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Attorneys for Defendants Janice K. Brewer, Governor of the State of Arizona, and the State of Arizona

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

The United States of America,

Plaintiff,

v.

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

Defendants.

No. 10-CV-01413-PHX-SRB

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiff's Response in Opposition to Defendants' Motion to Dismiss does not address the arguments Governor Brewer and the State of Arizona raised in their Motion to Dismiss plaintiffs' Supremacy Clause[1] and Commerce Clause challenges to Sections 1 through 6 of SB 1070. Instead, plaintiff speculates about potential applications of each provision, relies on inapposite case law, and asserts overly broad views of immigration regulation and interstate commerce. Plaintiff has not demonstrated that it has asserted valid facial constitutional challenges to Sections 1 through 6.

I. ARGUMENT

A. Plaintiff's Complaint Does Not Adequately Allege that Sections 1 through 6 of SB 1070 Are Preempted In *All* of Their Applications

Because plaintiff is asserting facial challenges to Sections 1 through 6, plaintiff must plead and be able to establish "that no set of circumstances exists under which [the provisions] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 589 (1987) (rejecting a facial challenge because the Commission had identified "a possible set of permit conditions not pre-empted by federal law"); Mot. to Dismiss at 5-6. Plaintiff has not acknowledged this standard, much less demonstrated how its Complaint satisfies it.[2] None of plaintiff's preemption claims meets plaintiff's burden for asserting a facial challenge.

1. Federal law cannot preempt the Arizona Legislature's purpose

Arizona moved to dismiss plaintiff's Complaint to the extent it challenges Section 1 on the theory that Sections 1 through 6 collectively interfere with foreign policy and improperly attempt to set state-level immigration policy. *See* Mot. to Dismiss at 14-15.[3] Plaintiff has not addressed Arizona's arguments or articulated how the Arizona

[1] Plaintiff's claims that Sections 1 through 6 violate the Supremacy Clause and are preempted (Counts I and II) are substantively indistinguishable. Compl. ¶¶ 61-68.

[2] Arizona recognizes that this Court has already found, on an expedited basis, that plaintiff is likely to succeed on its challenges to Sections 2(B), 3, 5(C), and 6 of SB 1070 and that plaintiff's burden for obtaining preliminary injunctive relief is less than its burden under Fed. R. Civ. P. 12(b)(6). *See* Resp. at 2. Arizona respectfully submits, however, that plaintiff's facial challenges to Sections 1 through 6 fail as a matter of law.

[3] As the Court found in its July 28, 2010 Order, Section 1 "has no operative function" and "[t]he Court cannot enjoin a purpose." July 28, 2010 Order at 13.

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Legislature's purpose set forth in Section 1 can be preempted. *See* Resp. at 1 n.2.

2. Plaintiff's challenge to Section 2 ignores Congress' intent and fails to allege that Section 2 is unconstitutional in *all* applications

Plaintiff argues that it has stated cognizable claims challenging Section 2 because Section 2 is *likely* to burden: (i) legally-present aliens and (ii) federal resources. Resp. at 3. Plaintiff's argument is insufficient to sustain its facial challenge and ignores indisputable (and controlling) evidence of Congress' intent.[4]

i. Section 2's alleged burden to lawfully-present aliens

Plaintiff's argument that Section 2 is preempted based on the alleged burden it may impose on lawfully-present aliens fails for three reasons. First, plaintiff has not alleged that Section 2 is preempted in all of its applications. Rather, plaintiff alleges that Section 2 could be unconstitutional *as applied* to lawfully-present aliens or persons "who are stopped, questioned, or detained and cannot readily prove their immigration or citizenship status." Compl. ¶ 43. These allegations are insufficient to state a claim that Section 2 is preempted on its face. *See, e.g.*, *Salerno*, 481 U.S. at 745; *Wash. State Grange v. Wash. Republican Party*, 552 U.S. 442, 450 (2008).

