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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

The United States of America,

Plaintiff,

v.

The State of Arizona, et al.,

Defendants.

The State of Arizona, et al.,

Counterclaimants,

v.

The United States of America, et al.

Counterdefendants.

No. 2:10-cv-01413-SRB

COUNTERCLAIMANTS' RESPONSE TO THE MOTION TO DISMISS COUNTERCLAIMS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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Defendants/Counterclaimants, the State of Arizona and Governor Janice K. Brewer (hereinafter collectively "Arizona"), hereby submit this Response to the Counterdefendants' Motion to Dismiss the Counterclaims (hereinafter "Motion").

INTRODUCTION

Arizona passed S.B. 1070 to protect its citizens from the harms associated with unchecked illegal immigration. Rather than welcome Arizona's assistance in this immigration battle,[1] the United States sued to enjoin S.B. 1070, arguing that certain of its provisions were preempted by federal immigration law and, more particularly, by the Executive Branch's current policies of inaction and non-enforcement, which underlie an effort to attain "immigration reform without legislative action." Arizona filed its Counterclaims against the United States, Secretary Napolitano, and Attorney General Holder (hereinafter collectively the "Government"), which seek injunctive, declaratory, and mandamus relief.

The Counterclaims are necessary to help relieve Arizona from the overwhelming burden imposed upon it by its illegal immigration crisis and the Government's inaction and non-enforcement. Through the Counterclaims, Arizona seeks redress for:

- Failure to obtain control of the border and failure to protect Arizona (Counts I and II);
- Refusal by the Government to enforce immigration laws (Counts III and V);
- Failure by the Government to comply with the State Criminal Alien Assistance Program, 8 U.S.C. § 1231 (2006 amendment) ("SCAAP") and to properly reimburse Arizona for the expense of incarcerating criminal aliens (Count IV).

[1] In the words of Judge Learned Hand, "it would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow." *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928).

As more fully explained in the following Memorandum, the Government's motion should be denied because Arizona has standing and asserts justiciable claims that are not precluded for which relief should be granted.

LEGAL STANDARD

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for the dismissal of claims for "lack of subject-matter jurisdiction." Challenges to subject matter jurisdiction can be "facial" or "factual." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Here, because the Government asserts a facial Rule 12(b)(1) challenge, the Court must presume Arizona's factual allegations are true and draw all reasonable inferences in Arizona's favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a pleading that fails "to state a claim upon which relief can be granted." An adequately stated legal claim may be supported by showing any set of facts consistent with the allegations in the claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). A Rule 12(b)(6) motion to dismiss must be denied if, taking all factual allegations in the complaint as true and making all reasonable inferences in the plaintiff's favor, the complaint states a plausible claim for legal relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). If a complaint is dismissed, "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (citations omitted).

ARGUMENT

I. Arizona Has Standing to Assert the Counterclaims[2]

The Government's deliberate failure to secure the Arizona border and comply with Congressional mandates to coordinate enforcement efforts with the various states has directly increased the flow of illegal aliens into the State. As a result, Arizona has been forced to divert significant resources from its domestic concerns to battle what is a federal responsibility—illegal immigration. Additionally, Arizona holds all state land in trust for certain beneficiaries, primarily the state education system, and the rampant illegal immigration across the border has harmed the environment and diminished the value of these trust lands. Relief granted by this Court will require the Government to increase its efforts to address illegal immigration, thereby reducing the damage to Arizona's trust lands and the costs Arizona incurs to combat illegal immigration.

To establish standing, a claimant must demonstrate "that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress the injury." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). At the pleading stage, a claimant may satisfy this burden by alleging general facts that, if proven, would establish the court's jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.' " *EPA*, 549 U.S. at 517. This question must be answered in the affirmative because, as a sovereign state, Arizona is owed particular deference in this analysis, and Arizona has adequately alleged all of the elements of standing.

[2] The Government specifically argues that Arizona lacks standing to raise Counts II, III, and V of the Counterclaims. It also appears to suggest that Arizona lacks standing to raise Count I. *See* Mot. at 18 n.9.

A. Arizona Is Owed Special Solicitude in Standing Analysis as a Quasi-Sovereign

The Supreme Court has recognized that "States are not normal litigants for the purpose of invoking federal jurisdiction." *EPA*, 549 U.S. at 518. As a quasi-sovereign in the federal system, Arizona has "an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Id.* at 517 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)). Arizona also has a quasi-sovereign interest in "the health and well-being of its residents." *Oregon v. Legal Servs. Corp*, 552 F.3d 965, 971 (9th Cir. 2009). Injury to Arizona's quasi-sovereign interest constitutes a sufficiently concrete injury to satisfy Article III, and is especially compelling where, as here, it is combined with injury as a landowner. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 338 (2d Cir. 2009). In *Massachusetts v. EPA*, the Supreme Court recognized that the state suffered injury to its quasi-sovereign interest and its direct interest as a landowner because the federal government's refusal to exercise regulatory power to incrementally reduce greenhouse gases created a risk of actual and imminent harm arising from the effect of climate change on the state's environment. 549 U.S. at 521. Similarly, Arizona is suffering injury to its quasi-sovereign interest and direct injury to its proprietary and financial interests because the Government refuses to take meaningful action to secure the border and check the tide of illegal immigration into the state. Arizona is therefore entitled to "special solicitude" in the standing analysis. *Id.* at 520.

B. Arizona Has Established Injury-in-Fact

The unchecked flood of illegal aliens into Arizona as a result of the Government's policy of non-enforcement has caused Article III injury by forcing the diversion of state resources to address this federal responsibility, placing Arizona residents at greater risk from criminal aliens, and diminishing the value of Arizona trust land. The Government's failure to secure Arizona's border with Mexico and its continuing policy of inaction has caused more than 40% of all illegal border crossings

nationwide to come through Arizona. Countercl. ¶ 2. These illegal entrants are often criminals fleeing the law in other countries or expanding criminal operations (such as drug smuggling, human smuggling, and murder) into Arizona, exposing residents of the state to increased danger and fear. *Id*. ¶¶ 40, 43. Indeed, the Government placed signs only 30 miles south of Phoenix, Arizona (80 miles north of the border with Mexico), warning residents to beware of criminal activity by illegal aliens. *Id*. ¶ 7.

