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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Martin H. Escobar,

Plaintiff,

v.

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

Defendants.

The City of Tucson,

Cross-plaintiff,

v.

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

Cross-defendants.

Case No. CV10-00249-TUC-DCB

GOVERNOR BREWER'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

(Oral Argument Requested)

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Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), Defendant Janice K. Brewer ("Governor Brewer") moves to dismiss plaintiff's First Amended Complaint because plaintiff does not have standing to assert these claims and plaintiff has failed to state a claim upon which relief can be granted. With respect to standing, plaintiff simply has 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"). Plaintiff essentially alleges only "abstract outrage" at SB 1070's enactment based on a fundamental misunderstanding of SB 1070's provisions and pure speculation about potential future harm – primarily to third parties – that is too attenuated, as a matter of law, to establish a cognizable case or controversy.

Even if plaintiff did have standing, he has failed to state a claim upon which relief can be granted. Plaintiff alleges that federal law preempts certain provisions of SB 1070 and summarily concludes that SB 1070 violates the First, Fourth, Fifth, and Fourteenth Amendments. Federal law does not preempt any of the provisions of SB 1070 that plaintiff challenges. Plaintiff's remaining constitutional challenges fail because plaintiff has not articulated how SB 1070 allegedly violates any rights *plaintiff* has under the Constitution. Accordingly, Governor Brewer respectfully requests that the Court dismiss plaintiff's First Amended Complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. Pertinent Provisions of SB 1070

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; First Amended Complaint ("FAC") ¶ 12. On April 30, 2010, Governor Brewer signed HB 2162 approving various amendments to SB 1070. FAC ¶ 13. SB 1070, as amended by HB 2162, is scheduled to take effect on July 29, 2010.

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In this action, plaintiff Martin Escobar ("Officer Escobar"),[1] seeks to enjoin Governor Brewer and the City of Tucson from enforcing SB 1070 in its entirety. Officer Escobar's FAC, however, actually challenges only *four* of SB 1070's provisions. First, Officer Escobar challenges 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, Officer Escobar challenges 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";[2] and (2) "reasonable suspicion exists that the person is an alien ***and*** is unlawfully present in the United States."[3] If (and only if) these two prerequisites are satisfied, A.R.S. § 11-1051(B) provides that a law enforcement official shall make "a reasonable attempt . . . *when practicable*, to determine the immigration status of the person" unless doing so "may hinder or obstruct an investigation." (emphasis added).

Not only are the constitutionality and requirements of the reasonable suspicion standard well-established, but the U.S. Supreme Court has made it clear that a person's "Mexican descent," does not constitute "a reasonable belief that [the person is an] alien[]," much less that the person is in the country unlawfully. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975). A.R.S. § 11-1051(B) further prohibits a law enforcement official from "consider[ing] race, color or national origin in implementing

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[1] Plaintiff is a Lead Patrol Officer for the Tucson Police Department. FAC ¶ 10.

[2] 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).

[3] 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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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, Officer Escobar challenges 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 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. Even if Officer Escobar is someday sued under this provision, A.R.S. § 11-1051(K) would require the City of Tucson to indemnify him *unless* he "is adjudged to have acted in bad faith." The doctrine of qualified immunity further protects Officer Escobar from liability for civil damages provided that his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Estrada v. Rhode Island*, 594 F.3d 56, 62 (1st Cir. 2010) (citation omitted).[4]

Fourth, Officer Escobar challenges 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."

B. Officer Escobar's Constitutional Challenges

Officer Escobar challenges the constitutionality of the foregoing provisions on the

[4] In *Estrada*, the court held that the doctrine of qualified immunity barred claims against a law enforcement officer who detained the plaintiffs based solely on his suspicion that the plaintiffs were in violation of federal immigration laws and transported them to the nearest Immigration and Customs Enforcement office because "a reasonable defendant in [the officer's] position would have believed he had sufficient evidence giving rise to probable cause to support the conclusion that the van's occupants had committed immigration violations." 594 F.3d at 65.

bases that they violate the Supremacy Clause and the First, Fourth, Fifth, and Fourteenth Amendments. The alleged basis for these claims is Officer Escobar's mistaken belief that SB 1070:

> [C]ompels under threat of lawsuit, discipline and loss of required certification every Law Enforcement Officer in the State of Arizona to actively engage in racial profiling ***to detain, question and require every Hispanic found within the limits of the City of Tucson to prove their legal status in the United States of America*** irrespective of county of origin, citizenship, immigrant status based solely on immutable and mutable characteristics common or stereotypical in attribution to Hispanics.

FAC ¶ 48 (emphasis added). Based on his misinterpretation of the Act's requirements, Officer Escobar alleges that he "***believes*** that the Act is the product of racial bias aimed specifically at Hispanics," and that it "results in impermissible deprivations of rights guaranteed by the United States Constitution." FAC ¶ 57 (emphasis added).

