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IN THE UNITED STATES DISTRICT COURT

FOR THE STATE OF ARIZONA

MARTIN H. ESCOBAR,

plaintiff,

v.

JAN BREWER, Governor of the State of Arizona, in her Official and Individual Capacity, and the CITY of TUCSON, a municipal corporation,

defendants.

CITY OF TUCSON, a municipal corporation,

cross-plaintiff,

v.

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

cross-defendants.

No. CV 10-249 TUC SRB

RESPONSE IN OPPOSITION TO BREWER MOTION TO DISMISS

(Oral Argument Requested)

Plaintiff, Martin H. Escobar, through his undersigned counsel, hereby responds to the pending motion to dismiss, CD. No. 55, filed on June 23, 2010.[1] The Brewer motion seeks dismissal pursuant to the provisions of Rule 12(b)(1) and (6), FRCP. Neither Rule provides in this case a basis for dismissal.

Plaintiff is a proper individual to assert the claims identified in his first amended complaint. CD No. 4. He is a Hispanic citizen of the United States, residing in Arizona and a certified police officer who subject to the mandates of SB 1070[2], required to violate the constitutional rights of all Hispanics, irrespective of their alienage or status in the United States.[3] Defendant's contention that SB 1070 is not race specific rings hollow and is a specious denial of this undeniably Hispanic specific law.

This Court has already concluded that those provisions of SB 1070 that plaintiff challenges are likely preempted by federal immigration law. While not yet decided, this Court has also made note of the real and substantial risks of Fourth Amendment violations and the danger of racial profiling emanating from this flawed law.

Accordingly, for the reasons more fully set forth in the accompanying memorandum of points and authorities, Plaintiff Martin H. Escobar respectfully urges denial of defendant's motion to dismiss.

Respectfully submitted this 10th day of August 2010.

s/*Richard M. Martinez*, Esq.
Richard M. Martinez, Esq.

Stephen Montoya
Augustine B. Jimenez III
Counsel for Plaintiff

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[1] This response is timely submitted as provided in the stipulated filed on July 12th and the order of July 13th. See CD Nos. 77 & 78.

[2] Senate Bill 1070, as amended by Arizona House Bill 2162 ("SB 1070"), the "Support Our Law Enforcement and Safe Neighborhoods Act".

[3] Plaintiff as a resident of Arizona living in Tucson is similarly situated and equally exposed to the unconstitutional and discriminatory effects of SB 1070 as are all Hispanics who are within the geographic boundaries of the state.

Memorandum of Points and Authorities

I. Preliminary Statement

Defendant Brewer's motion is before this Court after careful and thoughtful consideration of the motion for preliminary injunction submitted by the United States in *U. S. v. Arizona and Brewer*, CV 10-249 PHX SRB.[4] That order resulted in a preliminary injunction of key provisions of SB 1070.[5] They are A.R.S.§ 11-1051(B), A.R.S.§ 13-1509, A.R.S.§ 13-2928(C) and A.R.S.§ 13-3883(A)(5).[6] The order enjoined in the *United States v. Arizona* case those provisions that plaintiff seeks to be enjoined in the instant action.[7]

In the referenced order, this court noted:

> Against a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns, the Arizona Legislature enacted a set of statutes and statutory amendments in the forms of Senate Bill 1070, the "Support Our Law Enforcement and Safe Neighborhood Act," 2010 Arizona Session Laws, Chapter 113, which Governor Janice K. Brewer signed into law on April 23, 2010. Seven days later, the Governor signed into law a set of amendments to Senate Bill 1070 under House Bill 2162, 2010 Arizona Session Laws, Chapter 211. (Footnote omitted.)[8]

While not part of the record, the court clearly took note of the attention that immigration and the undocumented have received for the past several years in Arizona. Elected officials, such as Russell Pearce, Joe Arpaio, John Kavanaugh and more recently Jan Brewer have made "illegals" a principle focus of their public

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[4] CD No. 80.

