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20 **IN THE UNITED STATES DISTRICT COURT**
21 **FOR THE DISTRICT OF ARIZONA**

22 Martin H. Escobar,
23
24 Plaintiff,

25 v.

26 Jan Brewer, Governor of the State of
27 Arizona, in her Official and Individual
28 Capacity; the City of Tucson, a
municipal corporation,
Defendants.

The City of Tucson,
Cross-plaintiff,

v.

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

Case No. CV10-00249-TUC-DCB

**GOVERNOR BREWER'S MOTION
TO DISMISS THE FIRST AMENDED
COMPLAINT**

(Oral Argument Requested)

1 Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), Defendant Janice K. Brewer
2 (“Governor Brewer”) moves to dismiss plaintiff’s First Amended Complaint because
3 plaintiff does not have standing to assert these claims and plaintiff has failed to state a
4 claim upon which relief can be granted. With respect to standing, plaintiff simply has not
5 alleged, and cannot allege, the requisite real and immediate threat of harm from
6 enforcement of the “Support Our Law Enforcement and Safe Neighborhoods Act,” as
7 amended (“SB 1070” or the “Act”). Plaintiff essentially alleges only “abstract outrage”
8 at SB 1070’s enactment based on a fundamental misunderstanding of SB 1070’s
9 provisions and pure speculation about potential future harm – primarily to third parties –
10 that is too attenuated, as a matter of law, to establish a cognizable case or controversy.

11 Even if plaintiff did have standing, he has failed to state a claim upon which relief
12 can be granted. Plaintiff alleges that federal law preempts certain provisions of SB 1070
13 and summarily concludes that SB 1070 violates the First, Fourth, Fifth, and Fourteenth
14 Amendments. Federal law does not preempt any of the provisions of SB 1070 that
15 plaintiff challenges. Plaintiff’s remaining constitutional challenges fail because plaintiff
16 has not articulated how SB 1070 allegedly violates any rights *plaintiff* has under the
17 Constitution. Accordingly, Governor Brewer respectfully requests that the Court dismiss
18 plaintiff’s First Amended Complaint.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. BACKGROUND**

21 **A. Pertinent Provisions of SB 1070**

22 On April 23, 2010, Governor Brewer signed SB 1070 into law to address the
23 impact of unlawful immigration on Arizona and to assist understaffed federal
24 immigration agencies through “the cooperative enforcement of federal immigration
25 laws.” SB 1070, § 1; First Amended Complaint (“FAC”) ¶ 12. On April 30, 2010,
26 Governor Brewer signed HB 2162 approving various amendments to SB 1070. FAC ¶
27 13. SB 1070, as amended by HB 2162, is scheduled to take effect on July 29, 2010.
28

1 In this action, plaintiff Martin Escobar (“Officer Escobar”),¹ seeks to enjoin
2 Governor Brewer and the City of Tucson from enforcing SB 1070 in its entirety. Officer
3 Escobar’s FAC, however, actually challenges only *four* of SB 1070’s provisions. First,
4 Officer Escobar challenges A.R.S. § 11-1051(A), which prohibits government officials
5 and agencies in Arizona from “limit[ing] or restrict[ing] the enforcement of federal
6 immigration laws to less than the full extent permitted by federal law.”

7 Second, Officer Escobar challenges A.R.S. § 11-1051(B), which is triggered only
8 if: (1) there is a “lawful stop, detention or arrest” by a law enforcement official or agency
9 of the state “in the enforcement of any other law or ordinance of a county, city or town or
10 this state”;² and (2) “reasonable suspicion exists that the person is an alien *and* is
11 unlawfully present in the United States.”³ If (and only if) these two prerequisites are
12 satisfied, A.R.S. § 11-1051(B) provides that a law enforcement official shall make “a
13 reasonable attempt . . . *when practicable*, to determine the immigration status of the
14 person” unless doing so “may hinder or obstruct an investigation.” (emphasis added).

15 Not only are the constitutionality and requirements of the reasonable suspicion
16 standard well-established, but the U.S. Supreme Court has made it clear that a person’s
17 “Mexican descent,” does not constitute “a reasonable belief that [the person is an]
18 alien[,],” much less that the person is in the country unlawfully. *United States v.*
19 *Brignoni-Ponce*, 422 U.S. 873, 886 (1975). A.R.S. § 11-1051(B) further prohibits a law
20 enforcement official from “consider[ing] race, color or national origin in implementing
21

22 ¹ Plaintiff is a Lead Patrol Officer for the Tucson Police Department. FAC ¶ 10.

