No. _____

# In The
# Supreme Court of the United States

STATE OF ARIZONA AND JANICE K. BREWER,
GOVERNOR OF THE STATE OF ARIZONA,

*Petitioners,*

v.

VALLE DEL SOL, INC., ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


JOSEPH SCIARROTTA, JR.
General Counsel
OFFICE OF GOVERNOR
JANICE K. BREWER
1700 West Washington Street
9th Floor
Phoenix, AZ 85007
(602) 542-1586

JOHN BOUMA
*Counsel of Record*
ROBERT A. HENRY
KELLY A. KSZYWIENSKI
SNELL & WILMER LLP
One Arizona Center
400 East Van Buren
Phoenix, AZ 85004
(602) 382-6000
jbouma@swlaw.com

*Counsel for Petitioners*



COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTIONS PRESENTED

In this pre-enforcement, facial challenge to the constitutionality of Ariz. Rev. Stat. § 13-2929, the Ninth Circuit ignored this Court's decision in *Clapper v. Amnesty International USA, Inc.*, 133 S. Ct. 1138 (2013) and found that one individual and unidentified members, volunteers, and employees of three organizations have standing to challenge Ariz. Rev. Stat. § 13-2929 because they face a "reasonable likelihood" of prosecution under the statute. The Ninth Circuit also found that three organizations have standing to challenge § 13-2929 because they claimed to have diverted resources to educate people allegedly confused by the Act in which § 13-2929 was enacted, but not § 13-2929 specifically. The question presented is whether Respondents have Article III standing and have established the requisite imminent risk of irreparable harm to obtain an injunction of Ariz. Rev. Stat. § 13-2929.

If the Ninth Circuit properly reached the merits of Respondents' constitutional challenge to Ariz. Rev. Stat. § 13-2929, two additional questions are presented:

1. Whether Ariz. Rev. Stat. § 13-2929 is void for vagueness even though its meaning is commonly understood.

2. Whether the Court of Appeals erred in finding that States are precluded from enacting any law that restricts a person from furthering or exploiting another's unlawful presence in the United States.

## PARTIES TO THE PROCEEDINGS

Petitioners, the State of Arizona and Governor Janice K. Brewer, were the appellants in the court below. Respondents, Service Employees International Union, Service Employees International Union, Local 5, United Food and Commercial Workers International Union, Arizona South Asians for Safe Families, Southside Presbyterian Church, Arizona Hispanic Chamber of Commerce, Asian Chamber of Commerce of Arizona, Border Action Network, Tonatierra Community Development Institute, Japanese American Citizens League, Valle del Sol, Inc., Coalición de Derechos Humanos, Pedro Espinoza, C.M., Luz Santiago, Jim Shee, Jose Angel Vargas, Maura Castillo, John Doe #1, and Jane Doe #3, were the appellees in the court below.

The following parties are named as defendants in the litigation in their official capacities as Arizona's County Sheriffs and County Attorneys, but they did not participate in the proceedings in the Ninth Circuit: Michael B. Whiting, Edward G. Rheinheimer, David W. Rozema, Bradley D. Beauchamp, Kenny Angle, Derek Rapier, Tony Rodgers, William G. Montgomery, Matthew J. Smith, Bradley Carlyon, Barbara LaWall, M. Lando Voyles, George Silva, Sheila S. Polk, Jon R. Smith, Joseph Dedman, Jr., Mark J. Dannels, Bill Pribil, Adam Sheppard, Preston J. Allred, Larry Avila, John C. Drum, Joseph Arpaio, Tom Sheahan, Kelly Clark, Clarence W. Dupnik, Paul Babeu, Tony Estrada, Steve Waugh, and Leon N. Wilmot.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

## PETITION FOR A WRIT OF CERTIORARI

Petitioners, the State of Arizona and Governor Janice K. Brewer (collectively "Arizona"), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 732 F.3d 1006, and reproduced in the appendix hereto ("App.") at App. 1-47. The opinion of the District Court for the District of Arizona is not reported, but is available at 2012 U.S. Dist. LEXIS 172196, and is reproduced at App. 48-65.

## JURISDICTION

The judgment of the Ninth Circuit was entered on October 8, 2013. App. 3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the U.S. Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be

made, under the authority of the United States, shall be the supreme law of the land. . . ."

The Tenth Amendment of the U.S. Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X.

The Due Process Clause of the Fourteenth Amendment of the Constitution provides: "nor shall any state deprive any person of life, liberty, or property without due process of law." U.S. Const., amend. XIV, § 1.

Pertinent provisions of Title 8 of the United States Code and of the Arizona Revised Statutes are reproduced in the Appendix.

## INTRODUCTION

On February 26, 2013, this Court issued its opinion in *Clapper v. Amnesty International USA, Inc.*, 133 S. Ct. 1138 (2013), reversing the Second Circuit's finding that Article III standing could be based on an "objectively reasonable likelihood" of future harm or costs the plaintiffs chose to incur to avoid harms that were not "certainly impending." Approximately seven months later, the Ninth Circuit issued the decision below, affirming a pre-enforcement injunction of Ariz. Rev. Stat. § 13-2929. Without citing *Clapper* or even acknowledging that a risk of future harm must be

"certainly impending" to satisfy Article III, the Ninth Circuit found that four Respondents (one individual and three organizations) established their standing and the likelihood of irreparable harm necessary to obtain injunctive relief because the individual and *unidentified* members, volunteers, and employees of the organizations faced a "reasonable likelihood" of prosecution under the statute.

Moreover, the Ninth Circuit based this conclusion on *unverified* allegations in Respondents' First Amended Complaint regarding the individual's alleged standing (ignoring her actual testimony on the issues), declarations from two organizations that were *two years old* at the time Respondents moved for injunctive relief, and vague and conclusory discovery responses from the third organization – none of which alleged any intent by any Respondent or any member, volunteer, or employee of a Respondent organization, to engage in conduct that would actually violate Ariz. Rev. Stat. § 13-2929.

The Ninth Circuit also found that the organizations had demonstrated the requisite standing and *future* risk of irreparable harm because they had allegedly diverted resources to educate persons confused by the Act in which the statute was adopted (S.B. 1070), without *any* allegation (much less showing) that any organization diverted any specific resource as a result of the particular provision of S.B. 1070 they had moved to enjoin, Ariz. Rev. Stat. § 13-2929, or had any need to educate people in the future,

since § 13-2929 had been in effect for two years at the time Respondents moved for injunctive relief.

After finding standing, the Ninth Circuit affirmed the injunction of § 13-2929 on a ground that Respondents *never raised* – that the phrase "in violation of a criminal offense" made the statute void for vagueness under the Due Process Clause. The Ninth Circuit did so without addressing the fact that the United States, the District Court, and the agency charged with training Arizona's law enforcement officers regarding the enforcement of § 13-2929 (the Arizona Peace Officers Standards and Training Board) had all understood the phrase and interpreted it consistently. In the alternative, the majority found that § 13-2929 is field and conflict preempted, disregarding its own prior precedent that Congress had *not* occupied the field of criminal immigration enforcement, and this Court's precedent that States can (and often do) penalize conduct that is also a crime under federal law without running afoul of the Supremacy Clause.

The Ninth Circuit's opinion conflicts with this Court's precedent because the Ninth Circuit: (1) found standing based on a "reasonable likelihood" of future harm; (2) affirmed injunctive relief based on unverified allegations in a pleading; (3) invalidated a statute on vagueness grounds without considering evidence that the statute was commonly and consistently understood; and (4) found the statute conflict preempted because Congress has criminalized the same conduct.

The Ninth Circuit also addressed important issues that have not been, but should be, decided by this Court, including whether: (1) organizations can manufacture the harm necessary to establish Article III standing by simply alleging that they have expended resources to educate people about the challenged law; (2) two-year-old declarations can be sufficient to demonstrate a *future* threat of irreparable harm; and (3) Congress has entirely occupied the field of criminal immigration enforcement.

This Court's review is appropriate.

## STATEMENT OF THE CASE

The Support Our Law Enforcement and Safe Neighborhoods Act, as amended ("S.B. 1070") was signed by Governor Brewer on April 23, 2010, and was clarified and revised a week later by Arizona H.B. 2162. S.B. 1070 is designed to address the public safety and economic crisis caused by rampant illegal immigration in Arizona by reinforcing provisions of the federal immigration laws. The Act contains 14 subsections that add or amend provisions of the Arizona Revised Code related to law enforcement procedures, crime, labor, and transportation.

Respondents are eight individuals and 12 organizations[1] who assert a pre-enforcement, facial challenge to all 14 subsections of S.B. 1070 under the U.S. and Arizona Constitutions based on their belief about the motives of the Arizona legislators who voted for S.B. 1070 and Arizona officials who will implement the Act's provisions. The District Court had jurisdiction under 28 U.S.C. § 1331. At issue in this Petition are Respondents' preemption and due process challenges to Ariz. Rev. Stat. § 13-2929.

Ariz Rev. Stat. § 13-2929 is one of two statutes enacted in Section 5 of S.B. 1070. It reinforces the federal prohibitions on persons who further or exploit the unlawful presence of aliens in the United States by making it unlawful for a person, knowing or in reckless disregard of the fact that an alien is unlawfully present in the United States, and who is in violation of a criminal offense to: (1) transport or move or attempt to transport or move the alien in Arizona in furtherance of the alien's unlawful presence in the United States; (2) conceal, harbor, or shield or attempt to conceal, harbor, or shield the alien from detection in Arizona; or (3) encourage or induce the alien to come to or live in Arizona. Ariz. Rev. Stat. § 13-2929(A).

---

[1] Several plaintiffs have been dismissed from Respondents' initial and First Amended Complaint, but those dismissals are not material to this Petition.

### A. After the District Court Dismissed Two Challenges to Ariz. Rev. Stat. § 13-2929, the Statute Went Into Effect for Two Years.

On May 17, 2010, Respondents filed their initial Complaint challenging § 13-2929 under the Supremacy Clause and also challenging two phrases in the statute as unconstitutionally vague in violation of the Due Process Clause – "in furtherance of illegal presence" and "that the immigrant has entered or remained in the United States illegally." Compl. ¶ 208.[2] Around the same time, the United States filed its Complaint challenging Sections 1-6 of S.B. 1070, including Ariz. Rev. Stat. § 13-2929, under the Supremacy Clause. Both Respondents and the United States moved to enjoin § 13-2929 on preemption grounds and Arizona moved to dismiss both Complaints for failure to state a claim upon which relief may be granted.

The District Court first ruled on the United States' motion for a preliminary injunction, enjoining certain provisions of S.B. 1070 under the Supremacy Clause, but *denying* the United States' motion for a preliminary injunction of § 13-2929.[3] *See United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part and rev'd in part by* 132 S. Ct. 2492 (2012).

---

[2] These phrases are substantially identical to phrases in 8 U.S.C. § 1324(a)(1)(A)(ii).

[3] The United States did not appeal the order denying injunctive relief as to Ariz. Rev. Stat. § 13-2929.

The District Court next ruled on the cross motions in this case, granting Arizona's motion to dismiss Respondents' due process challenge to § 13-2929 and denying Respondents' motion for a preliminary injunction of S.B. 1070 (including § 13-2929) as moot, incorporating its ruling from *United States v. Arizona* and finding that Respondents' "preemption arguments are no different from those made by the United States." Order at 25-26 & 35, *Friendly House v. Whiting*, CV 10-1061-PHX-SRB (D. Ariz. Oct. 8, 2010) (ECF No. 447).

Finally, on December 10, 2010, the District Court granted Arizona's motion to dismiss the United States' preemption challenge to § 13-2929 for failure to state a claim upon which relief may be granted.

As a result of the foregoing rulings, Ariz. Rev. Stat. § 13-2929 went into effect on July 28, 2010 and remained in effect for over two years.

### B. The District Court Addressed Respondents' Standing to Challenge § 13-2929 at the Pleading Stage Only and Found Standing Based on a "Reasonable Likelihood" of Future Harm.

Arizona challenged Respondents' standing three times in the District Court, twice facially and once factually, but the District Court addressed Respondents' standing to challenge § 13-2929 only once and only at the pleading stage.

1. On October 8, 2010, the District Court granted in part but largely denied Arizona's motion to dismiss the initial Complaint for lack of standing. *See Friendly House v. Whiting*, No. CV 10-1061-PHX-SRB, 2010 U.S. Dist. LEXIS 145778 (D. Ariz. Oct. 8, 2010). The court did not address Respondents' standing to assert the preemption challenges to S.B. 1070. In addressing Respondents' other challenges to S.B. 1070, the court dismissed for lack of standing Respondents' claims that Ariz. Rev. Stat. § 11-1051(B) violated the First Amendment and the right to travel, but found that the organizations had standing to assert the remaining "civil rights violations" to S.B. 1070 based on allegations that: (1) the organizations "[would] have to divert resources, or already ha[d] diverted resources, in order to educate and assist community members affected by S.B. 1070 and address the fear and confusion created by S.B. 1070"; and (2) S.B. 1070 would frustrate the organizations' missions by deterring people from participating in the organizations' programs and living in Arizona. *Id.* at *69-*76. The District Court did not address the *individuals'* standing to assert these claims or evaluate the organizations' standing to challenge S.B. 1070 on a provision-by-provision basis.

2. On May 29, 2012, the District Court denied Arizona's motion to dismiss the individual Respondents from the First Amended Complaint for lack of standing, including the only individual who alleged any risk of harm under § 13-2929 (Luz Santiago). *See* Order, *Friendly House v. Whiting*, No. CV

10-1061-PHX-SRB (D. Ariz. May 24, 2012) (ECF No. 682). The District Court agreed that, based on its prior rulings, Respondents' First Amended Complaint "no longer asserts a claim directly challenging [Ariz. Rev. Stat.] § 13-2929," but the court addressed Santiago's standing for the purpose of appellate review, finding that Santiago had standing to challenge § 13-2929 because she had alleged that she provides food, transportation, and shelter to members of her congregation, most of whom are not authorized to be in the United States, which the District Court found "sufficient to demonstrate a ***reasonable likelihood*** that A.R.S. § 13-2929 ***could be*** enforced against her and that her conduct would violate the challenged provision." *Id.* at 15-16 (emphasis added).[4] The District Court acknowledged that "§ 13-2929 prohibits transporting and harboring unlawfully present aliens only while also violating another criminal offense," but found it insignificant that Santiago had not alleged any intent to engage in any conduct that would satisfy this requirement. Instead, the court found that "this additional requirement does not make enforcement of [Ariz. Rev. Stat.] § 13-2929 ***unrealistic***" because "traffic violations are common and a violation of the federal alien smuggling statute would

[4] Arizona had also moved to strike the class allegations because the proposed classes were not defined in a way that each member would have standing, but the District Court deferred ruling on the proposed class definitions until its ruling on the motion for class certification.

not ***necessarily*** involve additional criminal conduct." *Id.* at 16 (emphasis added).

