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ACLU of Arizona Section By Section Analysis of SB 1070 **“Immigration; Law Enforcement; Safe Neighborhoods”**

Summary of major provisions: This bill unconstitutionally allows the state of Arizona to regulate immigration by establishing a separate state offense for any person to violate provisions of the federal immigration law regarding registration and carrying registration documents. It gives local police officers authority to investigate, detain and arrest people for perceived immigration violations without the benefit of proper training, exacerbating the problem of racial profiling and raising concerns about the prolonged detention of citizens and legal residents.

Section 2

Would create a new section A.R.S. § 11-1051 that:

- (A) Prohibits cities, towns, and counties from having any policy in place limiting the investigation of violations of federal enforcement laws to less than the full extent permitted by federal law.

This appears to prohibit localities from having policies aimed at increasing trust within immigrant communities, such as not questioning victims and witnesses of crime about their immigration status. It also severely ties the hands of local governments by not permitting them to exercise their own judgment about the allocation of law enforcement resources because it requires police agencies to treat administrative violations of the immigration law on the same level as serious felonies. We are aware of no other law—except funding incentives—that attempt to dictate law enforcement priorities in this way.

- (B) Requires police officers to make a reasonable attempt to determine the immigration status of a person whenever there is reasonable suspicion that the person is unlawfully present and verify that status with the federal government, except to the extent that it would hinder an ongoing investigation.

Requires all local law enforcement to investigate a person’s immigration status when certain indicators exist that give rise to reasonable suspicion that they are in the country unlawfully, regardless of whether that person is suspected of a crime. Some examples of reasonable suspicion of undocumented status that have been upheld by the courts include not having proper identification and evasive behavior. Under the law, a person would be presumed to be in the country lawfully if they could show valid government ID or tribal identification. Contrary to the claims of some proponents, the bill does not prohibit officers from relying on race or ethnicity in deciding who to investigate. Because most police officers have not been trained to enforce immigration law, many U.S. citizens and lawful permanent residents will be wrongfully detained and would likely have a claim against their local police agencies for damages resulting from their detention.

- (C) Provides for the transfer of any noncitizen who is unlawfully present to federal custody upon discharge from prison or assessment of a fine after conviction of a state offense.

This law is unnecessary as to any person who is booked into a jail or serves time in prison because federal law already provides for a process by which individuals are checked against law enforcement databases and immigration “holds” or detainers can be placed on persons who are identified as non-U.S. citizens. A detainer ensures that the person will be transferred to federal custody instead of being released.

- (D) Provides authority for state and local law enforcement to transport noncitizens in their custody suspected of being unlawfully present to federal authorities, even outside the jurisdiction of the local agency.

This law is unnecessary as to any person who the federal government has reason to believe is in the country illegally because federal law already provides for a process by which those persons can be transported to federal custody. Local agencies can also contract with federal authorities to be reimbursed the cost of detaining and transporting such persons. The only reason why this provision seems to have been included is to permit local law enforcement to transport undocumented immigrants to some point of transfer other than the local Immigration and Customs Enforcement (ICE) office— i.e., ICE is, for whatever reason, not interested in taking custody of the person.

- (E) Gives police officers authority to conduct warrantless arrests of persons for whom the officer has probable cause to believe have committed any public offense that makes those persons deportable.

To the extent that provision attempts to create state arrest authority for administrative violations of federal immigration law, it is likely to be deemed invalid by the courts because states cannot create such arrest authority where it does not exist under federal law. As the Ninth Circuit held in a case from Arizona called Gonzales v. City of Peoria, while Arizona could authorize Peoria to enforce the criminal provisions of the immigration law, “we firmly emphasize [] that this authorization is limited to criminal violations.” The court took issue with the Peoria Police Department policy because it obscured the difference between civil administrative violations and criminal violations of the immigration law, and, as the court stressed, the lack of documentation or an admission of illegal presence “does not, without more, provide probable cause of [any] criminal violation” of the immigration law. Officers not trained in federal immigration law who attempt to exercise this arrest authority would be subject to legal liability for violations of the Fourth Amendment. In addition, an immigration judge could invalidate the arrest of immigrants by Arizona police officers pursuant to this provision because even federal immigration agents do not have the power to conduct warrantless arrests away from the border unless the agent can articulate specific reasons to believe the person was likely to escape before a warrant could be obtained. 8 U.S.C. § 1357(a)(2).

- (F) Establishes that, except as provided in federal law, state and local government officials cannot be prohibited from maintaining information about the immigration status of individuals or communicating that information to any other governmental entity, including the federal government, in the course of 1) verifying eligibility for public benefits, 2) verifying claims of residence or domicile, 3) verifying the identity of any person detained, or 4) determining if the person is compliance with federal alien registration laws.

This provision is unnecessary with respect to any legitimate attempt to communicate with federal authorities for the purpose of enforcing the federal immigration laws. 8 U.S.C. § 1373(a) and (b) already provide that such communications and the maintenance of information about immigration status cannot be restricted. However, the bill seems to direct government officials to communicate

and maintain such information even in contexts where doing so might constitute an unwarranted invasion of privacy and discourage lawful participation in public benefits programs and services intended for an entire community. In this respect, the provision is likely a nullity, as it would be in conflict with federal law.

- (G) Creates a private right of action for any person to sue a city, town, or county for any violation of subsection (A) and establishes civil penalties for the city, town, or county.

This subjects local governments to unreasonable and potentially frivolous litigation by private citizens with an anti-immigrant agenda. Even if a municipality is vindicated in court, it will still have to incur the costs of defense.

