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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Martin H. Escobar,

Plaintiff,

v.

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

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-SRB

GOVERNOR BREWER'S RESPONSE TO THE CITIES OF FLAGSTAFF, TOLLESON, SAN LUIS AND SOMERTON'S MOTION TO INTERVENE

/ / /

Defendant Governor Janice K. Brewer ("Governor Brewer") opposes the Cities of Flagstaff, Tolleson, San Luis, and Somerton's (collectively, the "Intervenor Cities") Motion to Intervene (Doc. 32, the "Motion") in this case. The Intervenor Cities' two-paragraph Motion does not explain why their participation in this case is necessary – or even how it could be helpful for the Intervenor Cities to intervene so that they could just re-assert the same claims already being asserted by other parties in this action.

The Intervenor Cities' Motion should be denied for a number of reasons, including the fact that the Intervenor Cities do not have standing. Even if the Intervenor Cities could move past that threshold requirement, the Intervenor Cities have not alleged that the original parties – Officer Martin Escobar ("Officer Escobar") and, more particularly, Cross-Plaintiff the City of Tucson ("Tucson") – are unwilling or incapable of adequately representing the same interests raised by the Intervenor Cities in their proposed Complaint (Doc. 33, the "Cities' Complaint"). In short, the Intervenor Cities are unnecessary parties to this action, and their direct involvement as parties would only further complicate and delay adjudication on the merits.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

On April 23, 2010, Governor Brewer signed the "Support Our Law Enforcement and Safe Neighborhoods Act," SB 1070, into law to address the impact of unlawful immigration on Arizona and to assist understaffed federal immigration agencies through "the cooperative enforcement of federal immigration laws." SB 1070, § 1. On April 30, 2010, Governor Brewer signed HB 2162 approving various amendments to SB 1070 ("SB 1070" or the "Act"). The Act, as amended, is scheduled to take effect on July 29, 2010.

In response to the Act, Officer Escobar filed a Complaint on April 28, 2010, and an Amended Complaint on May 18, 2010 contesting the constitutionality of SB 1070. (Docs. 1 and 4). In his Amended Complaint, Officer Escobar seeks declaratory and injunctive relief on six grounds: (1) Fourteenth Amendment Due Process; (2) Fourteenth Amendment Equal Protection; (3) First Amendment Free Speech; (4) the Fourth

Amendment; (5) the Fifth Amendment; and (6) federal preemption. Officer Escobar's Amended Complaint (Doc. 4) at 14-15. On May 26, 2010, the City of Tucson filed its Answer and Cross-Claim in this case ("Tucson Cross-Claim"). (Doc. 9). The Tucson Cross-Claim alleges that: (1) SB 1070 "is preempted by federal immigration law"; (2) "[t]he Act delegates the inalienable police power of the government to individuals"; (3) its "budget policies and other policies … which do not enforce federal immigration law to the full extent permitted by federal law do not violate the Act"; and (4) SB 1070 imposes an unconstitutional "burden on out-of-state commerce." Tucson Cross-Claim ¶¶ 60-63. The foundation for Tucson's claims is its alleged concern that if the Act is not enjoined, "Tucson will be required by the Act to implement an unconstitutional law and will incur liability for that conduct." Tucson Cross-Claim ¶ 32.

On June 11, 2010, the Intervenor Cities filed their motion seeking permissive intervention in this case pursuant to Fed. R. Civ. P. 24(b)(2)(b). The Motion consisted of two paragraphs, requesting intervention "due to the unmistakable similarity between the parties [sic] claims" and that "all three cases challenge the constitutionality of SB 1070." Motion at 2. The Intervenor Cities further contend that intervention is necessary due to the Act's allegedly "harmful effect on Plaintiff intervenors' ability to carry out their mandated duties." *Id.* The Motion specifically indicates that the Intervenor Cities' claims are "similar" to the original parties, but does not explain why those parties, one of which is the second largest municipality in the state of Arizona, will not capably represent the Intervenor Cities' interests.