[5] All references to "SB 1070" are in reference to SB 1070 and HB 2162, which amended SB 1070.

[6] Order, CD No. 80, at p. 4, ll. 7-26.

[7] A.R.S.§ 11-1051(B), A.R.S.§ 13-1509 and A.R.S.§ 13-3883(A)(5). Plaintiff's motion for preliminary injunction is pending. CD No 71.

[8] Order, CD No. 80, at p. 1, l. 19-25.

comments, legislative and executive efforts as evidenced by SB 1070.[9] Ms. Brewer, as Governor, even recently suggested that **most** "illegals" were drug smugglers or felons and that decapitated corpses had been found in Arizona as a result of crimes committed by "illegals".[10] This hyperbole has been constant and unrelenting. For Hispanics who live in Arizona, the racial climate has changed dramatically.

In Arizona, "illegals" is a term synonymous with Hispanic or Mexican. There is no other racial or ethnic group that is of any concern to those who have made immigration and the undocumented their public and often campaign issue. This merger between the two, "illegals" and Hispanic or Mexican is the result of the fact that Arizona shares its entire southern border with Mexico, and it is from Mexico that everyone attributes as the source and flow of "illegals".

The hostile climate that currently exists in Arizona, and now spreading throughout the United States, is nothing new. The insatiable thirst for cheap labor has historically created a magnet for Mexican migration, a fact that is certainly true in Arizona.[11] In good economic times, Mexican labor is welcome, but when the tide turns, as it always does and the country finds itself in the clutches of a recession or depression, then the welcome mat evaporates and Mexicans (Hispanics) become

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[9] Among their stated immigration related issues is enactment of a state law denying birth certificates to children born in Arizona who's parents are undocumented, legislation that contravenes the Fourteenth Amendment. See, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

[10] See, e.g., Ginger Rowe, Article, *Brewer: Most Illegal Immigrants Smuggling Drugs*, The Arizona Republic, June 25, 2010; Transcript of FOX News Interview; On the Record with Greta; *Gov. Brewer: We Can't Continue to Be the Gateway for Illegal Immigration*, June 17, 2010, http://www.foxnews.com/story/0,2933,594802,00.html. Unfortunately, comments of a similar type were echoed by the Governor's counsel during the recent hearing in *Salgado and CPLC v. Brewer*, CV 10-0951 PHX SRB; and evidence the extent to which the climate has changed for the worst, and exposed serious fractures within our fragile social fabric.

[11] See, e.g., Borderline Americans: Racial Division and Labor War in the Arizona Borderlands, Katherine Benton-Cohen, Harvard University Press, 2009; Corridors of Migration, The Odyssey of Mexican Laborers, 1600-1933, Rodolfo F. Acuna, University of Arizona Press, 2005.

the focal point of anti-immigrant sentiments, policy and laws. "Operation Wetback" in 1954 is a prime example of how Mexicans are thought of and treated when the domestic economy is performing poorly; this federal effort resulted in the deportation of well over a million Mexicans, and included police sweeps through Mexican neighborhoods and police interrogations of Mexicans as potential aliens.[12] The similarities between SB 1070 and "Operation Wetback" are numerous with one critical distinction; "Operation Wetback" was a federal Border Patrol enforcement effort, and **not** the creation of state law.

The immigration debate has also been fundamentally impacted and intensified by the demographic shift in the population of the United States; the pace and rate of growth of Hispanics within the country is not welcomed by some and is too often portrayed as a threat to the identity and future of the country.[13] Thus, while there are some who argue for reasoned debate,[14] their voices have been for the most part silenced by the fever of hysteria, lies and irrational actions; the brunt of which is suffered by Hispanics, Mexicans who believe Arizona is their rightful place and home.

