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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Friendly House, et al., Plaintiff, v. Michael B. Whiting, et al., Defendants.	NO. CV 10-1061-PHX-MEA **DEFENDANT SHERIFF JOSEPH M. ARPAIO'S MOTION TO DISMISS**

Defendant Sheriff Arpaio hereby moves to dismiss the "Complaint for Declaratory and Injunctive Relief (Class Action)" filed herein, as follows:

The "Complaint for Declaratory and Injunctive Relief" should be dismissed in its entirety pursuant to Rule 12(b) (1) and (6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted and because Plaintiffs do not have standing to assert these claims. The Plaintiffs have not alleged the real and immediate threat of harm from enforcement of SB 1070 that is required for a justiciable

case or controversy. Plaintiffs merely speculate in the abstract about potential future harm. As a matter of law, Plaintiffs have failed to establish a cognizable case or controversy.

Plaintiffs have failed to state a claim upon which relief can be granted. They summarily conclude that SB 1070 attempts to supersede federal law and that it violates the Equal Protection Clause; the First Amendment; the Fourth Amendment; Article II, Section 8 of the Arizona Constitution; the Civil Rights' Act, 42 U.S.C. §§1983 and 1981; the Due Process Clause of the Fourteenth Amendment; the Privileges and Immunities Clause of the U.S. Constitution, Art IV, §2, cl.1; and the right to travel. However, these allegations reflect a fundamental misunderstanding of SB 1070's provisions and of established law. SB 1070 does not conflict with federal law.

The constitutional challenges based upon 42 U.S.C.§1983 civil rights violations fail because they are premised solely upon the conduct of unidentified third parties and not upon any provisions in SB 1070.

For these reasons, the Sheriff of Maricopa County, Joseph Arpaio, requests that this Court dismiss Plaintiffs' Complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

1. THERE IS NO JUSTICIABLE CASE OR CONTROVERSY AND NO STANDING.

Plaintiffs have failed to allege facts in their 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' Complaint cites to news reports and alleges

conclusions based on hearsay summarily. This is insufficient to meet pleading standards under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 9292 (2007); *Ashcroft v. Iqbal*, ---U.S.---, 129 S. Ct.1937, 173 L.Ed.2d 868 (2009).

A declaratory judgment or injunction can issue only when the constitutional standing requirements of a case or controversy are met. *Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974 (4th Cir. 1992). In order to be judiciable and to have standing, Plaintiffs must have alleged such a personal stake in the outcome of the controversy as to warrant federal court jurisdiction and to justify exercise of the court's powers on their behalf. *Warth v. Seldin*, 422 U. S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). A party has standing to maintain a declaratory judgment action where an actual controversy is created and there are cognizable interests. The constitutional requirement of personal stake has two prongs: (1) the litigant must show that he has suffered an actual or threatened injury, an injury in fact; and (2) the litigant must demonstrate that the defendant's conduct caused the injury and that granting the relief requested likely would redress the injury. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). A personal stake in the outcome of the controversy assures that concrete adverseness which sharpens the presentation of issues upon which the court depends. *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)

Only those to whom the statute applies and who are adversely affected can question a statute's constitutional validity in declaratory judgment proceedings. *See Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters*

and Joiners of America v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945); *Ward v. Utah*, 321 F.3d 1263 (10th Cir. 2003); *Nova Health Systems v. Gandy*, 416 F.3d 1149 (10th Cir. 2005) (Deterrent effect that declaratory relief against Oklahoma public officials responsible for overseeing state medical institutions would have on others seeking to sue abortion providers in reliance on Oklahoma statute making providers that perform abortions on minors without parental consent liable for post-abortion medical costs did not satisfy requirement for Article III standing in provider's action challenging statute's constitutionality.)

SB 1070 does not come into play until after there has been a lawful stop; the statute provides that first, there must be reasonable suspicion the person questioned is engaged in illegal activity of some sort. A.R.S. §11-1051(B). Yet Plaintiffs are, for the most part, racially-based or civil rights organizations, not associated by the common experience of illegal activity or lawful stops by police agencies, and would more properly be *amicus curiae* in this constitutional challenge than plaintiffs or real parties in interest. There is an underlying presumption in the Complaint that the members of certain racial and ethnic groups will be disproportionately impacted, but there is no sufficient factual basis alleged for this presumption.

