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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

David Salgado, et al.,

Plaintiffs,

v.

Jan Brewer, et al.,

Defendants.

No. CV-10-00951-PHX-ROS

GOVERNOR BREWER'S MOTION TO DISMISS

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Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), Defendant Janice K. Brewer ("Governor Brewer") moves to dismiss plaintiffs' Amended Complaint because plaintiffs do not have standing to assert these claims and plaintiffs have failed to state a claim upon which relief can be granted. With respect to standing, plaintiffs simply have not alleged, and cannot allege, the requisite real and immediate threat of harm from enforcement of the "Support Our Law Enforcement and Safe Neighborhoods Act," as amended ("SB 1070" or the "Act"). Plaintiffs essentially allege only "abstract outrage" at SB 1070's enactment and pure speculation about potential future harm that is too attenuated, as a matter of law, to establish a cognizable case or controversy.

Even if plaintiffs did have standing, they have failed to state a claim upon which relief can be granted. Plaintiffs allege that federal law preempts certain provisions of SB 1070 and summarily conclude that SB 1070 violates the First Amendment and the Equal Protection Clause. However, these allegations reflect a fundamental misunderstanding of SB 1070's provisions and well-established law. SB 1070 is not preempted by federal law. Moreover, plaintiffs' First Amendment challenge fails because it is premised solely upon the conduct of unidentified third parties – not any provisions in SB 1070. Finally, plaintiffs' Equal Protection challenge fails because plaintiffs have not articulated any basis for such a claim.

For these and the other reasons set forth below, Governor Brewer respectfully requests that the Court dismiss plaintiffs' Amended Complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

1. General Allegations in Plaintiffs' Amended Complaint.

On April 23, 2010, Governor Brewer signed SB 1070 into law to address the impact of unlawful immigration on Arizona and to assist understaffed federal immigration agencies through "the cooperative enforcement of federal immigration laws." SB 1070, § 1; Amended Complaint ("AC") ¶ 15. On April 30, 2010, Governor Brewer signed HB 2162 approving various amendments to SB 1070. AC ¶ 16. SB 1070, as amended by HB

2162, is scheduled to take effect on July 29, 2010.

In this action, plaintiffs – David Salgado ("Officer Salgado") and Chicanos Por La Causa, Inc. ("CPLC") – ask the Court to enjoin defendants from enforcing SB 1070 on two grounds. First, plaintiffs allege that federal law preempts SB 1070 because: (1) the Immigration and Nationality Act (the "INA") – specifically 8 U.S.C. §§ 1252c(a), 1304(e), and 1357(g) – allegedly preempts A.R.S. §§ 11-1051(A)-(B) and 13-3883(A)(5); and (2) the Supremacy Clause allegedly preempts SB 1070 to the extent SB 1070 "purports to give the courts of Arizona jurisdiction to adjudicate violations of federal immigration law." AC ¶¶ 38-42. Second, plaintiffs contend that enforcement of the Act would violate their constitutional rights in the following ways: (1) SB 1070, if applied to minors, would violate *Plyler v. Doe*, 457 U.S. 202 (1982) and (2) SB 1070's enactment has caused unidentified third parties to "chill" Officer Salgado from exercising his First Amendment right to speak out about SB 1070's constitutionality. AC ¶¶ 45, 49-50, 57.

Both Officer Salgado and CPLC claim to be in a "dilemma" over what they perceive to be their future obligations to enforce or assist in the enforcement of SB 1070's provisions. Officer Salgado alleges that he will face discipline if he refuses to enforce SB 1070 or "be subjected to costly civil actions alleging the deprivation of the civil rights of the individual against whom he enforces the Act." AC ¶ 52. Based on Officer Salgado's *belief* that SB 1070 is unconstitutional, he alleges that he will not enforce it without first obtaining "a judicial declaration that the Act is lawful." AC ¶¶ 26, 35, 43-45. Similarly, CPLC "believes" that Arizona law requires it to assist in the enforcement of SB 1070, yet, if CPLC does so, CPLC alleges that "its students ***will be threatened*** with unlawful interrogation, detention, and arrest if they cannot quickly prove that they are lawfully in the United States." AC ¶ 58 (emphasis added). Most notably, neither Officer Salgado nor CPLC has alleged a discrete, identifiable harm attributable to SB 1070 that either they or CPLC's students imminently face.

