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

13 The United States of America,  
 Plaintiff,  
 14  
 v.  
 15 The State of Arizona; and Janice K. Brewer,  
 Governor of the State of Arizona, in her  
 16 Official Capacity,  
 17 Defendants.

No. 2:10-cv-01413-SRB

**THE STATE OF ARIZONA AND  
 GOVERNOR JANICE K.  
 BREWER’S ANSWER AND  
 COUNTERCLAIMS**

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

v.  
 21 The United States of America; the United  
 22 States Department of Homeland Security;  
 Janet Napolitano, Secretary of the United  
 23 States Department of Homeland Security, in  
 her official capacity; the United States  
 24 Department of Justice; and Eric H. Holder,  
 Jr., Attorney General for the United States  
 25 Department of Justice, in his official capacity,  
 26 Counterdefendants.

1 Defendants, the State of Arizona (“Arizona”) and Governor Janice K. Brewer  
2 (“Brewer”), collectively referred to in the Answer as Defendants respond and answer  
3 Plaintiff’s Complaint as follows:

4 **INTRODUCTION**

5 1. Defendants admit that the United States of America has sought to enjoin the  
6 enforcement of SB 1070, but defendants deny that SB 1070 is preempted by federal law or  
7 violates the Supremacy Clause of the United States Constitution (“Constitution”).

8 2. The allegations contained in paragraph 2 are legal conclusions and  
9 conjecture about the interpretation of the Constitution and numerous immigration laws.  
10 The documents speak for themselves and the characterizations of the Constitution and  
11 immigration laws are specifically denied.

12 3. Defendants admit that the State of Arizona enacted SB 1070. The  
13 remaining allegations contained in paragraph 3 contain conclusions about the intent of SB  
14 1070. Answering further, SB 1070 is a document that speaks for itself and any  
15 characterizations of SB 1070 are denied.

16 4. Defendants deny the allegations contained in paragraph 4. Answering  
17 further, plaintiff’s statements in paragraph 4 are conclusions and conjecture about the  
18 goals and implications of SB 1070. SB 1070 speaks for itself and any characterizations of  
19 SB 1070 are denied.

20 5. Defendants deny that SB 1070 violates the Supremacy Clause of the  
21 Constitution. The remaining portions of paragraph 5 contain characterizations and  
22 interpretations of the Constitution, numerous immigration laws, and the purported view of  
23 the United States, all of which are denied.

24 **JURISDICTION AND VENUE**

25 6. Defendants admit that this action arises under the Constitution and the  
26 Immigration and Nationality Act, (“INA”), 8 U.S.C. § 1101, *et. seq.*, but deny that it is

1 limited to the specified Articles of the Constitution. Defendants admit that this Court has  
2 jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1345 and the plaintiff  
3 seeks remedies under 28 U.S.C. §§ 1651, 2201, and 2202.

4 7. Defendants admit that venue is proper.

5 **PARTIES**

6 8. Defendants admit that the United States of America is the plaintiff, and  
7 admits that it has brought this claim on behalf of the United States Department of  
8 Homeland Security (“DHS”), the Department of Justice (“DOJ”), and the Department of  
9 State.

10 9. Defendants admit that DHS is an executive department of the United States.  
11 To the extent that paragraph 9 attempts to summarize portions of the INA, the INA speaks  
12 for itself and any characterizations of such laws are denied.

13 10. Defendants admit that the DOJ is an executive department of the United  
14 States and that the Attorney General shares certain immigration-related responsibilities  
15 with the Secretary of Homeland Security. To the extent that paragraph 10 attempts to  
16 summarize portions of the INA, the INA speaks for itself and any characterizations of  
17 such laws are denied.

18 11. Defendants admit that the Department of State is an executive department of  
19 the United States and that the Department of State has responsibility for administering  
20 some aspects of immigration laws.

21 12. Defendants admit the allegations contained in paragraph 12.

22 13. Defendants admit the allegations contained in paragraph 13.

23 **STATEMENT OF THE CLAIM**

24 **Federal Authority And Law Governing Immigration And Status of Aliens**

25 14. Defendants admit that the allegations contained in paragraph 14 contain a  
26 quote from a small portion of Article VI, Clause 2 of the Constitution. The Constitution is

1 a document that speaks for itself and any characterizations of the Constitution are denied.

2 15. Defendants admit that the allegations contained in paragraph 15 contain two  
3 quotes from a small portion of Article I, Section 8 of the Constitution. The Constitution  
4 speaks for itself and any characterizations of the Constitution are denied. The remaining  
5 allegations are characterizations of the federal government's "broad" discretion and such  
6 characterizations are denied.

7 16. Defendants admit that the allegations contained in paragraph 16 contain a  
8 quote from a small portion of Article II, Section 3 of the Constitution. Defendants further  
9 admit that foreign affairs are a part of the President's duties. To the extent paragraph 16  
10 attempts to characterize the President's duties, such characterizations are denied.

11 17. Defendants admit the allegation contained in paragraph 17 that Congress has  
12 exercised its authority to make laws governing immigration and the status of aliens within  
13 the United States by enacting various provisions of the INA and other laws regulating  
14 immigration. To the extent that paragraph 17 attempts to summarize portions of the INA,  
15 the INA speaks for itself and any characterizations of the INA are denied.

16 18. Defendants admit the allegations contained in paragraph 18 that the INA at  
17 times vests discretion with respect to specific provisions of immigration laws. Upon  
18 information and belief, the federal government has from time to time set enforcement  
19 priorities for the arrest, detention, prosecution, and removal of aliens. Defendants are  
20 without sufficient information and knowledge to either admit or deny the specific  
21 enforcement priorities of the federal government.

22 19. Defendants admit the allegations contained in paragraph 19 that Congress  
23 has taken into account competing interests and agree that "effective enforcement of the  
24 provisions against illegal migration and unlawful presence is a highly important interest"  
25 and it is not the singular goal of the federal immigration laws. To the extent that  
26 paragraph 19 attempts to summarize portions of the nation's immigration laws, the

1 immigration laws and the cases interpreting the laws speak for themselves and any  
2 characterizations of such laws and cases are denied.

3 20. Defendants admit the allegations contained in paragraph 20 of the  
4 Complaint that DHS, DOJ and the Department of State all have powers and obligations  
5 with respect to aspects of the immigration laws. To the extent that paragraph 20 attempts  
6 to summarize portions of the nation's immigration laws, the immigration laws speak for  
7 themselves and any characterizations of such laws are denied.

8 21. Defendants admit the nation's immigration laws at times vest discretion  
9 with respect to specific provisions of immigration laws. Paragraph 21 attempts to  
10 summarize portions of the nation's immigration laws. The immigration laws speak for  
11 themselves and the defendants deny any characterizations of such laws.

12 22. Defendants admit the immigration laws at times vest discretion with respect  
13 to specific provisions of immigration laws and that DOJ and DHS exercise discretion  
14 from time to time in enforcing the laws. Paragraph 22 attempts to summarize portions of  
15 the nation's immigration laws. The immigration laws speak for themselves and the  
16 defendants deny any characterizations of such laws.

17 23. Defendants admit that "unlawful entry into the United States is a criminal  
18 offense" under 8 U.S.C. § 1325. Defendants further admit that Congress authorized,  
19 without a warrant, "federal immigration officers to patrol the United States border, as well  
20 as search vehicles and lands near the border, to prevent aliens from unlawfully entering  
21 the United States." The remaining allegations contained in paragraph 23 of the Complaint  
22 are incomplete summaries of portions of the nation's immigration laws. The immigration  
23 laws speak for themselves and the defendants deny that such summaries are complete, and  
24 further deny the characterizations of such laws.

25 24. Paragraph 24 of the Complaint attempts to summarize portions of the  
26 nation's immigration laws related to an alien registration system. The immigration laws

1 speak for themselves and the defendants deny that such summaries are complete, and  
2 further deny any characterizations of such laws.

3 25. Paragraph 25 of the Complaint attempts to summarize portions of the  
4 nation's immigration laws related to an alien registration system. The immigration laws  
5 speak for themselves and the defendants deny that such summaries are complete, and  
6 further deny any characterizations of such laws.

7 26. Paragraph 26 of the Complaint attempts to summarize portions of the  
8 nation's immigration laws related to an alien registration system. The immigration laws  
9 speak for themselves and the defendants deny that such summaries are complete, and  
10 further deny any characterizations of such laws.

11 27. Defendants admit that paragraph 27 of the Complaint quotes small portions  
12 of 8 U.S.C. § 1324. 8 U.S.C. § 1324 speaks for itself and any characterizations of the  
13 statute are denied.

14 28. Defendants admit that paragraph 28 of the Complaint quotes small portions  
15 of 8 U.S.C. § 1324. 8 U.S.C. § 1324 speaks for itself and any characterizations of the  
16 statute are denied.

17 29. Defendants admit that paragraph 29 of the Complaint quotes small portions  
18 of 8 U.S.C. § 1324. 8 U.S.C. § 1324 speaks for itself and any characterizations of the  
19 statute are denied.

20 30. Defendants admit that under specific portions of the INA and other  
21 immigration laws, DHS is charged with administering and enforcing the laws and that  
22 DHS includes, among others, U.S. Immigration and Customs Enforcement ("ICE"), U.S.  
23 Customs and Border Protection ("CBP"), and U.S. Citizenship and Immigration Services  
24 ("USCIS"). Defendants affirmatively allege that DHS and its components have failed to  
25 enforce the nation's immigration laws. Defendants further admit that Congress has  
26 acknowledged numerous ways that the states may assist in the enforcement of the

1 immigration laws. Paragraph 30 of the Complaint attempts to summarize portions of the  
2 nation's immigration laws. The immigration laws speak for themselves and the  
3 defendants deny that such summaries are complete, and further deny any characterizations  
4 of such laws.

5 31. Defendants admit the allegations contained in paragraph 31 of the  
6 Complaint that DHS has some programs where DHS works cooperatively with states and  
7 localities. Defendants admit that LEAR and LESC are two such programs. Defendants  
8 admit that state and local authorities frequently work with DHS for determinations  
9 regarding immigration status and other immigration matters. The remaining allegations in  
10 paragraph 31 attempt to summarize portions of DHS programs that involve state and local  
11 agencies and officers, but defendants deny that such summaries are complete.

12 32. Plaintiff's statements in paragraph 32 of the Complaint are legal conclusions  
13 and, therefore, denied.

14 **Arizona's SB 1070**

15 33. Defendants admit Governor Brewer signed SB 1070 into law on April 23,  
16 2010. Defendants admit that paragraph 33 of the Complaint includes quotes of portions of  
17 SB 1070 and paragraph 33 attempts to summarize portions of SB 1070. SB 1070 speaks  
18 for itself. Defendants further deny any characterizations of SB 1070 contained in  
19 paragraph 33.

20 34. Defendants admit that Governor Brewer issued Arizona State Executive  
21 Order 2010-09 (April 23, 2010) and that paragraph 34 of the Complaint includes quotes  
22 from a small portion of Executive Order 2010-09. Executive Order 2010-09 speaks for  
23 itself.

24 35. Defendants admit that Arizona passed HB 2162, which amended SB 1070  
25 and that Governor Brewer made a statement after HB 2162 was signed. The remaining  
26 portions of paragraph 35 of the Complaint include a quote from a small portion of

1 Governor Brewer’s statement. Defendants affirmatively assert that HB 2162, SB 1070 as  
2 amended, and Governor Brewer’s statement speak for themselves.