Representational standing is allowed in declaratory judgment suits only where the association shows that its members have or will suffer immediate or threatened injury as a result of the challenged action; that the members could bring the same suit individually; and that the nature of the claim and relief requested do not require the individual participation of the injured parties for a proper resolution. *Warth, supra.*

Here, the members of the Plaintiff organizations are not the people potentially injured by SB 1070 since there is no showing that they would be any more likely than any other group to be engaged in an unlawful activity or to be the subject of an inquiry by a police agency under SB 1070.

2. THE CLAIMS ARE NOT RIPE FOR ADJUDICATION.

Plaintiffs have brought all seven counts of their Complaint under the Civil Rights' Act, 42 U.S.C. §1983. Section 1983 and the long line of case law construing this section require there to be a state actor who deprived a person of his civil rights. The civil rights must have been guaranteed to him by the U.S. Constitution or its Amendments:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
> (*emphasis added*)

Here, no state actor has deprived a person of rights. No state actor has violated a declaratory decree. The Complaint is based entirely on projecting into the future and the possibility that future civil rights' deprivations might occur. Since civil rights' deprivation under color of state law have not occurred, and are not alleged to have occurred, there is a ripeness issue and this Complaint to the extent it purports to be based

on the Civil Rights' Act, 42 U.S.C.§1983, fails to state a claim upon which relief can be granted. This case is not yet ripe for adjudication. In the hysteria surrounding the passage of SB 1070, the plaintiffs have put the cart before the horse.

The Court should decline to rule on the merits of the allegation that SB 1070 is unconstitutional until such time as there is an actual case or controversy. *See United Public Workers v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556, 91 L.Ed.754 (1947) (where the Supreme Court found the issues challenging the Hatch Act to be not ripe for adjudication for all plaintiffs except for the one and only plaintiff who had actually violated the provision and the rules under it.)

"A hypothetical threat is not enough." *Mitchell, supra*, 330 U.S.at 90. The Court would have to speculate as to the kinds of activity the defendants here would engage in that would result in violations. *Id* 330 U.S. at 89-91, 67 S.Ct. at 564-65. The Court needs to know the actual practices of enforcement, the "bare text" of an unenforced statute does not show how it will be enforced. Scharph, "Judicial Review and the Political Question: A Functional Analysis", 75 Yale L. J. 517, 531-532 (1966) citing *Public Workers v. Mitchell*, 330 U. S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947), and *Adler v. Board of Education*, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed.517 (1952).

Until the controversy becomes focused rather than abstract, the Court cannot weigh the positions of each party. Prior to addressing these issues, the Court must know the details of the actual police practices employed in the enforcement of SB 1070 by each law enforcement agency in Arizona.

The balance of equities weighs heavily in favor of permitting the people of

Arizona, through their elected representatives in the legislative and executive branch to enact and live under their own laws. The Court, after receiving evidence on the actual enforcement of the law should, to the extent possible, find a way to interpret the statute in a way that minimizes the constitutional issue. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S.Ct.1384, 1389, 89 L.Ed.1725 (1945). An actual record may justify a narrow interpretation of its scope. If the Court awaits an actual controversy, some or all of the hypothetical constitutional problems may be eliminated.

Plaintiffs have failed to satisfy the requisite threshold for alleging actual cases or controversies. U.S.C.A.Const.Art.III, §2, cl.1; *See also City of Los Angeles v. Lyons*, 461 U.S.95,101, 103 S.Ct.1660, 1665, 75 L.Ed.2d 675(1983). The federal courts do not have unconditional authority to review the actions of the legislatures of the several states. The power of the federal court is finite, as expressly limited by Article III of the United States Constitution. *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc*, 454 U.S. 464, 471, 102 S.Ct. 752,757-758, 70 L.Ed.2d.700 (1982).

It is premature for the Court to hear these speculative complaints; therefore, the Court should decline to do so.