2. <u>The Specific Provisions of SB 1070 that Plaintiffs Challenge</u>.

Plaintiffs seek to enjoin enforcement of SB 1070 in its entirety, yet their Amended

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Complaint actually challenges only *four* of SB 1070's provisions. First, plaintiffs challenge A.R.S. § 11-1051(A), which prohibits government officials and agencies in Arizona from "limit[ing] or restrict[ing] the enforcement of federal immigration laws to less than the full extent permitted by federal law."

Second, plaintiffs challenge A.R.S. § 11-1051(B), which is triggered only if: (1) there is a "lawful stop, detention or arrest" by a law enforcement official or agency of the state "in the enforcement of any other law or ordinance of a county, city or town or this state";[1] and (2) "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."[2] If (and only if) these two prerequisites are satisfied, A.R.S. § 11-1051(B) requires that a law enforcement official make "a reasonable attempt . . . *when practicable*, to determine the immigration status of the person." (emphasis added). A.R.S. § 11-1051(B) expressly prohibits a law enforcement official from "consider[ing] race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution." Also, A.R.S. § 11-1051(L) requires that the statute "be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."

Third, plaintiffs challenge A.R.S. § 11-1051(H), which permits "[a] person who is a legal resident of [Arizona] . . . [to] bring an action in superior court to challenge any official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements *a policy that limits or restricts the enforcement of federal*

[1] A lawful stop or brief detention requires "specific, articulable facts which, together with objective and reasonable inferences, form a basis for suspecting that [a] particular person is engaged in criminal activity." *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989); *see also United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). A prolonged detention or arrest requires probable cause. *Muehler v. Mena*, 544 U.S. 93, 101 (2005); *United States v. Tarango-Hinojos*, 791 F.2d 1174, 1175-76 (5th Cir. 1986).

[2] Based on the well-established "reasonable suspicion" standard, this means that specific, articulable facts must exist "which, together with objective and reasonable inferences, form a basis for suspecting that" the person stopped, detained, or arrested is ***both*** an alien ***and*** unlawfully present in the United States. *See Hernandez-Alvarado*, 891 F.2d at 1416; *Tarango-Hinojos*, 791 F.2d at 1176.

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immigration laws . . . to less than the full extent permitted by federal law." (Emphasis added.) *Entities* that violate this section must pay a civil penalty, but the statute does not impose any penalties for *individual officials* who violate the statute. Further, A.R.S. § 11-1051(K) indemnifies law enforcement officers in connection with actions brought under this section *except* where the officer "is adjudged to have acted in bad faith."

Fourth, plaintiffs challenge A.R.S. § 13-3883(A)(5), which permits a peace officer to arrest a person without a warrant where "the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States."

II. LEGAL ANALYSIS

1. Plaintiffs' Claims Should Be Dismissed Under Fed. R. Civ. P. 12(b)(1) Because Plaintiffs Have Not Alleged a Justiciable Case or Controversy.

Plaintiffs have failed to allege facts in the Amended Complaint showing that they have suffered, or will suffer, either an actual or imminent injury that would give them standing to pursue their claims. Plaintiffs are essentially seeking an improper advisory opinion.[3]

A. Plaintiffs do not have standing.

The Court's standing analysis has two components. The inquiry "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 234 (9th Cir. 1980) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Plaintiffs do not have standing under either of these components.

i. Plaintiffs do not satisfy constitutional standing requirements.

