

1 Geoffrey S. Kerksmar (#20528)
Gregory B. Collins (#023158)
KERCSMAR & FELTUS PLLC
2 6263 N. Scottsdale Road, Suite 320
Scottsdale, AZ 85250
3 Tel: (480) 421-1001
gsk@kflawaz.com
4 gbc@kflawaz.com

5 Paul J. Orfanedes
(Motion for admission *pro hac vice* to be filed)
6 James F. Peterson
(Motion for admission *pro hac vice* to be filed)
7 Michael Bekesha
(Motion for admission *pro hac vice* to be filed)
8 JUDICIAL WATCH, INC.
9 425 Third Street, S.W., Suite 800
10 Washington, DC 20024
Tel: (202) 646-5172

11 *Attorneys for Proposed Intervenor/Defendant Russell Pearce*

12
13 **IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

14 The United States of America,

15 Plaintiff,

16 v.

17 The State of Arizona; and Janice K.
18 Brewer, Governor of the State of Arizona,
19 in her Official Capacity,

20 Defendants.
21
22
23
24
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) Case No.: 2:10-cv-01413-SRB
)
)
)

LODGED: MOTION TO DISMISS

1 Geoffrey S. Kercksmar (#20528)
Gregory B. Collins (#023158)
KERCKSMAR & FELTUS PLLC
2 6263 N. Scottsdale Road, Suite 320
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13 **IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

14 The United States of America,) Case No.: 2:10-cv-01413-SRB
15)
16 Plaintiff,)
17 v.) **[PROPOSED] MOTION TO DISMISS**
18 The State of Arizona; and Janice K.)
19 Brewer, Governor of the State of Arizona,)
20 in her Official Capacity,)
Defendants.)

21
22 State Senator Russell Pearce, by counsel, moves to dismiss Plaintiff's Complaint
23 under Fed. R. Civ. P. 12(b)(6) because the Complaint fails to state a claim upon which
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1 relief may be granted.¹ Senator Pearce incorporates by reference (1) the arguments set
2 forth in his Amended Proposed Memorandum in Response to Plaintiff's Motion for
3 Preliminary Injunction, which was lodged with this Court on July 20, 2010; and (2) the
4 arguments in the Motion to Dismiss of Defendants State of Arizona and Governor Janice
5 K. Brewer. Dkt. Entry Nos. 61, 81. As further grounds in support of this motion, Senator
6 Pearce states as follows:

7
8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. Background**

10 On April 23, 2010, Defendant Janice K. Brewer, Governor of the State of Arizona,
11 signed Senate Bill 1070 into law. On April 30, 2010, Governor Brewer signed House
12 Bill 2162, which amended various provisions of Senate Bill 1070. SB 1070 is scheduled
13 to take effect on July 29, 2010.

14
15 Plaintiff, the United States of America, filed its Complaint on July 6, 2010
16 asserting that Sections 1-6 of SB 1070 violate the Supremacy Clause of the United States
17 Constitution, are preempted by federal law, and violate the Commerce Clause of the
18 United States Constitution. Sections 1, 4, and 6 of SB 1070 remain the same. Sections 2,
19 3, and 5 were amended by HB 2162. SB 1070 Section 2 is now HB 2162 Section 3, SB
20 1070 Section 3 is now HB 2162 Section 4, and SB 1070 Section 5 is now HB 2162
21 Section 5.
22

23
24 ¹ In his Motion to Intervene, Senator Pearce pledged to submit a pleading as
25 contemplated under F.R.C.P. 24(c) at the appropriate time. Now that the proper time for
a responsive pleading has arrived, this filing satisfies such requirement.

1 **II. Legal Standard**

2 To survive a motion to dismiss, a complaint must contain sufficient factual matter,
3 accepted as true, to ‘state a claim to relief that is plausible on its face.’ *Mkt. Trading v.*
4 *AT&T Mobility, LLC*, 2010 U.S. App. LEXIS 14905, *5 (9th Cir. July 20, 2010) (*citing*
5 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citation omitted)). “Threadbare recitals
6 of the elements of a cause of action,” such as those in Plaintiff’s complaint, “supported
7 by mere conclusory statements, do not suffice.” *Id.* (citation omitted). Plaintiff has failed
8 to state a claim under which Sections 1-6 are preempted by federal law.
9

10 **III. Argument**

11 **A. Facial challenges are the most difficult challenges to mount.**

12 Plaintiff brings a facial challenge, which is generally disfavored by the courts
13 because such challenges only rest on speculation, run contrary to the fundamental
14 principal of judicial restraint, and threaten to “short circuit” the democratic process.
15 *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449
16 (2008). Significantly, a facial challenge has been described as “the most difficult
17 challenge to mount successfully.” *U.S. v. Salerno*, 481 U.S. 739, 745 (1987).
18

