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11 *Attorneys for Defendant Janice K. Brewer, Governor of the  
 State of Arizona, and Cross-Defendant The State of Arizona*

12 **IN THE UNITED STATES DISTRICT COURT**  
 13 **FOR THE DISTRICT OF ARIZONA**

14 Martin H. Escobar,  
 15  
 16 Plaintiff,

17 v.

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

20 Defendants.

21 The City of Tucson,  
 22  
 23 Cross-plaintiff,

24 v.

25 The State of Arizona, a body politic; and  
 Jan Brewer, in her capacity as Governor  
 of the State of Arizona,  
 26

27 Cross-defendants.  
 28

Case No. CV10-00249-TUC-SRB

**GOVERNOR BREWER'S  
 RESPONSE TO PLAINTIFF'S  
 MOTION FOR PRELIMINARY  
 INJUNCTION**

1 Defendant Janice K. Brewer (“Governor Brewer”) hereby responds to plaintiff’s  
2 motion for preliminary injunction (the “Motion”) (doc. 71). Plaintiff’s Motion should be  
3 denied.

4 First, the Motion is moot in light of this Court’s order dated July 28, 2010 in the  
5 case captioned *United States v. Arizona, et al.*, Case. No. CV10-1413-PHX-SRB (the  
6 “Federal Case”). All of the provisions of Senate Bill 1070, as amended (“SB 1070” or the  
7 “Act”), that plaintiff challenges in his Motion were the subject of this Court’s order  
8 granting in part and denying in part the motion for preliminary injunction in the Federal  
9 Case. Plaintiff cannot demonstrate the likelihood or even the possibility of irreparable  
10 harm with respect to the provisions of SB 1070 that the Court enjoined. With respect to  
11 the provisions of the Act that the Court did not enjoin, plaintiff cannot demonstrate a  
12 likelihood of success on the merits. As a result, the Motion should be denied.

13 Second, plaintiff is not entitled to a preliminary injunction because he lacks  
14 standing. As set forth in Governor Brewer’s motion to dismiss (doc. 55), plaintiff lacks  
15 standing because he has failed to allege facts showing that he has suffered or will suffer  
16 any actual or imminent injury if SB 1070 is enforced. Governor Brewer respectfully  
17 submits that if the Court determines that plaintiff’s Motion is not moot, the Court should  
18 first resolve the motion to dismiss and the threshold issue of standing before turning to the  
19 issue of whether preliminary injunctive relief is appropriate.

20 Finally, even if the requested injunction were not moot and plaintiff had standing,  
21 the Motion should be denied because plaintiff has not made the requisite showing that  
22 would entitle *him* to a preliminary injunction. Plaintiff has not demonstrated that he is  
23 likely to succeed on the merits, that he faces any irreparable harm, that the balance of  
24 equities tips in his favor, or that an injunction is in the public interest.

25 For these reasons, Governor Brewer respectfully requests that plaintiff’s Motion be  
26 denied. This response is supported by the following Memorandum of Points and  
27 Authorities.

28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. BACKGROUND**

3 On April 23, 2010, Governor Brewer signed SB 1070 into law to address the  
4 impact of unlawful immigration on Arizona and to assist understaffed federal immigration  
5 agencies through “the cooperative enforcement of federal immigration laws.” SB 1070, §  
6 1. On April 30, 2010, Governor Brewer signed HB 2162 approving various amendments  
7 to SB 1070. SB 1070, as amended, was scheduled to take effect on July 29, 2010.

8 Plaintiff Martin H. Escobar filed his initial Complaint on April 29, 2010, and  
9 subsequently filed his First Amended Complaint (“FAC”) (doc. 4) on May 18, 2010.  
10 Plaintiff lodged his Motion on June 3, 2010, and it was filed with the Clerk of the Court  
11 on July 8, 2010 (doc. 71). In his Motion, plaintiff requests that the Court enjoin all of SB  
12 1070 and offers the following specific arguments:

- 13 ● That Sections 2, 3, and 6 of SB 1070 are preempted by 8 U.S.C. §§  
14 1103(a)(10), 1252c, and 1324(c);
- 15 ● That Section 3 conflicts with 8 U.S.C. §§ 1304(e) and 1306(a);
- 16 ● That Section 4 and the portion of Section 5 creating A.R.S. § 13-2929 are  
17 preempted by 8 U.S.C. § 1324(a);
- 18 ● That Sections 2, 3, 4, and 6, and the portion of Section 5 creating A.R.S. §  
19 13-2929 are preempted by 8 U.S.C. § 1357(g);
- 20 ● That Section 2(B) conflicts with the requirements of due process; and
- 21 ● That Sections 2 and 6 are contrary to the Supreme Court’s holding in *Plyler*  
22 *v. Doe*, 457 U.S. 202 (1982).