To have standing, a plaintiff must allege facts that demonstrate "an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b)

[3] "[T]o invoke the jurisdiction of the federal courts," a plaintiff "must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (citation omitted); *see also Allen v. Wright*, 468 U.S. 737, 750 (1984) ("The case or controversy requirement establishes the "fundamental limits on federal judicial power….").

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actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citation omitted).[4] Where, as here, official conduct provides the basis for a plaintiff's alleged injury, the plaintiff must show that "the injury or threat of injury [is] both '*real* and *immediate*,' not 'conjectural' or 'hypothetical.'" *Lyons*, 461 U.S. at 102 (emphasis added) (citation omitted). When standing is based on an injury that may occur "at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control," a "high degree of immediacy" is required. *Lujan*, 504 U.S. at 564 n.2.

a. Officer Salgado cannot establish an injury in fact.

Officer Salgado claims that he does not intend to enforce SB 1070 and expresses concern that "he will be subject to (among other things) discipline by Defendant City of Phoenix."[5] AC ¶¶ 43-46. The possibility of being disciplined by one's employer, however, does not give one standing to challenge the constitutionality of a law. Officer Salgado further alleges that his intent not to enforce SB 1070 will violate A.R.S. § 11-1051(A) and, therefore, "subject [him] to costly lawsuits by private parties under . . . A.R.S. § 11-1051(H)." AC ¶ 47. But SB 1070 imposes penalties for violations of A.R.S. § 11-1051 upon "entities" only, not individual police officers, and would further require the City of Phoenix to indemnify Officer Salgado unless he acted in bad faith. *See* A.R.S. §§ 11-1051(H), (K).

Officer Salgado next alleges that SB 1070 will force him "to expend his scarce time and resources in order to thoroughly familiarize himself with the Act's requirements and the Act's complex interaction with federal immigration law." AC ¶ 48. Setting aside the fact that Officer Salgado already has invested the time to learn about the Act and to

[4] A plaintiff must also demonstrate that there is "a causal connection between the injury and the conduct complained of" and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61. Because plaintiffs cannot establish an injury in fact, however, they necessarily cannot establish these additional elements.

[5] Plaintiffs have not alleged any facts suggesting that the City of Phoenix has threatened to discipline Officer Salgado if he refuses to enforce the Act.

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file suit in federal court, he does not explain how he will be *harmed* by learning about the law. For instance, he does not explain how the time he will "expend" learning SB 1070 differs from any other law that the City of Phoenix expects its officers to enforce. As alleged, "the Phoenix Police Department is already planning to prepare its officers—including Officer Salgado—to enforce federal immigration law as required by the Act." AC ¶ 37. Thus, it appears that Officer Salgado will receive all the training he requires in the course of his normal duties.[6] Moreover, any inconvenience that Officer Salgado might endure in having to familiarize himself with the law does not constitute an injury in fact. *See Kushner v. Ill. State Toll Highway Auth.*, 575 F. Supp. 2d 919, 923 (N.D. Ill. 2008) ("There is no legally protected interest in freedom from administrative inconvenience.").

Officer Salgado further claims that he is "suffering increasing pressure" from unidentified third parties "to enforce the Act," which, he alleges, "is chilling [him] from exercising his First Amendment right to speak out against the Act as unlawful and discriminatory." AC ¶¶ 49-50. Injury in fact for the purposes of standing cannot be "'the result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (citation omitted). Moreover, Officer Salgado has not explained how these actions chill him from exercising his rights. This alleged "chilling" has not stopped Officer Salgado from filing this very public lawsuit or otherwise speaking out against the Act. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.").

Finally, Officer Salgado alleges that "he can be subjected to costly civil actions alleging the deprivation of the civil rights of the individuals against whom he enforces the Act." AC ¶ 52. But as a police officer, Officer Salgado cannot be liable for deprivation of a person's civil rights under either 42 U.S.C. § 1983 or SB 1070, except under very limited circumstances. *See S. Lake Tahoe*, 625 F.2d at 239 (quoting *O'Connor v.*

[6] In any event, Officer Salgado's complaints regarding insufficient training and potential discipline must be addressed in the employment context, not in a constitutional challenge.