19 The Supreme Court’s disfavor toward facial challenges and its rationale for the
20 heavy burden placed on persons advancing such challenges is manifest. When a
21 legislative enactment is facially attacked, a court is at a disadvantage because it does not
22 know how the law will be applied or construed by an enforcing authority. The law might
23 be applied or construed in such a way as to avoid any constitutional issues. As the
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1 Supreme Court has stated, “It is neither our obligation nor within our traditional
2 institutional role to resolve questions of constitutionality with respect to each potential
3 situation that might develop.” *Gonzalez v. Carhart*, 550 U.S. 124, 168 (2007). Instead of
4 playing a game of hypotheticals, as Plaintiff too often does in its Complaint, courts prefer
5 to wait until the law is construed “in the context of actual disputes.” *Washington State*
6 *Grange*, 552 U.S. at 450. A court “must be careful not to go beyond the statute’s facial
7 requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.” *Salerno*, 481 U.S.
8 at 745. “Exercising judicial restraint in a facial challenge frees the Court not only from
9 unnecessary pronouncement on constitutional issues, but also from premature
10 interpretations of statutes in areas where their constitutional application might be
11 cloudy.” *Id.*

12
13 Because of this strong disfavor toward facial challenges, courts “impose[] a ‘heavy
14 burden’ on the plaintiffs.” *Id.* (“the fact that [a statute] might operate unconstitutionally
15 under some conceivable set of circumstances is insufficient to render it wholly invalid.”).
16 A court cannot find a statute to be facially unconstitutional unless every reasonable
17 interpretation of the statute would be unconstitutional. *Id.*; see also *City Council v.*
18 *Taxpayers for Vincent*, 466 U.S. 789, 796-97 (1984). Conversely, to defeat a facial
19 challenge under the Supremacy Clause, a party need “merely to identify a possible
20 application” of the state law not in conflict with federal law. *Baltimore and Ohio*
21 *Railroad Co. v. Oberly*, 837 F.2d 108, 116 (3d Cir. 1988) (quoting *California Coastal*
22 *Comm’n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987)). In other words, unlike an “as
23
24
25

1 applied” challenge, in which the plaintiff applies specific facts to the challenged statute, a
2 facial challenge must show that “no set of circumstances exists under which the [statute]
3 would be valid.” *Washington State Grange*, 552 U.S. at 449. In other words, the law
4 must be unconstitutional under any set of facts or in all of its applications. *Id.*

5 By filing the Complaint prior to SB 1070’s effective date, Plaintiff asks this Court
6 to do precisely what the Supreme Court has warned against— to make a premature
7 interpretation and an unnecessary pronouncement on the constitutionality of SB 1070.
8 Plaintiff has not and cannot prove that all applications of SB 1070 would cause all
9 provisions of Sections 1-6 to be unconstitutional. For this reason alone, Plaintiff has
10 failed to state a claim upon which relief may be granted.
11

12 **B. SB 1070 is not preempted by Federal Law.**

13 Plaintiff argues that SB 1070 is preempted because it is an unlawful attempt to set
14 immigration policy at the state level and conflicts with federal law. While the framework
15 for preemption analysis is not always precise, *Crosby v. Nat’l Foreign Trade Council*,
16 530 U.S. 363, 373 (2000), Plaintiff nonetheless fails to establish preemption under any
17 plausible framework. On the contrary, SB 1070 falls within the well-recognized
18 authority of the states, does not regulate immigration, and is in no way an obstacle to the
19 enforcement of federal immigration law.
20
21

22 **i. SB 1070 falls within the well-recognized authority of a state.**

23 The law of this Circuit is clear. The Ninth Circuit has squarely held that nothing
24 in federal law precludes a city from enforcing the criminal provisions of immigration law.
25

1 *Gonzalez*, 722 F.2d at 476. Similarly, the Supreme Court has held that “the States do
2 have some authority to act with respect to illegal aliens, at least where such action mirrors
3 federal objectives and furthers a legitimate state goal.” *Plyler v. Doe*, 457 U.S. 202, 225
4 (1982) (citing *De Canas v. Bica*, 424 U.S. 351 (1975)). SB 1070 simply codifies already
5 existing enforcement provisions of federal law. SB 1070 mirrors Congress’ objectives
6 and furthers the legitimate goals set forth by Congress.
7

8 **ii. SB 1070 does not regulate immigration.**

9 Although the federal government has the power to regulate immigration, the mere
10 fact that “aliens are the subject of a state statute does not render it a regulation of
11 immigration.” *De Canas*, 424 U.S. at 352-53. Regulation of immigration is “a
12 determination of who should or should not be admitted into the country, and the
13 conditions under which a legal entrant may remain.” *Id.* at 355; *Toll v. Moreno*, 458 U.S.
14 1, 10 (1982) (“The authority to ‘control immigration’ is the power to ‘admit or exclude
15 aliens.’”). SB 1070 plainly does not impose new restrictions on the manner in which an
16 alien enters the country. Nor does it create any new requirements for such individuals to
17 remain in the country. It certainly does not impose new conditions under which a legal
18 entrant may remain in the country. SB 1070 simply codifies already existing
19 enforcement provisions of federal law.
20
21

