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Attorneys for Defendants Janice K. Brewer, Governor of the State of Arizona and *The State of Arizona*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

League of United Latin American Citizens; Anna Ochoa O'Leary; Cordelia Chavez Candelaria Beveridge; Magdalena Schwartz; Jose David Sandoval; Jane C.H.P Doe, Jane E.C-J Doe; Jane E.O. Doe ,

Plaintiffs,

v.

State of Arizona; Janice Brewer, Governor of Arizona,

Defendants.

No. 10-CV-1453-PHX-SRB

DEFENDANTS JANICE K. BREWER AND THE STATE OF ARIZONA'S MOTION TO DISMISS

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Janice K. Brewer ("Governor Brewer") and the State of Arizona (the "State") move to dismiss plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(1) because plaintiffs lack standing to pursue these claims and under Fed. R. Civ. P. 12(b)(6) because the Complaint fails to state a claim upon which relief may be granted. Plaintiffs seek to enjoin enforcement of certain sections of the "Support Our Law Enforcement and Safe Neighborhoods Act," as amended ("SB 1070" or the "Act") on the grounds that Sections 1-6 allegedly are preempted by federal law, that Section 5 allegedly violates the Commerce Clause, and that Sections 1-6 violate the due process and equal protection clauses of the Fourteenth Amendment. But Plaintiffs' challenges to SB 1070 are based either on unsupported speculation about their potential injuries under the Act or a misreading of the applicable law. Further, the State is immune from prosecution under the Eleventh Amendment. Accordingly, the Complaint should be dismissed. This motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

On April 23, 2010, Governor Brewer signed SB 1070 into law to ensure "the cooperative enforcement of federal immigration laws" encouraged by Congress. *See* SB 1070, § 1; Compl. ¶ 42. On April 30, 2010, Governor Brewer signed HB 2162, which amended SB 1070 in various respects. Compl. ¶ 43.

The plaintiffs in this action purport to represent a class of plaintiffs affected by SB 1070. Compl. ¶¶ 24-27. The named plaintiffs are an organization (League of United Latin American Citizens, or "LULAC") and seven individuals. LULAC alleges that it is "the largest and oldest Hispanic organization in the United States" whose "primary goals include the promotion and protection of the legal, political, social, and cultural interests of Latino people living in the United States." Compl. ¶ 13. Two of the individuals are "state and local taxpayer[s]" who believe that the State of Arizona is making an "illegal expenditure of funds" relating to SB 1070. Compl. ¶¶ 14-15. The remaining five individuals are foreign nationals residing in Arizona who are involved in immigration

proceedings, have applied for a visa, or are eligible to apply for a visa. Compl. ¶¶ 16-20.

Before this Complaint was filed on July 9, 2010, other plaintiffs had initiated six other actions in this Court that also challenged SB 1070. Among the other related cases is *United States v. Arizona*, Case No. CV10-01413-PHX-SRB, which was filed shortly before this action. Compl. ¶ 7. On July 22, 2010, this Court conducted a hearing in that case. On July 28, 2010, this Court issued an order that granted in part and denied in part the motion for preliminary injunction filed by the plaintiff in *United States v. Arizona*.

SB 1070 has 14 sections. In this action, plaintiffs challenge only Sections 1-6. *See* Compl. ¶¶ 55-63. These sections are summarized as follows.

A. Section 1

In Section 1 of SB 1070, the Arizona Legislature "finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona," and declares that "the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona."

B. Section 2 (A.R.S. § 11-1051)

Plaintiffs purport to challenge all of Section 2, but address only subsections A and B in their Complaint. *See* Compl. ¶¶ 44, 45, 47. Subsection B provides, in part, that when officers make a "lawful, detention or arrest," they shall make a "reasonable attempt" to determine a person's immigration status only if: (1) reasonable suspicion exists that the person is an alien *and* is unlawfully present in the country; (2) it is practicable for the officer to conduct the inquiry; and (3) the inquiry would not hinder or obstruct an investigation. *See* A.R.S. § 11-1051(B). A.R.S. § 11-1051(A) provides that state and local governments may not "limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law."

C. Section 3 (A.R.S. § 13-1509)

A.R.S. § 13-1509 reinforces and mirrors federal law: "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 [U.S.C. §§] 1304(e) or 1306(a)."

