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IN THE UNITED STATES DISTRICT COURT

FOR THE STATE OF ARIZONA

Martin H. Escobar, Plaintiff, v. Jan Brewer, Governor of the State of Arizona, in her Official and Individual Capacity, the City of Tucson, a municipal corporation, and Barbara LaWall, County Attorney, Pima County, Defendants.	No. CV 10-249 TUC DCB MOTION FOR PRELIMINARY INJUNCTION ENJOINING THE ENFORCEMENT OF THE "SUPPORT OUR LAW ENFORCEMENT AND SAFE NEIGHBORHOOD ACT" a.k.a. SB 1070 (Expedited Evidentiary Hearing And Oral Argument Requested)

Pursuant to F.R.C.P. 65(a), Plaintiff hereby moves for a preliminary injunction to enjoin the "Support Our Law Enforcement And Safe Neighborhood Act" a.k.a. SB 1070 for the reasons set forth in accompanying memorandum of points and authorities.

Respectfully submitted this 3rd day of June 2010.

s/*Richard M. Martinez*, Esq.
RICHARD M. MARTINEZ, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction and Summary of Argument

This case presents a question of fundamental national importance: can a state unilaterally negate a comprehensive federal statutory regime specifically limiting the enforcement of federal immigration law by state and local law enforcement authorities? Although the question is of increasing importance,[1] the Supreme Court of the United States answered it in the negative long ago–federal authority in the field of immigration law is supreme, and any state law that contradicts or undermines federal immigration law is void as violative of the Constitution. See, *e.g.*, *DeCanas v. Bica*, 424 U.S. 351, 354-355, and 358, n. 5 (1976) ("[the] [p]ower to regulate immigration is unquestionably exclusively a federal power," and "the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws").[2]

Plaintiff invokes these long-standing principles to enjoin the enforcement of the "Support Our Law Enforcement and Safe Neighborhoods Act," Senate Bill 1070, as amended by House Bill 2162 (the "Act"). See Exhibit B. The Act cannot be lawfully enforced because: (1) it conflicts with a comprehensive statutory regime codified in a series of amendments to Title 8 of the United States Code, 8 U.S.C. §§1103(a)(10), 1252c(a), 1324(c), and 1357(g); (2) it conflicts with 8 U.S.C. §§1304(e) and 1306(a)

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[1] According to the National Conference of State Legislators, in the first three months of 2010, legislators in 45 states introduced 1,180 bills and resolutions regarding immigration and have already passed 107 laws regarding immigration this year. See Exhibit A.

[2] See also, *Hines v. Davidowitz*, 312 U.S. 52, 60-62 (1941)("the supremacy of the national power . . . over immigration, naturalization and deportation is made clear by the Constitution"); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (voiding California statute regulating Chinese immigration because immigration power is federal); *Henderson v. Mayor of New York*, 92 U.S. 259, 270-274 (1875) (voiding New York law requiring vessel owners to give a bond for each foreign passenger because it undermined federal power "to regulate commerce with foreign nations"); and *Smith v. Turner,* 48 U.S. 283, 394 (1849) (voiding New York and Massachusetts laws imposing head taxes on landing foreign persons because they regulated foreign commerce).

by adding to the penalties already established by Congress for violations of Sections 1304(e) and 1306(a); (3) it conflicts with federal due process requirements by mandating that "any person who is arrested shall have the person's immigration status determined **before** the person is released;" and, (4) when enforced against primary and secondary school students, it conflicts with the Supreme Court of the United States' opinion in *Plyler v. Doe*, 457 U.S. 202 (1983).

First, the Act (at A.R.S. §§11-1051, 13-1509 and 13-3883(A)(5)) is preempted by 8 U.S.C. §1103(a)(10), because the Attorney General of the United States has **not** authorized state and local law enforcement officers to enforce federal immigration law after the Attorney General has determined that an "actual or imminent mass influx of aliens" at the border presents "urgent circumstances" requiring "immediate" assistance from state or local law enforcement authorities.

Second, the Act (at A.R.S. §§11-1051, 13-1509 and 13-3883(A)(5)) is preempted by 8 U.S.C. §1252c(a) because Section 1252c(a) limits the authority of state and local law enforcement officers to arrest **only** those undocumented immigrants (1) who have already been convicted of a felony in the United States, (2) who have left or been deported from the United States after their conviction, and (3) whom federal immigration authorities have **already** determined have unlawfully reentered the United States.

Third, the Act (at A.R.S. §13-1509) conflicts with 8 U.S.C. §§1304(e) and 1306(a) by making it a Class 1 misdemeanor to violate either Section 1304(e) or Section 1306(a). By adding to the specific penalties established by Congress for violations of Sections 1304(e) and 1306(a), the Act violates the Supremacy Clause of the United States Constitution. See, *e.g.*, *Hines v. Davidowitz*, 312 U.S. at 60-62 (1941) ("[n]o state can add to . . . the force and effect of . . . [a federal immigration] statute").

Fourth, the Act (at A.R.S. §§11-1051, 13-1509 and 13-3883(A)(5)) is preempted by 8 U.S.C. §1324(c), because–except as provided by 8 U.S.C. §§1103(a)(10),

1252c(a), and 1357(g)–state and local law enforcement officials can only make arrests for violations of 8 U.S.C. §1324(a), which criminalizes smuggling, transporting, concealing, and harboring undocumented immigrants. Correspondingly, the Act (at A.R.S. §§13-2319 and 13-2929) is also preempted by 8 U.S.C. §1324(a) because the Act adds to the specific penalties established by Congress for violations of Section 1324(a) and thus violates the Supremacy Clause of the United States Constitution. See, *e.g.*, *Hines v. Davidowitz*, 312 U.S. at 60-62 (1941) ("[n]o state can add to . . . the force and effect of . . . [a federal immigration] statute").

Fifth, the Act (at A.R.S. §§11-1051, 13-1509, 13-2319, 13-2929, and 13-3883(5)(A)) is also preempted by 8 U.S.C. §1357(g) because–except as provided by 8 U.S.C. §§1103(a)(10), 1252c(a) and 1324(c)–state and local law enforcement officials can enforce federal immigration law only (1) **after** executing a "memorandum of agreement" with the Secretary of the Department of Homeland Security, (2) **after** receiving a written certification of their "adequate training" regarding the enforcement of federal immigration law from the Department of Homeland Security, and (3) when subject to the supervision of federal immigration law enforcement authorities, all in accordance with all of the specific requirements of Section 1357(g)(1)-(3).

Sixth, the Act (at A.R.S. §11-1051(B)) conflicts with basic due process requirements by mandating that anyone arrested for any reason in Arizona be detained until their "immigration status [is] determined." See generally, *Mortimer v. Baca*, 594 F. 3d 714, 722-723 (9th Cir. 2010), and *Brass v. County of Los Angeles*, 328 F.3d 1192, 1200 (9th Cir. 2003).

Lastly, when enforced in primary and secondary schools, the Act (at A.R.S. §§11-1051 and 13-3883(A)(5)) violates the Supreme Court of the United States' opinion in *Plyler v. Doe*, 457 U.S. 202 (1982).