It is in this time, place and climate that Martin H. Escobar stepped forward to challenge the constitutionality of SB 1070.[15] He is a Mexican by birth, an immigrant who became a naturalized citizen. He works as a Police Officer in the community that is his home. For 15 years Officer Escobar has faithfully served his community,

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[12] See, e.g., Operation Wetback, The Mass Deportation of Undocumented Workers in 1954, Juan Ramon Garcia, Greenwood Press, 1980.

[13] See, e.g.,Mongrels, Bastards, Orphans, and Vagabonds, Mexican Immigration and the Future of Race In America, Gregory Rodriguez, Pantheon Books, 2007.

[14] See, e.g.,Let Them In, The Case for Open Borders, Six Common Arguments Against Immigration and Why They are Wrong, Jason L. Riley, Gotham Books, 2008.

[15] A role that has subjected plaintiff to the scrutiny, scorn and regulation of his speech at work his co-employees and TPD command staff. (Command staff have limited their communications to regulating plaintiff's speech as to time, manner, dress and location.)

risked his life, and remained loyal to his oath of office.

Martin H. Escobar is in the somewhat unique position to know what SB 1070 means as a law enforcement officer compelled by state law to search out and detect potential aliens who may be undocumented and at the same time he is a member of the "suspect" group.[16] His harms emanate not only from his official position 40 hours a week but includes the fact that he is a Spanish-speaking Mexican 24 hours a day.[17] A person who irrespective of his citizenship will be treated differently and confronted with proving his rightful presence in the United States if subject to a lawful stop, detention or arrest.[18]

II. Standard of Review

A. 12(b)(1)

Plaintiff has the burden of establishing standing.[19] "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the

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[16] Plaintiff's first amended complaint details in ¶¶ 27-33, the number of Hispanics in Tucson, Pima County, the percentage of Hispanics in the area he patrols, proximity to Mexico and the number of annual visitors. His complaint also details that lack of race neutral factors and the racial profiling that will occur as a result of SB 1070. ¶¶ 34-48.

[17] While defendants will continue to deny the impact of SB 1070 on police practices in Tucson, it is clear that all Hispanics are now subject to questioning about their status in the United States and subject to Border Patrol detention if the TPD officer is not satisfied with the person's response. The climate created by SB 1070 exists even after this court's order of July 28, 2010. See, e.g., event of August 2, 2010 in Tucson by TPD officers captured on video. http://www.youtube.com/watch?v=Q7pomFrlMyM

[18] In the referenced preliminary injunction order, this Court expressly noted that at least one provision of SB 1070 would adversely affect United States citizens; A.R.S.§ 11-1051(B). As noted by the court, every person arrested must have their immigration status determined. Order, CD No. 80, p. 16, ll. 1-13. This court has made no specific findings with respect to the Fourth Amendment or Equal Protection Clause issues, including racial profiling, but noted in fn. 6, at p. 16, cognizance of the length of detention issue, and at fn. 11, p. 20, the racial profiling issue. This provision also has no age limitation, thus requires police officers to make inquiries of day care and school age students, a practice that is not within ICE or Border Patrol procedures. See: *Plyler v. Doe*, 457 U.S. 202 (1982).

[19] See, e.g., *Kokkonen v. Guardian of Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

complaint in favor of the complaining party."[20] As stated in *Lujan v. Defenders of Wildlife*,"[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim".[21]

12(b)(6)

A 12(b)(6) motion to dismiss is appropriate only if plaintiff has failed to provide fair notice of his claim and his factual allegations, accepted as true, are plausible and are more than mere speculation.[22]

III. Plaintiff's Claims Are Not Subject To 12(b)(6) Dismissal

Plaintiff's first amended complaint provides a detailed factual basis for the claims asserted therein. Notice of the claims asserted is undisputedly provided. Defendant Brewer's motion reflects an absence of any acknowledgment of federal constitutional law in the area of immigration and related First, Fourth and Fourteenth Amendments to the United States Constitution; thus the blanket denial there are facts, as alleged by plaintiff, that demonstrate the constitutional flaws in SB 1070. This Court's preliminary injunction order of July 28, 2010 confirms the viability of plaintiff's claims to the specific provisions of SB 1070 challenged and renders this portion of defendant's motion moot.[23]

IV. Plaintiff Satisfies All Standing Requirements of Article III

A plaintiff establishes standing when:

1. he has suffered an actual or imminent injury that is

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[20] *Takhar v. Kessler*, 76 F.3d 995, 1000 (9th Cir.1996) (internal citations and quotation marks omitted).