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A.R.S. § 13-1509(A). A.R.S. § 13-1509 also imposes the same misdemeanor penalties as federal law for violations of 8 U.S.C. § 1304(e). A.R.S. § 13-1509(A), (H). Section 3 "does not apply to a person who maintains authorization from the federal government to remain in the United States." A.R.S. § 13-1509(F).

D. Section 4 (A.R.S. § 13-2319(E))

Section 4 of SB 1070 modifies A.R.S. § 13-2319, a statute enacted in 2005 that makes it "unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose." Section 4 merely adds a single subsection to the statute to codify officers' existing authority to stop any person operating a motor vehicle "if the officer has reasonable suspicion to believe the person is in violation of any civil traffic law."

E. Section 5 (A.R.S. § 13-2928)

Plaintiffs focus only on a portion of Section 5 that adds A.R.S. § 13-2928. Compl. ¶ 52. A.R.S. § 13-2928 provides, in relevant part, that it is unlawful for "a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." A.R.S. § 13-2928(C).

F. Section 6 (A.R.S. § 13-3883(A)(5))

Section 6 of SB 1070 adds to the authority Arizona peace officers have under A.R.S. § 13-3883(A) to arrest a person without a warrant by authorizing such arrests when "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. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIMS

"[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). The inquiry "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *City of S. Lake Tahoe v. Cal.*

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Tahoe Reg'l Planning Agency, 625 F.2d 231, 234 (9th Cir. 1980) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Here, plaintiffs have failed to demonstrate that they have standing under either the constitutional or prudential limitations.[1]

A. Plaintiffs Have Failed to Allege Any Injury-in-Fact

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). Where, as here, official conduct provides the basis for the plaintiffs' alleged injuries, the plaintiffs 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.

1. Taxpayer Standing

Two plaintiffs, Anna Ochoa O'Leary and Cordelia Chavez Candelaria Beveridge, allege no injury except for the facts that they are "state and local taxpayer[s]" and they seek to challenge the "illegal expenditure of funds" relating to SB 1070. Compl. ¶¶ 14, 15. It is well-established that "individuals do not generally have standing to challenge governmental spending solely because they are taxpayers." *Winn v. Arizona Christian School Tuition Org.*, 562 F.3d 1002, 1008 (9th Cir. 2009) (citing *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007)). This rule applies both to suits challenging allegedly "unconstitutional state action" as well as federal action. *Id.* (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-49 (2006)). The sole exception to this general rule are suits in which a plaintiff contends that "a use of funds violates the

[1] The fact that plaintiffs purport to represent a class of similarly situated plaintiffs does not change the standing analysis. As the Ninth Circuit has explained, "standing is the threshold issue in any suit. If the individual plaintiff lacks standing, the court need never reach the class action issue." *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) (quoting 3 Herbert B. Newberg on Class Actions § 3:19, at 400(4th ed. 2002)).

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Establishment Clause" of the First Amendment. *Id.* (citing *Flast v. Cohen*, 392 U.S. 83, 88 (1968)). As the Supreme Court has made clear, "[w]e have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause." *Hein*, 551 U.S. at 609 (internal citations omitted).

Because plaintiffs do not assert any claim based on the Establishment Clause (or any First Amendment claim at all), their status as state and local taxpayers is insufficient to provide them with standing.

2. Individuals Who Face Threats of Prosecution

Plaintiffs also include five individuals who assert that they face "interrogation, detention, arrest, or prosecution under SB 1070." Compl. ¶¶ 16-20. In addition, plaintiff organization LULAC asserts a claim on behalf of its "Hispanic members," who allegedly face "interrogation, temporary detention, or arrest" under SB 1070. Compl. ¶ 13. But none of these individuals have alleged facts showing that they face any meaningful risk of being interrogated, detained or arrested.

When a plaintiff attempts to demonstrate standing by demonstrating a threat of criminal prosecution, he or she must show "a *genuine* threat of *imminent* prosecution." *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (internal quotes omitted, emphases in original). In determining whether such a threat exists, courts review the following factors: (1) whether the plaintiff "articulated concrete plans to violate" the statute in question; (2) whether the government has issued a "specific warning" or threat of its intent to prosecute the plaintiff under the statute; and (3) whether the plaintiff has been prosecuted under the statute in the past. *Id.* at 1126-29 "[P]ersons having no fears of state prosecution except those that are ***imaginary or speculative***, are not to be accepted as appropriate plaintiffs." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (internal citation omitted).

