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7 **UNITED STATES DISTRICT COURT**
 8 **DISTRICT OF ARIZONA**

9 **MARTIN H. ESCOBAR,**
 10 **Plaintiff,**

11 **vs.**

12 **JAN BREWER, Governor of the**
 13 **State of Arizona, in her Official and**
 14 **Individual Capacity; THE CITY OF**
 15 **TUCSON, a municipal corporation,**
 16 **and BARBARA LaWALL, County**
 17 **Attorney, Pima County,**
 18 **Defendants.**

No. CV 10-249 TUC DCB

**MOTION FOR PRELIMINARY
 INJUNCTION**

17 **THE CITY OF TUCSON, a municipal**
 18 **corporation,**
 19 **Cross-plaintiff,**

20 **vs.**

21 **THE STATE OF ARIZONA, a body**
 22 **politic; and JAN BREWER, in her**
 23 **capacity as Governor of the State**
 24 **of Arizona,**
 25 **Cross-defendants.**

26 Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure,
 27 Defendant/Cross-plaintiff, City of Tucson ("Tucson" or the "City"), hereby

1 moves for an order enjoining the defendants from enforcing in any manner
2 Senate Bill 1070 as amended by House Bill 2161 (hereafter "SB 1070" or the
3 "Act").¹ Cross-plaintiff's motion is based upon the attached points and
4 authorities, the affidavit of Laura Brynwood that has been filed with the Court
5 (Docket No. 14) and such other and further materials as the Cross-plaintiff
6 may present to the Court by affidavit or testimony at a hearing on the motion.
7

8 Respectfully submitted this 7th day of June, 2010.
9

10 MICHAEL G. RANKIN
11 City Attorney

12
13 By: /s/ Michael W.L. McCrory
14 Michael W.L. McCrory
15 Principal Assistant City Attorney
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24 _____
25 ¹ SB 1070 and HB 2162 are attached as Exhibit B to Plaintiff's Motion for Preliminary Injunction
26 Enjoining the Enforcement of the "Support Our Law Enforcement and Safe Neighborhood Act", a.k.a.
27 SB 1070 (hereafter "Plaintiff's Motion"), Docket No. 17(3). Cross Plaintiff joins in Plaintiff's Motion and
incorporates cross references herein where appropriate.

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1 A. SB 1070 as a whole establishes state immigration laws and
2 mandates enforcement of a state immigration policy. Immigration is in the sole
3 and exclusive jurisdiction of the federal government, acting on behalf of all
4 states and for a common foreign policy. It is not subject to individual
5 regulation by the separate states and the Act thus violates federal supremacy
6 in immigration.
7

8 B. SB 1070 establishes state immigration crimes that duplicate,
9 expand and contradict federal law and enforcement policy. The Act's overall
10 purpose and effect is to indiscriminately force unlawful immigrants to leave the
11 state. That directly conflicts with federal law and policies that require training
12 and supervision of local law enforcement pursuing immigration violations. It
13 further conflicts with federal priorities for the arrest and deportation of those
14 who pose the greatest danger to the public and inhibits or prevents the federal
15 government from carrying out that priority. State laws that conflict and inhibit
16 the enforcement of federal laws are preempted under the supremacy clause.
17

18 C. SB 1070 forces the legislature's political view that there should be
19 full enforcement of immigration laws as defined by Arizona on the federal
20 executive branch and local executive and judicial branches of the government.
21 The Act deprives those branches of their constitutional authority to determine
22 how to implement laws and what must be done to achieve justice. It thus
23 violates the constitutional separation of powers.
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1 D. SB 1070 creates a private right of action to compel a particular
2 exercise of the governmental police power. That unconstitutionally
3 compromises the inalienable authority of the government to act on behalf of
4 the public rather than particular individuals.

5
6 E. SB 1070 expressly discriminates against the residents of other
7 states by requiring that they travel and engage in commerce in Arizona with
8 proof of citizenship in addition to their driver's license. Arizona residents are
9 not required to carry such additional documentation of their immigration status.
10 Thus the Act expressly discriminates against interstate commerce in violation
11 of the commerce clause.
12

13 For these reasons, as more fully set forth below, this Court must enjoin
14 any enforcement of the Act.

15
16 **2. THE COURT HAS JURISDICTION TO GRANT THE PRELIMINARY
INJUNCTION.**

17
18 **A. THE COURT HAS SUPPLEMENTAL JURISDICTION OVER
THE CROSSCLAIM.**

19 Under this Court's supplemental jurisdiction and pursuant to Rule 13(g)
20 of the Federal Rules of Civil Procedure, Tucson has standing to file a cross-
21 claim against Governor Brewer and the State of Arizona. Supplemental
22 jurisdiction encompasses earlier concepts of ancillary and pendent jurisdiction,
23 and lets the Court decide all issues constituting a single case or controversy in
24 one case. *Ruud v. U.S. Dept. of Labor*, 347 F.3d 1086, 1089 (9th Cir.,2003);
25 *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130,
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27

1 16 L.Ed.2d 218 (1966). Exercising supplemental jurisdiction prevents
2 relitigation of the same issues in later actions. Thus, because Tucson's cross-
3 claim falls within this Court's supplemental jurisdiction, the cross-claim does
4 not require independent jurisdiction. *Glens Falls Indem. Co. v. U.S. ex rel. and*
5 *to Use of Westinghouse Elec. Supply Co.*, 229 F.2d 370, 373 -374 (C.A.9
6 1956).

8 The cross-claim challenges SB 1070's constitutionality. This challenge
9 requires this Court to decide legal issues about the same law that the present
10 Plaintiff is challenging. The cross-claim raises similar issues based on the
11 same facts as those that the Plaintiff raises in his complaint and this brief
12 cross-references similar and supplemental arguments in the Plaintiff's brief.
13

14 Both Tucson and the Plaintiff challenge the Act on the grounds that it is
15 preempted. Both allege that Tucson police, including the Plaintiff, will be
16 mandated to increase immigration enforcement in conflict with federal law and
17 policies. In paragraph 72 of Plaintiff's complaint, he alleges that one section of
18 SB 1070 will expose him to liability to lawsuits. Tucson agrees that the section
19 will lead to lawsuits that will result in many divergent decisions. In fact, Tucson
20 stands financially liable, since it will have to indemnify the Plaintiff, and others
21 similarly situated, for any liability involved in enforcing SB 1070.
22

24 The cross-claim raises some issues that are not in Plaintiff's complaint.
25 Those issues include violation of the constitutional separation of powers and
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1 the commerce clause. Those distinct issues supplement and do not conflict
2 with the main thrust of both the Plaintiff's and Cross-plaintiff's arguments.