3 36. Defendants deny the allegations contained in paragraph 36 of the  
4 Complaint. Defendants affirmatively allege that no response is necessary to the extent the  
5 allegations are intended to challenge Section 1 of SB 1070 because the Court granted  
6 defendants’ Motion to Dismiss with respect to Section 1.

7 37. Defendants deny the allegations contained in paragraph 37 of the  
8 Complaint. To the extent that paragraph 37 attempts to summarize SB 1070, SB 1070  
9 speaks for itself. Defendants deny that the summaries contained in paragraph 37 are  
10 accurate and complete. Defendants further deny any characterizations of SB 1070.  
11 Defendants affirmatively allege that no response is necessary to the extent the allegations  
12 are intended to challenge Section 1 of SB 1070 because the Court granted defendants’  
13 Motion to Dismiss with respect to Section 1.

14 38. Defendants deny the allegations contained in paragraph 38 of the  
15 Complaint. To the extent that paragraph 38 attempts to summarize SB 1070 and its  
16 influence on foreign relations, trade, national security, etc., SB 1070 speaks for itself as  
17 does the article cited in paragraph 38. Defendants deny that the summaries contained in  
18 paragraph 38 are accurate and complete, and further deny any characterizations of SB  
19 1070. Defendants affirmatively allege that no response is necessary to the extent the  
20 allegations are intended to challenge Section 1 of SB 1070 because the Court granted  
21 defendants’ Motion to Dismiss with respect to Section 1.

22 39. Defendants are without sufficient information and knowledge to admit or  
23 deny whether other states are “contemplating” similar legislation. Defendants deny all  
24 remaining allegations contained in paragraph 39 of the Complaint.

25 **Section 2 of SB 1070**

26 40. Defendants admit that paragraph 40 of the Complaint includes quotes of



1 small portions of Section 2 of SB 1070 and paragraph 40 attempts to summarize portions  
2 of Section 2 of SB 1070. SB 1070 speaks for itself and the defendants deny that the  
3 summaries contained in paragraph 40 are complete. Defendants further deny any  
4 characterizations of SB 1070.

5 41. Defendants admit that paragraph 41 of the Complaint includes quotes of  
6 small portions of Section 2 of SB 1070 and paragraph 41 attempts to summarize and  
7 characterize Section 2 of SB 1070. SB 1070 speaks for itself and the defendants deny that  
8 the summaries contained in paragraph 41 are complete. Defendants further deny any  
9 characterizations of SB 1070 and the truth of any such characterizations. All remaining  
10 allegations contained in paragraph 41 are denied.

11 42. Defendants deny the allegations contained in paragraph 42 of the  
12 Complaint.

13 43. Defendants deny the allegations contained in paragraph 43 of the  
14 Complaint. To the extent that paragraph 43 attempts to characterize, summarize, and  
15 quote from small portions of SB 1070, SB 1070 speaks for itself. Defendants deny that  
16 the summaries in paragraph 43 are accurate and complete. Defendants further deny any  
17 characterizations of SB 1070.

18 44. Defendants deny the allegations contained in paragraph 44 of the  
19 Complaint. Defendants affirmatively allege that inquiries of immigration status under  
20 section 2 of SB 1070 are specifically permitted by 8 U.S.C. § 1373(a) and 8 U.S.C. §  
21 1644.

22 45. Defendants deny the allegations contained in paragraph 45 of the  
23 Complaint.

### 24 **Section 3 of SB 1070**

25 46. Defendants admit that paragraph 46 of the Complaint includes quotes of  
26 small portions of Section 3 of SB 1070 and paragraph 46 attempts to summarize portions

1 of Section 3 of SB 1070. SB 1070 speaks for itself. Defendants deny that the summaries  
2 in paragraph 46 are complete. Defendants further deny any characterizations of SB 1070  
3 contained in paragraph 46.

4 47. Defendants deny the allegations contained in paragraph 47 of the  
5 Complaint.

6 48. Defendants deny the allegations contained in paragraph 48 of the  
7 Complaint. To the extent that paragraph 48 attempts to characterize or summarize  
8 portions of SB 1070, SB 1070 speaks for itself. Defendants deny that the summaries  
9 contained in paragraph 48 are accurate and complete. Defendants further deny any  
10 characterizations of SB 1070.

11 49. Defendants deny the allegations contained in paragraph 49 of the Complaint  
12 to the extent that such paragraph attempts to characterize SB 1070. SB 1070 speaks for  
13 itself. The defendants deny the characterizations of SB 1070.

14 **Section 4 of SB 1070/A.R.S. § 13-2319**

15 50. Defendants admit that paragraph 50 of the Complaint includes quotes of  
16 small portions of A.R.S. § 13-2319. Paragraph 50 attempts to summarize portions of  
17 Section 3 of SB 1070. SB 1070 speaks for itself. Defendants deny that the summaries  
18 contained in paragraph 50 are complete, and further deny any characterizations of SB  
19 1070.

20 51. Defendants deny the allegations contained in paragraph 51 of the  
21 Complaint. To the extent that paragraph 51 attempts to summarize and characterize  
22 A.R.S. § 13-2319 and 8 U.S.C. § 1324 and immigration law, these statutes and laws  
23 speaks for themselves and the defendants deny the characterizations of these laws.

24 **Section 5 of SB 1070**

25 52. Defendants admit the allegations contained in paragraph 52 of the  
26 Complaint. Defendants affirmatively allege that no response is necessary to the extent the

1 allegations are intended to challenge Section 5 of SB 1070 that creates A.R.S. §§ 13-  
2 2928(A) and (B) because the Court granted defendants' Motion to Dismiss based on  
3 plaintiff's failure to state a claim with respect to portions of Section 5.

4 53. Defendants admit that paragraph 53 of the Complaint includes quotes of  
5 small portions of A.R.S. § 13-2319. Paragraph 53 attempts to summarize portions of  
6 A.R.S. § 13-2319, but A.R.S. § 13-2319 speaks for itself. Defendants deny that the  
7 summaries contained in paragraph 53 are complete. Defendants further deny any  
8 characterizations of A.R.S. § 13-2319.

9 54. Defendants deny the allegations contained in paragraph 54 of the  
10 Complaint.

11 55. Defendants deny the allegations contained in paragraph 55 of the  
12 Complaint. To the extent that Paragraph 55 attempts to summarize and characterize  
13 A.R.S. § 13-2929 and 8 U.S.C. § 1324 and immigration law, these statutes and law speaks  
14 for themselves. Defendants deny the characterizations of these laws. Defendants  
15 affirmatively allege that no response is necessary to the extent the allegations are intended  
16 to challenge Section 5 of SB 1070 based on preemption by federal immigration law for  
17 purposes of a facial challenge or based on the dormant Commerce Clause because the  
18 Court granted defendants' Motion to Dismiss on these grounds.

19 56. Defendants deny the allegations contained in paragraph 56 of the  
20 Complaint. Defendants affirmatively allege that no response is necessary to the extent the  
21 allegations are intended to challenge Section 5 of SB 1070 that creates A.R.S. §§ 13-  
22 2928(A) and (B) because the Court granted defendants' Motion to Dismiss based on  
23 plaintiff's failure to state a claim with respect to portions of Section 5.

24 **Section 6 of SB 1070**

25 57. Defendants admit that paragraph 57 of the Complaint includes quotes of  
26 small portions of A.R.S. § 13-3883. Paragraph 57 attempts to summarize portions of

1 Section 6 of SB 1070, but A.R.S. § 13-3883 and SB 1070 speak for themselves.  
2 Defendants deny that such summaries are complete, and further deny any  
3 characterizations of A.R.S. § 13-3883 and SB 1070.

4 58. Defendants deny the allegations contained in paragraph 58 of the  
5 Complaint. To the extent that paragraph 58 attempts to summarize and characterize  
6 A.R.S. § 13-3883 and SB 1070, these statutes and laws speak for themselves. Defendants  
7 deny the characterizations of these laws.

8 59. Defendants deny the allegations contained in paragraph 59 of the  
9 Complaint. To the extent that paragraph 59 attempts to summarize and characterize  
10 A.R.S. § 13-3883 and SB 1070, these statutes and laws speak for themselves. Defendants  
11 deny the characterizations of these laws and the truth of any such characterizations.

12 60. Defendants deny the allegations contained in paragraph 60 of the  
13 Complaint.

14 **First Cause of Action – Violation Of The Supremacy Clause**

15 61. Defendants incorporate the responses from paragraphs 1 through 60.

16 62. Defendants deny the allegations contained in paragraph 62 of the  
17 Complaint. Defendants affirmatively allege that no response is necessary to the extent the  
18 allegations are intended to challenge Section 1 and subsections 2(A), (C) through (G), (I),  
19 (J), (K), and (L) of SB 1070 because the Court granted defendants' Motion to Dismiss  
20 finding the Complaint failed to state a claim and the absence of facts sufficient to find  
21 Section 2(H) is preempted on its face.

22 63. Defendants deny the allegations contained in paragraph 63 of the  
23 Complaint. Defendants affirmatively allege that no response is necessary to the extent the  
24 allegations are intended to challenge Section 1 and subsections 2(A), (C) through (G), (I),  
25 (J), (K), and (L) of SB 1070 because the Court granted defendants' Motion to Dismiss  
26 finding the Complaint failed to state a claim and the absence of facts sufficient to find

1 Section 2(H) is preempted on its face.

2 **Second Cause of Action – Violation Of The Supremacy Clause**

3 64. Defendants incorporate the responses from paragraphs 1 through 63.

4 65. Defendants deny the allegations contained in paragraph 65 of the  
5 Complaint. Defendants affirmatively allege that no response is necessary to the extent the  
6 allegations are intended to challenge Section 1 and subsections 2(A), (C) through (G), (I),  
7 (J), (K), and (L) of SB 1070 because the Court granted defendants' Motion to Dismiss  
8 finding the Complaint failed to state a claim and the absence of facts sufficient to find  
9 Section 2(H) is preempted on its face.

10 **Third Cause of Action – Violation Of The Commerce Clause**

11 66. Defendants incorporate the responses from paragraphs 1 through 65.

12 67. Defendants deny the allegations contained in paragraph 67 of the  
13 Complaint. Defendants affirmatively allege that no response is necessary to the extent  
14 that the allegations are intended to challenge Section 5 of SB 1070 based on the restriction  
15 of interstate movement of aliens or the Commerce Clause because the Court granted  
16 defendants' Motion to Dismiss on those grounds.

17 68. Defendants deny the allegations contained in paragraph 68 of the  
18 Complaint. Defendants affirmatively allege that no response is necessary to the extent  
19 that the allegations are intended to challenge Section 5 of SB 1070 based on the restriction  
20 of interstate movement of aliens or the Commerce Clause because the Court granted  
21 defendants' Motion to Dismiss on those grounds.

22 **GENERAL DENIAL**

23 69. Defendants deny all allegations not specifically admitted.

24 70. Defendants deny all legal conclusions and any allegations based on hearsay.

25 **AFFIRMATIVE DEFENSES**

26 1. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

1 The Court dismissed the following claims or those portions of the Complaint based on the  
2 following: Section 1, Subsections 2(A), (C) through (G), (H), (I), (J), (K), and (L),  
3 portions of Section 5 of SB 1070 that created A.R.S. § 13-2928(A) and (B), and portions  
4 of Section 5 of SB 1070 that created A.R.S. § 13-2929.