Arizona has also spent substantial sums of money incarcerating criminal aliens who have entered the country illegally. As of December 31, 2010, Arizona was housing over 5,700 criminal aliens in its prisons (more than 14% of its prison population), in addition to the criminal aliens held by local authorities. Countercl. ¶¶ 121, 122, 125. The Government's refusal to take these criminal aliens into federal custody or fully reimburse Arizona for housing the criminal aliens in accordance with 8 U.S.C. § 1231(i) causes further injury and exacerbates the impact of illegal immigration on the state's financial health. Countercl. ¶¶ 139-146. The failure to secure the border and enforce laws has drastically redefined Arizona's political climate driving public discourse, policy decisions, and resources toward addressing matters of federal responsibility and away from policy concerns important to lawful Arizona citizens**.** This injury to Arizona's quasi-sovereign interest in securing the health and safety of its residents, together with the diversion of state resources to remedy the injury, provide sufficient injury in fact to establish Arizona's standing in this case. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding diversion of resources to remedy defendant's conduct to be injury in fact).

Arizona also establishes injury in fact based on the damage to state trust land caused by the wave of illegal immigration flowing across its border. Arizona holds all state land in trust for designated beneficiaries. Ariz. Const. art. X, § 1. The State Land Department manages and administers state trust lands with the goal of protecting the properties and maximizing their value to the trust. A.R.S. §§ 37-102(A), 37-201(A)(3). "The Department, through the Commissioner, has the same fiduciary obligations as does

any private trustee: it must manage state trust lands for the benefit of the trust and its beneficiaries." *Koepnick v. Ariz. State Land Dep't*, 212 P.3d 62, 69 (Ariz. Ct. App. 2009). As a fiduciary, state law requires the Department to take actions necessary "to protect the interest of the state in lands within the state." A.R.S. § 37-102(C).

As a result of unchecked illegal immigration, the value of Arizona trust lands has diminished. Countercl. ¶ 138. In FY 2008, the Bureau of Land Management collected over 468,000 pounds of trash from the Arizona border area. *Id*. ¶ 132. The passage of illegal aliens and criminal aliens threaten native wildlife on the trust lands and citizens seeking to engage in outdoor activities such as hiking and camping. *Id*. ¶ 133. Some of Arizona's state trust lands are located along the border or lie within the Government's "defense in depth" area, and are well within the 80 mile zone where the Government posted signs warning citizens to stay off public lands. *Id*. ¶ 131. Taken together, these conditions lower the value of the trust land both for recreational use by residents and for commercial development in the best interest of the trust. Thus, Arizona has established that it is suffering an actual injury in fact that is concrete and particularized.

C. Arizona's Injuries Are Fairly Traceable to the Government's Conduct

The Government's failure to secure the border and its policy of non-enforcement have significantly contributed to the wave of illegal immigration that is injuring Arizona. The Government argues that this injury results from the "independent action of some third party not before the court" and thus does not satisfy the requirements for Article III standing. Mot. at 14. The Supreme Court, however, disposed of a similar argument when it concluded that the EPA's failure to enact rules regulating greenhouse gas emissions contributed to the state's injury, even though the EPA didn't release the greenhouse gases and its regulation would be a small step in checking the international release of such gases. *EPA*, 549 U.S. at 523-24 ("EPA does not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming. At a minimum, therefore, EPA's *refusal to regulate* such emissions 'contributes' to

Massachusetts' injuries.") (emphasis added). The causation prong of the standing analysis, especially at the pleading phase, "is not equivalent to a requirement of tort causation." *Am. Elec. Power Co.*, 582 F.3d at 346; *see also Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006) (explaining that "for purposes of satisfying Article III's causation requirement, we are concerned with something less than the concept of proximate cause" and that "even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes").

The Government's inaction in Arizona and its failure to obtain control of the border as Congress has required (Countercl. ¶¶ 88-91) significantly contribute to the exponential increase of illegal immigration into Arizona. Just as the EPA's reticence to regulate greenhouse gases was found to contribute to Massachusetts' environmental injuries, so too does the Government's reticence to protect the border contribute to Arizona's injuries by allowing the growing flood of illegal immigration to spill into the state. *See EPA*, 549 U.S. at 524. Furthermore, the Government has undermined Arizona's own efforts to address these harms by bringing legal action to enjoin S.B. 1070. For these reasons, Arizona's injuries arising from illegal immigration can fairly be traced to the Government's conduct.

D. Arizona's Injuries Are Redressable

Arizona's injuries are capable of being redressed by (1) requiring the Government to reimburse Arizona for the expense of incarcerating criminal aliens as expressly required by 8 U.S.C. §§ 1231(i) and (ii), and (2) requiring the Government to implement immigration enforcement policies and complete construction of the border fence as mandated by Congress.

A favorable decision in this case would require the Government to undertake effective enforcement activity along the border and would inevitably reduce the flow of illegal immigration into Arizona. Although the border fence and increased enforcement may not completely eliminate illegal immigration, the reduction would provide a

significant step toward reducing the damage to Arizona trust land, relieve residents from danger and fear, and replenish at least some of the resources diverted to compensate for the Government's inaction. This is sufficient to establish the redressability requirement of the standing analysis. *EPA*, 549 U.S. at 526 (noting that "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere"); *see also Am. Elec. Power Co.*, 582 F.3d at 347 ("A party need only demonstrate that it would receive 'at least some' relief to establish redressability."). And, just as the Supreme Court attached "considerable significance" to the EPA's agreement with the President to address the issue of climate change, this Court should give similar weight to the Congressional goal of drastically reducing illegal immigration that is manifested in federal statutes such as the Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006) (the "Secure Fence Act") and SCAAP. Thus, Arizona has established standing to assert its Counterclaims.

II. Arizona's Claims Are Not Barred by Collateral Estoppel

The Government argues that Counts II, III, and V of Arizona's Counterclaims are barred by collateral estoppel. However, changes to the legal and factual underpinnings of the mid-1990s litigation render collateral estoppel inapplicable. In addition, this case involves constitutional claims falling within the *Moser* exception to the doctrine of collateral estoppel.

In 1994, Arizona filed suit against the Government seeking a judicial resolution of what was then a much different and less severe illegal alien crisis. The Government successfully resisted that suit on the basis that the issue was not one for the courts to decide but one that had to be resolved in the political arena. *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997), *cert. denied*, 522 U.S. 806 (1997). Since Arizona filed its complaint in 1994, however, Congress has enacted various laws designed to address these problems, but the Government has failed to enforce them, which has only increased the severity of the illegal immigration problems, including significant drug

and human smuggling activities. *See, e.g.,* Countercl. ¶¶35-43, 110-138. In effect, the Government has precluded the possibility of a political resolution through fourteen years of inaction, thus opening the constitutional door for Arizona to take action to solve its problems.