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Donaldson, 422 U.S. 563, 577 (1975)); A.R.S. § 11-1051(K). In short, Officer Salgado has not alleged that he has suffered any actual injury or will suffer any imminent injury if SB 1070 takes effect.

b. CPLC has not alleged an injury in fact.

Plaintiffs also allege that SB 1070 will harm CPLC based on the hypothetical *possibility* that its *students* would be subject to "unlawful interrogation, detention, and arrest if they cannot quickly prove that they are lawfully in the United States." AC ¶¶ 54, 58. Alternatively, CPLC alleges that if it "stops working with local law enforcement agencies and officials, it will be in violation of state law and its students' safety and welfare will be undermined." AC ¶ 58. These allegations do not demonstrate an injury that would give CPLC standing to pursue these claims.

CPLC alleges that it has a legal obligation to work with law enforcement agencies, citing a statute that requires it to report a reasonable belief that a minor has been a victim of child abuse, neglect, or similar crime. *See* AC ¶ 54; A.R.S. § 13-3620. However, CPLC has not explained how reporting its reasonable belief that one of its students is a victim of abuse would trigger any provision of SB 1070. As stated in Section I(2) above, SB 1070 requires law enforcement officers to inquire into a person's immigration status in extremely limited circumstances. One of the threshold requirements for such an inquiry is that the officer must have, *at a minimum*, reasonable suspicion to believe that the *person questioned* is engaged in criminal activity. *See* A.R.S. § 11-1051(B); *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989). SB 1070 neither authorizes nor requires law enforcement officers to inquire into the immigration status of *victims*.

Although CPLC's compliance with A.R.S. § 13-3620 could potentially result in CPLC reporting abuse that would lead to an investigation into one of its students, that remote possibility is insufficient to establish an injury in fact. First, it is a hypothetical scenario. *See Lujan*, 504 U.S. at 564 ("conjectural" or "hypothetical" injuries cannot establish standing). Second, even assuming that the requirements set forth in A.R.S. § 11-1051(B) were satisfied and the law enforcement officer inquired into the immigration

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status of one of CPLC's students, the end result would be an inquiry into the immigration status of a student whom the officer has reasonable suspicion to believe: (1) engaged in criminal activity; and (2) is in violation of federal immigration laws. It is well-established that a law enforcement officer may do so without violating a person's civil rights. *See, e.g.*, *Muehler v. Mena*, 544 U.S. 93, 101 (2005); *Hernandez-Alvarado*, 891 F.2d at 1416. As a result, CPLC lacks standing to challenge SB 1070.

ii. Plaintiffs have not satisfied prudential standing requirements.

Prudential standing requirements also weigh strongly against the Court exercising jurisdiction in this case. "Beyond [the] 'minimum constitutional [standing] mandate,'… the Supreme Court has developed, as a prudential matter of self-governance, certain 'other limits on the class of persons who may invoke the courts' decisional and remedial powers.'" *S. Lake Tahoe*, 625 F.2d at 234 (citation omitted). These prudential principles prohibit courts from considering generalized grievances and claims on behalf of third parties. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982).

a. Plaintiffs may not assert generalized grievances.

Even if plaintiffs sufficiently allege an actual injury, courts are to refrain "from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Id.* (quoting *Warth*, 422 U.S. at 499-500).

