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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 MOTION FOR JUDGMENT ON THE PLEADINGS (RE CROSS-PLAINTIFF CITY OF TUCSON'S CROSS-CLAIM)

/ / /

Pursuant to Fed. R. Civ. P. 12(c), cross-defendant Governor Janice K. Brewer ("Governor Brewer") moves for judgment on the pleadings on the City of Tucson's Cross-Claim (doc. 9).[1] Tucson's Cross-Claim should be dismissed because the Ninth Circuit has established a *per se* rule prohibiting political subdivisions of the state, such as Tucson, from challenging the constitutionality of a state statute. Even if Tucson had standing to pursue its claims, Tucson's Cross-Claim should be dismissed because it fails to state a claim upon which relief may be granted.

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.

On April 28, 2010, Officer Escobar commenced this action against Governor Brewer and the City of Tucson to contest the constitutionality of SB 1070 and to enjoin defendants from enforcing the Act (doc. 1).[2] On May 18, 2010, after Governor Brewer signed HB 2162, Officer Escobar filed his Amended Complaint (doc. 4). The City of Tucson then cross-claimed against Governor Brewer and the State of Arizona alleging 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) Tucson is entitled to a declaratory judgment that 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";

[1] Cross-Defendant the State of Arizona has separately moved to dismiss the Cross-Claim under Fed. R. Civ. P. 12(b)(1) (doc. 54). If the Court denies the State's pending motion, the State reserves the right to join this Motion or to otherwise seek dismissal of the Cross-Claim on the grounds set forth herein.

[2] Officer Escobar also named the Pima County Attorney Barbara LaWall as a defendant, but subsequently dismissed her from this suit (*see* doc. 24).

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and (4) SB 1070 imposes an unconstitutional "burden on out-of-state commerce." Cross-Cl. (doc. 9) ¶¶ 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." Cross-Cl. ¶ 32.

II. LEGAL ANALYSIS

A. Tucson Lacks Standing to Pursue Its Cross-Claim

"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) ("*S. Lake Tahoe*") (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). In *South Lake Tahoe*, the Ninth Circuit established a "per se rule" that "'political subdivisions' of a state lack standing to challenge statutes of the state itself." *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1997) ("*Burbank*") (quoting *S. Lake Tahoe*, 625 F.2d at 233). In *Burbank*, the Ninth Circuit recognized the continuing validity of this rule and further held that the "broad language" in *South Lake Tahoe* "foreclose[d] the possibility" of finding any exception to the rule. *Id.*[3]

Tucson seeks to circumvent the *South Lake Tahoe* rule on five grounds, all of which fail under explicit authority from the Ninth Circuit and the U.S. Supreme Court.[4] First, Tucson argues that *South Lake Tahoe* does not bar its claims because the *South Lake Tahoe* decision "was solely predicated on cases arising under the Fourteenth Amendment involving individual rights." Mot. for Prelim. Inj. (doc. 22) at 6. In fact, the City in *South Lake Tahoe* challenged the constitutionality of a California statute under the Supremacy Clause, the Fifth Amendment, and the Fourteenth Amendment. 625 F.2d at 232-33. In considering whether the City had standing to pursue its claims, the Ninth Circuit began its

[3] *See also Williams v. Mayor & City Council of Balt.*, 289 U.S. 36, 40 (1933) ("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.") (citations omitted).

[4] Although Tucson did not raise these specific allegations in its Cross-Claim, it has subsequently raised these arguments and, thus, Governor Brewer anticipates that Tucson will raise these arguments in its response to this Motion.

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analysis by recognizing that "[i]t is well established that '(political) subdivisions of a state may not challenge the validity of a state statute under the *Fourteenth Amendment,*'" but went on to hold that "[b]ecause all of [the City's] claims are based on the Constitution, the City's challenge was properly dismissed." *Id.* at 233-34.

Second, Tucson argues that "no clear Ninth Circuit precedent bars a city from suing a state on a supremacy clause claim, [or] a commerce clause claim." Mot. for Prelim. Inj. at 8. However, in the very opinion Tucson attempts to distinguish (*South Lake Tahoe*), the Ninth Circuit barred the City from suing California on a Supremacy Clause claim. *S. Lake Tahoe*, 625 F.2d at 232-34. And in *Burbank*, the Ninth Circuit barred a political subdivision from challenging the constitutionality of a statute under *both* the Supremacy Clause and the Commerce Clause. *Burbank*, 136 F.3d at 1362-64.