In this case, none of the five individuals or the Hispanic members of LULAC alleges facts showing that they face a genuine threat of imminent prosecution. As alleged, each of the five individuals is in a transitional immigration status but lack

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"documentary evidence" confirming their immigration status. Compl. ¶¶ 16-20. Two of the plaintiffs are involved in ongoing immigration proceedings (¶¶ 16-17), and three of the plaintiffs have either applied for, or are eligible to apply for, a "U visa." (¶¶ 18-19). None of the plaintiffs, however, allege that they face a genuine risk of imminent prosecution. For any of them to be subject to interrogation under Section 2, the following events must occur: (1) they must be the subject of a "lawful stop, detention or arrest" regarding another violation or offense; (2) there must be a "reasonable suspicion" that the person is an alien *and* unlawfully present in the United States; and (3) it is practicable to make that determination and it would not hinder or obstruct an investigation. A.R.S. § 11-1051(B).[2] Yet plaintiffs provide no facts showing that *any* of these events is likely to occur, much less all of them. Plaintiffs do not explain why they are more likely than any other person to be stopped, detained or arrested for another violation or offense, and they do not explain why they face a risk of imminent prosecution. As the Ninth Circuit has emphasized, "a general threat of prosecution is not enough to confer standing." *Id.* (citing *Poe v. Ullman*, 376 U.S. 497, 501 (1961)).

Likewise, the unspecified members of LULAC have not demonstrated that they face any risk of prosecution, let alone a genuine risk of imminent prosecution. Plaintiffs allege that they face interrogation, detention, or arrest as "Hispanic members of LULAC" due to "vague and ill-defined terms" in SB 1070 and Arizona's training materials, but plaintiffs fail to include any facts showing why LULAC members face any threats of prosecution that are meaningfully different from any other person. Compl. ¶ 13. These allegations fall well short of establishing any particularized or concrete injury.

3. Organizational Plaintiff

LULAC also argues that it has standing to challenge SB 1070 that is independent from the standing of its members. According to plaintiffs, "SB 1070 has also reasonably caused Plaintiff LULAC to divert its limited resources to address the injuries faced by

[2] These plaintiffs each allege that their "presence is authorized by federal law." Compl. ¶¶ 16-20. Accordingly, they would not be subject to Section 3, which specifically "does not apply to a person who maintains authorization from the federal government to remain in the United States." A.R.S. § 13-1509(F).

Hispanic residents of Arizona as a result of the imminent implementation of SB 1070." Compl. ¶ 13.

The Supreme Court has held that organizations have standing in cases where organizations devote "significant resources" to the extent that their mission is "perceptibly impaired." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Here, however, LULAC does not point to any particular resources that would be diverted and does not identify any specific manner in which its mission would be impaired by enforcement of the statute. In *Havens*, for instance, the plaintiffs pointed to *actual* acts of discrimination as a basis for their injuries, not unspecified injuries supposedly caused by a law not yet in effect. This speculation does not grant standing to LULAC.

B. 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.'" *South Lake Tahoe*, 625 F.2d at 234 (quoting *Warth*, 422 U.S at 499). Without a specific injury, plaintiffs are essentially expressing a "generalized grievance" that is more appropriately addressed in the "representative branches." *Id.* (quoting *Warth*, 422 U.S. at 499-500).

III. THE STATE OF ARIZONA IS IMMUNE FROM PROSECUTION

Plaintiffs' claims against the State also are barred by the Eleventh Amendment. The Eleventh Amendment precludes the judicial power of the United States from extending "to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. It is well settled that the Eleventh Amendment bars suits in federal court against states brought by citizens. "While the Amendment by its terms does not bar suits against a State by its own citizens, [the Supreme] Court has consistently held that an unconsenting State is immune from suits brought in federal

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courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (citations omitted). The State has not consented to being sued in federal court by undocumented aliens, permanent residents, or even its own citizens with regard to SB 1070. Accordingly, the State should be dismissed as a party.

IV. PLAINTIFFS HAVE FAILED TO STATE A CLAIM

"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 (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 facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *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." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

A. SB 1070 Is Not Preempted by Federal Law

In their Complaint, plaintiffs assert two separate legal claims based on their argument that SB 1070 conflicts with federal law. For their first claim for relief, plaintiffs assert that Sections 1-6 of SB 1070 violate the Supremacy Clause. Compl. ¶¶ 55-57. For their second claim for relief, plaintiffs assert that Sections 1-6 are preempted by federal law and foreign policy. Compl. ¶¶ 58-59. But no matter how their claims are labeled, plaintiffs fail to demonstrate that SB 1070 is preempted by federal law.