3 These issues are integral to determining SB 1070's constitutionality and
4 they form the heart of Plaintiff's case. In fact, if Tucson could not bring this
5 cross-claim, it would not be able to fully defend itself against Plaintiff's
6 statutory and constitutional claims and arguments. See *Alberti v. Sheriff of*
7 *Harris County, Tex.*, 937 F.2d 984 (5th Cir.,1991) (In case alleging
8 unconstitutional jail overcrowding, County sheriff brought cross-claim in federal
9 court against state for policies that forced it to violate plaintiff's rights.)
10
11

12 **B. THE COURT HAS INDEPENDENT JURISDICTION OVER THE**
13 **CROSSCLAIM.**

14 This Court also has independent jurisdiction over Tucson's cross-claim.
15 The City has a unique role in that it has raised issues regarding the separation
16 of powers and prosecutorial discretion and impact of the Act's mandate for full
17 enforcement of immigration laws on the City's legal authority to establish
18 budgets and law enforcement priorities. These are issues that most directly
19 impact the City itself and its ability to carry out its governmental functions.
20

21 As with all cities in Arizona, Tucson is required by state law to adopt an
22 annual budget starting July 1. Tucson has already prepared its recommended
23 budget which includes a 3.5% cut in wages for city workers and other cut
24 backs. That budget does not provide for any additional enforcement of
25 immigration laws. If this Court does not enjoin SB 1070, the City will be
26
27

1 harmed by the imposition of substantial new expenses for full immigration law
2 enforcement or sued for budget policies that preclude such enforcement.²

3 These are issues that have not been addressed by the individual
4 plaintiffs who have challenged SB 1070, precisely because they are not in the
5 forefront of the concerns of individual plaintiffs. They are in the forefront of the
6 City's concerns which ensures they will be fully presented.
7

8 It is true that, in the 1980 *South Tahoe Lake* case, the Ninth Circuit held
9 that a municipal government lacks standing to sue a state in federal court for
10 violating the Fourteenth Amendment of the United States Constitution. *City of*
11 *South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d
12 231, 233 (9th Cir. 1980). That decision was solely predicated on cases arising
13 under the Fourteenth Amendment involving individual rights. Under that case,
14 a city official likewise lacks standing to sue a state in federal court, if the city
15 official merely seeks redress for "abstract outrage at the enactment of an
16 unconstitutional law."³
17

18
19 But Tucson's cross-claim is not a nebulous or potential Fourteenth
20 Amendment claim. Nor are Tucson's officials suing for "abstract outrage."
21 Among other reasons, Tucson is filing a cross-claim because Plaintiff has sued
22 Tucson. Now that it has been sued, Tucson is bringing its own cross-claim,
23 because SB 1070 violates the federal Constitution's Fourth Amendment,
24 supremacy clause, and commerce clause.
25
26

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² See also the City's irreparable injuries in Sec. 5 *infra*.

1 The violations expose Tucson to financially harmful international and
2 national criticism and boycotts.⁴ More important for the cross-claim, the
3 violations entangle it in enforcing a preempted, unconstitutional state statutory
4 scheme. That is, to the extent that Tucson and its officials and employees
5 must enforce SB 1070, that enforcement compels them to violate the Fourth
6 Amendment, the commerce clause, and the supremacy clause. SB 1070 also
7 forces Tucson to violate the state constitution's mandate to follow the federal
8 Constitution.⁵ Those violations are something that Tucson will not willingly
9 commit.
10
11

12 **C. SOUTH TAHOE LAKE DOES NOT DEPRIVE TUCSON OF**
13 **STANDING.**

14 This Court should note that some later Ninth Circuit opinions have
15 loosely treated the 1980 *South Lake Tahoe* case as creating a *per se* rule
16 extending to cases brought under the supremacy clause.⁶ The Ninth Circuit
17 has not, however, directly addressed whether a city may bring a cross-claim to
18

19 ³ *Id.* at 237.

20 ⁴ See, e.g., Bob Christie, *Arizona Immigration Law Sparks Boycott*, THE CHARLESTON GAZETTE
21 [West Virginia] A-7 (May 1, 2010); Sabrina Ford, Rebecca Rosenberg, Joe Walker, *Arizona*
22 *Immigration Law Stirs Angry NY Protests*, NEW YORK POST 22 (May 2, 2010); Kevin Johnson, *Mexico*
23 *Issues Travel Alert over New Arizona Immigration Law; Cautions Citizens about 'Negative'*
24 *Environment*, USA TODAY A-5 (April 28, 2010); Stacy St. Clair, *8,000 Rally in Chicago Against New*
25 *Arizona Immigration Law*, CHICAGO TRIBUNE 18 (May 2, 2010); United States: *Hysterical Nativism;*
26 *Arizona's Immigration Law*, 395 THE ECONOMIST 28 (April 24, 2010); *United States: The Backlash*
27 *Begins; Arizona's Immigration Crackdown*, 395 THE ECONOMIST 31 (May 8, 2010).

⁵ Ariz. Const., Art. 2, § 3 ("The Constitution of the United States is the supreme law of the land."). See also *State v. Ikeda*, 61 Ariz. 41, 48, 143 P.2d 880, 883 (1943) ("It is elementary that where both the Congress of the United States and a state legislative act have reference to the same subject matter, the action of the congress is controlling in case of conflict.").

⁶ See, e.g., *Indian-Oasis Baboquivari Unified Sch. Dist. v. Kirk*, 91 F.3d 1240, 1242 (9th Cir. 1996), *reh'g. en banc granted*, 102 F.3d 999 (9th Cir. 1996), *appeal dismissed*, 109 F.3d 634 (9th Cir. 1997) (*en banc*). But see *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1309 n.7 (9th Cir. 1981) ("While there are broad dicta that a political subdivision may never sue its maker on constitutional grounds, we doubt that the rule is so broad." (citation omitted)).

1 prevent violations of the constitutional separation of powers, commerce clause
2 or to settle supplemental jurisdiction claims. After all, *South Lake Tahoe* did
3 not involve a commerce clause claim or a state-constitutional claim.

4 Thus, the Ninth Circuit has not directly addressed those issues. The
5 point here is that no clear Ninth Circuit precedent bars a city from suing a state
6 on a supremacy clause claim, on a commerce clause claim, or on a
7 supplemental jurisdiction state constitutional claim. That is especially true
8 when Tucson has a sufficient interest to merit pursuing those issues in a
9 federal court cross-claim.⁷

10 Just as important, the *South Lake Tahoe* doctrine rests in large part on
11 the notion that a state's political subdivision cannot sue the state that created
12 it. As the Ninth Circuit explained in the 1999 *Palomar Pomerado Health*
13 *System* case, courts have denied standing to sue the state to political
14 subdivisions like municipal corporations "on the ground that they have no
15 rights against the state of which they are a creature."⁸ Indeed, the *first*
16 question in the *Palomar Pomerado Health System* case was whether the
17 health care district trying to sue the state was a political subdivision of the
18 state and thus unable to sue the state that had created it.⁹

25 ⁷ See *Thomas v. Mundell*, 572 F.3d 756, 764 (9th Cir., 2009) ("In this case, Thomas and the
26 individual plaintiffs have not alleged sufficient interest in this dispute to merit their entry into federal
27 court.").

⁸ *Palomar Pomerado Health System v. Belshe*, 180 F.3d 1104, 1107 (9th Cir. 1999), *cert.*
denied, 528 U.S. 1074 (2000) (citation and internal quote marks omitted).

⁹ *Id.*

1 But Tucson is not a hapless, subservient creature unable to sue the
2 State to protect its rights and to determine constitutional issues. In fact, under
3 the Arizona Constitution, Tucson is a charter city—sovereign in its municipal
4 affairs.¹⁰ It has an independent right to sue and be sued.¹¹ Under Arizona
5 law, that independent right to sue includes the right to sue the State to
6 challenge the constitutionality of its statutes.¹² That state-approved standing
7 to challenge a state statute’s constitutionality is notably absent from the *South*
8 *Lake Tahoe* case.