3. Less than two months later, the District Court granted Respondents' motion to certify a class of "[a]ll persons who are or will be deterred from living, associating, worshipping, or traveling with immigrants in Arizona because of [Ariz. Rev. Stat.] § 13-2929 as enacted by Section 5 of S.B. 1070." Order at 13, *Valle del Sol v. Whiting*, No. CV 10-1061-PHX-SRB (D. Ariz. July 24, 2012) (ECF No. 725). Arizona had opposed the motion based, in part, on the grounds that: (a) Respondents' challenges to § 13-2929 had been dismissed; (b) the evidence (including Santiago's deposition testimony) failed to establish Santiago's standing to represent the proposed class; and (c) the class definition was overbroad because it included people without standing.[5] Despite having previously agreed with Arizona that Respondents' challenges to § 13-2929 had been dismissed, the District Court reversed course and held that Respondents' "pre-emption challenge to this provision rests on different grounds from those asserted by the federal government." *Id.* at 11. The District Court then rejected Arizona's standing arguments based solely on its prior finding that Santiago had adequately *alleged*

[5] The class definition includes, for example, people who are or will be deterred from "worshipping with immigrants," even though § 13-2929 could not possibly be construed as prohibiting someone from worshipping with immigrants or engaging in any conduct involving *lawfully present* immigrants.

her standing in the First Amended Complaint. *See id.* at 5-6. The District Court did not address any of the *evidence* presented regarding Santiago's standing or the standing of class members who are not similarly situated with Santiago.

### C. Respondents' Renewed Motion to Enjoin Ariz. Rev. Stat. § 13-2929.

1. After this Court issued its decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012), affirming the injunction of three provisions of S.B. 1070, but finding that Ariz. Rev. Stat. § 11-1051(B) was not preempted on its face, Respondents again moved for a preliminary injunction of Ariz. Rev. Stat. §§ 11-1051(B) and 13-2929 under the Supremacy Clause.[6] In their motion, Respondents did not identify any actual harm they had suffered during the two years § 13-2929 had been in effect. Instead, Respondents cited Santiago's deposition testimony that she provides food, transportation, and shelter to individuals in need, and argued that "[i]f [Ariz. Rev. Stat.] § 13-2929 is not enjoined, Santiago will continue to face the '***reasonable likelihood***' of criminal charges." Respondents also argued that the organizational Respondents would "suffer direct harm in the form of resource diversion, the frustration of their core mission activities, and the

[6] Respondents also argued that § 11-1051(B) is facially unconstitutional under the Fourth Amendment and the Equal Protection Clause.

***possibility*** of criminal prosecution of staff or volunteers under [Ariz. Rev. Stat.] § 13-2929," relying on declarations that representatives of Border Action Network ("BAN") and Southside Presbyterian Church ("Southside") executed in ***June 2010*** – before § 13-2929 went into effect – and discovery responses from Arizona South Asians for Safe Families ("ASASF") stating "that ASASF volunteers often transport citizen and non-citizen domestic violence victim members to medical and legal appointments." Pls.' Mot. for Preliminary Injunction at 45-47 (ECF No. 723) (emphasis added).

2. On September 5, 2012, the District Court found that Respondents were not likely to prevail on their pre-enforcement, facial challenges to Ariz. Rev. Stat. § 11-1051(B), but that Respondents were likely to establish that § 13-2929 is field and conflict preempted. App. 48-65. In addressing the non-merits factors, the District Court did not address any harm to Arizona or make any factual findings regarding the alleged harm to Respondents as Fed. R. Civ. P. 52(a)(2) requires. The court only recited the legal standard for demonstrating irreparable harm sufficient to justify injunctive relief and then stated: "The Court finds that [Respondents] are likely to suffer irreparable harm in the absence of an injunction running to [Ariz. Rev. Stat.] § 13-2929 because it is preempted by federal law." The District Court thus granted Respondents' motion for a preliminary injunction of Ariz. Rev. Stat. § 13-2929, but denied the requested injunction of § 11-1051(B).

3. Respondents timely appealed the denial of the requested injunction of § 11-1051(B) but dismissed the appeal after the Ninth Circuit motions panel denied Respondents' emergency motion for a stay pending appeal. Arizona timely cross-appealed the injunction of § 13-2929, arguing that: (a) Santiago lacked standing because her alleged conduct did not violate § 13-2929; (b) the organizations lacked standing because their alleged harm was speculative and self-inflicted; (c) no Respondent had demonstrated an imminent threat of *future* harm that would warrant injunctive relief; and (d) § 13-2929 was not preempted. The Ninth Circuit had jurisdiction under 28 U.S.C. § 1292(a)(1).

After the briefing closed but before the Ninth Circuit heard argument, this Court issued its decision in *Clapper*, 133 S. Ct. 1138, reversing the Second Circuit's finding that the plaintiffs had standing based on an "objectively reasonable likelihood" of future harm – the same standard the District Court applied in finding that Santiago has standing to challenge Ariz. Rev. Stat. § 13-2929. Arizona thus submitted a notice of supplemental authority regarding the *Clapper* opinion to the Ninth Circuit on February 28, 2013 (ECF No. 84).

On April 2, 2013, the Ninth Circuit heard argument on the appeal. On March 25, 2013, just days before the argument, the panel directed Arizona to file "a letter brief not exceeding five (5) pages explaining what is meant by Ariz. [sic] § 13-2929's reference to 'a person who is in violation of a criminal offense'

and what the appellants mean in their brief at page 24 in stating 'she violates another criminal offense.'" Order at 1 (ECF No. 91). During the argument, the panel asked whether the phrase "in violation of a criminal offense" made § 13-2929 void for vagueness – an argument Respondents never raised and the District Court never addressed. Following the argument, the Ninth Circuit ordered supplemental briefing on the vagueness issue. *See* Order (ECF No. 97).

### D. The Ninth Circuit Affirmed the Injunction of Ariz. Rev. Stat. § 13-2929.

On October 8, 2013, the Ninth Circuit affirmed the injunction of § 13-2929. App. 46.

1. The Ninth Circuit found that Santiago had standing by following the District Court's ruling at the motion-to-dismiss stage and relying solely on the unverified allegations in the First Amended Complaint that Santiago provides "shelter and transportation to her congregants, most of whom are unauthorized aliens." App. 12. Without even citing *Clapper* or acknowledging that any alleged threat of future harm must be "certainly impending" to satisfy Article III, the Ninth Circuit held that Santiago's allegations are "sufficient to demonstrate a ***reasonable likelihood*** that [Ariz. Rev. Stat.] § 13-2929 ***could be*** enforced against her." App. 10 (emphasis added). The court acknowledged that Arizona's Peace Officer Standards and Training Board ("AZPOST") interpreted § 13-2929 to require the commission of a predicate criminal

offense and trained Arizona's law enforcement officers to enforce § 13-2929 accordingly. App. 13. The court found, however, that this requirement did not impact the standing analysis for two reasons. *First*, the court found that "in violating § 13-2929, Santiago will likely also be violating the federal harboring statute, 8 U.S.C. § 1324." App. 13-14. The court then contradicted itself by *rejecting* Arizona's argument that § 13-2929 parallels 8 U.S.C. § 1324, reasoning that "[t]he Arizona state courts . . . are not bound by federal precedent when interpreting their own state harboring provision." App. 16 n.9.[7] *Second*, the Ninth Circuit found that the predicate criminal offense requirement could be satisfied by a violation of *any* state or federal law, App. 14, even though § 13-2929 requires that the predicate offense be *criminal*, and there was no evidence (or even allegations) that Santiago was likely to engage in any other conduct that would constitute a criminal offense.

2. The Ninth Circuit found that the three organizations (BAN, Southside, and ASASF) had standing based on the two-year-old declarations from BAN and Southside and the discovery responses from

[7] The Ninth Circuit also created uncertainty if not a circuit split regarding the elements necessary to establish a violation of 8 U.S.C. § 1324. Arizona had analyzed Respondents' potential to violate § 1324 based on precedent in which the Ninth and Seventh Circuits found that § 1324 has an implicit intent requirement, but the Ninth Circuit rejected Arizona's analysis, characterizing its own precedent on the issue as not "entirely stable" and disregarding the Seventh Circuit precedent. App. 16 n.9.

ASASF expressing fear that their members, volunteers, or staff could be arrested under § 13-2929 (because they provide transportation and shelter to "citizen and non-citizen domestic violence victim members") and because the organizations claimed to have diverted resources to educate people regarding *S.B. 1070*, not Ariz. Rev. Stat. § 13-2929 specifically. App. 18.

3. On the merits, the Ninth Circuit affirmed the injunction of § 13-2929 because it found that "the phrase 'in violation of a criminal offense' is unintelligible and therefore the statute is void for vagueness." App. 22. As the Ninth Circuit recognized, Respondents had not raised the issue. App. 22 n.12.[8] Applying literal interpretations of the terms "violation" and "offense," however, the court found the phrase "in violation of a criminal offense" incomprehensible, notwithstanding that numerous courts and statutes have used the same or similar language. *See*, *e.g.*, *Alman v. Reed*, 703 F.3d 887, 900 (6th Cir. 2013); *United States v. Arturo Garcia*, 590 F.3d 308, 316 n.17 (5th Cir. 2009); *Echavarria-Olarte v. Reno*, 35 F.3d 395, 398 (9th Cir. 1994); *Licata v. United States*, 429 F.2d 1177, 1180 (9th Cir. 1970), *vacated as moot by*

[8] Respondents had asserted a vagueness challenge to Ariz. Rev. Stat. § 13-2929, but, as stated above, Respondents' challenge was based on the allegation that the phrases "in furtherance of illegal presence" and "that the immigrant has entered or remained in the United States illegally" are unconstitutionally vague. *See* Compl. ¶ 208.

400 U.S. 938 (1970); *United States v. Vazquez*, 319 F.2d 381, 384 (3d Cir. 1963); 18 U.S.C. § 3592(c)(5); 18 U.S.C. § 924(d)(3). The court also did not address Arizona's argument that the United States, the District Court, and the agency charged with training Arizona's law enforcement officers (AZPOST), had all interpreted the statute the same way – as requiring the contemporaneous commission of a predicate criminal offense. And the court did not address the cases Arizona cited in which courts (including this Court) have refused to construe a statute literally when the legislature's intent is clear and the literal interpretation produces absurd results.

4. The panel majority also held in the alternative that § 13-2929 is both field and conflict preempted. App. 28-46.

a. In finding the statute field preempted, the majority analogized the general criminal provisions of the federal immigration laws to Congress' comprehensive scheme for alien registration. App. 32-34. The majority also relied on the fact that Congress has authorized only federal authorities to prosecute violations of the criminal provisions of the federal immigration laws, App. 36, citing both 8 U.S.C. § 1329 and 18 U.S.C. § 3231. Under 18 U.S.C. § 3231, however, federal district courts have original and exclusive jurisdiction over "*all* offenses against the laws of the United States" (emphasis added). And the majority distinguished the Ninth Circuit's own prior determination that it "cannot be inferred that the federal government has occupied the field of criminal

immigration enforcement," *see Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983), *overruled in part on other grounds by Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999), because *Gonzales* involved different activity in the field. App. 34-35 n.16. A finding of field preemption, however, precludes *any* state or local activity in the field.

b. The majority found conflict preemption based on the facts that the state and federal statutes are not identical and that Ariz. Rev. Stat. § 13-2929 would permit Arizona authorities to prosecute persons for conduct that would also violate federal law. App. 39-44.

Judge Bea dissented as the preemption analysis because it was unnecessary to resolve the appeal. App. 46-47.

5. In addressing the non-merits factors, the court devoted only two sentences to its analysis, finding that Respondents had "established a likelihood of irreparable harm" because "[a]s discussed in section I, Santiago has demonstrated a credible threat of prosecution under the statute and the organizational plaintiffs have shown ongoing harms to their organizational missions as a result of the statute." App. 45. The court's irreparable harm finding, again, was based on the unverified allegations in Respondents' pleading, the two-year-old declarations from BAN and Southside, and the discovery responses from ASASF.

## REASONS FOR GRANTING THE PETITION

### I. The Ninth Circuit Opinion Conflicts with Supreme Court Precedent on Important Federal Questions.

1. The Court should grant the Petition to require the Ninth Circuit to follow this Court's clear and well-established precedent. "No principle is more fundamental to the judiciary's proper rule in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper*, 133 S. Ct. at 1146 (citation omitted). This Court has repeatedly held that Article III's limitation on federal courts' authority requires federal courts to ensure that parties seeking redress in federal court demonstrate an injury that is "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Id.* at 1147 (citation omitted). The Ninth Circuit's finding that Respondents have standing to challenge Ariz. Rev. Stat. § 13-2929 conflicts with this Court's standing precedent in at least five respects.

a. First, the court found standing based on a "reasonable likelihood" that Ariz. Rev. Stat. § 13-2929 *could* be enforced against Santiago or the members, volunteers, or employees of the organizational Respondents. App. 10, 18. The "reasonable likelihood" standard the Ninth Circuit applied, however, is the precise standard this Court rejected in *Clapper*. *See Clapper*, 133 S. Ct. at 1147 ("[T]he Second Circuit's 'objectively reasonable likelihood' standard is

inconsistent with our requirement that 'threatened injury must be *certainly impending* to constitute injury in fact.'" (emphasis added and citation omitted)). Although Arizona notified the Ninth Circuit of *Clapper*, the Ninth Circuit declined to follow (or even cite) the decision.

b. Second, the Ninth Circuit relied solely on unverified allegations in Respondents' First Amended Complaint[9] to find that Luz Santiago has standing, disregarding Santiago's deposition testimony, which is what the parties had relied on to support their arguments regarding Respondents' request for injunctive relief. App. 10. Finding standing at the preliminary injunction stage based on unverified allegations in a pleading, particularly where, as here, the deposition testimony did not support some of the allegations upon which the Ninth Circuit relied and further weakened Santiago's standing arguments, conflicts with this Court's requirement that each element of standing "be supported in the same way as any other matter on which the plaintiff bears the burden of

[9] The Ninth Circuit found that Arizona did not dispute the allegations, *see* App. 10 n.4, but Arizona did not address the allegations because Respondents' entitlement to injunctive relief should be based on the *evidence* they presented, not the allegations in their complaint, and the parties had all based their arguments on Santiago's deposition testimony. More importantly, "it is well established that the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009).

proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At the preliminary injunction stage, a movant must make a "clear showing" of its entitlement to such relief. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21 (2008); *see also Summers*, 555 U.S. at 499 (addressing whether the plaintiff organizations had standing to obtain injunctive relief and confirming that parties must make "'a *factual* showing of perceptible harm'" (emphasis added and citation omitted)).

c. Third, the Ninth Circuit found that the organizational Respondents have standing based on vague assertions about the potential risk of prosecution to *unidentified* members, employees, or volunteers, which conflicts with this Court's finding that standing cannot be based on the assertion that some, unidentified member of an organization might have standing. *Summers*, 555 U.S. at 499.

d. Fourth, the Ninth Circuit's finding that the organizations have standing because they have allegedly diverted resources to counteract the risk that their members, employees, or volunteers could be prosecuted under Ariz. Rev. Stat. § 13-2929 conflicts with this Court's finding that an organization "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending," *Clapper*, 131 S. Ct. at 1151.

e. Fifth, the Ninth Circuit's finding that BAN, Southside, and ASASF have standing to challenge Ariz. Rev. Stat. § 13-2929 because they have allegedly diverted resources to educate members and volunteers about "S.B. 1070," App. 18, conflicts with this Court's finding that standing "is not dispensed in gross," but must be established for each claim a plaintiff seeks to press and each form of relief sought, *Davis v. FEC*, 554 U.S. 724, 734 (2008) (citation omitted).