The Intervenor Cities apparently rely upon their Complaint (lodged with their Motion) to support their involvement in this case. However, a close reading of the Cities' Complaint is similarly unavailing. Therein, the Intervenor Cities again acknowledge that their claims are similar to, if not the same as, Officer Escobar's and (more specifically) Tucson's. The Intervenor Cities, nevertheless, assert that such claims are appropriate for consideration because they "fall within this Court's supplemental jurisdiction." Cities' Complaint ¶ 3. Specifically, the Intervenor Cities allege: (1) the Act is preempted by

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federal law; (2) "[t]he Act requires the Cities to violate the … Fourth and Fourteenth Amendments by mandating the detention and verification of [an arrestee's] immigration status"; and (3) SB 1070 is unconstitutionally vague because it mandates enforcement of immigration law, but prohibits consideration of "race, color, or national origin." Cities' Complaint ¶¶ 34-36.

The Intervenor Cities' allegations are the same as Tucson's in almost all respects, including the following:

- The Intervenor Cities and Tucson both allege that the State of Arizona, through the enforcement of the Act, "seeks to control and regulate immigration in a manner that conflicts with federal immigration laws, policies and practices." Tucson Cross-Claim ¶ 32; Cities' Complaint ¶ 14.
- The Intervenor Cities and Tucson allege that, if the Act is not enjoined they will be required to "implement unconstitutional laws," and "will confront and likely incur liability for that conduct." Tucson Cross-Claim ¶ 32; Cities' Complaint ¶¶ 13, 14, 28.
- The Intervenor Cities and Tucson claim that they cannot, under the Supremacy Clause, "restrain or limit federal enforcement of immigration law" within the city limits, but that they also "lack the resources and training" to "enforce federal immigration law to the fullest extent permitted by federal law…," and that "such enforcement would conflict with federal" enforcement "policies" and "priorities." Tucson Cross-Claim ¶ 36; Cities' Complaint ¶ 15.
- The Intervenor Cities and Tucson allege that requiring verification of the immigration status of all individuals that are arrested runs afoul of their "cite and release" authority under A.R.S. § 13-3903 – a procedure they have used for the immediate release of persons upon citation for "criminal speeding," "liquor offenses," "minor drug offenses," "assault," "trespass," and "disorderly conduct." The Intervenor Cities and Tucson further claim the verification requirement may result in a strain on resources due to unplanned incarceration during the verification process. Tucson Cross-Claim ¶¶ 38-45; Cities' Complaint ¶¶ 19-23.
- The Intervenor Cities and Tucson claim that they currently "cooperate with federal immigration agents when individuals are identified as aliens who may be unlawfully present in the United States," but that federal immigration agents "will not be able to respond with an immediate verification of the immigration status of every person who receives a criminal misdemeanor citation within the city and within the State of Arizona" as required by A.R.S. § 11-1051(B). The cities allege they therefore "will be required to incarcerate persons who would have been released at the time of citation pending federal verification of" the person's immigration status. They further allege that this "verification will be particularly difficult for natural born citizens who" do not have a "passport or other record with federal immigration agencies," and may take days or weeks. Tucson Cross-Claim ¶¶ 42-45; Cities' Complaint ¶¶ 21-23.

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- The Intervenor Cities and Tucson further allege that the Act will upset the delicate policy balance each city achieves through the annual budgeting process, and that the budgets do "not include sufficient funds for the enforcement of federal immigration laws to the fullest extent permitted by federal law," which could potentially result in "decreased investigation and prosecution of violent crimes against persons and other major felonies." Tucson Cross-Claim ¶¶ 52-54; Cities' Complaint ¶¶ 29-31.

Finally, Officer Escobar, Tucson, and the Intervenor Cities also all request the same exact relief: a declaration that the Act is unconstitutional and an order enjoining its enforcement. Officer Escobar's Amended Complaint at 15-16; Tucson Cross-Claim at 15-16; Cities' Complaint at 9-10 (The Intervenor Cities and Tucson assert the same prayer for relief.).