10 Moreover, the Ninth Circuit has also explained that *South Lake Tahoe*
11 had found that there was no threat of any lawsuit or any reason to believe that
12 a lawsuit was inevitable. Indeed, since many contingencies had to happen
13 before any alleged injury occurred, “the threat of civil liability” in *South Lake*
14 *Tahoe* “was only *potential*.”¹³ Therefore, in *South Lake Tahoe*, the threatened
15 lawsuit was “too attenuated and conjectural” to provide a basis for standing.¹⁴
16 Here, in contrast, there is nothing potential. The lawsuit confronting Tucson is
17 real, on file, and moving forward. Plaintiff sued Tucson, which is asserting a
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23 ¹⁰ ARIZ. CONST., Art. 13, § 2. See also *McMann v. City of Tucson*, 202 Ariz. 468, 471-472, 47
24 P.3d 672, 675 - 676 (App 2002), review denied (Oct. 29, 2002).

25 ¹¹ See ARIZ. R. CIV. P. 17(d) (“Actions brought by [an] incorporated city or town shall be in its
26 corporate name.”).

27 ¹² See, e.g., *City of Tucson v. Woods*, 191 Ariz. 523, 525-26, 959 P.2d 394, 396-97 (App.
1997), review denied (July 17, 1998) (City had standing to sue the State to challenge the
constitutionality of a statute letting certain communities within the same county as the city incorporate
as towns without the city’s consent.).

¹³ *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 675 (9th Cir. 1988)
(emphasis in original).

¹⁴ *Id.*

1 responsive cross-claim. Thus, under *South Lake Tahoe*, independent
2 jurisdiction exists for Tucson's cross-claim.

3 **D. TUCSON IS ENTITLED TO A PRELIMINARY INJUNCTION.**

4 "A preliminary injunction is appropriate when a plaintiff
5 demonstrates either: (1) a likelihood of success on the merits and
6 the possibility of irreparable injury; or (2) that serious questions
7 going to the merits were raised and the balance of hardships tips
8 sharply in [the plaintiff's] favor. These two options represent
9 extremes on a single continuum: the less certain the district court
10 is of the likelihood of success on the merits, the more plaintiffs
11 must convince the district court that the public interest and balance
12 of hardships tip in their favor." *Wong v. Bush*, 542 F.3d 732,
13 735 (9th Cir., 2008).

14 Tucson submits that as set forth below, there is a very strong likelihood
15 of success on the merits. SB 1070 is by stated intent and actual effect a
16 regulation of immigration. Since that is a field exclusively left to the federal
17 government, and since the Act will conflict with federal government
18 enforcement and policies, it is very likely the Cross-plaintiff will succeed on the
19 merits. Likewise with the Act's clear imposition of a specific political policy on
20 all other branches of the government and its express discrimination against
21 interstate commerce, it is patently unconstitutional.

22 The pole on the other end of the continuum also favors the City. There
23 is little impact on the State if enforcement is enjoined since the criminal
24 conduct addressed is already subject to federal criminal sanctions. The State
25 cannot argue that crimes will go unpunished. Indeed, the only impact of delay
26 in enforcement during a preliminary injunction is that the State cannot increase
27 the level of immigration law enforcement. That impact, as set forth in section 3

1 *infra.*, will conflict with federal law and enforcement policies and thus is not a
2 valid policy concern.

3 The impact on Tucson, however, is substantially different. Tucson will
4 be put in the position of implementing state laws that conflict with federal laws
5 and forced to choose which one it will violate. Tucson's police officers,
6 including the Plaintiff, will be faced with similar choices and will be mandated
7 to unconstitutionally discriminate against persons from other states whose
8 driver's licenses don't meet Arizona standards.
9

10 The day the Act goes into effect, Tucson will be forced to abandon its
11 practice of citing and releasing persons arrested for misdemeanors. In fiscal
12 year 2009, there were 36,821 such arrests – more than 100 a day.¹⁵ Tucson
13 will have to begin verifying, through the authorized federal agencies, the
14 immigration status of each such person. Since it is impossible for federal
15 authorities to respond immediately to all those requests for verifications along
16 with similar requests from every jurisdiction in the State, Tucson will have to
17 start incarcerating such individuals. That will require increased funding at a
18 time when the City is already experiencing employee furloughs and layoffs,
19 including in its public safety workforce.
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23 Delays in verification of the immigration status of arrestees will almost
24 inevitably cause some individuals to be held in custody after a release is
25 ordered by a judge, bail is posted, or a fine is paid. That places the City in the
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¹⁵ Affidavit of Laura Brynwood, Document 14.

1 position of violating the individual's Fourth Amendment rights with consequent
2 liability in addition to the increased incarceration costs. See *Wyoming v.*
3 *Oklahoma*, 502 U.S. 437, 448-450, 112 S.Ct. 789, 797 - 798 (U.S.,1992);
4 *Buckley v. Valeo*, 424 U.S. 1, 114, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)
5 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143, 95 S.Ct.
6 335, 42 L.Ed.2d 320 (1974)). ["[w]here the inevitability of the operation of a
7 statute against certain individuals is patent, it is irrelevant to the existence of a
8 justiciable controversy that there will be a time delay before the disputed
9 provisions will come into effect."]
10
11

12 Having publicly stated its position that it does not have the budget or
13 police resources for increased immigration enforcement, Tucson is also highly
14 likely to be immediately subject to a private lawsuit under the Act to require the
15 City to enforce immigration laws to the full extent permitted by federal law.
16 That will require concurrent litigation in state court of the federal issues before
17 this Court.
18

19 Finally, aside from the legal impact of enforcement, there is also the
20 economic impact. By increasing the requirements for proof of legal status for
21 both tourists and business representatives from Sonora, Mexico, only about 65
22 miles to the south, and from New Mexico, about 130 miles by interstate
23 highway to the east, SB 1070 has already decreased tourism and commerce
24 between these areas and Tucson. Tucson has a "bed tax" on each night a
25 visitor stays in a local hotel, Tucson Code §19-66, *et. seq.* The City also has a
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1 sales tax that will likewise be reduced by the loss of tourism and commercial
2 business. These sources of revenue will be seriously diminished if SB 1070 is
3 allowed to go into effect, increasing the already dire budget problems faced by
4 the City.

5
6 The likelihood of success, balance of hardship, and irreparable injury to
7 the City all favor the granting of a preliminary injunction.