2. The Ninth Circuit's analysis of the non-merits factors also conflicts with this Court's precedent in at least two respects.

a. First, the Ninth Circuit's failure to consider the harm to Arizona conflicts with this Court's requirement that a court issuing injunctive relief must find that "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2748 (2009) (citation omitted).

b. Second, the Ninth Circuit's finding of irreparable harm based on allegations in Respondents' pleading and vague and conclusory assertions in Respondents' declarations and discovery responses conflicts with this Court's requirement that movants make a "clear showing" of future, irreparable harm to obtain injunctive relief. *See Winter*, 555 U.S. at 21.

3. The Ninth Circuit's finding that Ariz. Rev. Stat. § 13-2929 is void for vagueness conflicts with this Court's precedent because the Ninth Circuit

focused entirely on the literal interpretation of the terms "violate" and "offense." App. 22-23. For a statute to be unconstitutionally vague, however, "'men of common intelligence must necessarily guess at its meaning.'" *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (citation omitted); *see also Grayned v. City of Rockford*, 408 U.S. 104, 111 (1972) (rejecting a vagueness challenge because "it is clear what the ordinance as a whole prohibits"). Although the phrase "in violation of a criminal offense" may be grammatically incorrect, it has only one possible meaning and its common understanding is reflected in the fact that the United States, the District Court, and AZPOST have all understood the phrase and construed it consistently. The Ninth Circuit, however, refused to consider these facts, including, in particular, the construction given Ariz. Rev. Stat. § 13-2929 "by those charged with enforcing it." *Grayned*, 408 U.S. at 111.

4. The Ninth Circuit's due process analysis also conflicts with this Court's requirement that statutes must be construed, if possible, in a way that "avoid[s] their constitutional invalidation." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). In *Zadvydas*, for example, this Court rejected the Government's argument that 8 U.S.C. § 1231(a)(6) should be read to "mean[ ] what it literally says" – that there is no limit on the post-removal-detention period for certain aliens – finding instead that the statute must be construed to contain

an implicit limitation so as to avoid constitutional difficulties. *Id*. at 689-90.[10]

5. Finally, the Ninth Circuit's finding that § 13-2929 is conflict preempted because Congress has penalized the same conduct, App. 40, conflicts with the well-established principle that "a State may make violation of federal law a crime," *Arizona*, 132 S. Ct. at 2502; *see also United States v. Lanza*, 260 U.S. 377, 382 (1922) ("[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.").

## II. The Ninth Circuit Addressed Important Questions of Federal Law that Have Not Been, but Should Be, Decided by this Court.

1. This Court has not addressed the requirements for an organization to establish standing in its own right at the preliminary injunction stage or in the context of a constitutional challenge to a state law. The Court last addressed the requirements for organizational standing in 1982 and did so at the motion-to-dismiss stage in a case involving an alleged violation of the Fair Housing Act. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The Ninth

[10] Arizona courts also have "a duty to construe a statute so that it will be constitutional . . . 'unless its invalidity is established beyond a reasonable doubt.'" *Blake v. Schwartz*, 42 P.3d 6, 8 (Ariz. Ct. App. 2002) (citation omitted).

Circuit relied on *Havens* to support its finding that BAN, Southside, and ASASF have standing to challenge Ariz. Rev. Stat. § 13-2929 as a result of the resources they allegedly diverted to educate people about S.B. 1070. App. 18. Because each of these organizations opposes S.B. 1070 on policy grounds and none were required to explain how they diverted resources or how such activities differed from their political opposition to S.B. 1070, the Ninth Circuit's application of *Havens* effectively permits organizations to manufacture their own standing. That is at odds with Fifth Circuit precedent and cannot have been what the *Havens* Court intended. *See NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010) (finding that an organization's activities in examining and communicating about the challenged zoning ordinance did not establish its standing under *Havens*); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) ("Article III standing 'is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests."'" (citation omitted)).

2. This Court has held that a party seeking injunctive relief must demonstrate "that remedies available at law, such as monetary damages, are inadequate to compensate for that injury." *Monsanto Co.*, 130 S. Ct. at 2748 (citation omitted). This Court has not addressed, however, whether expenses an organization allegedly incurs to counteract the effects of a challenged law can constitute the type of irreparable harm necessary to warrant injunctive relief.

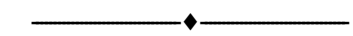
3. This Court has not addressed whether injunctive relief can be based on declarations that are two years old *at the time* a party moves for a preliminary injunction. The two-year delay between the execution of the BAN and Southside declarations in June 2010 and the filing of Respondents' motion for a preliminary injunction in July 2012 is particularly significant because the declarants primarily speculated about the harm that *could* occur *if* Ariz. Rev. Stat. § 13-2929 went into effect; § 13-2929 then went into effect in July 2010 (a month after the declarations were executed), and Respondents did not move for the present injunction of § 13-2929 until the statute had been in effect for almost two years. At a minimum, the Ninth Circuit should have considered the fact that none of the harms the organizations allegedly feared came to fruition when § 13-2929 was in effect, but the Ninth Circuit disregarded the time lag, finding it immaterial to its standing analysis and ignoring it entirely when addressing the organizations' alleged risk of irreparable harm. App. 19 n.11 & 44-46.

4. This Court also has not addressed whether Congress has occupied the field of criminal immigration enforcement. In *Arizona*, the only area this Court found field preempted is the field of alien registration. *See Arizona*, 132 S. Ct. at 2501-09. Several courts of appeals, including the Ninth Circuit in the decision below, have incorrectly construed this Court's analysis of Congress' alien registration provisions as precluding any State action that relates to

immigration absent an invitation from Congress. *See* App. 32-36. The Ninth Circuit correctly analyzed the issue when it found that Congress had *not* occupied the field of criminal immigration enforcement in *Gonzales*, 722 F.2d at 475. The *Gonzales* decision is in line with the decisions of state courts that Congress did *not* intend to occupy the field of alien smuggling. *See In re Jose*, 198 P.3d 1087 (Cal. 2009); *State v. Flores*, 188 P.3d 706 (Ariz. Ct. App. 2008). Nothing in *Arizona* undermines these decisions.

In the decision below, however, the Ninth Circuit turned well-established principles of federalism upside down, ignoring that States have inherent, plenary police power and are not dependent on an invitation from Congress to enact legislation designed to protect the health, safety, and welfare of their citizens. It is commonplace for state and federal law to prohibit the same conduct. A conclusion that States are foreclosed from exercising their traditional police powers to prohibit conduct that Congress has made unlawful could be supported only by the clearest of congressional statements that no concurrent state regulation is authorized. Congress made no such statement regarding the enforcement of federal *criminal* immigration laws. To the contrary, Congress expressly invited state and local law enforcement officers to make arrests for violations of the federal laws. *See* 8 U.S.C. § 1324(c).

These issues merit this Court's plenary review.



## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH SCIARROTTA, JR.
General Counsel
OFFICE OF GOVERNOR
JANICE K. BREWER
1700 West Washington Street
9th Floor
Phoenix, AZ 85007
(602) 542-1586

JOHN BOUMA
*Counsel of Record*
ROBERT A. HENRY
KELLY A. KSZYWIENSKI
SNELL & WILMER LLP
One Arizona Center
400 East Van Buren
Phoenix, AZ 85004
(602) 382-6000
jbouma@swlaw.com

*Counsel for Petitioners*

January 6, 2014

**VALLE DEL SOL INCORPORATED; COALICION DE DERECHOS HUMANOS; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; BORDER ACTION NETWORK; JIM SHEE; UNKNOWN PARTY, Named as Jane Doe #3 in Amended Complaint; JOHN DOE #1, proceeding under pseudonym; LUZ SANTIAGO; ARIZONA SOUTH ASIANS FOR SAFE FAMILIES; JAPANESE AMERICAN CITIZENS LEAGUE; LOCAL 5 SERVICE EMPLOYEES INTERNATIONAL UNION; SOUTHSIDE PRESBYTERIAN CHURCH; TONATIERRA COMMUNITY DEVELOPMENT INSTITUTE; C.M., a minor; ASIAN CHAMBER OF COMMERCE OF ARIZONA; SERVICE EMPLOYEES INTERNATIONAL UNION; ARIZONA HISPANIC CHAMBER OF COMMERCE; PEDRO ESPINOZA; MAURA CASTILLO; JOSE ANGEL VARGAS, Plaintiffs-Appellees, v. MICHAEL B. WHITING; EDWARD G. RHEINHEIMER; DAISY FLORES, Gila County Attorney, in her official capacity; RICHARD M. ROMLEY, Maricopa County Attorney, in his official capacity; MATTHEW J. SMITH, Mohave County Attorney, in his official capacity; BRADLEY CARLYON, Navajo County Attorney, in his official capacity; SAM VEDERMAN, La Paz County Attorney, in his official capacity; KENNY ANGLE, Graham County Attorney, in his official capacity; DEREK D. RAPIER, Greenlee County Attorney, in his official capacity; DAVID W. ROZEMA, Esq., Coconino County Attorney, in his official**

**capacity; BARBARA LAWALL, Pima County Attorney, in her official capacity; JAMES P. WALSH, Pinal County Attorney, in his official capacity; GEORGE SILVA, Santa Cruz County Attorney, in his official capacity; SHEILA S. POLK, Yavapai County Attorney, in her official capacity; JON R. SMITH, Yuma County Attorney in his official capacity; JOSEPH DEDMAN, JR., Apache County Sheriff, in his official capacity; BILL PRIBIL, Coconino County Sheriff, in his official capacity; ROD ROTHROCK, Chief Deputy; JOHN R. ARMER, Gila County Sheriff, in his official Capacity; PRESTON J. ALLRED, Graham County Sheriff, in his official capacity; STEVEN N. TUCKER, Greenlee County Sheriff, in his official capacity; DONALD LOWERY, La Paz County Sheriff, in his official capacity; JOSEPH M. ARPAIO, Maricopa County Sheriff, in his official capacity; TOM SHEAHAN, Mohave County Sheriff, in his official capacity; KELLY CLARK, Navajo County Sheriff, in his official capacity; CLARENCE W. DUPNIK, Pima County Sheriff, in his official capacity; PAUL R. BABEU, Pinal County Sheriff, in his official capacity; TONY ESTRADA, Santa Cruz County Sheriff, in his official capacity; STEVE WAUGH, Yavapai County Sheriff, in his official capacity; RALPH OGDEN, Yuma County Sheriff, in his official capacity, Defendants, and STATE OF ARIZONA; JANICE K. BREWER, Intervenor-Defendants – Appellants.**

**No. 12-17152**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

***732 F.3d 1006; 2013 U.S. App. LEXIS 20474***

**April 2, 2013, Argued and Submitted,**
**San Francisco California**
**October 8, 2013, Filed**

JUDGES: Before: John T. Noonan, Richard A. Paez, and Carlos T. Bea, Circuit Judges. Opinion by Judge Paez; Partial Concurrence and Partial Dissent by Judge BEA.

## OPINION

PAEZ, Circuit Judge:

Plaintiffs challenge Arizona Revised Statutes § 13-2929, which attempts to criminalize the harboring and transporting of unauthorized aliens within the state of Arizona.[1] The district court granted the plaintiffs' motion for a preliminary injunction with respect to this provision on the basis that § 13-2929 is preempted by federal law. Arizona appealed. We

[1] We use the term "unauthorized aliens" to refer to aliens who have entered or are present in the United States in violation of federal immigration law. This is the same convention that Arizona uses through out its briefs on appeal. The plaintiffs use the term "unauthorized immigrant," but, as the Third Circuit noted in *Lozano v. City of Hazleton,* 724 F.3d 297, 2013 WL 3855549 at *1 n.1 (3d Cir. July 26, 2013), in the context of a statute such as § 13-2929 the term "alien" is more precise.

conclude that the statute as written is void for vagueness under the Due Process Clause because one of its key elements – being "in violation of a criminal offense" – is unintelligible. We also find that the provision, however it is interpreted, is preempted by federal law and thus invalid under the Supremacy Clause. Therefore, we affirm the district court's grant of a preliminary injunction.

## BACKGROUND

This case arises from the extensive litigation regarding Arizona's 2010 Senate Bill 1070 ("S.B. 1070"). S.B. 1070, which is comprised of a variety of immigration-related provisions, was passed in response to the growing presence of unauthorized aliens in Arizona. The stated purpose of S.B. 1070 is "to make attrition through enforcement the public policy of all state and government agencies in Arizona." S.B. 1070 § 1. It does so by creating "a variety of immigration-related state offenses and defin[ing] the immigration-enforcement authority of Arizona's state and local law enforcement officers." *United States v. Arizona,* 641 F.3d 339, 344 (9th Cir. 2011), *aff'd in part, rev'd in part,* 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012).

The subject of this appeal is Ariz. Rev. Stat. § 13-2929, which was contained in section 5 of S.B. 1070.

Section 13-2929 attempts to criminalize[2] transporting, concealing, harboring, or attempting to transport, conceal, or harbor an unauthorized alien, at least under certain circumstances. It also seeks to criminalize inducing or encouraging an unauthorized alien to come to or reside in Arizona. The full relevant text of the provision is reproduced here:

> A. It is unlawful for a person who is in violation of a criminal offense to:
>
> 1. Transport or move or attempt to transport or move an alien in this state, in furtherance of the illegal presence of the alien in the United States, in a means of transportation if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.
>
> 2. Conceal, harbor or shield or attempt to conceal, harbor or shield an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.
>
> 3. Encourage or induce an alien to come to or reside in this state if the person knows or recklessly disregards the fact that

[2] As will be discussed in more detail, *infra,* the statute as written fails to clearly criminalize any conduct.

> such coming to, entering or residing in this state is or will be in violation of law.

Ariz. Rev. Stat. § 13-2929(A). A violation of § 13-2929 is a class one misdemeanor carrying a fine of at least one thousand dollars. § 13-2929(F). A violation involving "ten or more illegal aliens" is a class 6 felony carrying a minimum fine of one thousand dollars for each alien involved. *Id.* The only exemptions to the statute are for child protective service workers, first responders, ambulance attendants, and emergency medical technicians acting in their official capacities. § 13-2929(E).

In order to place this appeal in context, we review some of the procedural history of the relevant litigation surrounding S.B. 1070. Before S.B. 1070 went into effect, both the private plaintiffs in the instant case and the United States, separately, filed suit challenging various provisions of the bill. As a result of that litigation, the district court preliminarily enjoined four provisions of S.B. 1070 – sections 2(B), 3, 5(C), and 6 – on preemption grounds. *United States v. Arizona,* 703 F. Supp. 2d 980, 987 (D. Ariz. 2010). The United States also challenged the provision that is the subject of this appeal, Ariz. Rev. Stat. § 13-2929, not on the basis of preemption, but on the grounds that it was an improper regulation of immigration and violated the Dormant Commerce Clause. The district court rejected this challenge to § 13-2929. *Id.* at 1003-04. Therefore, § 13-2929 went into effect on July 29, 2010.