5 2. Defendants complied with all relevant federal, state and local laws,  
6 including the Arizona Constitution and the Constitution.

7 3. Defendants have a right to protect their citizens.

8 4. Arizona has a right to self defense under the Constitution, particularly when  
9 the federal government fails to protect it.

10 5. Plaintiff lacks both Article III and prudential standing to bring this Action.

11 6. Plaintiff has failed to name DHS, DOJ, and the State Department as the real  
12 parties-in-interest.

13 7. Any alleged foreign policy implications were caused by individuals other  
14 than defendants, including the plaintiff and its agencies and officials.

15 8. Pursuant to the Constitution, the plaintiff should have brought this matter in  
16 the United States Supreme Court as it has original jurisdiction of lawsuits between the  
17 United States and an individual state under the Constitution.

18 9. Plaintiff has unclean hands to the extent it has failed to enforce the  
19 immigration laws and otherwise fulfill its duties as required by law and the Constitution  
20 and the executive branch of the federal government has failed to enforce the decisions  
21 Congress made when it enacted the immigration laws.

22 10. Defendants acted within their discretion under the State's broad police  
23 power under the 10th Amendment of the Constitution.

24 11. Defendants will be irreparably harmed if plaintiff obtains the relief sought in  
25 this matter.

26 12. Plaintiff's facial challenge to the constitutionality of SB 1070 is barred to

1 the extent that it relies on hypothetical or speculative circumstances.

2 13. SB 1070 is not preempted by federal law or the Constitution. SB 1070 does  
3 not conflict with federal law, does not constitute an improper regulation of immigration,  
4 and Congress has not fully occupied the field.

5 14. SB 1070 does not violate the Commerce Clause of the Constitution or  
6 discriminate or burden interstate commerce.

7 15. The allocation of power contained in the Commerce Clause does not  
8 authorize Congress to regulate state governments' regulation of interstate commerce.

9 16. Defendants do not know if additional affirmative defenses may prove to  
10 have some application and, therefore, incorporate by reference the additional defenses  
11 contained within Rule 8(c) of the Fed. R. Civ. P.

12 WHEREFORE, having fully answered, defendants request that the Court:

13 A. Dismiss plaintiff's complaint with prejudice and that plaintiff take nothing  
14 thereby;

15 B. Award defendants their costs and reasonable attorney fees, and other  
16 expenses pursuant to any applicable statutes;

17 C. Award any such other and further relief as the Court deems appropriate.  
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1 **COUNTERCLAIMS**

2 For their Counterclaims, Defendants/Counterclaimants the State of Arizona and  
3 Governor Janice K. Brewer (collectively the “State of Arizona” or “Arizona”) allege as  
4 follows:

5 **SUMMARY**

6 1. The federal government is not complying with its constitutional and  
7 statutory duty to protect Arizona and its citizens from the overwhelming problems  
8 associated with the invasion of illegal aliens into Arizona. Arizona brings these  
9 counterclaims to address the “rampant illegal immigration, escalating drug and human  
10 trafficking crimes, and serious public safety concerns” noted by many, including this  
11 Court. *See* Order at 1, July 28, 2010, ECF No. 87.

12 2. The federal government has failed to achieve and maintain “operational  
13 control” of the United States-Mexico border and the Arizona-Mexico border in particular.  
14 The impact to Arizona is acute and unique. Based on current estimates from the federal  
15 government, over 40% of all illegal border crossings nationwide are through Arizona.

16 3. The federal government is not enforcing the immigration laws within the  
17 United States. The current policy of the Executive Branch of the United States  
18 government is to take *no* action regarding the vast majority of aliens who are unlawfully  
19 present in the country.

20 4. Upon information and belief, the Executive Branch is currently working to  
21 pursue its own agenda, irrespective of Congress’ intent, and attempting to achieve  
22 “meaningful immigration reform absent legislative action.”

23 5. The federal government’s practice of non-enforcement of the immigration  
24 laws has caused the union representing 7,000 employees of the Immigration and Customs  
25 Enforcement (“ICE”) to issue a unanimous vote of “no confidence” in the leadership of  
26 ICE because ICE leadership has “abandoned the Agency’s core mission of enforcing



1 United States Immigration Laws and providing for public safety.”

2 6. The federal government refuses to reimburse Arizona for the staggering  
3 economic, social, and institutional costs and damages associated with illegal immigration  
4 in Arizona. To cite a single example, illegal aliens now occupy more than 14% of the  
5 State’s prison population. These costs adversely affect the already extreme budget  
6 problems for Arizona, and the public health, safety, and welfare of Arizona and its  
7 citizens.

8 7. The federal government has effectively conceded its inability to protect  
9 Arizona and its citizens from criminal activities associated with illegal aliens. For  
10 example, within the last year, the federal government placed warning signs in the desert  
11 80 miles north of the border and only 30 miles south of Phoenix warning people to stay  
12 away from the area and to call 911 (*i.e.*, Arizona’s state and local law enforcement) if  
13 there were encounters with illegal aliens engaged in criminal activity in the area.

14 8. Arizona has taken all reasonable steps to obtain assistance from the federal  
15 government in addressing the harm that illegal immigration is causing to the health,  
16 safety, and welfare of Arizona’s citizens. Former Arizona Governor Napolitano (now the  
17 Secretary of the Department of Homeland Security) previously declared a state of  
18 emergency, both former Governor Napolitano and Governor Brewer have repeatedly  
19 requested the federal government’s assistance, and Arizona has specifically sought  
20 reimbursement from the federal government for over one billion dollars in unreimbursed  
21 costs of incarcerating illegal criminal aliens in Arizona prisons.

22 9. Arizona’s efforts to persuade the federal government to take effective action  
23 to protect Arizona have been unsuccessful. The problems associated with illegal  
24 immigration persist in Arizona, and they continue to grow at an exponential and  
25 disproportionate pace in comparison to other states.

26 10. The federal government has taken the position that if the current

1 administration decides that nothing shall happen with respect to enforcement of certain  
2 statutes that Congress has enacted pertaining to illegal aliens or illegal immigration, state  
3 or local law enforcement officials are essentially powerless to do anything other than  
4 accept the consequences.

5 11. The Executive Branch is improperly attempting to assume control over the  
6 power that Article I, Section 8 grants exclusively to the Legislative Branch to set a  
7 uniform rule of naturalization. The current Executive Branch is attempting to establish  
8 unilaterally what the immigration laws are or what they should be.

9 12. The Executive Branch's practices are contrary to the Constitution and the  
10 laws that the Legislative Branch has established. The Executive Branch's position is that  
11 compliance with its *own* recently announced priorities takes precedence over compliance  
12 with congressional mandates. Judicial review must be available to safeguard citizens  
13 from this abuse of unconstrained government power.

14 13. Via these Counterclaims, the State of Arizona seeks relief from the Judicial  
15 Branch to clarify the significant constitutional and statutory issues involved. In particular,  
16 Arizona seeks declaratory judgments that clarify the constitutional and statutory  
17 obligations of the Executive and Legislative Branches of the federal government with  
18 respect to immigration and illegal aliens, and the rights of the various parties (including  
19 Arizona) with significant issues at stake.

20 14. Arizona further seeks mandamus and injunctive relief to compel the federal  
21 government and its responsible officers to take the necessary and appropriate actions to  
22 satisfy their constitutional and statutory obligations.

23 15. Arizona and other states have previously asserted other claims  
24 addressing immigration-related issues in prior lawsuits, including *Arizona v. United*  
25 *States*, 104 F.3d 1095 (9th Cir. 1997). However, Arizona finds itself in a very different  
26 procedural posture and substantive position. For example, in the last twenty years, the

1 disproportionate impact of illegal immigration to Arizona has increased substantially.  
2 Further, unlike the prior claimants, the federal government is suing Arizona for attempting  
3 to take action to protect its citizens from the public safety concerns arising out of rampant  
4 illegal immigration and has acted to enjoin Arizona from providing the type of assistance  
5 in the enforcement of federal immigration laws that the Legislative Branch expressly  
6 invited and encouraged states to provide.

7         16. President Obama summarized the state of affairs regarding immigration:  
8 “the system is broken . . . [and] everyone knows it.” Rather than working with Arizona to  
9 address these issues, however, the federal government initiated this lawsuit to prevent  
10 Arizona from taking action to protect the State from significant and disproportionate  
11 public health, safety, and welfare problems caused by the “broken system.” With the  
12 Executive Branch refusing to enforce the law, the Judicial Branch must step in to resolve  
13 the rights, roles, and obligations in this “system.”

14   **JURISDICTION AND VENUE**

15         17. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because the matters  
16 in controversy in these Counterclaims arise under the Constitution of the United States  
17 and laws of the United States. This Court also has jurisdiction of this matter under 28  
18 U.S.C. § 1345 because the United States is the plaintiff, and pursuant to 28 U.S.C. § 1346  
19 because the United States and its agencies and officers are Counterdefendants.

20         18. This Court also has jurisdiction pursuant to the Administrative Procedures  
21 Act (“APA”), 5 U.S.C. §§ 701-706, because Counterclaimants are seeking to compel  
22 agency action unlawfully withheld or unreasonably delayed, and to challenge agency  
23 actions and inactions as being arbitrary, capricious, an abuse of discretion, contrary to  
24 federal law, contrary to a constitutional obligation, in excess of statutory authority,  
25 without observance of procedures required by law, and unwarranted by the facts.

26         19. Finally, this Court has jurisdiction because Counterclaimants are seeking a

1 remedy in the nature of mandamus to compel officers to complete a duty pursuant to 28  
2 U.S.C. §§ 1361, 1651.

3 20. Venue lies in the District of Arizona pursuant to 28 U.S.C. §§ 1391 and  
4 1402 because the underlying lawsuit is already in the District of Arizona and a substantial  
5 portion of the events or omissions giving rise to the claims alleged arose within the  
6 jurisdiction of United States District Court for the District of Arizona.

7 **PARTIES**

8 21. Counterclaimant State of Arizona is a sovereign state of the United States.

9 22. Counterclaimant Janice K. Brewer is the Governor of the State of Arizona  
10 (“Governor Brewer”). In that capacity, Governor Brewer is vested with the supreme  
11 executive power of Arizona and is responsible for the faithful execution of all laws, for  
12 the protection of the health and safety of Arizona’s citizens, and for developing a unified  
13 and comprehensive state budget generally reflecting spending priorities and policy  
14 preferences for Arizona. Governor Brewer sues in her official capacity.

15 23. Counterdefendant United States of America is a sovereign government of  
16 those limited enumerated powers specified in the Constitution of the United States. All  
17 references in these Counterclaims to the “United States” refer to Counterdefendant United  
18 States in its sovereign capacity.

19 24. Counterdefendant Department of Homeland Security (“DHS”) is an  
20 executive department of the United States. DHS is responsible for the administration and  
21 enforcement of the federal immigration laws, as well as obtaining operational control of  
22 the United States border. Relevant components of DHS include, but are not limited to,  
23 ICE and the United States Custom and Border Protection (“CBP”). ICE is the DHS  
24 agency responsible for interior enforcement of the federal immigration laws. ICE’s  
25 mandate includes, among other things, “identifying criminal aliens for removal” and  
26 “detaining illegal immigrants and ensuring their departure (or removal) from the United

1 States.” DHS also assists in the administration of the States Criminal Alien Assistance  
2 Program (“SCAAP”).

3 25. Counterdefendant Janet Napolitano (the “Secretary”) is the Secretary of  
4 DHS. Napolitano also served as governor of Arizona from 2003 until 2009. The  
5 Secretary is responsible for the administration and enforcement of laws relating to  
6 immigration and, pursuant to 8 U.S.C. § 1103(a), has the “duty to control and guard the  
7 boundaries and borders of the United States against the illegal entry of aliens.” The  
8 Secretary also has specific statutory obligations under the nation’s immigration laws,  
9 including mandates under the Secure Fence Act of 2006 and the Appropriations Act of  
10 2008. The Secretary is being joined as an additional party pursuant to Fed. R. Civ. P.  
11 13(h).