8 **3. SB 1070 IS PREEMPTED BY FEDERAL IMMIGRATION LAW.**

9 **A. SB 1070 INFRINGES UPON THE FEDERAL GOVERNMENT'S**
10 **PLENARY POWER OVER IMMIGRATION.**

11 In adopting Senate Bill ("SB") 1070 (the "Act"), the State of Arizona has
12 stated that its intent is to regulate which immigrants are allowed to stay in the
13 State by forcing the attrition of immigrants it determines to be unlawfully
14 present through enforcement of new state criminal codes. SB 1070, §1. The
15 Act creates new state criminal immigration offenses such as failing to comply
16 with immigration registration requirements or committing offenses that are
17 removable under immigration law. The new statutory sections, while minimally
18 cloaked in a chimera of state law, implement the stated purpose by compelling
19 local law enforcement agencies to enforce immigration law to the fullest extent
20 permitted by federal law. The Act then provides any state resident with the
21 legal tool to follow up and make sure immigration law is enforced to the
22 maximum extent. The Act was adopted with a public record that it was meant
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1 to be the “toughest immigration law” in the country and was meant to do what
2 its supporters say the federal government is not doing.¹⁶

3 In doing so, the State adopted an immigration law and trespassed on
4 the exclusive plenary power of the federal government to control immigration.
5 It has long been recognized that the federal government has exclusive
6 jurisdiction to regulate immigration. *Chy Lung v. Freeman*, 92 U.S. 275
7 (1875); *Truax v. Raich*, 239 U.S. 33, 42, 36 S.Ct. 7, 11 (1915) (“The authority
8 to control immigration-to admit or exclude aliens is vested solely in the Federal
9 government.”); *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399 (1941),
10 *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 933 (1976).¹⁷ This federal
11 supremacy is premised on the fact that regulation of immigration and individual
12 immigrants inherently involves issues of foreign policy which are exclusively
13 federal. As stated in *Hines*:

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17 “The Federal Government, representing as it does the
18 collective interests of the forty-eight states, is entrusted with
19 full and exclusive responsibility for the conduct of affairs
20 with foreign sovereignties. ‘For local interests the several
21 states of the Union exist, but for national purposes,
22 embracing our relations with foreign nations, we are but one
23 people, one nation, one power. Our system of government
24 is such that the interest of the cities, counties and states, no
25 less than the interest of the people of the whole nation,
26 imperatively requires that federal power in the field affecting
27 foreign relations be left entirely free from local interference.
As Mr. Justice Miller well observed of a California statute
burdening immigration: ‘If (the United States) should get
into a difficulty which would lead to war, or to suspension of
intercourse, would California alone suffer, or all the Union?’”

¹⁶ See also Plaintiff’s Motion, pg. 8-9, fn 22, pg. 29, Dkt. No. 17

¹⁷ See also Plaintiff’s Motion, pg. 12, Dkt No. 17.

1 [footnotes and citations omitted] U.S. at 63-64, S.Ct. at
2 402.

3 While SB 1070 focuses on the exclusion of immigrants who are
4 unlawfully present or subject to removal procedures, that does not diminish the
5 impact on federal sovereignty. SB 1070 has already led to a controversy in
6 the address to Congress by the President of Mexico, as well as travel
7 advisories to foreign citizens from Mexico and other countries. It has created
8 substantial opposition in the neighboring state of Sonora, Mexico, which has
9 impacted foreign affairs and diminished tourism and business injuring
10 Tucson's economy.¹⁸

11
12 Contrary to the new Arizona policy, the federal immigration policy has
13 not sought to target removal of all unlawful aliens since the early 1950's.¹⁹
14 Over the past decades, the Congress through its budget authority and the
15 executive branch through enforcement policies have focused limited resources
16 on identifying the aliens who pose a danger to the community and not on mass
17 deportation. There are an estimated 11.6 million undocumented immigrants
18 currently in the country.²⁰ That is essentially the same estimate made by the
19 Commissioner of the I.N.S. in 1974 and cited by the Supreme Court in *U.S. v.*
20 *Brignoni-Ponce*, 422 U.S. 873, 879, 95 S.Ct. 2574, 2579 (U.S., 1975).
21
22
23

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25 ¹⁸ The Governor of Sonora canceled the June meeting of the Arizona-Mexico Commission which is
26 held to bring business and political leaders together and foster cross border trade and relations.
Arizona Daily Star, Apr. 27, 2010, available at http://azstarnet.com/news/local/border/article_44d8bc2e-523d-11df-a9b9-001cc4c03286.html.

27 ¹⁹ See Plaintiff's Motion, fn 22, pg. 29, Dkt. No. 17.

²⁰ U.S. Dept. of Homeland Security, Estimates of the Unauthorized Immigrant Population Residing in the United States, Jan. 2005, available at [http://dhs.gov/xlibrary/assets/statistics/publications/ III PE 2005.pdf](http://dhs.gov/xlibrary/assets/statistics/publications/III%20PE%202005.pdf).

1 Both Republican and Democratic presidents have rejected mass
2 deportation of undocumented aliens. On December 21, 2000, President
3 Clinton signed The Legal Immigration and Family Equity Act of 2000 (“LIFE
4 Act”) into law.²¹ That allowed persons who entered without inspection or
5 otherwise violated certain immigration rules to adjust their status upon
6 payment of a penalty. In 2006, President Bush stated that mass deportations
7 were unrealistic.²² Currently, President Obama supports a system that allows
8 undocumented immigrants who are in good standing to pay a fine, learn
9 English, and go to the back of the line for the opportunity to become citizens.²³

12 There are international repercussions as well. A major shift in
13 immigration policy forcing a substantial number of Mexican nationals to return
14 home can undermine the political and economic stability of Mexico. The
15 money sent by Mexican nationals working in the United States, “remittances”,
16 is Mexico’s largest source of dollars after oil exports.²⁴ The United States
17 cannot ignore these issues even if Arizona does.

19 It is not the role of the State to legislate on immigration matters, *Hines*,
20 *supra.*, *DeCanas, supra.* Nor can a single state require that the federal
21 government enforce immigration laws in a particular way. *Texas v. United*

24 ²¹ Pub. L. 106-554, December 21, 2000, 114 Stat 2763.

25 ²² George W. Bush, Immigration Reform: Address in Irvine, California, Apr. 24, 2006.

26 ²³ <http://www.whitehouse.gov/issues/immigration>

27 ²⁴ Remittances drop from \$26 to 25 billion, are second highest source of dollars, Jan. 28,
2009, Wall Street Journal, available at

<http://online.wsj.com/article/SB123310695110822547.html>

1 States, 106 F.3d 661 (5th Cir., 1997); *Chiles v. United States*, 69 F.3d 1094
2 (11th Cir., 1995). By enacting SB 1070, Arizona has sought to take control of
3 the immigration policy of the country regardless of the will of 49 other states or
4 the established federal process for determining federal national policy. In
5 doing so, it has violated the plenary power that has resided with the federal
6 government since the inception of our country.
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11 **B. SB 1070 CONFLICTS WITH FEDERAL LAW AND POLICY.**

12 SB 1070 does not simply tread into a field that is the exclusive province
13 of the federal government, it also creates state laws that directly conflict with
14 federal laws and enforcement policies.
15

16 Federal immigration enforcement over the last two decades has evolved
17 into a comprehensive set of programs to coordinate all aspects of enforcement
18 by local agencies. Federal laws regulate the terms and conditions for
19 immigration, the entry of immigrants, transportation, harboring, and
20 employment of unlawful immigrants, cooperation with state and local agencies
21 and numerous other areas in extensive detail. Those laws are supplemented
22 with enforcement policies of the Immigration and Custom Enforcement (“ICE”)
23 agency of the Department of Justice. The federal government has occupied
24 the field of immigration regulation and thus any state law must yield to the
25 federal law. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-
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1 374, 120 S.Ct. 2288, 2293 - 2294 (2000); *U.S. v. Locke*, 529 U.S. 89, 108-109,
2 120 S.Ct. 1135, 1147 - 1148 (U.S., 2000).

