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*Attorneys for Defendant Janice K. Brewer,  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

16 David Salgado, et al.,  
17  
18 Plaintiffs,  
19  
20 v.  
21 Jan Brewer, et al.,  
22  
23 Defendants.

No. CV-10-00951-PHX-SRB  
**GOVERNOR BREWER'S RESPONSE  
TO PLAINTIFFS' MOTION TO  
CONSOLIDATE**

22 The United States of America,  
23  
24 Plaintiffs,  
25  
26 v.  
27 The State of Arizona, et al.,  
28  
29 Defendants.

No. CV 10-1413-PHX-SRB

1 Defendant Janice K. Brewer (“Governor Brewer”) hereby responds to plaintiffs’  
2 motion to consolidate *Salgado v. Brewer, et al.*, Case No. CV-10-00951-PHX-SRB (the  
3 “Salgado Case”) with *United States v. Arizona, et al.*, Case No. CV-10-1413-PHX-SRB  
4 (the “Federal Case”) (doc. 84).

5 Plaintiffs’ motion should be denied. First, consolidation is premature because  
6 Governor Brewer’s motion to dismiss the case based (in part) on plaintiffs’ lack of  
7 standing remains pending. Second, consolidation is inappropriate in light of the different  
8 legal arguments presented by the parties in the two actions and the differing procedural  
9 postures of the cases.

10 **I. PROCEDURAL BACKGROUND**

11 Both actions are one of seven pending cases that challenge the validity of Senate  
12 Bill 1070, as amended by House Bill 2162 (“SB 1070”).

13 On June 11, 2010, Governor Brewer moved to dismiss the First Amended  
14 Complaint in the Salgado Case on the grounds that plaintiffs lack standing to pursue these  
15 claims and that they failed to state a claim upon which relief can be granted (doc. 39).

16 Plaintiffs in the Salgado Case also filed a motion for preliminary injunction that sought to  
17 enjoin the enforcement of SB 1070 before its effective date of July 29, 2010 (doc. 33).

18 Both pending motions were the subject of oral argument on July 15, 2010. In addition, on  
19 June 24, 2010, plaintiffs in the Salgado Case moved for leave to file a Second Amended  
20 Complaint that added additional plaintiffs to this action (doc. 52).

21 On July 28, 2010, the Court entered an order in the Federal Case granting in part  
22 and denying in part the plaintiff’s motion for preliminary injunction, and enjoining the  
23 enforcement of certain provisions of SB 1070. On July 29, 2010, Governor Brewer  
24 appealed the preliminary injunction order in the Federal Case to the U.S. Court of Appeals  
25 for the Ninth Circuit.

26 **II. LEGAL STANDARD**

27 Rule 42 of the Federal Rules of Civil Procedure permits consolidation of cases  
28 involving a common question of law or fact. *See* Fed. R. Civ. P. 42(a); LRCiv 42.1(b).

1 The district court has broad discretion to determine whether consolidation is appropriate,  
2 and in making this determination, should “balance the interest in judicial convenience  
3 against the potential for delay, confusion and prejudice that may result from such  
4 consolidation.” *Sapiro v. Sunstone Hotel Investors, L.L.C.*, No. CV03-1555-PHX-SRB,  
5 2006 U.S. Dist. LEXIS 21234, \*3 (D. Ariz. Apr. 4, 2006) (quoting *Bank of Montreal v.*  
6 *Eagle Assoc.*, 117 F.R.D. 530, 532 (S.D.N.Y. 1987)). Plaintiffs bear the burden of  
7 showing that consolidation will not lead to inefficiency, inconvenience, or unfair  
8 prejudice. *See Lewis v. City of Fresno*, No. CV-F-08-1062 OWW/GSA, 2009 U.S. Dist.  
9 LEXIS 57083, at \*4 (E.D. Cal. July 6, 2009).

10 **III. ARGUMENT**

11 Plaintiffs present little explanation in support of their motion to consolidate these  
12 cases other than to say that the two cases “assert virtually identical claims” and seek the  
13 same relief (doc. 84). In truth, there are important differences between the two cases.  
14 Governor Brewer submits that consolidation is inappropriate and that plaintiffs’ motion  
15 should be denied.

16 First, the plaintiffs in the Salgado Case have not yet demonstrated that they have  
17 suffered cognizable injuries that would grant them standing to pursue their claims.  
18 Governor Brewer has moved to dismiss plaintiffs’ First Amended Complaint in the  
19 Salgado Case on this ground (doc. 39). This motion to dismiss was argued to the Court on  
20 July 15, 2010 and remains pending. Governor Brewer submits that it would not serve the  
21 interests of judicial economy to take action to consolidate cases before it is clear whether  
22 the action will proceed. *See Y.P. Corp. v. Sitrick and Co.*, No. CV-05-0769-PHX-SRB,  
23 2005 U.S. Dist. LEXIS 32513, at \*19 (D. Ariz. Dec. 8, 2005) (motion to consolidate is  
24 moot when one suit is dismissed). On the other hand, no such challenge has been made in  
25 the Federal Case. Until the issue of standing is resolved, the motion to consolidate is  
26 premature.

27 Second, there are notable differences in the legal and factual issues raised in the  
28 two cases. As noted in the opposition brief of the United States filed in the Federal Case

1 (doc. 85), the plaintiffs in the Salgado Case challenged a more limited portion of SB 1070  
2 than the United States in the Federal Case. Further, although both cases (like all seven of  
3 the cases challenging SB 1070) raise preemption issues, the United States raises  
4 preemption issues that are unique to the claimed interest of the federal government.  
5 Plaintiffs in the Salgado Case also have not explained why these two cases should be  
6 consolidated, but the remaining five cases that also challenge SB 1070 should not.

7 Finally, consolidation may delay the resolution of the Federal Case and complicate  
8 matters on appeal because the cases are proceeding on different schedules. As the Court  
9 is aware, on July 29, 2010, Governor Brewer appealed the Court's preliminary injunction  
10 order to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit has already set  
11 a briefing schedule and placed the case on its calendar. On the other hand, Governor  
12 Brewer's motion to dismiss and plaintiffs' motion for preliminary injunction in the  
13 Salgado Case remain pending, as well as plaintiffs' motion for leave to file a second  
14 amended complaint. Consolidating a case that is already on appeal with a case that has  
15 numerous pending motions at the district court level is likely to lead to delay and  
16 unneeded complexity. *See Sapiro*, 2006 U.S. Dist. LEXIS 21234, at \*4 ("Factors such as  
17 differing trial dates or stages of discovery usually weigh against consolidation.") (citing  
18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2383 (1995)).  
19 Contrary to plaintiffs' argument, consolidating cases with such different procedural  
20 postures is likely to lead to additional time and effort on the part of all counsel, and higher  
21 fees and costs for all parties involved.

22 **IV. CONCLUSION**

23 For these reasons, Governor Brewer requests that the motion to consolidate be  
24 denied.

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RESPECTFULLY SUBMITTED this 2nd day of August, 2010.

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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 a Notice of Electronic Filing to the CM/ECF registrants on record.

By s/ John J. Bouma

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