In determining whether a state law is preempted, "the purpose of Congress is the ultimate touchstone." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (citation omitted); *see also Nw. Central Pipeline Corp.*, 489 U.S. at 509 (the court's task is to "examine congressional intent"). Further, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally

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occupied,' . . . [a court must] 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (citation omitted).

"Federal preemption can be either express or implied." *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009), *cert. granted by* 130 S. Ct. 3498 (2010); *Altria Group*, 129 S. Ct. at 543. Plaintiffs have not argued that any provision of federal law expressly preempts SB 1070. To establish their claim for implied preemption, plaintiffs must show that the challenged provisions of SB 1070: (1) purport to regulate immigration, an exclusively federal power; (2) legislate in a federally occupied field; or (3) conflict with federal law. *See De Canas v. Bica*, 424 U.S. 351, 355-63 (1976).

1. Supremacy Clause Claim

Plaintiffs contend in their first claim for relief that SB 1070 is "an impermissible attempt by state actors to regulate immigration" that conflicts with federal law, federal policies and priorities, and foreign policy. Compl. ¶ 56. Plaintiffs allege that Sections 1-6 of the Act are invalid under Article I, Section 8, Clause 4 of the U.S. Constitution (which establishes a uniform rule of naturalization) and Article I, Section 8, Clause 3 (which establishes the federal power to regulate commerce with foreign nations).

The applicable legal standard is set forth in *De Canas*, where the Supreme Court 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." 424 U.S. at 355. 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.* Here, no part of SB 1070 addresses the admission, authorization or deportation of aliens from the United States. Plaintiffs do not cite to any provision of SB 1070 that purports to regulate immigration in this manner. Instead, ignoring the governing legal principles in *De Canas*, they assert only that

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"federal courts have long held that immigration regulation, policies, and enforcement priorities have direct and indirect impact on the nation's foreign policy and should be exercised by federal not local authorities." Compl. ¶ 30. In fact, *De Canas* provides the controlling authority and plaintiffs do not cite to any contrary authority.

Rather than focus on the governing case law, plaintiffs instead choose to cite to the complaint filed by the U.S. Department of Justice in this Court as evidence of what the "United States Government" supposedly "holds" as a matter of law. *See, e.g.*, Compl. ¶ 44. But litigation positions taken by the Department of Justice are not legal authority. As the Supreme Court has made clear, "the purpose of Congress is the ultimate touchstone" for preemption purposes, not political positions taken by the Executive Branch. *See Altria Group*, 129 S. Ct. at 543. As the Supreme Court held in rejecting the Department of Defense's ("DoD") preemption challenge to a North Dakota law: "It is Congress—not the DoD—that has the power to pre-empt otherwise valid state laws . . ." *North Dakota v. United States*, 495 U.S. 423, 442 (1990). Instead, because SB 1070 "is premised on enforcement of federal standards as embodied in federal immigration law" and does not create new requirements for lawfully present aliens, it does not intrude upon the federal government's regulation of immigration. *See Chicanos Por La Causa*, 558 F.3d at 866.

2. Federal preemption

Plaintiffs also contend, in their second claim for relief, that Sections 1-6 of SB 1070 are "preempted by federal law, including 8 U.S.C. § 1101, et seq., and by U.S. foreign policy." Compl. ¶ 59. Each of these sections is considered in turn. *See Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 886 (9th Cir. 2008) ("[W]hen the constitutionality of a state statute is challenged, principles of state law guide the severability analysis and [courts] should strike down only those provisions which are inseparable from the invalid provisions.") (internal citation omitted).

a. Section 1

Section 1 of SB 1070 contains a finding by the Arizona Legislature that "there is a compelling interest in the cooperative enforcement of federal immigration laws

throughout all of Arizona" and a statement that "the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona." Section 1, by itself, does not require anyone to do anything or make any conduct unlawful. Plaintiffs offer no specific arguments against Section 1. There is no basis to assert that Section 1 is preempted.