Officer Escobar further alleges that "[a]bsent a judicial declaration that the Act is lawful," he will not enforce SB 1070 because "he believes that he lacks the authority to do so under the Immigration and Nationality Act, 8 U.S.C. §§ 1252c(a) and 1357(g)" and further "believes that doing so would violate the rights of Latinos and Latinas under the [D]ue [P]rocess and [E]qual [P]rotection [C]lauses of the Fourteenth Amendment." FAC ¶¶ 68-69. Thus, Officer Escobar claims to be in a "dilemma" over whether to: (1) refuse to enforce the Act and face discipline by the City of Tucson, or (2) enforce the Act and "be subject to costly lawsuits by private parties under the Act." FAC ¶¶ 71-72.

II. LEGAL ANALYSIS

A. Officer Escobar Lacks Standing to Pursue His Claims

Officer Escobar has failed to allege facts in the FAC showing that he has suffered, or will suffer, either an actual or imminent injury that would give him standing to pursue his claims. Officer Escobar essentially seeks an improper advisory opinion.[5]

[5] "[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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1. Officer Escobar does 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)). Officer Escobar does not have standing under either of these components.

i. Officer Escobar cannot 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) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citation omitted).[6] 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.

Officer Escobar 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 Tucson."[7] FAC ¶¶ 68-71. The mere possibility that a law enforcement officer will be disciplined by his employer, however, does not give him standing to challenge the constitutionality of a law. Officer Escobar further alleges that his intent not to enforce

[6] 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 Officer Escobar cannot establish an injury in fact, however, he necessarily cannot establish these additional elements.

[7] Officer Escobar has not alleged any facts suggesting that the City of Tucson has threatened to discipline him if he refuses to enforce the Act.

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)." FAC ¶ 72. 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 Tucson to indemnify Officer Escobar unless he acted in bad faith. *See* A.R.S. §§ 11-1051(H), (K).

Officer Escobar 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." FAC ¶ 73. Officer Escobar, however, 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 Tucson expects its officers to enforce. As alleged, "the Tucson Police Department is already planning to prepare its officers—including Officer Escobar—to enforce federal immigration law as required by the Act." FAC ¶ 62. Thus, it appears that Officer Escobar will receive the training he requires in the course of his normal duties.[8] Moreover, any inconvenience that Officer Escobar might endure in having to familiarize himself with the law does not constitute an injury in fact. *See*, *e.g.*, *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 Escobar 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." FAC ¶¶ 74-75. 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 Escobar has not explained how these actions chill him from exercising his rights. Indeed, this alleged "chilling" has not stopped Officer Escobar from filing this very public lawsuit or otherwise speaking out

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

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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 Escobar 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." FAC ¶ 77. But as a police officer, Officer Escobar 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 City of S. Lake Tahoe*, 625 F.2d at 239 (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975)); A.R.S. § 11-1051(K). In short, Officer Escobar has not alleged that he has suffered any actual injury or will suffer any imminent injury if SB 1070 takes effect.

ii. Officer Escobar cannot satisfy 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.'" *City of 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. Officer Escobar may not assert generalized grievances

Even if Officer Escobar had sufficiently alleged 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 *City of South Lake Tahoe*, for instance, council members alleged that they had standing

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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 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 Escobar's "dilemma" about SB 1070 similarly does not grant him standing to challenge its constitutionality. *See* FAC ¶ 77. As in *South Lake Tahoe*, Officer Escobar 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 City of S. Lake Tahoe*, 625 F.2d at 239.[9]

b. Officer Escobar 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. For the reasons stated above, Officer Escobar has not alleged any real or immediate threat of harm to himself. To the extent Officer Escobar premises his claims on his belief that enforcement of SB 1070 would "violate the rights of Latinos and Latinas" and school children, he improperly seeks to assert claims on behalf of third parties. FAC ¶¶ 69-70. Not only are these threatened injuries speculative, but Officer Escobar's "dilemma" regarding his

[9] Moreover, finding that Officer Escobar 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." *City of S. Lake Tahoe*, 625 F.2d at 238.

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enforcement obligations, *see* FAC ¶ 77, does not serve as a concrete claim capable of a judicial determination.

2. Officer Escobar seeks an improper advisory opinion

Officer Escobar is 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. 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*, Officer Escobar is not facing any actual harm and instead has alleged purely speculative harm. The only threat of harm Officer Escobar 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* FAC ¶¶ 71-72, 77. Like the plaintiffs in *Mitchell*, Officer Escobar alleges he is reluctant to enforce SB 1070 without "a judicial declaration that the Act is lawful." FAC ¶¶ 68-70. 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 Officer Escobar faces concrete, actual harm, he has not alleged a case or controversy.

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B. The FAC Should Be Dismissed Under Fed. R. Civ. P. 12(b)(6) Because Officer Escobar Has 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, Officer Escobar's facial challenges to SB 1070 fail because: (a) federal law does not preempt the Act; (b) the Fifth Amendment applies only to action taken by the federal government; and (c) Officer Escobar has not articulated how SB 1070, on its face, would violate any of *his* rights under the First, Fourth, or Fourteenth Amendments.