23 Mot. at 3:7–4:25.

24 On July 15 and 22, 2010, this Court held three hearings on motions for preliminary  
25 injunctions in three other cases that also challenged the validity of SB 1070, including the  
26 Federal Case. On July 28, 2010, this Court issued an order granting in part and denying in  
27 part the motion for preliminary injunction in the Federal Case (the “Injunction Order”)  
28 (doc. 80). In that Order, the Court preliminarily enjoined the enforcement of the

1 following provisions of SB 1070: Section 2(B) creating A.R.S. § 11-1051(B); Section 3  
2 creating A.R.S. § 13-1509; the portion of Section 5 creating A.R.S. 13-2928(C); and  
3 Section 6 creating A.R.S. § 13-3883(A)(5). The Court, however, permitted the following  
4 provisions of the Act to take effect: Section 1; Section 2(A) and (C)-(L); Section 4; the  
5 portion of Section 5 creating A.R.S. § 13-2929; the portion of Section 5 creating A.R.S. §  
6 13-2928(A) and (B); and Sections 7-13.

## 7 **II. LEGAL STANDARD FOR PRELIMINARY INJUNCTION**

8 “A plaintiff seeking a preliminary injunction must establish that he is likely to  
9 succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
10 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in  
11 the public interest.” *Winter v. NRDC*, 129 S. Ct. 365, 374 (2008); *see also Stormans, Inc.*  
12 *v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009). In *Winter*, the Supreme Court rejected  
13 the Ninth Circuit’s lenient “possibility of irreparable injury” standard and made clear that  
14 injunctive relief is “an *extraordinary* remedy that may be awarded only upon a *clear*  
15 showing that the plaintiff is entitled to such relief.” *Stormans*, 586 F.3d at 1127 (citing  
16 *Winter*, 129 S. Ct. at 375-76) (emphasis added). “When a plaintiff seeks to enjoin the  
17 activity of a government agency . . . his case must contend with the well-established rule  
18 that the Government has traditionally been granted the widest latitude in the ‘dispatch of  
19 its own internal affairs.’” *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976) (citation omitted).  
20 “Where, as here, the exercise of authority by state officials is attacked, federal courts must  
21 be constantly mindful of the ‘special delicacy of the adjustment to be preserved between  
22 federal equitable power and State administration of its own law.’” *Id.* at 378 (quoting  
23 *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)).

## 24 **III. PLAINTIFF’S MOTION IS MOOT IN LIGHT OF THIS COURT’S ORDER** 25 **IN THE FEDERAL CASE**

26 At the time that plaintiff filed his Motion, the Court had not yet issued its  
27 Injunction Order in the Federal Case. Now that the Court has ruled on these issues and  
28 enjoined certain provisions of SB 1070, plaintiff’s Motion is moot. All of the provisions

1 of SB 1070 that are the subject of plaintiff’s Motion were also the subject of the Court’s  
2 Injunction Order. The Court need not rule on these issues a second time. *Nw. Env’tl. Def.*  
3 *Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988) (“The basic question in determining  
4 mootness is whether there is a present controversy as to which effective relief can be  
5 granted.”) (citing *United States v. Geophysical Corp.*, 732 F.2d 693, 698 (9th Cir. 1984)).

6 **A. The Court Has Ruled On All the Issues Presented In Plaintiff’s Motion**  
7 **for Preliminary Injunction**

8 First, there is significant overlap between the provisions of SB 1070 that plaintiff  
9 challenges in his Motion and the provisions of SB 1070 that have already been enjoined.  
10 In its Injunction Order, the Court enjoined the enforcement of Section 2(B), Section 3, the  
11 portion of Section 5 creating A.R.S. 13-2928(C), and Section 6. Likewise, plaintiff also  
12 seeks to enjoin Sections 2(B), 3, and 6. It is plain that this Court has already granted the  
13 requested relief as to these specific sections.

14 In addition, plaintiff’s Motion covers certain provisions that already have been  
15 considered by the Court but *not* enjoined. In particular, plaintiff’s Motion challenges  
16 portions of Section 2 other than Section 2(B), Section 4, and the portion of Section 5  
17 creating A.R.S. § 13-2929. However, these provisions were all considered by the Court  
18 and not enjoined. In the Injunction Order, this Court specifically rejected preemption  
19 challenges by the United States to Section 4 and the portion of Section 5 creating A.R.S. §  
20 13-2929. Although the United States withdrew its challenge to Section 4 at the hearing on  
21 its motion for preliminary injunction,<sup>1</sup> the Court specifically held that Section 4 makes  
22 only a “minor change” to Arizona’s human smuggling statute and “[n]othing about the  
23 section standing alone warrants an injunction.” Injunction Order at 23:16-18. As a result,  
24 the Court determined that the plaintiff was “not likely to succeed on a claim that Section 4  
25 of S.B. 1070 is preempted by federal law.” *Id.* Likewise, this Court has already rejected a  
26 preemption challenge to the portion of Section 5 creating A.R.S. § 13-2929. The Court  
27 specifically held that the plaintiff was “not likely to succeed on its claim that A.R.S. § 13-

28 <sup>1</sup> See Tr. of Prelim. Inj. Hr’g, July 22, 2010, at 5:11-20.

1 2929 is an impermissible regulation of immigration” under federal law. Injunction Order  
2 at 28:9-13.

