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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MARTIN H. ESCOBAR, Plaintiff,	No. CV 10-249-TUC-SRB **CITIES OF FLAGSTAFF,**

vs.

JAN BREWER, Governor of the State of Arizona in her Official and Individual Capacity; TERRY GODDARD, the Attorney General of the State of Arizona, in his Official and Individual Capacity; the CITY OF TUCSON, a municipal corporation; and BARBARA LAWALL, County Attorney, Pima County,

Defendants.

CITY OF FLAGSTAFF, an Arizona chartered municipal corporation; CITY OF TOLLESON, an Arizona municipal corporation; CITY OF SAN LUIS, an Arizona municipal corporation; CITY OF SOMERTON, an Arizona municipal corporation

Plaintiff-Intervenors,

vs.

STATE OF ARIZONA, a body politic; and JAN BREWER, Governor of the State of Arizona, in her Official and Individual Capacities.

Defendants in Intervention.

TOLLESON, SAN LUIS AND SOMERTON'S MOTION FOR PRELIMINARY INJUNCTION

Assigned to: Hon. Susan R. Bolton

(Oral Argument Requested)

The Cities of Flagstaff, Tolleson, San Luis, and Somerton (collectively, the "Cities") move for a preliminary injunction enjoining the State of Arizona and the Governor (collectively, the "State") from enforcing the "Support Our Law Enforcement and Safe Neighborhoods Act," Arizona Senate Bill 1070 (2010 Ariz. Sess. Laws Ch. 113) as amended by Arizona House Bill 2162 (2010 Ariz. Sess. Laws Ch. 211) (collectively, the "Act"), pending resolution of this matter by declaratory judgment that the Act is unconstitutional and unenforceable.

INTRODUCTION

A fundamental element of public authority is the power to establish priorities for the employment of limited resources in the effort to meet expansive responsibilities. The federal government must do so in the exercise of its vast responsibility pursuant to

Article I, Section VIII of the United States Constitution to "establish an uniform rule of naturalization." The Cities must do so in the exercise of their heavy local responsibilities for law enforcement and for the maintenance of public health, safety, and order. The Act impermissibly impinges upon both.

The Act's impingement upon federal plenary power over immigration and naturalization forms the core of our argument that it is federally preempted and that it violates Article VI of the United States Constitution (the "Supremacy Clause.") The Act's impingement upon the Cities and its imminent disruption of their law enforcement policies and priorities form the core of our argument that they will be irreparably injured if not relieved of the Act's unconstitutional burdens through the exercise of this Court's injunctive powers.

The Cities have moved to intervene in one of a series of separate actions that constitute a single case or controversy and have now been transferred to this Court. The Cities filed their motion in the present action because the City of Tucson, with whom they are most closely aligned, is a cross-claimant, but they believe that all related cases should eventually be consolidated in the interest of judicial economy. Recognizing that other Plaintiffs have already briefed some issues that the Cities wish to advance, we will attempt to spare the Court and counsel unnecessary duplication, incorporate pertinent arguments from other briefs by reference, and summarize or supplement them insofar as necessary to the coherent advancement of the Cities' case.

ARGUMENT

"Plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest." *N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1111 (9th Cir. 2010). Because the harm that faces the Plaintiffs is a threshold element of their claim, we address it in the first two sections of this memorandum. We will address the merits of preemption in Section III.

I. The Cities will Suffer Irreparable Harm because the Act Disrupts Their Law Enforcement Priorities and Diverts Scarce Resources from Their Essential Responsibility to Maintain Safe Communities.