23 ² A lawful stop or brief detention requires “specific, articulable facts which, together with
24 objective and reasonable inferences, form a basis for suspecting that [a] particular person
25 is engaged in criminal activity.” *United States v. Hernandez-Alvarado*, 891 F.2d 1414,
1416 (9th Cir. 1989); *see also United States v. Salinas-Calderon*, 728 F.2d 1298, 1301
26 n.3 (10th Cir. 1984) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). A prolonged detention or
27 arrest requires probable cause. *Muehler v. Mena*, 544 U.S. 93, 101 (2005); *United States*
28 *v. Tarango-Hinojos*, 791 F.2d 1174, 1175-76 (5th Cir. 1986).

³ Based on the well-established “reasonable suspicion” standard, this means that specific,
articulable facts must exist “which, together with objective and reasonable inferences,
form a basis for suspecting that” the person stopped, detained, or arrested is *both* an alien
and unlawfully present in the United States. *See Hernandez-Alvarado*, 891 F.2d at 1416;
Tarango-Hinojos, 791 F.2d at 1176.

1 the requirements of this subsection except to the extent permitted by the United States or
2 Arizona Constitution.” Also, A.R.S. § 11-1051(L) requires that the statute “be
3 implemented in a manner consistent with federal laws regulating immigration, protecting
4 the civil rights of all persons and respecting the privileges and immunities of United
5 States citizens.”

6 Third, Officer Escobar challenges A.R.S. § 11-1051(H), which permits “[a] person
7 who is a legal resident of [Arizona] . . . [to] bring an action in superior court to challenge
8 any official or agency of this state or a county, city, town or other political subdivision of
9 this state that adopts or implements *a policy that limits or restricts the enforcement of*
10 *federal immigration laws . . . to less than the full extent permitted by federal law.”*
11 (emphasis added). *Entities* that violate this section must pay a civil penalty, but the
12 statute does not impose any penalties for *individual officials* who violate the statute.
13 Even if Officer Escobar is someday sued under this provision, A.R.S. § 11-1051(K)
14 would require the City of Tucson to indemnify him *unless* he “is adjudged to have acted
15 in bad faith.” The doctrine of qualified immunity further protects Officer Escobar from
16 liability for civil damages provided that his “conduct does not violate clearly established
17 statutory or constitutional rights of which a reasonable person would have known.”
18 *Estrada v. Rhode Island*, 594 F.3d 56, 62 (1st Cir. 2010) (citation omitted).⁴

19 Fourth, Officer Escobar challenges A.R.S. § 13-3883(A)(5), which permits a
20 peace officer to arrest a person without a warrant where “the officer has probable cause to
21 believe . . . [t]he person to be arrested has committed any public offense that makes the
22 person removable from the United States.”

23 **B. Officer Escobar’s Constitutional Challenges**

24 Officer Escobar challenges the constitutionality of the foregoing provisions on the

25 ⁴ In *Estrada*, the court held that the doctrine of qualified immunity barred claims against
26 a law enforcement officer who detained the plaintiffs based solely on his suspicion that
27 the plaintiffs were in violation of federal immigration laws and transported them to the
28 nearest Immigration and Customs Enforcement office because “a reasonable defendant in
[the officer’s] position would have believed he had sufficient evidence giving rise to
probable cause to support the conclusion that the van’s occupants had committed
immigration violations.” 594 F.3d at 65.

1 bases that they violate the Supremacy Clause and the First, Fourth, Fifth, and Fourteenth
2 Amendments. The alleged basis for these claims is Officer Escobar’s mistaken belief that
3 SB 1070:

4 [C]ompels under threat of lawsuit, discipline and loss of
5 required certification every Law Enforcement Officer in the
6 State of Arizona to actively engage in racial profiling *to*
7 *detain, question and require every Hispanic found within*
8 *the limits of the City of Tucson to prove their legal status in*
9 *the United States of America* irrespective of county of origin,
10 citizenship, immigrant status based solely on immutable and
11 mutable characteristics common or stereotypical in attribution
12 to Hispanics.

13 FAC ¶ 48 (emphasis added). Based on his misinterpretation of the Act’s requirements,
14 Officer Escobar alleges that he “*believes* that the Act is the product of racial bias aimed
15 specifically at Hispanics,” and that it “results in impermissible deprivations of rights
16 guaranteed by the United States Constitution.” FAC ¶ 57 (emphasis added).

17 Officer Escobar further alleges that “[a]bsent a judicial declaration that the Act is
18 lawful,” he will not enforce SB 1070 because “he believes that he lacks the authority to
19 do so under the Immigration and Nationality Act, 8 U.S.C. §§ 1252c(a) and 1357(g)” and
20 further “believes that doing so would violate the rights of Latinos and Latinas under the
21 [D]ue [P]rocess and [E]qual [P]rotection [C]lauses of the Fourteenth Amendment.” FAC
22 ¶¶ 68-69. Thus, Officer Escobar claims to be in a “dilemma” over whether to: (1) refuse
23 to enforce the Act and face discipline by the City of Tucson, or (2) enforce the Act and
24 “be subject to costly lawsuits by private parties under the Act.” FAC ¶¶ 71-72.