Second, Congress' intent determines whether a state law is preempted, *see, e.g.*, *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008), and current evidence of Congress' intent refutes plaintiff's argument. Plaintiff relies solely on *Hines v. Davidowitz*, 312 U.S. 52 (1941) to support its argument that investigations into aliens' immigration status contravene congressional intent. Resp. at 3-4. *Hines*, however, addressed the constitutionality of a state-specific alien registration law and was based on Congress' intent in enacting the Alien Registration Act of 1940. 312 U.S. at 73-74. Since *Hines*, Congress has enacted criminal sanctions for aliens who fail to carry their registration cards, *see* 8 U.S.C. § 1304(e),[5] and codified strong federal policies to

[4] Plaintiff argues that it has stated a valid claim that Section 2 of SB 1070 is preempted by federal law because the Court has enjoined Section 2(B). Resp. at 3-4. The Court did not, however, enjoin Section 2(A) or Sections (C) through (L). July 28, 2010 Order at 3.

[5] *See also Martinez v. Nygaard*, 831 F.2d 822, 828 (9th Cir. 1987) (finding that an alien's "failure to produce a green card, provides probable cause for an arrest").

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encourage state and local assistance in the enforcement of federal immigration laws. *See, e.g.*, 8 U.S.C. §§ 1357(g)(10), 1373, and 1644; *United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001). Section 2 is consistent with *current* congressional policy.

Third, plaintiff cannot demonstrate that potential investigations into the immigration status of lawfully-present aliens would impose an unconstitutional burden on them. It is well-established that federal, state, and local law enforcement officers may (and often do) investigate a person's immigration status where reasonable suspicion of unlawful presence exists. *See* Mot. to Dismiss at 7; Resp. at 3-4; Compl. ¶ 41; 8 C.F.R. § 287.8(b)(2); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044-45 (1984). Plaintiff does not dispute this authority, but argues that Section 2 will "result in the harassment of lawfully present aliens" because "reasonable suspicion is not a requirement of absolute certainty." Resp. at 4 n.5 (citation omitted). In effect, plaintiff's argument is that any other federal, state, or local officer can investigate a lawfully-present alien's immigration status, but if Section 2 is enforced, an Arizona officer could not conduct the exact same investigation based on the exact same objective facts without violating the Constitution. Plaintiff's argument ignores that the effect (or alleged burden) on the lawfully-present alien is the same regardless of which officer investigates the alien's immigration status. Section 2 does not alter the nature of the investigation, nor authorize investigations without the constitutional prerequisite of reasonable suspicion of unlawful presence.[6]

ii. Section 2's alleged burden on federal resources

Plaintiff's argument that Section 2 would impermissibly burden federal resources incorrectly presumes that the Department of Homeland Security ("DHS") can override Congress' express intent. Congress has directed DHS to respond to inquiries from Arizona's law enforcement officers regarding individuals' immigration status. *See* 8 U.S.C. § 1373(c). Congress set no qualifications or limitations on this obligation, nor did it grant DHS any discretion in determining the circumstances in which it would respond to such inquiries. *See id.* It is Congress, not DHS, that has the power to preempt

[6] The fact that more investigations may occur under Section 2 is irrelevant because, in each instance, reasonable suspicion of unlawful presence must still exist.

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otherwise valid state laws. *Wyeth v. Levine*, 129 S. Ct. 1187, 1207 (2009) (Breyer, J., concurring); *North Dakota v. United States*, 495 U.S. 423, 442 (1990); *see also* Mot. to Dismiss at 7-8. The fact that DHS may consider inquiries from Arizona's law enforcement officers "low priority" does not render Section 2 unconstitutional.

The cases upon which plaintiff relies are inapposite. In *Buckman Co. v. Plaintiffs' Legal Committee*, the Supreme Court evaluated Congress' intent with respect to claims involving fraud on the FDA and found a state law preempted based, in part, on the fact that it would encourage individuals to "submit a deluge of information that the [FDA] *neither wants nor needs*, resulting in additional burdens on the FDA's evaluation of an application." 531 U.S. 341, 351 (2001) (emphasis added). Here, Arizona would be providing information to DHS that *Congress has expressly invited and encouraged* state and local authorities to provide. *See* 8 U.S.C. §§ 1373 and 1644. And in *Garrett v. City of Escondido*, the court found that the challenged ordinance would burden federal resources because it sought to deny illegal aliens *private* benefits by using a federal system that was designed to exclude illegal aliens from receiving *public* benefits. 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006).[7] Because plaintiff cannot demonstrate that the inquiries Section 2 requires would contravene any *congressional* intent, plaintiff cannot establish preemption on this ground.