Frustrated by the Government's inaction on resolving the increasingly severe illegal alien crisis, Arizona enacted S.B. 1070. In response, the Government initiated this litigation, which allowed Arizona to seek the redress set forth in its Counterclaims. Despite having hailed Arizona into court over this very same crisis, and without abandoning its attack on Arizona's duly-enacted legislation, the Government now seeks to simultaneously hide behind the "political question" doctrine.

A. Changed Facts and Circumstances Prevent Collateral Estoppel

Collateral estoppel extends only to contexts in which "the controlling facts and applicable legal rules remain unchanged." *Comm'r v. Sunnen*, 333 U.S. 591, 600 (1948). The Supreme Court has observed that "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana v. United States*, 440 U.S. 147, 158 (1979). The Ninth Circuit has recognized a three-inquiry test for applying collateral estoppel: "(1) whether the issues presented are in substance the same in the present and prior litigation; (2) whether controlling facts or legal principles have changed significantly since the prior judgment; and (3) whether 'other special circumstances warrant an exception to the normal rules of preclusion.' " *Richey v. IRS,* 9 F.3d 1407, 1410 (9th Cir. 1993) (quoting *Montana*, 440 U.S. at 155).

Here, controlling facts and legal principles have sufficiently changed since *Arizona v. United States* was decided. Illegal immigration has exponentially increased since the mid-1990s, with a corresponding increase in its impact on Arizona. *See generally* Countercl. ¶¶ 110-138. In 2006, the House Committee on Homeland Security concluded that immediate action was required to enhance security on the Southwest

border. *Id*. ¶¶ 39-43. Congress has passed significant legislation intended to secure the Southwestern border and to encourage cooperation between federal immigration officials and state law enforcement, including some of the statutes under which Arizona's Counterclaims arise. *Id*. ¶¶ 50-57, 58-63. Importantly, Counts I and IV of the Counterclaim are based on statutes enacted after *Arizona v. United States* was filed and obviously were not a basis for Arizona's claims in that case. Count I is based on statutes enacted in 2006 and 2008. Count IV seeks a declaration of the Government's obligations under SCAAP's 2006 amendments. The "factual stasis" required for collateral estoppel simply is not present here. *Montana*, 440 U.S. at 158. Accordingly, Arizona's Counterclaims are not "in substance the same" as the legal claims raised in *Arizona v. United States*, and the Government's motion must be denied.

B. Arizona's Constitutional Questions Should Be Resolved on Their Merits

In this matter, "other special circumstances warrant an exception to the normal rules of preclusion." *Montana*, 440 U.S. at 155. The Court should not dismiss Arizona's Counterclaims to resolve this matter through "a political determination" where, as here, the Government has expressly adopted a policy to achieve amnesty through inaction. Countercl. ¶¶ 102, 214.

Another long-standing exception to collateral estoppel is the *Moser* exception: "Where . . . a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases." *Moser v. United States*, 266 U.S. 236, 242 (1924). The Supreme Court expressed concern with the constitutional stasis imposed by preclusion in *Montana*:

> Of possible relevance is the exception which obtains for 'unmixed questions of law' in successive actions involving substantially unrelated claims. . . . This exception is of particular importance in constitutional adjudication. Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical.

440 U.S. at 162-163 (citing *Moser*, 266 U.S. at 242). Thus, collateral estoppel does not preclude the Counterclaims.[3]

III. The Government's Arguments for Dismissal of the Individual Counts of the Counterclaims Are Unavailing

The Government's arguments that each of the Counterclaims' five Counts must be dismissed under Fed. R. Civ. P. 12(b)(6) are unpersuasive.

A. Count I Is Reviewable under the Administrative Procedure Act

The Government asserts that Count I must be dismissed as unreviewable because the claims "improperly seek to compel agency action which is either not required or is committed to the sole discretion and expertise of the agency." However, Count I asserts that the Government (1) has not taken all necessary and appropriate actions to achieve and maintain "operational control," (2) failed to construct 700 miles of border fencing, and (3) failed to comply with explicit timeframes. Countercl. ¶¶ 152, 154. These are claims of required agency action "unlawfully withheld or unreasonably delayed," which are reviewable under 5 U.S.C. § 706(1). Count I also raises claims that agency actions have been taken which are, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A). Countercl. ¶¶ 155-156. Both aspects of Count I are reviewable by this Court under the Administrative Procedure Act (the "APA").

1. Review of Count I Is Not Barred by Commitment to Agency Discretion

The Government asserts that Count I is unreviewable because it challenges a determination that is committed to agency discretion by law. However, courts

[3] The Government relegates to a footnote its argument that Counts II, III and V of the Counterclaim also are barred by res judicata because the issues could have been raised in *Arizona v. United States*. Mot. at 6 n.2. For the reasons previously discussed, the Government is incorrect in its argument that the distinct claims and issues raised by Arizona in Counts II, III and V are barred by res judicata.

frequently review the discretionary acts of agencies for "abuse of discretion," and that phrase within the APA would be meaningless if discretionary acts were entirely insulated from review. Accordingly, "[t]he Supreme Court has held that this provision applies only where 'the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.' " *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Rather, "[e]ven where statutory language grants an agency 'unfettered discretion,' [the agency's] decision may nonetheless be reviewed if regulations or agency practice provide a 'meaningful standard' by which th[e] court may review its exercise of discretion." *Id*. (citation omitted). In its argument, the Government conflates discretion as to the means of carrying out certain acts with the discretion to not carry out those acts at all.