[21] 504 U.S. 555, 561 (1992) (internal quotation marks and citation omitted).

[22] *Ashcroft v. Iqbal*, 19 S.Ct. 1937, 1951 (2009).

[23] Plaintiff's motion for preliminary injunction, CD No. 71, sets forth in detail his legal and factual analysis and is incorporated here by reference.

concrete and particularized;

2. the injury is fairly traceable to the challenged action of the defendants; and

3. the injury will likely be avoided or redressed by a decision in favor of the plaintiff.[24]

The equitable jurisdiction of the federal courts is both preventive and corrective.[25] The Supreme Court of the United States has repeatedly held that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."[26] As the Supreme Court proceeded to explain in *Babbitt*:

> When contesting the constitutionality of a criminal statute, it is **not** necessary that the plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights. When the Plaintiff has alleged an intention to engage in a course of conduct arguably affected with the constitutional interest, but prescribed by a statute, and there exists **a credible threat** of prosecution thereunder, he should **not** be required to await and undergo a criminal prosecution as the sole means of seeking relief.[27]

Although *Babbitt* involved a pre-enforcement challenge to a criminal statute, the

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[24] See, e.g., *Stormans, Inc., v. Selecky*, 586 F. 3d. 1109, 1119 (9th Cir. 2009)(pharmacy and two pharmacists had Article III standing to challenge a state law requiring pharmacists to dispense all lawful medications, including the "Plan B," pill," although they had not been threatened with enforcement of the law). The Ninth Circuit noted in Graham v. FEMA, 149 F.3d 997, 1003 (9th Cir. 1998), the applicable burden of proof in establishing standing is "likelihood," not certainty: "Plaintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision.... plaintiffs must show only that a favorable decision is likely to redress [their injuries], not that a favorable decision will inevitably redress [their injuries]") (emphasis added). This court's order of July 28th in the *United States v. Arizona and Brewer* case makes clear that this showing has been made.

[25] See, e.g., *Pierce v. Society of Sisters,* 268 U.S. 510, 536 (1925) ("[p]revention of impending injury by unlawful action is a well-recognized function of courts of equity").

[26] *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (emphasis added), quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

[27] 262 U. S. at 298. (internal citations and quotation marks omitted; emphasis added).

Ninth Circuit has applied this principle to cases contesting the constitutionality of civil statutes imposing monetary fines.[28]

Justice Scalia has summarized Article III standing requirements in the context of a challenge to a threatened–but indisputably unactualized–injury in the case of *MedImmune, Inc. v. Genentech, Inc.*:[29]

> Our analysis must begin with the recognition that, where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat–constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction. For example, in *Terrace v. Thompson*, 263 U.S. 197, (1923), the State threatened the plaintiff with forfeiture of his farm, fines, and penalties if he entered into a lease with an alien in violation of the State's anti-alien land law. Given this **genuine threat of enforcement**, we did **not** require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action. Id., at 216. Likewise, in *Steffel v. Thompson*, 415 U.S. 45 (1974), we did not require the plaintiff to proceed to distribute handbills and risk actual prosecution before he could seek a declaratory judgment regarding the constitutionality of a state statute prohibiting such distribution. *Id.*, at 458-460. As then-Justice Rehnquist put it in his concurrence, "the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity." *Id.*, at 480. In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply **not** doing what he claimed the right to do (enter into a lease, or distribute handbills at the shopping center). That did **not** preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced. The dilemma posed by that coercion–putting the challenger to the choice between abandoning his rights or risking prosecution–is "a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Abbott Laboratories v. Gardner*, 387 U.S. 36, 152(1967).