A plaintiff's personal view that a law is unconstitutional does not confer standing. In *South Lake Tahoe*, for instance, council members alleged that they had standing to challenge an ordinance based on the fact that "they [would be] required by law to enforce [the allegedly unconstitutional ordinance]" thereby violating "their oaths of office to uphold the U.S. Constitution and expos[ing] themselves to civil liability . . . for enforcing an unconstitutional law." 625 F.2d at 233. The Ninth Circuit, however, held that the council members lacked standing because their "abstract outrage at the enactment of an unconstitutional law" was the same as any ordinary citizen's and therefore insufficient to

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establish standing. *Id.* at 237; *see also Thomas v. Mundell*, 572 F.3d 756, 760-63 (9th Cir. 2009) (holding that a public official's personal dilemma regarding the constitutionality of a statute did not confer standing). Here, Officer Salgado's "dilemma" about SB 1070 similarly does not grant him standing to challenge its constitutionality. *See* AC ¶ 52. As in *South Lake Tahoe*, Officer Salgado has not alleged that he faces a real and immediate threat of suit nor has he acknowledged the immunities and indemnifications that would protect him (unless he acted in bad faith). *See S. Lake Tahoe*, 625 F.2d at 239.[7]

b. Plaintiffs may not assert claims on behalf of third parties not before the court.

In general, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499 (holding that plaintiffs did not have standing to assert constitutional claims attacking a city zoning ordinance); *see also Valley Forge*, 454 U.S. at 474. Here, CPLC does not allege a real and immediate threat of harm to itself or its students and, therefore, cannot raise third-party claims. AC ¶¶ 59, 60. The threatened injuries are speculative, and CPLC's devotion "to protecting the rights of individuals of Mexican ancestry" and its "dilemma" regarding cooperation with law enforcement do not serve as concrete claims capable of a judicial determination. *See* AC ¶¶ 58, 60.[8]

B. Plaintiffs are seeking an improper advisory opinion.

Plaintiffs are asking the Court to render an impermissible advisory opinion. It has long been settled that "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Pub. Workers of Am. (C.I.O.) v.*

[7] Moreover, finding that Officer Salgado has standing to bring this generalized grievance would set a dangerous precedent that police officers can enforce only laws with which they agree – converting the officers "into potential litigants, or attorneys general, as to laws within their charge." *S. Lake Tahoe*, 625 F.2d at 238.

[8] CPLC also fails to allege "next best friend" standing on behalf of its students because CPLC does not identify a purported real-party-in-interest, much less "provide an adequate explanation as to why the real parties in interest … cannot bring the suit themselves." *T.W. v. Brophy*, 954 F. Supp. 1306, 1309 (E.D. Wis. 1996); *see also Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153 (9th Cir. 2002).

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Mitchell, 330 U.S. 75, 89 (1947). "[T]he rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III." *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

The Supreme Court's decision in *Mitchell* is instructive. There, as here, the plaintiffs expressed their concerns about enforcing a law and sought "a declaration of the legally permissible limits of regulation." *Mitchell*, 330 U.S. at 83-84. The Court found that the plaintiffs' allegations were "closer to a general threat by officials to enforce those laws which they are charged to administer … than they [were] to the direct threat of punishment against a named organization for a completed act." *Id.* at 88. The Supreme Court considered such general objections requests for an "advisory opinion" and therefore "beyond the competence of courts to render … a decision." *Id.* at 89.

The same holds true here. As in *Mitchell*, plaintiffs are not facing any actual harm and instead have alleged purely speculative harm. The only threat of harm Officer Salgado alleges is his abstract fear that he somehow, some day, may be subject to civil liability or disciplinary proceedings for enforcing (or failing to enforce) SB 1070. *See* AC ¶¶ 46-52. Like the plaintiffs in *Mitchell*, Officer Salgado alleges he is reluctant to enforce SB 1070 without "a judicial declaration that the Act is lawful." AC ¶¶ 43-45. Similarly, CPLC speculates that "its students ***will be threatened*** with unlawful interrogation" and "***believes***" that SB 1070 is unconstitutional. AC ¶¶ 56-58 (emphasis added). These allegations of "general threat[s] of possible interference" with constitutional rights "do[] not make a justiciable case or controversy." *Mitchell*, 330 U.S. at 89. Without allegations that plaintiffs face concrete, actual harm, plaintiffs have not alleged a case or controversy.