Arizona appealed the district court's preliminary injunction. We affirmed, concluding that the provisions were preempted by federal immigration law. *Arizona,* 641 F.3d at 366. The Supreme Court affirmed our decision with respect to sections 3, 5(C), and 6, concluding that those three provisions were preempted by federal law. *United States v. Arizona,* 132 S. Ct. 2492, 2510, 183 L. Ed. 2d 351 (2012). With respect to section 2(B), the Supreme Court reversed, concluding that the provision may be interpreted by the Arizona courts in a manner that survives constitutional scrutiny. *Id.* It left open the possibility of further preemption and constitutional challenges to section 2(B) as interpreted and applied. *Id.*

After the Supreme Court's decision in *Arizona,* the plaintiffs in this case renewed their motion for a preliminary injunction against section 2(B) of S.B. 1070[3] and Ariz. Rev. Stat. § 13-2929. The district court denied the plaintiffs' motion with respect to section 2(B), relying on the reasoning provided by the Supreme Court in *Arizona,* which it interpreted as providing "clear direction . . . that [s]ubsection 2(B) cannot be challenged further on its face before the

[3] The plaintiffs in this case sought a preliminary injunction enjoining enforcement of section 2(B) on the basis of Equal Protection and Fourth Amendment challenges to the provision, not brought by the United States in its case, which focused solely on preemption. The plaintiffs also argued that the record in this case, substantially more developed than the record in *Arizona,* sufficiently established preemption notwithstanding the Supreme Court's decision in *Arizona.*

law takes effect." The plaintiffs voluntarily dismissed their appeal of that ruling.

The plaintiffs' challenge to § 13-2929 differs from the United States' prior challenge because it is based on field and conflict preemption. The district court granted the preliminary injunction against § 13-2929, finding it both field and conflict preempted by federal immigration law. Arizona now appeals that ruling arguing that the plaintiffs do not have standing to challenge § 13-2929, and, if they do, they cannot demonstrate a likelihood of success on the merits or the other non-merits elements required for injunctive relief.

## STANDARD OF REVIEW

We review de novo questions of Article III justiciability, including standing. *Porter v. Jones,* 319 F.3d 483, 489 (9th Cir. 2003).

We review the district court's grant of a preliminary injunction for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley,* 344 F.3d 914, 918 (9th Cir. 2003). A court abuses it discretion when it applies an incorrect legal rule or relies upon "a factual finding that [is] illogical, implausible, or without support in inference that may be drawn from the record." *United States v. Hinkson,* 585 F.3d 1247, 1263 (9th Cir. 2009).

ANALYSIS

I. STANDING

On appeal, Arizona argues that neither the individual plaintiff, Luz Santiago, nor the organizational plaintiffs have standing to challenge § 13-2929. Since the question of constitutional standing "is not subject to waiver," we must first "ensure that [a] plaintiff has Article III standing." *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco,* 624 F.3d 1043, 1065 (9th Cir. 2010) (internal quotation marks omitted).

In order to demonstrate standing to seek injunctive relief under Article III,

> a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

*Summers v. Earth Island Inst.,* 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009). We need only conclude that one of the plaintiffs has standing in order to consider the merits of the plaintiffs' claim. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 943-44 (9th Cir. 2011). Nonetheless, we conclude that both Luz Santiago, the individual plaintiff, and the organizational plaintiffs have standing to challenge § 13-2929.

A. Individual Standing of Luz Santiago

Luz Santiago is a pastor of a church in Mesa, Arizona, whose congregation is eighty percent unauthorized aliens.[4] She "provides transportation and shelter to members of her congregation," including those who are unauthorized aliens, on a daily basis. In particular, she alleges that she often drives congregants to school, court, and doctor's appointments. Importantly, she "provides shelter to persons who seek sanctuary in her church." In light of these activities, Santiago alleges that she fears prosecution under § 13-2929. In denying Arizona's motion to dismiss, the district court concluded that "Santiago's allegations are sufficient to demonstrate a reasonable likelihood that [Ariz. Rev. Stat.] § 13-2929 could be enforced against her." We agree and therefore hold that Santiago has standing to challenge § 13-2929.

It is well-established that, although a plaintiff "must demonstrate a realistic danger of sustaining a direct injury as a result of a statute's operation or enforcement," a plaintiff "does not have to await the consummation of threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers,* 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (internal quotation marks omitted). Thus, Santiago need not await prosecution to challenge § 13-2929. *Id.*

[4] The facts about Santiago's congregation and her activities within the church are drawn from the allegations in the complaint. Arizona does not contest the validity of any of Santiago's factual allegations.

("[I]t is not necessary that [the plaintiff] first expose himself to actual arrest or a prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.") (internal quotation marks omitted). "[I]t is 'sufficient for standing purposes that the plaintiff intends to engage in a 'course of conduct arguably affected with a constitutional interest' and that there is a credible threat that the provision will be invoked against the plaintiff.'" *Ariz. Right to Life Political Action Comm. v. Bayless,* 320 F.3d 1002, 1006 (9th Cir. 2003) (quoting *LSO, Ltd. v. Stroh,* 205 F.3d 1146, 1154-55 (9th Cir. 2000) (quoting *Babbitt,* 442 U.S. at 298)).

Santiago has established a credible threat of prosecution under this statute, which she challenges on constitutional grounds.[5] She alleges that she

[5] Arizona argues that Santiago does not have standing because she has not been prosecuted, or directly threatened with prosecution, by authorities in the past two years. But as discussed above, plaintiffs do not have to await prosecution to challenge unconstitutional statutes. In *Thomas v. Anchorage Equal Rights Commission,* we held that we consider, as *one* of the factors in "evaluating the genuineness of a claimed threat of prosecution," "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings." 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). But we have never held that a specific threat is necessary to demonstrate standing. *See Cal. Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1094 (9th Cir. 2003) ("The district court's decision implied that absent a threat or at least a warning that California might prosecute CPLC for its publications, CPLC could not possibly have suffered an injury-in-fact sufficient to give it standing. . . . Our ruling in *Thomas* did not purport to overrule years of Ninth

(Continued on following page)

provides, and plans to continue to provide, shelter and transportation to her congregants, most of whom are unauthorized aliens, on a daily basis. Her actions, therefore, "fall within the plain language of [§ 13-2929's] prohibitions on transporting [and] harboring . . . undocumented immigrants." *Ga. Latino Alliance for Human Rights v. Gov. of Georgia,* 691 F.3d 1250, 1258 (11th Cir. 2012) (holding that an immigration attorney providing services to unauthorized aliens had individual standing to bring a pre-enforcement challenge to a practically identical provision in Georgia) [hereinafter *GLAHR*]. Because the injury alleged – a credible threat of prosecution under § 13-2929 – is clearly traceable to § 13-2929, and can be redressed through an injunction enjoining enforcement of that provision, Santiago has standing to challenge it. *Id.* at 1260 ("Each injury is directly traceable to the passage of H.B. 87 [the cognate Georgia law] and would be redressed by enjoining each provision.").

Arizona argues that Santiago has not established a credible threat of prosecution for two reasons. First,

---

Circuit and Supreme Court precedent recognizing the validity of pre-enforcement challenges to statutes infringing upon constitutional rights."); *see also Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."); *Babbitt,* 442 U.S. at 302 (finding standing where the plaintiff's "fear of criminal prosecution . . . is not imaginary or wholly speculative" even though the penalty "has not yet been applied and may never be applied").

Arizona argues that § 13-2929 only punishes the transportation or harboring of unauthorized aliens where the individual is committing some other predicate criminal offense, and Santiago has not alleged an intent to commit any other criminal offense. For the reasons discussed below, *infra* at section II, we do not believe that the text of the statute that supposedly imposes this requirement – "in violation of a criminal offense" – has any substantive content that would make prosecution of Santiago any less likely. For the purposes of our standing analysis, however, we use the interpretation asserted by Arizona because it appears to be the interpretation that Arizona law enforcement, which is charged with enforcing the law, has adopted.[6] If Santiago has alleged a likelihood of violating § 13-2929 as interpreted by Arizona law enforcement, then she has alleged a credible threat of prosecution.

Thus, even assuming the statute includes a predicate criminal offense requirement, Santiago has still alleged a credible threat of prosecution. First, in violating § 13-2929, Santiago will likely also be violating the federal harboring statute, 8 U.S.C.

---

[6] *See* Arizona Peace Officer Standards & Training Board, Support Law Enforcement and Safe Neighborhood Act Training Course 29 ("[B]efore I go to the first section let me just tell you that all three sections of the statute have a preliminary requirement. The person who is the suspect in the case, who you are focused on, has to be in violation of a criminal law at the time that they commit one of these three additional offenses [listed in Ariz. Rev. Stat. § 13-2929].").

§ 1324, which also criminalizes the harboring and transporting of unauthorized aliens with practically identical provisions.[7] Notably, Arizona does not contend that a violation of the federal harboring statute would not satisfy the predicate criminal offense element. Second, the breadth of the supposed predicate criminal offense provision, which includes a violation of *any* federal or state statute, defeats any claim that the provision narrows the scope of the law sufficiently to deprive Santiago of standing. In *GLAHR,* the Eleventh Circuit addressed an identical provision in a similar statute and found the predicate criminal provision too broad to have any constitutionally significant effect on the likelihood of prosecution: "We do not agree with the State officers that the probability of an officer's finding of probable cause for any violation of state or federal law is comparable to the likelihood of the 'sequence of individually improbable events' held to be speculative in *Lyons.*" 691 F.3d at 1259 (quoting *Fla. State Conference of the NAACP v. Browning,* 522 F.3d 1153, 1162 (11th Cir. 2008)). We agree with the Eleventh Circuit.

Second, Arizona argues that Santiago has not alleged an intent to violate § 13-2929 (or 8 U.S.C. § 1324 for purposes of the predicate criminal offense element) because she has not alleged an "inten[t] to assist [any] alien in violating the federal immigration

[7] Section 1324 only differs from § 13-2929 in two ways, discussed *infra,* neither of which would apply Santiago's alleged activities.

laws." Arizona contends that the text in § 13-2929 (which mirrors 8 U.S.C. § 1324) that criminalizes transporting an unauthorized alien "in furtherance of the illegal presence of the alien in the United States" and the harboring of an unauthorized alien "from detection" clearly imposes a requirement that the individual actually intend to help the alien violate the federal immigration laws. We disagree.

Section 13-2929 does not clearly include an intent requirement with respect to the "furtherance of illegal presence" or shielding "from detection" elements of the crime. The statute could be read to prohibit providing shelter that shields an alien from detection by immigration officials or transporting an alien in a manner that furthers his illegal presence regardless of the individual's intent. This is a reasonable reading of the statute since the statute includes a knowledge requirement with respect to the alien's immigration status. *See* Ariz. Rev. Stat. § 13-2929(A) (criminalizing these acts only if the person "knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of the law"). The Arizona legislature clearly knew how to include a scienter requirement but chose not to phrase the statute to impose a "purposefully" mens rea requirement with respect to the "in furtherance of the illegal presence" or "from detection" elements.[8] Thus, an individual who knowingly or

[8] Although Arizona opines that the statute will be interpreted to impose such a requirement, there is no evidence that

(Continued on following page)

recklessly provides transportation and shelter to unauthorized aliens, as Santiago does, can allege a credible threat of prosecution under § 13-2929 without alleging a specific intent to assist an unauthorized alien in violating the federal immigration laws.[9]

---

this is anything more than a litigation position. Arizona has not produced any evidence that Arizona law enforcement or Arizona courts have interpreted or will interpret the provision in this manner.

[9] Arizona attempts to bolster its intent argument by referencing cases where federal courts *have* interpreted the text of 8 U.S.C. § 1324 to require an intent to assist aliens in violating the federal immigration laws. *See United States v. You,* 382 F.3d 958, 966 (9th Cir. 2004) (approving a jury instruction that requires the jury to find that the defendant acted with "the purpose of avoiding [the aliens'] detection by immigration authorities"). The Arizona state courts are not, however, bound by federal interpretations of federal law when interpreting their own state harboring provision. Nor is the federal interpretation adopted in *You* entirely stable. In *United States v. Costello,* the federal government argued that "harboring" under 8 U.S.C. § 1324 should be defined broadly to include a defendant who has allowed her boyfriend, an unauthorized alien, to live with her. 666 F.3d 1040 (7th Cir. 2012). The government argued that "harboring" simply meant "to house a person." *Id.* at 1043. While the Seventh Circuit ultimately determined that the statute should require more, it cited to several other cases that have defined harboring more broadly to include simple sheltering. *Id.* at 1049-50 (citing *United States v. Acosta de Evans,* 531 F.2d 428, 430 (9th Cir. 1976) ("We believe that [the purpose of the statute] is best effectuated by construing 'harbor' to mean 'afford shelter to' and so hold."); *United States v. Kim,* 193 F.3d 567, 573-74 (2d Cir. 1999)).

Given the foregoing, there is a reasonable probability that Arizona law enforcement and courts will interpret both the federal and state statutes broadly and find that an individual

(Continued on following page)

In any event, even if the statute does include an intent requirement, Santiago's statement that she "provides shelter to persons who seek sanctuary in her church" would be sufficient to allege that she intends to shield those persons from detection.[10] For the foregoing reasons, Santiago has standing to challenge § 13-2929.

B. Organizational Standing

We also hold that the organizational plaintiffs have standing to challenge § 13-2929. An organization has "direct standing to sue [when] it show[s] a drain on its resources from both a diversion of its resources and frustration of its mission." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC,* 666 F.3d 1216, 1219 (9th Cir. 2012) (quoting *Fair Hous. of Marin v. Combs,* 285 F.3d 899, 905 (9th Cir. 2002)). An organization "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all. It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de*

---

violates § 13-2929 whenever she knowingly or recklessly affords shelter to or transports an unauthorized alien.

[10] Sanctuary is commonly defined as a "place of refuge or asylum." *Sanctuary,* The American Heritage Dictionary, http://www.ahdictionary.com/word/search.html?q=sanctuary (last visited Sept. 21, 2013).

*Lake Forest v. Lake Forest,* 624 F.3d 1083, 1088 (9th Cir. 2010).

Southside Presbyterian Church ("Southside"), Border Action Network ("BAN"), and Arizona South Asians for Safe Families ("ASASF") have established standing under this standard. The declaration provided by Southside's pastor establishes that (1) the church runs a homeless program and "Samaritans" program, both of which offer transportation and shelter to unauthorized aliens, and therefore reasonably fears that its volunteers will be deterred from participating in light of § 13-2929's prohibitions and (2) it will be required to divert resources to educate its members and counteract this frustration of its mission. Likewise, BAN's executive director's declaration establishes that, as part of its regular activities, its staff buses members, many of whom are unauthorized aliens, to various organizational functions. Therefore, BAN reasonably fears that its staff will be subject to investigation or prosecution under the statute and may be deterred from conducting these functions, which would frustrate its organizational mission. Moreover, because of BAN's members' overwhelming concerns about the effects and requirements of S.B. 1070, BAN has been forced to divert staff and resources to educating their members about the law. Finally, ASASF's answers to defendant's interrogatories show that it too has had to divert resources to educational programs to address its members' and volunteers' concerns about the law's effect.