The Act will inflict irreparable harm on the Cities, their law enforcement missions, and the public. The City of Tucson has identified the Act's imminent disruptive impact in its Motion for Preliminary Injunction. *See* Dkt. 22 at 11 - 13. The Cities incorporate those pages by reference. Other cities and counties from around the country, fearing the "ripple effect" if state regulatory schemes such as SB 1070 are sanctioned, have echoed Tucson's concerns; in their proposed *amicus curiae* brief in the *Friendly House* suit, the California cities of Berkeley, Los Angeles, Monterey, Palo Alto, San Francisco, and San Jose; the California Counties of Los Angeles, San Francisco, and Santa Clara; and the cities of Baltimore, Maryland, Minneapolis and Saint Paul, Minnesota, Portland, Oregon, and Seattle, Washington accurately summarize the Act as "requir[ing] local law enforcement agencies to enforce federal civil immigration law through means that are unconstitutional, impractical, costly, and deeply damaging to the relationships of trust law enforcement agencies have built with immigrant communities and the public at large." *Friendly House v. Whiting*, Dkt 190 at 2.

Exhibits A and B to our Motion detail such impacts in two of the Plaintiff communities. The Act's imminent multiple burdens upon the Cities include the following:

A. Investigation.

The Act requires the City police officers, whenever practical, to attempt to determine the immigration status of any person whom they stop, detain, or arrest if there is reasonable suspicion to believe that the person is unlawfully present in the United States. A.R.S. § 11-1051(B). As the Flagstaff and San Luis Police Chiefs point out in their supporting declarations, this mandate applies "regardless of the severity of the suspected or actual offense." *See* Exh. A at ¶4; Exh. B at ¶ 4.

The full impact of this mandate emerges as one appreciates that it applies to stops and detentions as well as to arrest, and that a person who is stopped and ticketed for a civil traffic infraction undergoes a detention for the duration of the encounter. *See* A.R.S. § 13-3883(B) ("A peace officer may *stop and detain* a person as is reasonably necessary to investigate an actual or suspected violation of *any traffic law* committed in the officer's presence and may serve a copy of the traffic complaint for any alleged *civil or criminal* traffic violation.") (Emphasis added.) Thus, virtually every broken tail lamp, skipped turn-signal, or jaywalk that occasions a traffic citation in Arizona[1] will oblige the detaining officer to consider whether something about the detainee or the detainee's circumstances warrants an immigration status investigation.

In Exhibit A, Brent Cooper, Flagstaff's Chief of Police and a 32-year law enforcement veteran, explains the degree to which this requirement will divert the "already scarce resources" available to his department and subordinate to immigration enforcement the high priority he currently places on "investigating, preventing and deterring the most violent crimes." Exh. A at ¶¶ 2-5. In Exhibit B, Rick Flores, the San Luis Chief of Police and a 15-year law enforcement veteran, similarly describes the diversionary impact of the Act. Chief Flores, like Chief Cooper, describes violent crime control as his top priority but, as a consequence of San Luis's close proximity to the border, describes traffic control as a matter that also "needs constant attention," given "congestion in traffic seeking to enter into Mexico or coming to Arizona from Mexico." Both priorities must be subordinated to immigration enforcement if his 29 officers are subjected to the mandates of the Act. Exh. B at ¶¶ 2-5.

B. Verification.

Further diversion of resources and disruption of priorities occurs in instances of arrest, for upon any arrest, the Act requires not merely investigation but federal verification of immigration status prior to release. In plain and unambiguous terms the

[1] *See* A.R.S. §§ 28-921 and -925 (pertaining to vehicle equipment), 28-754 (pertaining to turning movements), and 28-791 (pertaining to pedestrians).

Act provides, "*Any person who is arrested* shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(C)." A.R.S. §11-1051(B) (emphasis added). Tucson explains the consequence as follows:

> The day the Act goes into effect, Tucson will be forced to abandon its practice of citing and releasing persons arrested for misdemeanors.[2] In fiscal year 2009 there were 36,821 such arrests -- more than 100 a day. Tucson will have to begin verifying, through the authorized federal agencies, the immigration status of each such person. Since it is impossible for federal authorities to respond immediately to all those requests for verifications along with similar requests from every jurisdiction in the state, Tucson will have to start incarcerating such individuals. That will require increased funding at a time when the City is already experiencing employee furloughs and layoffs, including in its public safety workforce.

Tucson Motion, Dkt. 22 at 14.