The Government also incorrectly argues that review is precluded because "Congress has allocated a lump sum appropriation for 'customs and border protection fencing, infrastructure, and technology.' " Mot. at 24. The Government relies upon *Lincoln v. Vigil*, where the Supreme Court held that APA review is unavailable where "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds." 508 U.S. 182, 192 (1993). This reliance is misplaced because the funding allocated to "Customs and Border Protection Fencing, Infrastructure, and Technology" is not a lump-sum appropriation of the type described in *Lincoln*. *Lincoln* involved a legal challenge to the cancellation of a pilot program for handicapped Indian children where "the appropriations Acts for the relevant period do not so much as mention the Program, and both the Snyder Act and the Improvement Act likewise speak about Indian health only in general terms." *Id*. at 193-194. By contrast, the very statutory requirements challenged in Count I were specifically created by the Appropriations Act of 2008, Pub. L. No. 110-261, Stat. 2090-91 (Dec. 26, 2007) (the "2008 Appropriations Act"). Countercl. ¶¶ 50-56. The 2008 Appropriations Act "authorized the appropriation of all sums necessary to carry out this requirement,

and provided that such funds were to remain available until expended." Countercl. ¶ 56. Similarly, the Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83 (Oct. 28, 2009) (the "2010 Appropriations Act") provides funding of $800,000,000 specifically for "a program to establish and maintain a security barrier along the borders of the United States, of fencing and vehicle barriers where practicable, and of other forms of tactical infrastructure and technology." The Act then specifies that the security barrier program must include eleven specific elements regarding reporting, accounting, and planning. *Id*. Finally, the Act provides withholds specific funding if DHS fails to comply with a requirement of 8 U.S.C. § 1103 note (where the Secure Fence Act and 2008 Appropriations Act are codified). DHS has received and mismanaged these specific appropriations. For example, DHS received over $800 million in specific appropriations for SBI*net* that the Secretary unilaterally froze after numerous reports of DHS' mismanagement of the appropriations. Countercl. ¶¶ 85-87. Here, Congress has clearly "circumscribe[d] agency discretion to allocate resources by putting restrictions in the operative statutes," *Lincoln*, 505 U.S. at 193, permitting judicial review of Count I.

2. Agency Action Is Required under § 706(1) and Can Be Ordered by this Court

The Government argues that courts can only review agency inaction if a statute requires discrete acts, relying upon *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (hereafter *SUWA*). The Government mischaracterizes *SUWA*'s impact on this case. The Secure Fence Act, the Appropriations Act of 2008, and the Appropriations Act of 2010 set forth discrete, required actions for DHS. Countercl. ¶¶ 50-57. Because these actions have been unlawfully withheld or unreasonably delayed, this Court has the authority to grant the relief that Arizona seeks.

a. The Congressional Acts at Issue Require Discrete Actions

The 2008 Appropriations Act requires the Secretary to construct at least 700

miles of reinforced fencing along the Southwest border. Countercl. ¶ 55. The Act further requires the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the Southwest border. *Id.* The 2010 Appropriations Act requires DHS to create a plan "for a program to establish and maintain a security barrier along the borders of the United States, of fencing and vehicle barriers where practicable . . ." again with an eye towards "obtaining operational control of the entire border of the United States." These are discrete actions that the Government is required to perform under Congressional acts.

b. Compliance with the Secure Fence Act and Other Congressional Acts Has Been Unlawfully Withheld and/or Unreasonably Delayed

The APA demands that a reviewing court "*shall* . . . compel action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (emphasis added). The Supreme Court has made it clear that when a statute uses the word "shall," Congress has imposed a mandatory duty upon the subject of the command. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989).

The Tenth Circuit has explained the distinction between actions "unreasonably delayed" and "unlawfully withheld" under § 706(1):

> [W]hen an agency is required to act – either by organic statute or by the APA – within an expeditious, prompt, or reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable. However, when Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld.

Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1998).

Here, Congress has given the Government clear deadlines for the construction of fencing and the achievement of operational control. Within eighteen months of the Secure Fence Act's passage, the Secretary of Homeland Security was required to: (1) take all actions necessary and appropriate to achieve and maintain operational control of the border; and (2) install physical infrastructure enhancements to facilitate access to the

border by CBP. *See* Secure Fence Act, § 2(a). These deadlines have passed; action is now "unlawfully withheld" and this Court must order the Government to take action.

c. This Court Can Order DHS to Take Action within Its Discretion

"[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *SUWA*, 542 U.S. at 65. Arizona seeks, *inter alia*, that this Court order DHS to take action to achieve operational control over the border and to complete 700 miles of fencing.

This remedy – an order to take action, without specific directions on how to act – is in keeping with the history of mandamus, the predecessor to APA review that the Supreme Court acknowledged in *SUWA*. *See id*. at 63. The Supreme Court has awarded precisely this sort of relief. *See, e.g.*, *ICC v. U.S. ex rel. Humboldt Steamship Co.*, 224 U.S. 474, 484-85 (1912) (holding that mandamus "may be issued to direct the performance of a ministerial act, but not to control discretion" and ordering the ICC "to take jurisdiction, [but] not in what manner to exercise it"); *U.S. ex rel. Dunlap v. Black*, 128 U.S. 40, 48 (1888) (explaining that mandamus may be issued when an executive officer refuses to act, even when those actions involve the exercise of discretion).[4]

Arizona does not merely seek compliance with "a broad statutory objective." Rather, Arizona seeks a declaration that the Secretary must build 700 miles of fencing and take action to achieve "operational control" of the area, which is clearly defined in objective terms by the Secure Fence Act and provides a judicially manageable standard for compliance. Both of these actions have adequate "specificity" to support relief from this Court.

[4] Further support for the availability of this type of relief is found in the 1947 Attorney General's Manual on the APA, which the *SUWA* Court cites with approval. *SUWA*, 542 U.S. at 63-64 (noting the Manual as "a document whose reasoning we have often found persuasive"). The Manual states that "a court may require an agency to take action upon a matter, without directing how it shall act." U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947).

3. DHS Has Taken Actions That Are Reviewable under § 706(2)

Count I further alleges that the Government has taken agency actions in violation of 5 U.S.C. § 706(2), which provides as follows:

> The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . .

The Counterclaim enumerates numerous specific actions taken by DHS and by the Secretary of Homeland Security which are arbitrary, capricious, an abuse of discretion, contrary to law, and short of statutory right in violation of § 706(2). *See* Countercl. ¶ 155. The Secretary of Homeland Security unilaterally froze funding of the SBI*net* program. *Id*. ¶ 86. DHS cancelled the SBI*net* program. *Id*. ¶ 87. DHS reduced the 700-mile requirement imposed by the 2008 Appropriations Act to a "target" of 661 miles. *Id*. ¶ 88. DHS has chosen to monitor "effective control" rather than "operational control" as mandated by the Secure Fence Act. *Id*. ¶ 89. DHS has not followed its own rules with respect to the Southwest border region. *Id*. ¶ 156. DHS has adopted a policy of "defense in depth" with respect to illegal entries that is not in keeping with Congressional intent of detecting and preventing illegal entries ***at*** the point of entry. *Id*. ¶ 131. Count I thus states claims which are reviewable under the APA, and for which relief can be granted under § 706(2).