3 SB 1070 conflicts with the implementation of these laws and polices.
4 Laws which conflict with federal laws are likewise preempted. *Id.* The cases
5 involving field preemption and conflict preemption often overlap. As
6 summarized in *Crosby*, where, as here, a law creates circumstances where
7 Plaintiff and Cross-plaintiff cannot comply with the provisions of both state and
8 federal law or where, in doing so, the parties will frustrate the objective of
9 federal law, the state law is preempted.²⁵

10
11
12 **i. ICE HAS ADOPTED COMPREHENSIVE FEDERAL**
13 **ENFORCEMENT POLICIES.**

14 Federal immigration policy emphasizes two fundamental policies -
15 the necessity of prioritizing enforcement of the law against those who pose the
16 greatest danger to the public and the necessity of protecting civil rights and
17 civil liberties. To accomplish these policies, there are comprehensive
18 programs for cooperation with local law enforcement. These programs include
19 delegation of legal authority to local officers subject to federal training and
20 supervision to ensure that authority is properly implemented.

21
22 The Office of State and Local Coordination for ICE provides
23 fourteen distinct options under its Agreements of Cooperation in Communities
24 to Enhance Safety and Security (“ACCESS”) program.²⁶ Under ACCESS, ICE

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27 ²⁵ See also Plaintiff’s Motion, pg. 13, Dkt No. 17.

²⁶ The listing of the programs is available at <http://www.ice.gov/oslc/iceaccess.htm>.

1 agents meet with communities requesting assistance to assess local needs
2 and draft appropriate plans. The programs include programs such as asset
3 forfeiture/equitable sharing, Criminal Alien Program, Fugitive Operation Team,
4 Operation Community Shield and Secure Communities. These various
5 ICE/ACCESS programs provide a variety of options that allow local law
6 enforcement to coordinate its activities with federal agents in conformance with
7 federal policies.
8

9 These programs also carry out the fundamental ICE policy of
10 prioritizing its enforcement to attack those aliens who pose the greatest danger
11 to the public and local communities rather than indiscriminate enforcement
12 against unlawful aliens. Thus Operation Community Shield targets violent
13 transnational street gangs and Secure Communities is designed to prioritize
14 actions on those posing the greatest threat to public safety.
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17 One of the programs under ACCESS is for the 287(g)
18 agreements. These agreements were authorized by the Illegal Immigration
19 Reform and Immigrant Responsibility Act (“IIRIR”) of 1996 as amendments to
20 section 287 of the Immigration and Nationality Act (“INA”)²⁷. Under 287(g)
21 agreements, local “officers are authorized to question aliens as to their
22 immigration status and removability, serve warrants for immigration violations,
23 and issue immigration detainers for state and local detention facilities to hold
24 aliens for a short time after completing their sentence.” Department of
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²⁷ Pub. L. 104-208, Sec. 133, Sept. 30, 1996, now codified as 8 U.S.C. §1357(g).

1 Homeland Security, Office of Inspector General, The Performance of 287(g)
2 Agreements, OIG-10-63 ["OIG Report"], pg. 3.²⁸

3 These agreements provide the federal government's primary
4 process for delegation of immigration enforcement authority to local law
5 enforcement. By statute, these agreements must be in writing and must
6 include substantial training of the local officers, a specification of duties and
7 supervision by federal officials. The agreements require local agencies to
8 adhere to federal law in their immigration enforcement actions, including the
9 protection of civil rights and civil liberties. 8 U.S.C.A. §1357(g).²⁹

10 The effectiveness of the 287g agreements was reviewed for
11 Congress by the General Accounting Office ("GAO") in 2009.³⁰ The report
12 found that better controls were necessary for the program. GAO determined
13 that although ICE had stated that the objective of the program was to address
14 serious crime, four of the 29 agencies "used 287(g) authority to process
15 individuals for minor crimes, such as speeding, contrary to the objective of the
16 program." (*Id.*, pg. 1) GAO found that of the 43,000 aliens apprehended in the
17 agencies it studied, ICE detained only about 34,000 – over 20% of those
18 apprehended by local law enforcement were not detained. *Id.*, pg. 1. Of those
19 who were detained, 5,000 (15%) were either given humanitarian releases,
20 referred to a federal or state prison, or released due to the minor nature of the
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26 ²⁸ The OIG Report is in Plaintiff's Motion, Exhibit J, Dkt. No. 17 (11).

27 ²⁹ A copy of the model 287(g) agreement is in Plaintiff's Motion, Exhibit I, Dkt 17 (10).

³⁰ GAO-09-109, available at <http://www.gao.gov/new.items/d09109.pdf>.

1 offense. The report states that “if all the participating agencies sought
2 assistance to remove aliens for such minor offenses [such as carrying an open
3 container of alcohol], ICE would not have detention space to detain all of the
4 aliens referred to them.” *Id.*, pg. 4.

5
6 The GAO report addresses another critical issue for enforcement,
7 namely the potential for abuse, and found that “over half of the 29 agencies
8 GAO contacted reported concerns from community members that use of the
9 program authority would lead to racial profiling and intimidation by law
10 enforcement officers.” *Id.*

11
12 The GAO report, which was followed by the OIG Report in March,
13 2010. The Report states that the 287(g) agreements were able to increase
14 immigration enforcement and that in delegating immigration enforcement to
15 local agencies, ICE “must ensure that its 287(g) efforts achieve a balance
16 among immigration enforcement, local public safety priorities, and civil
17 liberties.” OIG Report, pg. 7. The OIG Report states that the purpose of the
18 agreements is “to identify and process for removal criminal aliens who pose a
19 threat to public safety or a danger to the community.” *Id.*, pg. 8. But the OIG
20 Report found that only 9% of the aliens apprehended by local agencies were in
21 the top priority classification. “These results do not show that 287(g)
22 resources have been focused on aliens who pose the greatest risk to the
23 public.” *Id.*, pg. 9.
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1 “Since the audit was conducted, ICE has fundamentally reformed
2 the 287(g) program, strengthening public safety and ensuring consistency in
3 immigration enforcement across the country by prioritizing the arrest and
4 detention of criminal aliens - fulfilling many of the report's recommendations.”³¹
5

6
7 **ii. THE ACT’S MANDATE FOR FULL ENFORCEMENT OF
8 IMMIGRATION LAWS CONFLICTS WITH FEDERAL LAW
9 AND POLICIES.**

10 SB 1070 does exactly the opposite of what ICE has been trying to
11 achieve in federal enforcement. It promotes the indiscriminate apprehension
12 of unlawful aliens in order to overwhelm federal facilities and force a political
13 change in enforcement. It enacts state laws criminalizing immigration status
14 rather than adhering to federal laws and creates laws that conflict with federal
15 laws. It provides local officers with legal authority but without adequate
16 training and without any federal supervision. It allows Arizona local agencies
17 to entirely forgo the 287(g) agreement process and independently enforce
18 immigration law, thereby destroying any federal efforts to obtain consistent and
19 prioritized enforcement.
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22 Section 2 of SB 1070 enacted A.R.S. §11-1051 which created two
23 new mandates for Arizona law enforcement – the investigation of any
24 suspected unlawful alien “where practicable” and the continued detention of
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27 ³¹ Updated Facts on ICE 287(g) Programs, April 12, 2010, available at http://www.ice.gov/pi/news/factsheets/section287_g-reform.htm, and are attached to Plaintiff’s Motion, Exhibits K,O, Dkt. 17 (12,

1 any person who is arrested until his immigration status is determined by
2 federal officials.