(Internal citations omitted; emphasis added.) *Babbitt* and *MedImmune* establish

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[28] See, e.g., Bland v. Fessler, 88 F.3d 729, 737 n. 11 (9th Cir. 1996) ("[a]lthough Bland and other ADAD users in California do not face criminal penalties, they do face grave consequences for violations of the civil statute, including civil fines and private suits for damages" [emphasis added]).

[29] 549 U.S. 118, 128-129 (2007).

that a party seeking prospective equitable relief in the form of either a declaratory judgment or an injunction need only establish a "credible" or "genuine" threat of enforcement in order to satisfy Article III standing requirements.

In accordance with these Supreme Court opinions, the Ninth Circuit has concluded that a plaintiff who challenges a law before it is enforced can establish the requisite "credible threat" of enforcement by demonstrating "that the state [defendant] intends either to enforce a statute or to encourage local law enforcement agencies to do so."[30] As the Ninth Circuit has repeatedly stated, "[w]e are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."[31]

As the Supreme Court observed in *Pierce v. Society of Sisters*[32], in affirming a preliminary injunction entered in a pre-enforcement challenge to an Oregon state statute:

> The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable.

In this case, Governor Brewer has repeatedly stated that all state, county, and municipal law enforcement officers in Arizona will enforce SB 1070 according to its express terms, and if, as this court has, ordered otherwise, she will appeal to every appellate court available. The City of Tucson has made clear there intent to

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[30] *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 618 (9th Cir. 1999) (emphasis in original).

[31] *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000), quoting *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 386 (1988).

[32] 268 U.S. 510, 536 (1925). In *Pierce*, 268 U.S. at 510-11, the challenged statute, the Oregon "Compulsory Education Act," was enacted on November 7, 1922. The effective date of the Act was September 1, 1926. The Supreme Court entered its opinion affirming the district court's grant of a preliminary injunction against the Act on June 1, 1925, over a year before the effective date of the Act.

enforce SB 1070 if required to do such. Plaintiff's challenge is not premature or otherwise deficient; he has standing to challenge the constitutionality of SB 1070.

V. Officer Escobar's Constitutional Claims

Like the plaintiffs in *Stormans, Inc. v. Selecky*[33], Officer Escobar seeks relief from a law that he believes violates his constitutional rights, including the First, Fourth and Fourteenth Amendments. Therein, the Ninth Circuit affirmed that the plaintiffs had standing to challenge the newly imposed mandate although no enforcement action was threatened against them, stating:

> The individual pharmacists, Mesler and Thelen, also enjoy standing to sue under the Free Exercise Clause. The injuries suffered by Mesler and Thelen are "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Mesler alleges that, without the court's injunction, she expects to be fired because her religious convictions prohibit her from dispensing Plan B and her employer has told her that it will not be able to accommodate her. Thelen alleges she was forced to leave her former job (after her pharmacy was unable to hire a second pharmacist) to work at a pharmacy that accommodates her religious belief by ensuring that there is always another pharmacist on duty. Thelen has taken a job farther away from her house for less pay because her religious beliefs did not allow her to dispense Plan B.
>
> While indirect, there is a causal connection between the new rules and Mesler's threatened termination. Though it does not suffice if the injury complained of is the result of the independent action of some third party not before the court, that does not exclude injury produced by determinative or coercive effect upon the action of someone else. The new rules require a pharmacy to deliver medication in a timely manner–an act for which pharmacies generally depend upon their pharmacists. If certain pharmacists believe they cannot deliver certain medications and their employer is unable to accommodate this moral or religious belief, the pharmacy may not employ in the first place–and may terminate–the objecting pharmacists. Thus, if the new rules had not been passed, Mesler would not expect to lose her job and Thelen would not have been forced to find a new job. Furthermore, a favorable decision likely will redress the alleged injuries. If the new rules are invalidated, Mesler and Thelen will not be limited to employment only at