4. Review is Available for Changes in Agency Policy or Regulations

The Supreme Court has held that modifications of long-standing agency policy or regulation are subject to scrutiny under the APA:

> A 'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.' Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42 (1983)

(citation omitted). This gives rise to a narrow review of whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including 'a rational connection between the facts found and the choice made.' " *Id*. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962)).

The Government has changed its settled behavior here. In 2007, the Government recognized a Congressional mandate to achieve operational control and the necessity of doing so. Countercl. ¶¶ 81-82. Secretary Napolitano reversed DHS' commitment to SBI*net* and cancelled the program. *Id*. ¶¶ 83-87. DHS abandoned the statutorily-mandated standard of "operational control" as the measure of border security, choosing instead to track a subjective determination of "effective control." *Id*. ¶ 89. For each of these changes in course, the Government must provide a reasoned analysis for review by this Court—which it has not done.

B. Count II Does Not Raise a Nonjusticiable Political Question

Since the late 19th century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime, 8 U.S.C. § 1325, and those who have entered unlawfully are subject to deportation, 8 U.S.C. §§ 1227, 1228. However, despite these legal restrictions, a substantial number of persons have succeeded in unlawfully entering and remaining in Arizona. *See* Countercl. ¶¶ 35, 98, 111-17. Arizona enacted S.B. 1070 in an effort to address the burden that illegal aliens impose on the State. By *inter alia* filing suit to enjoin S.B. 1070, the Government has waived any claim that the issue is nonjusticiable. Even without waiver, Count II of the Counterclaims satisfies the *Baker* formulations for justiciability. Accordingly, Arizona has stated a valid claim for relief under Article IV, § 4 of the Constitution.

1. Application of the Political Question Doctrine Would Be Unjust

Here, the Government desires its affirmative claims against Arizona to be justiciable but asserts that Arizona's claims are nonjusticiable. The Government

improperly attempts to use the political question issue as both a sword and a shield. These abuses of the political question doctrine, combined with fourteen years of inaction with respect to Arizona's concerns, constitute a waiver by the Government of any claim it may have had that these are political questions. "Thus, when the circumstances require, estoppel should be permitted even when the government conduct complained of was in the form of inaction or silence." David K. Thompson, Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 562 (1979) (citations omitted).

In addition, the Government made a conscious decision to leave the executive arena and enter the judicial arena and in doing so waived any separation of powers argument that it may have had. To allow it the benefit of both arenas would be to deny due process and fundamental fairness to Arizona. Equitable estoppel principles also prevent the Government from seeking dismissal of Arizona's Counterclaims, because the Government affirmatively sought judicial intervention and thereby consented to a judicial resolution of these issues.

2. Earlier Cases Interpreting the Invasion Clause Are Distinguishable

Despite the judicial deference given to the executive and legislative branches in connection with immigration matters, a "unique coalescing of factors" also makes this case sufficiently different from prior immigration cases[5] to warrant a more searching judicial scrutiny of Arizona's Counterclaims. *Fiallo v. Bell*, 430 U.S. 787, 793 (1977). Although several cases have held claims similar to those in the Counterclaims are nonjusticiable political questions, none of those cases involved a suit by the Government against the state.

3. Review of Count II Is Not Barred by *Baker v. Carr*

Arizona alleges in Count II of the Counterclaim that the Government has failed to

[5] *See, e.g.*, *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997), *cert. denied*, 522 U.S. 806 (1997); and *California v. United States*, 104 F.3d 1086 (9th Cir. 1997), *cert. denied*, 522 U.S. 806 (1997).

protect it from invasion and domestic violence. The Government asserts that Count II must be dismissed as a nonjusticiable political question because it runs afoul of the "formulations" recognized by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962). Mot. at 9-10. However, the political question doctrine does not allow courts to avoid deciding cases merely because they have "political overtones or questions they might categorize as 'political,' " and "[t]he decision that a question is nonjusticiable is not one courts should make lightly." *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1362 (Fed. Cir. 2004). Indeed, it is with increasing rarity that a case is dismissed on political question grounds. *See In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 65-69 (E.D.N.Y. 2005) (citing academic authority regarding the questionable utility of the doctrine and the scant case law applying the doctrine successfully since *Baker*). The Supreme Court did not even mention the doctrine in its historic decision of *Bush v. Gore*, 531 U.S. 98 (2000). This omission has led some to question the doctrine's continuing vitality. *See* Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 Notre Dame L. Rev. 1093 (2001); Lawrence Tribe, *EROG v. HSUB and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 Harv. L. Rev. 170, 276-87 (2001).

Arizona respectfully submits that a *Baker* determination is not necessary because the Government has waived any claim or is estopped from asserting that these issues are nonjusticiable political questions because it brought suit against Arizona. However, even under a *Baker* analysis, Arizona's Invasion Clause claims are justiciable.

a. Count II Satisfies the First *Baker* Formulation

The Government first argues that Count II runs afoul of the first *Baker* formulation: "a textually demonstrable commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. However, the Supreme Court has been hesitant to conclude that unlawful immigration is wholly committed to the federal government to the exclusion of judicial review. In *Plyler v. Doe*, the Court declared that:

> [A]lthough the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service. Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.

457 U.S. 202, 229 n.23 (1982) (citation omitted). Furthermore, Article IV, § 4 of the Constitution provides only that "the United States . . . shall protect . . . ." Thus, the constitutional requirement to protect the States is not specifically committed to the legislative, executive, or judicial branch. *Compare* U.S. Const. art. I, § 8 ("Congress shall have the power . . . to establish a uniform rule of naturalization . . ."); U.S. Const. art I, § 10 ("No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."). Unlike these other immigration- and invasion-related constitutional provisions, Article IV, § 4 does not specify commitment to a particular branch of the federal government.

b. Count II Satisfies the Second *Baker* Formulation

The Government also argues that Count II runs afoul of the second *Baker* formulation: "a lack of judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217. Arizona has addressed this factor by reference to specific quantifiable, discoverable, and manageable standards. *See, e.g.*, Countercl. ¶¶ 45-52, 153, 157. "Operational control" is the definition of adequate protection adopted by Congress in Section 2(a) of the Secure Fence Act. "Effective control" is the definition of adequate protection tracked by the Executive Branch. Either definition provides "a discoverable and manageable standard."