3 In addition, the Court declined to enjoin all of Section 2, and allowed all portions  
4 other than Section 2(B) to take effect. Although plaintiff’s motion refers to Section 2 in  
5 general, he does not mention any specific provisions of Section 2 other than Sections  
6 2(A), 2(B), and 2(H). Likewise, the United States focused on the same provisions in the  
7 Federal Case, and Sections 2(A) or 2(H) were plainly litigated at the injunction hearing in  
8 the Federal Case. Specifically, the United States argued in its motion for preliminary  
9 injunction that both Section 2(A) and Section 2(H) of SB 1070 should be preempted. *See*  
10 United States’ Mot. for Prelim. Inj. (doc. 27 in the Federal Case) at 14:20-23 (arguing  
11 against Section 2(H)) and 15:8-13 (arguing against Section 2(A)). The United States also  
12 argued at the preliminary injunction hearing that Section 2(A) and Section 2(H) were  
13 improper and should be preempted. *See* Tr. of Prelim. Inj. Hr’g, July 22, 2010 (relevant  
14 excerpts attached as Exhibit A) at 18:23-19:4 (arguing against Section 2(A) and 2(H)).  
15 Notwithstanding these arguments, the Court did not enjoin any portions of Section 2 other  
16 than Section 2(B).

17 **B. This Court’s Ruling Renders Plaintiff’s Motion Moot**

18 Plaintiff faces no irreparable harm from Sections 2(B), 3, and 6 of the Act because  
19 the Court has already enjoined these provisions. *See New York v. Seneci*, 817 F.2d 1015,  
20 1017 (2d Cir. 1987) (dismissing claim for an injunction when another court already  
21 granted “all of the injunctive relief requested in the present case”); *Lee v. Boeing*, No.  
22 94-35909, 1996 U.S. App. LEXIS 7690, at \*2 (9th Cir. Mar. 26, 1996) (affirming decision  
23 by district court to deny motion for preliminary injunction as moot when another court  
24 had already issued an injunction covering the same conduct).

25 With respect to the provisions of SB 1070 not enjoined, plaintiff is not entitled to  
26 an injunction because he is not likely to succeed on the merits of those specific  
27  
28

1 challenges.<sup>2</sup> As noted above, the Court has specifically held that it is not appropriate for  
2 Section 4 to be enjoined and that the United States is not likely to succeed on the merits of  
3 its challenge to the portion of Section 5 creating A.R.S. § 13-2929. The same holds true  
4 for the portions of Section 2 other than Section 2(B), which the Court declined to enjoin  
5 despite the specific requests of the United States. In his Motion, plaintiff speculates that  
6 his likelihood of success “is underscored by the success of other lawsuits challenging the  
7 constitutionality of laws similar to (but not as extreme as) the Act.” Mot. at 28:20-22.  
8 Applying this principle to this Motion, this Court’s decision *not* to enjoin these portions of  
9 SB 1070 is a strong indication that plaintiff is unlikely to succeed on these claims.

10 More generally, plaintiff has not identified any other reason why an injunction in  
11 this case would do anything other than duplicate the injunction already entered in the  
12 Federal Case and require the parties and the Court to engage in unnecessary work. The  
13 terms of the injunction in the Federal Case specifically bind Governor Brewer and the  
14 State of Arizona. Likewise, the City of Tucson (the other defendant in this case) has  
15 represented to the Court that it considers itself bound by the injunction in the Federal Case  
16 and has withdrawn its own motion for preliminary injunction. *See* Stipulation Regarding  
17 Withdrawal of the City of Tucson’s Motion for Preliminary Injunction (doc. 82).<sup>3</sup>

18 **IV. PLAINTIFF LACKS STANDING BECAUSE HE HAS NOT SUFFERED**  
19 **NOR IS HE LIKELY TO SUFFER AN INJURY-IN-FACT**

20 If the Court determines that plaintiff’s Motion is not moot, Governor Brewer  
21 respectfully submits that the Court should resolve her motion to dismiss the First  
22 Amended Complaint (doc. 55) before turning to the merits of plaintiff’s claim for  
23 injunctive relief. As the Ninth Circuit has observed, courts should “assess the parties’  
24 standing before proceeding to the merits of their dispute.” *Long Beach Area Chamber of*

25 <sup>2</sup> Governor Brewer’s substantive arguments regarding plaintiff’s likelihood of success on  
26 the merits are set forth in greater detail below at pages 8-15.

27 <sup>3</sup> Before filing this response, Governor Brewer’s counsel requested that plaintiff stipulate  
28 to either the withdrawal of his Motion or a stay of injunctive relief proceedings pending  
the appeal of the Injunction Order. Plaintiff declined to stipulate to either a withdrawal of  
the Motion or a stay.

1 *Commerce v. City of Long Beach*, 603 F.3d 684, 689 (9th Cir. 2010) (citing *Lujan v.*  
2 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Cox v. City of Dallas*, 256 F.3d  
3 281, 303 (5th Cir. 2001) (“Standing is a jurisdictional doctrine that the Supreme Court has  
4 held must be decided before the merits of a case.”).

5 As set forth in Governor Brewer’s motion to dismiss, there are serious questions as  
6 to plaintiff’s standing to raise these claims. To have standing, a plaintiff must allege facts  
7 that demonstrate “an injury in fact – an invasion of a legally protected interest which is (a)  
8 concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”  
9 *Lujan*, 504 U.S. at 560 (internal quotations and citation omitted). Plaintiff, a police  
10 officer with the City of Tucson, does not allege that he has actually suffered any injury  
11 relating to SB 1070. Instead, he claims that he does not intend to enforce SB 1070 and  
12 expresses concern that “he will be subject to (among other things) discipline by Defendant  
13 City of Tucson.” FAC ¶¶ 68-71.