We conclude that the organizational plaintiffs have clearly shown that S.B. 1070, and § 13-2929 in particular, has "perceptibly impaired" their ability to carry out their missions. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982); *see also Lopez v. Candaele,* 630 F.3d 775, 785 (9th Cir. 2010) ("[A]t the preliminary injunction stage, a plaintiff must make a 'clear showing' of his injury in fact."). Many of the organizational plaintiffs' core activities involve the transportation and/or provision of shelter to unauthorized aliens, and they have diverted their resources to address their constituents' concerns about the impact of § 13-2929. Despite Arizona's arguments that the organizational plaintiffs' statements of injury are too vague to sustain standing, we have found organizational standing on the basis of similar organizational affirmations of harm.[11] *See Fair Hous. Council of San*

[11] Arizona also argues that the organizations' 2010 declarations can no longer support a finding of standing because they are outdated. But as the Court explained in *Davis v. Fed. Election Comm'n,* "[w]hile the proof required to establish standing increases as the suit proceeds . . . the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." 554 U.S. 724, 734, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008). Therefore, it is entirely appropriate for us to consider the 2010 declarations in determining whether the organizational plaintiffs had the requisite stake in the case when they filed their claim. Although Arizona is correct that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed," that inquiry goes to mootness rather than standing. *See Friends of the Earth, Inc. v. Laidlaw Envtl.*

(Continued on following page)

*Fernando Valley,* 666 F.3d at 1219 (finding standing at the preliminary injunction stage based on FHC's statements that it "investigated Roommate's alleged violations and, in response, started new education and outreach campaigns targeted at discriminatory roommate advertising"); *see also Smith v. Pac. Props & Dev. Corp.,* 358 F.3d 1097, 1105 (9th Cir. 2004) (finding standing where an organization alleged that "in order to monitor the violations and educate the public regarding the discrimination, [it] has had . . . to divert its scarce resources from other efforts . . . to benefit the disabled community in other ways"). Because the organizational plaintiffs have shown that their missions have been frustrated and their resources diverted as a result of § 13-2929, they have standing to challenge it.

---

*Services,* 528 U.S. 167, 190-92, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (discussing the important distinction between standing and mootness). A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin,* 133 S. Ct. 1017, 1023, 185 L. Ed. 2d 1 (2013) (internal quotation marks omitted); *see also San Francisco Baykeeper, Inc. v. Tosco Corp.,* 309 F.3d 1153, 1159 (9th Cir. 2002) ("To establish mootness, a defendant must show that the court cannot order any effective relief. Defendants claiming mootness must satisfy a heavy burden of persuasion." (internal citations and quotation marks omitted)). Arizona has not shown, or attempted to show, that this court could not order any effective relief. Therefore, its claims regarding plaintiffs' current stake in the case as opposed to their stake at the time of filing are misplaced.

## II. VAGUENESS

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *United States v. Backlund,* 689 F.3d 986, 996 (9th Cir. 2012) (quoting *United States v. Kim,* 449 F.3d 933, 941 (9th Cir. 2006) (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972))) (internal quotation marks omitted). A statute is void for vagueness if it "fails to give a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Hunt v. City of Los Angeles,* 638 F.3d 703, 712 (9th Cir. 2011) (quoting *Grayned,* 408 U.S. at 108); *see also United States v. Williams,* 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). Where a statute imposes criminal sanctions, "a more demanding standard of scrutiny applies." *Id.* at 712 (internal quotation marks omitted); *see also United States v. Harris,* 705 F.3d 929, 932 (9th Cir. 2013) ("For statutes . . . involving criminal sanctions the requirement for clarity is enhanced." (internal quotation marks omitted) (alteration in original)).

Section 13-2929 states that "[i]t is unlawful for a person who is *in violation of a criminal offense*" to knowingly or recklessly transport, conceal, harbor, or shield an unauthorized alien. We conclude that the

phrase "in violation of a criminal offense" is unintelligible and therefore the statute is void for vagueness.[12]

An "offense" is defined by the Arizona criminal code as:

> [C]onduct for which a sentence to a term of imprisonment or of a fine is provided by any law of the state in which it occurred or by any law, regulation or ordinance of a political subdivision of that state and, if the act occurred in a state other than this state, it would be so punishable under the laws, regulations or ordinances of this state or of a political subdivision of this state if the act had occurred in this state.

Ariz. Rev. Stat. § 13-105. This accords with the common usage of the word "offense" to mean "a breach of a law or rule; an illegal act." *Offense,* Oxford U.S. English Dictionary, http://oxforddictionaries.com/definition/american_english/offense (last visited Sept. 16, 2013). Black's Law Dictionary defines both "offense" and

---

[12] The plaintiffs did not originally raise this issue. But in order to address the plaintiffs' preemption claim, we must first interpret the statute's provisions. In attempting to do so, we are confronted with this incomprehensible element of § 13-2929. Thus, we resolve the vagueness issue because it is both "antecedent to . . . and ultimately dispositive of " the appeal before us. *Arcadia v. Ohio Power Co.,* 498 U.S. 73, 77, 111 S. Ct. 415, 112 L. Ed. 2d 374 (1990); *see also U.S. Nat'l Bank of Oregon v. Ind. Ins. Agents of Am., Inc.,* 508 U.S. 439, 447, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993) (stating that a court can rule on an antecedent issue even if "the parties fail to identify and brief [it]").

"criminal offense" as "a violation of the law." *Offense,* Black's Law Dictionary (9th ed.2009). In sum, an offense is an action (or, sometimes, inaction).[13] And one cannot violate, or be in violation of, an action. One can only violate an object, such as a law or an agreement. *See Violate,* Oxford U.S. English Dictionary, http://oxforddictionaries.com/definition/american_english/violate (defining four different meanings of the verb "violate," depending on the type of object-either a "rule or formal agreement," "someone's peace, privacy, or rights," "something sacred," or "someone").

"In violation of an offense," an element of § 13-2929, thus translates to "in violation of a violation of the law," which is, of course, nonsensical. While "[s]tatutes need not be written with 'mathematical' precision," "they must be intelligible." *Forbes v. Napolitano,* 236 F.3d 1009, 1011 (9th Cir. 2000), *amended* 247 F.3d 903 (9th Cir. 2000) and *amended* 260 F.3d 1159 (9th Cir. 2001). The "violation of an offense" element of § 13-2929, which has no discernible meaning, simply cannot meet this test.

---

[13] Although the Arizona criminal code does not define "criminal offense" generally, the code does define "criminal offense" for purposes of the crime victims' rights chapter of the code. Ariz. Rev. Stat. tit. 13, ch. 40. The definition – "conduct that gives a peace officer or prosecutor probable cause to believe that a felony, a misdemeanor, a petty offense or a violation of a criminal ordinance has occurred" – is also framed in terms of conduct. Ariz. Rev. Stat. § 13-4401.

"Outside the First Amendment context, a plaintiff alleging facial vagueness must show that the enactment is impermissibly vague in all its applications." *Humanitarian Law Project v. U.S. Treasury Dep't,* 578 F.3d 1133, 1146 (9th Cir. 2009) (internal quotation marks omitted). Therefore, a statute is only facially void for vagueness if it "is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Alphonsus v. Holder,* 705 F.3d 1031, 1042 (9th Cir. 2013) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495 n.7, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)). "Such a provision simply has *no core*." *Vill. of Hoffman Estates,* 455 U.S. at 495 n.7 (emphasis in original); *see e.g., Forbes,* 236 F.3d at 1012 (concluding that the undefined terms "experimentation," "investigation," and "routine" in the statute were so ambiguous that the statute did not "establish any 'core' of unquestionably prohibited activities"). Section 13-2929 is exactly the type of statute that has "*no* core." *Id.* The element of being "in violation of a criminal offense" is not simply an "imprecise but comprehensible normative standard" but rather an incomprehensible element that provides "no standard of conduct . . . at all." *Id.* Therefore, we hold that the statute is unconstitutionally vague. On this basis, we affirm the district court's injunction. *Enyart v. Nat'l Conference of Bar Examiners, Inc.,* 630 F.3d 1153, 1159 (9th Cir. 2011) ("We may affirm the district court on any ground supported by the record.").

Arizona makes no claim that "in violation of a criminal offense" makes any sense as written. Nonetheless, Arizona argues that we should substitute the phrase "in violation of a law or statute" for "in violation of a criminal offense" because this is the "common understanding" of the latter phrase. But there is no common understanding of the strange phrase "in violation of an offense."[14] There is only a common understanding of the words "violation" and "offense," and those meanings applied to this phrase create a nonsensical result.

In the alternative, Arizona argues that we should interpret the statute as they suggest because it is a possible limiting construction that would save the

---

[14] Arizona attempts to establish this "common understanding" by referring to a few cases across the circuits that it argues use the phrase "violation of an offense." But, as Arizona acknowledges, these cases generally cross-reference a particular enumerated offense or set of offenses. *See, e.g., Marshall v. Columbia Lea Reg'l Hosp.,* 474 F.3d 733, 743 (10th Cir. 2007) ("If a person under arrest for violation of an offense enumerated in the Motor Vehicle Code. . . ." (quoting N.M. Stat. Ann. § 66-8-111(A))). While the language in these off-handed cases is still grammatically incorrect, the cross-references to specific statutorily created offenses make clear the courts' meaning in each of these cases. The statute here provides no similar cross-reference. It does not, for example, say "in violation of a criminal offense enumerated in the Arizona criminal code."

Even if these cases were not distinguishable on this ground, we doubt that the use of this incomprehensible phrase by a few courts across the years would be sufficient to give notice of this element's meaning to the "person of ordinary intelligence." *Hunt,* 638 F.3d at 712.

statute. But the cases Arizona relies upon are inapposite. They are cases where the state provided a reasonable narrowing construction to statutory language amenable to several interpretations. *See, e.g., Broadrick v. Oklahoma,* 413 U.S. 601, 617, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) ("The State Personnel Board, however, has construed [§] 818's explicit approval of 'private' political expression to include virtually any expression not within the context of active partisan political campaigning, and the State's Attorney General, in plain terms, has interpreted [§] 818 as prohibiting 'clearly partisan political activity' only."); *Law Students Research Council v. Wadmond,* 401 U.S. 154, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971) (accepting the state authorities' limited construction of the terms "form of the government of the United States," "belief," and "loyalty" in approving a rule governing admission to the New York State bar).

Here, Arizona asks us not to adopt a narrowing construction, but rather to replace a nonsensical statutory element with a different element. Rewriting the statute is a job for the Arizona legislature, if it is so inclined, and not for this court. *See H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 249, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989); *see also Foti v. City of Menlo Park,* 146 F.3d 629, 639 (9th Cir. 1998) ("Although we must consider the City's limiting construction of the ordinance, we are not required to insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance."). The Arizona legislature knows how to write a statute

requiring the commission of a predicate criminal offense and could have done so here. *See, e.g.,* Ariz. Rev. Stat. § 13-1508(A) ("A person commits burglary in the first degree if such person or an accomplice violates the provisions of either § 13-1506 or 13-1507 and knowingly possesses explosives, a deadly weapon or a dangerous instrument *in the course of committing any theft or any felony.*") (emphasis added); Ariz. Rev. Stat. § 13-2323(B) ("A person commits assisting a human smuggling organization by *committing any felony offense,* whether completed or preparatory, at the direction of or in association with any human smuggling organization.") (emphasis added).

"[A]ny narrowing construction of a state statute adopted by a federal court must be a reasonable and readily apparent gloss on the language." *Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F.3d 908, 925 (9th Cir. 2004). Exchanging the words "a criminal offense" for the words "a law or statute" is not a "readily apparent gloss" on the statute's language.[15]

---

[15] In considering Arizona's proposed revision to the statute, "we are especially mindful of our uncomfortable position as a federal court construing a state statute." *Planned Parenthood of Idaho, Inc.,* 376 F.3d at 932. "When federal courts rely on a 'readily apparent' constitutional interpretation, plaintiffs receive sufficient protection from unconstitutional application of the statute, as it is quite likely nonparty prosecutors and state courts will apply the same interpretation. Where federal courts apply a strained statutory construction, however, the state courts and non-party prosecutors, not bound by a federal court's reading of a state statute, are free to, and likely to, reject the interpretation and convict violators of the statute's

(Continued on following page)

As currently drafted, the statute is incomprehensible to a person of ordinary intelligence and is therefore void for vagueness.

## III. PREEMPTION

Even were we to accept Arizona's proposed interpretation of § 13-2929, we conclude that the statute is also preempted by federal law. *See United States v. Johnson,* 256 F.3d 895, 914 (9th Cir. 2001) ("Panels often confront cases raising multiple issues that could be dispositive, yet they find it appropriate to resolve several, in order to avoid repetition of errors on remand or provide guidance for future cases. Or, panels will occasionally find it appropriate to offer alternative rationales for the results they reach."). Our analysis is guided by the Supreme Court's most recent discussion of preemption principles in *Arizona,* 132 S. Ct. at 2492, and the three out-of circuit decisions finding nearly identical provisions in Alabama, Georgia, and South Carolina preempted by federal law. Therefore, we also affirm the district court's order on this additional ground.

---

plain meaning. The result is inadequate relief from unconstitutional prosecution for plaintiffs who do not or cannot sue every conceivable state prosecutor who could institute proceedings against them." *Id.*

A. Guiding Preemption Principles

The preemption doctrine stems from the Supremacy Clause. It is a "fundamental principle of the Constitution [ ] that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). There are "three classes of preemption": express preemption, field preemption and conflict preemption. *United States v. Alabama,* 691 F.3d 1269, 1281 (11th Cir. 2012). "The first, express preemption, arises when the text of a federal statute explicitly manifests Congress's intent to displace state law." *Id.; see also Arizona,* 132 S. Ct. at 2500-01. Under the second, field preemption, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona,* 132 S. Ct. at 2501. Field preemption can be "inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)).

Third, "even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby,* 530 U.S. at 372. Conflict preemption, in turn, has two forms: impossibility and obstacle preemption. *Id.* Courts find

impossibility preemption "where it is impossible for a private party to comply with both state and federal law." *Id.* Courts will find obstacle preemption where the challenged state law "stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona,* 132 S. Ct. at 2501 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). Finally, any direct regulation of immigration – "which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain" – is constitutionally proscribed because the "[p]ower to regulate immigration is unquestionably exclusive federal power." *DeCanas v. Bica,* 424 U.S. 351, 354-55, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976).

Analysis of a preemption claim "must be guided by two cornerstones of [the Supreme Court's] jurisprudence. First, 'the purpose of Congress is the ultimate touchstone in every pre-emption case.' Second, '[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the states have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine,* 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009) (quoting *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)) (internal quotation marks and citations omitted) (alterations in original).

*But see United States v. Locke,* 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000) ("[A]n assumption of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." (internal quotation marks omitted)).

B. § 13-2929 is Field Preempted

As discussed above, field preemption can be inferred either where there is a regulatory framework "so pervasive . . . that Congress left no room for the States to supplement it" or where the "federal interest [is] so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona,* 132 S. Ct. at 2501. As the Supreme Court reiterated in *Arizona,* the federal government has "broad, undoubted power over the subject of immigration and the status of aliens." *Id.* at 2498. This authority rests in part on the federal government's constitutional power to "establish an uniform Rule of Naturalization," U.S. Const., Art. I, § 8, cl. 4, but also rests significantly on "its inherent power as a sovereign to control and conduct relations with foreign relations." *Id.* Federal control over immigration policy is integral to the federal government's ability to manage foreign relations:

> Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.

> Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.
>
> It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.

*Id.* (citations omitted). In light of this federal interest, "[f]ederal governance of immigration and alien status is extensive and complex." *Id*. at 2499. It is within this context that § 13-2929 must be analyzed.

In *Arizona,* the Court held that section 3 of S.B. 1070 was field preempted. It held that the federal plan for alien registration – which includes requirements for registration, fingerprints, change of address reporting, and carrying proof of registration and provides penalties for failure to register – was a "single integrated and all-embracing system," designed as a "harmonious whole," with "a full set of standards . . . including the punishment for noncompliance." 132 S. Ct. at 2501-02. Thus, it concluded that the federal government "occupie[s] the field of alien registration" and "even complementary state regulation is impermissible." *Id.* at 2502.

Section 13-2929 attempts to regulate conduct – the transportation and/or harboring of unauthorized aliens – that the federal scheme also addresses. Federal law, as set forth in 8 U.S.C. § 1324 prohibits

a nearly identical set of activities as § 13-2929. Section 1324 provides, in relevant part:

> Any person who –
>
> . . .
>
> (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;
>
> (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or
>
> . . .
>
> shall be punished as provided in subparagraph (B).

*Id.* § 1324(a)(1)(A). The remainder of § 1324 outlines a detailed set of graduated punishments for violations,

§ 1324(a)(1)(B)(i)-(iv), (a)(2)(A)-(B), (a)(3)(A), (a)(4), (b), prescribes special evidentiary rules, § 1324(b)(3), (d), and mandates the creation of an educational program on the penalties for harboring aliens, § 1324(3).

Section 1324 is also part of a larger federal scheme of criminal sanctions for those who facilitate the unlawful entry, residence, or movement of aliens within the United States. *See* 8 U.S.C. § 1323 (penalizing transportation companies and persons for bringing aliens to the United States without valid passports and necessary visas or taking consideration contingent upon an alien's admission to the United States); § 1327 (penalizing those who aid or assist certain inadmissible aliens to enter the country); § 1328 (penalizing those who import aliens for immoral purposes). Aliens themselves may also be criminally prosecuted for unlawful entry or reentry into the United States. *Id.* § 1325 (penalizing improper entry); § 1326 (penalizing unauthorized reentry following removal).

Thus, the scheme governing the crimes associated with the movement of unauthorized aliens in the United States, like the registration scheme addressed in *Arizona* (and *Hines*), provides "a full set of standards" designed to work as a "harmonious whole." 132 S. Ct. at 2501.[16] A version of § 1324 has been part

[16] Arizona argues that *Gonzales v. Peoria,* 722 F.2d 468 (9th Cir. 1983), already resolved the question of whether federal law

(Continued on following page)

of our "extensive and complex," *Arizona,* 132 S. Ct. at 2499, federal immigration scheme for over a century. *United States v. Sanchez-Vargas,* 878 F.2d 1163, 1168 (9th Cir. 1989). Its slow evolution over time demonstrates Congress's intentional calibration of the appropriate breadth of the law and severity of the punishment. *Id.* at 1168-70. As we explained in *Sanchez-Vargas,* the current version of § 1324 "now presents a single comprehensive 'definition' of the

---

on harboring unauthorized aliens is field preemptive. But Arizona is incorrect. *Gonzales* addressed a distinct question from the one raised here. It considered whether the criminal immigration statutes preempted local law enforcement arrests for violations of those federal statutes. Within that context, we wrote:

> [T]his case does not concern that broad scheme [of removal regulation], but only a narrow and distinct element of it – the regulation of criminal immigration activity by aliens. The statutes relating to that element are few in number and relatively simple in their terms. They are not, and could not be, supported by a complex administrative structure. It therefore cannot be inferred that the federal government has occupied the field of criminal immigration enforcement.

*Id.* at 475. The foregoing analysis makes perfect sense within the context of determining the authority of local law enforcement officers to *arrest* for violations of the federal criminal immigration statutes. The federal criminal immigration statutes rarely address the question of arrests and the section that does explicitly allows for local law enforcement arrests. Thus, the federal government did not occupy the field with respect to arrests for violations of these statutes. *Gonzales* says nothing about whether the statutory scheme is comprehensive with respect to the substantive prohibitions of the federal criminal immigration statutes.

federal crime of alien smuggling – one which tracks smuggling and related activities from their earliest manifestations (inducing illegal entry and bringing in aliens) to continued operation and presence within the United States (transporting and harboring or concealing aliens)." *Id.* at 1169.

Moreover, in developing the scheme for prohibiting and penalizing the harboring of aliens, Congress specifically considered the appropriate level of involvement for the states. Section 1324(c) allows state and local law enforcement officials to make arrests for violations of § 1324. Congress did not, however, grant states the authority to prosecute § 1324 violations, but instead vested that power exclusively in the federal authorities. *See* 8 U.S.C. § 1329; 18 U.S.C. § 3231; *see also GLAHR,* 691 F.3d at 1258, 1264. Thus, "the inference from these enactments is that the role of the states is limited to arrest for violations of federal law." *GLAHR,* 691 F.3d at 1264.

The Third, Fourth, and Eleventh Circuits, in cases addressing similar statutes,[17] all recently concluded

[17] The Georgia law in *GLAHR* was virtually indistinguishable from the provision challenged in this appeal. *GLAHR,* 691 F.3d at 1263. The Alabama and South Carolina laws were very similar but arguably broader because they did not include the "violation of a criminal offense" element. *United States v. South Carolina,* 720 F.3d 518, 523 (4th Cir. 2013); *Alabama,* 691 F.3d at 1277. However, as discussed, this element is incomprehensible and, even under Arizona's interpretation, the element is illusory because a simultaneous violation of the federal harboring law could suffice.

(Continued on following page)

that the federal scheme on harboring is comprehensive and field preemptive. *Lozano,* 724 F.3d at 297, 2013 WL 3855549 at *14-15; *South Carolina,* 720 F.3d at 531-32; *Alabama,* 691 F.3d at 1288; *GLAHR,* 691 F.3d at 1267. Based on the foregoing – the comprehensive nature of § 1324, its place within the INA's larger structure governing the movement and harboring of aliens, and § 1324(c)'s explicit but limited provision for state involvement – the Eleventh Circuit concluded that the INA demonstrates an "overwhelmingly dominant federal interest in the field." *GLAHR,* 691 F.3d at 1264. Because Congress has dominated the field and "adopted a calibrated framework within the INA to address this issue," the Eleventh Circuit held that any "state's attempt to intrude into this area is prohibited." *Id.; see also Alabama,* 691 F.3d at 1286 ("Like the Georgia law at issue in *GLAHR,* we similarly conclude that Alabama is prohibited from enacting concurrent state legislation in this field of federal concern.").

---

The City of Hazleton's ordinance in the Third Circuit case made it "unlawful for any person or business or entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law." *Lozano,* 724 F.3d at 297, 2013 WL 3855549 at *12. "'Harboring' is broadly defined to include 'let[ting], leas[ing], or rent[ing] a dwelling unit to an illegal alien.'" *Id.* (quoting The Illegal Immigration Relief Act Ordinance § 5A(1)) (alterations in original).

The Fourth Circuit came to the same conclusion. *South Carolina,* 720 F.3d at 531 ("Sections 4(B) and (D) [South Carolina's challenged harboring and transportation provisions] of the Act are field preempted because the vast array of federal laws and regulations on this subject is 'so pervasive . . . that Congress left no room for the States to supplement it.'" (quoting *Arizona,* 132 S. Ct. at 2501)). Unsurprisingly, in addressing a law outlawing renting housing to unauthorized aliens, the Third Circuit concurred: "We agree with the Eleventh Circuit and other courts that have held that 'the federal government has clearly expressed more than a 'peripheral concern' with the entry, movement, and residence of aliens within the United States and the breadth of these laws illustrates an overwhelming dominant federal interest in the field.'" *Lozano,* 724 F.3d at 297, 2013 WL 3855549 at *14 (quoting *GLAHR,* 691 F.3d at 1264).[18] We also agree.

---

[18] *See also Garrett v. Escondido,* 465 F. Supp. 2d 1043, 1056 (S.D. Cal. 2006) (finding that a harboring provision that prohibited leasing or renting housing to unauthorized aliens raises "serious concerns in regards to field preemption" based on 8 U.S.C. § 1324). *But see Keller v. City of Fremont,* 719 F.3d 931 (8th Cir. 2013) ("We find nothing in an anti-harboring prohibition contained in one sub-part of one subsection of 8 U.S.C. § 1324 that establishes a 'framework of regulation so pervasive . . . that Congress left no room for the States to supplement it,' or evinces 'a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" (quoting *Arizona,* 132 S. Ct. at 2501)). In *Keller,* a divided panel upheld a housing ordinance similar to the

(Continued on following page)

C. Section 13-2929 is Conflict Preempted

A statute is conflict preempted where it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona,* 132 S. Ct. at 2501 (quoting *Hines,* 312 U.S. at 67). We conclude that § 13-2929 is conflict preempted because, although it shares some similar goals with 8 U.S.C. § 1324, it "interfere[s] with the careful balance struck by Congress with respect to" the harboring of unauthorized aliens. *Arizona,* 132 S. Ct. at 2505. As *Arizona* reiterated, "a '[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.'" *Id.* (quoting *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 287, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971)); *see also American Ins. Ass'n v. Garamendi,* 539 U.S. 396, 427, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003) (finding conflict preemption where the state sought "to use an iron fist where the President ha[d] consistently chosen kid gloves"); *Crosby,* 530 U.S. at 379 n.14 ("Identity of ends does not end our analysis of preemption.").

First, the provision of additional and different state penalties under § 13-2929 for harboring unauthorized aliens disrupts "the congressional calibration of force." *Crosby,* 530 U.S. at 380. Like the additional

---

one challenged in *Lozano.* For the all [sic] the reasons discussed above, we, along with the Third, Fourth, and Eleventh Circuits, disagree with *Keller's* analysis.

and distinct penalties section 3 imposed in *Arizona,* "[t]his state framework of sanctions creates a conflict with the plan Congress put in place." 132 S. Ct. at 2503; *see also GLAHR,* 691 F.3d at 1267 ("The end result of section 7 is to layer additional penalties atop federal law in direct opposition to the Court's direction in *Crosby*.").

Second, § 13-2929 conflicts with the federal scheme by divesting federal authorities of the exclusive power to prosecute these crimes. As discussed above, the current federal scheme reserves prosecutorial power, and thus discretion, over harboring violations to federal prosecutors. By allowing state prosecution of the same activities in state court, Arizona has conferred upon its prosecutors the ability to prosecute those who transport or harbor unauthorized aliens in a manner unaligned with federal immigration enforcement priorities. In other words, "the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Arizona,* 132 S. Ct. at 2503; *see also GLAHR,* 691 F.3d at 1265 ("The terms of section 7, however, are not conditioned on respect for the federal concerns or the priorities that Congress has explicitly granted executive agencies the authority to establish."); *Alabama,* 691 F.3d at 1287 (same). Section 13-2929 also gives state courts the power to interpret it, unconstrained by how

federal courts have interpreted the scope of 8 U.S.C. § 1324.

As the Eleventh Circuit explained:

> [I]nterpretation of [state harboring] crimes by state courts and enforcement by state prosecutors unconstrained by federal law threaten the uniform application of the INA. . . . Given the federal primacy in the field of enforcing prohibitions on the transportation, harboring, and inducement of unlawfully present aliens, the prospect of fifty individual attempts to regulate immigration-related matters cautions against permitting states to intrude into this area of dominant federal concern.

*GLAHR,* 691 F.3d at 1266;[19] *see also Arizona,* 132 S. Ct. at 2501 ("If § 3 of the Arizona statute were

---

[19] Arizona contends that the Eleventh Circuit erred in concluding that the federal courts have exclusive jurisdiction to "interpret the boundaries of federal law." *GLAHR,* 691 F.3d at 1265. Arizona seemingly argues that its state courts have concurrent jurisdiction over prosecutions under 8 U.S.C. § 1324. But that proposition is clearly foreclosed by 18 U.S.C. § 3231, which grants federal district courts exclusive jurisdiction over federal crimes.

Although Arizona failed to so argue in its brief, the better argument is presented by amicus. State courts do have concurrent jurisdiction over civil RICO claims, which can include violations of 8 U.S.C. § 1324. *Tafflin v. Levitt,* 493 U.S. 455, 458, 110 S. Ct. 792, 107 L. Ed. 2d 887 (1990) ("[S]tate courts have concurrent jurisdiction over civil RICO claims."); 18 U.S.C. § 1961(1)(F) (including violations of § 1324 in the definition of "racketeering activity"). But even this argument misses the

(Continued on following page)

valid, every State could give itself independent authority to prosecute federal registration violations, 'diminish[ing] the [Federal Government]'s control over enforcement' and 'detract[ing] from the integrated scheme of regulation created by Congress.'" (quoting *Wisconsin Dep't of Indus. v. Gould Inc.,* 475 U.S. 282, 288-89, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986))); *see also Villas at Parkside Partners v. City of Farmers Branch,* 726 F.3d 524, 2013 WL 3791664 at *5 (5th Cir. 2013) (concluding that an ordinance criminalizing renting housing to unauthorized aliens is conflict preempted because it "giv[es] state officials authority to act as immigration officers outside the 'limited circumstances specified' by federal law" and "'interfer[es] with the careful balance struck by Congress' with respect to the harboring of non-citizens here contrary to law" (quoting *Arizona,* 132 S. Ct. at 2505-06)).[20] In sum, § 13-2929, as interpreted

---

mark. By passing a state statute criminalizing harboring, Arizona has vested its courts with the power to define the breadth and scope of its own prohibition on harboring unauthorized aliens, an area of important federal concern, unconstrained by federal priorities. Thus, although the text of the state and federal statutes is similar, Arizona's scheme may significantly differ in practice from the federal scheme and thus disrupt the uniformity of the federal scheme. A state court has concurrent jurisdiction over a civil RICO claim concerning a violation of 8 U.S.C. § 1324. But the federal courts remain the ultimate arbiters of the meaning of § 1324. The federal courts are not the ultimate arbiters of the meaning of Arizona's harboring statute. Therein lies the difference.

[20] Indeed, the likelihood of differing enforcement priorities is far from speculative. Under a current executive order, Arizona's

(Continued on following page)

by Arizona, "create[s] an obstacle to the smooth functioning of federal immigration law, improperly place[s] in the hands of state officials the nation's immigration policy, and strip[s] federal officials of the authority and discretion necessary in managing foreign affairs." *South Carolina,* 720 F.3d at 531.

The Arizona statute also conflicts with the federal scheme by criminalizing conduct not covered by the federal harboring provision. First, Congress explicitly provided a safe harbor in § 1324 for certain religious activities. 8 U.S.C. § 1324(a)(1)(C). The Arizona law provides no such safe harbor. Therefore, individuals could be prosecuted for conduct that Congress specifically sought to protect through the exemption. By seeking to punish conduct that Congress chose not to punish, the Arizona statute clearly poses an obstacle to the accomplishment of the "full purposes and objectives of Congress," *Arizona,* 132 S. Ct. at 2501, one of which was to protect certain religious activities from prosecution.