Moreover, even if the unambiguous "any" and "shall" terms of the federal verification mandate could be interpreted to mean something other than "any" and "shall" and the pre-release verification requirement could be read to apply only when an arrestee lacks status documentation, the burdens of detention pending federal verification would remain substantial in both personnel and cost. As the Chiefs tell us, their officers routinely encounter people who do not carry citizenship documentation or whose citizenship or legal status cannot be readily determined based on the documentation they carry, including persons from other states whose drivers' licenses are issued without proof of legal presence in the United States. Exh. A at ¶ 8; Exh. B at ¶¶ 3, 8. If such persons are arrested, no matter how petty the infraction, the Act will

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[2] *See* A.R.S. §13-3903, which provides that a person arrested for a misdemeanor or petty offense may be cited and released at the site of the arrest in lieu of being transported to a law enforcement facility. During fiscal year 2009 the Cities used the cite and release procedure in arrests for the following numbers of petty offenses: Flagstaff, 1543; San Luis, 724; Somerton, 463; and Tolleson, 1019.

foreclose the effective and economical option of citation and release and require the Cities to detain them until federal officials can verify their legal status.

Federal immigration enforcement agents will likely lack the capacity for swift response to the grossly swollen volume of calls for verification from law enforcement officers throughout the State. Exh. A at ¶7; Exh. B at ¶ 7. The Cities will thus be required to incarcerate persons pending federal verification of status who would otherwise have been released upon citation. That verification will be particularly difficult for natural-born citizens who lack a passport and have no record with federal immigration agencies. The federal verification may take days, substantially increasing the costs of incarceration for the Cities, not to mention the consequences for the persons needlessly swept into their jails.

C. Diversion of Law Enforcement Personnel and Financial Resources.

The Act cuts deeply into the scarce and shrinking financial resources of the Cities.[3] State law requires municipalities to adopt an annual budget effective July 1 of each year. A.R.S. §42-17101 *et seq.* In doing so, the Cities weigh their multiple responsibilities, including those for public health, safety, and law enforcement, and adopt priorities for meeting such responsibilities to the extent possible within tight budgetary constraints.

The Act's investigative mandates will not only require City police forces to commit more time to investigating the immigration status of petty misdemeanants and civil traffic offenders they encounter. The Act will also require them to commit more time and resources to training officers in the intricacies of immigration enforcement and less time and resources, as we have noted, to the high priority responsibilities of deterring, investigating, and solving violent and other serious crimes. *See* Exh. A at 4;

[3] Chief Cooper attests that the Flagstaff Police Department's limited budget of approximately $13,000,000 has been reduced by approximately $2,000,000 over the last two years. Exh. A at 4. Chief Flores describes the shrinkage of the San Luis budget in Exh. B at 5-6.

Exh. B at 4; *see also infra* at 17-18, discussing the intense training required to provide local law enforcement officers sufficient understanding of the intricacies of immigration law to enable them to participate in the federal "287(g) program."

The increased detention and incarceration necessitated by the Act will also divert law enforcement personnel and resources, increase transportation and jail booking costs, and burden municipal courts with a substantially increased volume of proceedings as the Cities detain substantially larger numbers of people. *See* Exh. A at ¶ 11 and Exh. B at ¶ 11. Chief Flores of San Luis explains the particular losses his City will face in transporting larger numbers of persons to the county jail:

> [T]he Yuma County Jail is located in the northern part of the City of Yuma and the time to transport a person, book that person, and travel back to the city takes the officer out of the city for anywhere from 3 to 3 1/2 hours. There are times there is only one officer on patrol for a city of 32 square miles. This means the city is unprotected for the time needed to book into the Yuma County Jail. If one projects the impact of booking an additional 920 persons into the county jail, this means the City will not be covered by a patrol officer for more than 2750 hours or more than 100 days during the fiscal year of 2010/2011.

Exh. B at ¶ 11.