II. Standard of Review

A party is entitled to a preliminary injunction by demonstrating that: (1) it is likely to succeed on the merits; (2) it will likely suffer irreparable harm in the absence of

preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. See, e.g., *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1092 (9th Cir. 2010) (affirming a preliminary injunction enjoining enforcement of a California statute that was preempted by the Medicaid Act).

As explained in detail below, Plaintiff meets this test and is consequently entitled to a preliminary injunction enjoining the enforcement of the Act pending a trial on the merits.[3]

III. Argument

1. The Support Our Law Enforcement and Safe Neighborhoods Act.

On April 23, 2010, acting in her official capacity as Governor of Arizona, Janice K. ("Jan") Brewer signed into law the "Support Our Law Enforcement and Safe Neighborhoods Act," Senate Bill 1070. See Exhibit B. On April 30, 2010, once again acting in her official capacity, Governor Brewer approved several amendments to the Act, House Bill 2162. Id.[4]

The Arizona Constitution directs Governor Brewer to ensure that the laws of Arizona "shall . . . be faithfully executed." Ariz. Const., Art. 5, §4. Correspondingly, Governor Brewer is statutorily authorized to "direct" the Attorney General of Arizona "in **any** challenge" of the Act in "state or federal court." HB 2162 §8A (emphasis added). Governor Brewer also has the statutory authority to "direct [legal] counsel

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[3] See, *e.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1124 (9th Cir. 2009) (in a pre-enforcement action by pharmacists seeking equitable relief against Washington state rules requiring pharmacies to deliver any lawfully prescribed medication, including "Plan B," a postcoital contraceptive used to prevent pregnancy after the intended method of birth control fails or after unprotected sexual intercourse, sometimes referred to as "the abortion pill" or the "morning after pill." The court found equitable relief was appropriate, reasoning that "[a]lthough Mesler [a plaintiff] has not yet suffered the consequences of the new rules, her employer has informed her that it will not be able to accommodate her refusal to dispense Plan B under them. She is at serious risk of losing her job because of these new rules. This risk is sufficiently real and immediate such that, assuming her claims have merit, a declaratory judgment or injunction is warranted").

[4] Both SB 1070 and HB 2162 were passed by the forty-ninth Arizona legislature at its second regular session. See Exhibit B, p. 10.

other than the attorney general to appear on behalf of [Arizona] to defend **any** challenge" of the Act. HB 2162 §8B (emphasis added).[5]

Thus, Governor Brewer signed the Act into law, has an obligation under the Arizona Constitution to faithfully execute the Act, and has an obligation under Arizona statutory law to defend the legality of the Act in "any challenge" of the Act "in state or federal court." In accordance with her duty to enforce the Act, Governor Brewer has already issued an Executive Order directing the Arizona Peace Officer Standards and Training Board ("AzPOST") to formulate a uniform training program so that approximately 170 state and local law enforcement agencies can train approximately 15,000 law enforcement officers throughout the State in the enforcement of the Act. See Exhibit D.[6]

The purpose of the Act is announced in Section 1 of the Act:

> Intent
>
> The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make **attrition through enforcement** the public policy of all state and local government agencies in Arizona. The provisions of this Act are intended to work together to **discourage and deter** the **unlawful entry and presence** of aliens and economic activity by persons unlawfully in the United States (emphasis added).

SB 1070, §1. Based on the specific language of Section 1, the Act expressly requires all state and local law enforcement officers to engage in and enforce federal immigration law in accordance with the terms of the Act without **any** authorization **or** supervision by federal immigration law enforcement authorities.

In order to achieve its broad purpose, the Act compels any state or local law

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[5] In fact, Governor Brewer has exercised her right to retain counsel other than the Arizona Attorney General in this lawsuit. See Exhibit C.

[6] Moreover, on May 26, 2010, acting in accordance with her legal obligation to enforce and defend the Act, Governor Brewer issued another Executive Order creating the "Governor's Border Security and Immigration Legal Defense Fund" in order to (among other things) help pay the private attorneys that she has retained to represent her in this case. See Exhibit E.

enforcement officer involved in "**any** lawful stop, detention or arrest" in connection with the "enforcement of **any** other law or ordinance of a county, city or town or this state" to "attempt . . . to determine the immigration status of the person" when a "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States . . . ." A.R.S. §11-1051(B) (emphasis added). Based on this language, the Act applies to any lawful "stop," even **non**-criminal stops for routine traffic violations or civil violations of municipal ordinances.

The Act also authorizes state and local law enforcement officers to arrest–without a warrant–**any** person whom the officer has "probable cause to believe . . . has committed any public offense that makes the person removable from the United States." A.R.S. §13-3883(A)(5). Significantly, the Act does **not** in any way limit the investigative techniques customarily used by state and local law enforcement officers to obtain "probable cause" of criminal violations. Thus, the Act does **not** prohibit state and local law enforcement officials from asking anyone to voluntarily disclose either their nationality or immigration status (lawful or otherwise) in the course of trying to obtain probable cause of a crime.

The Act also makes it a Class 1 misdemeanor under Arizona law for a person to engage in the "willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a)." A.R.S. §13-1509(A) and (H).

The Act also requires that "any person who is arrested [for any reason] **shall** have the person's immigration status determined **before** the person is released." A.R.S. §11-1051(B) (emphasis added) .

The Act also mandates that "no official or agency of this state or county, city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law." A.R.S. §11-1051(A). This provision ensures that the Act will be enforced to a **greater** extent than the enforcement of federal immigration law by federal law enforcement

authorities. Indeed, a central assumption of the Act is the belief that federal authorities are **not** adequately enforcing federal immigration law.[7]

The Act also creates its own private enforcement mechanism by establishing a private right of action by any "legal resident" of Arizona against any state or local "official" or "agency" that "adopts or implements a policy that limits or restricts the enforcement of federal immigration laws . . . to less than the full extent permitted by federal law." A.R.S. §11-1051(H).

Correspondingly, the Act also creates a "civil penalty of not less than five hundred dollars and not more than five thousand dollars for **each** day that the policy [limiting or restricting full enforcement of the Act] has remained in effect after the filing of an action pursuant to this subsection." Id. (Emphasis added.) The Act's private right of action and attendant civil penalties do **not** exist in the field of federal immigration law and are designed to ensure that the Act will be enforced **more** aggressively than the enforcement of federal immigration law by federal authorities.

Based on the breadth of its express language, one of the Act's principal legislative sponsors has described it as the "toughest immigration law" in the nation.[8]

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[7] Except through the electoral process, states cannot legally compel the federal government to enforce immigration law any more or less than the federal government deems appropriate. See generally, *Texas v. United States*, 106 F.3d 661, 663 (5th Cir. 1997) ("Texas . . . and its political subdivisions appeal a dismissal of their complaint seeking declaratory and injunctive relief which would require that the United States pay the educational, medical, and criminal justice expenses allegedly incurred as a result of the presence of undocumented or illegal aliens in Texas. Concluding that the complaint raises questions of policy rather than colorable claims of constitutional or statutory violations, we affirm"), and *Chiles v. United States*, 69 F.3d 1094, 1075 (11th Cir. 1995) (dismissing an action against the United States and federal law enforcement officials alleging that they had improperly failed to enforce immigration policies because it presented nonjusticiable political questions and the question of whether the United States Attorney General was "adequately guarding United States borders is committed to agency discretion by law and unreviewable").