25 **II. LEGAL ANALYSIS**

26 **A. Officer Escobar Lacks Standing to Pursue His Claims**

27 Officer Escobar has failed to allege facts in the FAC showing that he has suffered,
28 or will suffer, either an actual or imminent injury that would give him standing to pursue
his claims. Officer Escobar essentially seeks an improper advisory opinion.⁵

⁵ “[T]o invoke the jurisdiction of the federal courts,” a plaintiff “must satisfy the
threshold requirement imposed by Article III of the Constitution by alleging an actual
case or controversy.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (citation
omitted); *see also Allen v. Wright*, 468 U.S. 737, 750 (1984) (“The case or controversy
requirement establishes the “fundamental limits on federal judicial power.”).

1 **1. Officer Escobar does not have standing**

2 The Court’s standing analysis has two components. The inquiry “involves both
3 constitutional limitations on federal-court jurisdiction and prudential limitations on its
4 exercise.” *City of S. Lake Tahoe v. Cal. Tahoe Reg’l Planning Agency*, 625 F.2d 231,
5 234 (9th Cir. 1980) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Officer Escobar
6 does not have standing under either of these components.

7 i. Officer Escobar cannot satisfy constitutional standing
8 requirements

9 To have standing, a plaintiff must allege facts that demonstrate “an injury in fact –
10 an invasion of a legally protected interest which is (a) concrete and particularized, and (b)
11 actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504
12 U.S. 555, 560 (1992) (internal quotations and citation omitted).⁶ Where, as here, official
13 conduct provides the basis for a plaintiff’s alleged injury, the plaintiff must show that
14 “the injury or threat of injury [is] both ‘real and immediate,’ not ‘conjectural’ or
15 ‘hypothetical.’” *Lyons*, 461 U.S. at 102 (emphasis added) (citation omitted). When
16 standing is based on an injury that may occur “at some indefinite future time, and the acts
17 necessary to make the injury happen are at least partly within the plaintiff’s own control,”
18 a “high degree of immediacy” is required. *Lujan*, 504 U.S. at 564 n.2.

19 Officer Escobar claims that he does not intend to enforce SB 1070 and expresses
20 concern that “he will be subject to (among other things) discipline by Defendant City of
21 Tucson.”⁷ FAC ¶¶ 68-71. The mere possibility that a law enforcement officer will be
22 disciplined by his employer, however, does not give him standing to challenge the
23 constitutionality of a law. Officer Escobar further alleges that his intent not to enforce

24 _____
25 ⁶ A plaintiff must also demonstrate that there is “a causal connection between the injury
26 and the conduct complained of” and that it is “‘likely,’ as opposed to merely
27 ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Lujan*, 504 U.S.
28 at 560-61. Because Officer Escobar cannot establish an injury in fact, however, he
necessarily cannot establish these additional elements.

⁷ Officer Escobar has not alleged any facts suggesting that the City of Tucson has
threatened to discipline him if he refuses to enforce the Act.

1 SB 1070 will violate A.R.S. § 11-1051(A) and, therefore, “subject [him] to costly
2 lawsuits by private parties under . . . A.R.S. § 11-1051(H).” FAC ¶ 72. But SB 1070
3 imposes penalties for violations of A.R.S. § 11-1051 upon “entities” only, not individual
4 police officers, and would further require the City of Tucson to indemnify Officer
5 Escobar unless he acted in bad faith. *See* A.R.S. §§ 11-1051(H), (K).

6 Officer Escobar next alleges that SB 1070 will force him “to expend his scarce
7 time and resources in order to thoroughly familiarize himself with the Act’s requirements
8 and the Act’s complex interaction with federal immigration law.” FAC ¶ 73. Officer
9 Escobar, however, does not explain how he will be *harmed* by learning about the law.
10 For instance, he does not explain how the time he will “expend” learning SB 1070 differs
11 from any other law that the City of Tucson expects its officers to enforce. As alleged,
12 “the Tucson Police Department is already planning to prepare its officers—including
13 Officer Escobar—to enforce federal immigration law as required by the Act.” FAC ¶ 62.
14 Thus, it appears that Officer Escobar will receive the training he requires in the course of
15 his normal duties.⁸ Moreover, any inconvenience that Officer Escobar might endure in
16 having to familiarize himself with the law does not constitute an injury in fact. *See, e.g.,*
17 *Kushner v. Ill. State Toll Highway Auth.*, 575 F. Supp. 2d 919, 923 (N.D. Ill. 2008)
18 (“There is no legally protected interest in freedom from administrative inconvenience.”).