D. Impairment of Community Trust.

An intangible yet indispensable element of law enforcement is earning and maintaining community trust. The Chiefs tell us, however, that the Act will jeopardize the relationships and undermine the trust their forces rely on to protect the communities they serve: It will impede investigation of serious crimes by deterring victims, witnesses, and others with useful information from interacting with police out of fear that they will subject themselves or friends or family members to immigration status investigation. And it will make immigrant victims more vulnerable, including victims of domestic violence and human trafficking, as the perpetrators take advantage of their reluctance to come forward. In these and other ways, the Chiefs tell us, the Act will

undermine their Departments' "law enforcement priorities and ability to protect people from serious crime." Exh. A at ¶¶ 13-18; Exh. B at 13-18.

E. Liability Exposure.

The Act compounds the series of harmful costs that we have already described by exposing the Cities to lawsuits and potential liabilities that we will detail in Part II.

II. The Cities will Suffer Irreparable Harm because the Act's Vague Standards Place Them between the Rock and the Hard Place of Conflicting Liabilities.

We have discussed in Part I.A the Act's requirement that local law enforcement officers attempt to determine the immigration status of any person whom they stop, detain, or arrest if there is reasonable suspicion to believe that the person is unlawfully present in the United States. A.R.S. § 11-1051(B). The standard of "reasonable suspicion" has provided a basis for investigatory stops since *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968) (holding that to justify the intrusion of an investigatory stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.") Conceived as something less than probable cause, yet something more than an unparticularized hunch, *Id.* at 22, reasonable suspicion is inherently "context-specific and not quantifiable." Gabriel J. Chin, Carissa Byrne Hessick, Toni Massaro, and Marc L. Miller, *Arizona Senate Bill 1070: A Preliminary Report* at 20 (June 7, 2010) (henceforth "Preliminary Report").[4]

Although the police have achieved some familiarity with the vagaries of reasonable suspicion in the years since *Terry*, the standard is problematic in the Act's context for the reasons that follow:

First, the intended focus of reasonable suspicion under the Act is not a suspect's actions, but the suspect's status: specifically, whether the suspect is "an alien and is unlawfully present in the United States." A.R.S. §11-1051(B).

[4] The report is abstracted at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440 and is available for download in full there. A courtesy copy is provided for the Court.

Second, in the fact-specific formulation of reasonable suspicion in immigration status investigations, the courts have treated factors closely correlated with race and ethnicity as permissible considerations, including language, accent, clothing, hairstyle, neighborhood, and border proximity. Preliminary Report at 20.

Third, the Act's purported ban on racial profiling is an exercise in misdirection, containing an exception that so swallows its proscription as to subject the police to utter confusion with respect to the permissibility of racial and ethnic considerations in the enforcement of the Act. As the authors of the Preliminary Report explain,

> Although public officials have stated that the legislation prohibits racial profiling and that profiling is not otherwise legal, these statements are not consistent with the text of the statute or with existing law. The law says that law enforcement officers "may not consider race, color or national origin . . . *except to the extent permitted by the United States or Arizona Constitution*." A.R.S. § 11-1051(B).[5] Decisions by both the United States Supreme Court and the Arizona Supreme Court have identified "ethnic factors" as a relevant consideration in enforcement of immigration laws, and have further determined that the U.S. Constitution allows race to be considered in immigration enforcement. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975); *State v. Graciano*, 653 P.2d 683, 687 n.7 (Ariz. 1982) (citing *State v. Becerra*, 534 P.2d 743 (1975)).

Id. at 4. *See also Corona-Palomera v. Immigration & Naturalization Serv.*, 661 F.2d 814, 818 (9th Cir. 1981)("Evidence of foreign birth gives rise to a presumption that the person so born is an alien, and it is presumed that alienage continues until the contrary is shown.")

This is not to say that the law lacks crosscurrents as it grapples with the inevitability of ethnic considerations in the assessment of immigration status. *Compare with United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (en banc) ("The likelihood that in an area in which the majority--or even a substantial part--of the

[5] The same mixed message regarding the consideration of race, color, or national origin is repeated at three other places in the Act. *See* A.R.S. §§ 13-1509(C), 13-2928(D), and 13-2929(C).

population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.") with *State v. Gonzales-Gutierrez*, 187 Ariz. 116, 120, 927 P.2d 776, 780 (Ariz. 1996) ("Mexican ancestry alone, that is, Hispanic appearance, is not enough to establish reasonable cause, but if the occupants' dress or hair style are associated with people currently living in Mexico, such characteristics may be sufficient.")

