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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, TOLLESON, SAN LUIS, AND**

vs.

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

Defendants.

THE CITY OF TUCSON, a municipal corporation,

Cross-Plaintiff,

vs.

STATE OF ARIZONA, a body politic; and JAN BREWER, in her capacity as Governor of the State of Arizona.

Cross-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,

Plaintiffs-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.

SOMERTON'S REPLY IN SUPPORT OF THEIR MOTION TO INTERVENE

(Hon. Susan R. Bolton)

The Court should let the Cities of Flagstaff, Tolleson, San Luis, and Somerton ("Cities") intervene. In the Ninth Circuit, the Cities need not prove independent standing to intervene. Moreover, no other party is adequately representing their interests. Although the Cities and the City of Tucson share some common interests about SB 1070, the Tucson's City Attorney is not and cannot be the Cities' lawyer. They have separate legal counsel. Further, the City of Tucson is in the awkward position being both a defendant and a cross-plaintiff. While simultaneously trying to defeat the claims made

against it and to advance its own interests, the City of Tucson may not effectively represent the Cities.

The Cities' claims share common issues of fact and law with those of the underlying case. Their intervention motion is timely. Letting the Cities intervene will offer the Court a broader perspective based on the Cities' unique historical and social background and experience. The Court should therefore grant the motion to intervene.

Memorandum of Point and Authorities

1. Federal courts construe intervention petitions liberally.

Courts broadly interpret Fed. R. Civ. P. 24 in favor of intervention.[1] In deciding if intervention is proper, "practical and equitable considerations" offer the main guidance.[2] Liberally favoring intervention helps: (1) broaden court access, (2) resolve issues efficiently, (3) let other interested parties express their views, and (4) prevent or simplify future litigation on related claims and issues.[3]

Because the Cities seek permissive intervention under Fed. R. Civ. P. 24(b)(1)(B), they need only show that: (1) their claims share common questions of law or fact with the main action; (2) their motion is timely; and (3) the trial court has jurisdiction over their claims.[4] Where the proposed intervenor has met those requirements, the court may consider other factors in the exercise of its discretion, including the nature and extent of the intervenor's interest and whether existing parties are adequately representing the intervenor's interests.[5] Finally, the court must "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."[6]

2. For intervenors, the Ninth Circuit does not require independent standing.

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[1] *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1148 (9th Cir. 2010).

[2] *Id*. *See also California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006) (construing the rule "liberally in favor of potential intervenors.").

[3] *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n. 8 (9th Cir. 1995).

[4] *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998).

[5] *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326 (9th Cir. 1977).

[6] Fed. R. Civ. P. 24(b)(3).

The Defendants in Intervention argue that the Cities lack standing—an argument addressed substantively in the next two sections. But the direct, simple answer to the lack-of-standing argument is that the Ninth Circuit does *not* require that an intervenor have standing if a party on whose side the intervenor seeks to intervene has standing.

As the Ninth Circuit stated in the 2008 *Flores v. Arizona* opinion: "Parties need not have standing to intervene in our circuit."[7] The Tenth and Eleventh Circuits fully agree that a prospective intervenor may "piggyback" on an existing party's standing, as long as there is a justiciable case or controversy when the intervenor seeks to intervene.[8] The Second and Sixth Circuits also follow the same rule.[9]

This doctrine rests on solid ground—and is not a recent, unprecedented circuit-court concoction. In the 1986 *Diamond v. Charles* case, the United States Supreme Court stated that intervenors could "ride 'piggyback' on the . . . undoubted standing" of the original parties to an ongoing case or controversy.[10] Commentators agree. In fact, Harvard Law School Professor David L. Shapiro explained that "that there is a difference between the question whether one is a proper plaintiff . . . in an initial action and the question whether one is entitled to intervene."[11] In a matter where the questions of ripeness and standing have been resolved for other parties, a court's disposition of the intervention request "should focus on whether the prospective intervener has a sufficient stake in the outcome and enough to contribute to the resolution of the controversy to justify [its]

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[7] *Flores v. Arizona*, 516 F.3d 1140, 1165 (9th Cir. 2008) ("Parties need not have standing to intervene in our circuit.") (citing *State of California Dept. of Soc. Servs. v. Thompson*, 321 F.3d 835, 846 n. 9 (9th Cir. 2003)), *rev'd on other grounds sub nom. Horne v. Flores*, 129 S. Ct. 2579 (2009).

[8] *City of Colorado Springs v. Climax Molybdenum Co*., 587 F.3d 1071, 1081 (10th Cir. 2009); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989).

[9] *See Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994); *U.S. Postal Service v. Brennan*, 579 F.2d 188 (2nd Cir. 1978).

[10] *Diamond v. Charles*, 476 U.S. 54, 64 (1986).