3. S.B. 1070 DOES NOT PREEMPT FEDERAL LAW.

The Doctrine of Preemption is only relevant when a state law conflicts with federal law**.** State laws that are harmonious with federal immigration law are not preempted. *DeCanas v. Bica,* 424 U.S. 351,358, 96 S.Ct. 933,937-938, 47 L.Ed.2d 43 (1976). SB 1070 is modeled on the existing federal law. The state statute does not

replace federal immigration law, but creates state law which mirrors the federal law, thus enabling state and local law enforcement to assist federal law enforcement. SB 1070 expressly requires Arizona law enforcement officers to implement the new law "in a manner consistent with federal laws regulating immigration . . . ." A.R.S. § 11-1051(L). It is noteworthy that SB 1070 does not purport to authorize state and local law enforcement with the power to deport illegal immigrants.

Application of the preemption should be reserved for use only against state laws that conflict with federal law in areas of express federal jurisdiction. *DeCana, 424 U.S. at* 358; s*ee also, In re Jose C.*, 198 P.3d 1087, 1097 (Cal. 2009), *cert. denied*, 129 S.Ct. 2804, 174 L.Ed.2d 301, 77 USLW 3678 (2009). Arizona has enacted a law modeled on federal immigration law, creating an environment of comity, not conflict.

It is noteworthy that SB 1070 does not purport to authorize state and local law enforcement with the power to deport undocumented aliens. SB 1070 does not conflict with federal law; therefore, there is nothing to preempt. Plaintiff's broad attack on the constitutionality of SB 1070 carries with it a heavy burden of persuasion, which they have failed to meet. "Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion." *Crawford v. Marion County Election Bd.*, 553 U.S. 181,200, 128 S.Ct. 1610, 1621, 170 L.Ed.2d 574 (2008). This heavy burden cannot be met with a blank factual background of enforcement and outside the context of any particular case. *Chicanos Por La Causa, Inc. Napolitano,* 558 F.3d 856, 861 (9th Cir.2009). Plaintiffs come to this Court with speculative arguments, as no

complaints have yet been filed by individuals alleging actual harm caused by enforcement of the Act, leaving this Court with no adequate basis in the record for holding that the enforcement of the law creates a conflict with the federal immigration regime as codified in 8 U.S.C. §§ 1252c(a), 1304(e) and 1357(g). [1]

The Doctrine of Preemption is only relevant when a state law conflicts with federal law. SB 1070 is modeled on the existing federal law. The state statute does not replace federal immigration law, but creates state law which mirrors the federal law, thus enabling state and local law enforcement to meaningfully cooperate with federal law enforcement. Therefore, plaintiffs' claims for declaratory relief based on the application of the Doctrine of preemption should be dismissed.

4. DESIGNATION AS A "CLASS ACTION" IS NOT APPROPRIATE

Designating this action as a "Class Action" is inappropriate. This is an action for declaratory and injunctive relief and is an attack on the constitutionality of the statute known as SB 1070. Class action is inappropriate because if SB 1070 is declared unconstitutional, it will be so for everyone, not just "class members." Conversely, if the law is constitutional, it will be so for everyone. In any event, there is no way to determine a "class" of members who would be affected by SB 1070, *i.e.*, who would be a class member, who would be deterred from soliciting employment, and so on.

[1] Were Plaintiffs sincerely interested in challenging state and municipal statutes and regulations that conflict with federal immigration law, they would challenge the so-called "sanctuary city" resolutions whereby municipalities openly flaunt their disagreement with federal immigration laws which require visitors and immigrants to obtain federal permission to enter the United States and to keep documentation of his or her legal status on his or her person. *See* 8 U.S.C. §§ 1252c(a), 1304(e), and 1357(g). See also San Francisco Admin. Order 12H Secs. 1-6.

5. CONCLUSION

Plaintiffs feign to come before this Court attacking Arizona law to uphold the integrity of federal law, but in reality, it is federal law they oppose. They claim that federal law is "obsolete" and they want it changed in a "comprehensive" manner. Plaintiffs are within their rights to disagree with the federal law, but the proper forum for seeking the comprehensive change they desire is in the U.S. Congress, not the federal court. The Complaint which pretends that the Arizona Law, which is aligned with the federal law, conflicts with federal law is not only disingenuous, but also procedurally flawed. For the foregoing reasons, Sheriff Arpaio respectfully requests that the Court dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief.

RESPECTFULLY SUBMITTED this 18th day of June, 2010.

MARICOPA COUNTY
OFFICE OF SPECIAL LITIGATION SERVICES

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CERTIFICATE OF SERVICE

I hereby certify that on June 18th, 2010, I caused the foregoing document to be electronically transmitted 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:

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