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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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

(Oral Argument Requested)

Plaintiff, Martin H. Escobar, through his undersigned counsel, hereby submits his Reply to the Response submitted by Defendant Brewer to the pending motion for preliminary injunction, CD. No. 71. The Brewer response offers that plaintiff's motion is moot and fails to satisfy the showing required for a preliminary injunction. Neither argument is supported by the applicable law and facts.

Plaintiff has established a likelihood that (1) he will ultimately succeed on the merits, (2) he will suffer irreparable injury absent this Court's equitable relief, (3) the balance of hardships tips sharply in his favor, and (4) granting of an injunction advances the public interest. SB 1070 is preempted by federal law and cannot be lawfully enforced. This Court has found that those provisions of SB 1070 that plaintiff challenges are likely preempted by federal immigration law.[1]

Contrary to Defendant Brewer's assertion, Plaintiff's request for a preliminary injunction is not moot. *Escobar* has interests that are distinct from those in the case brought by the United States. And while the interests of all plaintiffs in the SB 1070 challenges overlap, absent consolidation, they are distinct real parties with an important interests in the relief sought and each essential to representing the rights of all within the ambit of their individual case. While the interests of the United States are important, so too are the interests of all the individual and organizational parties. Violations of individual constitutional rights demand paramount consideration and an equal role at the courthouse.

For the reasons more fully set forth in the accompanying memorandum of points and authorities, Plaintiff Martin H. Escobar respectfully urges that the court to grant his motion for preliminary injunction.

Respectfully submitted this 20th day of August 2010.

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

[1] *United States v. Arizona and Brewer*, CV 10-1413, CD No. 80.

Memorandum of Points and Authorities

I. Plaintiff's Request For A Preliminary Injunction Is Not Moot

Defendant Brewer's response to Plaintiff's Motion for a Preliminary Injunction relies upon two distinct and arguably inconsistent positions. It is claimed that the Preliminary Injunction order in *United States v. Arizona and Brewer*, CD No. 80, CV 10-1413, renders the instant motion moot. This ignores that the two cases have distinct parties and interests.[2] The order relied upon by Defendant Brewer is not binding on the City of Tucson, nor can Plaintiff enforce it as to any defendant, including Governor Brewer.[3] Defendant Brewer can not, as the party asserting mootness, meet her burden of establishing that there is no effective relief that the court can provide in *Escobar*. *Forest Guardians v. Johanna*, 450 F.3d 455, 461 (9th Cir. 2006), (citing *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1134 (9th Cir. 2004)).[4] Her burden is significant. Id. In this instance, all issues remain "live" and all parties maintain a legally cognizable interest in the outcome. *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1243 (9th Cir. 1988). This is certainly true in the need for a preliminary injunction that applies to all parties in *Escobar.*

II. Plaintiff Has Standing To Bring His Challenge to SB 1070

Defendant Brewer response to the instant request for a preliminary injunction includes a challenge to Plaintiff's standing as a named party plaintiff. Plaintiff rightful role as a plaintiff has been fully briefed for the court in CD No. 87, and is incorporated in whole here by reference. As noted in his Response to the pending motion to dismiss, he is in a unique role and a member of the "suspect" group at significant risk and a local

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[2] At this time Martin Escobar and the City of Tucson are parties unique to the instant action. There has been no ruling on the pending motions for consolidation. CD Nos. 20, 30, and 79.

[3] Nor can Plaintiff or the City of Tucson participate in the current Ninth Circuit briefing.

[4] *See also*: *Wolfson v. Brammer*, 2010 U.S. App. LEXIS 16766 (9th Cir. 2010) Copy attached as Ex. 1

police office who faces the mandate to act in violation of the United States Constitution.

III. The Immigration And Nationality Act Preempts SB 1070

The intent of Congress is "the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (alteration and internal quotation marks omitted). "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in [the statute's] structure and purpose." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983)(internal citations and quotation marks omitted).

"The first step in ascertaining congressional intent is to look to the plain language of the statute." *Robinson v. United States*, 586 F.3d 683, 686-687 (9th Cir. 2009). As the Ninth Circuit has noted, "[t]he statutory text itself is the 'authoritative statement' of a statute's meaning." *Cooper v. F.A.A.*, 596 F.3d 538, 547 (9th Cir. 2010). *See*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976)("the starting point in every case involving construction of a statute is the language [of the statute] itself"). The Supreme Court of the United States has repeatedly held that:

> It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. It is our duty to give effect, if possible, to every clause and word of a statute. . . .

TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)(internal quotation marks and citations omitted). See also, *Cooper v. F.A.A.*, 596 F.3d at 547 (9th Cir. 2010)(rejecting a statutory interpretation that would render part of the statute "meaningless").