[11] Prof. David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 726 (Feb. 1986).

inclusion" in the case.[12] The Supreme Court has approved Professor Shapiro's thoughtful analysis of the "distinction between intervention and initiation."[13]

As long as *any* Plaintiff challenging SB 1070 in these proceedings has standing, the Cities do not need to prove independent standing to intervene.

3. The Cities are not "political subdivisions" in the *South Lake Tahoe* sense.

Although they do not need to prove independent standing to intervene, the Cities should be accorded independent standing. In their Proposed Motion for Preliminary Injunction (Dkt. # 64), the Cities have explained how SB 1170 will force their police officers into the complex field of immigration law enforcement, divert them to the investigation of the immigration status of petty misdemeanants and civil traffic offenders, diminish their ability to devote time and resources to the priority of investigating serious and violent crime, impose standards that create a quagmire of uncertainty, and expose them to countervailing liabilities if they stumble.[14] These consequences are imminent, concrete, and acute. They are not the abstract concerns that ordinarily undermine one's standing for a legal challenge.

Despite their concrete interest in this lawsuit, the Cities recognize that in the Ninth Circuit, their standing is a concern under the 1980 *South Tahoe Lake* case.[15] In *South Lake Tahoe*, the Ninth Circuit held that a California city—as the State's "political subdivision"—lacked standing to sue the State in federal district court for federal constitutional violations.[16] (*South Lake Tahoe* also held that city officials likewise lack standing to sue a State in federal court, if the city officials seek redress for "abstract

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[12] *Id*. *See also* Amy M. Gardner, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. CHI. L. REV. 681, 702 (Spring 2002).

[13] *Trbovich v. United Mine Workers*, 404 U.S. 528, 537 n. 7 (1972).

[14] *Proposed Motion for Preliminary Injunction* (Dkt. # 64) at 4-5, 13 (June 29, 2010).

[15] *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980).

[16] *Id*. at 233.

outrage at the enactment of an unconstitutional law."[17])

But the political-subdivision doctrine that the Ninth Circuit applied in *South Lake Tahoe* does not easily fit Arizona cities. Unlike Arizona, California early held that, "at least" in California, "municipal corporations are but subordinate subdivisions of the State Government, which may be created, altered, or abolished, at the will of the Legislature."[18] Arizona cities have a different character: Although Arizona's Governor must approve a city's charter, a city only comes into existence through general law.[19] The Arizona Constitution bars the Legislature from enacting local or special laws to incorporate a city—or to amend its charter.[20] Once incorporated, Arizona cities have their own powers, and can pass their own codes and ordinances.[21] Indeed, the State cannot dissolve a city.[22]

Arizona appellate courts have held that Arizona "cities are voluntary corporations" that their inhabitants organize, request, and approve "for special and local purposes."[23] An Arizona city's purposes are independent of the State of Arizona's general governmental activities, and inure to the city's benefit, "as distinguished from that of the state"[24] In contrast, the Legislature creates counties "regardless of the wishes of the inhabitants for the purpose of exercising a certain portion of the general powers of the government in a specified locality."[25] Arizona

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[17] *Id.* at 237.

[18] *City of San Francisco v. Canavan*, 42 Cal. 541, 557 (1872). *But see Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992) (discussing how later constitutional amendments had granted considerable independence to California charter cities).

[19] A.R.S. § 9-282(C).

[20] Ariz. Const. art. 4, pt. 2. § 19; art. 13 § 1.

[21] A.R.S. §§ 9-499.01 and 9-802.

[22] A.R.S. §§ 9-102 and 9-121.

[23] *Hartford Acc. & Indem. Co. v. Wainscott*, 41 Ariz. 439, 445, 19 P.2d 328, 330 (1933).

[24] *Id*.

[25] *Id*. *See also Mayor and Common Council of City of Prescott v. Randall*, 67 Ariz. 369, 371, 196 P.2d 477, 478 (1948).

counties are plainly the state's political subdivisions. But the status of Arizona cities is not nearly as clear.[26]

It is true that in the 1970 *Collar* case, the Arizona Court of Appeals held that cities are the State of Arizona's political subdivisions.[27] In 1991, however, this Court held that *Collar* had "limited applicability" because it only referred to the meaning of garnishment legislation.[28] This Court held that there was no evidence that Arizona regarded cities as political subdivisions.[29] And that was true. Under traditional Arizona constitutional and statutory law, a city is an independent, voluntary organization, while a county is merely an arm of the State.[30] Although Arizona cities might be viewed as political subdivisions for some purposes, for the purpose of deciding their standing to sue the State in federal court, their unique status as separate strong entities capable of confronting the State over unconstitutional laws cuts against a finding that they are political subdivisions in the *South Lake Tahoe* sense.

