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10 UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

11
12 The United States of America,
13 Plaintiff,

14 v.

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

17
18 Defendants.
19

No. 2:10-cv-1413-PHX-SRB

**PLAINTIFF'S RESPONSE TO
THE MOTION OF MARTIN H.
ESCOBAR TO CONSOLIDATE**

20 **INTRODUCTION**

21 The United States respectfully submits this memorandum in opposition to the
22 motion by Martin H. Escobar to consolidate the instant action with *Escobar v. Brewer*,
23 No. CV-10-0249-TUC-SRB (D. Ariz.). Consolidation of the two cases is inappropriate
24 because individualized issues present in the *Escobar* case but not the instant action would
25 prejudice or delay the United States' lawsuit.
26

27 **ARGUMENT**

28 The Federal Rules of Civil Procedure allow separate lawsuits to be consolidated
where the "actions before the court involve a common question of law or fact." Fed. R.

1 Civ. P. 42(a). Although a district court has “broad discretion” in evaluating a motion to
2 consolidate (*Paxonet Communs., Inc. v. Transwitch Corp.*, 303 F. Supp. 2d 1027, 1028-
3 29 (N.D. Cal. 2003)), this Court has explained that “[c]onsolidation is inappropriate . . . if
4 it leads to inefficiency, inconvenience, or unfair prejudice to a party.” *See Glass v. Intel*
5 *Corp.*, 2007 U.S. Dist. LEXIS 57666, at *11 (D. Ariz. 2007). Similarly, “consolidation
6 may be inappropriate if individual issues predominate” or if the issues in one case will
7 “confus[e]” the adjudication of another case. *See Lewis v. City of Fresno*, 2009 U.S. Dist.
8 LEXIS 57083, at *3-4 (E.D. Cal. 2009) (internal citations omitted). *See also Campbell v.*
9 *PriceWaterhouseCoopers*, 2008 U.S. Dist. LEXIS 75756 (E.D. Cal. 2008) (“Factors to be
10 weighed [in evaluating a motion to consolidate] include the risk of prejudice and
11 confusion.”).

12 Consolidation may also be rejected if one case presents an issue that need not be
13 adjudicated in the other case. *See, e.g., W. Watersheds Project v. United States Forest*
14 *Serv.*, 2009 U.S. Dist. LEXIS 1359 (D. Idaho 2009) (rejecting consolidation because one
15 of the cases involved a waiver issue that was not present in the other case, and because
16 rejecting consolidation “keeps [the] case simple and avoids delay”). Thus, if the plaintiff
17 in one case “rel[ies] on different legal theories to support their claims” than a plaintiff in
18 the second case, consolidation may prove unduly prejudicial. *Behrend v. Klein*, 2006
19 U.S. Dist. LEXIS 68652 (E.D.N.Y. 2006).

20 This Court should reject the instant motion to consolidate because *Escobar v.*
21 *Brewer* presents significantly different issues from the instant dispute. Defendants have
22 moved to dismiss the *Escobar* claims for lack of standing – an issue that is not present in
23 the United States’ lawsuit against Arizona. Although the United States does not offer any
24 opinion on the merits of the standing issue in *Escobar*, the dispute itself creates a
25 sufficient distinction between the cases as to recommend against consolidation. *See, e.g.,*
26 *W. Watersheds Project v. United States Forest Serv.*, 2009 U.S. Dist. LEXIS 1359 (D.
27 Idaho 2009).

1 Additionally, although both disputes challenge the constitutionality of certain
2 sections of S.B. 1070, the United States has challenged a larger portion of the statute than
3 the *Escobar* plaintiffs – who have only challenged Sections 2, 3, and 6 of S.B. 1070 – and
4 has sought to vindicate very different interests than those presented in *Escobar*. Whereas
5 the United States has sought to prevent Arizona from interfering with its enforcement
6 priorities, undermining foreign policy, and harassing lawfully present aliens, the *Escobar*
7 preemption argument claims primarily that S.B. 1070 negates certain specific provisions
8 of the INA. Additionally, Plaintiff Escobar has brought claims under the First, Fourth,
9 Fifth, and Fourteenth Amendments to the United States Constitution that are not
10 implicated by the United States’ lawsuit. These different legal theories recommend
11 against consolidation. *See Behrend v. Klein*, 2006 U.S. Dist. LEXIS 68652 (E.D.N.Y.
12 2006).

13 Consolidation will likewise delay the United States’ litigation. A preliminary
14 injunction has already been entered in *United States v. Arizona*. By contrast, Plaintiff
15 Escobar’s motion for a preliminary injunction will not be fully briefed until August 20,
16 2010. *See* Order of July 13, 2010 (Docket No. 78). Consolidation with *Escobar* would
17 thereby prejudicially delay the instant litigation. *See Glass v. Intel Corp.*, 2007 U.S. Dist.
18 LEXIS 57666, at *11-12 (rejecting consolidation so as to avoid “unreasonable delay” in
19 one of the actions).

20 Moreover, consolidation will not necessarily promote judicial efficiency.
21 Although Plaintiff Escobar conclusorily claims that consolidation would “avoid[]
22 duplication of effort,” reduce “time, legal fees and costs, and . . . simplify the adjudication
23 of the underlying dispute” (Motion at 2), Plaintiff Escobar has not in any way explained
24 how such judicial economy will arise. As discussed above, a preliminary injunction has
25 already been issued in the United States’ lawsuit. Future proceedings are ill suited to
26 consolidated efforts because the United States has challenged different sections of the
27 statute from Plaintiff Escobar, has advanced different preemption arguments from
28 Plaintiff Escobar, and seeks to protect different interests from Plaintiff Escobar.

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of Notice of Electronic Filing to the CM/ECF registrants on record in this matter.

/s/ Joshua Wilkenfeld
Joshua Wilkenfeld