- (H) Directs that civil penalties assessed against cities, towns, or counties shall be applied towards a DPS Gang and Immigration Intelligence Team Enforcement Mission (GIITEM) Fund.
- (I) Indemnifies police officers against costs and attorneys' fees incurred in connection with any litigation brought by citizens and residents who were wrongfully detained, questioned, arrested, or transported, unless the officer was acting in bad faith.
- (J) Declares that the above provisions shall be implemented in a manner consistent with federal immigration laws and civil rights protections.

It is unclear what this provision could mean in practice, since several of the provisions of the bill are facially inconsistent with federal statutes, regulations, and the constitutions of the United States and Arizona.

Section 3

Would create a new section A.R.S. § 13-1509 that establishes a separate state offense for any person to violate provisions of the federal immigration law regarding registration and carrying registration documents (8 U.S.C. §§ 1304(e), 1306(a)). The first offense would be a class 1 misdemeanor, punishable by up to six months of jail time and an additional \$500 fine, as well as jail costs, with the assessments to be applied towards the GIITEM Fund. The second offense would be a class 4 felony and an additional \$1,000 fine and jail costs. Persons who have accepted voluntary removal or who had been deported in the past 5 years would be subject to a class 4 felony charge upon their first arrest under this Section. A person found in possession of drugs or weapons would face a class 3 felony charge upon their first arrest.

This provision is a back door attempt to create the state arrest authority for immigration violations described above, without any training or supervision by federal authorities. This attempt will likely be invalidated by the courts because it violates the Supremacy Clause of the U.S. Constitution. The Constitution grants the federal government exclusive power to regulate our borders and, with very few exceptions, states are not free to create their own laws regulating immigration.

Section 4

Adds a provision to the state human smuggling statute at A.R.S. § 13-2319 clarifying that a police officer may stop any car if there is reasonable suspicion to believe the driver is committing a civil traffic violation and the human smuggling law.

This law is unnecessary to the extent that police officers already have the authority to briefly detain the occupants of a car in order to investigate a traffic violation or possible criminal activity. Officers may not detain anyone for longer than it takes to issue a traffic citation or dispel their suspicions of criminal activity.

Section 5

Would add a new section, A.R.S. § 13-2928, that makes it a class 1 misdemeanor to attempt to hire or pick up day laborers to work at a different location if the driver is impeding the normal flow of traffic. It also makes it a misdemeanor for a worker to get into a car if it is impeding traffic. Finally, this Section would criminalize the solicitation of work (by a gesture or nod) by undocumented immigrants in any public place.

In order to be subject to the first or second parts of this Section, the vehicle in question has to be obstructing traffic. This provision adds no value insofar as there are already laws on the books that address traffic hazards. It is also likely to be found unconstitutional by the courts because the third part singles out the speech of immigrant day laborers for criminalization. The solicitation of work has been found by courts across the county to be protected speech under the First Amendment.

Would add a new section, A.R.S. § 13-2929, that makes unlawful for any person who is “in violation of a criminal offense” to transport, move, conceal, harbor, shield from detection, or attempt to do any of the above, any undocumented immigrant if the person knows or recklessly disregards the fact that the immigrant has entered or remained in the United States illegally. It also makes it a state crime to encourage or induce any immigrant to come, enter, or reside in the country illegally. A person who violates this law would be subject to a class 1 misdemeanor and a fine of at least \$1,000, with additional penalties where the offense involves ten or more immigrants. Any means of transportation used in connection with the crime will be impounded.

This provision is unnecessary because the exact same actions (transporting, moving, concealing, harboring, and shielding undocumented immigrants) are already prohibited under federal law where the person commits those acts with the intent to further the immigrant’s violation of the law. 8 U.S.C. § 1324(a)(1)(a). Furthermore, Arizona peace officers have explicit authority to arrest anyone who violates the federal harboring law, 8 U.S.C. § 1324(c), and vehicles used to commit the offense may be seized. 8 U.S.C. § 1324(b). Courts have not permitted prosecutions under the federal statute where a person offers a ride or shelter to another person out of humanitarian concern rather than with the intent to further the violation, such as for a profit motive. There is also a specific provision in the federal statute exempting churches who provide room and board to members of their congregation serving as ministers or missionaries. To the extent that the state law is applied differently than the federal law, it could be invalidated as violating the Supremacy Clause of the U.S. Constitution. The state offense also adds a requirement that the person already be violating some other criminal law in order to be found guilty.

Section 6

Amends Arizona’s state law on warrantless arrests, A.R.S. § 13-3883 to include the arrest of persons who have committed any public offense that makes them deportable.

Sections 7 and 8

Adds a new section to the state employer sanctions law, A.R.S. § 23-212, that establishes an affirmative defense to a violation of the law if they were entrapped by law enforcement. To assert the defense, an employer must prove—by a preponderance of the evidence—that the idea of committing the violation started with the undercover officer, the officer urged or induced the employer to commit the violation, and the employer was not predisposed to commit the violation.

Section 9

Adds a new section to the state law on verification of employment eligibility, A.R.S. § 23-214, that requires employers to keep records of their verification of eligibility for the duration of the worker's employment with the company or at least three years, whichever is longer.

Section 10

Adds a new section to the state law governing impoundment of vehicles, A.R.S. § 28-3511, mandating the impoundment of any vehicle used to transport, move, conceal, harbor, or shield an undocumented immigrant.

Section 11

Establishes the purposes and process for GIITEM Fund appropriations.

Section 12

States that the remaining provisions of the bill are severable and will remain in effect even if certain portions are held to be invalid.