2. Plaintiffs' Amended Complaint Should Be Dismissed Under Fed. R. Civ. P. 12(b)(6) Because Plaintiffs Have Not Adequately Alleged Any Basis Upon Which the Court Could Find SB 1070 Unconstitutional.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (U.S. 2009) (citation omitted). Claims are facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

A pre-enforcement challenge to the constitutionality of a statute seeks to invalidate the statute on its face. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid.'" *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). When considering a facial challenge, the court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 449-50; *United States v. Raines*, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."). Facial challenges are disfavored because they: (1) "often rest on speculation;" (2) "run contrary to the fundamental principle of judicial restraint" with respect to constitutional challenges; and (3) "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 450-51. Here, plaintiffs' facial challenges to SB 1070 fail because federal law does not preempt the Act and because plaintiffs have not articulated how SB 1070, on its face, runs afoul of either the First Amendment or the Equal Protection Clause.

A. Federal law does not preempt SB 1070.

The states' broad powers to regulate for the health, safety, and welfare of its citizens are limited only to the extent such laws are prohibited by the U.S. Constitution or preempted by federal law.[9] "Federal preemption can be either express or implied." *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (U.S. 2008). A preemption analysis, however, ***begins*** "with the assumption that the historic police powers of the States [are] not to be

[9] The Supreme Court has "frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen v. Roe*, 429 U.S. 589, 597 (1977). "State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." *Id.*

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superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)).

i. Federal law does not expressly preempt SB 1070.

Plaintiffs refer the Court to three statutes that supposedly preempt provisions of SB 1070. *See* AC ¶¶ 38-42 (citing 8 U.S.C. §§ 1252c(a), 1304(e), and 1357(g)). It is unclear whether plaintiffs claim that these statutes expressly or impliedly preempt SB 1070. None of these statutes, however, expressly preempt state law. The Tenth Circuit has already found that the language in § 1252c "cannot reasonably be read as an express preemption of preexisting state law." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1297 (10th Cir. 1999). Nothing in the language of 8 U.S.C. § 1304(e) refers to state or local law in any respect. And 8 U.S.C. § 1357(g)(10) expressly includes a *non-preemption* clause with respect to state and local "cooperat[ion] with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," which is exactly what SB 1070 requires. Similarly, none of the provisions of the INA, codified at 8 U.S.C. § 1101 *et seq.*, expressly preempt state regulation regarding aliens. *See DeCanas v. Bica*, 424 U.S. 351, 358 (1976) (finding no express preemption).

Plaintiffs also allege that the Supremacy Clause preempts SB 1070 because SB 1070 "purports to give the courts of Arizona jurisdiction to adjudicate violations of federal immigration law." AC ¶ 42. However, plaintiffs do not identify which provision of SB 1070 purportedly does so.[10] Governor Brewer does not dispute that district courts "have jurisdiction of all causes, civil and criminal, brought by the United States that arise under the [8 U.S.C. § 1101 *et seq.*]," but that jurisdiction is not exclusive. *See* 8 U.S.C. § 1329; *In re Jose C.*, 198 P.3d 1087, 1097 (Cal. 2009) ("We think it clear [that 8 U.S.C. § 1329 does not] preempt[] state court jurisdiction."), *cert. denied*, 129 S. Ct. 2804 (U.S. 2009).

[10] The only provision plaintiffs identify in the Amended Complaint that addresses the jurisdiction of Arizona courts is A.R.S. § 11-1051(H), which authorizes Arizona residents to bring an action in superior court against Arizona officials and agencies who violate *Arizona* law by "adopting or implementing a policy that limits or restricts the enforcement of federal immigration laws" in violation of A.R.S. § 11-1051(A).

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Thus, federal law does not expressly preempt SB 1070.

ii. Federal law does not impliedly preempt SB 1070.

