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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

National Coalition of Latino Clergy and Christian Leaders ("CONLAMIC"), et al. Plaintiff, v. State of Arizona, et al. Defendants.	**NO. CV 10-0943-PHX-SRB** **DEFENDANT SHERIFF ARPAIO'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT** (Oral Argument Requested)

Defendant Sheriff Joseph M. Arpaio, by and through the undersigned counsel, hereby replies to Plaintiffs' Response to Defendant's Motion to Dismiss (Doc. 28). Plaintiffs misstate the proper standard for the requisite statement of facts within a Complaint sufficient to survive a Motion to Dismiss pursuant to the Federal Rules of Civil Procedure. (Response, Dkt.28 at 2.)

Plaintiffs have not alleged facts to establish that they have standing to challenge

the legality of S.B. 1070. Plaintiffs make conclusory and speculative statements that each individual Plaintiff that appears Latino or speaks English with a Spanish-language accent, is in imminent danger of being harmed. (Dkt.28 at 5) Yet Plaintiffs have alleged no facts to support the allegation that any person of Latino appearance or who speaks with an accent is subject to inquiry regarding immigration status, much less arrest. Such allegations are gratuitous and conclusory and, therefore, insufficient to withstand the Motion to Dismiss.

Conclusory allegations are no longer adequate to survive a motion to dismiss in the federal courts. *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1955, 173 L.Ed.2d 868 (2009). A threadbare recitation of the elements of a cause of action, supported by mere conclusory statements, is insufficient. *Iqbal*, 129 S. Ct. at 1949. Plaintiffs must plead facts showing that the allegations in the Complaint are plausible, not merely possible. *Id.* at 1949-50; *see Bell Atlantic Corp.v. Twombly*, 550 U.S.544, 555, n. 3, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The Supreme Court's opinion in *Iqbal* extends the reach of *Twombly*, instructing that all civil complaints must contain "more than an unadorned, the-defendant-unlawfully-harmed–me accusation." *Iqbal*, 129 S.Ct. at 1949.

Furthermore, Plaintiffs conclusory statements that, " . . . many law-abiding citizens commit minor infractions (for example, traffic violations) that would justify a lawful stop . . . and trigger S.B. 1070's immigration enforcement provisions" is not only unsupported by the requisite recitation of facts, but also is false. The immigration enforcement provisions of S.B. 1070 require indicia of unlawful immigration status sufficient to give rise to reasonable suspicion. Plaintiffs have not alleged that they

intend to display any such indicators. Moreover, a fact alleged, "that each individual Plaintiff appears to be Latino" is expressly prohibited from being a basis for law enforcement inquiry into unlawful immigration status by the language of S.B. 1070, amended by HB 2162, Sec. 3(B).

Standing and Ripeness

Plaintiff brings forth no one who has been arrested, stopped or prosecuted under S.B. 1070. This lawsuit is all speculation and should be dismissed for lack of standing.

The remedy for someone such as John Doe #2 who has lost his lawful permanent resident card is to get another one. One would think he would be doing that in any case. Jane Doe #2 would not be required to produce a document unless she is a foreign national. John Doe who has been granted refugee status needs to tell the police he has refugee status, and if the police do not respond appropriately, his remedy is to sue the police. If plaintiffs are racially profiled, they have a remedy at law which is to sue for a civil rights' violation.

No preemption

Plaintiff's argument that this Arizona law, ". . . conflicts with federal law and regulates the field of immigration law enforcement which Congress has plainly intended to occupy. . . ." (Response at 9), is undercut by its own admission that, "Section 3 creates a misdemeanor for not carrying certain immigration papers based on an **arcane federal immigration provision**, . . ." (Response at 8) Simply put, the federal law conflicts with itself, or more properly put, federal policy may conflict with federal law, or Congress' laws may be considered "arcane" by the executive branch.