19 Officer Escobar further claims that he is “suffering increasing pressure” from
20 unidentified third parties “to enforce the Act,” which, he alleges, “is chilling [him] from
21 exercising his First Amendment right to speak out against the Act as unlawful and
22 discriminatory.” FAC ¶¶ 74-75. Injury in fact for the purposes of standing cannot be
23 “the result [of] the independent action of some third party not before the court.” *Lujan*,
24 504 U.S. at 560 (citation omitted). Moreover, Officer Escobar has not explained how
25 these actions chill him from exercising his rights. Indeed, this alleged “chilling” has not
26 stopped Officer Escobar from filing this very public lawsuit or otherwise speaking out

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28 ⁸ In any event, Officer Escobar’s complaints regarding insufficient training and potential discipline must be addressed in the employment context, not in a constitutional challenge.

1 against the Act. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (“Allegations of a
2 subjective ‘chill’ are not an adequate substitute for a claim of specific present objective
3 harm or a threat of specific future harm.”).

4 Finally, Officer Escobar alleges that “he can be subjected to costly civil actions
5 alleging the deprivation of the civil rights of the individuals against whom he enforces the
6 Act.” FAC ¶ 77. But as a police officer, Officer Escobar cannot be liable for deprivation
7 of a person’s civil rights under either 42 U.S.C. § 1983 or SB 1070, except under very
8 limited circumstances. *See City of S. Lake Tahoe*, 625 F.2d at 239 (quoting *O’Connor v.*
9 *Donaldson*, 422 U.S. 563, 577 (1975)); A.R.S. § 11-1051(K). In short, Officer Escobar
10 has not alleged that he has suffered any actual injury or will suffer any imminent injury if
11 SB 1070 takes effect.

12 ii. Officer Escobar cannot satisfy prudential standing
13 requirements

14 Prudential standing requirements also weigh strongly against the Court exercising
15 jurisdiction in this case. “Beyond [the] ‘minimum constitutional [standing] mandate,’ ...
16 the Supreme Court has developed, as a prudential matter of self-governance, certain
17 ‘other limits on the class of persons who may invoke the courts’ decisional and remedial
18 powers.” *City of S. Lake Tahoe*, 625 F.2d at 234 (citation omitted). These prudential
19 principles prohibit courts from considering generalized grievances and claims on behalf
20 of third parties. *Valley Forge Christian Coll. v. Ams. United for Separation of Church &*
21 *State, Inc.*, 454 U.S. 464, 474-75 (1982).

22 a. *Officer Escobar may not assert generalized grievances*

23 Even if Officer Escobar had sufficiently alleged an actual injury, courts are to
24 refrain “from adjudicating ‘abstract questions of wide public significance’ which amount
25 to ‘generalized grievances,’ pervasively shared and most appropriately addressed in the
26 representative branches.” *Id.* (quoting *Warth*, 422 U.S. at 499-500).

27 A plaintiff’s personal view that a law is unconstitutional does not confer standing.
28 In *City of South Lake Tahoe*, for instance, council members alleged that they had standing

1 to challenge an ordinance based on the fact that “they [would be] required by law to
2 enforce [the allegedly unconstitutional ordinance]” thereby violating “their oaths of office
3 to uphold the U.S. Constitution and expos[ing] themselves to civil liability . . . for
4 enforcing an unconstitutional law.” 625 F.2d at 233. The Ninth Circuit, however, held
5 that the council members lacked standing because their “abstract outrage at the enactment
6 of an unconstitutional law” was the same as any ordinary citizen’s and therefore
7 insufficient to establish standing. *Id.* at 237; *see also Thomas v. Mundell*, 572 F.3d 756,
8 760-63 (9th Cir. 2009) (holding that a public official’s personal dilemma regarding the
9 constitutionality of a statute did not confer standing). Here, Officer Escobar’s “dilemma”
10 about SB 1070 similarly does not grant him standing to challenge its constitutionality.
11 *See* FAC ¶ 77. As in *South Lake Tahoe*, Officer Escobar has not alleged that he faces a
12 real and immediate threat of suit nor has he acknowledged the immunities and
13 indemnifications that would protect him (unless he acted in bad faith). *See City of S.*
14 *Lake Tahoe*, 625 F.2d at 239.⁹

15 *b. Officer Escobar may not assert claims on behalf of third*
16 *parties not before the court*

17 In general, a plaintiff “must assert his own legal rights and interests, and cannot
18 rest his claim to relief on the legal rights or interests of third parties.” *Warth*, 422 U.S. at
19 499 (holding that plaintiffs did not have standing to assert constitutional claims attacking
20 a city zoning ordinance); *see also Valley Forge*, 454 U.S. at 474. For the reasons stated
21 above, Officer Escobar has not alleged any real or immediate threat of harm to himself.
22 To the extent Officer Escobar premises his claims on his belief that enforcement of SB
23 1070 would “violate the rights of Latinos and Latinas” and school children, he
24 improperly seeks to assert claims on behalf of third parties. FAC ¶¶ 69-70. Not only are
25 these threatened injuries speculative, but Officer Escobar’s “dilemma” regarding his

26 _____
27 ⁹ Moreover, finding that Officer Escobar has standing to bring this generalized grievance
28 would set a dangerous precedent that police officers can enforce only laws with which
they agree – converting the officers “into potential litigants, or attorneys general, as to
laws within their charge.” *City of S. Lake Tahoe*, 625 F.2d at 238.