b. Section 2

Among other things, Section 2 provides that, in the context of a "lawful stop, detention or arrest" made by a law enforcement officer, a "reasonable attempt shall be made, when practicable," to determine the immigration status of a person if there is "reasonable suspicion" that the person is unlawfully present in this country. A.R.S. § 11-1051(B); Compl. ¶ 45. Plaintiffs offer no specific argument in the Complaint explaining why Section 2 should be preempted. Instead, plaintiffs allege only that the law is "unclear" and that the training materials are "vague and imprecise." Compl. ¶ 45. This argument implicates due process rather than preemption and will be discussed below.

c. Section 3

Section 3 (A.R.S. § 13-1509) incorporates the federal penalties for violations of federal statutes that require certain aliens to register with the federal government. *See* 8 U.S.C. §§ 1304(e), 1306. Notably, Section 3 does not impose any new registration requirements, it simply imposes penalties under state law that already exist under federal law. Plaintiffs contend that Section 3 is preempted by "the comprehensive federal immigration registration laws" that provide "a federal scheme for alien registration in a single integrated and all-embracing system." Compl. ¶ 50.

This allegation appears to refer to the Supreme Court's decision in *Hines v. Davidowitz*, in which the Supreme Court invalidated a Pennsylvania statute that imposed state-specific alien registration requirements *in addition to* the registration requirements Congress imposed. 312 U.S. 52, 67, 74 (1941). The *Hines* Court did not establish a *per se* bar on state laws touching upon alien registration. Rather, the Court held that "where the federal government, in the exercise of its superior authority in [the field of

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immigration], has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, ***inconsistently with the purpose of Congress***, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." 312 U.S. at 66-67 (emphasis added). The purpose of the federal law was "to protect the personal liberties of ***law-abiding aliens*** through one uniform national registration system." *Id.* at 74 (emphasis added).

By contrast, Section 3 of SB 1070 does not implicate any of the concerns that led the *Hines* Court to invalidate Pennsylvania's alien registration statute. Section 3 does not apply to law-abiding aliens or any alien that has authorization from the federal government to remain in the country. *See* A.R.S. § 13-1509(F); *see also De Canas*, 424 U.S. at 363 (noting that the statute preempted in *Hines* "imposed burdens on aliens lawfully within the country that created conflicts with various federal laws"). Indeed, the Supreme Court has rejected the argument that a state-law cause of action that was narrower than federal law was preempted because it was "different from" the federal requirement. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). In *Medtronic*, the Court held that "[w]hile such a narrower requirement might be 'different from' the federal rules in a literal sense, such a difference would surely provide a strange reason for finding pre-emption of a state rule insofar as it duplicates the federal rule." *Id.* at 495; *see also Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 502-03 & n.10 (9th Cir. 2005) (California statute requiring companies to abide by federal requirements not preempted because it "merely provides appliance manufacturers another reason to comply with existing requirements under federal law").

d. Section 4

Plaintiffs have not alleged any basis on which the Court could find that Section 4 is preempted. Section 4 made only a minor amendment to A.R.S. § 13-2319, which the Legislature enacted in 2004. Plaintiffs, however, challenge Section 4 based on the argument that federal law preempts *other* provisions of A.R.S. § 13-2319 that were in effect before SB 1070 was enacted. Because plaintiff focuses on the preexisting

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"smuggling prohibition" portion of A.R.S. § 13-2319 (*see* Compl. ¶ 51) rather than the new portion added by Section 4, plaintiffs do not provide a basis to invalidate Section 4.

Even if plaintiffs had properly alleged a preemption challenge to the entire statute, it would not succeed. Plaintiffs assert that A.R.S. § 13-2319 is preempted by federal law, and specifically 8 U.S.C. § 1324, because "[t]here are material differences between the federal and Arizona smuggling [law]." Compl. ¶ 51. However, "[a] mere difference between state and federal law is not conflict." *Ariz. Contractors Ass'n v. Napolitano*, No. CV07-1355-PHX-NVW, 2007 U.S. Dist. LEXIS 96194, at *25 (D. Ariz. Dec. 21, 2007). The fact that Arizona's statute is broader than federal law neither impedes the federal government's ability to prosecute persons for smuggling under 8 U.S.C. § 1324 nor makes it impossible for a person to comply with both laws.