After all, under the Arizona Constitution, the Cities are sovereign in their municipal affairs.[31] They have an independent right to sue and be sued.[32] That right includes the right to sue the State to challenge the constitutionality of its statutes.[33] Such

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[26] *See*, *e.g.*, *Sorenson v. Superior Court*, 31 Ariz. 421, 425-26, 254 P. 230, 231 (1927) (A city is not a political subdivision of a state.) (citing *Kansas City v. Neal*, 26 S.W. 695, 696 (Mo. 1894)); *Taylor v. Roosevelt Irrigation Dist.*, 72 Ariz. 160, 164, 232 P.2d 107, 109 (1951) ("By court decisions political subdivisions, as distinguished from municipalities, have been vested with immunity.").

[27] *City of Phoenix v. Collar, Williams & White Engineering, Inc.*, 12 Ariz. App. 510, 472 P.2d 479 (1970).

[28] *Devore v. City of Mesa*, 783 F. Supp. 452, 454 (Ariz. 1991).

[29] *Id*.

[30] *Transamerica Title Ins. Co. v. Cochise County*, 26 Ariz. App. 323, 328, 548 P.2d 416, 421 (1976).

[31] ARIZ. CONST. art. 13, § 2. *See also McMann v. City of Tucson*, 202 Ariz. 468, 471-472, 47 P.3d 672, 675 - 676 (App 2002), *review denied* (Oct. 29, 2002).

[32] *See* ARIZ. R. CIV. P. 17(d).

[33] *See*, *e.g.*, *City of Tucson v. Woods*, 191 Ariz. 523, 525-26, 959 P.2d 394, 396-97 (App. 1997), *review denied* (July 17, 1998).

independence is absent from *South Lake Tahoe*.

4. The City of Tucson may not represent the Cities' interests adequately.

Defendants in Intervention argue that the City of Tucson will represent the Cities' interests adequately, but the Defendants in Intervention do not deny that the Cities share common questions of law or fact with the main action or that the Cities' motion is timely.

On the adequacy or representation, a proposed intervenor has a "minimal" burden, and need only show that the representation of its interests "may be" inadequate.[34] Although on many points the Cities have a commonality of interest with the City of Tucson, the Tucson City Attorney does not and cannot represent the Cities. Indeed, the City of Tucson is both a Defendant (aligned with the Defendants in Intervention) and a Cross-Plaintiff (opposed to the Defendants in Intervention). In this delicate posture, the City of Tucson may find it necessary, to protect its own interests, to agree on certain points with the Defendants in Intervention that the Cities would dispute.

Moreover, the Cities differ from the City of Tucson in history, demographics, geography, and traditions. How the Cities can and will enforce SB 1070 differs as well. These differences, which are vividly demonstrated by the Declaration of the San Luis Chief of Police, color their arguments and their perspective.[35] All are smaller than the City of Tucson and lack its police, jail, and judicial resources. Moreover, the Cities are arguing that SB 1070 is unconstitutionally vague, a claim that the City of Tucson failed to make.[36] And unlike the City of Tucson, the Cities have focused on the misleading and confusing provisions of SB 1070, those dealing with race, color, and national origin, and the harmful impact of those provisions when considered in conjunction with A.R.S. § 11-1051(H).[37] In addition, the Cities have alleged that their budgets *will not* include enough

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[34] *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972).

[35] *Proposed Motion for Preliminary Injunction* at 8, (June 29, 2010) (Dkt. # 64), quoting Exhibit B to *Proposed Motion for Preliminary Injunction* at ¶11

[36] *Complaint in Intervention* at ¶ 39 (June 11, 2010) (Dkt. # 33).

[37] *Complaint in Intervention* at ¶¶ 24-27 (June 11, 2010) (Dkt. # 33); *Proposed Motion for Preliminary Injunction* at 9-13 (June 29, 2010) (Dkt. # 64).

money to properly enforce SB 1070.[38] At the very least, the Cities have shown that the City of Tucson may not represent their interests adequately—and that is all they need to prove to intervene in this case.[39]

5. Intervention will not cause undue delay or prejudice.

The final point is "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."[40] To resolve SB 1070's constitutionality, this Court has received party briefs and amicus curiae briefs from many sources. Letting the Cities add their views by intervention will not prejudice anyone or cause undue delay, especially since the Cities will rapidly meet any reasonable briefing schedule. Allowing intervention will provide an even broader perspective for this Court's resolution of one of the most controversial laws that any state has enacted in recent decades.

Conclusion

The Court should let the Cities of Flagstaff, Tolleson, San Luis, and Somerton (the "Cities") intervene. Under Ninth Circuit precedent, the Cities need not prove that they have independent standing—although they do. Their claims share common issues of law and fact with existing claims, their intervention motion is timely, no party may represent their interests adequately, and intervention will not cause delay or undue prejudice.

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[38] *Complaint in Intervention* at ¶¶ 29-30 (June 11, 2010) (Dkt. # 33).

[39] *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006).

[40] Fed. R. Civ. P. 24(b)(3).

DATED this 8th day of July, 2010.

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