1 enforcement obligations, *see* FAC ¶ 77, does not serve as a concrete claim capable of a
2 judicial determination.

3 **2. Officer Escobar seeks an improper advisory opinion**

4 Officer Escobar is asking the Court to render an impermissible advisory opinion.
5 It has long been settled that “the federal courts established pursuant to Article III of the
6 Constitution do not render advisory opinions.” *United Pub. Workers of Am. (C.I.O.) v.*
7 *Mitchell*, 330 U.S. 75, 89 (1947). “[T]he rule against advisory opinions implements the
8 separation of powers prescribed by the Constitution and confines federal courts to the
9 role assigned them by Article III.” *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

10 The Supreme Court’s decision in *Mitchell* is instructive. There, as here, the
11 plaintiffs expressed their concerns about enforcing a law and sought “a declaration of the
12 legally permissible limits of regulation.” *Mitchell*, 330 U.S. at 83-84. The Court found
13 that the plaintiffs’ allegations were “closer to a general threat by officials to enforce those
14 laws which they are charged to administer ... than they [were] to the direct threat of
15 punishment against a named organization for a completed act.” *Id.* at 88. The Supreme
16 Court considered such general objections requests for an “advisory opinion” and
17 therefore “beyond the competence of courts to render ... a decision.” *Id.* at 89.

18 The same holds true here. As in *Mitchell*, Officer Escobar is not facing any actual
19 harm and instead has alleged purely speculative harm. The only threat of harm Officer
20 Escobar alleges is his abstract fear that he somehow, some day, may be subject to civil
21 liability or disciplinary proceedings for enforcing (or failing to enforce) SB 1070. *See*
22 FAC ¶¶ 71-72, 77. Like the plaintiffs in *Mitchell*, Officer Escobar alleges he is reluctant
23 to enforce SB 1070 without “a judicial declaration that the Act is lawful.” FAC ¶¶ 68-70.
24 These allegations of “general threat[s] of possible interference” with constitutional rights
25 “do[] not make a justiciable case or controversy.” *Mitchell*, 330 U.S. at 89. Without
26 allegations that Officer Escobar faces concrete, actual harm, he has not alleged a case or
27 controversy.
28

1 **B. The FAC Should Be Dismissed Under Fed. R. Civ. P. 12(b)(6) Because**
2 **Officer Escobar Has Not Adequately Alleged Any Basis Upon Which**
3 **the Court Could Find SB 1070 Unconstitutional**

4 “To survive a motion to dismiss, a complaint must contain sufficient factual
5 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*
6 *v. Iqbal*, 129 S. Ct. 1937, 1949-50 (U.S. 2009) (citation omitted). Claims are facially
7 plausible “when the plaintiff pleads factual content that allows the court to draw the
8 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citation
9 omitted).

10 A pre-enforcement challenge to the constitutionality of a statute seeks to invalidate
11 the statute on its face. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S.
12 442, 449 (2008). “[A] plaintiff can only succeed in a facial challenge by ‘establish[ing]
13 that no set of circumstances exists under which the Act would be valid.’” *Id.* (quoting
14 *United States v. Salerno*, 481 U.S. 739, 745 (1987)). When considering a facial
15 challenge, the court “must be careful not to go beyond the statute’s facial requirements
16 and speculate about ‘hypothetical’ or ‘imaginary’ cases.” *Id.* at 449-50; *United States v.*
17 *Raines*, 362 U.S. 17, 22 (1960) (“The delicate power of pronouncing an Act of Congress
18 unconstitutional is not to be exercised with reference to hypothetical cases thus
19 imagined.”). Facial challenges are disfavored because they: (1) “often rest on
20 speculation;” (2) “run contrary to the fundamental principle of judicial restraint” with
21 respect to constitutional challenges; and (3) “threaten to short circuit the democratic
22 process by preventing laws embodying the will of the people from being implemented in
23 a manner consistent with the Constitution.” *Wash. State Grange*, 552 U.S. at 450-51.

24 Here, Officer Escobar’s facial challenges to SB 1070 fail because: (a) federal law
25 does not preempt the Act; (b) the Fifth Amendment applies only to action taken by the
26 federal government; and (c) Officer Escobar has not articulated how SB 1070, on its face,
27 would violate any of *his* rights under the First, Fourth, or Fourteenth Amendments.