c. Count II Satisfies the Third *Baker* Formulation

The Government argues that Count II runs afoul of the third *Baker* formulation: "the impossibility of deciding without an initial policy determination of a kind clearly for

nonjudicial discretion." *Baker,* 369 U.S. at 217. Count II requires no such determination. Rather, the determinations requested of the Court are whether the Government has an obligation to protect Arizona and whether the Government has met that requirement by obtaining and maintaining control. Congress has provided any necessary initial policy determination of the Government's obligations through various findings, reports, and legislation. Countercl. ¶ 164. Even DHS concedes that it has only 40% of the Tucson sector of the Southwestern border under "effective control." Countercl. ¶ 91.

d. Count II Satisfies the Fourth *Baker* Formulation

Finally, the Government argues that Count II runs afoul of the fourth *Baker* formulation: "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government." *Baker*, 369 U.S. at 217. The constitutional obligation to protect Arizona is not solely entrusted to any particular branch of the federal government, *see supra* at 19. There is no lack of respect in the judiciary interpreting whether the Executive Branch has complied with constitutional and statutory mandates. In addition, the requested relief permits the Government to use its expertise and make ultimate decisions on how to discharge its obligations under Article IV, § 4. Thus, this requested relief gives the "respect due" to the Executive Branch.

4. The Government Has Failed to Protect Arizona

In *California,* 104 F.3d at 1091, the Ninth Circuit held that it could not determine that the U.S. had been invaded when the political branches had not made such a determination. Congress has, in effect, recognized that the Government has failed in its duties to protect Arizona, through findings, reports, and legislation, and recognized the credible threat that exists at the Arizona border. Countercl. ¶¶ 39-42, 164. Former Arizona Governor Janet Napolitano declared a state of emergency. *Id*. ¶ 8.

Moreover, a proper reading of the Invasion Clause does not require an "actual invasion," a phrase that appears in Article I, § 10 of the Constitution but not in Article IV, § 4. Nor does the actual language of the Article IV, § 4 require that the federal government shall protect the states only "after" an invasion and domestic violence have occurred. Rather, the Government's duty operates prospectively to safeguard the states against the credible and looming threats of invasion and domestic violence—threats currently posed by armed cartels, border bandits, and terrorists. Defining the Government's duty to protect the States in this fashion embraces the modern equivalent to a military invasion from a foreign political entity – direct armed conflict with criminal terrorist organizations. The situation on the Arizona border presents this modern threat of "invasion and domestic violence." U.S. Const. art. IV, § 4. Paramilitary bands, organized criminal enterprises, and individuals with ties to terrorist organizations threaten Arizona. Countercl. ¶ 170. Armed cartels and illegal aliens are present in Arizona, where they threaten law enforcement officers and have killed border patrol agents. *Id*. ¶ 129. These groups have been found by Congress to require "immediate action" to stem the possibility of "terrorist infiltration" and "represent[] a real threat to America's national security." *Id*. ¶ 39-41.

C. Count III Is Reviewable under the APA

The Government asserts that Arizona's claims fail because immigration enforcement is wholly committed to the discretion of the Executive Branch and non-enforcement decisions cannot be reviewed. The Government further asserts that Arizona cannot show the Government has abdicated its enforcement responsibilities. Both of these contentions are unpersuasive. Rather, Count III raises colorable claims for relief from injuries caused by the Government's adoption of a consistent policy not to enforce immigration laws.

1. Review of Count III Is Not Barred by Commitment to Agency Discretion

Courts review the discretionary acts of agencies for an "abuse of discretion." As set forth in Part III.A.1, *supra* at 11, discretionary acts are insulated from review "only where the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Spencer Enters.*, 345 F.3d at 688 (citation omitted).

The Government's argument that enforcement has been fully committed to agency discretion is particularly unpersuasive as to the deliberate non-enforcement of the federal immigration laws. The Government has repeatedly asserted that current Executive Branch policies, practices, and priorities operate to preempt S.B. 1070. Yet the Government also asserts that the same policies, practices, and priorities are discretionary actions insulated from any inquiry by the judiciary. The same Executive Branch decision cannot serve as both sword and shield.

2. Review Is Available for Changes in Agency Policy or Regulations

The Supreme Court has held that modifications of long-standing agency policy or regulation are subject to scrutiny under the APA:

> A 'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.' Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Motor Vehicle Mfrs. Ass'n, 463 U.S. at 41-42 (citation omitted). This gives rise to a narrow review of whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including 'a rational connection between the facts found and the choice made.' " *Id*. at 43 (quoting *Burlington*, 371 U.S. at 168).

This is precisely the case here. The Government has taken the position that Arizona's inquiries pursuant to 8 U.S.C. §§ 1373 and 1644 will not be honored, Countercl. ¶ 98, which is both inconsistent with the statutory mandate and DHS'

previously settled course of behavior. Moreover, the U.S. Citizenship and Immigration Services ("USCIS") seeks to implement a radical shift in immigration policy by enabling aliens to remain in the United States despite non-compliance with the Immigration and Naturalization Act. Countercl. ¶ 103. These and other, similar shifts in agency policy with respect to immigration priorities – shifts associated with the Executive Branch's efforts to achieve "meaningful immigration reform absent legislative action" (Countercl. ¶ 102) – are subject to judicial review.

3. Review Is Available for Patterns of Non-Enforcement of Clear Statutory Language

Agency non-action can be reviewed where "an agency engages in a pattern of nonenforcement of clear statutory language." *Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (Brennan, J., concurring). "A consistent failure to [take action] is a dereliction of duty reviewable in the courts." *Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973). 8 U.S.C. § 1227 provides for the deportation of certain aliens unlawfully present in the United States. This statute does not limit deportation to those aliens who have committed aggravated or violent criminal offenses. However, the Government has adopted a policy of amnesty for aliens who have not committed aggravated or violent offenses within the United States, and has otherwise refused to enforce the INA. Countercl. ¶¶ 34-35, 97. This constitutes "a pattern of nonenforcement of clear statutory language," *Chaney*, 470 U.S. at 839, for which judicial review of agency non-action is available.

4. The Government's Policies Are a Clear Abdication of Statutory Responsibilities

The Government does not deny that review of non-enforcement decisions is available under the Ninth Circuit's exception for cases where an agency has adopted a general policy so extreme as to abdicate its statutory responsibilities. However, the Government asserts that this exception "is plainly inapplicable here." Mot. at 17. The

Government further asserts that Arizona's Counterclaim does not specifically identify any policy of abdication. Mot. at 18. These assertions are incorrect.