12 26. Counterdefendant United States Department of Justice (“DOJ”) is an  
13 executive department of the United States government. The DOJ is responsible for certain  
14 immigration-related responsibilities that it shares with DHS. In addition, the Bureau of  
15 Justice Assistance (“BJA”), a component of the Office of Justice Programs for the DOJ,  
16 administers SCAAP in conjunction with DHS.

17 27. Counterdefendant Eric J. Holder, Jr. is the Attorney General of the United  
18 States (the “Attorney General”) and, as the head of the DOJ, shares certain immigration-  
19 related responsibilities with the Secretary, including numerous enforcement obligations.  
20 The Attorney General is tasked with administering SCAAP in accordance with 8 U.S.C. §  
21 1231(i). The Attorney General is being joined as an additional party under Fed. R. Civ. P.  
22 13(h).

23 28. The individual Counterdefendants are sued in their official capacities.  
24  
25  
26

1 **FACTUAL BACKGROUND**

2 **A. The Federal Government Has a Constitutional Obligation to Protect States**  
3 **from Invasion and Domestic Violence.**

4 29. Article IV, Section 4 of the U.S. Constitution imposes an obligation on the  
5 United States to “protect each [state] against Invasion and . . . Domestic Violence.”

6 30. Article I, Section 8 of the U.S. Constitution grants Congress the exclusive  
7 authority “[t]o establish an uniform Rule of Naturalization.”

8 31. Congress has exercised its power under Article I by enacting various laws  
9 designed to secure the nation’s borders.

10 32. In 1952, Congress enacted the Immigration and Nationality Act (“INA”),  
11 Pub. L. 414, 182 Stat. 66 (June 27, 1952), to regulate immigration. The INA is codified at  
12 8 U.S.C. §§ 1101-1778.

13 33. DHS,<sup>1</sup> the Attorney General, and the DOJ have primary responsibility for  
14 enforcing the INA.

15 34. DHS, the Attorney General, and the DOJ have refused to enforce the INA,  
16 which has led to rampant illegal immigration, escalating crimes, and serious public safety  
17 concerns.

18 35. Federal law enforcement has estimated that only 10 percent to 30 percent of  
19 illegal aliens are actually apprehended.

20 36. Illegal immigration causes substantial harm to public safety, the economy,  
21 the environment, and national security.

22 37. For example, several terrorists who attacked the World Trade Center and the  
23 Pentagon in 2001 were illegal aliens.

24 38. The harms associated with illegal immigration are particularly acute along  
25 the nation’s Southwest border—including the Arizona-Mexico border—where the

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26 <sup>1</sup> Congress initially empowered the Immigration and Naturalization Service (the “INS”) with enforcement of the federal immigration laws, but DHS absorbed the INS in 2003.

1 overwhelming majority of illegal border crossings occur.

2 39. The House Committee on Homeland Security, Subcommittee of  
3 Investigations has recognized the significant threat illegal immigration poses to the  
4 Southwest border, finding that: “[i]t is imperative that immediate action be taken to  
5 enhance security along our nation’s Southwest border.”<sup>2</sup>

6 40. In its report, the Subcommittee found that illegal aliens are often “dangerous  
7 criminals [who] are fleeing the law in other countries and seeking refuge in the United  
8 States.” *Id.* at 3. The Subcommittee further found that:

9 Mexican drug cartels operating along the Southwest border are  
10 more sophisticated and dangerous than any other organized  
11 criminal enterprise. . . . Murders and kidnappings on the both  
12 sides of the border have significantly increased in recent years.  
The violence along the U.S.-Mexican border has increased [ ]  
dramatically. . . . [T]here is an ever-present threat of terrorist  
infiltration over the Southwest border.

13 *Id.* at 4.

14 41. Based on these and other findings, the Subcommittee concluded that “much  
15 more is needed to combat an increasingly powerful, sophisticated, and violent criminal  
16 network which has been successful in smuggling illegal contraband, human or otherwise,  
17 into our country” and that “[t]he growth of these criminal groups, along the Southwest  
18 border, and the potential for terrorists to exploit the vulnerabilities which they create,  
19 represents a real threat to America’s national security.” *Id.* at 38.

20 42. The Subcommittee’s findings and conditions remain true today.

21 43. In fact, on or about January 5, 2011, the Arizona Senate issued concurrent  
22 resolution SCR1006 acknowledging that “organized criminals have extended their  
23 operations into southern Arizona, the resulting incidents of burglary, home invasions,  
24 drug smuggling, human smuggling, murder, extortion and kidnapping have created

25 <sup>2</sup> Majority Staff of H. Comm. on Homeland Sec., *A Line in the Sand, Confronting the*  
26 *Threat at the Southwest Border* 38 (2006), available at [http://www.house.gov/sites/members/tx10\\_mccaul/pdf/Investigaions-Border-Report.pdf](http://www.house.gov/sites/members/tx10_mccaul/pdf/Investigaions-Border-Report.pdf).

1 intolerable levels of fear and frustration among southern Arizona's residents and ranching  
2 families.”

3 **B. Congress Has Mandated that DHS, the Secretary, and the Attorney General**  
4 **Take Various Steps to Reduce Illegal Immigration.**

5 44. Congress has recognized the serious problems that illegal immigration  
6 causes and the federal government’s obligation to address those problems. Congress has  
7 sought to do so by, among other things: (a) mandating that DHS secure the nation’s  
8 border; (b) enhancing interior enforcement by requiring increased communications  
9 between ICE and federal, state, and local authorities; and (c) alleviating the economic  
10 burden on states by requiring the Attorney General either to incarcerate criminal aliens or  
11 to compensate states for doing so.

12 ***Congress’ Mandate that DHS Secure and Maintain “Operational  
13 Control” of the United States Border***

14 45. In the last 15 years, Congress has enacted various laws designed to compel  
15 DHS to secure the nation’s border.

16 46. In 1996, Congress enacted the Illegal Immigration Reform and Immigration  
17 Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (“IIRIRA”).

18 47. Section 102(a) of IIRIRA requires the Attorney General to improve barriers  
19 at the border and specifically requires him or her to “take such actions as may be  
20 necessary to install additional physical barriers and roads (including the removal of  
21 obstacles to detection of illegal entrants) in the vicinity of the United States border to  
22 deter illegal crossings in areas of high illegal entry into the United States.”

23 48. Section 102(c) of IIRIRA provides that certain environmental laws “are  
24 waived to the extent the Attorney General determines necessary to ensure expeditious  
25 construction of the barriers and roads under this section.”

26 49. In 2003, Congress established DHS and transferred the Attorney General’s  
powers and duties to “control and guard the boundaries and borders of the United States



1 against the illegal entry of aliens” to the Secretary of DHS. 8 U.S.C. §§ 1103(a)(1) and  
2 (5); *see also* 6 U.S.C. §§ 251 and 291.

3 50. On October 26, 2006, Congress passed the Secure Fence Act of 2006, Pub.  
4 L. No. 109-367, 120 Stat. 2638, “[t]o establish operational control over the international  
5 land and maritime borders of the United States.”

6 51. Among other things, Section 2(a) of the Secure Fence Act provides that the  
7 Secretary “shall take all actions the Secretary determines necessary and appropriate to  
8 achieve and maintain operational control over the entire international land and maritime  
9 borders of the United States” through both border surveillance and “physical  
10 infrastructure enhancements.”

11 52. Section 2(b) of the Secure Fence Act defines “operational control” as “the  
12 prevention of all unlawful entries into the United States, including entries by terrorists,  
13 other unlawful aliens, instruments of terrorism, narcotics, and other contraband.”

14 53. Section 3 of the Secure Fence Act expanded the number of places where the  
15 Secretary “shall provide for [at] least 2 layers of reinforced fencing, the installation of  
16 additional physical barriers, roads, lighting, cameras, and sensors” to include the entire  
17 Arizona-Mexico border.

18 54. Section 2(c) of the Secure Fence Act also requires that “[n]ot later than one  
19 year after the date of the enactment of this Act and annually thereafter, the Secretary shall  
20 submit to Congress a report on the progress made toward achieving and maintaining  
21 operational control over the entire international land and maritime borders of the United  
22 States in accordance with this section.”

23 55. In 2007, Congress enacted the Appropriations Act of 2008, Pub. L. No. 110-  
24 261, 121 Stat. 2090-91 (Dec. 26, 2007), which struck and replaced a portion of the Secure  
25 Fence Act related to the construction of the physical fence along the Southwest border.  
26 Specifically, the Appropriations Act of 2008 requires the Secretary to construct at least

1 700 miles of reinforced fencing along the Southwest border and provides for the  
2 installation of additional physical barriers, roads, lighting, cameras, and sensors to gain  
3 operational control of the Southwest border.

4 56. The Appropriations Act of 2008 also established a deadline for constructing  
5 certain priority miles of the border fence, authorized the appropriation of all sums  
6 necessary to carry out this requirement, and provided that such funds were to remain  
7 available until expended.

8 57. In the DHS Appropriations Act, 2010, Pub. L. No. 111-83 (Oct. 28, 2009),  
9 Congress required that DHS create a plan “for a program to establish and maintain a  
10 security barrier along the borders of the United States, of fencing and vehicle barriers  
11 where practicable, and of other forms of tactical infrastructure and technology, that  
12 includes - . . . (6) a report on budget, obligations and expenditures, the activities  
13 completed, and the progress made by the program in terms of obtaining operational  
14 control of the entire border of the United States.”

15 ***Congress Seeks to Enhance Interior Enforcement Through Increased***  
16 ***Cooperation Between Federal, State, and Local Authorities***

17 58. In 1996, Congress found that the “acquisition, maintenance, and exchange  
18 of immigration-related information by State and local agencies is consistent with, and  
19 potentially of considerable assistance to, the Federal regulation of immigration and the  
20 achieving of the purposes and objectives of the [INA].”

21 59. Congress was also concerned about the prevalence of policies that various  
22 jurisdictions and law enforcement agencies had adopted to restrict or limit law  
23 enforcement officials from communicating with the federal government regarding aliens’  
24 immigration status (“Sanctuary Policies”) and the detrimental effect such policies had on  
25 the federal government’s ability to enforce the federal immigration laws effectively.

26 60. To increase the cooperation between federal, state, and local authorities in

1 the interior enforcement of the federal immigration laws, therefore, Congress enacted 8  
2 U.S.C. §§ 1373 and 1644, which forbid any federal, state, or local government entity or  
3 official from prohibiting or in any way restricting inquiries about the immigration status,  
4 lawful or unlawful, of any individual.

5 61. 8 U.S.C. § 1373 further requires ICE to respond to any lawful inquiry from  
6 any state or local government entity or official regarding the citizenship or immigration  
7 status, lawful or unlawful, of any individual.

8 62. Congress also sought to enhance DHS' resources by authorizing the  
9 Attorney General to "enter into a written agreement with a State, or any political  
10 subdivision of a State, pursuant to which an officer or employee of the State or  
11 subdivision" could act, in effect, as federal immigration officers. 8 U.S.C. § 1357(g).