[8] See Russel Goldman, Arizona Law Promises to Be 'Toughest' on Illegal Immigration, http://abcnews.go.com, March 26, 2010 ("It will be, there's no doubt, the toughest immigration enforcement bill in the nation, said [State Senator Russell] Pearce . . . the Mesa Republican who sponsored the bill"). See also, Craig Harris, et al., Arizona Governor signs immigration law; foes promise fight, The Arizona Republic, April 24, 2010 ("Arizona's immigration law, now considered the toughest in the nation, makes

Indeed, as reflected in the Act's express mandate of "full enforcement" and the creation of private enforcement actions backed by hefty civil fines, the Act is designed to be **broader** and more **strictly** enforced than federal immigration law.

Under the Arizona Constitution, Art. 4, Part 1, §1(3), the Act is effective on July 29, 2010,[9] ninety days after the close of the forty-ninth legislature's second regular session on April 30, 2010.

2. The nature of Plaintiff's claims against the Act.

Martin Escobar is a full-time Lead Patrol Officer for the Tucson Police Department and has been for fifteen years. In the course of his police work, Officer Escobar frequently stops individuals of Mexican and Latin-American ancestry in the City of Tucson. These individuals include children and minors who do **not** have or carry any form of state or federal identification. Officer Escobar reasonably suspects that some of these adults and children are **not** lawfully in the United States. Officer Escobar does **not** believe that he can lawfully enforce the Act because (1) he is **not** authorized to enforce federal immigration law, (2) he is **not** trained to enforce federal immigration law, and (3) enforcing federal immigration law under these circumstances has a high probability of in resulting in the violation of the civil rights of those individuals whom he attempts to enforce the Act against.

Officer Escobar is aware that all schools within the City of Tucson are legally obligated to work with state and local law enforcement agencies and officers–including the City of Tucson Police Department and the Arizona Department of Public Safety–to help insure the safety and welfare of its students. See, e.g., A.R.S. §13-3620(A)1.

For example, if an educator suspects that one of his or her students is abused

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it a state crime to be in the country illegally and requires local police to enforce federal immigration law"), and Randal C. Archibold, Arizona Enacts Stringent Law on Immigration, New York Times, April 23, 2010 ("Gov. Jan Brewer of Arizona signed the nation's toughest bill on illegal immigration into law on Friday"). These articles are reproduced at Exhibit F.

[9] See Exhibit G.

or neglected, that teacher and school administrator have a legal duty to report that suspicion to local law enforcement authorities. See A.R.S. §13-3620(A)1. This report will often result in contact with local law enforcement officials on campus and/or at the student's home. The failure to make such a report is a crime. See A.R.S. §13-3620(O). Officer Escobar reasonably suspects that some of the students within the City of Tucson are undocumented immigrants and that state and local law enforcement authorities cannot lawfully enforce federal immigration law against students at schools or Head Start centers.

The government of the United States of America, acting through the Secretary of the Department of Homeland Security in accordance with the Immigration and Nationality Act, 8 U.S.C. §1357(g)(1), has not authorized the law enforcement officers employed by the Tucson Police Department–including Officer Escobar–to enforce federal immigration law to the "full extent permitted by federal law" as required by the Act. See A.R.S. §11-1051(A) and (11). See Answer filed by City of Tucson. CD No. 9.

Nor will every member of the Tucson Police Department–including Officer Escobar–receive federally approved training regarding the enforcement of federal immigration law or obtain written certification of their receipt of such training from the Department of Homeland Security as expressly required by the Immigration and Nationality Act, 8 U.S.C. §1357(g)(2), **before** a local law enforcement officer purports to enforce federal immigration law as required by the Act. See Answer filed by City of Tucson. CD No. 9.

Nor will all of the members of the Tucson Police Department–including Officer Escobar–be subject to the direct supervision of United States Immigration and Customs Enforcement ("ICE") officers as required by the Immigration and Nationality Act, 8 U.S.C. §1357(g)(3), when engaged in the immigration law enforcement activities mandated by the Act. See Answer filed by City of Tucson. CD No. 9.

Notwithstanding the fact that the Tucson Police Department lacks the requisite

authorization from the Department of Homeland Security to enforce federal immigration law to the "full extent permitted by federal law," A.R.S. §11-1051(A), the Tucson Police Department is already planning to prepare its officers–including Officer Escobar–to enforce federal immigration law as required by the Act. See Exhibit H and Answer filed by City of Tucson. CD No. 9. .

Under these circumstances, Plaintiff is placed in an impossible dilemma: if Officer Escobar refuses to enforce the Act, he can be disciplined by his employer and AzPOST and subjected to costly private enforcement actions under the Act; conversely, if he enforces the Act, he can be subjected to costly civil actions alleging the deprivation of the civil rights of the individuals against whom he enforces the Act.

These facts combine to require this Court's speedy equitable relief.[10]

3. The Act conflicts with and is preempted by the Immigration and Nationality Act.

The Supremacy Clause of the Constitution of the United States, Article VI, Section 2, provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

The Supremacy Clause mandates that federal law preempts any state law that conflicts or interferes with federal law. Federal supremacy in the field of immigration law is predicated on the Constitution's grant of the authority to the federal government to "establish a uniform Rule of Naturalization," U.S. Const., Art. I, §8, cl. 4., and to "regulate Commerce with foreign Nations." Id., cl. 3. As the Supreme Court of the United States observed in *Hines v. Davidowitz,* 312 U.S. at 60-62 (1941):

> That the supremacy of the national power in the general field of foreign affairs, including power over immigration,

[10] See generally, *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)("a refusal on the part of the federal courts to [grant equitable relief] . . . may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity").

> naturalization and deportation, is made clear by the Constitution was pointed out by authors of The Federalist in 1787,and has since been given continuous recognition by this Court. When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute.[11]

See also, *DeCanas v. Bica,* 424 U.S. at 358, n. 5 (1976) ("the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws").[12] The Supreme Court has also long recognized that national control of immigration law is essential to the United States' status as a "nation-state," **not** just a confederation of states.[13]

This issue is of increasing importance because state laws purporting to regulate immigration have dramatically increased in recent years. According to a report issued by the National Conference of State Legislators on April 27, 2010:

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[11] In support of its conclusion, in footnotes eleven and twelve of its opinion in *Hines*, the Court quotes James Madison ("The second class of powers, lodged in the general government, consist of those which regulate in intercourse with foreign nations. . . . This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations") and Alexander Hamilton ("The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members") from The Federalist, No. 41 and 80. The Act threatens these principles by repudiating federal limits on state and local enforcement of immigration law.

[12] See, e.g., *Toll v. Moreno*, 458 U.S. 1, 10 (1982) ("[o]ur cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders"), and *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977) ("[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere").

[13] See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275, 279, (1876) ("if this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?").