3. Congress' intent in enacting the Alien Registration Act of 1940 does not support a finding that Section 3 is preempted

Plaintiff challenges Section 3 based on a misreading of *Hines* and Congress' intent in enacting the Alien Registration Act of 1940, which Congress substantially modified in 1952 by enacting the Immigration and Nationality Act (the "INA"). The *Hines* Court did not bar all state laws touching upon alien registration. Rather, it held that "where the federal government, in the exercise of its superior authority in [the field of immigration], has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict

[7] The *Garrett* court failed to consider Congress' intent in enacting 8 U.S.C. §§ 1373 and 1644 in determining whether the inquiries would burden federal agencies. *Id.* at 1057.

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or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." 312 U.S. at 66-67. Plaintiff argues that Section 3 is preempted because it impermissibly "complements" the federal registration laws by "creating auxiliary penalties for violations of the federal alien registration laws." Resp. at 5.

Plaintiff's argument fails for three reasons. First, it ignores the crux of the *Hines* Court's holding—that federal law preempts state laws that are *inconsistent* with Congress' purpose. 312 U.S. at 66-67. Here, the sole purpose of Arizona's law is to ensure compliance with the statutes Congress enacted. Second, both the Supreme Court and the Ninth Circuit have squarely rejected arguments that state laws imposing penalties for violations of federal law are preempted. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the Supreme Court held that "[t]he presence of a damages remedy does not amount to the additional or different 'requirement' that is necessary under the [preemption provision]; rather, it merely provides another reason for manufacturers to comply with identical existing 'requirements' under federal law." *Id.* The Ninth Circuit similarly found that a California statute requiring appliance manufacturers to display "[t]he marking required by 16 C.F.R. Part 305 (2001)" was not preempted because it "merely provides appliance manufacturers another reason to comply with existing requirements under federal law." *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 502-03 & n.10 (9th Cir. 2005). Third, Section 3 does not run afoul of the congressional intent the Supreme Court identified in *Hines*, which was to protect lawfully-present aliens, because Section 3 applies only to persons who are not authorized to remain in the United States. *See* Section 3(F).[8]

4. Plaintiff has not alleged that Section 4 is preempted

Plaintiff has not alleged any basis upon which the Court could find that Section 4

[8] Plaintiff's argument that *some* aliens may be prosecuted under Section 3 that may not be prosecuted under federal law is insufficient to sustain plaintiff's facial challenge. *See Salerno*, 481 U.S. at 745. Plaintiff also inexplicably argues that Section 3 seeks to punish conduct that Congress has chosen not to criminalize, Resp. at 6 n.11, despite the fact that Section 3 criminalizes the very conduct that Congress criminalized by enacting 8 U.S.C. §§ 1304(e) and 1306(a). The fact that Section 3 is narrower than federal law does not provide a basis for preemption. *See Medtronic*, 518 U.S. at 495.

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violates the Supremacy Clause. Section 4 made only a minor amendment to A.R.S. § 13-2319, which the Legislature enacted in 2005.[9] Plaintiff, however, seeks to invalidate Section 4 based solely on allegations that federal law preempts *other* provisions of A.R.S. § 13-2319 that were already in effect when SB 1070 was enacted. *See* Compl. ¶¶ 50-51. Because the provisions plaintiff challenges in the Complaint are not part of Section 4, they cannot provide a basis to invalidate Section 4.

Even if plaintiff had properly alleged a preemption challenge to A.R.S. § 13-2319 (as opposed to Section 4 only), plaintiff's claim would fail as a matter of law for the reasons stated in Arizona's Motion. *See* Mot. to Dismiss at 10-11. Plaintiff does not address any of Arizona's arguments. Instead, plaintiff essentially reiterates the allegations in its Complaint and cites two inapposite cases: *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 380 (2000), in which the Supreme Court found preemption based on a direct conflict between a Massachusetts law and express congressional directives, and *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 966 (9th Cir. 2005), in which the Ninth Circuit found preemption because regulations promulgated by Office of the Comptroller of the Currency (pursuant to its authority under the National Bank Act) occupied the field. A.R.S. § 13-2319, by contrast, does not conflict with federal law and the Supreme Court has expressly rejected the possibility that the INA occupies the legislative field. *See De Canas*, 424 U.S. at 358.[10]