14 However, plaintiff’s claimed risk of being disciplined and suffering injury has  
15 virtually disappeared in light of the Court’s Injunction Order in the Federal Case  
16 preliminarily enjoining certain provisions of SB 1070. As alleged in the First Amended  
17 Complaint, plaintiff contends that he “does not believe” he can enforce the Act “[a]bsent a  
18 judicial declaration that the Act is lawful.” FAC ¶¶ 68-70. This Court’s ruling, however,  
19 provides plaintiff with the support he needs to enforce the remaining portions of the Act.  
20 As discussed above, all of the portions of SB 1070 challenged by plaintiff in his Motion  
21 have either been enjoined or allowed to take effect over the challenge of the United States.  
22 Certainly, plaintiff will not be called upon to enforce any of the provisions of SB 1070  
23 that have been enjoined in light of the City of Tucson’s representation to the Court that it  
24 considers itself bound by the injunction. (Doc. 82). As a result, plaintiff will not be  
25 enforcing the enjoined provisions of the Act. With respect to the provisions that have not  
26 been enjoined, this Court has made a specific determination that an injunction is not  
27 appropriate. Now that the Court has issued its order, nothing supports plaintiff’s refusal to  
28 enforce the law other than his unsupported, subjective opinion about its validity.

1 In any event, and even before the Court issued its injunction, plaintiff failed to  
2 identify any actual or imminent harm that would grant him standing to pursue these  
3 claims. As set forth in greater detail in Governor Brewer’s motion to dismiss, plaintiff has  
4 not alleged that he has suffered any actual injury or will suffer any imminent injury if SB  
5 1070 takes effect. *See* Mot. to Dismiss (doc. 55) at 4-9.

6 **V. PLAINTIFF IS NOT OTHERWISE ENTITLED TO A PRELIMINARY**  
7 **INJUNCTION**

8 Even if plaintiff’s Motion were not moot, and even if plaintiff somehow  
9 demonstrated standing, he still would not be entitled to a preliminary injunction for the  
10 additional reasons set forth below.

11 **A. Plaintiff Is Not Likely to Succeed on the Merits**

12 Plaintiff’s request for a preliminary injunction should be denied because plaintiff  
13 has not met his burden of establishing that he is likely to succeed on the merits of his  
14 claims. *See Doe v. Reed*, 586 F.3d 671, 681 n.14 (9th Cir. 2009), *aff’d* by 130 S. Ct. 2811  
15 (2010) (concluding that plaintiffs failed to satisfy the first *Winter* factor and declining to  
16 examine the three remaining factors); *Reed v. Town of Gilbert*, 587 F.3d 966, 974 (9th Cir.  
17 2009) (affirming the denial of a preliminary injunction on First Amendment and Equal  
18 Protection claims). Further, plaintiff’s request that the Court enjoin enforcement of SB  
19 1070 in its entirety is undeniably overbroad, as plaintiff’s First Amended Complaint  
20 addresses the alleged unconstitutionality of only a few of SB 1070’s provisions. *See*  
21 *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 886 (9th Cir. 2008) (“[W]hen the  
22 constitutionality of a state statute is challenged, principles of state law guide the  
23 severability analysis and [courts] should strike down only those provisions which are  
24 inseparable from the invalid provisions.”) (internal citation omitted). This is especially  
25 true where, as here, the Act contains a severability clause. *See* SB 1070, § 12(A).

26 **1. Plaintiff has a heavy burden of demonstrating that the**  
27 **challenged provisions of SB 1070 are facially unconstitutional**

28 Plaintiff’s pre-enforcement challenge to the constitutionality of SB 1070 “seeks to

1 invalidate the statute on its face.” *Wash. State Grange v. Wash. State Republican Party*,  
2 552 U.S. 442, 449 (2008). “[A] plaintiff can only succeed in a facial challenge by  
3 ‘establish[ing] that no set of circumstances exists under which the Act would be valid.’”  
4 *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). When considering a  
5 facial challenge, the court “must be careful not to go beyond the statute’s facial  
6 requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.” *Id.* at 449-50  
7 (citing *United States v. Raines*, 362 U.S. 17, 22 (1960)). Here, plaintiff will not succeed  
8 on the merits of his facial challenges to SB 1070 because federal law does not preempt the  
9 Act and because plaintiff has not articulated how SB 1070, on its face, violates due  
10 process or the Supreme Court’s decision in *Plyler v. Doe*.

11 **2. Plaintiff’s Amended Complaint does not raise a valid claim that**  
12 **federal law preempts any provision of SB 1070**

13 In his Amended Complaint, plaintiff alleges that three provisions of the  
14 Immigration and Nationality Act (“INA”) preempt SB 1070. *See* FAC ¶¶ 63-66. In his  
15 Motion, plaintiff argues that certain provisions of SB 1070 allegedly conflict with the  
16 three provisions of the INA identified in his Amended Complaint plus three additional  
17 provisions of the INA. Mot. at 13:23-25.<sup>4</sup> “Conflict preemption” is present only “when  
18 ‘compliance with both State and federal law is impossible, or when the state law stands as  
19 an obstacle to the accomplishment and execution of the full purposes and objectives of  
20 Congress.’” *Ariz. Contractors Ass’n v. Napolitano*, No. CV07-1355-PHX-NVW, 2007  
21 U.S. Dist. LEXIS 96194, at \*25 (D. Ariz. Dec. 21, 2007) (citations omitted).<sup>5</sup> Plaintiff