[33] 586 F.3d at 1124.

pharmacies able to accommodate their religious views.[34]

As a Hispanic residing in Arizona, plaintiff is exposed to all the dangers that SB 1070 presents. When off duty, he dresses and looks like a civilian, but one who is undoubtedly Hispanic. Whether in Tucson or any other locale within Arizona, he is as exposed to the 14,999 other police officers working in local law enforcement as any other Hispanic who finds himself in Arizona on a daily basis. If arrested for any charge, he must establish his legitimate status in the United States before being released. If stopped or subjected to detention, he is undoubtedly within the "suspect group" for which "reasonable suspicion" may exist in the mind of another officer.[35]

Additionally, Officer Escobar, as City of Tucson Police Officer, works in a predominately Mexican part of the city and routinely stops individuals who are Mexican/Hispanic. Many of these individuals are children and minors who do not have or carry any form of state or federal identification. Officer Escobar reasonably suspects that some of these adults and children are not lawfully in the United States, which would subject them to detention and possible arrest under the Act. See A.R.S. §§11-1051(A) and 13-3883(A)(5).

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[34] 586 F.3d at 1121. See also: *Canatella v. State of California*, 304 F.3d 843, 855 (9th Cir. 2002) (Concluding that a lawyer had Article III standing to challenge state bar disciplinary rules, the Ninth Circuit stated that "[t]o establish a dispute susceptible to resolution by a federal court, plaintiffs must allege that they have been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. While Canatella is not currently involved in [lawyer] disciplinary proceedings, it cannot be said that Canatella's fear of facing future disciplinary proceedings is imaginative and wholly speculative" [emphasis added]).

[35] Reasonable suspicion is not defined in SB 1070. It is a subjective term fraught with any number of definitions or applications. Recognizing that "illegals" in Arizona are uniformly portrayed as Hispanic and coming from the Arizona-Mexico border, every police office in Arizona is predisposed to look for Mexicans (Hispanics) who are not lawfully in the United States when in contact with them. It defies logic to think that any police officer in Arizona is alerted to checking for the potential "illegal" status of any person who is not Hispanic. Conversely, every Hispanic, especially those who are a little too Mexican, ie., speak Spanish, listen to Spanish language music, radio, being with a mon-lingual Spanish-speaker, traveling in a car with relatives from Mexico or whatever triggers that officer's "suspicion" will expose himself, his spouse, kids mother, relatives and Hispanic friends to treatment based upon their racial characteristics in contravention of the Equal Protection Clause of the Fourteenth Amendment.

Unless this Court declares that the SB 1070 complies with the United States Constitution, Officer Escobar does not believe he can enforce the SB 1070 because to do so would violate federal limits on the enforcement of federal immigration law by state and local law enforcement officers because: (1) federal law enforcement authorities have not authorized him to enforce federal immigration law, (2) federal law enforcement authorities have not trained him to enforce federal immigration law, and (3) federal law enforcement authorities will not supervise his enforcement of federal immigration law.

Under these circumstances, Officer Escobar has standing to challenge SB 1070 before it is enforced against him or he is compelled to violate federal law.[36]

In this case–like the plaintiffs in *Stormans,* Officer Escobar's employment with the Tucson Police Department and his career as a law enforcement officer is directly threatened by SB 1070 by mandating all state and local law enforcement officers in Arizona to verify the immigration status of anyone that they "stop, detain, or arrest," if they "reasonably suspect" that the individual so encountered is unlawfully in the United States. A.R.S. §11-1051(B). The fact that the SB 1070 is directed specifically to Officer Escobar as a law enforcement officer weighs heavily