Absent express preemptive language, "courts should be 'reluctant to infer pre-emption.'" *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1297 (10th Cir. 1999) (citation omitted). For this reason, courts should not find that federal law preempts state law "unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Implied preemption in the immigration context exists if: (1) the state law purports to regulate immigration, an exclusively federal power; (2) federal law occupies the field; or (3) the state regulation conflicts with federal law. *See DeCanas*, 424 U.S. at 355-63. Here, plaintiffs have not demonstrated any reason to overcome the strong presumption that state laws are valid and *not* preempted.

a. SB 1070 is not a "regulation of immigration."

In *DeCanas*, the Supreme Court stated that the "[p]ower to regulate immigration is unquestionably exclusively a federal power," but explained that a "regulation of immigration" is a statute that defines "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 354-55. The Supreme Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power." *Id.* at 355. In *Chicanos Por La Causa*, the Ninth Circuit relied on *DeCanas* in holding that federal law does *not* preempt the Legal Arizona Workers Act because "the Act does not attempt to define who is eligible or ineligible to work under [federal] immigration laws," but, instead, "is premised on enforcement of federal standards as embodied in federal immigration law." 558 F.3d at 866; *see also Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987) ("No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce [federal] immigration laws."); *In re Jose C.*, 198 P.3d at 1091, 1098.

Here, SB 1070 does not regulate the terms upon which aliens may enter and remain in the country. None of the provisions plaintiffs challenge – nor any other provision of

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SB 1070 – in any way addresses the admission, authorization or deportation of aliens from the United States. Nor do plaintiffs make such a claim. Rather, SB 1070 "is premised on enforcement of federal standards as embodied in federal immigration law." *See Chicanos Por La Causa*, 558 F.3d at 866. Consequently, SB 1070 does not intrude upon the federal government's exclusive power to "regulate immigration."

b. Federal law does not occupy the field.

Implied federal preemption exists where "the scope of the statute indicates that Congress intended federal law to occupy the legislative field." *Altria Group*, 129 S. Ct. at 543. In *DeCanas*, the Supreme Court considered and rejected the possibility that the federal government's regulation of immigration might be so comprehensive that it leaves no room for state action. *See DeCanas*, 424 U.S. at 358 ("[Respondents] fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general."). Further, the fact that multiple provisions of the INA *invite* state and local police into the field confirms that the INA does not occupy the field. *See, e.g.*, 8 U.S.C. §§ 1357(g)(10), 1373(c), and 1644.

c. SB 1070 does not conflict with federal law.

State laws that are in harmony with the INA are not preempted. *DeCanas*, 424 U.S. at 358. Although SB 1070 mirrors federal law, plaintiffs allege the Act conflicts with three specific provisions of the INA. First, plaintiffs allege that 8 U.S.C. § 1252c(a) expressly limits the circumstances in which state and local law enforcement officers may "detain and arrest . . . undocumented immigrants." AC ¶ 39. The only federal court to consider this argument has flatly rejected it. *See Vasquez-Alvarez*, 176 F.3d at 1297-1300.[11] In *Vasquez-Alvarez*, the defendant moved to suppress "his post-arrest statements, fingerprints, and identity," after an Oklahoma police officer arrested him based solely on the fact that he was an "illegal alien." The defendant claimed that, under 8 U.S.C.

[11] Although other courts have approved the Tenth Circuit's holding, *see, e.g.*, *In re Jose C.*, 198 P.3d at 1099, it does not appear that any other court has squarely addressed it.

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§ 1252c, state and local police officers have the authority to "arrest an illegal alien only when the INS has confirmed, before the arrest, that the alien has previously been convicted of a felony and has, since that conviction, been deported or left the United States." *Id.* at 1295. After analyzing both the language of the statute and its congressional history, however, the Tenth Circuit rejected the defendant's argument, and held that to interpret § 1252c as preempting state law "would both contradict the plain language of § 1252c and give the statute an interpretation and effect that Congress clearly did not intend."[12] *Id.* at 1300.

