

No. 11-16487

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

ANGEL LOPEZ-VALENZUELA; ISAAC CASTRO-
ARMENTA,

Plaintiffs-Appellants,

v.

JOSEPH M. ARPAIO, Maricopa County
Sheriff, in his official capacity; COUNTY OF
MARICOPA; WILLIAM GERARD
MONTGOMERY, Maricopa County, in his
official capacity,

Defendants-Appellees.

D.C. NO. 2:08-cv-00660-srb

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

**MOTION TO STAY ISSUANCE OF MANDATE AND TO REMAND TO
DISTRICT COURT TO DEVELOP THE RECORD**

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CIRCUIT RULE 27-3 CERTIFICATE

Defendants-Appellees Joseph M. Arpaio, Maricopa County Sheriff, County of Maricopa, and William Gerard Montgomery, hereby certify compliance with Circuit Rule 27-3, and provide the following contact information:

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I. Facts Showing The Existence And Nature Of The Emergency

On October 15, 2014, this Court issued its opinion in the instant case, ruling that Arizona's Proposition 100, which is embodied in A.R.S. § 13-3961, is facially unconstitutional in that the bail provisions are determined to violate substantive due process. *Lopez-Valenzuela v. Arpaio*, 11-16487, 2014 WL 5151625 (9th Cir. Oct. 15, 2014). The undersigned Maricopa County Defendants request that the matter be stayed and that the District Court be directed to reopen the record to determine the factual basis for the asserted danger of flight risk of undocumented aliens who are charged with a serious felony.

If this opinion is not stayed pending resolution through a remand, the Mandate will issue and will prevent Arizona from applying A.R.S. § 13-3961 to undocumented aliens who are charged with serious felony offenses. In addition, the courts in Arizona will have to reconsider the bail/no bail determinations in all pending criminal trials. In this situation, the citizens of Arizona will be deprived of the benefits of the referendum law which was passed by 78% of the voters in 2006.

If this matter is not stayed, Defendants-Appellees will prepare a petition for certiorari to the United States Supreme Court to review this opinion. Pending review by the Supreme Court, the courts in Arizona will not be allowed to implement A.R.S. § 13-3961.

The granting of a stay is the only way that this matter can be brought to resolution without disruption of the bail system that Arizona has been operating under for almost 8 years.

II. When And How Other Parties Were Notified

Undersigned attorney certifies that all parties were notified both by e-mail and by telephone call of the filing of this motion before it was filed. Clerical staff in our offices telephoned each office shown above and notified them of the proposed motion, which was separately e-mailed to them.

III. Statement Of Consultation With Opposing Counsel

The undersigned notifies this Court that opposing counsel has been notified of this motion, and the one person that was spoken to personally advised that his client opposes this motion. It is safe to assume that the remaining parties also oppose to this motion

IV. An Emergency Stay And Remand To The District Court Will Allow The Court To Develop A Record Regarding The Seriousness And Actuality Of The Risk Of Flight.

One of the unanswered questions in this case is whether there is a significant flight risk for undocumented aliens who are charged with a class four or more serious felony. Class four felonies create the possibility for lengthy imprisonment, up to 18 years or more.¹

The district court's factual finding that illegal immigrants as a class pose a greater flight risk was supported by an admission by Plaintiffs, so there was no need to develop a factual record in the court below on that factual issue. This Court's ruling is based on a contrary assumption, so reopening the case below for the development of a factual record on that issue is critical. It is also necessary to determine whether Arizona's implicit determination of increased flight risk is also consistent with Congress's own legislative findings in the parallel context addressed by federal law. *See United States v. Baig*, 536 F. App'x 91, 92 (2d Cir.

¹ A class four felony provides for imprisonment for between one year and 3.75 years with a presumption term of 2.5 years. If the offense is charged as a dangerous or repetitive offense the length of imprisonment can be up to 16 years (or up to 18 years if the offense is committed while released or on escape per A.R.S. § 13-708(D)). A dangerous crime against children can subject the defendant to even longer periods of incarceration. Of course, class three, two or one felonies provide even more lengthy prison terms. *See* www.azcourts.gov/PublicServices/CriminalLaw/CriminalCodeSentencingChart.aspx (last accessed October 22, 2014). If prison is not imposed, some offenses qualify for probation which can include up to a year in jail. *Id.*

2013) (“For a defendant to be detained, the Government must prove ‘by a preponderance of the evidence that the defendant, if released, presents an actual risk of flight,’ and that ‘no condition or combination of conditions could be imposed on the defendant that would reasonably assure his presence in court.’” (quoting *United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007)). *See also United States v. Valdivia*, 104 F. App’x 753, 754 (1st Cir. 2004) (“Congress based that [rebuttable] presumption on findings that flight to avoid prosecution is particularly high among persons charged with major drug offenses”) (omitting citation and internal quotations).

This Court has concluded that the record did not support the stated goal of Proposition 100: to reduce flight risk:²

Proposition 100 is excessive in relation to its stated legitimate purpose because it purports to deal with a societal ill – unmanageable flight risk posed by undocumented immigrants as a class – that has not been shown to exist.