---

state policy is to consider young people without official permanent legal status, but who have been granted deferred action status by the federal government under the Deferred Action for Childhood Arrivals initiative, to be "unlawfully present aliens." Executive Order 2012-06, "Re-Affirming Intent of Arizona Law in Response to the Federal Government's Deferred Action Program," (Aug. 15, 2012), *available at* http://azgovernor.gov/dms/upload/EO_081512_2012-06.pdf. If the state applies this policy to its enforcement of § 13-2929, it would authorize the prosecution of those who transport or provide shelter to these young people despite the fact that the federal government has chosen to allow them to stay, and work, in the country.

Second, § 13-2929(A)(3) criminalizes encouraging or inducing an alien to come to or reside in Arizona. Section 1324 criminalizes encouraging or inducing an alien to come to or reside in the United States but it does not penalize encouraging or inducing aliens, already in the United States, to travel from state to state or into any particular state. Therefore, § 13-2929 sweeps more broadly than its federal counterpart by adding a new category of prohibited activities. In doing so, it disrupts the uniformity of the federal scheme because some harboring activities involving unauthorized aliens are now punishable in Arizona but not elsewhere. Thus, in addition to disrupting the uniformity of enforcement by federal authorities, § 13-2929 disrupts the substantive uniformity of the harboring scheme. It does not "closely track[§ 1324] in all material respects." *Chamber of Commerce v. Whiting,* 131 S. Ct. 1968, 1981, 179 L. Ed. 2d 1031 (2011).

For the foregoing reasons, even were we to adopt Arizona's interpretation of § 13-2929, it is conflict preempted by federal law.

## IV. Non-Merits Factors

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def.*

*Council,* 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

For the reasons discussed in section II and III, we conclude that the plaintiffs are likely to succeed on the merits. The district court did not abuse its discretion in its analysis of the other non-merits factors. As discussed in section I, Santiago has demonstrated a credible threat of prosecution under the statute and the organizational plaintiffs have shown ongoing harms to their organizational missions as a result of the statute. Thus, the plaintiffs have established a likelihood of irreparable harm. *See GLAHR,* 691 F.3d at 1269 (finding a likelihood of irreparable harm because plaintiffs were "under the threat of state prosecution for crimes that conflict with federal law"); *see also Arizona,* 641 F.3d at 366 ("We have 'stated that an alleged constitutional infringement will often alone constitute irreparable harm.'" (quoting *Assoc. Gen. Contractors v. Coal. For Econ. Equity,* 950 F.2d 1401, 1412 (9th Cir. 1991))).

"'[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Arizona,* 641 F.3d at 366 (quoting *Cal. Pharmacists Ass'n v. Maxwell-Jolly,* 563 F.3d 847, 852-53 (9th Cir. 2009) *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. Of S. Cal., Inc.,* 132 S. Ct. 1204, 182 L. Ed. 2d 101 (2012)). Therefore, the district court did not abuse its discretion in holding

that plaintiffs established the elements necessary to grant a preliminary injunction.

CONCLUSION

We hold that the individual plaintiff and organizational plaintiffs have standing to challenge Ariz. Rev. Stat. § 13-2929. We further hold that § 13-2929 is void for vagueness and, in the alternative, preempted by federal law. The district court's partial grant of plaintiffs' motion for a preliminary injunction is **AFFIRMED**.

---

**DISSENT**

BEA, Circuit Judge, concurring in part and dissenting in part:

I concur with the majority opinion's holdings regarding standing and the void for vagueness doctrine, as well as its holding that "the district court did not abuse its discretion in holding that plaintiffs established the elements necessary to grant a preliminary injunction." Op. at 44. I write separately to address Part III of the majority's opinion, from which I respectfully dissent. Because this case is resolved on other grounds, namely vagueness, I believe the court should not reach the preemption issue. *See Video Software Dealers Ass'n v. Schwarzenegger,* 556 F.3d 950, 953 (9th Cir. 2009) *aff'd sub nom. Brown v. Entm't Merchants Ass'n,* 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) ("Because we affirm the district

court on these grounds, we do not reach two of Plaintiffs' [other] challenges to the Act. . . .").[1] And the "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v. DEA,* 362 F.3d 786, 799, 360 U.S. App. D.C. 344 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment), *cited in Morse v. Frederick,* 551 U.S. 393, 431, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part).

[1] The Plaintiffs in *Video Software Dealers* filed suit seeking to invalidate a California statute, "which imposed restrictions and a labeling requirement on the sale or rental of 'violent video games' to minors, on the grounds that the Act violate[d] rights guaranteed by the First and Fourteenth Amendments." *Video Software Dealers,* 556 F.3d at 953. The district court granted Plaintiffs' motion for summary judgment, invalidating the Act based on the Free Speech Clause and declining to address Plaintiffs' vagueness and Equal Protection arguments. *Id.* at 956. On appeal, the Ninth Circuit affirmed the district court's grant of summary judgment to the Plaintiffs based on their Free Speech claim. *Id.* at 953. Because the court resolved the case based on the Free Speech Clause, it declined to address the Plaintiffs' additional constitutional claims. *Id.*

**Valle del Sol, et al., Plaintiffs, vs. Michael B. Whiting, et al., Defendants.**

**No. CV 10-1061-PHX-SRB**

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

***2012 U.S. Dist. LEXIS 172196***

**September 5, 2012, Decided**
**September 5, 2012, Filed**

**OPINION BY:** Susan R. Bolton

**ORDER**

At issue is Plaintiffs' Motion for Preliminary Injunction ("4th PI Mot.") (Doc. 723). The Court also resolves Intervenor Defendants Janice K. Brewer and the State of Arizona's ("Defendants") Motion to Strike, Request for Judicial Notice, and Notice Re Evidentiary Hearing on Plaintiffs' Motion for Preliminary Injunction ("Defs.' Mot.") (Doc. 741) and Plaintiffs' Motion for Temporary Restraining Order in Event Injunction in *United States v. Arizona* Is To Be Dissolved ("Pls.' TRO Mot.") (Doc. 717).

## I. BACKGROUND

This Court's Order of October 8, 2010, which is incorporated fully herein, contains a full account of the facts of this case. (*See* Doc. 447, Oct. 8, 2010, Order at 1-4.) The pertinent details are briefly summarized here. Plaintiffs bring a variety of challenges to Arizona's Senate Bill 1070 ("S.B. 1070"), the "Support Our Law Enforcement and Safe Neighborhoods

Act," which was signed into law by Governor Brewer on April 23, 2010.[1] In this Motion, Plaintiffs seek to enjoin two of S.B. 1070's provisions: Subsection 2(B) and the portion of Section 5 creating Arizona Revised Statutes ("A.R.S.") § 13-2929. (*See* 4th PI Mot. at 1.)

Subsection 2(B) requires law enforcement officers to make a reasonable attempt, when practicable, to determine an individual's immigration status during any lawful stop, detention, or arrest where reasonable suspicion exists that the person is unlawfully present in the United States. A.R.S. § 11-1051(B). Subsection 2(B) also requires that all persons who are arrested have their immigration status verified prior to release. *Id.* Section 5 of S.B. 1070 creates A.R.S. § 13-2929, which provides that it is unlawful for a person who is in violation of a criminal offense to: (1) transport or move or attempt to transport or move an alien in Arizona in furtherance of the alien's unlawful presence in the United States; (2) conceal, harbor, or shield or attempt to conceal, harbor, or shield an alien from detection in Arizona; and (3) encourage or induce an alien to come to or live in Arizona. *Id.* § 13-2929(A)(1)-(3). In order to violate A.R.S. § 13-2929(A), a person must know or recklessly disregard the fact that the alien is unlawfully present in the United

[1] In this Order, the Court refers to Senate Bill 1070 and House Bill 2162 collectively as "S.B. 1070," describing the April 23, 2010, enactment as modified by the April 30, 2010, amendments.

States. *Id.* Violation of A.R.S. § 13-2929 is a class 1 misdemeanor. *Id.* § 13-2929(F).

S.B. 1070 had an effective date of July 29, 2010; on July 28, 2010, the Court preliminarily enjoined certain provisions of the law from taking effect in the related case *United States v. Arizona,* CV 10-1413-PHX-SRB. The Court concluded that Subsection 2(B) was preempted by federal immigration law and preliminarily enjoined it from taking effect. *United States v. Arizona,* 703 F. Supp. 2d 980, 993-98, 1008 (D. Ariz. 2010), *aff'd,* 641 F.3d 339 (9th Cir. 2011), *aff'd in part, rev'd in part,* 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012). The Court rejected the United States' two challenges to A.R.S. § 13-2929, which were that it was an improper regulation of immigration and that it violated the dormant Commerce Clause. *Id.* at 1002-04. No preliminary injunction issued as to A.R.S. § 13-2929. The Ninth Circuit Court of Appeals upheld this Court's conclusions as to Subsection 2(B). *United States v. Arizona,* 641 F.3d at 346-54. Arizona appealed to the United States Supreme Court, and on June 25, 2012, the Supreme Court reversed with respect to Subsection 2(B), ruling that there is "a basic uncertainty about what the law means and how it will be enforced," so "it would be inappropriate to assume [Subsection] 2(B) will be construed in a way that creates a conflict with federal law." *See Arizona v. United States ("Arizona")*, 132 S. Ct. at 2507-10. On August 8, 2012, the Ninth Circuit Court of Appeals issued its mandate, returning the case to this Court for "further proceedings consistent with the opinion

and judgment of the Supreme Court." *See United States v. Arizona,* 689 F.3d 1132, 2012 WL 3205612, at *1 (9th Cir. 2012).

While the United States only challenges S.B. 1070 on the grounds that it is preempted by federal law, Plaintiffs in this case bring a variety of other claims. Pertinent to this Motion, Plaintiffs argue that, in addition to being preempted, Subsection 2(B) also violates the Fourth Amendment and the Equal Protection Clause. (4th PI Mot. at 1-2.) Plaintiffs also make different arguments with respect to A.R.S. § 13-2929. Where the United States only argued that the provision was an improper regulation of immigration and violated the dormant Commerce Clause, Plaintiffs here assert that it is field and conflict preempted by federal immigration law. (*Id.* at 2-3.) Plaintiffs now move for a preliminary injunction as to Subsection 2(B) and A.R.S. § 13-2929. (*Id.* at 1.) Defendants oppose Plaintiffs' Motion. (Doc. 731, Defs.' Resp. to 4th PI Mot. ("Resp.") at 1.)

## II. LEGAL STANDARDS AND ANALYSIS

### A. Preliminary Injunction Standard

Plaintiffs seek to preliminarily enjoin the enforcement of Subsection 2(B) of S.B. 1070 and A.R.S. § 13-2929, as enacted by Section 5 of S.B. 1070. (4th PI Mot. at 1.) "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

### B. Likelihood of Success on the Merits

#### 1. Subsection 2(B)

Plaintiffs seek a preliminary injunction as to Subsection 2(B) on the grounds that it is preempted by federal law and violates the Fourth Amendment and the Equal Protection Clause. (*See* 4th PI Mot. at 1-2.) Intervenor Defendants argue that the Supreme Court's opinion in *Arizona,* 132 S. Ct. at 2507-10, forecloses any further preenforcement challenges to Subsection 2(B). (Resp. at 3; *see also* Hr'g Tr. 23:14-24:5, Aug. 21, 2012 ("Hr'g Tr.").)

In *Arizona,* the Supreme Court concluded that Subsection 2(B) was not preempted on its face. 132 S. Ct. at 2510. The Court held,

> The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume [Subsection] 2(B) will be construed in a way that creates a conflict with federal law.

*Id.* The Court further stated that "[t]his opinion does not foreclose other preemption and constitutional challenges to the law *as interpreted and applied after it goes into effect." Id.* (emphasis added). Plaintiffs argue that the Supreme Court did not have before it the record that exists in this case, demonstrating that Subsection 2(B) "will be implemented in precisely the manner that the Supreme Court deemed unconstitutional." (4th PI Mot. at 1 .)

While the Supreme Court did state that "it is not clear at this stage and on this record that the verification process would result in a prolonged detention," the Court went on to conclude that it was improper to enjoin Subsection 2(B) "before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives." *Arizona,* 132 S. Ct. at 2509-10. In a pair of cases challenging similar laws enacted in Georgia and Alabama, the Eleventh Circuit Court of Appeals concluded that the Supreme Court's holding in *Arizona* barred preenforcement facial challenges to the laws on preemption and other grounds. *See Ga. Latino Alliance for Human Rights ("GLAHR") v. Governor of Ga.,* 691 F.3d 1250, 2012 WL 3553612, at *12-13 (11th Cir. 2012); *United States v. Alabama,* 691 F.3d 1269, 2012 WL 3553503, at *8-9 (11th Cir. 2012).

This Court will not ignore the clear direction in the *Arizona* opinion that Subsection 2(B) cannot be challenged further on its face before the law takes

effect. As the Supreme Court stated, Plaintiffs and the United States may be able to challenge the provision on other preemption and constitutional grounds "as interpreted and applied after it goes into effect." *See Arizona,* 132 S. Ct. at 2510. Plaintiffs have not shown that they are likely to succeed on their facial challenges to Subsection 2(B) because of the conclusions of the Supreme Court in *Arizona.*[2]

Plaintiffs also request that the Court certify a question to the Arizona Supreme Court as to whether Subsection 2(B) authorizes additional detention beyond the point a person would otherwise have been released, in order to determine that person's immigration status. (4th PI Mot. at 10 & n.2.) The Arizona Supreme Court has jurisdiction to answer questions certified to it by a federal court if the question "may be determinative of the cause then pending in the certifying court." A.R.S. § 12-1861; *see also In re Price Waterhouse Ltd.,* 202 Ariz. 397, 46 P.3d 408, 409 (Ariz. 2002) (stating that § 12-1861 is jurisdictional).

The Court declines to follow the unusual procedure of certifying a question to the state supreme court at this juncture. In the Court's view, such action should be taken sparingly and only where resolution

---

[2] As a result of this conclusion, Defendants' Motion is rendered moot. The court does not rely on any of the evidence Defendants seek to strike, nor is it necessary to take judicial notice of the documents Defendants submit or to conduct an evidentiary hearing. (*See* Defs.' Mot. at 1.) Defendants' Motion is denied as moot.

of a particular question of state law is necessary for the progression of a federal case. *See Stollenwerk v. TriWest Health Care Alliance,* 254 F. App'x 664, 668-69 (9th Cir. 2007) (declining to certify a question to the Arizona Supreme Court where the question was not determinative of the action at bar). At this point, such a question has not presented itself, either in the briefing or through the Court's own analysis and consideration of this issue. As stated at the hearing on Plaintiffs' Motion, Plaintiffs' proposed question "would not be productive of any answer that [the Court does not] already know." (Hr'g Tr. 38:21-22.) Given the Supreme Court's ruling, the Arizona Supreme Court would be faced with the same issue that bars this Court's consideration of Plaintiffs' facial challenges to Subsection 2(B). Without a set of as-applied facts, the Supreme Court has held that it would be speculative to decide as a matter of law that Subsection 2(B) will be enforced in an unconstitutional manner. Therefore, the Court declines to certify a question to the Arizona Supreme Court.