22 \_\_\_\_\_  
23 <sup>4</sup> “A proper motion for injunctive relief must relate to the allegations of the complaint and  
24 seek an outcome that may ultimately be available in the action.” *Muhammad v. Dir. of*  
25 *Corr.*, No. CIV S-07-0375 GEB GGH P, 2010 U.S. Dist. LEXIS 5534, at \*6 (E.D. Cal.  
26 Jan. 5, 2010). Accordingly, the court may not consider “matters extraneous to the  
27 complaint” or “disputes outside the complaint” on motions for preliminary injunction. *Id.*  
28 at \*8; *see also Jones v. Horel*, No. C 08-4077 MHP (pr), 2009 U.S. Dist. LEXIS 5728, at  
\*8 (N.D. Cal. Jan. 21, 2009).

<sup>5</sup> “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 by* 78 U.S.L.W. 3762 (U.S.  
June 28, 2010); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). 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

1 has the burden of proving preemption. *We Are Am./Somos Am., Coalition of Ariz. v.*  
2 *Maricopa Cnty. Bd. of Supervisors*, 594 F. Supp. 2d 1104, 1114 n.5 (D. Ariz. 2009).  
3 Plaintiff must also overcome the presumption, which the Supreme Court has held applies  
4 “[i]n all pre-emption cases, . . . that the historic police powers of the States were not to be  
5 superseded by the Federal Act unless that was the clear and manifest purpose of  
6 Congress.” *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (citation omitted).

7 All of the preemption allegations in plaintiff’s Amended Complaint and all but one  
8 of the preemption arguments plaintiff raises in his Motion are distinct from the  
9 preemption arguments the United States made in the Federal Case and fail as a matter of  
10 law.<sup>6</sup>

11 i. 8 U.S.C. § 1103(a)(10) does not conflict with the Act

12 Plaintiff first asserts that 8 U.S.C. § 1103(a)(10) somehow preempts Sections 2, 3,  
13 4, and 6 (A.R.S. §§ 11-1051, 13-1509, 13-2319 and 13-3883(A)(5)) because the Act’s  
14 provisions authorize state and local law enforcement officers to enforce federal  
15 immigration laws without first obtaining authorization from the Attorney General that an  
16 “actual or imminent mass influx of aliens” requires the assistance of state and local law  
17 enforcement officials. Mot. at 14:6-20.<sup>7</sup> Nothing in § 1103(a)(10), however, limits the  
18 circumstances in which state and local law enforcement officers may assist the federal  
19 government in the enforcement of the immigration laws. Plaintiff cites no case or  
20 authority in support of his argument. Indeed, state and local law enforcement officers  
21 have long had the authority to assist the federal government in enforcing the immigration  
22 laws. *See, e.g.*, 8 U.S.C. § 1357(g)(10); *Samayoa-Martinez v. Holder*, 558 F.3d 897 (9th

23 state regulation conflicts with federal law. *See De Canas v. Bica*, 424 U.S. 351, 355-63  
24 (1976). Plaintiff does not argue in his Motion that SB 1070 purports to regulate  
25 immigration or that federal law occupies the field. Should the Court choose to consider  
26 this argument, however, Governor Brewer has fully addressed the argument in her Motion  
to Dismiss and incorporates that argument in this response. *See* Mot. to Dismiss (doc. 55)  
at 11:8-14:23.

27 <sup>6</sup> The sole remaining argument – that 8 U.S.C. §§ 1304(e) and 1306(a) preempt Section 3  
28 – is not alleged in plaintiff’s Amended Complaint and, thus, should not provide a basis for  
plaintiff to obtain preliminary injunctive relief. Even if plaintiff had properly raised this  
argument, it is moot because the Court has already enjoined Section 3.

1 Cir. 2009).

2 ii. 8 U.S.C. § 1252c(a) does not conflict with the Act

3 Plaintiff next argues that the Act is “far broader” than 8 U.S.C. § 1252c(a), which  
4 authorizes “state and local law enforcement officials to arrest and detain certain illegal  
5 aliens” in certain circumstances. Mot. at 15:1-16:9. The only federal court to consider  
6 this argument has flatly rejected it. *See United States v. Vasquez-Alvarez*, 176 F.3d 1294,  
7 1297-1300 (10th Cir. 1999). In *Vasquez-Alvarez*, the defendant moved to suppress “his  
8 post-arrest statements, fingerprints, and identity” after an Oklahoma police officer arrested  
9 him based solely on the fact that he was an illegal alien. The defendant claimed that,  
10 under 8 U.S.C. § 1252c, state and local police officers have the authority to “arrest an  
11 illegal alien only when the INS has confirmed, before the arrest, that the alien has  
12 previously been convicted of a felony and has, since that conviction, been deported or left  
13 the United States.” *Id.* at 1295. The Tenth Circuit squarely rejected the defendant’s  
14 argument, and held that to interpret § 1252c as preempting state law “would both  
15 contradict the plain language of § 1252c and give the statute an interpretation and effect  
16 that Congress clearly did not intend.” *Id.* at 1300.