Application of these interpretive principles to SB1070 results in revealing undeniable violations of the federal limits on the enforcement of immigration law by state and local law enforcement officers. SB 1070 renders the "plain language" of Sections 1103(a)(10), 1252c(a), 1324(c), and 1357(g) of Title 8 "superfluous, void, [and] insignificant."

IV. SB 1070 Conflicts With Federal Immigration Law.

Reflecting "the supremacy of national power" over the field of immigration law,

e.g., *Hines v. Davidowitz,* 312 U.S. 52, 60 (1941), Congress has considered, drafted, and enacted specific statutory limitations on the enforcement of federal immigration law by state and local law enforcement officers.[5] Under the Immigration and Nationality Act ("INA"), state and local law enforcement officials can enforce federal immigration law in only four specific areas:

1. when responding to "actual or imminent" threats of a "mass influx of aliens" at the border after receiving express authorization from the Attorney General of United States under 8 U.S.C. §1103(a)(10);

2. when arresting convicted felons already determined by ICE to be unlawfully in the United States under 8 U.S.C. §1252(c);

3. when arresting smugglers, transporters, concealers, and haborers of undocumented immigrants under 8 U.S.C. §1324(c); and

4. when arresting and detaining criminal aliens within the express boundaries of memorandum of agreements with the Department of Homeland Security under 8 U.S.C. §1357(g).

Based on the "plain language" of this legislation, it is clear that Congress considered the issue of the enforcement of federal immigration law by state and local law enforcement officers and has restricted such enforcement to limited, specific circumstances. Enforcement of the plain meaning of these statutes against any conflicting provisions in SB 1070 is necessary and appropriate. *See*, *Cooper v. F.A.A.*, 596 F.3d 538, 544 (9th Cir. 2010) ("[t]he purpose of statutory construction is to discern the intent of Congress in enacting a particular statute. . . . If the relevant language [of the statute] is plain and unambiguous, our task is complete")(internal quotation marks and citations omitted).

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[5] See, *Graham v. Richardson*, 403 U.S. 365, 380 (1971)(in affirming a preliminary injunction against an Arizona law excluding resident aliens from state welfare benefits, the Supreme Court ruled that ("[s]ince such laws encroach upon exclusive federal power, they are constitutionally impermissible"), and *Truax v. Raich,* 239 U.S. 33, 42 (1915) (in affirming a preliminary injunction against the "Arizona anti-alien labor law," the Supreme Court held that "[t]he authority to control immigration . . . is vested solely in the federal government").

If, as contended, state and local law enforcement officers already had the general authority to enforce federal immigration law **without** federal authorization, Congress would have never needed to enact any of the explicitly limited grants of authority. SB 1070 renders these express limitations imposed by each of these acts of Congress "superfluous." This result violates a "cardinal principle" of statutory construction and should be rejected. *See*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)("no clause, sentence, or word [of a statute] shall be [construed to be] superfluous, void, or insignificant").[6]

Ignoring the limits established by federal statutes, SB 1070 authorizes state and local law enforcement officers in Arizona to stop and detain anyone whom they "reasonably suspect" is illegally in the country, A.R.S. §11-1051(B), **and** to arrest (without a warrant) anyone whom the officer has "probable cause to believe . . . has committed a public offense that makes the person removable from the United States." A.R.S. §13-3883(A)(5). SB1070 breaches the specific limitations established by Congress in Sections 1103(a)(10), 1252c(a), 1324(c), and 1357(g) of Title 8 and unilaterally expands the authority of state and local law enforcement officers to enforce federal immigration law.[7] Nor is the power to unilaterally question, detain, and arrest

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[6] The specific textual conflicts between the Immigration and Nationality Act and the Act are set forth in Exhibit 2.

[7] Contrary to Defendant Brewer's position that preemption analysis begins with the assumption that the historic police powers of the States are not to be superceded by federal law, this is not true when a state ventures into the regulation of immigration law; such regulation does not fall within the "historic police powers of the state." *See*, *U.S. v. Locke*, 529 U.S. 89, 108 (2000)("The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers"). The regulation of immigration law has historically been an area of exclusively federal concern. See, *Toll v. Moreno*, 458 U.S. 1, 10 (1982) ("[o]ur cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders"); *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977)("Control over immigration and naturalization is entrusted exclusively to the federal government, and a state has no power to interfere"); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102, n. 21 (1976)("the authority to control immigration is . . . vested solely in the federal Government, rather than the States"); *Graham v. Richardson*, 403 U.S. 365, 376-80 (1971) ("laws encroach[ing] upon exclusive federal power . . . are constitutionally impermissible"); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419

suspected undocumented immigrants under SB 1070 contingent upon the request, approval, or supervision of federal law enforcement authorities.[8]