These crosscurrents, however, do not relieve but rather augment the uncertainty and confusion that the police will experience as they grapple with the investigative requirements of the Act.

Fourth, the Act not only creates confusion rather than guidance concerning the permissibility of racial profiling; it *requires* the police to consider race, ethnicity, and national origin to whatever uncertain degree the law allows, and it reinforces that requirement by subjecting the Cities to the expense of private lawsuits and the prospect of monetary sanctions if their police departments fail to do so.

Specifically, Subsections A and H of A.R.S. §11-1051 provide:

> **A**. No official or agency of this state or a county, city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law.
>
> **H.** A person who is a legal resident of this state may bring an action in superior court to challenge any official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws, including 8 United States Code Sections 1373 and 1644, to less than the full extent permitted by federal law.

Because deep uncertainty clouds the "full extent" to which the law permits "race, ethnicity, and national origin" to be considered as elements of reasonable suspicion in immigration status determinations, Subsections A and H place the Cities between a rock and a hard place of countervailing liabilities.

The rock is the exposure to lawsuits for the violation of equal protection if the Cities police officers venture into this treacherous ground.[6] *See, e.g., Chavez v. Illinois*

[6] The importance of not doing so is reflected in Standard 1.2.9, entitled "Bias Based Profilng, adopted by the Commission on Accreditation for Law Enforcement Agencies (CALEA) in 2001. CALEA was formed "to develop a set of law enforcement standards and to establish and administer an accreditation process through which law enforcement agencies [can] demonstrate voluntarily that they meet professionally-recognized criteria for excellence in management and service delivery." CALEA standard 1.2.9 and its accompanying commentary provide as follows:

1.2.9 *The agency has a written directive governing bias based profiling and, at a minimum, includes the following provisions:*

a. a prohibition against bias based profiling in traffic contacts, field contacts and in asset seizure and forfeiture efforts;

b. training agency enforcement personnel in bias based profiling issues including legal aspects;

c. corrective measures if bias based profiling occurs; and

d. an annual administrative review of agency practices including citizen concerns.

Commentary: Profiling, in itself, can be a useful tool to assist law enforcement officers in carrying out their duties. Bias based profiling, however, is the selection of individuals based solely on a common trait of a group. This includes but is not limited to race, ethnic background, gender, sexual orientation, religion, economic status, age, cultural group or any other identifiable groups.

Law enforcement agencies should not condone the use of any bias based profiling in its enforcement programs as it may lead to allegations of violations of the constitutional rights of the citizens we serve, undermines the legitimate law enforcement efforts and may lead to claims of civil rights violations. Additionally, bias based profiling alienates citizens, fosters distrust of law enforcement by the community, invites media scrutiny, legislative action, and judicial intervention.

Law enforcement personnel should focus on a person's conduct or other specific suspect information. They must have reasonable suspicion supported by specific articulated facts that the person contacted regarding their identification, activity or location has been, is, or is about to commit a crime or is currently presenting a threat to the safety of themselves or others. Annually, the agency should include profiling related training that

State Police, 251 F.3d 612, 635 (7th Cir. 2001) ("[U]tiliz[ing] impermissible racial classifications in determining whom to stop, detain, and search…would amount to a violation of the Equal Protection Clause of the Fourteenth Amendment."). *See also infra* at 17-18, discussing the detailed training requirements being implemented for state and local law enforcement officers participating in the "287(g) program" to assure that they adequately understand the complexities of civil rights requirements and constraints. The hard place is subsection H, for when an Arizona city or town adopts or enforces a racial profiling standard or policy that restricts the consideration of ethnic criteria by its officers, it subjects itself to the risk of a lawsuit by any legal resident within the State and to the prospect of a civil penalty of "not less than five hundred dollars and not more than five thousand dollars" per day upon the theory that the City has restricted "the enforcement of federal immigration laws … to less than the full extent permitted by federal law." A.R.S. §11-1051(H).