II. LEGAL ANALYSIS

A. Legal Standard for a Motion to Intervene

"On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

"[A] court may grant permissive intervention where the applicant for intervention shows: (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Nw. Forest Resource Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996) (citing *Greene v. United States*, 996 F.2d 973, 978 (9th Cir. 1993)). As part of this analysis, courts further consider:

> the nature and extent of the intervenors' interest, their ***standing to raise relevant legal issues***, the legal position they seek to advance, and its probable relation to the merits of the case … ***whether the intervenors' interests are adequately represented by other parties***, whether intervention will ***prolong or unduly delay the litigation***, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

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Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977) (emphasis added and citations omitted); *see also Silver v. Babbitt*, 166 F.R.D. 418, 433-34 (D. Ariz. 1994) (citing *Spangler*).

The Intervenor Cities have failed to satisfy this standard for four reasons: (1) they lack standing to raise the claims in their Complaint; (2) their claims are merely "supplemental" to, not independent from, those of the original parties; (3) the claims alleged are redundant to those raised by the original parties and will be adequately represented by the parties to this litigation; and (4) adding an unnecessary party to argue and brief the same claims as the original parties will only interfere with the efficient adjudication of this case.

B. <u>The Intervenor Cities' application for intervention should be denied because there are no independent grounds for jurisdiction</u>

1. The Intervenor Cities do not have standing

"Standing is a necessary element of federal court jurisdiction." *City of S. Lake Tahoe v. Cal. Tahoe Reg. Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "A party seeking to intervene in an action must demonstrate a direct, substantial, legally protectable interest in the proceeding before that party will be granted intervenor status." *United States v. Napper*, 887 F.2d 1528, 1532 (11th Cir. 1989) (Johnson, J., concurring) (citations and internal quotations omitted). Thus, "[r]egardless of whether the intervention [is] as of right or permissive, … the [intervenor must] have standing in order to intervene." *Id.*; *see also Silver*, 166 F.R.D. at 434 (without standing, permissive intervention is inappropriate).

"A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams v. Mayor & City Council of Balt.*, 289 U.S. 36, 40 (1933) (citations omitted). Based on this settled principle, the Ninth Circuit has held consistently that cities do not have standing to challenge the constitutionality of a state statute or local ordinance in federal court. *City of S. Lake Tahoe*, 625 F.2d at 233;

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Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk, 91 F.3d 1240, 1242 (9th Cir. 1996) (dismissing school district's Supremacy Clause challenge against the state for lack of standing).[1]

In *City of S. Lake Tahoe*, a city brought constitutional challenges to regulations adopted by a regional planning authority. *City of S. Lake Tahoe*, 625 F.2d at 232. Specifically, the city alleged violations of the Fifth Amendment Takings Clause, the Fourteenth Amendment Equal Protection Clause, and the Article VI Supremacy Clause of the United States Constitution. *Id.* at 232-33. The Ninth Circuit dismissed all of the city's claims, finding that the city did not have standing to challenge the regional planning authority's regulations on constitutional grounds. *Id.* As in *City of S. Lake Tahoe*, the Intervenor Cities assert constitutional challenges based upon the Fourteenth Amendment and the Supremacy Clause. And just as in *City of S. Lake Tahoe*, the Intervenor Cities, being municipal corporations of the State of Arizona, are similarly without standing to bring constitutional claims against the State from which they were created. Because the Intervenor Cities are unable to satisfy this threshold standing requirement, their motion to intervene should be denied.

2. "Supplemental jurisdiction" does not satisfy the permissive intervention standard

In an attempt to shore up the standing deficiencies, plaintiffs allege in their proposed Complaint (but not in their Motion) that their claims fall within the Court's supplemental jurisdiction. Cities' Complaint ¶ 3. But it is settled that "permissive intervention under Rule 24(b) cannot be regarded as part of the main action and the would-be intervenor must establish independent grounds for federal subject matter

[1] The Supreme Court has further held that the fact that a municipality may be granted standing to challenge the constitutionality of a state statute in state court, does not abrogate the federal courts' holdings that municipalities are without such standing to contest state statutes at the federal level. *See Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (recognizing that "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution") (citations omitted).