28 **1. Federal law does not preempt SB 1070**

 The states’ broad powers to regulate for the health, safety, and welfare of its

1 citizens are limited only to the extent such laws are prohibited by the U.S. Constitution or
 2 preempted by federal law.¹⁰ “Federal preemption can be either express or implied.”
 3 *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009); *Altria*
 4 *Group, Inc. v. Good*, 129 S. Ct. 538, 543 (U.S. 2008). A preemption analysis, however,
 5 **begins** “with the assumption that the historic police powers of the States [are] not to be
 6 superseded by the Federal Act unless that was the clear and manifest purpose of
 7 Congress.” *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)).

8 i. Federal law does not expressly preempt SB 1070

9 Officer Escobar refers the Court to three statutes that supposedly preempt
 10 provisions of SB 1070. *See* FAC ¶¶ 63-66 (citing 8 U.S.C. §§ 1252c(a), 1304(e), and
 11 1357(g)). None of these statutes, however, expressly preempt state law. The Tenth
 12 Circuit has already found that the language in § 1252c “cannot reasonably be read as an
 13 express preemption of preexisting state law.” *United States v. Vasquez-Alvarez*, 176 F.3d
 14 1294, 1297 (10th Cir. 1999). Nothing in the language of 8 U.S.C. § 1304(e) refers to
 15 state or local law in any respect. And 8 U.S.C. § 1357(g)(10) expressly includes a *non-*
 16 *preemption* clause with respect to state and local “cooperat[ion] with the Attorney
 17 General in the identification, apprehension, detention, or removal of aliens not lawfully
 18 present in the United States,” which is exactly what SB 1070 requires. Similarly, none of
 19 the provisions of the INA, codified at 8 U.S.C. § 1101 *et seq.*, expressly preempt state
 20 regulation regarding aliens. *See DeCanas v. Bica*, 424 U.S. 351, 358 (1976) (finding no
 21 express preemption).

22 Officer Escobar also alleges that the Supremacy Clause preempts SB 1070
 23 because SB 1070 “purports to give the courts of Arizona jurisdiction to adjudicate
 24 violations of federal immigration law.” FAC ¶ 67. However, Officer Escobar does not
 25

26 ¹⁰ The Supreme Court has “frequently recognized that individual States have broad
 27 latitude in experimenting with possible solutions to problems of vital local concern.”
 28 *Whalen v. Roe*, 429 U.S. 589, 597 (1977). “State legislation which has some effect on
 individual liberty or privacy may not be held unconstitutional simply because a court
 finds it unnecessary, in whole or in part.” *Id.*

1 identify which provision of SB 1070 purportedly does so.¹¹ Governor Brewer does not
2 dispute that district courts “have jurisdiction of all causes, civil and criminal, brought by
3 the United States that arise under the [8 U.S.C. § 1101 *et seq.*],” but that jurisdiction is
4 not exclusive. *See* 8 U.S.C. § 1329; *In re Jose C.*, 198 P.3d 1087, 1097 (Cal. 2009) (“We
5 think it clear [that 8 U.S.C. § 1329 does not] preempt[] state court jurisdiction.”), *cert.*
6 *denied*, 129 S. Ct. 2804 (U.S. 2009). Thus, federal law does not expressly preempt SB
7 1070.

8 ii. Federal law does not impliedly preempt SB 1070

9 Absent express preemptive language, “courts should be ‘reluctant to infer pre-
10 emption.’” *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1297 (10th Cir. 1999)
11 (citation omitted). For this reason, courts should not find that federal law preempts state
12 law “unless that [is] the clear and manifest purpose of Congress.” *Cipollone v. Liggett*
13 *Group, Inc.*, 505 U.S. 504, 516 (1992). Implied preemption in the immigration context
14 exists if: (1) the state law purports to regulate immigration, an exclusively federal power;
15 (2) federal law occupies the field; or (3) the state regulation conflicts with federal law.
16 *See DeCanas*, 424 U.S. at 355-63. Here, Officer Escobar has not demonstrated any
17 reason to overcome the strong presumption that state laws are valid and *not* preempted.

18 a. *SB 1070 is not a “regulation of immigration”*

19 In *DeCanas*, the Supreme Court held that the “[p]ower to regulate immigration is
20 unquestionably exclusively a federal power,” but explained that a “regulation of
21 immigration” is a statute that defines “who should or should not be admitted into the
22 country, and the conditions under which a legal entrant may remain.” *Id.* at 354-55. The
23 Supreme Court “has never held that every state enactment which in any way deals with
24 aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional
25

26 ¹¹ The only provision Officer Escobar identifies in the FAC that addresses the jurisdiction
27 of Arizona courts is A.R.S. § 11-1051(H), which authorizes Arizona residents to bring an
28 action in superior court against Arizona officials and agencies who violate *Arizona* law
by “adopting or implementing a policy that limits or restricts the enforcement of federal
immigration laws” in violation of A.R.S. § 11-1051(A).