Third, Tucson argues that *South Lake Tahoe* does not apply because "Tucson is a charter city." Mot. for Prelim. Inj. at 9. The *South Lake Tahoe* rule, however, applies to *all* political subdivisions of the state. *See S. Lake Tahoe*, 625 F.2d at 233. Arizona law generally defines "charter cities" as one of the State's political subdivisions. *See*, *e.g.*, A.R.S. § 41-563(E)(3) ("'Political subdivision' means any county, city, including any charter city, or town."); A.R.S. § 41-1493(4) ("'Political subdivision' includes any county, city, *including a charter city* . . . .") (emphasis added). The Ninth Circuit has also explicitly held that the *South Lake Tahoe* rule applies to charter cities. *See Burbank*, 136 F.3d at 1364 (rejecting the argument that "because Burbank is a charter city, rather than a general law city, it is not a political subdivision of the state for purposes of its ability to challenge a state statute").

Fourth, Tucson argues that it has standing to challenge the constitutionality of SB 1070 because, under Arizona law, Tucson has "the right to sue the State to challenge the constitutionality of its statutes." Mot. for Prelim. Inj. at 9 (citing *City of Tucson v. Woods*, 191 Ariz. 523, 525-26, 959 P.2d 394, 396-97 (App. 1997)). But Arizona law does not establish the jurisdictional boundaries of this Court, the U.S. Constitution does. *See* U.S. Const., art. III. While this Court *is* bound by the jurisdictional limitations of Article III, it

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is well established 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." *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (emphasis added).[5]

Fifth, Tucson argues that *South Lake Tahoe* is distinguishable because the threat of civil liability was only a potential liability in that case, whereas here "[t]he lawsuit confronting Tucson is real, on file, and moving forward." Mot. for Prelim. Inj. at 9. This argument misconstrues the Ninth Circuit's standing analysis in *South Lake Tahoe*, which involved constitutional challenges asserted by *both* the City *and* several of its officials. After establishing the *per se* bar on ***the City's standing*** to challenge the California statute, the court separately analyzed ***the officials' standing***, holding that the officials lacked standing because they had alleged only "abstract outrage at the enactment of an [allegedly] unconstitutional law." *S. Lake Tahoe*, 625 F.2d at 237.[6] The court rejected the *officials'* argument that they had standing based on their potential exposure to civil liability because the alleged exposure was "wholly speculative" since "[n]o lawsuit is currently threatened." *Id.* at 238-39. Here, however, Tucson's rights and interests of course parallel that of *the City* in *South Lake Tahoe*, not the city officials. Thus, the fact that Tucson is a defendant in this action does not permit Tucson to circumvent the Ninth Circuit's *per se* rule that bars its claims.

B. <u>The Cross-Claim Fails to State a Claim</u>

"To survive a Rule 12(c) motion, [a] 'complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Johnson v. Rowley*, 569 F.3d 40 (2d Cir. 2009) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949

[5] Unlike in this Court, "[a] lack of standing is not jurisdictional in Arizona but is solely a rule of judicial restraint which can be waived." *City of Tucson*, 191 Ariz. at 526 n.2, 959 P.2d at 397 n.2.

[6] In fact, the Ninth Circuit explicitly held that "[t]he councilmembers do not seek here to represent the City's interests; if they did their claims would be barred along with the City's." *S. Lake Tahoe*, 625 F.2d at 237.

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(2009)).[7] Claims are facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 129 S. Ct. at 1949-50 (citation omitted). A pre-enforcement challenge to the constitutionality of a statute seeks to invalidate the statute on its face. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid.'" *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

1. Federal law does not preempt SB 1070

Tucson seeks "declaratory and injunctive relief prohibiting the Cross-defendants from enforcing the Act" on the ground that SB 1070 is allegedly "preempted by federal immigration law." Cross-Cl. ¶ 60. "Federal preemption can be either express or implied." *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 5321 (June 28, 2010). However, "[i]n all pre-emption cases," a court must "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (citation omitted). And where "[f]ederal and local enforcement have identical purposes," preemption does not occur. *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds by Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999)).

The Cross-Claim contains three allegations suggesting that federal law has impliedly preempted SB 1070,[8] none of which is sufficient to establish a preemption claim. First, Tucson alleges that "[t]he United States has plenary authority to control and

[7] *See also Buchannan-Moore v. Cnty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009) (courts "review Rule 12(c) motions by employing the same standard that applies when reviewing a motion to dismiss for failure to state a claim under Rule 12(b)(6)").