- In 2006, 570 bills regarding immigration were introduced, 84 laws were enacted and 12 resolutions adopted.
- In 2007, activity almost tripled and 1,562 bills regarding immigration were introduced, 240 laws were enacted and 50 resolutions were adopted.
- In 2008, 1,305 bills regarding immigration were introduced, 206 laws were enacted and 64 resolutions adopted.
- In 2009, more than 1,500 regarding immigration were introduced, 222 laws were enacted and 131 resolutions adopted.
- In 2010, legislators in 45 states introduced 1,180 bills and resolutions regarding immigration and state legislatures have already enacted 107 laws regarding immigration as of March 31, 2010.
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See Exhibit A. Based on the dramatic rise of state laws attempting to regulate immigration–if the Supremacy Clause is ignored or trivialized–the potential for a complex, conflicting, and chaotic mix of immigration laws throughout the states is imminent.[14]

The Supreme Court of the United States has set forth three basic principles governing "federal preemption" under the Supremacy Clause. See *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). A state law is preempted when:

(1) Congress enacts a statute that explicitly preempts state law (known as "express preemption");

(2) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field ("field preemption"); or

(3) state law actually conflicts with federal law ("conflict preemption").

Id.[15] In this case, the Act is unlawful because it "actually conflicts" with (at least) six specific substantive provisions of the Immigration and Nationality Act, 8 U.S.C.

[14] See, e.g., Randal C. Archibold, Side by Side, but Divided Over Immigration, New York Times, May 11, 2010.

[15] See also, *Chae v. SLM Corp.*, 593 F.3d 936, 942 (9th Cir. 2010), and *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 851 (9th Cir. 2002).

§§1304(e), 1306(a), and 1324(c), as amended by the Illegal Immigration Reform Act and Immigration Responsibility Act of 1996, 8 U.S.C. §§1103(a)(10) and 1357(g), and the Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1252c(a).[16] Each section expressly limits the enforcement of federal immigration law by state and local governments, and each section is examined below.

A. The Act is preempted by 8 U.S.C. §1103(a)(10).

The Act negates 8 U.S.C. §1103(a)(10), which provides that:

> In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

The Act (at §§11-1051, 13-1509, 13-2319, 13-2929, and 13-3883(A)(5)) nullifies Section 1103(a)(10) by compelling state and local law enforcement officials to enforce federal immigration law without **first** obtaining authorization by the Attorney General of the United States based on the Attorney General's determination that an "actual or imminent mass influx of aliens" requires the assistance of state and local law enforcement officials. These sections of the Act are consequently preempted and must be enjoined.

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[16] Although Plaintiff primarily argues that the Act is preempted because it specifically conflicts with Title 8 of the United States Code, so-called "conflict preemption," in this case the various sections of Title 8 that the Act contradicts also "occupy the legislative field" of laws governing the direct enforcement of federal immigration law by state and local law enforcement officers. Consequently, the Act is also preempted under the second category of federal preemption (so-called "field preemption") set forth in *English v. General Electric Co.*, 462 U.S. at 79 n.5 ("[b]y referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation"). Plaintiff makes note of this issue only to underscore that he is **not** waiving any of his preemption arguments.

B. The Act is preempted by 8 U.S.C. §1252c(a).

8 U.S.C. §1252c(a) provides that:

> (a) In general
>
> Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who--
>
> 1. is an alien illegally present in the United States; and
>
> 2. has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.
>
> (b) Cooperation
>
> The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials.

(Emphasis added.) Thus, Section 1252c(a) applies **only** to felons and authorizes detention and arrest only **after** local law enforcement officers confirm with federal authorities that the felon in question is in fact unlawfully in the United States.

In contrast, the Act is far broader than Section 1252c(a) because the Act requires all state and local law enforcement officials to arrest **anyone**–convicted felon **or** otherwise–whom they have probable cause to believe has "committed any public offense that makes the person removable from the United States," A.R.S. §13-3883(A)(5), and "any person who is arrested [for any reason] shall have that person's

immigration status determined **before** the person is released." A.R.S. §11-1051(B).

The Act consequently negates the express limitations of Section 1252c(a) in reference to both the **class** of "offenses" (the Act applies to civil, misdemeanor and felony "stops," A.R.S. §11-1051(B); in contrast, Section 1252c(a) applies only to felony "convictions") and **when** the arrest occurs (under the Act arrest is based on probable cause and release is contingent upon a prior "determination" of lawful presence in the United States; in contrast, under Section 1252c(a) arrest is authorized only **after** confirming a suspect's unlawful immigration status with federal immigration authorities).

C. The Act is preempted by 8 U.S.C. §§1304(e) and 1306(a).

The Act also conflicts with 8 U.S.C. §§1304(e)[17] and 1306(a).[18] Specifically, the Act provides that:

> In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration

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[17] 8 U.S.C. §1304(e) provides that:

Personal possession of registration or receipt card; penalties

> Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d) of this section. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined [in an amount] not to exceed $100 or be imprisoned not more than thirty days, or both.

[18] 8 U.S.C. §1306(a) provides that:

Willful failure to register

> Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined [in an amount] not to exceed $1,000 or be imprisoned not more than six months, or both.

> document if the person is in violation of United States Code section 1304(e) or 1306(a).

A.R.S. §13-1509(A). Under subsection (H) of Section 13-1509, a violation of subsection (A) is a Class 1 misdemeanor with a maximum fine of $100.00 and a jail sentence of no more than 20 days for the first offense and no more than 30 days for any subsequent violation.

Under 8 U.S.C. §1304(e), "any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined [in an amount] not to exceed $100 or be imprisoned not more than thirty days, or both." Under 8 U.S.C. §1306(a),"any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined [in an amount] not to exceed $1,000 or be imprisoned not more than six months, or both."

Thus, the Act "adds to" the specific penalties already established by Congress for violations of 8 U.S.C. §§1304(e) and 1306(a). However, as the Supreme Court observed in *Hines v. Davidowitz*, 312 U.S. at 60-62 (1941),

> When the national government . . . has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the . . . statute is the supreme law of the land. No state can add to . . . the force and effect of such . . . statute.

The Act is consequently preempted by 8 U.S.C. §§1304(e) and 1306(a).

D. The Act is preempted by 8 U.S.C. §1324.

8 U.S.C. §1324(a) establishes criminal penalties for smuggling, transporting, concealing, and harboring undocumented immigrants. Subsection (c) of Section 1324, provides that:

> Authority to arrest
>
> No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and **all** other officers whose duty it is to enforce criminal laws.

(Emphasis added.) The legislative history of Section 1324(c) indicates that the phrase "all other officers whose duty it is to enforce the criminal laws" includes state and local law enforcement officers authorized to enforce criminal law.[19]

In contrast to Section 1324(c), the Act authorizes state and local law enforcement authorities to detain any individual that they "reasonably suspect" is "unlawfully present in the United States," A.R.S. §11-1051(B), and to arrest anyone–smuggler, transporter, haborer or otherwise–whom they have probable cause to believe has "committed any public offense that makes the person removable from the United States," A.R.S. §13-3883A(5). The Act is consequently far broader than Section 1324(c).