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jurisdiction." *Silver*, 166 F.R.D. at 434 (citing *Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977)). In *Blake*, the Ninth Circuit emphasized that "ancillary jurisdiction … cannot support the claims by permissive intervenors." 554 F.2d at 957 (citations omitted). "Ancillary claims are claims which … arise out of the same transactions that are the subject of the federal causes of action but which are asserted after the original complaint is filed, usually by one other than the original plaintiff." *Id.* at 957 n.11. In situations involving such ancillary claims, "[w]here proposed intervenors present no new questions, courts … [generally do not] grant[] permissive intervention." *Silver*, 166 F.R.D. at 434 (citations omitted).

Here, the Intervenor Cities have failed to allege any independent jurisdiction to support their request for intervention. Rather, they readily concede that their request is ancillary to the claims presented by Officer Escobar and Tucson. Indeed, the Intervenor Cities even emphasize "the ***unmistakable similarity*** between the parties' claims." Motion at 2 (emphasis added). Without an independent basis for jurisdiction, the Intervenor Cities' claims merely restate the claims of Officer Escobar and Tucson, and intervention should be denied.

C. Even if this Court finds that the Intervenor Cities have standing, intervention should be denied because their claims are redundant and will unduly impair the efficiency of this litigation

1. The Intervenor Cities' interests are adequately represented by the existing parties

Permissive intervention is redundant and improper when the interests of the proposed intervenor are adequately represented by the original parties. *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) (each of the proposed intervenor's "concerns is being addressed by at least one of the existing parties); *see also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950-51 (9th Cir. 2009) (the "most important factor" to determine whether a proposed intervenor is adequately represented by a present party to the action is "how the intervenor's interest compares with the interests of existing parties") (internal quotation marks and citations omitted).

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This analysis considers "the cumulative effect of the representation of all existing parties," not just those parties that are similarly situated to the proposed intervenor. *California*, 792 F.2d at 779.

A presumption of adequacy of representation applies where a party and the proposed intervenor share the same "ultimate objective." *Perry*, 587 F.3d at 951 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). The proposed intervenor can rebut that presumption only with a "compelling showing" to the contrary. *Id.* For example, the First Circuit has held that to overcome the presumption of adequate representation, the "petitioner ordinarily must demonstrate adversity of interest, collusion, or nonfeasance." *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979); *see also United States v. Metropolitan Dist. Comm'n*, 761 F. Supp. 206, 207 (D. Mass. 1991) (denying city's application for intervention where its interests were adequately protected by parties to the lawsuit).

Here, the Intervenor Cities have not even argued, let alone established, that the current parties (including the City of Tucson) will not make, and capably make, all of the "City arguments" pertinent to SB 1070 in the event that it is found that Arizona municipalities somehow have standing to be asserting these claims. Indeed, the Intervenor Cities readily concede that their arguments are the same as those of the existing parties. However, where (as here) it is apparent that the "ultimate objective" of the Intervenor Cities and the original parties is "identical" and not "meaningfully distinct," courts presume that the other parties are adequately representing those interests without a "compelling showing" from the Intervenor Cities. *Perry*, 587 F.3d at 951. The Intervenor Cities have not made that showing.

2. Intervention will cause undue delay and prejudice

Permitting intervention will undoubtedly delay these proceedings and would force, among other things, additional motion practice to address the Intervenor Cities' claims. When the participation of the proposed intervenors "would consume additional time and resources of both the Court and the parties that have a direct stake in the outcome of these

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proceedings," intervention should be denied. *Id.* at 955-56.

III. CONCLUSION

For these reasons, the cities of Flagstaff, Tolleson, San Luis, and Somerton's motion to intervene in this case should be denied.

Respectfully submitted this 28th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 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

11673464.3

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