12 63. In doing so, however, Congress expressly reserved the right "for any officer  
13 or employee of a State or political subdivision of a State" to communicate or "otherwise  
14 to cooperate with the Attorney General in the identification, apprehension, detention, or  
15 removal of aliens not lawfully present in the United States," without entering into an  
16 agreement under 8 U.S.C. § 1357(g). *See* 8 U.S.C. § 1357(g)(10).

17 ***Congress' Mandate that the Attorney General Either Incarcerate Criminal***  
18 ***Aliens or Compensate States for Doing So***

19 64. In addition to its attempts to strengthen the enforcement of the federal  
20 immigration laws, Congress established the SCAAP, which is currently codified at 8  
21 U.S.C. § 1231(i), to compensate states for the substantial economic burdens they have  
22 suffered as a result of the federal government's failure to incarcerate or deport criminal  
23 aliens.

24 65. SCAAP provides that upon written request by a governor, the Attorney  
25 General shall either (a) enter into a contractual arrangement to provide compensation to  
26 the state for the incarceration of the undocumented criminal aliens in the state or (b)

1 federally incarcerate the undocumented criminal alien.

2 66. SCAAP also provides that “compensation” to the state “shall be the average  
3 cost of incarceration of a prisoner in the relevant state as determined by the Attorney  
4 General.”

5 67. SCAAP mandates that the Attorney General “shall give priority to Federal  
6 incarceration of undocumented criminal aliens who have committed aggravated felonies.”

7 68. SCAAP was due to expire in January 2006, but was extended by an  
8 amendment to the Violence Against Women and Department of Justice Reauthorization  
9 Act of 2005 (Pub. L. No. 109-162) sponsored by Congressman Kolbe of Arizona (the  
10 “Kolbe Amendment”).

11 69. The Kolbe Amendment reauthorized SCAAP through FY2011, authorizing  
12 appropriations of \$750 million for FY 2006, \$850 million for FY 2007, and \$950 million  
13 for FY 2008, FY 2009, FY 2010, and FY 2011.

14 70. Congress unanimously approved the Kolbe Amendment.

15 71. Congress’ intent in enacting the Kolbe Amendment was to “ensure[] the  
16 Federal Government assumes more of its responsibility for incarcerating undocumented  
17 criminal aliens.” 151 Cong. Rec. H8433-01 (2005).

18 72. As Congressman Kolbe stated, this amendment was particularly important  
19 to Arizona because “Arizona has been the doormat of the country for illegal immigration.  
20 The Federal Government has failed to secure our borders and reform our broken  
21 immigration system . . . Arizona has been at the forefront of this problem for so long and  
22 had more than 50 percent of all the apprehensions . . .” *Id.*

23 73. Congressman Conyers further explained that the purpose of the Kolbe  
24 Amendment was to meet federal responsibilities and described the program as follows:

25  
26

1 The SCAAP fund is not a grant program. We are reimbursing  
2 State and local governments for money they have already  
3 spent to arrest, process and incarcerate criminal aliens. These  
4 aliens should not be here, creating a burden on our society.  
We all agree that if the federal government was protecting our  
borders effectively, this would not be the problem it is.

5 *Id.*

6 74. SCAAP reimburses state and local governments for the costs incurred more  
7 than one year before the fiscal year at issue. Thus, SCAAP funding for fiscal year 2010  
8 reimbursed expenses incurred from July 1, 2008 to June 30, 2009.

9 75. SCAAP fiscal year 2011 funds are therefore anticipated to cover the next  
10 one year timeframe - July 1, 2009 to June 30, 2010.

11 76. Therefore, Arizona is now and has been incarcerating illegal criminal aliens  
12 since July 1, 2010 in Arizona jails without any existing law for reimbursement of those  
13 expenses.

14 **C. Counterdefendants Have Failed to Enforce the Federal Immigration Laws In**  
**Accordance With the Intent and Mandates of Congress.**

15 ***DHS Has Not Secured the Nation's Border***

16 77. Despite clear mandates from Congress, DHS has not achieved and  
17 maintained operational control of the borders of the United States and has not installed at  
18 least 700 miles of fence and other physical barriers along the border to deter illegal  
19 crossings.

20 78. From 2006 through 2009, DHS made some efforts to comply with  
21 Congress' mandate and achieve operational control of the borders of the United States.

22 79. In 2006, DHS initiated the Secure Border Initiative Network ("SBI*net*") for  
23 the development, installation, and integration of technology solutions to secure the  
24 Southwest border of the United States.

25 80. In 2007, pursuant to his authority under 8 U.S.C. § 1103, the Secretary of  
26

1 DHS waived several laws to ensure expeditious construction of the border fence.

2 81. In a lawsuit challenging the waiver, the United States recognized both the  
3 congressional mandate to achieve operational control and the necessity of doing so.  
4 Specifically, the United States argued that “Congress enacted the Border Fence Act to  
5 abate both undisputed border security threats and undisputed harm to public lands  
6 occasioned by an influx of undocumented aliens” and that “an injunction of the [Arizona]  
7 border fence construction would contravene the public interest by delaying federal  
8 defendants’ urgent responses to: documented border security risks; related national  
9 security risks; and serious environmental risks occasioned by illegal road construction and  
10 widespread encroachment by [undocumented aliens] on both protected wildlife habitat  
11 and other federal lands.”

12 82. The United States further provided a declaration from the Deputy  
13 Commissioner of the CBP, in which he described the significant threats of invasion and  
14 domestic violence that exist at the Arizona border and the need to obtain operational  
15 control, stating that:

- 16 • Illegal cross border traffic has created thousands of new  
17 trails and roads on Federal lands in southern Arizona.
- 18 • Past experience has shown that border fencing leads to  
19 more effective border security, reduction in cross-border  
20 traffic, is a force multiplier for the Border Patrol, and has  
21 positive environmental effects.
- 22 • Due to the increasing number of illegal entrants in this  
23 area, construction of fencing is also vital to protecting the  
24 Nation from threats.
- 25 • The urgent need to gain and maintain operational control  
26 of the border in this area is clearly evident.
- [A]gency records indicate that approximately 11% of these  
illegal entrants, on average *more than 5 individuals each  
day in this area alone*, have a criminal background. These  
individuals present an unacceptable risk of harm to the  
United States and its citizens. Aside from the obvious  
national Security concerns, the environmental impacts of

1 illegal entrants and activities in the area are pervasive and  
2 can be significantly mitigated by operational control of the  
border in that area.

3 83. On April 8, 2008, the former Secretary of DHS again declared large portions  
4 of Arizona to be areas of high illegal entry and noted his “mandate to achieve and  
5 maintain operational control of the borders of the United States.”

6 84. Shortly after taking office in 2009, Secretary Napolitano stated that *SBI*  
7 was an “integral part” of the plan to obtain “operational control” of the border.

8 85. Despite substantial funding and the importance of *SBI* to border security,  
9 DHS mismanaged the program. Both the DHS’ Office of the Inspector General and the  
10 U.S. Government Accountability Office (“GAO”) having repeatedly identified numerous  
11 and various problems with *SBI* caused by DHS mismanagement.

12 86. In 2010, the Secretary unilaterally froze all funding of the \$800 million  
13 dollar *SBI* project and replaced it with \$50 million in stimulus funds without any  
14 indication of how DHS planned to achieve and maintain “operational control” along the  
15 Arizona-Mexico border.

16 87. In January 2011, DHS cancelled *SBI*.

17 88. DHS is not even attempting to construct the 700-mile minimum of “Tactical  
18 Infrastructure” (a/k/a fencing) that the Appropriations Act of 2008 requires. Instead, DHS  
19 has unilaterally reduced the requirement to a “target” of 661 miles.

20 89. Not only has DHS reduced the length of the fence, but DHS has tracked  
21 only its subjective determination of “effective control,” not the “operational control” the  
22 Secure Fence Act requires, and has inappropriately based its speculative determination of  
23 that metric solely on mileage.

24 90. The Arizona-Mexico border is 387 miles, which includes the 262-mile  
25 Tucson Sector and the 125-mile Yuma Sector.

26 91. Upon information and belief, DHS has less than 40% of the mileage along

1 the Tucson Sector under its own definition of “effective control.”

2 92. Upon information and belief, DHS also has not complied with the  
3 requirement in the Secure Fence Act of 2006 that DHS “submit to Congress a report on  
4 the progress made toward achieving and maintaining operational control over the entire  
5 international land and maritime borders of the United States.”

6 93. In 2009, Congress reinforced the requirement that DHS report on its  
7 progress in achieving and maintaining operational control of the border in the  
8 Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009  
9 (Pub. L. No. 110-329).

10 94. DHS has not satisfied its reporting requirements.

11 95. DHS has failed to report on “operational control” as the DHS  
12 Appropriations Act of 2010 requires. Instead, DHS “focused on describing the progress  
13 made by the program in terms of securing the U.S. border without defining this term,  
14 linking it to the operational control of the border, or providing performance measures on  
15 the progress made in obtaining operational control of the border.”

16 96. DHS refuses to track and report whether it has achieved or maintained  
17 “operational control,” and also refuses to provide a plan to meet its obligation under this  
18 express congressional mandate.

19 ***The Executive Branch Has Failed to Enforce the Federal Immigration***  
20 ***Laws In the Manner Congress Intended***

21 97. ICE has failed to achieve its mandate of identifying criminal aliens for  
22 removal and detaining illegal immigrants and ensuring their departure (or removal) from  
23 the United States.

24 98. The Executive Branch has caused or substantially contributed to ICE’s  
25 failure to achieve its mandate by frustrating Congress’ objectives in enacting 8 U.S.C. §§  
26 1373 and 1644. Specifically, the Executive Branch has:



1 a. taken the position that Arizona is precluded from making inquiries to  
2 ICE regarding individuals' immigration status under 8 U.S.C. §§ 1373 and 1644;  
3 and

4 b. failed to take any action to prevent or otherwise address the many  
5 Sanctuary Policies that exist in violation of 8 U.S.C. §§ 1373 and 1644.

6 99. Upon information and belief, the federal government has treated Arizona  
7 differently than other states by accommodating other state or local law enforcement  
8 agencies that have adopted practices or procedures that led to an increase in such inquiries  
9 to ICE.

10 100. ICE's refusal to enforce the federal immigration laws in accordance with  
11 congressional mandates has led over 7,000 ICE officers and employees to issue a vote of  
12 "no confidence" in ICE Director John Morton and Assistant Director Phyllis Coven.

13 101. The National Council 118 – Immigration and Customs Enforcement,  
14 American Federation of Government Employees (AFL-CIO) issued the unanimous vote of  
15 "no confidence," which explains:

16 This action reflects the growing dissatisfaction and concern  
17 among ICE employees and Union Leaders that Director John  
18 Morton and Assistant Director Phyllis Coven have abandoned  
the Agency's core mission of enforcing the United States  
Immigration Laws and providing for public safety . . .

19 It is the desire of our union within ICE and our employees to .  
20 . . . publicly state that ICE officers and employees do not  
21 support Morton or Coven, or their misguided and reckless  
initiatives, which could ultimately put many in America at  
risk. . . .

22 • . . . ICE is currently overwhelmed by the massive criminal  
23 alien problem in the United States resulting in the large-scale  
release of criminals back into local communities.