In addition, the Act is preempted by 8 U.S.C. §1324(a)(1)(B) because Sections 13-2319(B) and (C) and 13-2929(F) of the Act add to the specific penalties enacted by Congress for violations of Section 1324(a) and thus violate the Supremacy Clause of the United States Constitution. See, e.g., *Hines v. Davidowitz*, 312 U.S. at 60-62 (1941) ("[n]o state can add to . . . the force and effect of . . . [a federal immigration] statute").

E. The Act is preempted by 8 U.S.C. §1357(g).[20]

The Act also conflicts with 8 U.S.C. §1357(g), which provides that:

> (1) Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any

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[19] The Senate version of Section 1324(c) provided that arrests for violations of Section 1324(a) could be made by INS agents and "other officers of the United States whose duty it is to enforce criminal laws." However, the House struck the words "of the United States" in order to enable state and local law enforcement officials to enforce Section 1324(a). This change to the language of Section 1324(c) indicates that Congress intended that all criminal law enforcement officers, including state and local officers, are authorized to enforce Section 1324(a). See 98 Cong. Rec. 810, 813, 1414-15 (1952), and Conf. Rep. No. 1505, 82 Cong., 2d (1952).

[20] Section 1357(g) is often referred to by its original section number in the Illegal Immigration Reform Act and Immigration Responsibility Act of 1996, "Section 287(g)." For purposes of simplicity, throughout this Memorandum, 8 U.S.C. §1357(g) will be referred to as Section 1357(g).

political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.

(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written

agreement between the Attorney General and the State or political subdivision.

(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.

(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5 (relating to compensation for injury) and sections 2671 through 2680 of Title 28 (relating to tort claims).

(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the

> identification, apprehension, detention, or removal of aliens not lawfully present in the United States.[21]

The Act negates all of the express limitations of Section 1357(g). Specifically, pursuant to Subsection (1) of Section 1357(g), the Secretary of the Department of Homeland Security "may" enter into an agreement (called a "memorandum of agreement" or "MOA") with state or local law enforcement authorities whom the Secretary believes to be qualified to "perform the functions of an immigration law officer." The Act nullifies Section 1357(g)(1) by unilaterally compelling all state and local law enforcement officers in Arizona to enforce federal immigration law under the specific terms of the Act **without** a Section 1357(g)(1) agreement with the Secretary.

Correspondingly, **if** the Secretary of the Department of Homeland Security elects to enter into an agreement authorizing state and local law enforcement officials to enforce federal immigration law, pursuant to Section 1357(g)(2), the memorandum of agreement "shall" certify that the local law enforcement authorities operating under the agreement have received "adequate training" in the enforcement of federal immigration law. In fact, the training of state and local law enforcement officials in federal immigration law is central to Section 1357(g)(2). Accordingly, ICE's standard memorandum of agreement provides that:

> Training:
>
> The [1357](g) training program, the Immigration Authority Delegation Program (IADP), will be taught by ICE instructors and tailored to the immigration functions to be performed. ICE Office of Training and Development (OTD) will proctor examinations during the IADP. The AGENCY nominee must pass each examination with a minimum

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[21] Section 1357(g) specifically names the "United States Attorney General," rather than the Secretary of the Department of Homeland Security, as the federal official having the authority to authorize state and local law enforcement officers to enforce federal immigration law. However, this and other immigration enforcement functions of the former Immigration and Naturalization Service were transferred to the Department of Homeland Security under the Homeland Security Act of 2002. See 6 U.S.C. §251.

> score of 70 percent to receive certification. If the AGENCY nominee fails to attain a 70 percent rating on an examination, the AGENCY nominee will have one opportunity to remediate the testing material and re-take a similar examination. During the entire duration of the IADP, the AGENCY nominee will be offered a maximum of one remediation examination. Failure to achieve a 70 percent on any two examinations (inclusive of any remediation examination), will result in the disqualification of the AGENCY nominee and their discharge from the IADP. Training will include, among other topics: (I) discussion of the terms and limitations of this MOA; (ii) the scope of immigration officer authority; (iii) relevant immigration law; (iv) the ICE Use of Force Policy; (v) civil rights laws; (vi) the U.S. Department of Justice "Guidance Regarding the Use Of Race By Federal Law Enforcement Agencies," dated June 2003; (vii) public outreach and complaint procedures; (viii) liability issues; (ix) cross-cultural issues; and (x) the obligation under Federal law and the Vienna Convention on Consular Relations to make proper notification upon the arrest or detention of a foreign national.
>
> Approximately one year after the participating AGENCY personnel are trained and certified, ICE may provide additional updated training on relevant administrative, legal, and operational issues related to the performance of immigration officer functions. Local training on relevant issues will be provided as needed by ICE supervisors or designated ICE team leaders. An OSLC designated official shall, in consultation with OTD and local ICE officials, review on an annual basis and, if needed, refresh training requirements.

See Exhibit I, pp. 17-18. In stark contrast to Section 1357(g)(2), the Act does **not** even mention (much less mandate) training.

Moreover, under Subsection (3) of Section 1357(g), whenever local or state law enforcement officers are enforcing federal immigration law, they "must" act under the supervision of the Department of Homeland Security. Specifically, ICE's standard memorandum of agreement provides that:

> Supervision:
>
> A [1357](g) delegation of authority task force is designed to proactively respond to, identify, and remove criminal aliens that reside within the AGENCY's jurisdiction pursuant to the tiered level of priorities set forth in Appendix D's "Prioritization" section. The following identifies each entity's roles and responsibilities. These roles and responsibilities include, but are not limited to: If the AGENCY conducts an interview and verifies identity, alienage, and deportability,

> they must contact ICE for arrest approval. **No arrest for a violation of Title 8 is to be conducted by an AGENCY task force officer without prior approval from the ICE supervisor**.
>
> The AGENCY is responsible for ensuring proper record checks have been completed, obtaining the necessary court/conviction documents, and, upon arrest, ensuring that the alien is processed through ENFORCE/IDENT and served with the appropriate charging documents.
>
> Prior to an AGENCY conducting any enforcement operation that will involve the use of its [1357](g) delegation of authority, the AGENCY must provide the ICE supervisor with a copy of the operations plan, and the SAC/FOD **must** concur and approve with the plan prior to it being initiated.
>
> The ICE supervisor is responsible for requesting alien files, reviewing alien files for completeness, approval of all arrests, and TECS checks and input. The SAC/FOD office is responsible for providing the AGENCY with current and updated DHS policies regarding the arrest and processing of illegal aliens.
>
> On a regular basis, the ICE supervisor is responsible for conducting an audit of the IDENT/ENFORCE computer system entries and records made by the LEA officers. Upon review and auditing of the IDENT/ENFORCE computer system entries and records, if errors are found, the ICE supervisor will communicate those errors in a timely manner to the responsible official for the AGENCY. The ICE supervisor will notify the AGENCY of any errors in the system and the AGENCY is responsible for submitting a plan to ensure that steps are taken to correct, modify, or prevent the recurrence of errors that are discovered.

See Exhibit I, pp. 20-21 (emphasis added). The Act nullifies the supervisory requirements of Section 1357(g)(3) by mandating that all state and local law enforcement officers enforce federal immigration law to the "full extent permitted by federal law" **without** any federal supervision whatsoever.

