs are entitled to summary judgment on Count Three (First  
 9 Amendment). The Section 5 day labor provisions, A.R.S. § 13-2928(A)-(B), are  
 10 permanently enjoined.

11 **IT IS ORDERED** granting Intervenor Defendants' Motion for Summary  
 12 Judgment re: Counts One, Two, Four, Five, Six, and Seven of the FAC (Doc. 1215).

13 **IT IS FURTHER ORDERED** granting in part and denying in part Plaintiffs'  
 14 Motion for Partial Summary Judgment and for Permanent Injunction (Doc. 1223).

15 **IT IS FURTHER ORDERED** denying as moot Plaintiffs' Motion to Strike  
 16 Intervenor Defendants' Responses and Objections to Plaintiffs' Statement of Additional  
 17 Facts Precluding Summary Judgment (Doc. 1280).

18 **IT IS FURTHER ORDERED** directing the Clerk to enter judgment in favor of  
 19 Arizona on Counts One (Supremacy Clause), Two (Equal Protection Clause), Four  
 20 (Fourth Amendment), Five (Article II, § 8 of the Arizona Constitution), Six (Due Process  
 21 Clause), and Seven (42 U.S.C. § 1981).

22 **IT IS FURTHER ORDERED** directing the Clerk to enter judgment in favor of  
 23 Plaintiffs on Count Three (First Amendment).

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1           **IT IS FURTHER ORDERED** permanently enjoining the Section 5 day labor  
2 provisions, A.R.S. § 13-2928(A)-(B).

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4           Dated this 4th day of September, 2015.

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10           Susan R. Bolton  
11           United States District Judge  
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