Second, plaintiffs allege that A.R.S. § 11-1051(B) conflicts with 8 U.S.C. § 1304(e), which requires persons eighteen and over to carry their "certificate of alien registration or alien registration receipt card" at all times. Plaintiffs allege that A.R.S. § 11-1051(B) exceeds this requirement by allegedly requiring persons under eighteen years old "to prove they are lawfully in the United States." *See* AC ¶ 41. Nothing in the text of A.R.S. § 11-1051(B), however, requires anyone under eighteen to "prove" that he or she is lawfully in the United States. Rather, the statute requires only that, under limited circumstances described in Section I(2) above, Arizona law enforcement officers make "a reasonable attempt . . . when practicable, to determine a person's immigration status" and to verify that status "with the federal government." *See* A.R.S. § 11-1051(B). Because A.R.S. § 11-1051(B) does not impose any affirmative requirements upon persons under eighteen – much less an obligation to carry a certificate of alien registration or alien registration receipt card, A.R.S. § 11-1051(B) does not conflict with 8 U.S.C. § 1304(e).

Third, plaintiffs allege that 8 U.S.C. § 1357(g) preempts SB 1070 because, "except as provided by 8 U.S.C. § 1252c(a)[,] state and local law enforcement officials can enforce federal immigration law only after executing a 'memorandum of agreement' with the Secretary of Homeland Security in accordance with . . . Section 1357(g)." AC ¶ 40.

[12] Further, as Judge Learned Hand recognized, "it would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow." *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) (finding that a New York State trooper had authority under state law to arrest a defendant for a federal misdemeanor).

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This allegation misconstrues the scope of authority granted to local law enforcement officers under a § 1357(g) agreement, which essentially deputizes the officers to function as federal immigration officers. SB 1070, by contrast, requires only that Arizona's law enforcement officers assist the federal government in the identification and apprehension of persons in violation of federal immigration laws. *See* A.R.S. § 11-1051. Not only does 8 U.S.C. § 1357(g)(10) expressly permit such assistance and exclude it from the agreements set forth in § 1357(g), but courts have also routinely recognized the authority of state and local authorities to "investigate and make arrests for violations of federal immigration laws." *Vasquez-Alvarez*, 176 F.3d at 1296 (citing cases); *United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001).

B. Plaintiffs do not properly allege constitutional violations.

Plaintiffs appear to challenge the constitutionality of SB 1070 under the First Amendment and the Equal Protection Clause based on allegations that fall far short of the standard required to state a claim for relief. First, plaintiffs allege that that the conduct of unidentified third parties has "chill[ed] Officer Salgado from exercising his First Amendment right to speak out against [SB 1070] as unlawful and discriminatory." AC ¶¶ 49-50. Because plaintiffs rely solely on the opinions and conduct of unidentified third parties and *not* any provision *of SB 1070* that purportedly "chills" Officer Salgado's speech, plaintiffs have failed to allege a valid First Amendment challenge to SB 1070. *See Laird*, 408 U.S. at 10-11 ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations" if "the challenged exercise of governmental power [is] regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.").[13]

[13] *See also D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004) ("The chilling effect, to amount to an injury, must arise from an objectively justified fear of real consequences, which can be satisfied by showing a credible threat of prosecution or other consequences following *from the statute's enforcement*.") (emphasis added).

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Second, plaintiffs allege that SB 1070, if applied to minors, would violate *Plyler v. Doe*, 457 U.S. 202 (1982). AC ¶¶ 45, 57. Yet plaintiffs fail to articulate the relationship between the Texas statute invalidated in *Plyler*, which prohibited undocumented children from attending public schools free of charge, and SB 1070, which seeks to enhance state and local assistance in the enforcement of federal immigration laws and makes no reference to public schools whatsoever. As a result, plaintiffs have failed to state a plausible claim that SB 1070 violates the Equal Protection Clause and their speculative claims should be dismissed.

III. CONCLUSION.

For the foregoing reasons, Governor Brewer respectfully requests that the Court dismiss plaintiffs' Amended Complaint.

RESPECTFULLY SUBMITTED this 11th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

By s/John J. Bouma

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