In summary, the Act diminishes the Cities' ability to devote their law enforcement resources to the priority of deterring and investigating serious and violent crime, forces them instead into the complex field of immigration law enforcement, imposes standards that create a quagmire of uncertainty, and exposes them to countervailing liabilities if they stumble. These consequences are imminent, concrete, and acute and, in the absence of injunctive relief will cause the Cities irreparable harm.

III. The Cities are entitled to Injunctive Relief because the Act is Unconstitutional.

The Cities recognize that a state may subordinate local priorities to statewide priorities and that the Arizona Legislature and Governor have attempted to do so in the passage of the Act. The State cannot do so, however, where its mandate conflicts with the United States or Arizona Constitution.

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should include field contacts, traffic stops, search issues, asset seizure and forfeiture, interview techniques, cultural diversity, discrimination, and community support. *See* http://www.calea.org/online/NewsRelease/newsreleasemarch282001.htm

A. The Act is Unconstitutionally Vague.

Because we have just completed a discussion of the Act's vague and confusing standards, we will defer our central argument on the issue of preemption and will first discuss the Cities' allegation that the Act's vagueness reaches the level of unconstitutionality. A law is unconstitutionally vague when its mandates or prohibitions lack sufficient clarity to give persons of ordinary intelligence a reasonable opportunity to know what the law prohibits or requires. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). One danger of such a law is to "delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id*. at 108-09.

SB 1070 achieves precisely such dangers. Its vague standards are not counterbalanced by more definite terms that would guide those it obliges to apply them. It delegate the complexities of immigration law and policy "to the moment-to-moment judgment of the policemen on his beat." *Cf. Smith v. Goguen*, 415 U.S. 566, 575 (1974) (citations omitted).

The Cities are mindful that a facial vagueness challenge to a law is a "heavy burden" and a "strong medicine" that is "generally disfavored." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (citations omitted). But an ambiguous regulatory scheme can "raise substantial vagueness concerns," and where its terms "are undeniably opaque," a challenge on vagueness grounds is justified. *Id*. at 588. In the Cities' view, the opacity of SB 1070's terms is the clearest feature of that law.

The Cities are aware, however, that in the resolution of vagueness challenges, the Supreme Court has "instructed 'the federal courts … to avoid constitutional difficulties by [adopting a limiting interpretation] if such a construction is fairly possible.'" *Skilling v. United States*, 561 U.S. ___ (2010), slip op. at 42, *quoting Boos v. Barry*, 485 U.S. 312, 331 (1988). The Cities recognize as well that federal courts are often disposed to defer to state court construction "[i]f the courts of a state could adopt a construction of

its statute that eliminates the constitutional defects." *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1191 (9th Cir. 1988).

Accordingly, although the Cities maintain that the Act's regulatory standards and commands are irremediably vague, they do not make that claim the linchpin of their constitutional challenge to the Act. Particularly for purposes of preliminary injunction, they assert preemption as the ground most likely to achieve success.

B. Federal Law Preempts the Act.

"The Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties." *DeCanas v. Bica*, 424 U.S. 351, 358, n. 5 (1976). Motions for preliminary injunction and supporting memoranda lodged by other plaintiffs have extensively briefed the multiple ways in which the Act will burden and conflict with federal immigration law. Examples are the motion by Cross-Claimant the City of Tucson, Dkt. 22 at pages 13-26; the motion by Plaintiff Escobar, Dkt 17 at pages 11-28; and in *Friendly House v. Whiting*, Case No. CV-10-01061A, the motion by Plaintiffs, Dkt. 70 at pages 4-24. We incorporate the indicated pages of those motions by reference, but will limit our discussion of preemption to the incompatibility of the Act's mandates with established federal policies and priorities for immigration enforcement.