3 The mandate to investigate any suspected unlawful alien creates
4 the obligation both to question and pursue the matter and, if it turns out the
5 person is an unlawful alien, to arrest. This is clearly the intent of the Act as
6 stated in Section 1 “to deter and discourage the unlawful entry and presence
7 of aliens . . .” This is buttressed by the Act’s requirement that immigration law
8 be enforced to the full extent permitted by federal law, which can be enforced
9 by a private lawsuit by any “legal resident” of the state. Any officer, whether
10 the Plaintiff, other Tucson police officers or other local officers, will be
11 compelled to pursue immigration enforcement unless the officer can be sure
12 there are circumstances that clearly allow an exception as impracticable or
13 necessary to further an investigation.
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17 This obligation applies in all cases, whether a violent felony
18 involving danger to the public or a misdemeanor such as a college kid drinking
19 alcohol, someone speeding or someone involved in a minor fight. The Act’s
20 mandate is to pursue anyone who may be an illegal alien regardless of the
21 overall danger to the community. That is directly contrary to federal
22 enforcement priorities and policies.
23

24 SB 1070 provides new authority for local officers to not only
25 arrest, but to transfer to a federal facility. The obvious purpose of that
26

27 16).

1 provision is to dictate to the federal government who will be detained and
2 processed by ICE. The equally obvious result will be exactly what GAO
3 warned – ICE will not have adequate detention space for all of the aliens
4 referred to it.

5
6 Section 11-1051(B) further states that any person who is arrested
7 must have his immigration status verified by federal officials before his release.
8 This provision applies regardless of whether there is any basis for suspicion
9 that a person is an alien or in the country unlawfully. Read in the context of
10 the intent of the Act and its other provisions, this is plainly directed at
11 immigration enforcement within a targeted population - persons who are
12 arrested. This contravenes established Fourth Amendment law and further
13 intrudes upon and conflicts with federal enforcement policies.

14
15
16 In establishing this target group, the drafters overlooked or
17 ignored the fact that many people are technically arrested on misdemeanors
18 and then released at the time with a citation to appear in court. This process
19 of cite and release is authorized by A.R.S. § 13-3903.

20
21 The City of Tucson used this procedure to cite and release 36,821
22 persons arrested for misdemeanors during fiscal year 2009. Affidavit of Laura
23 Brynwood, Docket No. 14. This is more than half of the total number of
24 individuals identified for removal by ICE by all 287(g) officers throughout the
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1 country in 2009.³² ICE simply cannot manage an increase that large from one
2 city, let alone every jurisdiction in the State.

3 The City also faces situations where persons who are arrested are
4 then ordered released by a court prior to the federal verification of their
5 immigration status. This requires that the City detain the person without any
6 reasonable suspicion, probable cause or other legal basis to question their
7 citizenship in violation of the Fourth Amendment to the U.S. Constitution.
8

9 Both such detentions for minor offenses and demands for
10 verification from federal officials are outside the scope of federal priorities.
11 The Act nonetheless forces Tucson to implement the detentions and make the
12 36,000 or more requests for verification. If ICE tries to process those
13 verifications, and those from every other community in Arizona, the State will
14 have dictated its use of resources and destroyed any ability to prioritize
15 enforcement. If ICE does not respond, the local communities are stuck with
16 people in detention who cannot, under Arizona law, be released even though
17 there may be no basis to hold them.
18
19

20 SB 1070 establishes other state crimes that conflict with federal
21 law. A.R.S. §13-1509 establishes a state crime for failure to register as an
22 alien or carry a registration card.³³ A.R.S. §13-2928 adds a new crime of
23 soliciting employment where it obstructs a highway a provision solely directed
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27 ³² OIG Report, Table 2, page 6.

³³ cf. 8 U.S.C.A. §1302(a), 1304(e), 1306(a), (e), 18 U.S.C.A. §3282(A).

1 at the employment of unauthorized aliens.³⁴ A.R.S. §13-2929 parallels, but
2 does not equal, federal criminal provisions for the transportation of unlawful
3 aliens.³⁵ A.R.S §13-3838(5) gives state law enforcement the authority to
4 arrest a person subject to removal under immigration laws.³⁶
5

6 None of these sections addresses actions that are subject to
7 traditional state police power. All of them parallel federal immigration
8 enforcement. But these new laws allow for separate interpretations by local
9 law enforcement, allow the state courts to determine the meaning of each,
10 separate from any prevailing federal law and impose distinct state penalties.
11 That inherently conflicts with the supremacy of federal immigration law
12 enforcement. *Hines, supra.*; *Crosby, supra.*
13

14 The impact of SB 1070 is not solely upon undocumented aliens.
15 Increased enforcement of immigration laws inevitably will encompass
16 questioning and possible detentions of legal aliens and citizens. As stated in
17 the OIG Report, pg. 22, “[o]ne aspect of DHS’ primary mission is to ensure that
18 civil rights and civil liberties are not diminished by its efforts, activities and
19 programs aimed at securing the homeland.”
20
21

22 The OIG Report found that civil rights and civil liberties had not
23 been consistently included and monitored in the 287(g) programs. It
24 specifically noted one jurisdiction that “is subject of (1) an ongoing racial
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26 ³⁴ *cf.* 8 U.S.C.A. §1324a.

27 ³⁵ *cf.* 8 U.S.C.A. §1324.

³⁶ For further discussion of the conflicts between SB 1070 and federal immigration laws see Plaintiff’s Motion, pg. 11-27, Dkt No. 17.

1 profiling lawsuit related to 287(g) program activities; (2) a lawsuit alleging
2 physical abuse of a detained alien; and (3) A DOJ investigation into alleged
3 discriminatory police practices, unconstitutional searches and seizures and
4 national origin discrimination.” *Id.*, pg. 23. To address this, the Report
5 recommends that ICE incorporate a civil rights and civil liberties review into the
6 approval process. *Id.* pg. 24.

8 SB 1070 circumvents this federal concern for enforcement
9 consistent with civil rights and civil liberties by allowing local law enforcement
10 to exercise the powers that would be delegated in a 287(g) agreement under
11 state law and without the supervision of the federal government. That
12 inherently trespasses on the federal government’s control of immigration law
13 enforcement.
14

15
16 **4. SB 1070 VIOLATES THE CONSTITUTIONAL SEPARATION OF**
17 **POWERS.**

18 The drafters of SB 1070 have created a law that ignores the separation
19 of governmental powers in their determination to ensure the mass deportation
20 of unlawful aliens. The Act reduces police and prosecutors to being agents of
21 any resident of the State who wants stricter immigration enforcement,
22 disregarding their separate roles and functions.
23

24 SB 1070 states that its purpose is to discourage and deter unlawful
25 aliens from remaining in the State. It mandates that local jurisdictions such as
26 Tucson shall have no policy that limits the enforcement of immigration laws to
27