Plaintiffs also argue that Section 4 is not limited to transportation in furtherance of unlawful immigration, but that it instead "prohibits the knowing provision of any commercial transportation services to an alien unlawfully present in the United States." Compl. ¶ 51. This argument misconstrues the requirements for a conviction under A.R.S. § 13-2319. The statute requires both: (1) intent to smuggle for a commercial purpose *and* (2) knowledge that the person is unlawfully present in the country. *See State v. Barragan-Sierra*, 219 Ariz. 276, 283, 196 P.3d 879, 886 (App. 2008).

e. Section 5

Plaintiffs also assert that the "prohibition on unauthorized immigrants seeking or performing work" in Section 5 (A.R.S. § 13-2928) is preempted by "the federal scheme of sanctions related to the employment of unauthorized aliens – 8 U.S.C. §§ 1324a – 1324c." Compl. ¶ 52. Plaintiffs contend that Section 5 conflicts with the decision by Congress "not to criminalize such conduct for humanitarian and other reasons." *Id.* Plaintiffs do not challenge any other portion of Section 5, such as A.R.S. § 13-2929.

However, federal statute contains an express preemption provision in which Congress could have, but chose not to, expressly preempt state and local laws that impose sanctions on employees. *See* 8 U.S.C. § 1324a(h)(2); *Wyeth*, 129 S. Ct. at 1196 ("[W]hen

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Congress enacted an express pre-emption provision for medical devices in 1976 . . . it declined to enact such a provision for prescription drugs."). By enacting a *limited* express preemption provision, Congress did not attempt to occupy the legislative field. *See, e.g.*, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (when express preemption provision "provides a reliable indicium of congressional intent with respect to state authority . . . there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation"). Preemption cannot be lightly inferred in this instance because "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *De Canas*, 424 U.S. at 356. In addition, there is no actual conflict between Section 5(c) and any provision of federal law. Thus, A.R.S. § 13-2928 is well within Arizona's police powers and is not preempted by federal law.

f. Section 6

Section 6 amends A.R.S. § 13-3883 to authorize the warrantless arrest of aliens who are removable. Plaintiffs argue that Section 6 makes no exception for "aliens whose removability has already been resolved by the federal government," which would result in the arrest of aliens based on out-of-state crimes, which would in turn "interfere[] with the federal government's enforcement prerogatives" and "conflict[] with the purposes and practices of the federal immigration laws." Compl. ¶ 53.

Plaintiffs have not alleged that A.R.S. § 13-3883(A)(5), which authorizes warrantless arrests of aliens who are removable, is preempted in *all* of its applications. The hypothetical conflicts identified by plaintiffs are insufficient to sustain a facial challenge. *See Salerno*, 481 U.S. at 745; *Wash. State Grange*, 552 U.S. at 450. Further, nothing in SB 1070 or any other provision of state or federal law authorizes Arizona's law enforcement officers to make determinations regarding a person's removability. Under A.R.S. § 11-1051, Arizona's law enforcement officers will regularly communicate with federal authorities and their authorized agents regarding whether an alien has been found removable or has committed an offense that would make the alien removable.

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Because there are plainly circumstances in which A.R.S. § 13-3883(A)(5) can be applied consistent with federal law, the statute is not invalid on its face.

B. SB 1070 Does Not Violate the Commerce Clause

For their third claim for relief, plaintiffs assert that the portion of Section 5 that adds A.R.S. § 13-2929 violates the Commerce Clause because it "restricts the interstate movement of immigrants." Compl. ¶ 61. Plaintiffs do not claim that any other provision of SB 1070 violates the Commerce Clause.[3] By its terms, however, A.R.S. § 13-2929 does not address whether aliens can or cannot come to the State, nor does it regulate their entry in any way. A.R.S. § 13-2929 simply provides that individuals, ***who are in violation of a criminal offense***, cannot also transport, move, conceal, harbor or shield *illegal* aliens within the state *in furtherance of their unlawful presence*, nor can they encourage an *illegal* alien to *illegally* enter or reside in the State.

"To make out a claim that [a] regulation impermissibly burdens the commerce clause, [plaintiff] must sufficiently plead that the local law discriminates against interstate commerce either on its face, or in its effect." *Hertz Corp. v. City of New York*, 1 F.3d 121, 131 (2d Cir. 1993) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). Plaintiffs do not explain how A.R.S. § 13-2929 supposedly discriminates against interstate commerce. Plaintiffs allege only that A.R.S. § 13-2929 "restricts the interstate movement of aliens in a manner that is prohibited by [the Commerce Clause]." Compl. ¶ 61. This conclusory allegation does not meet plaintiffs' burden.