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[36] Defendant's reliance on *City of South Lake Tahoe, et al v. California Regional Planning Agency, et. al.*, 625 F.2d 231 (1980) is misplaced. The decision is distinguishable from the instant case in significant ways. Additionally the definition of who has standing has evolved in the past 30 years. A fundamental distinction between Officer Escobar and the plaintiffs in *City of South Lake Tahoe* is their failure to demonstrate a personal stake in the outcome of the controversy. In the instant action, plaintiff has established that he is a member of the "suspect group" who are subject to the unprecedented scrutiny of SB 1070 as a Mexican immigrant living in Arizona. Moreover, it would be error to conclude that plaintiff is the "wrong litigant". Plaintiff is not an elected official, but a Hispanic resident of Arizona who works as a police officer, and thus exposed in his personal and professional life to the harms that SB 1070 creates for Hispanics in Arizona, all persons arrested, and local law enforcement officers. This Court's preliminary injunction order in the *United States case* also eliminates any contention that the harm done to plaintiff's constitutional rights are too abstract or speculative. To the contrary, those provisions of SB 1070 that have been enjoined include all of the laws mandates that plaintiff challenged. The interests of the United States do not differ in any material way from the interests of plaintiff as a Hispanic police officer. It is, however, only Officer Escobar who has been forced to live and work under the cloud of SB 1070; a reality that the federal government can not experience or suffer. In this case, *Storman's* is the decision that provides the analytical framework applicable here.

in favor of a finding of standing. As the United States Supreme Court stated in *Virginia v. American Booksellers Ass'n, Inc*.:[37]

> To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact; that is, there must be some threatened or actual injury resulting from the putatively illegal action. . . . That requirement is met here, as the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution.

(Internal citations and quotation marks omitted; emphasis added.)[38] Because SB 1070 mandates specific behavior expressly directs Officer Escobar's actions as a police officer, he has standing to challenge the Act's legality before he is injured by it; prevention is preferable to correction.

The City of Tucson has expressly advised this Court that it intends to enforce the SB 1070 absent this Court's order to the contrary. If Officer Escobar fails to comply with the City's directive to enforce the Act, he will certainly be disciplined by the City, up to and including termination.

Like the City, the Governor has been unequivocal in her intention to enforce the Act. Governor Brewer has repeatedly announced that she will use all of the powers of her office to enforce and defend SB 1070. Her efforts include the exclusive control of the legal defense of SB 1070, the issuance of an Executive Order to AzPOST regarding the training of law enforcement officers under SB 1070, and an Executive Order creating a "legal defense fund" to defend SB 1070 and thus ensure its enforcement. If Officer Escobar refuses to enforce the SB 1070, AzPOST (which is subject to the Governor's executive orders) can restrict,

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[37] 484 U.S. 383, 392.

[38] See also, *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501. 508 (9th Cir. 1991) ("However, even if [the plaintiffs] had not already been charged with violating the challenged provisions, the individual appellees would have standing. The challenged statute . . . is regulatory and proscriptive in nature and the penalty for noncompliance is high. Moreover, the individual appellees fall within the class of persons whose conduct the statute proscribes".

suspend, or revoke his license as a Arizona law enforcement officer.[39] The Governor's public commitment to enforce and defend the Act has clearly created the requisite "credible threat" of enforcement.[40]

Officer Escobar will also be subject to private civil suits (and attendant civil fines) filed by SB 1070's many partisans if he is deemed to have refused to enforce it to "the fullest extent permitted by federal law."[41]

As a law enforcement officer, plaintiff has taken an oath to uphold the United States Constitution. He believes that SB 1070 violates the Supremacy Clause of the Constitution of the United States because it conflicts with 8 U.S.C. §§1103(a)(10), 1252c(a), 1324(c) and 1357(g). Accordingly, if Officer Escobar enforces SB 1070, he will violate his oath to uphold the United States Constitution and breach federal limits on the enforcement of immigration law by state and local law enforcement officers.