17 iii. 8 U.S.C. § 1324(c) does not conflict with the Act

18 Plaintiff next asserts that 8 U.S.C. § 1324, which “establishes criminal penalties for  
19 smuggling, transporting, concealing, and harboring undocumented immigrants,” preempts  
20 Section 2 (A.R.S. § 11-1051), Section 3 (A.R.S. § 13-1509), and Section 6 (A.R.S. § 13-  
21 3882(A)(5)) because these provisions of the Act are “far broader” than federal law.<sup>8</sup> Mot.  
22 at 18:4-10. But a mere *difference* between A.R.S. § 13-2319 and the federal smuggling  
23 statute (8 U.S.C. § 1324) does not constitute a conflict. *See Ariz. Contractors Ass’n*, 2007  
24 U.S. Dist. LEXIS 96194, at \*25. The fact the Act is broader than the federal statute  
25 neither impedes the federal government’s ability to prosecute persons for smuggling under  
26

27 <sup>7</sup> Plaintiff did not make this allegation in his Amended Complaint.

28 <sup>8</sup> Plaintiff did not make this allegation in his Amended Complaint.

1 *its* smuggling statute (8 U.S.C. § 1324) nor makes it impossible for a person to comply  
2 with both laws.

3 Plaintiff also contends that Section 4 (A.R.S. § 13-2319) and Section 5 (A.R.S. §  
4 13-2929(F)) are preempted because they allegedly “add to the specific penalties enacted  
5 by Congress for violations of Section 1324(a).” Mot. at 18:11-16. It has long been settled  
6 that “[t]he same act may offend the laws of both the state and the federal government and  
7 may be prosecuted and punished by each.” *State v. Barragan-Sierra*, 219 Ariz. 276, 287,  
8 196 P.3d 879, 890 (App. 2008) (citing *Abbate v. United States*, 359 U.S. 187, 194 (1959)).  
9 In fact, at least two courts in Arizona have already addressed claims that 8 U.S.C. § 1324  
10 preempts A.R.S. § 13-2319 and held that nothing in “the language or the legislative  
11 history of the INA, [indicates] that ‘Congress intended to preclude harmonious state  
12 regulation touching on the smuggling of illegal aliens.’” *We Are America*, 594 F. Supp.  
13 2d at 1112 (quoting *Barragan-Sierra*, 219 Ariz. at 287, 196 P.3d at 890).<sup>9</sup>

14 iv. 8 U.S.C. § 1357(g) does not conflict with the Act

15 Plaintiff also argues that 8 U.S.C. § 1357(g) preempts various provisions of the Act  
16 because it supposedly “nullifies Section 1357(g)(1) by unilaterally compelling all state  
17 and local law enforcement officers in Arizona to enforce federal immigration law . . .  
18 without a Section 1357(g)(1) agreement with the [Attorney General].” Mot. at 21:9-11  
19 (emphasis in original). But courts have routinely recognized state and local officers’  
20 authority – without reference to § 1357(g) – to “investigate and make arrests for violations  
21 of federal immigration laws.” *Vasquez-Alvarez*, 176 F.3d at 1296 (citing cases);  
22 *Martinez-Medina v. Holder*, No. 06-75778, 2010 WL 2055675, at \*2-3 (9th Cir. May 25,  
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24 \_\_\_\_\_  
25 <sup>9</sup> Notably, the *Barragan-Sierra* court also held that A.R.S. § 13-2319 neither conflicted  
26 with federal law nor stood as an obstacle to federal objectives because “*to a large extent*,  
27 Arizona’s objectives mirror federal objectives.” *Id.* (emphasis added). The same holds  
28 true for A.R.S. § 13-2929, which prohibits “transporting, concealing, and harboring  
undocumented immigrants” while the offender is in violation of a criminal offense.  
Because A.R.S. §§ 13-2319 and 13-2929 do not stand as “an obstacle to the  
accomplishment and execution of the full purposes and objectives of Congress” – and  
plaintiff does not contend otherwise – there is no conflict preemption.

1 2010); *United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001).<sup>10</sup> A  
2 1357(g) agreement essentially deputizes state and local officers to function as federal  
3 immigration officers. SB 1070, by contrast, does not delegate *federal* authority. SB 1070  
4 provides only the circumstances when Arizona’s law enforcement officers may assist the  
5 federal government in the identification and apprehension of persons who are in violation  
6 of federal immigration laws. *See* A.R.S. § 11-1051. Section 1357(g)(10) expressly  
7 permits such assistance from state and local authorities.

8 v. The Court has already addressed plaintiff’s new argument that  
9 8 U.S.C. §§ 1304(e) and 1306(a) conflict with the Act

10 In his Motion, plaintiff argues for the first time that 8 U.S.C. §§ 1304(e) and  
11 1306(a) preempt Section 3 (A.R.S. § 13-1509(A)). Mot. at 16:10-17:19. Because  
12 plaintiff did not make this allegation in his Amended Complaint, it should not provide a  
13 basis for plaintiff to obtain preliminary injunctive relief. *See, e.g., Muhammad*, 2010 U.S.  
14 Dist. LEXIS 5534, at \*6; *Jones*, 2009 U.S. Dist. LEXIS 5728, at \*8.