Lopez-Valenzuela, *supra*, slip opinion at 37. In addition, the majority opinion held “there is no evidence that the Proposition laws were adopted to address a particularly acute problem.” *Id.*, at 21.

² “Nobody disputes that there is no [] evidence in the record [as to the risk of flight]. . . .But even assuming that [undocumented immigrants commit a disproportionate share of felonies in Arizona], it does not suggest undocumented immigrants overall are more *likely to flee* than other arrestees, nor does it shed light on the flight risk posed by any given individual defendant.” *Lopez-Valenzuela*, *supra*, slip opinion at 39. (Nguyen, J., concurring).

But the District Court Order pointed out that “[t]he parties agree that Proposition 100 is aimed only at flight risk, not dangerousness.” District Court Order, filed 3/29/11 at 11. More importantly, the District Court concluded the opposite of the 9th Circuit as to flight risk:

Like the Arizona Court of Appeals, this Court finds “that Proposition 100 is a legitimate regulatory provision ensuring that [unlawfully present aliens] accused of certain serious felonies appear to stand trial and that it does not cast an unreasonably wide net.” *Hernandez*, 167 P.3d at 1270 (citing *Simpson*, 85 P.3 at 486). Therefore, no triable issues of fact remain.

Id., at 12. There is thus a contradiction that should be clarified by opening the record for the taking of evidence.

Accordingly, a remand to the District Court with direction to create a record of the risk of flight by undocumented aliens will either substantiate or undercut the opposing assumptions made by the District Court versus this Court. Having a more complete record in this regard will help ensure that whatever the ultimate resolution in this case is, the decision will be *fact-based* and not *supposition-based*. Doing so will ensure justice in the instant case and provide guidance for courts in future cases.

V. If There Is No Remand, A Stay Is Necessary To Allow For Supreme Court Review Of Serious Constitutional Issues And To Do So Without Interrupting Arizona’s Bail Regime.

Multiple constitutional issues are raised by the instant case that deserve review by the Supreme Court. A review will clarify rights that are important and

have not yet been settled by the Supreme Court. They include the role of the Eighth Amendment in the analysis of the Proposition 100, the question of the seriousness of the risk of flight of accused illegal aliens, whether strict scrutiny is the proper test to apply in a substantive due process analysis, whether Proposition 100 is regulatory rather than penal, and indeed, whether empirical evidence is needed to justify the actions of the electorate in passing Proposition 100.

If this Court does not grant the motion to remand, and the Supreme Court grants the petition for certiorari and reverses this Court's opinion, the criminal courts in Arizona will shift from applying Proposition 100 and A.R.S. § 13-3961 (as they have been doing for some 8 years), to not applying them, to ultimately again applying these provisions. Such a sequence will not only create an inconsistent application of the law but will also deprive the citizens of Arizona, for a period of time, of the assurance that charged defendants who meet the requisites of A.R.S. § 13-3961 will be present for their trials and will not commit new public offenses while awaiting trial.

Important constitutional questions are raised by the instant opinion as this Court acknowledged in n.8:

[W]e conclude that whether a categorical denial of bail for noncapital offenses could ever withstand heightened scrutiny is an open question, and then assume without deciding that such a rule would be constitutional were it adequately tailored. Our conclusion that this is an open question is clearly correct, given that neither the Supreme Court nor any federal court of appeals has addressed the question.

Lopez-Valenzuela v. Arpaio, supra. Similarly, this Court recognized that more attention should be addressed to the Eighth Amendment issues in this case:

As Judge O’Scannlain recognizes, Dissent at 71, the parties also have not “thorough[ly] brief[ed]” the Eighth Amendment issues. For these reasons, we properly rely on substantive due process rather than the Eighth Amendment to address Proposition 100’s constitutionality.

Id., at n.16. Since this case will give the Supreme Court the opportunity to clarify, *inter alia*, the role of the Eighth Amendment in this bail case, it will be prudent to delay the mandate until a determinative opinion is rendered by the Supreme Court.

Similarly, a stay will allow the Supreme Court to consider, without disruption of Arizona’s established bail regime, the question of *flight risk* as an additional, authorized carve-out (along with danger to the community and impermissible punishment before trial) which meets the substantive due process requirements of the Constitution. *See U.S. v. Salerno*, 481 U.S. 739 (1987).

VI. Conclusion.

In conclusion, the undersigned respectfully request that this Court grant a stay and remand this case to the District Court to receive evidence and develop the record with respect to how serious the flight risk is from undocumented aliens who are charged with serious felonies, and to determine if such constitutes a pressing societal problem similar to the problem of dangerousness to the community. *See* Bail Reform Act, 18 U.S.C. §§ 3141–3150.

If this Court declines to remand this case to the District Court for the purpose of developing the record, then the undersigned respectfully request that this Court grant a stay pending a review by the Supreme Court of a petition for certiorari.

RESPECTFULLY SUBMITTED this 23rd day of October, 2014.

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CERTIFICATE OF SERVICE

I certify that on October 23, 2014, I electronically filed the foregoing with the Clerk of the Court for the United Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ William G. Montgomery
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