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10 *Attorneys for Defendant Janice K. Brewer,*
 11 *Governor of the State of Arizona*

12 **IN THE UNITED STATES DISTRICT COURT**
 13 **FOR THE DISTRICT OF ARIZONA**

14 Martin H. Escobar,
 15 Plaintiff,

16 v.

17 Jan Brewer, Governor of the State of
 Arizona, in her Official and Individual
 18 Capacity; the City of Tucson, a
 municipal corporation,
 19 Defendants.

Case No. CV-10-00249-TUC-SRB

**GOVERNOR BREWER'S
 RESPONSE TO PLAINTIFF'S
 MOTION TO CONSOLIDATE**

21 The City of Tucson,
 22 Cross-plaintiff,

23 v.

24 The State of Arizona, a body politic; and
 Jan Brewer, in her capacity as Governor
 25 of the State of Arizona,
 26 Cross-defendants.

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1 The United States of America,

2 Plaintiff,

3 v.

4 The State of Arizona; and Janice K.
5 Brewer, Governor of the State of
6 Arizona, in her Official Capacity,

7 Defendants.

8 Defendant Janice K. Brewer (“Governor Brewer”) hereby responds to plaintiff’s
9 Motion to Consolidate *Escobar v. Brewer, et al.*, Case No. CV-10-00249-TUC-SRB (the
10 “Escobar Case”) with *United States v. Arizona, et al.*, No. CV-10-1413-PHX-SRB (the
11 “Federal Case”) (doc. 79).

12 Plaintiff’s motion should be denied. First, consolidation is premature because
13 Governor Brewer’s motion to dismiss the case based (in part) on plaintiff’s lack of
14 standing remains pending. Second, consolidation is inappropriate in light of the different
15 legal arguments presented by the parties in the two actions and the differing procedural
16 postures of the cases.¹

17 **I. PROCEDURAL BACKGROUND**

18 The Escobar Case and the Federal Case are two of seven pending cases that
19 challenge the validity of Senate Bill 1070, as amended by House Bill 2162 (“SB 1070”).

20 On June 23, 2010, Governor Brewer moved to dismiss the First Amended
21 Complaint in the Escobar Case on the grounds that plaintiff lacks standing to pursue these
22 claims and that he failed to state a claim upon which relief can be granted (doc. 55).
23 Escobar also filed a motion for preliminary injunction that sought to enjoin the
24 enforcement of SB 1070 before its effective date of July 29, 2010 (doc. 17). In addition,
25 on May 26, 2010, the City of Tucson answered the plaintiff’s complaint and asserted a

26 _____
27 ¹ It is also unclear from plaintiff’s motion whether he is abandoning his first motion to
28 consolidate filed on June 4, 2010 (doc. 20) in which he asked the Court to consolidate this
action with *Salgado v. Brewer, et al.*, Case No. CV-10-00951-PHX-SRB.

1 cross-claim against the State of Arizona and Governor Brewer (doc. 9). On June 23,
2 2010, the State of Arizona moved to dismiss the cross-claim against the State of Arizona
3 because the action is barred by the Eleventh Amendment of the United States Constitution
4 (doc. 54). On July 2, 2010, Governor Brewer filed a motion for judgment on the
5 pleadings regarding the City of Tucson's cross-claim (doc. 68).² All of these motions
6 remain pending before the Court.

7 On July 28, 2010, the Court entered an order in the Federal Case granting in part
8 and denying in part the motion for preliminary injunction in the Federal Case, and
9 enjoining the enforcement of certain provisions of SB 1070. On July 29, 2010, Governor
10 Brewer appealed the preliminary injunction order in the Federal Case to the U.S. Court of
11 Appeals for the Ninth Circuit.