Underscoring the breadth of Section 1357(g), Subsection 10 of Section 1357(g) expressly provides that local law enforcement officials do not need a Section 1357(g) agreement in order (1) to communicate with the Department of Homeland Security regarding the immigration status of any individual, or (2) to cooperate with the Department of Homeland Security "in the identification, apprehension, detention or removal of aliens not lawfully present in the United States." Subsection 10 thus

underscores the fact that state and local law enforcement authorities **require** express authorization under Subsection 1 of Section 1357(g) to directly enforce federal immigration law. The Act ignores and nullifies this requirement.

Finally, in March of this year, the Office of the Inspector General of the United States ("OIG") conducted a review of ICE's Section 1357(g) program during the period of February 2009 through July 2009. See Exhibit J. Since the OIG audit was conducted, ICE has "fundamentally" reformed the Section 1357(g) program by (among other things) "prioritizing the arrest and detention of criminal aliens." See Exhibit K.

Specifically, in order to reform the Section 1357(g) program, ICE:

- Implemented comprehensive guidelines for ICE field offices that supervise [1357](g) partnerships, prioritizing the arrest and detention of criminal aliens;
- Now requires [1357](g) officers to maintain comprehensive alien arrest, detention, and removal data in order to ensure operations focused on criminal aliens, who pose the greatest risk to public safety and community;
- Strengthened the [1357](g) basic training course and created a refresher training course, providing detailed instruction on the terms of the new MOA and the responsibilities of a [1357](g) officer;
- Deployed additional supervisors to the field to ensure greater oversight over [1357](g) operations;
- Established an Internal Advisory Committee, which includes the DHS Office of Civil Rights and Civil Liberties, to review and assess ICE field office recommendations about pending [1357](g) applications.

Id. p. 1. Thus, in contrast to the Act–which can be enforced based on the mere **allegation** of a violation of a **civil** municipal ordinance–Section 1357(g) is directed at "the arrest and detention of criminal aliens."

The limited purpose of Section 1357(g) is reflected in the new standard "memorandum of agreement" ("MOA") between the Department of Homeland Security and participating local law enforcement agencies:

Purpose

> The purpose of this collaboration is to enhance the safety and security of communities by focusing resources on identifying and processing for removal criminal aliens who pose a threat to public safety or a danger to the community. This MOA sets forth the terms and conditions pursuant to which selected AGENCY personnel (participating AGENCY personnel) will be nominated, trained, and approved by ICE to perform certain functions of an immigration officer within the AGENCY'S area of responsibility. Nothing contained herein shall otherwise limit the jurisdiction and powers normally possessed by participating AGENCY personnel as members of the AGENCY. However, the exercise of the immigration enforcement authority granted under this MOA to participating AGENCY personnel shall occur only as provided in this MOA.

See Exhibit I p. 1 (emphasis added). ICE's new standard memorandum of agreement also establishes the following priorities:

> Prioritization:
>
> ICE retains sole discretion in determining how it will manage its limited resources and meet its mission requirements. To ensure resources are managed effectively, ICE requires the AGENCY to also manage its resources dedicated to [1357] (g) authority under the MOA. To that end, the following list reflects the categories of aliens that are a priority for arrest and detention with the highest priority being Level 1 criminal aliens. Resources should be prioritized to the following levels:
>
> Level 1 — Aliens who have been convicted of or arrested for major drug offenses and/or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping;
>
> Level 2 — Aliens who have been convicted of or arrested for minor drug offenses and/or mainly property offenses such as burglary, larceny, fraud, and money laundering; and
>
> Level 3 — Aliens who have been convicted of or arrested for other offenses.

See Exhibit I, p. 17. Correspondingly, under ICE's new standard memorandum of understanding, the detention and arrest powers of participating state and local law enforcement authorities are strictly limited and supervised:

> The participating AGENCY personnel are authorized to perform the following functions in the investigation, detention, and removal of aliens in the United States as allowed for the TFO model (INA 287(g)), pursuant to the tiered level of priorities set forth in Appendix D's

"Prioritization" section:

> The power and authority to interview any person reasonably believed to be an alien about his right to be or remain in the United States and to take into custody for processing an alien solely based on an immigration violation (INA §§ [1357](a)(1) and (2)) **will** be delegated **only** on a case-by-case basis. To exercise such authority, a TFO first **must** obtain approval from an ICE supervisor, who will approve the exercise **only** to further the priorities of removing serious criminals, gang members, smugglers, and traffickers and when reasonable suspicion exists to believe the alien is or was involved in criminal activity. When an alien is arrested for the violation of a criminal law, a TFO may process that alien for removal **subject** to ICE supervision as outlined in this agreement;
>
> The power and authority to arrest without warrant for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if there is reason to believe that the person so arrested has committed such felony and if there is likelihood of the person escaping before a warrant can be obtained (INA § [1357](a)(4) and 8 C.F.R. § 287.5(c)(2)). Arrested individuals must be presented to a federal magistrate judge or other authorized official without unnecessary delay (INA § [1357](a)(4); Fed. R. Crim. P. 5). Notification of such arrest must be made to ICE within twenty-four (24) hours;
>
> The power and authority to arrest for any criminal offense against the United States if the offense is committed in the officer's presence pursuant to INA § [1357](a)(5)(A) and 8 C.F.R. § 287.5(c)(3).

See Exhibit I, p 19. In contrast to the express limits on the authority of state and local law enforcement officers to arrest under Section 1357(g), the Act allows state and local law enforcement officers to engage in warrantless arrests of anyone who "has committed any public offense that makes the person removable from the United States." A.R.S. §13-3883(A) (5).

Similarly, in contrast to the focus of Section 1357(g) on the "arrest and detention of criminal aliens," the Act directs state and local law enforcement officers to "determine the immigration status" of individuals "stopped" in connection with the alleged violations of "ordinances," which are primarily civil, **not** criminal, in nature. See ARS §11-1051(B).

The foregoing materials demonstrate beyond question that the Act conflicts with Section 1357(g). The Act is consequently preempted by Section 1357(g). See, e.g., *Hines v. Davidowitz*, 312 U.S. at 60-62 (1941), *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 771 (D. Cal.,1995), *Lozano v. City of Hazelton,* 496 F. Supp. 2d 477 (D. Pa. 2007), and *Villas at Parkside Partners v. The City of Farmers Branch, Texas*, 2010 WL 1141398 (D. Tex. March 24, 2010).

4. The Act violates due process by mandating the continued incarceration of anyone arrested until their immigration status is determined.

As the United States Supreme Court recognized in *Mathews v. Diaz*, 426 U.S. 67, 78 (1976),

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

The Act provides that "[a]ny person who is arrested [for any reason] **shall** have the person's immigration status determined **before** the person is released." A.R.S. §11-1051(B) (emphasis added). Based on this language, an individual could be arrested for a minor misdemeanor offense and qualify for release under state law, but nonetheless be subject to indefinite detention until their "immigration status [is] determined." Fundamental due process requirements prohibit the government from incarcerating someone indefinitely during which time their immigration status is determined. See, *e.g.*, *Mortimer v. Baca*, 594 F.3d 714, 722-723 (9th Cir. 2010), and *Brass v. County of Los Angeles*, 328 F.3d 1192, 1200 (9th Cir. 2003). Because the Act facially violates this principle, this provision of the Act must enjoined.