5. Sections 5(C)-(E) do not conflict with federal law

Plaintiff's argument that it has asserted a valid preemption claim to subsections (C)-(E) of Section 5 confuses the concepts of field preemption and conflict preemption. Resp. at 7-8. Field preemption occurs "where the scheme of federal regulation is so

[9] Section 4 added A.R.S. § 13-2319(E), which states: "Notwithstanding any other law, in the enforcement of this section a peace officer may lawfully stop any person who is operating a motor vehicle if the officer has reasonable suspicion to believe the person is in violation of any civil traffic law."

[10] Plaintiff also argues, without citation, that the *De Canas* Court distinguished between smuggling concerns and alien employment. Resp. at 11. However, the *De Canas* Court merely held that it could not infer preemption from "a proviso to 8 U.S.C. § 1324, . . . [which] provides that 'employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." 424 U.S. at 360.

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pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) (citation omitted). Conflict preemption, by contrast, is present only if "compliance with both federal and state regulations is a physical impossibility . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009), *cert. granted by* 130 S. Ct. 3498 (2010) (internal citations and quotation marks omitted).

Arguing that the Immigration and Reform Act of 1986 ("IRCA") preempts Sections 5(C)-(E), plaintiff relies on four preemption cases. *See* Resp. 8-9.[11] In the first three, plaintiff cites portions of the opinions addressing field preemption. *See P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (distinguishing the case before it from *Transcontinental Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409, 411, 421-22 (1986), in which the Court held that the Natural Gas Policy Act of 1978 occupied the legislative field);[12] *Adkins v. Mireles*, 526 F.3d 531, 539 (9th Cir. 2008) (quoting a statement of *Condon v. Local 2944, United Steelworkers of America*, 683 F.2d 590, 594-95 (1st Cir. 1982) in which the First Circuit found that "Congress has 'occupied th(e) field and closed it to state regulation'"); *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 524-25 (M.D. Pa. 2007), *aff'd in part and rev'd in part by* No. 07-3531, 2010 U.S. App. LEXIS 18835 (3d Cir. Sept. 9, 2010) (finding that the challenged ordinance, "as it applies to employers is field pre-empted").[13]

Here, however, Congress has not occupied the field of *employee* sanctions. IRCA's express preemption clause is limited, preempting sanctions on *employers* only.

[11] *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) and *National Center for Immigrants' Rights v. INS*, 913 F.2d 1350 (9th Cir. 1990) did not involve preemption.

[12] *See also Nw. Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 513-14 (1989) (noting that the *Transcontinental* Court had held that the NGPA occupied the field).

[13] The Third Circuit found the district court's conclusion regarding field preemption "a difficult conclusion to sustain given IRCA's savings clause," but ultimately found it unnecessary to address the issue because the plaintiffs had waived the argument. *See Lozano*, No. 07-3531, 2010 U.S. App. LEXIS 18835, at *108 n.32.

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See 8 U.S.C. § 1324a(h)(2). Both the Ninth Circuit and the Supreme Court have repeatedly determined that, by enacting a limited express preemption provision, Congress did *not* intend to occupy the legislative field. *See, e.g.*, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995); *Chicanos Por La Causa*, 558 F.3d at 867; *Metrophones*, 423 F.3d at 1072; *see also Altria Group*, 129 S. Ct. at 543 ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'") (citation omitted). Congress' decision not to expressly preempt state laws that impose sanctions on employees is a strong indicator that Congress did not intend to preempt such laws, particularly where, as here, there is a presumption against preemption. *See Chicanos Por La Causa*, 558 F.3d at 864.