1 power.” *Id.* at 355. Thus, following the *De Canas* Court’s holding, the Ninth Circuit
2 held that federal law does *not* preempt the Legal Arizona Workers Act because “the Act
3 does not attempt to define who is eligible or ineligible to work under [federal]
4 immigration laws,” but, instead “is premised on enforcement of federal standards as
5 embodied in federal immigration law.” *Chicanos Por La Causa*, 558 F.3d at 866; *see*
6 *also Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987) (“No statute precludes
7 other federal, state, or local law enforcement agencies from taking other action to enforce
8 [federal] immigration laws.”); *In re Jose C.*, 198 P.3d at 1091, 1098.

9 Here, SB 1070 does not regulate the terms upon which aliens may enter and
10 remain in the country. None of the provisions Officer Escobar challenges – nor any other
11 provision of SB 1070 – in any way addresses the admission, authorization or deportation
12 of aliens from the United States. Nor does Officer Escobar make such an argument.
13 Rather, SB 1070 “is premised on enforcement of federal standards as embodied in federal
14 immigration law.” *See Chicanos Por La Causa*, 558 F.3d at 866. Consequently, SB
15 1070 does not intrude upon the federal government’s exclusive power to “regulate
16 immigration.”

17 *b. Federal law does not occupy the field*

18 Implied federal preemption exists where “the scope of the statute indicates that
19 Congress intended federal law to occupy the legislative field.” *Altria Group*, 129 S. Ct.
20 at 543. In *DeCanas*, the Supreme Court considered and rejected the possibility that the
21 federal government’s regulation of immigration might be so comprehensive that it leaves
22 no room for state action. *See DeCanas*, 424 U.S. at 358 (“[Respondents] fail to point
23 out, and an independent review does not reveal, any specific indication in either the
24 wording or the legislative history of the INA that Congress intended to preclude even
25 harmonious state regulation touching on aliens in general.”). Further, the fact that
26 multiple provisions of the INA *invite* state and local police into the field confirms that the
27 INA does not occupy the field. *See, e.g.*, 8 U.S.C. § 1357(g)(10) (acknowledging the
28 power of state and local police to make immigration arrests); 8 U.S.C. § 1373(c)

1 (requiring the federal government to respond to inquiries by state and local police officers
2 seeking to verify the immigration status of any alien); 8 U.S.C. § 1644 (prohibiting
3 restrictions on state and local government entities in “sending to or receiving from the
4 Immigration and Naturalization Service information regarding the immigration status,
5 lawful or unlawful, of an alien in the United States”).

6 *c. SB 1070 does not conflict with federal law*

7 State laws that are in harmony with the INA are not preempted. *DeCanas*, 424
8 U.S. at 358. Although SB 1070 mirrors federal law, Officer Escobar alleges that the Act
9 conflicts with three specific provisions of the INA. First, Officer Escobar alleges that 8
10 U.S.C. § 1252c(a) expressly limits the circumstances in which state and local law
11 enforcement officers may “detain and arrest . . . undocumented immigrants.” FAC ¶ 64.
12 The only federal court to consider this argument has flatly rejected it. *See Vasquez-*
13 *Alvarez*, 176 F.3d at 1297-1300.¹² In *Vasquez-Alvarez*, the defendant moved to suppress
14 “his post-arrest statements, fingerprints, and identity,” after an Oklahoma police officer
15 arrested him based solely on the fact that he was an “illegal alien.” The defendant
16 claimed that, under 8 U.S.C. § 1252c, state and local police officers have the authority to
17 “arrest an illegal alien only when the INS has confirmed, before the arrest, that the alien
18 has previously been convicted of a felony and has, since that conviction, been deported or
19 left the United States.” *Id.* at 1295. After analyzing both the language of the statute and
20 its congressional history, the Tenth Circuit rejected the defendant’s argument, holding
21 that to interpret § 1252c as preempting state law “would both contradict the plain
22 language of § 1252c and give the statute an interpretation and effect that Congress clearly
23 did not intend.”¹³ *Id.* at 1300.

24
25 ¹² Although other courts have approved the Tenth Circuit’s holding, *see, e.g., In re Jose*
26 *C.*, 198 P.3d at 1099, it does not appear that any other court has squarely addressed it.

27 ¹³ Further, as Judge Learned Hand recognized, “it would be unreasonable to suppose that
28 [the federal government’s] purpose was to deny itself any help that the states may
allow.” *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) (finding that a New
York State trooper had authority under state law to arrest a defendant for a federal
misdemeanor).