24 • Criminal aliens incarcerated in local jails seek out ICE  
25 officers and volunteer for deportation to avoid prosecution,  
conviction and serving prison sentences. Criminal aliens  
26 openly brag to ICE officers that they are taking advantage of  
the broken immigration system and will be back in the United

1 States within days to commit crimes, while United States  
2 citizens arrested for the same offenses serve prison sentences.  
3 State and local law enforcement, prosecutors and jails are  
4 equally overwhelmed by the criminal alien problem and lack  
5 the resources to prosecute and house these prisoners resulting  
6 in the release of criminal aliens back into local communities  
7 before making contact with ICE. Thousands of other criminal  
8 aliens are released to ICE without being tried for their criminal  
9 charges. ICE senior leadership is aware that the system is  
10 broken, yet refuses to alert Congress to the severity of the  
11 situation and request additional resources to provide better  
12 enforcement and support of local agencies.

- ICE is misleading the American public with regard to the effectiveness of criminal enforcement programs like the ICE “Secure Communities Program” using it as a selling point to move forward with amnesty related legislation . . .

- While ICE reports internally that more than 90 percent of ICE detainees are first encountered by ICE in jails after they are arrested by local police for criminal charges, ICE senior leadership misrepresents this information publicly . . .<sup>3</sup>

12 102. In August 2010, the U.S. Citizenship and Immigration Services (“USCIS”),  
13 a DHS’ executive agency, circulated a memorandum proposing administrative alternatives  
14 to comprehensive immigration reform, in which USCIS stated its intent to circumvent  
15 Congress and achieve “meaningful immigration reform absent legislative action.”<sup>4</sup>

16 103. The USCIS memorandum set forth various ways in which the agency could  
17 enable aliens to remain in the United States even though they had entered or remained in  
18 the United States without complying with the INA.

19 ***The Executive Branch Has Thwarted Congress’ Attempt to***  
20 ***Compensate States for the Costs of Incarcerating Criminal Aliens***

21 104. Although Congress authorized \$950 million in annual appropriations for the  
22 SCAAP program for FY 2008 through FY 2011, the Executive Branch has consistently

23 <sup>3</sup> AFL-CIO, Vote of No Confidence In ICE Director John Morton and ICE ODP  
24 Assistant Director Phyllis Coven (June 25, 2010), available at [http://www.iceunion.org/  
download/259-259-vote-no-confidence.pdf](http://www.iceunion.org/download/259-259-vote-no-confidence.pdf).

25 <sup>4</sup> The memorandum was addressed to the Director of USCIS, Alejandro Mayorkas, and  
26 prepared by Denise Vanison, Chief of the Office of Policy and Strategy; Roxana Bacon,  
Chief Counsel; Debra Rogers, Field Operations; and Donald Neufeld, Associate Director  
of Service Center Operations.

1 sought to reduce or eliminate appropriations for the program.

2 105. For example, the DOJ failed to include official requests for SCAAP funding  
3 in its past seven budget requests.

4 106. In 2009, the DOJ limited SCAAP reimbursement to 35.15% of the eligible  
5 jurisdiction's "correctional salary officer costs." The amount the DOJ has provided to  
6 states for reimbursement under SCAAP does not include many categories of costs, such as  
7 the cost to feed, clothe, house, or provide medical care to the undocumented criminal  
8 aliens.

9 107. President Obama also proposed to eliminate the program in his first budget.

10 108. Despite the President's attempt to eliminate the program, Congress still  
11 provided funding for the SCAAP program in 2010.

12 109. The Office of Management and Budget has continued the Administration's  
13 discouragement of the SCAAP program by proposing only \$330 million for SCAAP in  
14 the budget for 2011.

15 **D. The Federal Government's Failure to Secure the Border and to Enforce the**  
16 **Federal Immigration Laws As Congress Intended Has Uniquely Harmed**  
17 **Arizona.**

18 110. The crippling impact of illegal immigration in Arizona exceeds that of any  
19 other state in the nation.

20 111. The federal government's decision to focus its efforts on securing the  
21 California and Texas borders has caused a staggering increase in the percentage of illegal  
22 crossings into Arizona. For example, in 1992, only about 7.6% of the illegal aliens the  
23 federal government located nationwide were in the Arizona border sectors. Currently, that  
24 number is approximately 40%. In other words, Arizona has become the path of least  
25 resistance to cross the border.

26 112. There continues to be a far higher percentage of illegal aliens crossing into  
Arizona than in any other state. In 2009, the CBP apprehended almost as many illegal

1 aliens in Arizona as it apprehended in California and Texas combined.

2 113. Rampant illegal immigration in Arizona led former Arizona Governor  
3 Napolitano to declare a state of emergency in four Southern Arizona counties in August  
4 2005.

5 114. Since August 2005, illegal crossings into Arizona have continued at an  
6 alarming rate. As an example, during a 60-day period between February and March 2010,  
7 a hidden camera filmed 850 illegal aliens traveling a path from Mexico into Arizona,  
8 some of whom brought drugs and guns across the border.

9 115. Another hidden camera near Tucson filmed over 735 aliens walking on a  
10 trail from Mexico into Arizona over a 39-day period. During that same period, not a  
11 single Border Patrol officer was identified on film.

12 116. In FY 2009, the CBP reported the apprehension of over 550,000 illegal  
13 aliens between the ports of entry in the United States, and over 240,000 of those  
14 apprehensions occurred in the Tucson sector alone.

15 117. These statistics are only a fraction of the aliens who enter Arizona illegally  
16 and are not apprehended.

17 118. According to one federal law enforcement officer, his agency has nine law  
18 enforcement officers to patrol three million acres.

19 119. Recent federal government reports confirm that illegal activity on federal  
20 lands along the Arizona border are escalating and DHS' arrests are not keeping pace with  
21 the increase.

22 120. These illegal crossings cause serious harm to Arizona, including a  
23 substantial presence of criminal aliens.

24 121. The Arizona Department of Corrections has estimated that criminal aliens  
25 make up more than 14% of Arizona's prison population.

26 122. As of December 31, 2010, Arizona was incarcerating over 5,700 criminal

1 aliens in its state prisons, including:

- 2 a. 349 aliens convicted of murder;
- 3 b. 148 aliens convicted of manslaughter or negligent homicide;
- 4 c. 564 aliens convicted of kidnapping;
- 5 d. 403 aliens convicted of robbery;
- 6 e. 593 aliens convicted of assault;
- 7 f. 90 aliens convicted of rape or sexual assault;
- 8 g. 243 aliens convicted of child molestation;
- 9 h. 225 aliens convicted of other sex crimes; and
- 10 i. 1,921 aliens convicted of drug crimes.

11 123. Commission of an “aggravated felony,” such as murder, manslaughter,  
12 kidnapping, molestation, rape and sexual assault, robbery, assault, and drug offenses, are  
13 mandatory deportable offenses under the INA.

14 124. ICE has stated that its highest immigration enforcement priority is the  
15 removal of aliens convicted of aggravated felonies or two or more felonies. Yet Arizona  
16 has thousands of criminal aliens on ICE’s list of “highest priorities” for which the federal  
17 government is providing no assistance and insufficient funding.

18 125. The figures above do not include the thousands of criminal aliens in county  
19 jails or the numerous other jails throughout Arizona. Nor do they include the criminal  
20 aliens who have come to Arizona to escape conviction for crimes in their home countries  
21 or the criminal aliens who commit crimes in Arizona, but are not caught or incarcerated in  
22 the State.

23 126. For example, in FY 2009, Arizona prosecutors declined to prosecute over  
24 1,300 drug offense suspects who are illegal aliens. More than 40% of the time, the reason  
25 given for not prosecuting the drug offense was the lack of prosecutorial or investigative  
26 resources available for handling the matter. This is a drastically different story than the

1 rest of the Southwest border.

2 127. In 2010, recommendations for the prosecution of drug cases from the  
3 investigative agencies (what the DOJ calls “referrals”) increased faster than the actual  
4 prosecutions.

5 128. The federal government’s failure to apprehend and/or convict these criminal  
6 aliens only increases the harm to Arizona.

7 129. For example, Mexican drug cartels have threatened Nogales Police Officers  
8 and illegal aliens have shot several Arizona police officers and border bandits have  
9 murdered a CBP agent in the Tucson sector.

10 130. In 2009, the DOJ issued an analysis of the drug and illegal alien smuggling,  
11 armed cartels, and drug trafficking organizations (“DTOs”) in Mexico and Arizona. The  
12 report highlights the drugs, violence, and security threats caused by Arizona’s porous and  
13 “largely underprotected” border with Mexico, and its impact on the drug trade throughout  
14 the United States.

15 131. Because of these problems, the federal government put up prominent signs  
16 warning citizens to stay off public lands in Arizona within 80 miles of the border.

17 132. Illegal immigration in Arizona has also had significant detrimental impact  
18 on Arizona’s environment. For example, the Bureau of Land Management collected over  
19 468,000 pounds of trash from the Arizona border area in FY 2008.

20 133. The impact of illegal immigration also threatens wildlife, Arizona Game and  
21 Fish Officers, and citizens trying to use land along the Arizona border for outdoor  
22 pursuits.

23 134. Arizona has repeatedly asked the federal government for help in addressing  
24 the harmful effects of illegal immigration on Arizona and its citizens.

25 135. In December 2005, Governor Napolitano wrote to the Secretary of Defense,  
26 stating that “the federal government has lost operational control of the United States-

1 Mexico Border” and imploring the federal government to “redouble its efforts to return  
2 safety and security to this region.”

3 136. In March 2006, Governor Napolitano wrote to the Secretary of Defense and  
4 the Secretary of DHS requesting to have the Arizona National Guard “assist the Federal  
5 Government in its mission in Arizona to secure our border” at the expense of the federal  
6 government.

7 137. In 2010, Governor Brewer and Arizona Attorney General Terry Goddard  
8 wrote separately to President Obama to explain the devastating impacts of illegal  
9 immigration in Arizona and to request immediate federal assistance.

10 138. The New Mexico-Arizona Enabling Act, the Arizona Constitution, and the  
11 Arizona Revised Statutes create a significant trust obligation in the State. Arizona, as  
12 trustee of state trust lands, is charged with a fiduciary duty to maintain and protect the  
13 lands for the benefit of, inter alia, the Arizona education system. Illegal immigration—as  
14 evidenced by violence, sign posts and environmental degradation—has reduced the value  
15 of these lands, many of which are near the border. Arizona has a fiduciary trust  
16 obligation, and a constitutional and statutory duty to protect those lands from damage and  
17 harm.

18 **E. The Attorney General and the DOJ Have Not Compensated Arizona for the**  
19 **Substantial Costs Arizona Has Incurred Incarcerating Criminal Aliens.**

20 139. Of the jurisdictions that receive SCAAP funds, Arizona receives one of the  
21 lowest percentages of reimbursement for the cost to incarcerate.

22 140. On January 4, 2010, the Treasurer of Arizona sent a letter to the Secretary  
23 requesting payment of over one billion dollars in “uncompensated costs for incarcerating  
24 criminal aliens under [SCAAP] from FY1994 to FY2008.”

25 141. On or around October 1, 2010, the DOJ posted on its website the 2010  
26 SCAAP awards for all jurisdictions. For FY 2010, with a reporting date of July 1, 2008 to

1 June 30, 2009, the amount DOJ allocated to the State of Arizona is \$9,775,269.00.

2 142. Arizona’s actual cost to incarcerate qualifying illegal criminal aliens was  
3 over \$135 million—almost 14 times the amount the DOJ allocated to Arizona.