22 **iii. SB 1070 is not an obstacle to the enforcement of federal
23 immigration law.**

24 SB 1070 does not conflict with or stand “as an obstacle to the accomplishment and
25 execution of the full purposes and objectives of Congress.” *U.S. v. Locke*, 529 U.S. 89,

1 109 (2000). SB 1070, in fact, “mandates compliance with the federal immigration laws”
2 and therefore cannot “stand[] as an obstacle to [the] accomplishment and execution of
3 congressional objectives.” *In re Jose C.*, 198 P.3d 1087, 1100 (2009). As shown below,
4 applying specific facts to SB 1070 demonstrates that the statute does “not impair federal
5 regulatory interests” and therefore “concurrent enforcement activity is authorized.”
6 *Gonzales*, 722 F.2d at 474.

7
8 **IV. Conclusion**

9 For the foregoing reasons, Senator Pearce respectfully requests that this Court
10 dismiss Plaintiff’s Complaint for failure to state a claim upon which relief may be
11 granted.

1 Dated: July 27, 2010

Respectfully Submitted,

2 KERCSMAR & FELTUS PLLC

3 By: /s/ Geoffrey S. Kerksmar
4 Geoffrey S. Kerksmar (#20528)
5 Gregory B. Collins (#023158)
6 6263 N. Scottsdale Road, Suite 320
7 Scottsdale, AZ 85250
8 Tel: (480) 421-1001

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17 Washington, DC 20024
18 Tel: (202) 646-5172

19 *Attorneys for Proposed Intervenor/Defendant*
20 *Russell Pearce*

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2010, I electronically transmitted the foregoing to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following:

Plaintiff United States of America
Represented by Joshua Wilkenfeld
joshua.i.wilkenfeld@usdoj.gov

Edwin S. Kneedler
Edwin.S.Kneedler@usdoj.gov

Varu Chilakamarri
varudhini.chilakamarri@usdoj.gov

Defendant State of Arizona and Janice K.
Brewer, Governor of the State of Arizona
Represented by John J. Bouma
jbouma@swlaw.com

Joseph G. Adams
jgadams@swlaw.com

Joseph Andrew Kanefield
jkanefield@az.gov

Robert Arthur Henry
bhenry@swlaw.com

Amicus Center on the
Administration of Criminal Law
Represented by Anne Milgram
anne.milgram@nyu.edu

Anthony S. Barkow
anthony.barkow@nyu.edu

Ellen London
elondon@fklaw.com

1 Jessica Alexandra Murzyn
2 jmurzyn@fklaw.com

3 Ricardo Solano, Jr.
4 rsolano@kflaw.com

5 Timothy J. Casey
6 SCHMITT, SCHNECK, SMYTH & HERROD, P.C.
7 Special Assistant Attorney General for Michigan
8 For *Amici Curiae* Michigan, Florida, Alabama,
9 Nebraska, Northern Mariana Islands, Pennsylvania,
10 South Carolina, South Dakota, Texas and Virginia
11 timcasey@azbarristers.com

12 Carolyn B. Lamm (*pro hac vice*)
13 Stephen N. Zack (*pro hac vice*)
14 Sara Elizabeth Dill (*pro hac vice*)
15 Andrew Silverman (*pro hac vice*)
16 American Bar Association
17 clamm@whitecase.com
18 szack@bsflp.com
19 sdill@pkjlaw.com

20 Joseph M. Livermore
21 University of Arizona
22 James E. Rogers
23 College of Law
24 silverman@law.arizona.edu

25 Barnaby W. Zall
American Unity Legal Defense Fund, Inc.
bzall@aol.com

Stephen G. Montoya
stephen@montoyalawgroup.com
april@montoyalawgroup.com

1 Donald M. Peters
2 Kristin Mackin
3 Jeffrey T. Murray
4 Attorneys for Arizona Municipal
5 Risk Retention Pool
dpeters@lasotapeters.com
kmackin@lasotapeters.com
jtmurray@lawms.com

6 D. Q. Mariette Do-Nguyen
7 Kingdom of Heaven
D.Q_Mariette@wdcic.org

8 In addition a COURTESY COPY was mailed this day to:
9 HONORABLE SUSAN R. BOLTON
10 United States District Court
11 Sandra Day O'Connor U.S. Courthouse, Suite 522
12 401 West Washington Street
13 SPC 50
14 Phoenix, Arizona 85003-2153

15 Notice will be sent by other means to those listed below if they are affected by this filing:
16 B. Eric Restuccia
17 Office of the Attorney General
18 P.O. Box 30212
19 Lansing, MI 48909

20 Mark Sands
21 Office of the Attorney General
22 P.O. Box 30212
23 Lansing, MI 48909

24 Ray Elbert Parker
25 P.O. Box 320636
Alexandria, VA 22320

By s/ Geoffrey S. Kerksmar