Arizona's Counterclaims contain numerous examples of agency policies so extreme that they would qualify as the abdication of statutory responsibility by the Government, and these examples are presented exactly as such. The Counterclaims assert that the Government has "adopted policies with respect to enforcement of the federal immigration laws that are so extreme that they amount to an abdication of DHS' and the DOJ's statutory responsibilities." Countercl. ¶¶ 180. The Counterclaims then list *seven* specific allegations of the Government's actions constituting such abdication, including that the Government has abdicated its responsibility to deport illegal aliens who have not committed aggravated offenses; that the Government has abdicated its responsibility to provide information under 8 U.S.C. §§ 1373 and 1644; and that it has abdicated its responsibility to address sanctuary policies in violation of 8 U.S.C. §§ 1373 and 1644. *Id*. ¶ 181. Taking all seven of these allegations as true (as required by Fed. R. Civ. P. 12(b)), Arizona has stated a claim for which relief can be granted.

D. Count IV Is Reviewable under the APA and the Declaratory Judgment Act

The Government asserts that Count IV is unreviewable because the distribution of funds under SCAAP is entrusted to the Government's discretion and there are no judicially manageable standards to review the allocation. This is not correct. Furthermore, the Government misconstrues Count IV as being exclusively directed at review of agency actions under the APA. This also is not correct; Arizona has requested declaratory relief establishing the rights, duties, and obligations of Arizona and the Government under SCAAP, and the Court has the power to grant such relief.

1. Review of Count IV Is Not Barred by Commitment to Agency Discretion

The Government asserts that no portion of Count IV is reviewable because it challenges a determination that is committed to agency discretion by law. As set forth

in Part III.A.1, *supra* at 11, "[e]ven where statutory language grants an agency 'unfettered discretion,' [the agency's] decision may nonetheless be reviewed if regulations or agency practice provide a 'meaningful standard' by which th[e] court may review its exercise of discretion." *Spencer Enters.*, 345 F.3d at 688 (citation omitted). The Department of Justice itself provides such standards in documents such as the 2010 and 2011 SCAAP Guidelines.

2. Count IV Seeks Valid Relief under the Declaratory Judgment Act

Even if the Attorney General's distribution of funds under SCAAP were entirely insulated from judicial review, as the Government asserts, Arizona still has stated a claim. The Counterclaims do not merely seek injunctive relief for agency actions, they also seek declaratory judgment on the correct statutory interpretation of SCAAP.

28 U.S.C. § 2201(a) provides: "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Arizona seeks various declarations and determinations of rights by this Court with respect to 8 U.S.C. § 1231. Arizona seeks a determination as to meaning of the "enter into a contractual arrangement" provisions of 8 U.S.C. § 1231(i). Countercl. ¶ 192(a). Arizona seeks a declaration as to its right to reject SCAAP allocations. *Id.* ¶ 192(b). Arizona seeks clarification of the statutory duties of the Attorney General under 8 U.S.C. §1231(i)(4)(A), such as whether the Attorney General must pay the actual cost of incarceration, take aggravated felons into federal incarceration, or initiate expedited deportation proceedings. *Id.* ¶ 192(f). These examples are precisely the kind of declaration of "rights or other legal relations" envisioned by 28 U.S.C. § 2201(a). Because this is inarguably a "case of actual controversy" within the jurisdiction of the Court, Arizona has stated a claim for which relief can be granted in Count IV, and the Government's Motion must be denied.

E. Count V States a Valid Claim under the Tenth Amendment

In Count V, Arizona asks this Court to declare that the Tenth Amendment prohibits the Government from using unenforced federal immigration laws and regulations to prohibit Arizona from taking actions that are consistent with these federal laws and regulations to protect the State, its millions of acres of State Trust Lands, and its citizens from the harms associated with illegal immigration. The Tenth Amendment requires this Court to police the outer boundaries of federal power in order to maintain the Constitution's careful balance between the Government and Arizona. Arizona has raised a colorable Tenth Amendment claim under a historically accurate interpretation of the Tenth Amendment. The Government is simply incorrect that Arizona's injuries do not raise Tenth Amendment concerns.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment imposes "limits on Congress' authority to regulate state activities." *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). The general rule is that "the limits are structural, not substantive," and that "States must find their protection from congressional regulation through the national political process," not the courts. *Id.*

The Tenth Amendment reflects the importance of state sovereignty and maintaining the balance of power between federal and state governments. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 552 (1995) (holding that the "constitutionally mandated division of authority [between state and federal governments] was adopted by the Framers to ensure protection of our fundamental liberties"). Judicial enforcement of this balance is critical to maintaining it. Given the framework set forth in the Constitution, the balance of power in the relationship between the federal government and the states should remain static with the proper deference given to state sovereignty. *See, e.g., Alden v. Maine*, 527 U.S. 706, 714 (1999) ("[O]ur Constitution preserves the sovereign status of the States"). In upholding a state mandatory retirement age for

judges which was inconsistent with federal law, the Supreme Court recognized the importance of this balance of power: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 457-458 (2000).[6]

The Supreme Court has recognized two circumstances in which a state can challenge federal action under the Tenth Amendment. First, a state can challenge federal action if there are "extraordinary defects in the national political process" that have either: (1) deprived the state "of any right to participate in the national political process" or (2) singled out a state "in a way that left it politically isolated and powerless." *Id.* at 512-13. Second, even if a state had an opportunity to participate in the national political process, federal action violates the Tenth Amendment if it compels a state or its officers to enforce or carry out federal objectives. *See New York v. United States*, 505 U.S. 144, 178 (1992) ("Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."). In *New York*, for example, the Court struck down provisions in the Low-Level Radioactive Waste Policy Amendments Act of 1985 that "offer[ed] state governments a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress" because the Court found that "[n]o matter which path the State chooses, it must follow the direction of Congress." *Id.* at 176.

[6] *See also United States v. Morrison*, 529 U.S. 598, 608 (2000) (striking down a federal effort to criminalize and regulate gender-motivated violence and emphasizing the importance of its role in maintaining the balance of power between the branches of government); *New York v. United States*, 505 U.S. 144, 187 (1992) ("[T]he Constitution . . . divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.") (internal quotes and citation omitted).

1. Arizona Has Alleged Extraordinary Defects in the National Political Process that Have Deprived Arizona of Any Right to Participate.