In the final preemption case upon which plaintiff relies, *Crosby*, 530 U.S. at 380, the Supreme Court found that a Massachusetts law was preempted because it conflicted with express congressional directives. Here, plaintiff has not identified any actual conflict between IRCA and Sections 5(C)-(E), nor does any such conflict exist. In fact, as the Court recognized, Congress has "require[d] that an individual seeking employment 'attest, under penalty of perjury . . . that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized . . . to be hired, recruited, or referred for such employment.'" July 28, 2010 Order at 26 (quoting 8 U.S.C. § 1324a(b)(2)). Section 5(C) clearly furthers the strong federal policy of prohibiting illegal aliens from seeking employment in the United States. Plaintiff cannot, therefore, establish conflict preemption with respect to Sections 5(C)-(E). *See Chicanos Por La Causa*, 558 F.3d at 863 ("For conflict preemption to apply, the conflict must be an actual conflict, not merely a hypothetical or potential conflict.").

6. Section 5 (creating A.R.S. § 13-2929) is not preempted

A.R.S. § 13-2929 does not, as plaintiff contends, regulate immigration because it does not address whether an alien has a right to enter or remain in the country. *See* Mot. to Dismiss at 12-13. Rather, A.R.S. § 13-2929 prohibits a person *who is in violation of a criminal offense* from transporting, moving, concealing, harboring, or shielding an illegal

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alien. The statute also expressly requires that the person's immigration status be determined by the federal government or its authorized agents. A.R.S. § 13-2929(D).

Plaintiff argues that A.R.S. § 13-2929 is a regulation of immigration because the federal harboring statute (8 U.S.C. § 1324) was designed to deter unlawful presence and "Arizona courts can be expected to construe [A.R.S. § 13-2929] in combination with Arizona's general conspiracy offense . . . [to] essentially criminalize[] unlawful presence." Resp. at 11, 15. Any regulation that requires proof of unlawful presence is necessarily designed to deter (either directly or indirectly) unlawful presence. The Supreme Court has made clear, however, that states can regulate illegal aliens if the states "mirror[] federal objectives and further[] a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *see also De Canas*, 424 U.S. at 357-58. A.R.S. § 13-2929 satisfies both requirements. As the Ninth Circuit found, 8 U.S.C. § 1324(a)(1) was primarily directed "at curbing the widespread practice of transporting illegal immigrants, *already in the United States*, to jobs and locations away from the border where immigration enforcement resources may have been more scarce." *United States v. Sanchez-Vargas*, 878 F.2d 1163, 1169 (9th Cir. 1989) (emphasis added). A.R.S. § 13-2929 furthers the same goals, but is narrower in that it targets harboring, transporting, shielding, *etc*. in connection with criminal activity—an indisputably local concern.

Moreover, A.R.S. § 13-2929 is not designed to punish and cannot punish mere unlawful presence because a conviction under A.R.S. § 13-2929 requires a predicate criminal offense.[14] Plaintiff cannot demonstrate that A.R.S. § 13-2929 is preempted.[15]

[14] As stated in one of the cases upon which plaintiff relies, *United States v. Ozcelik*, 527 F.3d 88, 93 (3d Cir. 2008): "It is black letter law that in order to convict a defendant the government must prove each element of a charged offense beyond a reasonable doubt."

[15] Plaintiff also argues that A.R.S. § 13-2929 is preempted because "state statutes purporting to regulate third parties who transport or harbor aliens . . . are preempted by Congress's comprehensive regulation of this issue." Resp. at 10. Plaintiff does not identify a single case in which a court has found that regulations criminalizing transportation and harboring of illegal aliens is preempted. *Id.* Instead, plaintiff cites two cases involving preemption challenges to local ordinances that sought to deny housing to illegal aliens—*Villas at Parkside Partners v. City of Farmers Branch*, 2010 WL 1141398, at *17-18 (N.D. Tex. Mar. 24, 2010) and *Garrett*, 465 F. Supp. 2d at 1056.