15 In any event, as stated above, this argument is moot because the Court has already  
16 enjoined Section 3 on these grounds. Nevertheless, while recognizing that the Court has  
17 already held that the United States is likely to prevail on its claim that federal law  
18 preempts Section 3, Governor Brewer maintains her position that *Hines v. Davidowitz*,  
19 312 U.S. 52 (1941) – the sole authority upon which plaintiff relies to support his argument  
20 – does not compel the conclusion that Section 3 is preempted. In *Hines*, the Supreme  
21 Court held that a state statute requiring aliens to register with the State of Pennsylvania in  
22 *addition to* the registration under federal law conflicted with the federal government’s  
23 provision “for alien registration in a single integrated and all-embracing system.” 312  
24 U.S. at 56, 74. Here, by contrast, A.R.S. § 13-1509(A) does not require anyone to register  
25 with the State. In fact, A.R.S. § 13-1509(A) conforms to federal law by imposing the  
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27 <sup>10</sup> Because law enforcement officers’ authority under SB 1070 is distinct from law  
28 enforcement officers’ authority under a § 1357(g) agreement, plaintiff’s lengthy analysis  
of § 1357(g) agreements and ICE’s training standards (*see* Mot. at 21:12-26:28) is simply  
irrelevant to his claims.

1 same misdemeanor penalties as federal law for violations of 8 U.S.C. § 1304(e) or §  
2 1306(a).<sup>11</sup> It is settled that the INA does not preclude harmonious state legislation. *De*  
3 *Canas v. Bica*, 424 U.S. 351, 358 (1976). Where “[f]ederal and local enforcement have  
4 identical purposes,” preemption does not occur. *Gonzales v. Peoria*, 722 F.2d 468, 474  
5 (9th Cir. 1983), *overruled on other grounds by Durgin v. De La Vina*, 199 F.3d 1037 (9th  
6 Cir. 1999)).

### 7 **3. Plaintiff’s other constitutional challenges also fail**

#### 8 i. The Act does not violate due process

9 Plaintiff next argues that Section 2(B) (A.R.S. § 11-1051(B)) somehow violates  
10 due process requirements by requiring law enforcement officers to detain arrested persons  
11 until their immigration status is determined, even if the person otherwise qualifies for  
12 release. Mot. at 27:7-24. As an initial matter, again, plaintiff lacks standing to pursue this  
13 claim because he has not alleged any actual or imminent threat that *he* will be arrested and  
14 indefinitely detained. But even if plaintiff had standing to pursue this claim, he cannot  
15 establish that SB 1070 runs afoul of the Due Process Clause on its face. “The  
16 fundamental requirement of due process is the opportunity to be heard ‘at a meaningful  
17 time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)  
18 (citation omitted). “Length of detention will rarely by itself offend due process . . . .”  
19 *United States v. Millan*, 4 F.3d 1038, 1044 (2d Cir. 1993). The hypothetical scenarios  
20 plaintiff posits do not and cannot provide a basis to invalidate Section 2(B) (A.R.S. § 11-  
21 1051(B)) on its face. *See Wash. State Grange*, 552 U.S. at 449-50; *Raines*, 362 U.S. at 22.

#### 22 ii. The Act does not violate *Plyler v. Doe*

23 Plaintiff’s argument that Section 2(B) (A.R.S. § 11-1051(B)) and Section 6 (A.R.S.  
24 § 13-3883A(5)), if applied to minors, would violate *Plyler*, 457 U.S. 202, fails for  
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26 <sup>11</sup> 8 U.S.C. § 1304(e) requires every alien eighteen years of age and over to “at all times  
27 carry with him and have in his personal possession any certificate of alien registration or  
28 alien registration receipt card.” 8 U.S.C. § 1306(a) imposes penalties upon any “alien  
required to apply for registration and to be fingerprinted in the United States who willfully  
fails or refuses to make such application or to be fingerprinted.”

1 multiple reasons. First, the *Plyler* Court did not hold that Texas’ law excluding  
2 undocumented children from its public schools was a *per se* violation of the Equal  
3 Protection Clause. *See* Mot. at 27:25-28:16. Rather, the *Plyler* Court struck down that  
4 Texas law because Texas failed to demonstrate that its decision to “deny a discrete group  
5 of innocent children the free public education that it offers to other children residing  
6 within its borders” furthered a substantial state interest. 457 U.S. at 230. Here, unlike in  
7 *Plyler*, the Act is neutral and generally applicable on its face, and does not even reference  
8 school children. As a result, plaintiff has the burden of demonstrating that these  
9 provisions of SB 1070 are not “rationally related to a legitimate governmental purpose.”  
10 *Stormans*, 586 F.3d at 1137. Plaintiff has not even attempted to do so.

11 Further, plaintiff’s argument that SB 1070 will require law enforcement officers  
12 “to determine the immigration status’ of any student they ‘stop’ for any potential  
13 violation of another ‘law or ordinance’” does not explain how such an inquiry – based on  
14 a reasonable suspicion that the student is in violation of at least *two* separate laws – could  
15 in any way violate the student’s constitutional rights. Mot. at 28:2-6. Likewise, plaintiff’s  
16 attempt to rely on a hypothetical scenario that might lead to an inquiry into a students’  
17 immigration status cannot provide a basis to invalidate SB 1070 on its face. *See Wash.*  
18 *State Grange*, 552 U.S. at 449-50 (court cannot “speculate about ‘hypothetical’ or  
19 ‘imaginary’ cases” in a facial challenge).