1 the full extent permitted by federal law. SB 1070, Sec. 2, A.R.S. §11-1051(G).
2 It delegates to individual state residents the authority to sue to compel police
3 compliance with this provision with the threat of substantial fines. It preordains
4 the decision in the suits – the court must enforce immigration laws to the full
5 extent permitted by federal law. Taken together, these effectively force the city
6 to place full enforcement of immigration laws above every other local concern
7 of the executive branch of local government. *United Steelworkers of America*
8 *v. Weber*, 443 U.S. 193, 201 (1979) (courts interpret legislation “against the
9 background of the legislative history . . . and the historical context from which
10 the Act arose.”)
11

12
13 The Act violates the separation of powers on multiple levels. On one
14 level, it takes over the role of the federal executive branch in determining
15 immigration law enforcement policies. *Greenlaw v. United States*, 544 U.S.
16 237, 128 S.Ct. 2559 (2008); *Hecker v. Chaney*, 470 U.S. 821, 832 (1985);
17 “The prerogative of enforcing the criminal law was vested by the Constitution,
18 therefore, not in the Courts, nor in private citizens, but squarely in the
19 executive arm of the government. Congress has implemented the power of the
20 President by conferring the power and the duty to institute prosecution for
21 federal offenses upon the United States Attorney for each district. 28 U.S.C.A.
22 § 507. In exercising his power, the United States Attorney acts in an
23 administrative capacity as the representative of the public.” *Moses v.*
24 *Kennedy*, 219 F.Supp. 762, 764 -765 (D.C.D.C. 1963) (Denial of claim by civil
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1 rights activists to compel enforcement of federal civil rights laws by the
2 Attorney General in Mississippi.)

3 “Such considerations apply to investigations, arrests, and
4 imprisonments, just as much as they do to actual prosecutions.” *Id.*

5
6 By mandating that every local jurisdiction enforce immigration laws to
7 the fullest extent permitted by federal law, it lets state judges determine what
8 immigration laws get enforced and thus usurps the exclusive executive
9 authority and absolute executive discretion to decide whether to prosecute
10 cases. *U.S. v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100 (1974),
11 *Confiscation Cases*, 1869, 74 U.S. (7 Wall.) 454, 19 L.Ed. 196, *Powell v.*
12 *Katzenbach*, 1965, 123 U.S.App.D.C. 250, 359 F.2d 234, *cert. den.*, 1966, 384
13 U.S. 906, 86 S.Ct. 1341, 16 L.Ed.2d 359, *reh. den.*, 384 U.S. 967, 86 S.Ct.
14 1584, 16 L.Ed.2d 679. “[A]s an incident of the constitutional separation of
15 powers, . . . the courts are not to interfere with the free exercise of the
16 discretionary powers of the attorneys of the United States in their control over
17 criminal prosecutions.” *U.S. v. Cox*, 342 F.2d 167, 171 (5th Cir., 1965).

18
19
20
21 On another level, it infringes on state law separation of powers.³⁷ Under
22 Arizona law, the court evaluates a separation of power claim using the
23 following four factors as guidance: (1) the essential nature of the power
24 exercised; (2) the Legislature's degree of control in exercising the power; (3)
25 the Legislature's objective; and (4) the practical consequences of the action.
26

27

³⁷ Tucson submits that the Court's supplemental jurisdiction extends to the state law claim.

1 *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 193
2 Ariz. 195, 211, 972 P.2d 179, 195 (Ariz.,1999).

3 The essential nature of the power exercised is executive in terms of
4 decisions as to allocation of financial resources, allocation of police resources
5 and law enforcement arrest, investigation and prosecution functions.
6 Alternatively, it is the judiciary's power to determine whether an individual has
7 standing to sue to compel a specific type of law enforcement and whether
8 there is any legal basis for the court to intervene in the prosecutorial function
9 of the executive. It is not a legislative power.
10

11
12 Under SB 1070, the Legislature has assumed full control over the issue,
13 mandating that the level of immigration enforcement shall be to the maximum
14 extent permitted by federal law.
15

16 The Legislature's purpose in doing so is impermissible. The stated
17 intent is to impose a state immigration policy. That itself infringes on the
18 exclusive province of the federal government and is not subject to state
19 legislation. There is certainly no effort to cooperate with either the federal
20 executive or any of the local executives forced to implement state immigration
21 policy. Instead, the "objective of the legislature [is] obviously one of
22 establishing its superiority over the executive department in an area essentially
23 executive in nature. *State ex rel. Schneider v. Bennett*, 219 Kan. 285, 290-91,
24 547 P.2d 786, 792-3 (Kan. 1976), *quoted in J.W. Hancock Enterprises, Inc. v.*
25
26
27

1 *Arizona State Registrar of Contractors*, 142 Ariz. 400, 405, 690 P.2d 119,
2 124 (Ariz.App.,1984).

3 The practical result is to force cities and their individual police officers
4 such as the Plaintiff to subordinate local public safety concerns to the
5 impermissible state policy and to force them to act in conflict with the federal
6 government. The further practical result is to open the path for numerous
7 lawsuits against cities that will lead to financial liability and a variety of mixed
8 decisions and directions.
9

10 On yet another level, SB 1070 usurps Tucson's legislative authority to
11 set its own budget and its executive authority to implement that budget.
12 Tucson's budget is essentially complete for the coming fiscal year that starts
13 July 1, 2010. That budget does not provide for additional immigration
14 enforcement as mandated by SB 1070. The City has already experienced
15 furloughs and layoffs of employees due to the recession. It simply cannot
16 budget sufficient funds for all law enforcement. That legislative policy decision
17 in turn requires that the Tucson Police Department establish priorities in how
18 they enforce the law. Both the budget policy of the Mayor and Council and of
19 the Tucson Police Department will by necessity limit the enforcement of
20 immigration law to something less than the full extent permitted by federal law.
21 As a charter city, Tucson has the sovereign right to determine how to allocate
22 its budget and to set the policies for law enforcement by the Tucson Police
23 Department. *Strode v. Sullivan*, 72 Ariz. 360, 363, 236 P.2d 48 (1951),
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1 *Robertson v. Graziano*, 189 Ariz. 350, 354, 942 P.2d 1182, 1186 (Ariz.App.
2 Div. 1,1997) [“the power of a charter city . . . to conduct its operations is not
3 derived from the budget laws, but from the Constitution. See *City of Tucson v.*
4 *Tucson Sunshine Climate Club*, 64 Ariz. 1, 4, 164 P.2d 598, 599 (1945).”]

5
6 Finally, a separate section of SB 1070 requires that all persons who are
7 arrested must have their immigration status verified prior to their release. Sec.
8 2, A.R.S. 11-1051(B). SB 1070 provides no exception where a judge
9 determines that release is appropriate, the person posts the required bail or
10 simply pays the assessed fine. The statute thus prevents the courts from
11 exercising the fundamental judicial function of determining the length of
12 incarceration.