**2. A.R.S. § 13-2929**

Plaintiffs also seek to enjoin A.R.S. § 13-2929, created by a portion of Section 5 of S.B. 1070. (4th PI Mot. at 36-43.) A.R.S. § 13-2929 makes it illegal for a person who is in violation of a criminal offense to: (1) transport or move or attempt to transport or move an alien in Arizona in furtherance of the alien's unlawful presence in the United States; (2) conceal, harbor, or shield or attempt to conceal, harbor, or shield an alien

from detection in Arizona; and (3) encourage or induce an alien to come to or live in Arizona. A.R.S. § 13-2929(A)(1)-(3). In order to violate A.R.S. § 13-2929(A), a person must also know or recklessly disregard the fact that the alien is unlawfully present in the United States. *Id.* Plaintiffs argue that A.R.S. § 13-2929 should be enjoined because it is both field and conflict preempted by federal immigration law. (4th PI Mot. at 37.)

The Supremacy Clause of the United States Constitution makes federal law "the supreme law of the land." U.S. Const. art. VI, cl. 2. The Supreme Court has consistently ruled that the federal government has broad and exclusive authority to regulate immigration, supported by both enumerated and implied constitutional powers. While holding that the "[p]ower to regulate immigration is unquestionably exclusively a federal power," the Supreme Court concluded that not every state enactment "which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised." *De Canas v. Bica,* 424 U.S. 351, 354-355, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976).

Federal preemption can be either express or implied. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). There are two types of implied preemption: field preemption and conflict preemption. *Id.* Field preemption occurs "[w]hen Congress intends federal law to 'occupy the field.'" *Crosby v. Nat'l Foreign*

*Trade Council,* 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). Conflict preemption describes a situation in which "it is impossible for a private party to comply with both state and federal law" or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 372-73 (quotations and citations omitted). An actual, as opposed to hypothetical or potential, conflict must exist for conflict preemption to apply. *Chicanos Por La Causa, Inc. v. Napolitano,* 558 F.3d 856, 863 (9th Cir. 2009), *aff'd sub nom. Chamber of Commerce of U.S. v. Whiting,* 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011).

The Court previously rejected two arguments in favor of invalidating A.R.S. § 13-2929 made by the United States in *United States v. Arizona,* namely that the provision was an improper regulation of immigration and that it violated the dormant Commerce Clause. 703 F. Supp. 2d at 1002-04. The Court also rejected the United States' argument, made in a footnote, that A.R.S. § 13-2929 conflicts with federal immigration law because it does not contain an exception for certain religious groups for contact with volunteer ministers and missionaries. *Id.* at 1002 n.18. Plaintiffs here advance a different set of theories. (*See* 4th PI Mot. at 37-43.) Plaintiffs argue that A.R.S. § 13-2929 "conflicts with the purposes and objectives of the relevant federal law, criminalizes more conduct than its federal counterpart, and imposes additional penalties beyond those approved by the federal scheme." (*Id.* at 37-38.)

In *GLAHR* and *Alabama,* the Eleventh Circuit Court of Appeals examined two analogous provisions and concluded that they were preempted. *See GLAHR,* 691 F.3d 1250, 2012 WL 3553612, at *8-11; *Alabama,* 691 F.3d 1269, 2012 WL 3553503, at *9-12. The *GLAHR* court held that the Immigration and Nationality Act ("INA") "provides a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens." 691 F.3d 1250, 2012 WL 3553612, at *8. Indeed, pursuant to 8 U.S.C. § 1324, it is a federal crime to transport or move an unlawfully present alien within the United States; to conceal, harbor, or shield an unlawfully present alien from detection; or to encourage or induce a person to "come to, enter, or reside in the United States" without authorization. *See* 8 U.S.C. § 1324(a)(1)(A)(ii)(iv). It is also unlawful to conspire or aid in any of these acts. *Id.* § 1324(a)(1)(A)(v). While state officials are authorized to make arrests for these violations of federal law, the federal government retains exclusive jurisdiction to prosecute them, subject to evidentiary rules set forth in the statute. *Id.* §§ 1324(c)-(d), 1329.

Citing *De Canas,* the Eleventh Circuit Court of Appeals concluded, "In the absence of a savings clause permitting state regulation in the field, the inference from these enactments is that the role of the states is limited to arrest for violations of federal law." *GLAHR,* 691 F.3d 1250, 2012 WL 3553612, at *8. The court in *GLAHR* situated § 1324 within a larger context of federal provisions, finding the

overall scheme to be "comprehensive" and illustrative of "an overwhelmingly dominant federal interest in the field." *See id.* Analogizing to the Supreme Court's analysis of S.B. 1070's Section 3, the Eleventh Circuit Court of Appeals concluded that "[t]he INA comprehensively addresses criminal penalties for [the actions described in § 1324] undertaken within the borders of the United States, and a state's attempt to intrude into this area is prohibited because Congress has adopted a calibrated framework within the INA to address this issue." 691 F.3d 1250, *Id.* at *9. Accordingly, the *GLAHR* court found that Georgia's harboring provision was field preempted. *Id.* The court went on to determine that Georgia's law "presents an obstacle to the execution of the federal statutory scheme and challenges federal supremacy in the realm of immigration," thus concluding that it is also conflict preempted. *Id.* The *GLAHR* court found that federal enforcement priorities conflicted with Georgia state officials' priorities in such a way that the state law was impermissibly in conflict with federal law. 691 F.3d 1250, *Id.* at *9-10. Following its own reasoning in *GLAHR,* the Eleventh Circuit Court of Appeals came to the same conclusion regarding a very similar provision of Alabama law. *See Alabama,* 691 F.3d 1269, 2012 WL 3553503, at *9-12.

The Court follows the reasoning of the Eleventh Circuit Court of Appeals with respect to analogous provisions of Georgia and Alabama law and concludes that A.R.S. § 13-2929 is field and conflict preempted. Federal immigration law creates a comprehensive

system to regulate the transportation, concealment, movement, or harboring of unlawfully present people in the United States. *See* 8 U.S.C. §§ 1324, 1329; *GLAHR,* 691 F.3d 1250, 2012 WL 3553612, at *8. In crafting federal regulation of these activities, Congress permitted state law enforcement officials to arrest for violations of federal law, but did not allow for state regulation in the field. *See* 8 U.S.C. § 1324(c); *De Canas,* 424 U.S. at 363. Federal law creates a detailed framework governing the actions of people who come to the United States without authorization and the people who help them. *See GLAHR,* 691 F.3d 1250, 2012 WL 3553612, at *8 (citing 8 U.S.C. §§ 1323, 1325, 1327-28). "The federal government has clearly expressed more than a peripheral concern with the entry, movement, and residence of aliens within the United States," leaving no room for state legislation in the field. *See id.* (quotation omitted). Therefore, the Court finds that A.R.S. § 13-2929 is field preempted.

A.R.S. § 13-2929 also "presents an obstacle to the execution of the federal statutory scheme and challenges federal supremacy in the realm of immigration." *See* 691 F.3d 1250, *id.* at *9. By vesting enforcement discretion with state officials rather than federal officials, A.R.S. § 13-2929 conflicts with federal law and is preempted. *See Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 427, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003) ("California seeks to use an iron fist where the President has consistently chosen kid gloves."). Further, "[p]ermitting the State to impose

its own penalties for the federal offenses here would conflict with the careful framework Congress adopted." *Arizona,* 132 S. Ct. at 2502. It is immaterial to this analysis that S.B. 1070 might have the same goal as federal immigration law or incorporate some of the same substantive standards: "States may not enter, in any respect, an area the Federal Government has reserved for itself." *See id.* For these reasons, A.R.S. § 13-2929 is also conflict preempted. Plaintiffs have shown that they are likely to succeed on the merits of their claim with respect to this provision.

### C. Irreparable Harm

The Supreme Court has repeatedly recognized the "basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger v. Harris,* 401 U.S. 37, 43-44, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). Thus Plaintiffs have the burden to show that, absent a preliminary injunction, there is a likelihood – not just a possibility – that it will suffer irreparable harm. *Winter,* 555 U.S. at 22.

The Ninth Circuit Court of Appeals has stated "'that an alleged constitutional infringement will often alone constitute irreparable harm.'" *Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 715 (9th Cir. 1997) (quoting *Associated Gen. Contrs. Inc. v. Coalition for Economic Equity,* 950 F.2d 1401, 1412 (9th Cir. 1991)). Indeed, if an individual or entity faces the

imminent threat of enforcement of a preempted state law and the resulting injury may not be remedied by monetary damages, the individual or entity is likely to suffer irreparable harm. *See Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 381, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) (stating that a federal court may properly enjoin "state officers 'who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected [by] an unconstitutional act, violating the Federal Constitution'" (quoting *Ex parte Young,* 209 U.S. 123, 156, 28 S. Ct. 441, 52 L. Ed. 714 (1908)); *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 366-67, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) (suggesting that irreparable injury is an inherent result of the enforcement of a state law that is preempted on its face); *United States v. Arizona,* 641 F.3d at 366 (concluding that the Court did not abuse its discretion in determining that irreparable harm would ensue if Arizona were to implement preempted provisions of S.B. 1070). The Court finds that Plaintiffs are likely to suffer irreparable harm in the absence of an injunction running to A.R.S. § 13-2929 because it is preempted by federal law.

### D. Balance of the Equities and Public Interest

Plaintiffs have the burden to show that the balance of equities tips in their favor and that a preliminary injunction is in the public interest.

*Winter,* 555 U.S. at 20. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Id.* at 24. "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief,'" paying particular attention to the public consequences. *Id.* (quoting *Amoco Prod. Co. v. Vill. of Gambell, Alaska,* 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)).

The Ninth Circuit Court of Appeals has "found that 'it is *clear that it would not be equitable or in the public's interest to allow the state* . . . to violate the requirements of federal law, especially when there are no adequate remedies available. . . . In such circumstances, the interest of preserving the Supremacy Clause is paramount.'" *United States v. Arizona,* 641 F.3d at 366 (quoting *Cal. Pharmacists Ass'n v. Maxwell-Jolly,* 563 F.3d 847, 852-53 (9th Cir. 2009)). Likewise, in this instance, the Court finds that it would not be equitable or in the public interest to permit the enforcement of a preempted provision of state law, such as A.R.S. § 13-2929. Accordingly, Plaintiffs have satisfied this factor. (*See* 4th PI Mot. at 47-49.)

## III. CONCLUSION

Plaintiffs have not shown that they are likely to succeed on their facial challenges to Subsection 2(B) as a result of the Supreme Court's opinion in the related case. Plaintiffs have shown that they are

likely to succeed as to the merits of their claim that A.R.S. § 13-2929 is preempted. Plaintiffs have further shown that they are likely to suffer irreparable harm in the absence of an injunction and that the balance of the equities and the public interest favor an injunction as to A.R.S. § 13-2929.[3]

**IT IS THEREFORE ORDERED** granting in part and denying in part Plaintiffs' Motion for Preliminary Injunction (Doc. 723).

**IT IS FURTHER ORDERED** preliminarily enjoining the enforcement of A.R.S. § 13-2929.

**IT IS FURTHER ORDERED** denying as moot Intervenor Defendants Janice K. Brewer and the State of Arizona's Motion to Strike, Request for Judicial Notice, and Notice Re Evidentiary Hearing on Plaintiffs' Motion for Preliminary Injunction (Doc. 741).

**IT IS FURTHER ORDERED** denying as moot Plaintiffs' Motion for Temporary Restraining Order in Event Injunction in *United States v. Arizona* Is To Be Dissolved (Doc. 717).

---

[3] Plaintiffs moved for a temporary restraining order in the event the Court did not rule on their Motion for a Preliminary Injunction before the injunction in the federal government's case was dissolved. (Pls.' TRO Mot. at 1-2.) The Court's conclusions in this Order render Plaintiffs' TRO Motion moot.

DATED this 5th day of September, 2012.

/s/ Susan R. Bolton
Susan R. Bolton
United States District Judge

## 8 U.S.C. § 1324

§ 1324. Bringing in and harboring certain aliens

(a) Criminal penalties.

(1) (A) Any person who –

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v) (I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs –

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, United States Code, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A) (ii), (iii), (iv), or (v)(II), be fined under title 18, United States Code, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A) (i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of title 18, United States

Code) to, or places in jeopardy the life of, any person, be fined under title 18, United States Code, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under title 18, United States Code, or both.

(C) It is not a violation of clauses [clause] (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such

alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs –

(A) be fined in accordance with title 18, United States Code, or imprisoned not more than 1 year, or both; or

(B) in the case of –

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under title 18, United States Code, and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3) (A) Any person who, during any 12-month period, knowingly hires for employment at least 10

individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who –

(i) is an unauthorized alien (as defined in section 274A(h)(3) [8 USCS § 1324a(h)(3)]), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if –

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C) (i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

(b) Seizure and forfeiture.

(1) In general. Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection

(a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures. Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of title 18, United States Code [18 USCS §§ 981 et seq.], relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations. In determining whether a violation of subsection (a) has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not

received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest. No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

(d) Admissibility of videotaped witness testimony. Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audio-visually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(e) Outreach program. The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach program to educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.

---

**8 U.S.C. § 1329**

§ 1329. Jurisdiction of district courts

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, brought by the United States that arise under the provisions of this title. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 275 or 276 [8 USCS § 1325 or 1326] may be apprehended. No suit or proceeding for a violation of any of the provisions of this title shall be settled, compromised, or discontinued without the consent of the court in which it is pending and any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor. Nothing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers.

---

## Ariz. Rev. Stat. § 13-2929

§ 13-2929. Unlawful transporting, moving, concealing, harboring or shielding of unlawful aliens; vehicle impoundment; exception; classification

A. It is unlawful for a person who is in violation of a criminal offense to:

1. Transport or move or attempt to transport or move an alien in this state, in furtherance of the illegal presence of the alien in the United States, in a means of transportation if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.

2. Conceal, harbor or shield or attempt to conceal, harbor or shield an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.

3. Encourage or induce an alien to come to or reside in this state if the person knows or recklessly disregards the fact that such coming to, entering or residing in this state is or will be in violation of law.

B. A means of transportation that is used in the commission of a violation of this section is subject to mandatory vehicle immobilization or impoundment pursuant to section 28-3511.

C. A law enforcement official or agency of this state or a county, city, town or other political subdivision of

this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona Constitution.

D. In the enforcement of this section, an alien's immigration status may be determined by:

1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.

2. The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code section 1373(c).

E. This section does not apply to a child protective services worker acting in the worker's official capacity or a person who is acting in the capacity of a first responder, an ambulance attendant or an emergency medical technician and who is transporting or moving an alien in this state pursuant to title 36, chapter 21.1.

F. A person who violates this section is guilty of a class 1 misdemeanor and is subject to a fine of at least one thousand dollars, except that a violation of this section that involves ten or more illegal aliens is a class 6 felony and the person is subject to a fine of at least one thousand dollars for each alien who is involved.