20 **B. Plaintiff Is Not Likely to Suffer Irreparable Harm**

21 To establish his entitlement to a preliminary injunction, plaintiff must show a  
22 “direct and immediate hardship [that] would entail more than possible financial loss.”  
23 *Stormans*, 586 F.3d at 1126 (citation omitted). An injunction “‘is not a remedy which  
24 issues as of course’ . . . or ‘to restrain an act the injurious consequences of which are  
25 merely trifling.’” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (citations  
26 omitted). “The correct standard is not whether there is a ‘possibility’ but whether there is  
27 a ‘likelihood of irreparable injury.’” *Stormans*, 586 F.3d at 1138 (quoting *Winter*, 129 S.  
28 Ct. at 375). The mere fact that plaintiff has raised a constitutional challenge to SB 1070 is

1 not enough to demonstrate irreparable injury. *See id.*

2 Plaintiff also attempts to establish irreparable harm by arguing that enforcement of  
3 SB 1070 will create a danger of racial profiling. Mot. at 29:7-30:12. But the Act  
4 expressly prohibits law enforcement officials from “consider[ing] race, color or national  
5 origin in implementing the requirements of this subsection except to the extent permitted  
6 by the United States or Arizona Constitution.”<sup>12</sup> A.R.S. § 11-1051(L) further requires that  
7 the statute “be implemented in a manner consistent with federal laws regulating  
8 immigration, protecting the civil rights of all persons and respecting the privileges and  
9 immunities of United States citizens.” There is no basis for anyone to assume that  
10 Arizona’s state and local law enforcement officers’ assistance in the enforcement of  
11 federal immigration laws is *likely* to result in unconstitutional racial profiling.

12 **C. The Balance of Equities Does Not Tip In Plaintiff’s Favor**

13 In determining whether plaintiff has met his burden of establishing that the balance  
14 of equities tips in his favor, the Court must “balance the interests of all parties and weigh  
15 the damage to each.” *Stormans*, 586 F.3d at 1138 (citing *L.A. Mem’l Coliseum Comm’n v.*  
16 *Nat’l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980)). Where, as here, “the impact  
17 of an injunction reaches beyond the parties, carrying with it a potential for public  
18 consequences, the public interest will be relevant to whether the district court grants the  
19 preliminary injunction.” *Id.* at 1139 (citing *Winter*, 129 S. Ct. at 378).

20 Plaintiff’s argument regarding the balance of equities finds no support in fact or  
21 law. First, plaintiff argues that he *may* refuse to enforce SB 1070 and, if he does so, that  
22 he *may* be disciplined or fired. Plaintiff relies on *Nelson v. NASA*, 530 F.3d 865 (9th Cir.  
23 2008), in which the plaintiffs faced the “stark choice” of either suffering a violation of  
24 their constitutional rights of losing their jobs. Unlike in *Nelson*, plaintiff has not even

25 <sup>12</sup> Plaintiff argues that this provision is insufficient to deter racial profiling because the  
26 case law is unclear regarding whether law enforcement officers can consider race, color or  
27 national origin in enforcing SB 1070, citing both *United States v. Hernandez*, 62 F.3d  
28 1353, 1355-56 (11th Cir. 1995) and *United States v. Montero-Camargo*, 208 F.3d 1122,  
1135 (9th Cir. 2000). Mot. at 30 n.23. The Ninth Circuit opinion, *Montero-Camargo*,  
however, is clear and binding. The fact that the Eleventh Circuit reached a contrary result  
five years earlier simply has no bearing on the constitutionality of SB 1070.

1 argued or suggested that the City of Tucson has threatened to discipline or terminate  
2 plaintiff if he refuses to enforce the Act in the *impermissible* manner he claims the Act  
3 might be enforced.

4 Finally, Arizona has a substantial public interest in having SB 1070 enforced.  
5 Throughout our nation’s history, the “States traditionally have had great latitude under  
6 their police powers to legislate as to the protection of the lives, limbs, health, comfort, and  
7 quiet of all persons.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474 (1996) (quoting *Metro.*  
8 *Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). For the reasons set forth in  
9 Governor Brewer’s responses to the motions for preliminary injunction and supporting  
10 exhibits filed in the Federal Case, *Salgado v. Brewer, et al.*, Case No. CV-10-00951-PHX-  
11 SRB, and *Friendly House, et al. v. Whiting, et al.*, Case No. CV-10-01061-PHX-SRB – all  
12 of which Governor Brewer incorporates herein by reference – unlawful, unchecked  
13 immigration poses a significant threat to the safety of Arizona’s citizens, which Arizona  
14 has a substantial interest in protecting. Arizona’s strong interest in serving the health,  
15 safety and welfare of its citizens, combined with the latitude the Court must give  
16 Arizona’s Legislature to address such issues in the manner it deems appropriate,  
17 substantially outweigh plaintiff’s alleged interests – based solely on rhetoric and  
18 speculation – in having SB 1070 enjoined.

19 **VI. CONCLUSION**

20 For these reasons, Governor Brewer respectfully requests that the Court deny  
21 plaintiff’s Motion.  
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Respectfully submitted this 10th day of August, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 10, 2010, I electronically transmitted the foregoing 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 Bouma

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