5. The Act violates the Supreme Court of the United States' ruling in *Plyler v. Doe*, 457 U.S. 202 (1982).

In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court of the United States concluded that the State of Texas could **not** exclude undocumented children from its primary and secondary schools consistent with the due process clause of the

Fourteenth Amendment to the Constitution of the United States.

Ignoring *Plyler's* long-standing mandate, under the Act, state and local law enforcement officers will be required "to determine the immigration status" of any student they "stop" for any potential violation of an another "law or ordinance," if the officer "reasonable suspects" that the child "is unlawfully present in the United States." See A.R.S. §11-1051(B). Thus, if a student gets into a school yard fight and a "school resource officer" intervenes and in so doing "reasonably suspects" that one of the students is "unlawfully present in the United States," the officer is obligated to ask the student if he or she is lawfully in the United States. If the student answers "no," the officer is obligated to arrest the child in accordance with the express language of the Act. See A.R.S. §13-3883A(5)

By **not** excluding enforcement of the Act in or around the public schools, the Act violates *Plyler v. Doe* and is consequently unconstitutional. *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 785 (D. Cal.,1995)(enjoining California's Proposition 187 as applied to primary and secondary children as violative of *Plyler v. Doe*).

6. Plaintiff is entitled to a preliminary injunction.

A. Martin Escobar will likely prevail on the merits.

Based on the authorities set forth above, Plaintiff submits that he has established that he will likely prevail on the ultimate merits of this dispute. This likelihood is underscored by the success of other lawsuits challenging the constitutionality of laws similar to (but not as extreme as) the Act. See, e.g., *Hines v. Davidowitz*, 312 U.S. at 60-62 (1941), *League of United Latin American Citizens v. Wilson*, 908 F. Supp. at 771 (D. Cal.,1995), *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477 (D. Pa. 2007), and *Villas at Parkside Partners v. The City of Farmers Branch, Texas*, 2010 WL 1141398 (D. Tex. March 24, 2010).

B. Plaintiff will likely suffer irreparable harm if the Act is enforced.

If Defendants are allowed to enforce the Act, Plaintiff will suffer irreparable harm

based on the violation of his federal rights under the Constitution. See, e.g., *Dominguez v. Schwarzenegger*, 596 F.3d 1087, (9th Cir. 2010) (affirming grant of preliminary injunction against a California law that was preempted by the federal Medicaid Act). As the Ninth Circuit observed in *Associated General Contractors v. Coalition For Economic Equity*, 950 F.2d, 1401, 1412 (9th Cir. 1991), "an alleged constitutional infringement will often alone constitute irreparable harm."

Moreover, when considering the likelihood of irreparable injury, the Court should consider the danger of racial profiling in the enforcement of federal immigration law by state and local governments in Arizona. See generally, Carie L. Arnold, Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law, 49 Ariz. L. Rev. 113, 119-121 (2007) (discussing the "disaster" of the "Chandler Roundup" of 1997, which the Arizona Attorney General concluded "violated the Equal Protection and Fourth Amendment rights of American citizens and legal residents in the Chandler area"), and United States Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues and Immigration Law, p. 11 (1980) ("In the 1950's many Americans were alarmed by the number of immigrants from Mexico. As a result, then United States Attorney General Herbert Brownell, Jr., launched "Operation Wetback" to expel Mexicans from this country. Among those caught up in the expulsion were American citizens of Mexican decent who were forced to leave the country of their birth").[22]

In fact, the Ninth Circuit has repeatedly warned of the dangers of racial profiling

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[22] If fact, the Act's principal sponsor in the Arizona State legislature, Mesa Republican Russell Pearce, has called for the return of Operation Wetback: "We know what we need to do. In 1953 Dwight D. Eisenhower put together a task force called 'Operation Wetback.' He removed, in less than a year, 1.3 million illegal aliens. They must be deported." Sarah Lynch, Pearce calls on "Operation Wetback" for illegals," East Valley Tribune, September 29, 2006. See Exhibit F. At the evidentiary hearing on Plaintiff's Motion for a Preliminary Injunction, Plaintiff will introduce evidence of this statement to support the claim that the Act violates his rights under the Equal Protection clause based on its sponsors' discriminatory intent. See, *e.g.*, *United States v. Makowski*, 120 F.3d 1078, 1080-1082 (9th Cir. 1997)(use of the term "wetback" used as evidence of "racial animus"). See Also Exhibit L, Koback Pierce e-mail.

in the enforcement of immigration law. See, e.g., *United States v. Garcia-Camacho*, 53 F.3d 244, 246 n.2 (9th Cir. 1995) (finding a suspicious reoccurrence of border patrol agents facts supporting a "reasonable suspicion" to justify a stop), and *United States v. Rodriguez,* 976 F.2d 592, 594-595 (9th Cir. 1992) (courts "must be watchful for mere rote citations of factors which were held, in some past situations, to have generated reasonable suspicion"). See also, Carrie L. Arnold, Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law, 49 Ariz. L. Rev., p. 136 ("immigration officers are familiar with case law and are experienced enough to create pre-fabricated profiles that will satisfy courts that their stops were not based solely upon race or ethnic appearance"). Without doubt, this danger is magnified by the Act's failure to conform to federal training requirements for immigration law enforcement officers.[23]

C. The balance of hardships tips sharply in Officer Escobar's favor.

The "balance of hardships" is overwhelmingly in favor of Officer Escobar. If Officer Escobar refuses to enforce the Act, he could be disciplined or fired after more

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[23] Although the Act purports to preclude racial profiling, "this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution," A.R.S. §10-1050(B), the issue of whether or not law enforcement officials can consider these characteristics when enforcing federal immigration law is unclear, compare *United States v. Cruz-Hernandez*, 62 F.3d 1353, 1355-56 (11th Cir. 1995) ("Agent Zetts enumerated several factors upon which he relied in deciding to stop Cruz Hernandez: (1) Cruz-Hernandez was dressed in clothes typical of undocumented aliens working in the local fields; (2) Cruz-Hernandez quickly averted his gaze and jerked his head to the front, when Zetts looked at him, and he seemed nervous; (3) Cruz-Hernandez appeared to be Hispanic; (4) Cruz-Hernandez was driving a van typical of those that transport large numbers of undocumented aliens to and from the fields; (5) the vehicle displayed an out-of-state license plate; (6) Zetts knew that many undocumented aliens lived in a local trailer park near the location of the stop; and (7) local businesses and citizens had complained of undocumented aliens living in the area and working in area fields. Zetts articulated specific facts from which he made reasonable inferences, and the totality of the circumstances supported Zetts's suspicion. Therefore, the stop was constitutionally based on reasonable suspicion, and the motion to suppress properly was denied"), with *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000)("at this point in our nation's history, and given the continuing changes in our ethnic and racial composition, Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required. Moreover, we conclude, for the reasons we have indicated, that it is also not an appropriate factor").

than fifteen years of dedicated service to the Tucson Police Department. As the Ninth Circuit observed in *Nelson v. National Aeronautics and Space Administration*, 530 F.3d 865, 881-882 (9th Cir. 2008):

> The balance of hardships tips sharply toward Appellants, who face a stark choice-either violation of their constitutional rights or loss of their jobs. . . . Moreover, the loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages.