It is noteworthy that recently a memorandum created by the U.S. Citizenship and Immigration Services to the Director, Alejandro N. Mayorkas, from Denis Vanison, Roxana Bacon, of the Office of Chief Counsel, Debra Rogers and Donald Neufeld has been published on the subject of "Administrative Alternatives to Comprehensive Immigration Reform." (Exhibit A) This Memorandum suggests that immigration reform may be handled by executive order without Congress. This raises a question as to exactly what constitutes the federal immigration law scheme. It appears to be a patchwork of conflicting agencies and branches of government with no clearly defined approach. Therefore, how can this patchwork preempt the field of immigration law and trump the clear public will of the state's legislature made up of the people's representatives, not appointed employees.

A. <u>Section 1- State Legislature's Intent to Regulate Immigration is not preempted.</u>

The federal government cannot preempt the intention of a state legislature.

B. <u>Sections 2, 3, and 6- State "Immigration Enforcement" is not Preempted.</u>

Section 2 of S.B. 1070 has twelve subsections. *See* A.R.S. § 11-1051(A)-(L). Plaintiffs purport to challenge all of Section 2, but address only a portion thereof. For example, Plaintiffs assert that Section 2 attempts to authorize local law enforcement officers with the power to determine the immigration status of any person who is arrested. (Dkt. 28 at 8, lines 19-22). This assertion is false. S.B. 1070 expressly calls for the local law enforcement to notify the federal government and request a determination in compliance with federal law, "the person's immigration status shall be verified with

the federal government pursuant to 8 U.S.C. § 1373(c)." S.B. 1070 Sec. 2(b). Plaintiffs place themselves in the absurd position of claiming that S.B. 1070 conflicts with federal law because it mandates local law enforcement acts in compliance with federal law. Accordingly, Plaintiff has failed to allege facts which support their claim for relief and, therefore, such claim should be dismissed.

Section 3 of S.B. 1070 mirrors federal law: "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. §§ 1304(e) or 1306(a)." A.R.S.§13-1509(A). Moreover, A.R.S.§13-1509 mirrors federal law by imposing the same misdemeanor penalties as federal law for violations of 8 U.S.C.§1304(e). S.B. 1070 expressly "does not apply to a person who maintains authorization from the federal government to remain in the United States." A.R.S.§13-1509(F).

Section 6 of S.B. 1070 adds to the authority of law enforcement officers in Arizona under A.R.S. §13-3883(A) to arrest a person without a warrant by authorizing such arrests when "the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States." Section 6 does not authorize Arizona law enforcement officers, or any part of the state government, to determine whether any person is removable. That authority is expressly reserved for the federal government.

Perhaps the best demonstration of the fact that federal government has not preempted the field of immigration enforcement are the infamous signs posted by the federal government in Southern Arizona warning people to beware of the dangers of

illegal immigrants in the desert and then instructing them to call "911" rather than approach the illegal immigrants themselves. A call to "911" is a call to local law enforcement. Thus, the federal government has admitted that they are relying on local law enforcement.

C. INA Section 287 (g) Does Not Demonstrate that Congress Has Occupied the Field of Immigration Law Enforcement.

Section 287 (g) sets forth a scheme for cooperation and collectivism in its approach to immigration law enforcement, not preemption.

D. Sections 5,7-9- State's New Crimes Re Immigrant Workers are Not Preempted.

The fields of employment, health, and safety have been traditional areas of state law. *See generally, City of San Jose v. Dep't of Health Serv.*, 66 Cal.App.4th 35, 77 Cal.Rptr.2d 609 (1998).

E. Section 10- State's New Crimes for Transportation and Harboring are Not Preempted.

The State's so-called new crimes for transportation and harboring of illegal immigrants do not involve illegal immigrants; they pertain to citizens and those with legal status. Therefore, these laws cannot be preempted unless the federal government is somehow seeking to establish that the states are no longer able to pass criminal laws of their choosing.

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Conclusion

Plaintiffs have failed to state a complaint upon which relief can be granted and, therefore, the Motion to Dismiss should be granted.

RESPECTFULLY SUBMITTED this 4th day of August, 2010.

MARICOPA COUNTY
OFFICE OF SPECIAL LITIGATION SERVICES

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CERTIFICATE OF SERVICE

I hereby certify that on August 4th, 2010, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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