1 Second, Officer Escobar alleges that 8 U.S.C. § 1357(g) preempts SB 1070
2 because, “except as provided by 8 U.S.C. § 1252c(a)[,] state and local law enforcement
3 officials can enforce federal immigration law only after executing a ‘memorandum of
4 agreement’ with the Secretary of Homeland Security in accordance with . . . Section
5 1357(g).” FAC ¶ 65. This allegation misconstrues the scope of authority granted to local
6 law enforcement officers under a § 1357(g) agreement, which essentially deputizes the
7 officers to function as federal immigration officers. *See* 8 U.S.C. § 1357(g). SB 1070, by
8 contrast, requires only that Arizona’s law enforcement officers assist the federal
9 government in the identification and apprehension of persons in violation of federal
10 immigration laws. *See* A.R.S. § 11-1051. Not only does 8 U.S.C. § 1357(g)(10)
11 expressly permit such assistance and exclude it from the agreements set forth in 8 U.S.C.
12 § 1357(g), but courts have also routinely recognized the authority of state and local
13 authorities to “investigate and make arrests for violations of federal immigration laws.”
14 *Vasquez-Alvarez*, 176 F.3d at 1296 (citing cases); *United States v. Santana-Garcia*, 264
15 F.3d 1188, 1193 (10th Cir. 2001).

16 Third, Officer Escobar alleges that SB 1070 conflicts with 8 U.S.C. § 1304(e),
17 which requires persons eighteen and over to carry their “certificate of alien registration or
18 alien registration receipt card” at all times. Officer Escobar alleges that A.R.S. § 11-
19 1051(B) exceeds this requirement by allegedly requiring persons under eighteen years old
20 “to prove that they are lawfully in the United States.” FAC ¶ 66. A.R.S. § 11-1051(B),
21 however, does not require *any* person to “prove” that he or she is lawfully in the United
22 States. Rather, A.R.S. § 11-1051 sets forth procedures for law enforcement officers to
23 follow, in the limited circumstances described in Section I(2) above, “to determine a
24 person’s immigration status” and to verify that status “with the federal government.” *See*
25 A.R.S. § 11-1051(B). Certain forms of identification can entitle persons to a presumption
26 that they are lawfully present in the United States, but A.R.S. § 11-1051(B) does not
27 impose any affirmative obligation upon anyone – much less persons under eighteen – to
28 carry any form of identification or registration card. Thus, A.R.S. § 11-1051(B) does not

1 conflict with 8 U.S.C. § 1304(e).

2 **2. Officer Escobar does not properly allege constitutional violations**

3 Officer Escobar challenges the constitutionality of SB 1070 under the First,
4 Fourth, Fifth, and Fourteenth Amendments based on an erroneous interpretation of the
5 Act's requirements and various conclusory allegations about the harm SB 1070 will
6 allegedly cause. *See* FAC ¶¶ 78-95. As an initial matter, Officer Escobar's claim under
7 the Fifth Amendment must be dismissed because the Due Process Clause of the Fifth
8 Amendment imposes limits on the *federal* government, whereas the Due Process Clause
9 of the Fourteenth Amendment that imposes limits on state action. *See, e.g., Ins. Corp. of*
10 *Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 713 (1982); *Brown v.*
11 *State of N.J.*, 175 U.S. 172, 174 (1899) (citing *Barron v. Baltimore*, 32 U.S. 243 (1833)).

12 With respect to his remaining constitutional challenges, Officer Escobar alleges
13 only that "Defendants' actions constitute violations of [due process, equal protection, free
14 speech, the Fourth Amendment,] and 42 U.S.C. § 1983" and that "[a]s a direct and
15 proximate result of the conduct of Defendants, Plaintiff has suffered injury." *See* FAC ¶¶
16 79-89. There are no allegations in the FAC explaining how SB 1070 allegedly restricts
17 Officer Escobar's First Amendment right to free speech¹⁴ or deprives *Officer Escobar* of
18 any rights he has under the Fourth Amendment or the Due Process and Equal Protection
19 Clauses. Because Officer Escobar has not articulated how either SB 1070 or defendants
20 could violate any of these constitutional provisions, these claims must be dismissed for
21 failure to state a claim upon which relief may be granted. *See Iqbal*, 129 S.Ct. at 1949
22 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory

23 ¹⁴ To the extent Officer Escobar alleges that the opinions and conduct of unidentified
24 third parties have purportedly "chilled" his speech, Officer Escobar has failed to allege a
25 valid First Amendment challenge to SB 1070. *See Laird*, 408 U.S. at 10-11
26 ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of
27 governmental regulations" if "the challenged exercise of governmental power [is]
28 regulatory, proscriptive, or compulsory in nature, and the complainant was either
presently or prospectively subject to the regulations, proscriptions, or compulsions that he
was challenging."); *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004) ("The chilling
effect, to amount to an injury, must arise from an objectively justified fear of real
consequences, which can be satisfied by showing a credible threat of prosecution or other
consequences following from the statute's enforcement.") (emphasis added).

1 statements, do not suffice.”) (citation omitted).

2 **III. CONCLUSION**

3 For the foregoing reasons, Governor Brewer respectfully requests that the Court
4 dismiss Officer Escobar’s First Amended Complaint.

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

6 SNELL & WILMER L.L.P.

7

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CERTIFICATE OF SERVICE

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

s/John J. Bouma

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