[8] Implied preemption in the immigration context exists if: (1) the state law purports to regulate immigration, an exclusively federal power; (2) federal law occupies the field; or (3) the state regulation conflicts with federal law. *See De Canas v. Bica*, 424 U.S. 351, 355-63 (1976).

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regulate immigration[,] which is exclusive of any state authority." Cross-Cl. ¶ 30. Governor Brewer does not dispute this general proposition. In *De Canas v. Bica*, however, the Supreme Court explained that a "regulation of immigration" is a statute that defines "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." 424 U.S. 351, 354-55 (1976). The Supreme Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power." *Id.* at 355. Following *De Canas'* holding, the Ninth Circuit held that federal law does *not* preempt the Legal Arizona Workers Act because "the Act does not attempt to define who is eligible or ineligible to work under [federal] immigration laws," but, instead, "is premised on enforcement of federal standards as embodied in federal immigration law." *Chicanos Por La Causa*, 558 F.3d at 863; *see also Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987) ("No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce [federal] immigration laws.").

SB 1070 is not a "regulation of immigration." It does not regulate the terms upon which aliens may enter and remain in the country. Nor does Tucson identify any provision of SB 1070 that purportedly does so (because there is no such provision). Rather, SB 1070 "is premised on enforcement of federal standards as embodied in federal immigration law." *See Chicanos Por La Causa*, 558 F.3d at 866. SB 1070 does not intrude upon the federal government's exclusive power to "regulate immigration."

Second, Tucson alleges that "[t]he United States has fully occupied the field of immigration control and regulation through the adoption of the Immigration and Naturalization Act ["INA"] and subsequent amendments." Cross-Cl. ¶ 31. In *De Canas*, the Supreme Court expressly considered and rejected the possibility that the federal government's regulation of immigration might be so comprehensive that it leaves no room for state action. *See De Canas*, 424 U.S. at 358 ("[Respondents] fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state

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regulation touching on aliens in general."). Further, the fact that multiple provisions of the INA *invite* state and local police into the field confirms that the INA does not occupy the field. *See, e.g.*, 8 U.S.C. §§ 1357(g)(10), 1373(c), and 1644.

Third, Tucson alleges that it "does not have an agreement with the Immigration and Customs Enforcement Department pursuant to 8 U.S.C. § 1357(G)" and that "[s]uch agreements provide the exclusive basis for delegation of federal immigration authority to local police agencies." Cross-Cl. ¶ 37.[9] This allegation misconstrues the scope of authority granted to local law enforcement officers under a § 1357(g) agreement, which essentially deputizes the officers to function as federal immigration officers. SB 1070, by contrast, requires only that Arizona's law enforcement officers assist the federal government in the identification and apprehension of persons in violation of federal immigration laws. *See* A.R.S. § 11-1051. Not only does 8 U.S.C. § 1357(g)(10) expressly permit such assistance and exclude it from the agreements set forth in § 1357(g), but courts have routinely recognized the authority of state and local authorities to "investigate and make arrests for violations of federal immigration laws." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999) (citing cases); *United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001).

2. Tucson has not stated a claim under the Commerce Clause

The only specific provision of the Act that Tucson claims violates the Commerce Clause is the presumption provided by A.R.S. § 11-1051(B).[10] *See* Cross-Cl. ¶¶ 49-51.

[9] Tucson also alleges generally that SB 1070 "conflicts with federal immigration laws, policies and practices." Cross-Cl. ¶ 32. To state a claim for "conflict preemption," Tucson must allege sufficient facts to show that "'compliance with both State and federal law is impossible, or [that] the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Ariz. Contractors Ass'n v. Napolitano*, No. CV07-1355-PHX-NVW, 2007 U.S. Dist. LEXIS 96194, at *25 (D. Ariz. Dec. 21, 2007) (citations omitted). Because there are no such allegations in the Cross-Claim, Tucson has not stated a claim for conflict preemption.

[10] A.R.S. § 11-1051(B) provides a presumption that a person is not unlawfully present in the United States if the person provides to the law enforcement officer or agency: (1) a valid Arizona driver license; (2) a valid Arizona nonoperating identification license; (3) a valid tribal enrollment card or other form of tribal identification; or (4) any valid United States federal, state, or local government-issued identification, if the issuing entity requires proof of legal presence in the United States before issuance.