4 143. At the same time, the DOJ allocated over \$62 million in SCAAP funds to  
5 jurisdictions with Sanctuary Policies—policies that violate the express terms of 8 U.S.C.  
6 §§ 1373 and 1644.

7 144. For example, the DOJ allocated over \$14 million to Los Angeles County  
8 (approximately 50% more than the allocation to Arizona), over \$6.6 million to  
9 Massachusetts, and over \$5.9 million to Oregon—all of which have Sanctuary City  
10 Policies.

11 145. The federal government has not fully compensated Arizona for its costs to  
12 incarcerate criminal aliens, nor has the Attorney General attempted to incarcerate these  
13 criminal aliens in federal facilities or to deport the criminal aliens Arizona is incarcerating  
14 for commission of an aggravated felony.

15 146. Inadequate enforcement of immigration laws and the Executive Branch’s  
16 interpretation of the SCAAP program present Arizona with an unacceptable choice: pay  
17 the cost of incarcerating undocumented criminal aliens for only pennies on the dollar or  
18 place the health, safety, and welfare of Arizona and its citizens even further at risk.

19 **COUNT I**  
20 ***Failure and Refusal to Achieve and Maintain***  
21 ***“Operational Control” of the Arizona-Mexico Border***  
22 **(United States, DHS, and the Secretary)**

23 147. Counterclaimants incorporate all the paragraphs above in this Counterclaim  
24 as if fully stated herein.

25 148. Congress has mandated that the Secretary “shall have the power and duty to  
26 control and guard the boundaries and borders of the United States against the illegal entry  
of aliens.” 8 U.S.C. § 1103(a)(5).



1           149. Through the Secure Fence Act and the Appropriations Act of 2008,  
2 Congress has established meaningful standards as to the manner in which the Secretary is  
3 to carry out the duty to control and guard the boundaries and borders of the United States  
4 against the illegal entry of aliens. Specifically, these Acts require DHS and the Secretary  
5 to: (a) achieve and maintain “operational control” of the Arizona-Mexico border; (b)  
6 report to Congress on the progress made toward achieving and maintaining “operational  
7 control” of the border; (c) build at least 700 miles of fence along the United States-  
8 Mexico border; and (d) “provide for the installation of additional physical barriers, roads,  
9 lighting, cameras, and sensors to gain operational control of the southwest border.”

10           150. The Secretary has a duty to comply with the foregoing mandates.

11           151. The Secretary has not complied with this duty.

12           152. The Secretary has not taken all necessary and appropriate actions to achieve  
13 and maintain “operational control” of the Southwest border, to report on the progress  
14 toward achieving and maintaining “operational control” of the border, or to build at least  
15 700 miles of fence along the United States-Mexico border. In fact, DHS and the Secretary  
16 have expressly set goals that are less than what Congress has required by attempting to  
17 achieve and reporting on only “effective control” and setting a “target” for building only  
18 661 miles of fence along the United States-Mexico border and they have now cancelled  
19 *SBI*net.

20           153. Arizona is within the zone of interest intended to be protected by the  
21 provisions of the Secure Fence Act and the Appropriations Act of 2008 mandating that the  
22 Secretary achieve and maintain “operational control” of the border, build at least 700  
23 miles of fence along the United States-Mexico border, and provide for the installation of  
24 additional infrastructure.

25           154. The Secretary’s and DHS’ delays are unreasonable because they have  
26 caused significant harm to the safety, security, human health, and welfare of Arizona’s

1 citizens, federal lands in Arizona, and Arizona State Trust Lands.

2 155. DHS and the Secretary have acted:

3 a. arbitrarily, capriciously and abused their discretion, and not acted  
4 otherwise in accordance with law;

5 b. contrary to constitutional rights, powers, and duties to control the  
6 border and protect Arizona from invasion and domestic violence; and

7 c. in excess of statutory jurisdiction, authority, or limitations, or short of  
8 statutory obligations as set forth in IIRIRA, as amended by the Secure Fence Act  
9 of 2006 and the Appropriations Act of 2008, with respect to securing the United  
10 States border,

11 156. DHS and the Secretary have also failed and refused to follow DHS' own  
12 procedures for acquisition, failed to do proper studies in accordance with DHS' own  
13 regulations, failed to address numerous reports by the GAO and the other supervisory  
14 boards with respect to *SBI*net, and failed to report to Congress or even track "operational  
15 control" as federal law requires.

16 157. Counterclaimants accordingly request injunctive, declaratory, and  
17 mandamus relief requiring that the United States, DHS, and the Secretary comply with the  
18 Secure Fence Act of 2006 and the Appropriations Act of 2008 by:

19 a. achieving and maintaining "operational control" of the Arizona-  
20 Mexico border as defined in the Secure Fence Act of 2006; and

21 b. completing at least 700 miles of fencing along the Southwest border  
22 plus the additional infrastructure listed in the Appropriations Act of 2008.

23 158. Counterclaimants further request:

24 a. injunctive, declaratory, and mandamus relief that the United States,  
25 DHS, and the Secretary immediately deploy such temporary measures as are  
26 necessary and appropriate to protect Arizona and its citizens from the impact of

1 illegal immigration until the Secretary has achieved “operational control” of the  
2 Arizona-Mexico border;

3 b. an Order setting a hearing to address any other general or specific  
4 relief that may be necessary or appropriate under the circumstances; and

5 c. that this Court retain jurisdiction of this action to ensure compliance  
6 with this Court’s orders and grant such other relief as this Court deems equitable,  
7 just, and proper.

8 **COUNT II**

9 ***Failure and Refusal to Protect Arizona from Invasion and Domestic Violence***

10 **(All Counterdefendants)**

11 159. Counterclaimants incorporate all the paragraphs above in this Counterclaim  
12 as if fully stated herein.

13 160. This count raises an actual controversy within the meaning of Article III,  
14 Section 2 of the Constitution and is a matter of federal law and importance.

15 161. Article IV, Section 4 of the Constitution requires the United States to protect  
16 Arizona against invasion and domestic violence.

17 162. To protect the states against invasion and domestic violence by illegal  
18 aliens, Congress has mandated that the Secretary “shall have the power and duty to  
19 control and guard the boundaries and borders of the United States against the illegal entry  
20 of aliens.” 8 U.S.C. § 1103(a)(5).

21 163. The United States has failed and refused to protect Arizona from invasion  
22 and domestic violence as Article IV, Section 4 of the Constitution and the statutory  
23 codifications of that power and duty require.

24 164. Congress has, in effect, recognized that the United States has failed to  
25 protect Arizona from invasion by illegal aliens and domestic violence:

26 a. through various findings and reports, including the findings of the

1 House Committee on Homeland Security, Subcommittee of Investigations that  
2 “[i]t is imperative that immediate action be taken to enhance security along our  
3 nation’s Southwest border”; “[t]he violence along the U.S.-Mexican border has  
4 increased [ ] dramatically” and “there is an ever-present threat of terrorist  
5 infiltration over the Southwest border”; and

6 b. by enacting various laws, including the Secure Fence Act of 2006  
7 and the Appropriations Act of 2008, mandating that DHS and the Secretary  
8 achieve operational control of the United States-Mexico border, build at least 700  
9 miles of fence, and install the necessary physical barriers, roads, lighting, cameras,  
10 and sensors.

11 165. The United States’ failure and refusal to protect Arizona leaves Arizona  
12 without meaningful defenses from illegal criminal aliens, terrorists, instruments and  
13 weapons of terrorism, environmental harm, drug and human smugglers, and crippling  
14 economic costs.

15 166. Arizona, by bringing this cause of action (or these counterclaims in general),  
16 expressly is not alleging that any foreign country, including the sovereign nation of  
17 Mexico, is invading the United States through or primarily through Arizona.

18 167. Arizona recognizes the fact that some courts have previously concluded that  
19 the term “invasion” in the Constitution should be limited to something equivalent to a  
20 military invasion from a foreign political entity. Yet, the concept of “invasion” has  
21 changed since the drafting of the Constitution and in particular, the many national security  
22 threats that exist today are not the same threats that existed more than 200 years ago.

23 168. The political nature of the individuals or organizations invading the country  
24 does not alter the import and significance of an actual or potential invasion from the  
25 perspective of a border state such as Arizona.

26 169. In this instance, the nature and character of many of the illegal aliens who

1 are entering the United States through the Arizona/Mexico border has changed  
2 significantly since prior courts have analyzed the invasion issues.

3 170. Upon information and belief, paramilitary bands, individuals with ties to  
4 criminal enterprises (including human smuggling enterprises and violent drug cartels), and  
5 individuals with ties to terrorist organizations are and may continue to invade the United  
6 States through the Arizona/Mexico border unless actions are taken to stop the illegal  
7 entries.

8 171. The United States' failure and refusal to protect Arizona from invasion and  
9 domestic violence has caused and is continuing to cause significant harm to Arizona as set  
10 forth above.

11 172. Arizona is within the zone of interest intended to be protected by Article IV,  
12 Section 4 of the Constitution and the statutory codifications of that power and duty. The  
13 relief sought herein will redress Arizona's injury and harm, and will otherwise address  
14 Arizona's protectable interests.

15 173. Arizona has repeatedly requested that the United States protect it from these  
16 harms as set forth above.

17 174. Arizona is unable to bear the staggering costs of protecting itself, and even  
18 if it could, the federal government is asserting that Arizona is preempted from taking  
19 action to assist in the enforcement of federal immigration law.

20 175. Counterdefendants have acted: (a) arbitrarily, capriciously, with an abuse of  
21 discretion, and not otherwise in accordance with law; and (b) contrary to constitutional  
22 rights, powers, and duties to control the border and protect Arizona from invasion and  
23 domestic violence.

24 176. Counterclaimants accordingly request:

- 25 a. injunctive, declaratory, and mandamus relief that Counterdefendants  
26 create and implement priorities and enforcement policies that will protect Arizona

1 from invasion and domestic violence as Article 4, Section 4 requires;

2 b. injunctive, declaratory, and mandamus relief that Counterdefendants  
3 deploy such temporary measures, including additional personnel and technology  
4 along the Arizona-Mexico border, that are necessary and appropriate to protect  
5 Arizona pursuant to these constitutional requirements; and

6 c. that this Court retain jurisdiction of this action to ensure compliance  
7 with this Court's orders and grant such other relief as this Court deems equitable,  
8 just, and proper.

9 **COUNT III**  
10 ***Abdication of Statutory Responsibilities***  
11 ***(Enforcement of the Federal Immigration Laws)***  
12 **(All Counterdefendants)**

13 177. Counterclaimants incorporate all the paragraphs above in this Counterclaim  
14 as if fully stated herein.

15 178. This count raises an actual controversy within the meaning of Article III,  
16 Section 2 of the Constitution and is a matter of federal law and importance.

17 179. Arizona is within the zone of interest intended to be protected by the federal  
18 immigration laws.

19 180. Counterclaimants have adopted policies with respect to enforcement of the  
20 federal immigration laws that are so extreme that they amount to an abdication of DHS'  
21 and the DOJ's statutory responsibilities.