Moreover, lacking any federal authorization, training, or supervision to enforce federal immigration law, Officer Escobar is not equipped to enforce SB 1070, a fact that exposes him to a civil rights lawsuit, especially given the fact that federal and state law conflict in several significant areas under SB 1070.[42]

Under these circumstances, Officer Escobar can refuse to enforce SB 1070 and be disciplined by his employer, disciplined by AzPOST, and subjected to costly

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[39] See: A.R.S. §41-1822(C)(1)(AzPOST has authority to "suspend, revoke or cancel the certification of an officer").

[40] See, e.g., *Culinary Workers Union, Local 226 v. Del Papa,* 200 F.3d 614, 618 (9th Cir. 1999)(plaintiff can establish standing by demonstrating "that the state [defendant] intends either to enforce a statute or to encourage local law enforcement agencies to do so").

[41] See A.R.S. §11-1051(H).

[42] Compare the Ninth Circuit's opinion in *United States v. Montero-Camargo,* 208 F.3d 1122, 1135 (9th Cir. 2000) ("Hispanic appearance . . . may not be considered as a relevant factor where particularized or individualized suspicion is required") with the Arizona Supreme Court's opinion in *State v. Graciano*, 653 P.2d 683, 687 n.7 (Ariz. 1982) ("enforcement of immigration laws often involves a relevant consideration of ethnic factors").

private enforcement actions under SB 1070, or conversely, enforce SB1070 and violate his oath to obey the United States Constitution, breach federal limits on the enforcement of immigration law by local police officers, and be subjected to costly civil actions alleging the deprivation of the civil rights of the individuals against whom he enforces SB 1070. As the Ninth Circuit concluded in *Bland v. Fessler*[43],

> Bland chose to obey both the civil and utilities statutes and to bring a declaratory action challenging their constitutionality, rather than to violate the law, await an enforcement action against him, and raise the statutes' constitutionality as a defense. Bland's decision was altogether reasonable and demonstrates a commendable respect for the rule of law. Under the circumstances of this case, Bland should be allowed to test the law.

Based on these facts, Officer Escobar has standing to challenge the constitutionality of SB 1070 before it is actually enforced against him or he is compelled to enforce it against any person he comes into contact with as a police officer.[44]

Last, so long as one plaintiff has standing, the requirement is satisfied.[45] On June 4, 2010 plaintiff filed a motion to consolidate, to which Defendant Brewer had no objection with respect to consolidation of *Escobar* with *Salgado*.[46] Subsequently, a second motion for consolidation was filed to join the case filed by the United States.[47] Neither motion has been ruled on.

Both motions for consolidation are appropriate and should be granted. If

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[43] 88 F.3d 729, 737 (9th Cir. 1996).

[44] See: *Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 75 (4th Cir. 1991) ("Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution").

[45] *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897, 903 (9th Cir. 1975).

[46] See CD Nos. 20, 23 & 29. The City of Tucson joined in the motion for consolidation.

[47] CD No. 79.

such occurs, then this Court should consider the issue of standing as consolidated cases.

VI. Conclusion

Plaintiff has demonstrated that he has standing as a Hispanic living in Arizona and as local law enforcement officer mandated to enforce a constitutionally infirmed law. His stake in this controversy is personal, professional and he is profoundly vested in the outcome.

The claims made are those for which relief can and customarily is provided when the requisite showing is made.

Defendant Brewer motion fails to demonstrate any factual circumstance or binding authority that warrants dismissal of the instant action. Denial is urged and respectfully requested.

Respectfully submitted this 10th day of August 2010.

s/*Richard M. Martinez*, Esq.
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Certification of Service

I hereby certify that on August 10, 2010, I electronically transmitted the foregoing document to the Clerk of Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

s/*Richard M. Martinez*, Esq.
Richard M. Martinez, Esq.