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7. Plaintiff does not dispute that Section 6 can be applied consistent with federal law, which defeats plaintiff's facial challenge

Plaintiff does not dispute that there are circumstances in which Section 6 can be applied consistent with federal law. Resp. at 9 n.16. Because this is a facial challenge, that fact, standing alone, defeats plaintiff's preemption claim as a matter of law. *See Salerno*, 481 U.S. at 745. Regardless of whether plaintiff has conceded the point, Section 6 has constitutional applications. Federal law expressly permits state and local law enforcement officers to arrest aliens who have previously been deported or left the United States after a felony conviction, but only if state law provides such authority. *See* 8 U.S.C. § 1252c. Federal law also requires DHS "to maintain a current record of aliens who have been convicted of an aggravated felony, and . . . those who have been removed." 8 U.S.C. § 1226(d)(1)(C). Thus, Arizona's law enforcement officers can obtain confirmation from DHS that would permit the officers to make a constitutionally-permissible arrest under Section 6. Because the Court must presume that Section 6 will be implemented in a constitutional manner, *see United States v. Booker*, 543 U.S. 220, 279-80 (2005), plaintiff's facial challenge to Section 6 fails.

B. <u>A.R.S. § 13-2929 (Section 5) Does Not Violate the Commerce Clause</u>

Plaintiff's Commerce Clause claim fails because plaintiff cannot demonstrate that A.R.S. § 13-2929 discriminates against or impermissibly burdens interstate commerce.[16] Plaintiff argues that A.R.S. § 13-2929(A)(3) violates the first tier of the dormant Commerce Clause analysis by directly regulating interstate commerce. Resp. at 15-16. Specifically, plaintiff claims that A.R.S. § 13-2929 "is directed at interstate commerce and only interstate commerce." Resp. at 16 n.28. A statute impermissibly regulates

[16] "The Supreme Court has outlined a two-tiered approach to analyzing state regulations under the Commerce Clause: [t]he first step . . . is to determine whether it 'regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce.' . . . If a restriction on commerce is discriminatory, it is virtually per se invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Barber v. State of Hawaii*, 42 F.3d 1185, 1194 (9th Cir. 1994) (citation omitted); *Nat'l Collegiate Athletic Ass'n. v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993)).

commerce if it directly regulates interstate commerce and its practical effect is to control conduct beyond the boundaries of the state. *Nat'l Collegiate Athletic Ass'n. v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993).[17] As this Court has found, "A.R.S. § 13-2929 governs conduct occurring in Arizona and does not differentiate between in-state and out-of-state economic interests or burden out-of-state interests in a way that benefits in-state interests. Further, Arizona's nondiscriminatory statute is directed at legitimate local concerns related to public safety." July 28, 2010 Order at 30. These findings squarely refute plaintiff's arguments that A.R.S. § 13-2929 impermissibly regulates interstate commerce.

Plaintiff also alleges that Section 5 implicates the Commerce Clause because the federal government has exclusive control over the interstate movement of all aliens—including those who are unlawfully present. Resp. at 17. However, A.R.S. § 13-2929 does not directly regulate or discriminate against interstate commerce, nor does it criminalize unlawful presence or interfere with the lawful transportation of illegal aliens. *See* A.R.S. § 13-2929.[18] Rather, A.R.S. § 13-2929 creates parallel state statutory provisions for conduct already prohibited by federal law. *See* July 28, 2010 Order at 29.

II. CONCLUSION

For the foregoing reasons, plaintiff's Complaint should be dismissed for failure to state a claim upon which relief may be granted.

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[17] The Commerce Clause permits state regulation that has only an incidental effect on interstate commerce. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (citation omitted); *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 396 (9th Cir. 1995); *S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 468 (9th Cir. 2001). *Miller*, upon which Plaintiff relies, is distinguishable from the present case, as the Ninth Circuit held that the practical effect of the statute was to regulate enforcement proceedings wholly outside of Nevada. 10 F.3d at 639-40. This would have forced the NCAA to regulate in every state according to Nevada's procedural rules. *Id*.

[18] The cases plaintiff cites are inapposite. *See, e.g.*, *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 270 (1876) (explaining that the imposition of certain terms and conditions for the discharge of passengers on vessels coming from foreign ports was an impermissible regulation of commerce); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (finding a statute that restricted the movement of waste in New Jersey unrelated to any legitimate concerns and discriminatory); *Edwards v. California*, 314 U.S. 160, 174 (1941) (striking down a California statute that prohibited the transportation of indigent people in California); *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 493 (1888) (relying, in part, on the since-rejected original-package doctrine and invalidating an Iowa statute that burdened interstate commerce by requiring all liquor importers to obtain a permit).

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DATED this 10th day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2010 I electronically transmitted the foregoing document 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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