To focus this argument, we invite the court's attention to Dkt. 17, Exhibits I and J, (Exhibits to the Motion for Preliminary Injunction of Plaintiff Escobar), both of which we likewise incorporate by reference. No documents better demonstrate the trespass on federal enforcement priorities that inheres in the mandates of the Act.

Exhibit I is the template the U.S. Immigration and Customs Enforcement Agency (ICE) created in July 2009 for the Memorandum of Agreement (MOA) it now uses in the 287(g) program to delegate immigration enforcement powers to state and local law enforcement agencies.[7] At the outset the MOA defines the purpose of such delegations

[7] In 1996, Congress added section 287(g) to the Immigrant and Nationality act, authorizing the executive branch to delegate immigration enforcement activities to state

as "to enhance the safety and security of communities by focusing resources on identifying and processing for removal criminal aliens who pose a threat to public safety or a danger to the community. Exh. I at 1. [8] The MOA advances that purpose by mandating adherence to a set of graded enforcement priorities:

> Prioritization
>
> ICE retains sole discretion in determining how it will manage its limited resources and meet its mission requirements. To ensure resources are managed effectively, ICE requires the Agency to also manage its resources dedicated to 287(g) authority under the MOA. To that end, the following list reflects the categories of aliens that are a priority for arrest and detention with the highest priority being Level 1 criminal aliens. Resources should be prioritized to the following levels:
>
> **Level 1** -- Aliens who have been convicted of or arrested for major drug offenses and/or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping;
>
> **Level 2** -- Aliens who have been convicted of or arrested for minor drug offenses and/or mainly property offenses such as burglary, larceny, fraud, and money laundering; and
>
> **Level 3** -- Aliens who have been convicted of or arrested for other offenses.

Id. at 17.

This establishment of priorities is not unique to the 287(g) program. It advances a more comprehensive directive from Congress to the Department of Homeland Security in the DHS Appropriations Act of 2010 that the Department "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Pub. L. No. 111-83, 123 Stat. 2142, 2149.

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and local government agencies. Although that section is now codified at 8 U.S.C. §1357(g), the agreements that embody such delegations remain known as "287(g) agreements."

[8] For clarity of reference, references to Exhibits I and J will employ the internal pagination of each document.

Exhibit J is a special report issued on March 4, 2010, by the Office of Inspector General (OIG) of the Department of Homeland Security. Titled "The Performance of 287(g) Agreements," it constitutes a summary of an audit and inspection undertaken by the OIG to promote the "economy, efficiency, and effectiveness" of the 287(g) program. Exh. J at Preface. The OIG makes 33 recommendations, the common thread of which is to tighten delegations of enforcement power and improve training, oversight, data-collection, and follow-up in order to assure that the immigration enforcement activities of state and local law enforcement agencies (LEAs) adhere to and advance ICE policies and priorities. Exh J, *passim*.

Particularly germane is an early section titled "287(g) Performance Measures Do Not Align With Program Objectives." After quoting the three risk-based priorities set forth above for the arrest and detention of "criminal aliens who pose a threat to public safety or a danger to the community," the OIG observes:

> 287(g) resources are to be prioritized according to these levels. However, although ICE has developed priorities for alien arrest and detention efforts, it has not established a process to ensure that the emphasis of 287(g) efforts is placed on aliens that fall within the highest priority level.

Id. at 8-9.

To better ensure the proper focus of 287(g) enforcement, the Report lists 33 recommendations, including:

> **Recommendation #1:** Establish a process to collect and maintain arrest, detention, and removal data for aliens in each priority level for use in determining the success of ICE's focus on aliens who pose the greatest risk to public safety and the community.
>
> **Recommendation #2:** Develop procedures to ensure that 287(g) resources are allocated according to ICE's priority framework.

Id. at 9; *see also Id.* at 45-46, where ICE concurs in both recommendations and the OIG discusses ICE's efforts toward compliance.