V. The Tenth Circuit Has Failed To Apply Required Preemption Law

Defendant Brewer's reliance on *United States v. Vasquez-Alvarez*, is misplaced. 176 F.3d 1294 (10th Cir. 1999). Therein, a criminal defendant moved to suppress evidence obtained after an Oklahoma police officer arrested him because he was an "illegal alien," arguing that the arrest violated 8 U.S.C. § 1252(c), because the arresting officer did not confirm that the defendant had previously been convicted of a felony and was unlawfully in the United States before arresting him. Although the court noted that the language of Section 1252(c) suggested that "when Congress granted arrest power to state and local police officers in certain circumstances, it impliedly precluded the exercise of that power in all other circumstances," the court nevertheless concluded that express language of the statute was somehow "overcome" by its legislative history.[9]

According to the court in *Vasquez-Alvarez*, the legislative history of Section 1252(c) "does not contain the slightest indication that Congress intended to displace any preexisting enforcement powers already in the hands of state and local officers." Id. at p. 1299. However, the court failed to recognize the importance of why Congress

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(1948) ("states . . . can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states"); and *Hines v. Davidowitz*, 312 U.S. 52, 60-62 (1941)("the supremacy of the national power . . . over immigration, naturalization and deportation is made clear by the Constitution"). The Ninth Circuit continues to note these binding principles in finding preemption. See, e.g., *Chae v. SLM Corp*., 593 F.3d 936, 943 (9th Cir. 2010)(citing *Hines v. Davidowitz*), and *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010)(same).

[8] SB 1070 also makes it a state law crime to violate either 8 U.S.C. §§ 1304(e) or 1306(a). A.R.S. §13-1509.

[9] The court erred in concluding that the language of Section 1252(c) was "overcome" by its legislative history. In fact, the opposite was true. As the Supreme Court has "repeatedly held, the authoritative statement is the statutory text, not the legislative history. . . ." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005)(emphasis added). Correspondingly, although the court admitted that its "interpretation of § 1252c leaves the provision with no practical effect," this result violates "a cardinal principle" of statutory construction that a statute should not be construed to be meaningless. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

enacted Section 1252(c), because Congress (correctly) believed that "the current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encountered through their routine duties." Id. at p. 1298. Although the court indicated that the legislative history of Section 1252(c) "did not identify which 'current Federal law' prohibited 'State and local law enforcement officials from arresting and detaining criminal aliens," id. at p. 1299, n.4, the court ignored a long line of Supreme Court opinions holding that the federal government has the exclusive authority to enforce federal immigration law.[10]

The court in *Vasquez-Alvarez* cited its own opinion in *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301-02 (10th Cir.1984), and the Ninth Circuit's opinion in *Gonzales v. City of Peoria*, 722 F.2d 468, 477 (9th Cir.1983). Id. However, in *Salinas-Calderon*, 728 F.2d 1298, 1301-02 (10th Cir.1984), the court was considering a case of alien-transporting under 8 U.S.C. § 1324(a)(2), which local law enforcement officers are expressly authorized to enforce. *Salinas-Calderon* does not support the court's conclusion in *Vasquez-Alvarez*.

The *Vasquez-Alvarez* court's reliance on *Gonzalez v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), overruled on other grounds by *Hodgers-Durgin v. Delavina*, 199 F.3d, 1037 (9th Cir. 1999), was also misplaced. In *Gonzalez,* the Ninth Circuit concluded that local police officers had the authority to arrest an alien for violating of the criminal provisions of the Immigration and Nationality Act, reasoning that:

> Plaintiffs correctly assert that an intent to preclude local enforcement may be inferred where the system of federal regulation is so pervasive that no opportunity for state activity remains. We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status,

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[10] *See*, *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (voiding California statute regulating Chinese immigration because immigration power is federal); *Henderson v. Mayor of New York*, 92 U.S. 259, 270-274 (1875) (voiding New York law requiring vessel owners to give a bond for each foreign passenger because it undermined federal power "to regulate commerce with foreign nations"); and *Smith v. Turner*, 48 U.S. 283, 394 (1849) (voiding New York and Massachusetts laws imposing head taxes on landing foreign persons because they regulated foreign commerce).

> and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration. However, this case does **not** concern that broad scheme, but only a narrow and distinct element of it–the regulation of criminal immigration activity by aliens. The statutes relating to that element are few in number and relatively simple in their terms. They are **not**, and could **not** be, supported by a complex administrative structure. It therefore cannot be inferred that the federal government has occupied the field of criminal immigration enforcement.

