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11 *Attorneys for Defendant Janice K. Brewer, Governor of the
 State of Arizona, and Cross-Defendant The State of Arizona*

12 **IN THE UNITED STATES DISTRICT COURT**
 13 **FOR THE DISTRICT OF ARIZONA**

14 Martin H. Escobar,
 15
 16 Plaintiff,

17 v.

18 Jan Brewer, Governor of the State of
 Arizona, in her Official and Individual
 Capacity; the City of Tucson, a
 19 municipal corporation,
 20 Defendants.

Case No. CV10-00249-TUC-DCB
**MOTION TO DISMISS
 THE STATE OF ARIZONA**

21 The City of Tucson,
 22
 23 Cross-plaintiff,

24 v.

25 The State of Arizona, a body politic; and
 Jan Brewer, in her capacity as Governor
 of the State of Arizona,
 26
 27 Cross-defendants.

1 Pursuant to Fed. R. Civ. P. 12(b)(1), cross-defendant State of Arizona moves to
2 dismiss the City of Tucson’s Cross-Claim against the State of Arizona on the ground that
3 it is barred by the Eleventh Amendment of the United States Constitution. This motion is
4 supported by the following memorandum of points and authorities.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. BACKGROUND**

7 On April 29, 2010, Plaintiff Martin H. Escobar initiated this action against Jan
8 Brewer, Governor of the State of Arizona, in her Official and Individual Capacity; Terry
9 Goddard, the Attorney General of the State of Arizona, in his Official and Individual
10 Capacity; the City of Tucson, a municipal corporation; and Barbara LaWall, County
11 Attorney, Pima County. Plaintiff subsequently filed his First Amended Complaint on
12 May 18, 2010, which removed Attorney General Goddard as a defendant. Plaintiff later
13 voluntarily dismissed County Attorney LaWall from this action.

14 On May 26, 2010, the City of Tucson filed a cross-claim against the State of
15 Arizona and Jan Brewer in her Capacity as Governor of the State of Arizona. This motion
16 seeks only to dismiss the State of Arizona.¹

17 **II. LEGAL STANDARD**

18 Federal courts are courts of limited jurisdiction and federal subject matter
19 jurisdiction must exist at the time an action is commenced. *See Morongo Band of Mission*
20 *Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). “A party
21 invoking the federal court’s jurisdiction has the burden of proving the actual existence of
22 subject matter jurisdiction.” *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996).
23 Because of its importance, lack of subject matter jurisdiction may be raised at any time by
24 any party or by the court. *Attorneys Trust v. Videotape Computer Prods., Inc.*, 93 F.3d
25 593, 594-95 (9th Cir. 1996). “If the court determines at any time that it lacks subject-
26 matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3).

27
28 ¹ Cross-defendant Governor Brewer has answered the Cross-Claim.

1 **III. ARGUMENT**

2 The Cross-Claim filed by the City of Tucson against the State of Arizona must be
3 dismissed because it is barred by the Eleventh Amendment of the United States
4 Constitution. The Eleventh Amendment provides that “[t]he Judicial power of the United
5 States shall not be construed to extend to any suit in law or equity, commenced or
6 prosecuted against one of the United States by Citizens of another State, or by Citizens or
7 Subjects of any Foreign State.” U.S. Const. Amend. XI. The Eleventh Amendment also
8 bars federal suits against state governments by a state’s own citizens. *Hans v. Louisiana*,
9 134 U.S. 1, 15 (1890).

10 A municipality such as the City of Tucson is such a “citizen” for purposes of the
11 Eleventh Amendment and, as a result, cannot sue the State of Arizona in federal court.
12 Federal courts have consistently held that the Eleventh Amendment prevents a city from
13 suing a state directly. As one district court explained, “[p]laintiffs’ status as municipal
14 authorities does not remove them from the definition of ‘citizen’ in the Eleventh
15 Amendment.” *Mun. Auth. of the Town of Bloomsburg v. Commonwealth of Pa.*, 496 F.
16 Supp. 686, 688-89 (M.D. Pa. 1980); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 98
17 (1972) (the term “State” does not include its political subdivisions, such as cities and
18 town); *Cnty. of Monroe v. Florida*, 678 F.2d 1124, 1131 (2d Cir. 1982) (a county is a
19 “Citizen of another State” within the meaning of the Eleventh Amendment).

20 Applying these settled principles, a district court in another case dismissed a case
21 brought by the City of Bristol against the Commonwealth of Virginia and its Attorney
22 General that sought a declaratory judgment that federal law preempted a Virginia statute.
23 *City of Bristol, Virginia v. Earley*, 145 F. Supp. 2d 741, 745-46 (W.D. Va. 2001). In
24 determining whether the Commonwealth and Attorney General were proper defendants
25 under the doctrine of sovereign immunity, the court held that “it is well-settled that by
26 virtue of the Eleventh Amendment, a state cannot be sued unless it has waived immunity
27 and consented to suit or Congress has abrogated sovereign immunity under § 5 of the
28 Fourteenth Amendment.” *Id.* at 745. Because “neither of these conditions has been met,”

1 the Commonwealth of Virginia was immune from suit, and therefore dismissed from the
2 action. *Id.* at 745–46. Similarly, in another case, a county sued the State of Missouri,
3 challenging the constitutionality of two statutes. *St. Louis County, Mo. v. City of Town*
4 *and Country*, 590 F. Supp. 731, 734-35 (E.D. Mo. 1984). The court granted the State of
5 Missouri’s motion to dismiss on the ground that the Eleventh Amendment barred the suit
6 against the state. *Id.* at 734. As the court explained, the “Eleventh Amendment bars suit
7 directly against a state in federal court unless the state has consented to suit or Congress
8 has abrogated state immunity by a statute enacted to enforce the Fourteenth Amendment.”
9 *Id.* at 734. The court found no consent had been shown. *Id.* at 735.

10 Although a state’s Eleventh Amendment immunity is subject to abrogation by
11 Congress, no such abrogation is alleged or even suggested in the First Amended
12 Complaint. Moreover, when Congress’ intent to abrogate is unclear, a state’s Eleventh
13 Amendment immunity will be upheld. *Edelman v. Jordan*, 415 U.S. 651, 672 (1974).
14 Further, the State of Arizona has not waived its sovereign immunity. Consequently, the
15 City of Tucson’s claims against the State of Arizona must be dismissed as a matter of law.

16 **III. CONCLUSION**

17 For the foregoing reasons, the City of Tucson’s claims against the State of Arizona
18 are barred by the Eleventh Amendment and must be dismissed.

19 Respectfully submitted this 23rd day of June, 2010.

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By s/Joseph A. Kanefield with permission
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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2010, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

s/John Bouma

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