See also, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1124 (9th Cir. 2009) (finding injunctive relief was appropriate when plaintiff was "at serious risk of losing her job because of [the] new rules [the legality of which she challenged]").

Similarly, school administrators and educators have a statutory obligation under Arizona law to report potential abuse and neglect of its students to local law enforcement authorities. However, if the Act is enforced, such reports of potential abuse and neglect to law enforcement officers, its students will be threatened with unlawful interrogation, detention, and arrest if they cannot quickly prove that they are lawfully in the United States. See, *e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)("a refusal on the part of the federal courts to [grant equitable relief] . . . may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity").

D. The issuance of a preliminary injunction is in the public interest.

"The public interest analysis for the issuance of a preliminary injunction requires [the court] to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009). In this case, the public interest strongly weighs in favor of an injunction maintaining the status quo pending a trial on the merits because the people of Arizona have **no** interest in having 15,000 law enforcement officers throughout the State enforce federal immigration law with little or no training.

In accordance with the Governor of Arizona's Executive Order, see Exhibit D, AzPOST is creating a training program so that approximately 15,000 law enforcement officers employed by approximately 170 municipal, county, and state law enforcement agencies throughout the State of Arizona can proceed to enforce the Act on July 29, 2010. See Exhibit M, p. 1-3.

AzPOST's proposed training program does **not** comport with federal standards for the training of state and local law enforcement officers expressly authorized to enforce federal immigration law under 8 U.S.C. §1357(g).

AzPOST's "training" program will consist of:

- approximately a one to two hour "Digital Media" training program that will be sent on approximately June 30, 2010 by AzPOST to 170 police agencies approximately one month before the Act becomes effective; and
- according to at least one report, the AzPOST training is not mandatory and it will remain up to the various law enforcement agencies throughout the State to determine if and how the training program will be administered to their officers.

See Exhibits M and N.

In contrast to AzPOST's "training" program, ICE requires state and local law enforcement officials participating in the enforcement of federal immigration law under Section 1357(g) to meet the following requirements:

- United States citizenship;
- Successful completion of a background investigation;
- Minimum of two years experience in current position;
- No disciplinary action pending; and
- Completion of a four-week training program at the ICE Academy conducted by certified instructors.

See Exhibit O, p. 2. ICE also **requires** state and local law enforcement officers participating in Section 1357(g) programs to pass examinations equivalent to those given to full-time ICE officers **before** state and local officers can use federal

immigration enforcement powers under Section 1357(g). See Exhibit J, pp. 27-28.

ICE's standard memorandum of agreement provides that:

> Training:
>
> The [1357](g) training program, the Immigration Authority Delegation Program (IADP), will be taught by ICE instructors and tailored to the immigration functions to be performed. ICE Office of Training and Development (OTD) will proctor examinations during the IADP. The AGENCY nominee must pass each examination with a minimum score of 70 percent to receive certification. If the AGENCY nominee fails to attain a 70 percent rating on an examination, the AGENCY nominee will have one opportunity to remediate the testing material and re-take a similar examination. During the entire duration of the IADP, the AGENCY nominee will be offered a maximum of one remediation examination. Failure to achieve a 70 percent on any two examinations(inclusive of any remediation examination), will result in the disqualification of the AGENCY nominee and their discharge from the IADP.
>
> Training will include, among other topics: (I) discussion of the terms and limitations of this MOA; (ii) the scope of immigration officer authority; (iii) relevant immigration law; (iv) the ICE Use of Force Policy; (v) civil rights laws; (vi) the U.S. Department of Justice "Guidance Regarding the Use Of Race By Federal Law Enforcement Agencies," dated June 2003; (vii) public outreach and complaint procedures; (viii) liability issues; (ix) cross-cultural issues; and (x) the obligation under Federal law and the Vienna Convention on Consular Relations to make proper notification upon the arrest or detention of a foreign national.
>
> Approximately one year after the participating AGENCY personnel are trained and certified, ICE may provide additional updated training on relevant administrative, legal, and operational issues related to the performance of immigration officer functions. Local training on relevant issues will be provided as needed by ICE supervisors or designated ICE team leaders. An OSLC designated official shall, in consultation with OTD and local ICE officials, review on an annual basis and, if needed, refresh training requirements.

See Exhibit I pp. 17-18.

The 170 law enforcement agencies throughout Arizona simply do not have enough time to responsibly train 15,000 officers by July 29, 2010. This lack of training is likely to result in irreparable injuries to Plaintiffs and individuals of Mexican ancestry

in Arizona, given the fact that the vast majority of immigration enforcement actions are directed against individuals of Mexican Ancestry, who as a group are **not** "immigrants" to this region and are in fact some of its oldest residents. See generally, A. Chavez, Origins of New Mexico Families, (1992) (chronicling Hispanic settlers in present day New Mexico from 1598 to the eighteenth century).[24]

Moreover, as explained above, Arizona already has multiple avenues by which to enforce federal immigration law under the existing federal statutory regime codified at 8 U.S.C. §§1103(A)(10), 1252c(A), 1324(c), and 1357(g). The public interest will **not** be in any way undermined by preliminarily enjoining the Act; to the contrary, it will be advanced.

Conclusion:

Sections 1103(a)(10), 1252c(a), 1324(c), and 1357(g) of Title 8 regulate the enforcement of federal immigration law by state and local law enforcement officials. The Sections combine to **limit** the enforcement of federal immigration law by state and local law enforcement officials to **four** specific areas–(1) responding to "imminent" immigration threats at the border under Section 1103(a)(10); (2) arresting felons unlawfully in the United States under Section 1252(c); (3) the arrest of smugglers, transporters, and haborers of undocumented immigrants under Section 1324(c); and (4) the "arrest and detention of criminal aliens" within the express boundaries of memorandum of agreements with the Department of Homeland Security under Section 1357(g).

The Act breeches the limits of Sections 1103(a)(10), 1252c(a), 1324(c), and 1357(g) and unilaterally expands the scope of enforcement of federal immigration law by state and local law enforcement agencies. Federal courts considering laws similar in purpose--but far more narrow in scope--have uniformly concluded that they are

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[24] According to Office of Immigration Statistics of the Department of Homeland Security, 88% of the 792,000 foreign nationals apprehended by the Department of Homeland Security in 2008 were natives of Mexico. See Exhibit P.

preempted by the Immigration and Nationality Act. See, *e.g.*, *Hines v. Davidowitz,* 312 U.S. 52, 60-62 (1941), *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 771 (D. Cal.,1995), *Lozano v. City of Hazelton,* 496 F. Supp. 2d 477 (D. Pa. 2007), and Villas at Parkside Partners v. The City of Farmers Branch, Texas, 2010 WL 1141398 (D. Tex. March 24, 2010).

States cannot transgress federal limits on the enforcement of immigration law by the states. The Act is preempted by federal law.

Respectfully submitted this 3rd day of June 2010.

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