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Tucson generally alleges that "[t]he Act requires Tucson to impose a burden on out-of-state commerce and a preference for in-state commerce that discriminates against interstate commerce." *Id.* ¶ 63. Tucson's allegations reflect a basic misunderstanding of SB 1070 and a misapplication of the Commerce Clause.

i. Tucson misconstrues the requirements of SB 1070

Tucson misreads the presumption afforded by A.R.S. § 11-1051(B). The Act does *not* require, as Tucson suggests, that out-of-state individuals obtain and carry additional documentation. Cross-Cl. ¶ 49. Rather, it provides individuals who present certain forms of identification to law enforcement officers or agencies with a presumption that they are lawfully present in the United States. A.R.S. § 11-1051(B). This type of identification is *not required* to "prov[e] that they are citizens or lawful aliens," and individuals are not determined to be unlawfully present simply because they do not have identification that meets the presumptive criteria.[11] In fact, the presumption afforded by SB 1070 does not impact the determination of whether a person is unlawfully present in the United States.[12]

In addition, the Act does *not*, as Tucson suggests, give a "preference to Arizona residents by recognizing the Arizona driver's license as the sole documentation necessary to establish a presumption of lawful status." Cross-Cl. ¶ 50. The Act specifically provides that a person will receive the presumption of lawful status if he or she provides any valid federal, state, or local government-issued identification if the issuing entity requires proof of legal presence in the United States before issuance. *See* A.R.S. § 11-1051(B)(4). There is no "preference" for Arizona residents, nor is an Arizona driver's license the "sole documentation necessary to establish a presumption of lawful status." Cross-Cl. ¶ 50.

[11] A presumption is merely "[a] legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts." Black's Law Dictionary 1304 (9th ed. 2009).

[12] Rather, the Act specifies that an individual's immigration status is determined by: (1) a law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status or (2) the U.S. Immigration and Customs Enforcement or the U.S. Customs and Border Protection pursuant to 8 U.S.C. § 1373(c). *See* A.R.S. § 11-1051(E).

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ii. SB 1070 does not violate the Commerce Clause

By negative implication, the Commerce Clause has been interpreted as a restriction on permissible state regulation. *On the Green Apartments, L.L.C. v. City of Tacoma*, 241 F.3d 1235, 1238 (9th Cir. 2001) (holding that plaintiff's "interests are, at best, 'marginally related to . . . the purposes implicit in' the dormant Commerce Clause"); *see also* U.S. Const. art. I, § 8, cl. 3. However, "[l]egislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.'" *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444 (1960) (citation omitted). "As long as a state does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (internal citation omitted) (holding that Maine's ban on the importation of live baitfish did not violate the Commerce Clause as it served a legitimate local purpose).

The dormant Commerce Clause principally focuses on statutes that discriminate against interstate commerce. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987). If a statute does not directly regulate interstate commerce, discriminate against interstate commerce, or favor in-state economic interests over out-of-state interests, it is valid if it regulates evenhandedly and does not impose excessive burdens on interstate commerce. *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993).[13]

a. SB 1070 does not regulate interstate commerce

The Supreme Court has made clear that "[w]here state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." *White v. Mass. Council of Constr. Employers, Inc.*,

[13] *See also Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 393 (1983) (citation omitted) ("Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits.").

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460 U.S. 204, 213 (1983) (citation omitted). Here, it is settled law that "state and local police officers [have] implicit authority within their respective jurisdictions 'to investigate and make arrests for violations of federal law, including immigration laws.'" *Santana-Garcia*, 264 F.3d at 1194 (quoting *Vasquez-Alvarez*, 176 F.3d at 1295).[14] Consistent with this authority, SB 1070 is not a regulation of immigration. It is a means of "cooperative enforcement of federal immigration laws." SB 1070, § 1. SB 1070 requires only that Arizona's law enforcement officers assist the federal government in the identification and apprehension of persons in violation of federal immigration laws. *See* A.R.S. § 11-1051. Thus, SB 1070 does not regulate or burden interstate commerce and does not fall within the purview of the dormant Commerce Clause.