13
14 **5. SB 1070 UNCONSTITUTIONALLY GRANTS INDIVIDUALS THE**
15 **RIGHT TO CONTROL THE POLICE POWER.**

16 SB 1070, Section 2, establishes in A.R.S. 11-1051(G), the right of any
17 legal resident to bring an action against a local government to challenge any
18 “policy” that does not fully enforce immigration laws to the full extent permitted
19 by federal law. The Act provides no definition of what constitutes a policy nor
20 is there any legal definition of what constitutes “to the full extent permitted by
21 federal law.” Indeed, the “full extent” of federal immigration law is not now
22 known nor will it ever be known. It is constantly evolving as Congress adopts
23 new laws, modifies existing laws and the federal courts interpret those laws.
24
25

26 Despite the lack of outer parameters, there is no question that SB 1070
27 is the state legislature’s challenge to every local agency that it is not doing

1 enough to enforce immigration laws. In order to force the communities to do
2 so, the Legislature has delegated control over immigration policy to private
3 individuals. SB 1070, Sec. 2, A.R.S. §11-1051(G). The Act then offers them
4 the prospect of imposing substantial fines on the local communities for not
5 following their political views and the recovery of their attorney's fees. SB
6 1070, Sec. 2, A.R.S. §11-1051(I)

8 These individuals need not be members of the community that is sued.
9 They need not have any personal interest in how law is enforced in the
10 community and may be pursuing a case solely because of their own political
11 bias. Nonetheless, SB 1070 has stripped the law of the standard protections
12 requiring standing and personal interest to allow these individuals to determine
13 the exercise of the fundamental police power of local communities.

16 SB 1070 leaves no room for the courts to exercise their judicial authority
17 to determine what constitutes the appropriate enforcement of the law in each
18 case. Instead, the courts are required to follow the dictate of the Legislature
19 and require enforcement to the full extent permitted by federal law.

21 The police power, including the executive authority to determine how
22 laws are enforced and how enforcement is prioritized, are fundamental
23 governmental powers that are inalienable. Those powers cannot
24 constitutionally be delegated to private individuals. *Carter v. Carter Coal Co.*,
25 298 U.S. 238, 310-312, 56 S.Ct. 855, 872 - 873 (U.S. 1936); 6A McQuillin
26 Mun. Corp. § 24:7 (3rd ed.); Am. Jur. Constitutional Law § 342; *Emmett*
27

1 *McLoughlin Realty, Inc. v. Pima County*, 203 Ariz. 557, 559-560, 58 P.3d 39,
2 41-42 (Ariz.App. Div. 2, 2002); *Industrial Commission v. Navajo County*, 64
3 Ariz. 172, 179-180, 167 P.2d 113, 117 (Ariz.1946) (“It is a fundamental
4 principle of constitutional law that the police power is inalienable and cannot
5 be surrendered or delegated, by affirmative action, by inaction, by contract, or
6 otherwise.”)

8 **6. SB 1070 EXPRESSLY DISCRIMINATES AGAINST INTERSTATE**
9 **COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.**

10 SB 1070 strives to deter and discourage the presence of unlawful aliens
11 within the State by obligating all law enforcement officers to commence
12 immigration investigations when there is any “reasonable suspicion” a person
13 the officer contacts is an alien. SB 1070 also seeks to protect its Arizona
14 residents from the obvious intrusive nature of such investigations by
15 establishing a presumption of lawful residency upon the showing of an Arizona
16 driver’s license. A.R.S.§11-1051(b)(1).
17
18

19 The Act then goes on to expressly discriminate against residents from
20 other states by allowing the presumption to apply only if the other state
21 “requires proof of legal presence in the United States before issuance.” A.R.S.
22 §11-1051(b)(1).
23

24 This is not simply an issue of describing an effect of state documents.
25 Rather, it is another example of the intent of the Arizona legislature to force its
26 own political views upon the federal government and other states on the issue
27

1 of immigration. Whether or not to give driver's licenses to undocumented
2 residents has been a hotly contested political issue throughout the country.³⁸

3 The neighboring state of New Mexico has taken a different political
4 approach on the issue of providing driver's licenses to undocumented aliens.
5 New Mexico only require an applicant's name, birthdate, sex, New Mexico
6 address, and either a tax identification number or social security. It specifically
7 allows foreign nationals to use an individual taxpayer identification number
8 "regardless of immigration status." N.M.S.A. 1978 §66-5-9.
9

10
11 Arizona, however, is not content to have this issue decided differently by
12 other states nor content to wait until the federal government resolves the
13 issue.³⁹ It effectively forces its own immigration policy on other states by
14 making the drivers of those states carry citizenship documentation in addition
15 to the state license if they wish to travel in Arizona without the threat that each
16 may be detained while their immigration status is checked.
17

18 By requiring the drivers from other states to carry citizenship
19 documentation along with the standard state driver's license, SB 1070
20 imposes an express discriminatory burden on interstate commerce. "When a
21 state statute clearly discriminates against interstate commerce, it will be struck
22

23
24 ³⁸ See e.g. Obama takes big risk on driver's license issue, Carolyn Lochhead, Chronical, Washington
25 Bureau, Jan. 28, 2008, available at http://articles.sfgate.com/2008-01-28/news/17149619_1_driver-s-licenses-illegal-immigrants-immigration-overhaul; States slow to give driver's licenses to illegal aliens,
26 Kathleen Hunter, Stateline.org, available at <http://www.stateline.org/live/ViewPage.action?siteNodId=136&languageId=1&contentId=15696>

27 ³⁹ The State's Office of Tourism advises travelers of the express discrimination in driver's license status citing from the Act the preference for Arizona driver's license and the questionable status of all others. The Arizona Office of Tourism advisory is available at <http://www.arizona.com/arizona-travel-info/identification-requirements>.

1 down, see, e.g., *New Energy Co., [of Indiana v. Limbach*, 486 U.S. 269, 273,
2 108 S.Ct. 1803, 1807, 100 L.Ed.2d 302 (1988)], unless the discrimination is
3 demonstrably justified by a valid factor unrelated to economic protectionism,
4 see, e.g., *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110
5 (1986). Indeed, when the state statute amounts to simple economic
6 protectionism, a “virtually *per se* rule of invalidity” has applied.” *Wyoming v.*
7 *Oklahoma*, 502 U.S. 437, 454-455, 112 S.Ct. 789, 800 (U.S.,1992); *U.S. v.*
8 *Eckhart*, 569 F.3d 1263, 1272 -1273 (10th Cir., 2009); *Lynch v. Public Service*
9 *Commission of State of Nev.*, 376 F.Supp. 1033, 1038 (D.C.Nev. 1974);
10 *Abraham v. Hodges*, 255 F.Supp.2d 539, 555 (D.S.C., 2002).

13 The stated purpose of SB 1070 is to establish an immigration policy that
14 decreases the presence of unlawful aliens. As set forth above, that cannot be
15 a valid state policy since it is within the exclusive jurisdiction of the federal
16 government. In any event, it cannot justify the express discrimination against
17 the legal effect of the driver’s licenses of other states. *National Collegiate*
18 *Athletic Ass’n v. Miller*, 10 F.3d 633, 638 (9th Cir.,1993).

21 **7. CONCLUSION.**

22 SB 1070 mandates local enforcement of an aggressive immigration
23 policy designed to force unlawful aliens from the State. In doing so it infringes
24 upon the exclusive domain of the federal government over immigration and
25 foreign affairs. The specific policy choice of aggressive enforcement will result
26 in indiscriminate stops, detentions and arrests of aliens creating a flood of
27

1 demands on federal immigration that will overwhelm their capacity for
2 response.

3 The Act imposes the legislature's specific political choice on the federal
4 government, other states and other branches of Arizona governments. It
5 causes real and irreparable injury to the City and the Plaintiff.
6

7 For all the foregoing reasons, the Act must be enjoined by this Court.

8 Respectfully submitted this 7th day of June, 2010.
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10
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