Other pertinent recommendations include these:

- Recommendation 7 and 13 call for the development of field supervisory guidance and specific operating protocols to assure that 287(g) enforcement activities better comply with ICE policies and the terms of the MOA. *Id.* at 13, 21, 47-48, and 51.
- Recommendations 15-18 address the need to better weigh civil rights and civil liberties considerations in the 287(g) application review and selection process and in monitoring the methods that participating jurisdictions use in the course of their enforcement efforts. *Id.* at-27, 52-53.
- Recommendations 19-22: Improve training requirements to assure that local enforcement officers adequately understand the complexities of civil rights requirements and constraints, the limitations of enforcement pursuant to the MOA, and the complexities of immigration law relating to the asylum process, immigration benefits, and victim and witness protections. *Id.* at 27-32. 53-55.

B. Field and Conflict Preemption.[9]

Although the 287(g) program is a detailed statutory and regulatory scheme for engaging the assistance of state and local law enforcement officers in ICE's efforts to satisfy its enforcement responsibilities under the Immigration and Nationality Act, the Cities do not contend that §1357(g) so wholly occupies the field as to altogether preclude state and local enforcement other than through 287(g) agreements. This court has held that local police have authority to arrest for criminal violations of the Immigration and Nationality Act and turn offenders over to the federal government for prosecution. *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled*

[9] When Congress intends federal law to "occupy the field," state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. *Crosby v. National ForeignTrade Council*, 530 U.S. 363, 372 (2000). Field and conflict preemption frequently overlap and do so in this case.

on other grounds by Hodgers-Durgin v. De la Vina, 199 F.3d 1037 (9th Cir. 1999). Moreover, Subsection §1357(g)(10) provides:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—
>
> **(A)** to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> **(B)** otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.[10]

The Cities do contend, however, that the policies and priorities the Department has established at the direction of Congress permeate the field and set the standard for cooperative state and local law enforcement, whether pursuant to 287(g) agreements or not.

SB 1070 pays lip service in its preamble to "cooperative enforcement of federal immigration laws." But it does not undertake cooperation with the AG or the Secretary of Homeland Security, as contemplated in 8 U.S.C. §1357(g)(10). The Act goes far beyond occasional, incidental local enforcement assistance and instead establishes a comprehensive state regulatory scheme. Had the Act's authors intended a program of cooperative endeavors, they would have accepted the constraining force of Congress's and Homeland Security's priorities for the identification and apprehension of perpetrators of serious crimes. They would not have brushed aside such priorities in a sweeping, indiscriminate, wholesale mandate that extends to every routine traffic stop. Had they intended a program of cooperative endeavors, they would have assured that the

[10] Although §1357(g)(10) has not been amended to substitute the Secretary of Homeland Security for the Attorney General, the Act as a whole has been comprehensively amended to transfer to the Secretary the functions that were previously assigned to the Justice Department. *See* 6 U.S.C. §251.

local law enforcement officers they have obliged to engage in systematic immigration enforcement would be provided the degree of training that the Department of Homeland Security deems necessary to qualify such officers for the complexities of immigration enforcement.

The Act attempts to regulate immigration within the State of Arizona not in cooperation with but in challenge to federal policies and priorities that the Arizona Legislature and Governor deem inadequate to their preferences. Such enactments, if permitted state by state, would substitute a chaos of diverse regulatory programs for the uniform enforcement that Congress has assigned to the Department of Homeland Security. Because the Act directly burdens and conflicts with federal law in the ways that the Cities and other Plaintiffs have described, the Act should be preliminarily enjoined from taking effect and should ultimately be declared unconstitutional under the Supremacy Clause.

IV. The Balance of Equities and Public Interest Favor a Preliminary Injunction.

If permitted to take effect, the Act will disrupt both federal priorities for immigration enforcement and the Cities' local priorities for the maintenance of public safety in their communities. Both the public interest and the balance of equities favor staying such effects while the issues of federal preemption are determined.

For the foregoing reasons, the Plaintiff-Intervenor Cities respectfully request that the Motion for Preliminary Injunction be granted.

DATED this 29th day of June, 2010.

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