C. Due Process and Equal Protection

Finally, plaintiffs assert in their fourth claim for relief that Section 1-6 deny plaintiffs due process of law and equal protection of the laws under the Fourteenth Amendment by: (1) failing to provide fair warning of the acts punished by the law or to define when a person has committed a "public offense"; (2) permitting improper

[3] Plaintiffs do not allege that the Act violates *intra*state movement. Since A.R.S. § 13-2929(A)(1) and (2) relate exclusively to movement within the state, plaintiff is seemingly challenging only A.R.S. § 13-2929(A)(3), which relates to "encourag[ing] or induc[ing] an alien to come to or reside in this state" in violation of law. This subsection does not distinguish between in-state and out-of-state illegal aliens, as a person could conceivably encourage or induce an illegal alien, who is in-state *or* out-of-state, to reside in Arizona.

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detentions and arrests based on "vague and ill-defined facts" or for "purported immigration law violations" not punished by the federal government; and (3) failing to establish procedures for the release of persons whose lawful presence is not confirmed by the federal government. Compl. ¶ 63.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Unless the state action involves a suspect classification or fundamental right, "it will survive constitutional scrutiny for an equal protection violation as long as it bears a rational relation to a legitimate state interest." *Patel v. Penman*, 103 F.3d 868, 875 (9th Cir. 1996) (citing *New Orleans v. Duke*, 427 U.S. 297, 303-04 (1976)).

1. SB 1070 incorporates the requisite procedural protections

Plaintiffs' allegation that Section 2 of SB 1070 fails to provide the appropriate procedures ignores the fact that Section 2, is only triggered when there is: (1) a *lawful* "stop, detention or arrest" by a law enforcement official or agency of the state *and* (2) reasonable suspicion exists "that the person is an alien *and* is unlawfully present in the United States." (emphasis added). SB 1070 does not purport to give the state law enforcement official or agency authority to determine the person's immigration status, and it does not alter the procedural requirements that the federal government has already put into place to regulate immigration and to determine the lawful or unlawful status of aliens. Rather, the Act expressly provides that the immigration status is to be determined by the federal government, pursuant to 8 U.S.C. § 1373(c). *See* A.R.S § 11-1051(B).

2. SB 1070 is sufficiently clear and definite

A law is unconstitutionally vague only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010) (quoting *United States v. Williams*, 533 U.S. 285, 304 (2008)). The terms challenged by plaintiffs unquestionably meet this test. The language of SB 1070 matches the terminology of federal law, which refers to an "alien not lawfully present in the United States" or an "alien unlawfully present in the United States." *See*,

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e.g., 8 U.S.C. § 1229a(c)(2) (stating that, in a deportation proceeding, the alien has the burden of establishing that he or she "is lawfully present in the United States"). Likewise, the term "public offense" in A.R.S. § 13-3883(A)(5) when read in conjunction with the clause that immediately follows it, provides sufficient clarity as to its meaning. The term "reasonable suspicion" also is well-established and requires that specific, articulable facts exist "which, together with objective and reasonable inferences, form a basis for suspecting that" the person stopped, detained, or arrested is an alien *and* unlawfully present in the United States. *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989).

3. SB 1070 Establishes Appropriate Procedures

Plaintiffs also contend that it somehow violates due process and equal protection to permit the detention or arrest of persons "whose presence is known to the federal government which has not required their registration or detention." Compl. ¶ 63(d). But plaintiffs do not identify any legal principle that effectively immunizes a person from being charged with a state crime if they are not also charged with a federal crime. To the contrary, it is well-settled that states can punish conduct that is also the subject of federal law. In addition, plaintiffs assert that it also violates due process or equal protection because SB 1070 does not specifically address the situation arising when the federal government is either "unable or unwilling to verify" a person's immigration status. Compl. ¶ 63(d). On this facial challenge, it is proper for the Court to construe the law as containing an implicit "reasonable time" limitation on the duration of time a person may be detained pending an investigation into his or her immigration status. *See* A.R.S. § 11-1051(L); *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (construing a statute that authorized detention of aliens without any temporal limitation to contain an implicit "reasonable time" limitation so as to avoid "serious constitutional concerns").

V. CONCLUSION

For the reasons set forth, Governor Brewer and the State of Arizona respectfully request that plaintiffs' Complaint be dismissed.

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DATED this 13th day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2010, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants on record.

s/ John J. Bouma

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