The Court finds compelling AACJ's argument that Subsection 2(B) of S.B. 1070 "transforms investigatory stops into *de facto* arrests without probable cause." (AACJ Br. at 9.) The Court addressed this argument above, in the context of Defendants' Motion to Dismiss, finding that Plaintiffs had stated a claim sufficient to withstand a motion under Rule 12(b)(6), and the Court now considers whether Plaintiffs are likely to succeed on the merits of this theory. The requirement that police officers make a reasonable attempt to determine the immigration status of any person lawfully stopped, detained, or arrested when the officer has reasonable suspicion to believe that the person is unlawfully present appears, on its face, to likely increase detention time for many people who are stopped, detained, or arrested. As AACJ points out, detaining people for the additional time necessary to make a determination of immigration status will change the encounter for many from an investigatory *Terry* stop into an arrest, for which the police officer would need to have probable cause, *not* the reasonable suspicion required by S.B. 1070. (*See id.* at 9-10); *Herring v. United States,* 129 S. Ct. 695, 698 (2009) (observing that the Fourth Amendment "usually requires the police to have probable cause or a warrant before making an arrest").

The second sentence of Subsection 2(B) states: "Any person who is arrested shall have the person's immigration status determined before the person is released." A.R.S. § 11-1051(B). This provision is mandatory ("shall") and does not pertain only to people who are arrested and booked into a jail. The Court observes that serious questions also exist as to whether this sentence violates the Fourth Amendment. *See Dunaway v. New York,* 442 U.S. 200, 212 (1979) (holding that extensions of investigatory stops beyond the scope permitted in *Terry* must be based on consent or probable cause (citing *United States v. Brignoni-Ponce,* 422 U.S. 873, 881-82 (1975)).

Requiring Arizona law enforcement officials and agencies to determine the immigration status of every person who is arrested will, on its face, impermissibly expand the scope of detention for many arrestees because their liberty will be restricted while their status is checked. As stated above, many people each year are technically "arrested" but never booked into jail or perhaps even transported to a law enforcement facility, and detention time for this category of arrestee will inevitably be extended during an immigration status verification. (*See Escobar* Answer & Cross-cl., ¶ 38 (stating that during fiscal year 2009, Tucson used the cite-and-release procedure provided by A.R.S. § 13-3903 to "arrest" and immediately release 36,821 people).)

***21** Since the Court previously found that the United States was likely to succeed on its challenge to this provision on preemption grounds, rendering Plaintiffs' Motion for Preliminary Injunction moot, the Court does not engage in a full preliminary injunction analysis on Fourth Amendment grounds. However, there appear to be substantial questions as to whether Subsection 2(B) would withstand a challenge under the Fourth Amendment, and some of the facts supplied, both in this case and the related cases, suggest that Plaintiffs could demonstrate a likelihood of success on the merits of this claim.

**IT IS THEREFORE ORDERED** granting in part and denying in part the Motions to Dismiss filed by Defendants Pinal County Sheriff Paul Babeu and Pinal County Attorney James P. Walsh (Doc. 204), Defendant Maricopa County Sheriff Joseph Arpaio (Doc. 205), and Intervenor Defendant Arizona Governor Janice K. Brewer (Doc. 238). The following of Plaintiffs' claims are dismissed for lack of standing:

- violation of the First Amendment (Count 3) only as far as Plaintiffs challenge Section 2 of S.B. 1070;
- violation of the right to travel under the Privileges and Immunities Clause (Count 7).

Plaintiffs fail to state a claim upon which relief can be granted for the following claims:

- violation of the First Amendment (Count 3) only as far as Plaintiffs challenge A.R.S. § 13-2928(C) of Section 5 of S.B. 1070;
- violation of the Due Process Clause (Count 6) only as far as Plaintiffs challenge Sections 2 and 5 of S.B. 1070 for vagueness.

Defendants' Motions to Dismiss are denied for the balance of Plaintiffs' claims.

**IT IS FURTHER ORDERED** denying as moot Plaintiffs' Motion for Preliminary Injunction (Doc. 235) and Request for Order on Pending Motion (Doc. 430).