22 181. Specifically, Counterdefendants have:

23 a. adopted policies and practices with respect to enforcement of the  
24 federal immigration laws that have provided greater protection to other states than  
25 to Arizona and have caused Arizona to suffer a sharply disproportionate share of the  
26 nation's illegal entries;

b. filed this lawsuit to enjoin Arizona from adopting state policies in

1 furtherance of 8 U.S.C. §§ 1373 and 1644 that would increase communications and  
2 cooperation between Arizona’s law enforcement officers and the federal  
3 government regarding individuals’ immigration status;

4 c. publicly stated that, if A.R.S. § 11-1051(B) is not enjoined, ICE may  
5 choose not to respond to inquiries from Arizona regarding individuals’ immigration  
6 status despite ICE’s statutory obligation to do so under 8 U.S.C. § 1373(c);

7 d. failed and refused to take any action against the numerous  
8 jurisdictions that have adopted Sanctuary Policies in violation of 8 U.S.C. §§ 1373  
9 and 1644;

10 e. taken the position that enforcement of certain provisions of the  
11 federal immigration laws are not among its priorities and that they will not enforce  
12 them;

13 f. acted so contrary to their statutory responsibilities as to cause over  
14 7,000 ICE officers and employees to issue a vote of “no confidence” in ICE  
15 Director John Morton and Assistant Director Phyllis Coven; and

16 g. begun considering numerous significant changes to the ways in  
17 which the immigrations laws are interpreted and enforced to “result in meaningful  
18 immigration reform absent legislative action” and to result in a “non-legislative  
19 version of ‘amnesty’” to “hundreds of thousands” of persons who are currently  
20 unlawfully present in the United States.

21 182. By refusing to enforce certain provisions of the federal immigration laws  
22 Counterclaimants have threatened national security and imposed a tremendous burden on  
23 Arizona that substantially exceeds the burden imposed on other states.

24 183. The Secretary and Attorney General are not authorized to enforce only the  
25 immigration laws of which they approve or to ignore statutory standards in carrying out  
26 their regulatory functions and obligations.

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184. Accordingly, Counterclaimants request:

a. an order requiring DHS to respond to inquiries made by Arizona’s law enforcement personnel or agencies seeking to verify or ascertain the citizenship or immigration status of any individual under the jurisdiction of the law enforcement agency;

b. an order requiring DHS to allocate the resources, if any, that are necessary to ensure that DHS responds to such inquiries in a reasonable manner and time;

c. declaratory and injunctive relief in the nature of mandamus, ordering the United States Defendants to comply with their stated rules and highest priorities on matters where Congressional statutes have also mandated such actions. Specifically, the Counterdefendants should be compelled to detain and remove illegal aliens in Arizona and in Arizona’s jails "who pose a danger to national security or a risk to public safety," including those illegal aliens convicted of violent crimes, who have participated in organized crime, or are repeat offenders; and

d. that this Court retain jurisdiction of this action to ensure compliance with this Court’s orders and grant such other relief as this Court deems equitable, just, and proper.

**COUNT IV**  
***Declaratory Relief Regarding SCAAP Reimbursement Obligations***  
**(All Counterdefendants)**

185. Counterclaimants incorporate all the paragraphs above in this Counterclaim as if fully stated herein.

186. This count raises an actual controversy within the meaning of Article III, Section 2 of the Constitution and is a matter of federal law and importance.

187. 8 U.S.C. § 1231(i) requires that, upon request by a governor, the Attorney



1 General shall either incarcerate undocumented criminal aliens in a federal facility or enter  
2 into a contractual agreement with the state to provide compensation to the state in an  
3 amount equal to “the average cost of incarceration of a prisoner in the relevant State.”

4 188. The Attorney General’s and Secretary’s duties under 8 U.S.C. § 1231(i) are  
5 ministerial.

6 189. Governor Brewer and former Governor Napolitano have requested relief  
7 under 8 U.S.C. § 1231(i).

8 190. The Attorney General has not entered into a contractual arrangement with  
9 Arizona as SCAAP requires and has typically offered to compensate Arizona for only 7-  
10 15% of the cost of incarceration for the many qualifying undocumented criminal aliens  
11 that Arizona incarcerates.

12 191. Of the criminal aliens that Arizona is incarcerating, thousands are subject to  
13 mandatory deportation.

14 192. As a result of the Attorney General and Secretary’s failure and refusal to  
15 comply with their statutory obligations, Counterclaimants request:

16 a. a declaration interpreting 8 U.S.C. § 1231(i) and determining the  
17 DOJ and/or the Attorney General’s reimbursement obligations, including the  
18 requirement that the Attorney General enter into a “contractual arrangement” with  
19 Arizona and his obligation to “give priority to the Federal incarceration of  
20 undocumented criminal aliens who have committed aggravated felonies” under 8  
21 U.S.C. § 1231(i)(4);

22 b. a declaration interpreting 8 U.S.C. § 1231(i) and determining whether  
23 Arizona has the right, without prejudice, to reject future SCAAP allocations if the  
24 allocation is not reasonably calculated to compensate Arizona for the actual average  
25 costs incurred in the incarceration of criminal aliens in Arizona;

26 c. a declaration that the DOJ and/or the Attorney General’s calculation

1 method of using “officer salaries” violates federal law because it does not equal the  
2 “cost of incarceration”;

3 d. a declaration that “the Attorney General has failed to give priority to  
4 the federal incarceration of undocumented criminal aliens who have committed  
5 aggravated felonies” as required by 8 U.S.C. § 1231(i)(4);

6 e. a declaration interpreting 8 U.S.C. § 1231(i) and determining  
7 whether:

8 (1) the cost of federal incarceration is subject to the appropriations  
9 in the section;

10 (2) if so, is the cost of federal incarceration subject to the actual  
11 amount funded or the “amount approved for appropriation”, and

12 (3) if so, whether the cost of federal incarceration under 8 U.S.C.  
13 § 1231(i)(2) is subject to the same calculation method (*e.g.*, the DOJ’s  
14 proposed method of using only the cost of officer salaries) for calculating  
15 “cost of incarceration” payments as in 8 U.S.C. § 1231(i)(1).

16 f. a declaration regarding the statutory responsibilities of the DOJ  
17 and/or the Attorney General under ICE’s newly stated top priorities for  
18 undocumented illegal aliens with “aggravated felony” convictions and SCAAP’s  
19 requirement that “the Attorney General shall give priority to the Federal  
20 incarceration of undocumented criminal aliens who have committed aggravated  
21 felonies” under 8 U.S.C. § 1231(i)(4)(A), including whether the DOJ and/or  
22 Attorney General must:

23 (1) pay the actual cost of incarceration of “aggravated felons”;

24 (2) take aggravated felons into federal incarceration; and/or

25 (3) initiate expedited mandatory deportation proceedings for those  
26 criminals in Arizona jails who meet ICE’s new top priority.



1 furtherance of express congressional objectives and mandates (such as Congress'  
2 objectives in enacting 8 U.S.C. §§ 1304, 1306, 1373, and 1644).

3       200. Upon information and belief, the federal government has not taken any  
4 similar types of action against other states or political subdivisions or agencies that have  
5 enacted or implemented laws or policies designed to further these same congressional  
6 objectives and mandates.

7       201. Moreover, upon information and belief, the federal government has not  
8 taken any similar types of action against numerous state political subdivisions or agencies  
9 that have implemented policies, including Sanctuary Policies, that expressly conflict  
10 with—are even expressly intended to conflict with—these same congressional objectives  
11 and mandates.

12       202. The federal government's actions, in combination with Arizona's  
13 preexisting constitutional duties under the Fourteenth Amendment, compel Arizona to  
14 accommodate and provide education, medical care, and other benefits to illegal aliens  
15 within its borders.

16       203. While control of the border is a federal responsibility, when illegal aliens  
17 cross the border and commit crimes in Arizona, they become Arizona's responsibility.

18       204. The federal government is failing to fulfill its responsibility and attempting  
19 to use "preemption" to prevent Arizona from fulfilling its responsibility, which is a  
20 violation of the Tenth Amendment.

21       205. Congress, the President, Counterdefendants, and various other agencies and  
22 departments of the federal government have all recognized fundamental flaws in the  
23 enforcement of the federal immigration laws and the need for action.

24       206. The President has acknowledged the fundamental and significant failures  
25 inherent in the current federal immigration enforcement system and the political process  
26 that is supposed to be in place to address and correct these failures.

1           207. Although recognizing the fundamental flaws in the enforcement and  
2 administration of federal immigration laws, the federal government has nevertheless failed  
3 and refused to take action that is reasonable and necessary to address the fundamental  
4 defects in the enforcement of the federal immigration laws.

5           208. The federal government is failing and refusing to enforce the federal  
6 immigration laws in Arizona in the manner Congress deemed to be in the best interests of  
7 the nation and the individual states.

8           209. The federal government's actions and policies have caused an influx of  
9 illegal aliens and criminal illegal aliens into Arizona that is in substantial disproportion to  
10 other states.

11           210. The immigration policies of the federal government, have caused and  
12 continue to cause substantial and unique harm to Arizona and its citizens as set forth in  
13 this Counterclaim, in addition to numerous other problems and issues that are well  
14 documented and undisputed.

15           211. Extraordinary defects in the national political process have essentially  
16 created a vacuum in which the objectives and mandates of the federal immigration laws  
17 are not being or cannot be achieved, at least with respect to their disproportionate and  
18 staggering impacts within and to Arizona.

19           212. At the same time, and notwithstanding these admitted extraordinary defects  
20 in the national political process that render the federal government unable to address  
21 illegal immigration issues of significant concern to Arizona effectively, the federal  
22 government is prohibiting Arizona from taking action to protect the health, safety, and  
23 welfare of its citizens in a manner that furthers Congress' objectives based, in whole or in  
24 part, on the mere existence of laws and regulations that the federal government concedes  
25 are not being enforced or effectively enforced.

26           213. By adopting policies and taking actions that impede the enforcement of the

1 federal immigration laws and the achievement of express congressional objectives and  
2 mandates in a way that causes substantial and unique harm to Arizona, Counterdefendants  
3 have singled Arizona out in a way that leaves it politically isolated and powerless to  
4 protect itself and its citizens from the harm associated with rampant illegal immigration as  
5 contemplated by *South Carolina v. Baker*, 485 U.S. 505 (1985).

6 214. The Executive Branch is now considering taking action and, upon  
7 information and belief, is proceeding in a manner designed to achieve “meaningful  
8 immigration reform absent legislative action” (*i.e.*, without input and direction from the  
9 Legislative Branch), which would deprive and is depriving Arizona of the right to  
10 participate in the national political process in the manner required by the Constitution.

11 215. The national political process regarding border security and enforcement of  
12 immigration laws is operating in a defective manner, at least with respect to Arizona and  
13 its citizens who are left to suffer the most direct and significant brunt of the “broken  
14 system.”

15 216. The federal government’s actions and refusals to take action impair  
16 Arizona’s integrity as a sovereign entity and impact Arizona’s ability to function  
17 effectively in the federal system.

18 217. Accordingly, Counterclaimants request a declaration that federal  
19 immigration laws and regulations are invalid under the Tenth Amendment to the extent  
20 their mere existence as laws or regulations, without more (such as evidence of their actual  
21 enforcement or actual implementation), may be used by the federal government to  
22 prohibit Arizona from taking otherwise valid actions to protect the State and its citizens  
23 from the harms associated with illegal immigration that are consistent with these same  
24 laws and regulations.

25 218. Counterclaimants request that this Court retain jurisdiction of this action to  
26 ensure compliance with this Court’s orders and grant such other relief as this Court deems

1 equitable, just, and proper.

2 DATED this 10<sup>th</sup> day of February, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 10<sup>th</sup> , 2011, 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 CM/ECF registrants on record, including:

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