SB 1070 also does not "require[] Tucson to impose a burden on out-of-state commerce," as it does not require that individuals (whether in-state or out-of-state) carry any additional documentation. Cross-Cl. ¶ 63; *see also* A.R.S. § 11-1051(B). Further, SB 1070 does not provide a "preference for in-state commerce" in violation of the Commerce Clause, as the Act specifically provides that *out-of-state* identification may provide a presumption that a person is not an alien who is unlawfully present (so long as it is valid and the governmental entity issuing the identification requires proof of legal presence in the United States before issuance). Cross-Cl. ¶ 63; *see also* A.R.S. § 11-1051(B)(4).

b. SB 1070 does not discriminate against out-of-state interests or burden interstate commerce

The Act creates no barriers against interstate commerce, nor does it prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. *See Exxon v. Governor of Md.*, 437 U.S. 117, 126 (1978) (discussing that "[t]he absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce."). "Evenhanded local regulation to effectuate a legitimate local public interest

[14] *See also Gonzales*, 722 F.2d at 474 ("[L]ocal police are not precluded from enforcing federal statutes. ... Federal and local enforcement have identical purposes—the prevention of the misdemeanor or felony of illegal entry.").

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is valid unless pre-empted by federal action, or unduly burdensome on . . . interstate commerce." *Huron*, 362 U.S. at 443.[15] For example, in *Minnesota v. Clover Leaf Creamery Co.*, the Supreme Court held that a Minnesota statute, which prohibited milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State, did not violate the Commerce Clause. 449 U.S. 456, 471-72 (1981). The Court explained that the statute "regulates evenhandedly" and therefore, is unlike statutes that discriminate against interstate commerce. *Id*. Additionally, the burden imposed on interstate commerce was minor, and it did not outweigh the State's legitimate purpose. *Id*. at 472, 474.

Tucson's misunderstanding about the application of SB 1070 and its speculation about the Act's alleged potential impact on interstate commerce is not sufficient to establish a violation of the Commerce Clause. The Act does not discriminate against out-of-state interests, burden commerce, or create a preference for in-state commerce. There is no impermissible risk of inconsistent regulation. The Act is *not* even a regulation of immigration. It is simply a mechanism that enables state and local law enforcement personnel to assist with the enforcement of federal immigration regulations.

3. Tucson's claim for improper delegation of police power fails as a matter of law

Tucson also alleges that A.R.S. § 11-1051(H), which authorizes a private right of action to legal residents of Arizona to challenge any local policies that limit the enforcement of federal immigration laws, somehow improperly delegates control over the police power functions to individual legal residents of the State. Cross-Cl. ¶¶ 56, 61. But it has long been settled that private rights of action do not constitute a delegation of the police power. The State's "police power" is "an attribute of state sovereignty, and . . . the state may, in its exercise, enact laws for the promotion of public safety, health, morals and

[15] The fact that a state regulation burdens some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce. *See CTS Corp.*, 481 U.S. at 88 (rejecting the contention that the Act discriminates against interstate commerce "because nothing in the act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors").

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for the public welfare." *Dano v. Collins*, 166 Ariz. 322, 323, 802 P.2d 1021, 1022 (App. 1991). Pursuant to its police powers, the State can establish laws, such as A.R.S. § 11-1051(H), that promote the health, safety, and general welfare of Arizona citizens. *State v. Flores*, 218 Ariz. 407, 412-13, 188 P.3d 706, 711-12 (App. 2008) ("Arizona's human smuggling law furthers the legitimate state interest of attempting to curb 'the culture of lawlessness' that has arisen around this activity by a classic exercise of its police power.").

It is true that police powers generally cannot be delegated to private persons or associations. *See Indus. Comm'n v. Navajo Cnty.*, 64 Ariz. 172, 180, 167 P.2d 113, 117 (1946). However, numerous courts have recognized that the creation of a private right of action is a proper *exercise* of the police power, not an improper *delegation* of the police power. The "general police power" can serve as a "source of authority from which to create a private right of action." *Bradley v. Carydale Enters.*, 730 F. Supp. 709, 725 (E.D. Va. 1989). In *Bradley*, for instance, the district court held that a county's creation of a private cause of action to redress discrimination promotes the "general welfare" of county residents and is an exercise of police power. *Id.*

The Supreme Court has long recognized that private rights of action serve as legitimate exercises of a state's police power. *See Eiger v. Garrity*, 246 U.S. 97 (1918). In *Eiger*, the court held that the "police power of the State" permitted Illinois to grant private rights of action to those injured by the sale of "intoxicating liquor" and to obtain a lien on real property used to sell alcohol. *Id.* at 102-03; *see also Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843, 854 (Tex. App. 1997) ("[H]old[ing] that a statutory dram shop law that confers standing upon private individuals to sue for damages caused by violations of the state's alcoholic beverage code falls within the exercise of the state's police power."); *Bracker v. Cohen*, 612 N.Y.S.2d 113, 114 (N.Y. App. Div. 1994) (the "police powers" of municipalities are "broad enough to include the creation of a private right of action"). The same holds true here. Just as in *Eiger*, *Holguin*, and *Bracker*, the State's

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creation of a private cause of action under A.R.S. § 11-1051(H) is a legitimate exercise of *the State's* police power.