Under the established national political process, Congress has the power to set national policy and the Executive Branch has the responsibility for implementing that policy. Arizona participates in the national political process through its Congressional delegates. The federal government has recognized the security and economic threats that illegal immigration poses to the nation as a whole and to the individual states. Countercl. ¶¶ 41, 81-82, 196. To address these concerns, Congress has enacted detailed immigration requirements and imposed severe civil and criminal sanctions for violators. Congress has also taken numerous steps to ensure that its immigration laws are enforced through such acts as the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Countercl. ¶¶ 46-48, and the Secure Fence Act, *id.* ¶¶ 50-54.

The Government, however, has circumvented Congress' efforts by failing to enforce the laws Congress has enacted and seeking to achieve "meaningful immigration reform absent legislative action." Countercl. ¶¶ 100-03. The Government's refusal to enforce the laws Congress has enacted and to follow Congress' directives regarding the enforcement of the federal immigration laws constitute extraordinary defects in the national political process by "creat[ing] a vacuum in which the objectives and mandates of the federal immigration laws are not being or cannot be achieved." *Id.* ¶ 211, 214. These extraordinary defects in the national political process have resulted in an immigration policy in which the states, including Arizona, have been deprived of any opportunity to participate.

2. Arizona Has Alleged Extraordinary Defects in the National Political Process that Have Singled Out Arizona, Leaving It Politically Isolated and Powerless.

In addition to the extraordinary defects identified above, the Government has welcomed efforts from other states to increase their communications with the federal government regarding potential immigration violations. When Arizona sought to

increase such communications, however, the Government declared Arizona's efforts to be a "burden" and immediately acted to prevent Arizona from pursuing its objectives. Countercl. ¶ 99, 200. The Government has also openly criticized Arizona and its policies both nationally and internationally based, in large part, on misrepresentations regarding the effect and purpose of S.B. 1070. These criticisms have created foreign policy concerns that bolstered the Government's preemption arguments and have inflicted substantial economic harm on Arizona.

In addition, Arizona has a unique burden as a border state with over 40% of the illegal aliens nationwide entering its border that is compounded by the mandate of the Enabling Act (as a condition for becoming a state) to hold in trust millions of acres of land. Arizona was treated differently than the other states because it was the one of the last states and the previous allocations of public trust land had been squandered. *See Murphy v. State*, 65 Ariz. 338, 351, 181 P.2d 336, 344 (1947) (explaining that "[t]he sad experience of Congress with the handling by [the twenty-three previous states that had been] granted lands, the sale thereof, and the investment of monies derived from a disposition of the granted lands, brought about a new policy which found expression in the Enabling Act for New Mexico and Arizona"). This obligation to preserve and maximize the value of state lands on and near the most heavily trafficked illegal alien corridor in the United States for the express purpose of public education – including education of illegal aliens as required by the Fourteenth Amendment – distinguishes Arizona from the other states.

The Government's actions and Arizona's unique burdens have "single[d] Arizona out in a way that leaves it politically isolated and powerless to protect itself and its citizens from the harm associated with rampant illegal immigration." Countercl. ¶ 213.

3. Arizona Has Alleged Action by the Government that Compels Arizona to Carry Out the Executive Branch's Objectives.

The Constitution contemplates that Arizona has a right and obligation to

"represent and remain accountable to its own citizens." *Printz v. United States*, 521 U.S. 898, 920 (1997). "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Id*. at 928. To preserve state sovereignty and the balance of power between state and federal governments, the Tenth Amendment prohibits the federal government from "compel[ling] States to implement, by legislation *or executive action*, federal regulatory programs." *Id*. at 925 (emphasis added).

In *Printz*, the Supreme Court reversed a decision of the Ninth Circuit and found that a provision of the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (the "Brady Act"), which required "state and local law enforcement officers to conduct background checks on prospective handgun purchasers," was invalid under the Tenth Amendment. The Court rejected the argument that the federal government could require "state officers to perform discrete, ministerial tasks," finding no distinction between control of a state and control of the state's agents. *Id*. at 930-31. One of the primary bases for the Court's conclusion was that "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Id*. at 930.

The judicial balance of power between the states and the Government under the Tenth Amendment can also be seen in recent cases concerning Section III of the Defense of Marriage Act ("DOMA"), which excludes same-sex marriages in its federal definition of marriage and, therefore, imposes on the states' ability to regulate marriage. *See*, *e.g.*, *Massachusetts v. Sebelius*, 698 F. Supp. 2d 234, 235, 249 (D. Mass. 2010) (holding that DOMA was an unconstitutional violation of the Tenth Amendment because it plainly intrudes on a core area of state sovereignty – the ability to define the marital status of its citizens).[7]

[7] Although the Tenth Amendment was not invoked in the Supreme Court's recent decision upholding Arizona's right to mandate the use of E-Verify to confirm immigration status and to sanction employers who hire illegal aliens, *see Chamber of*

Here, the Government is forcing Arizona to absorb the financial burden of the federal government's policies and interfering with Arizona's state sovereignty by "effectively prohibit[ing] Arizona from exercising its police and other traditional state powers to address issues of importance to the State and its citizens." Countercl. ¶ 199.

This case is not like the claims in *California*, 104 F.3d at 1093, which were premised upon inaction by the federal government. Here, it is the Government's *action* in preventing Arizona from taking steps to discourage illegal immigration within its borders, coupled with its inaction in enforcing the federal immigration laws, which compels Arizona to act. Those actions, "in combination with Arizona's preexisting constitutional duties under the Fourteenth Amendment, compel Arizona to accommodate and provide education, medical care, and other benefits to illegal aliens within its borders." Countercl. ¶ 202.

CONCLUSION

If amnesty for illegal aliens is the desired outcome, there are proper procedures to change the law to reflect that desire. The Government, however, cannot ignore the mandates of federal law and adopt an unspoken policy of amnesty by inaction for some subset of undocumented immigrants who are present in the United States illegally. Furthermore, the Government has affirmatively sued Arizona for taking action to try to resolve the economic problems and injury caused by the Government's actions and deliberate inactions. These issues not only require a judicial solution, the Government has invoked this Court's jurisdiction to decide them.

The Government's arguments do not justify dismissal of Arizona's Counterclaims at this early stage. Arizona's allegations, if ultimately proven, state cognizable claims for relief. This Court should deny the Government's motion.

Commerce v. Whiting, 563 U.S. __ (2011), the decision further reflects the importance of state sovereignty and the judicial balance of power between the states and the Government. *See also City of Hazleton, Pa. v. Lozano*, __ S. Ct. __, 2011 W.L. 2175213 (2011) (remanded to the Third Circuit for consideration in light of the *Whiting* decision).

DATED this 13th day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 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 in this matter.

s/Michael Tryon

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