1. 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.[10] "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 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

Officer Escobar refers the Court to three statutes that supposedly preempt provisions of SB 1070. *See* FAC ¶¶ 63-66 (citing 8 U.S.C. §§ 1252c(a), 1304(e), and 1357(g)). 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).

Officer Escobar also alleges 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." FAC ¶ 67. However, Officer Escobar does not

[10] 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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identify which provision of SB 1070 purportedly does so.[11] 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). 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, Officer Escobar has 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 held 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

[11] The only provision Officer Escobar identifies in the FAC 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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power." *Id.* at 355. Thus, following the *De Canas* Court's holding, the Ninth Circuit held 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." *Chicanos Por La Causa*, 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 Officer Escobar challenges – nor any other provision of SB 1070 – in any way addresses the admission, authorization or deportation of aliens from the United States. Nor does Officer Escobar make such an argument. 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) (acknowledging the power of state and local police to make immigration arrests); 8 U.S.C. § 1373(c)

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(requiring the federal government to respond to inquiries by state and local police officers seeking to verify the immigration status of any alien); 8 U.S.C. § 1644 (prohibiting restrictions on state and local government entities in "sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States").

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, Officer Escobar alleges that the Act conflicts with three specific provisions of the INA. First, Officer Escobar alleges 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." FAC ¶ 64. The only federal court to consider this argument has flatly rejected it. *See Vasquez-Alvarez*, 176 F.3d at 1297-1300.[12] 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. § 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, the Tenth Circuit rejected the defendant's argument, holding 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."[13] *Id.* at 1300.

[12] 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.

[13] 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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Second, Officer Escobar alleges 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)." FAC ¶ 65. 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. *See* 8 U.S.C. § 1357(g). 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 8 U.S.C. § 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).

Third, Officer Escobar alleges that SB 1070 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. Officer Escobar alleges that A.R.S. § 11-1051(B) exceeds this requirement by allegedly requiring persons under eighteen years old "to prove that they are lawfully in the United States." FAC ¶ 66. A.R.S. § 11-1051(B), however, does not require ***any*** person to "prove" that he or she is lawfully in the United States. Rather, A.R.S. § 11-1051 sets forth procedures for law enforcement officers to follow, in the limited circumstances described in Section I(2) above, "to determine a person's immigration status" and to verify that status "with the federal government." *See* A.R.S. § 11-1051(B). Certain forms of identification can entitle persons to a presumption that they are lawfully present in the United States, but A.R.S. § 11-1051(B) does not impose any affirmative obligation upon anyone – much less persons under eighteen – to carry any form of identification or registration card. Thus, A.R.S. § 11-1051(B) does not

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conflict with 8 U.S.C. § 1304(e).

2. Officer Escobar does not properly allege constitutional violations

Officer Escobar challenges the constitutionality of SB 1070 under the First, Fourth, Fifth, and Fourteenth Amendments based on an erroneous interpretation of the Act's requirements and various conclusory allegations about the harm SB 1070 will allegedly cause. *See* FAC ¶¶ 78-95. As an initial matter, Officer Escobar's claim under the Fifth Amendment must be dismissed because the Due Process Clause of the Fifth Amendment imposes limits on the *federal* government, whereas the Due Process Clause of the Fourteenth Amendment that imposes limits on state action. *See*, *e.g.*, *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 713 (1982); *Brown v. State of N.J.*, 175 U.S. 172, 174 (1899) (citing *Barron v. Baltimore*, 32 U.S. 243 (1833)).

With respect to his remaining constitutional challenges, Officer Escobar alleges only that "Defendants' actions constitute violations of [due process, equal protection, free speech, the Fourth Amendment,] and 42 U.S.C. § 1983" and that "[a]s a direct and proximate result of the conduct of Defendants, Plaintiff has suffered injury." *See* FAC ¶¶ 79-89. There are no allegations in the FAC explaining how SB 1070 allegedly restricts Officer Escobar's First Amendment right to free speech[14] or deprives *Officer Escobar* of any rights he has under the Fourth Amendment or the Due Process and Equal Protection Clauses. Because Officer Escobar has not articulated how either SB 1070 or defendants could violate any of these constitutional provisions, these claims must be dismissed for failure to state a claim upon which relief may be granted. *See Iqbal*, 129 S.Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory

[14] To the extent Officer Escobar alleges that the opinions and conduct of unidentified third parties have purportedly "chilled" his speech, Officer Escobar has 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."); *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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statements, do not suffice.") (citation omitted).

III. CONCLUSION

For the foregoing reasons, Governor Brewer respectfully requests that the Court dismiss Officer Escobar's First Amended Complaint.

Respectfully submitted this 23rd day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 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:

s/John J. Bouma

11654233

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