An individual who commences a private cause of action under A.R.S. § 11-1051(H) is not exercising police power. Rather, the private cause of action is merely "a necessary enforcement tool." *Bradley*, 730 F. Supp. at 726; *see also Holguin,* 954 S.W.2d at 854 (finding that a private cause of action created by the Texas Dram Shop Act and brought by a private plaintiff does not constitute an enforcement action by the state). Nothing in the Act authorizes private citizens to decide what the law shall be or when a law shall be effective, or confer upon any private person unrestricted authority to make fundamental policy decisions. *Contra Carter v. Carter Coal Co.*, 298 U.S. 238 (1935) (statute delegating the power to fix maximum hours of labor to the producers of coal and miners was unconstitutional delegation of congressional power to private interests). Because A.R.S. § 11-1051(H) is directed at a legitimate legislative purpose and the means by which the State seeks to achieve that purpose are reasonable (*i.e.*, enforcement of the Act through the creation of a private cause of action), the statute does not constitute an improper delegation of police powers to private citizens.

4. Tucson is not entitled to a declaratory judgment

Finally, Tucson contends that it is entitled, in the alternative, to a declaratory judgment that "the budget policies and other policies lawfully adopted by Tucson which do not enforce federal immigration law to the full extent permitted by federal law do not violate the Act." Cross-Cl. ¶ 62. In particular, Tucson alleges that its City Manager has recommended that the City of Tucson adopt a budget that does not fully implement SB 1070 and that complying with the Act would shift law enforcement resources away from violent crimes and major felonies. Cross-Cl. ¶¶ 53, 54.

Arizona courts have repeatedly held that state law takes precedence over city policies and ordinances. To the extent that the City of Tucson is contending that its budget policies should take precedence over state legislation, its position is untenable. As courts of this state have explained, "the City of Tucson 'may exercise all powers granted

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by its charter, ***provided that the exercise is not inconsistent with either the constitution or general laws of the state***.'" *City of Tucson v. Grezaffi*, 200 Ariz. 130, 134, 23 P.3d 675, 679 (App. 2001) (quoting *City of Tucson v. Rineer*, 193 Ariz. 160, 971 P.2d 207 (App. 1998)) (emphasis added); *see also City of Tucson v. Ariz. Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 334, 195 P.2d 562, 564 (1948) (City of Tucson's charter is subject to "the constitution and the laws of the state"). As a result, to the extent that there is any conflict between the general laws of the state (*e.g.*, SB 1070) and any budgetary policies of the City of Tucson, the general laws of the state control. *See*, *e.g.*, *Coconino Cnty. v. Antco, Inc.*, 214 Ariz. 82, 90, 148 P.3d 1155, 1163 (App. 2007) (local government preempted by state law when legislature intended to "preclude local control" and there is "an actual conflict between local regulation and governing state law"). The City of Tucson simply has no power to set local policies that conflict with state laws such as SB 1070.

Further, Arizona cities and towns derive their power from the state, not from any other source. In Arizona, "[i]t is a fundamental rule that municipal corporations have no inherent police power, and that their powers must be delegated to them by the constitution or laws of the state." *State v. Jacobson*, 121 Ariz. 65, 68, 588 P.2d 358, 361 (App. 1978); *see also City of Scottsdale v. Superior Court*, 103 Ariz. 204, 205, 439 P.2d 290, 291 (1968) (cities and town in Arizona possess "no greater powers than those delegated to them by the constitution and the general laws of the state"). In light of this unambiguous authority, the City of Tucson's budget policies and other city policies cannot take precedence over SB 1070.

III. CONCLUSION

For the foregoing reasons, Tucson's Cross-Claim should be dismissed because Tucson lacks standing to pursue its claims and, even if Tucson had standing, Tucson has failed to state a claim upon which relief can be granted.

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Respectfully submitted this 2nd day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 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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