12 **II. LEGAL STANDARD**

13 Rule 42 of the Federal Rules of Civil Procedure permits consolidation of cases
14 involving a common question of law or fact. *See* Fed. R. Civ. P. 42(a); LRCiv 42.1(b).
15 The district court has broad discretion to determine whether consolidation is appropriate,
16 and in making this determination, should "balance the interest in judicial convenience
17 against the potential for delay, confusion and prejudice that may result from such
18 consolidation." *Sapiro v. Sunstone Hotel Investors, L.L.C.*, No. CV03-1555-PHX-SRB,
19 2006 U.S. Dist. LEXIS 21234, *3 (D. Ariz. Apr. 4, 2006) (quoting *Bank of Montreal v.*
20 *Eagle Assoc.*, 117 F.R.D. 530, 532 (S.D.N.Y. 1987)). Plaintiff bears the burden of
21 showing that consolidation will not lead to inefficiency, inconvenience, or unfair
22 prejudice. *See Lewis v. City of Fresno*, No. CV-F-08-1062 OWW/GSA, 2009 U.S. Dist.
23 LEXIS 57083, at *4 (E.D. Cal. July 6, 2009).

24 **III. ARGUMENT**

25 Plaintiff presents little explanation in support of his motion to consolidate these
26 cases other than to say that the two cases "assert the same central claim" and seek the

27 ² In addition, the City of Tucson filed its own motion for preliminary injunction (doc. 72)
28 to enjoin the enforcement of SB 1070. By stipulation dated August 5, 2010, the City of
Tucson withdrew its motion without prejudice.

1 same relief (doc. 79). In truth, there are important differences between the two cases.
2 Governor Brewer submits that consolidation is inappropriate and that plaintiff's motion
3 should be denied.

4 First, the plaintiff in the Escobar Case has not yet demonstrated that he has suffered
5 cognizable injuries that would grant him standing to pursue his claims. Governor Brewer
6 has moved to dismiss plaintiff's First Amended Complaint in the Escobar Case on this
7 ground (doc.55). Plaintiff has not filed a response and this motion remains pending.
8 Governor Brewer submits that it would not serve the interests of judicial economy to take
9 action to consolidate cases before it is clear whether the action will proceed. *See Y.P.*
10 *Corp. v. Sitrick and Co.*, No. CV-05-0769-PHX-SRB, 2005 U.S. Dist. LEXIS 32513, at
11 *19 (D. Ariz. Dec. 8, 2005) (motion to consolidate is moot when one suit is dismissed).
12 On the other hand, no such challenge has been made in the Federal Case. Until the issue
13 of standing is resolved, the motion to consolidate is premature.

14 Second, there are notable differences in the legal and factual issues raised in the
15 two cases. As noted in the opposition brief of the United States filed in the Federal Case
16 (doc. 91), the plaintiff challenged a more limited portion of SB 1070 than the United
17 States in the Federal Case. Further, although both cases (like all seven of the cases
18 challenging SB 1070) raise preemption issues, the United States raises preemption issues
19 that are unique to the claimed interest of the federal government. Escobar has not
20 explained why these two cases should be consolidated, but the remaining five cases that
21 also challenge SB 1070 should not.

22 Finally, consolidation may delay the resolution of the Federal Case and complicate
23 matters on appeal because the cases are proceeding on different schedules. As the Court
24 is aware, on July 29, 2010, Governor Brewer appealed the Court's preliminary injunction
25 order to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit has already set
26 a briefing schedule and placed the case on its calendar. On the other hand, there are
27 numerous pending motions in the Escobar Case, such as Governor Brewer's motion to
28 dismiss, plaintiff's motion for preliminary injunction, and the motion for judgment on the

1 pleadings regarding the City of Tucson’s cross-claims. Consolidating a case that is
2 already on appeal with a case that has unresolved motions at the district court level is
3 likely to lead to delay and unneeded complexity. *See Sapiro*, 2006 U.S. Dist. LEXIS
4 21234, at *4 (“Factors such as differing trial dates or stages of discovery usually weigh
5 against consolidation.”) (citing Charles Alan Wright & Arthur R. Miller, *Federal Practice*
6 *and Procedure* § 2383 (1995)). Contrary to plaintiff’s argument, consolidating cases with
7 such different procedural postures is likely to lead to additional time and effort on the part
8 of all counsel, and higher fees and costs for all parties involved.

9 **IV. CONCLUSION**

10 For these reasons, Governor Brewer requests that the motion to consolidate be
11 denied.

12 RESPECTFULLY SUBMITTED this 9th day of August, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

By s/John J. Bouma

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