Id. at 474-475 (emphasis added). In describing the number of criminal provisions in the INA as "few in number," the court in *Gonzales* identified only three criminal provisions in the INA, specifically, 8 U.S.C. §§ 1324, 1325, and 1326. However, there are at least thirty. *See* Exhibit 3.[11]

Moreover, the criminal provisions in the INA are not "relatively simple in their terms," and are in fact "supported by a complex administrative structure," namely, Customs and Border Protection, ICE, the Department of Homeland Security, the United States Department of Justice, and the federal court system.

When *Gonzales* was decided in 1983, Congress had yet to enact three of the four statutes that Plaintiff argue expressly preempt SB 1070, 8 U.S.C. §§1103(a)(10), 1252c(a), and 1357(g), which were enacted in 1996. In addition to being overruled, outdated, and inaccurate, *Gonzalez* does not answer the question of preemption in this case. In light of the growth in the number and complexity of the criminal provisions in the INA, the reasoning of *Gonzalez* actually supports the conclusion that state and local law enforcement officers are preempted from enforcing its civil and criminal provisions.

VI. Ninth Circuit And Arizona Law Are In Conflict

SB 1070 purports to "prohibit" law enforcement officials from "consider[ing] race, color or national origin in implementing the requirements of [A.R.S. §11-1051(B)], except

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[11] Since *Gonzalez* was decided in 1983, Congress has enacted multiple criminal sanctions for immigration-related offenses. *See*, *e.g.*, the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a, the Immigration Marriage Fraud Amendment of 1986, 8 U.S.C. § 1325c, Anti-Drug Abuse Act of 1988, 8 U.S.C. § 1326, the Violent Crime Control and Law Enforcement Act of 1994, 8 U.S.C. § 1326(b)(1), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1324c(e), 18 U.S.C. § 1546(a), and 18 U.S.C. § 1015(e)–(f).

to the extent permitted by the United States or Arizona Constitution," A.R.S. §11-1051(L). This provision exacerbates the conflict between SB 1070 and federal immigration law.

In *State v. Graciano*, 653 P.2d 683, 687 n.7 (Ariz. 1982), the Arizona Supreme Court concluded that the "enforcement of immigration laws often involves a relevant consideration of ethnic factors." This is still the law in Arizona. *See*, *State v. Gonzalez-Gutierrez,* 927 P.2d 776, 781 (Ariz. 1996) ("[m]exican ancestry alone, that is, Hispanic appearance, is not enough to establish reasonable cause, but if the occupants' dress or hair style are associated with people currently living in Mexico, such characteristics may be sufficient").

In contrast, in *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000), the Ninth Circuit ruled that:

> we conclude that, at this point in our nation's history, and given the continuing changes in our ethnic and racial composition, Hispanic appearance is, in general, of such little probative value that it may **not** be considered as a relevant factor where particularized or individualized suspicion is required. Moreover, we conclude, for the reasons we have indicated, that it is also **not** an appropriate factor.

(Emphasis added.) These cases illustrate the conflict between Arizona law and federal immigration law. Because both laws cannot be simultaneously obeyed, SB 1070 is preempted by federal law and cannot be enforced.

VII. Conclusion

SB 1070 is not a benign legislative act intended to assist understaffed federal immigration agencies through the cooperative enforcement of federal immigration laws; it represents a detailed effort to regulate immigration.

SB 1070 violates a comprehensive federal statutory regime specifically limiting the enforcement of federal immigration law by state and local law enforcement authorities, it is preempted by federal law and cannot be enforced.

Plaintiff has established a likelihood of success on the merits. See, *LULAC v. Wilson*, 908 F. Supp. 755, 771 (D. Cal.,1995). Moreover, "[a] party may be irreparably

injured in the face of the threatened enforcement of a preempted law." *Villas at Parkside Partners v. City of Farmers Branch*, 2010 WL 1141398, *20 (D. Tex. March 24, 2010), citing *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 381 (1992).

In this case, Plaintiff's is likely to suffer serious injuries if SB 1070 is enforced by or against him. The balance of hardships tips sharply in Plaintiff's favor for the same reason.

Last, the public has no interest in the enforcement of a state law that violates the laws of the United States.

Based on the foregoing, this Court is urged to conclude that federal law preempts SB 1070 and enjoin its enforcement in the same manner as occurred in the *United States v. Arizona and Brewer* matter.

Respectfully submitted this 20th day of August 2010.

s/*Richard M. Martinez*, Esq.
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Counsel for Plaintiff

Certification of Service

I hereby certify that on August 20, 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.