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7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ARIZONA**

10 **MARTIN H. ESCOBAR,**
11 **Plaintiff,**

12 **vs.**

13 **JAN BREWER, Governor of the**
14 **State of Arizona, in her Official**
15 **and Individual Capacity; THE**
16 **CITY OF TUCSON, a municipal**
17 **corporation; and BARBARA**
18 **LaWALL, County Attorney, Pima**
19 **County,**

20 **Defendants.**

21
22 **THE CITY OF TUCSON, a**
23 **municipal corporation,**

24 **Cross-plaintiff,**

25 **vs.**

26 **THE STATE OF ARIZONA, a body**
27 **politic; and JAN BREWER, in her**
28 **capacity as Governor of the**
29 **State of Arizona,**

30 **Cross-defendants.**

No. CV 10-249 TUC DCB

ANSWER AND CROSS-CLAIM

1 The City of Tucson (“Tucson”) answers the factual allegations in
2 Plaintiff’s first amended complaint (“complaint”) and alleges a cross-
3 complaint as follows:
4

5 **Answer**

6 1. Tucson admits the allegations in paragraphs 1 through 4 of
7 the Plaintiff’s complaint.
8

9 2. In response to paragraph 5 of Plaintiff’s complaint, Tucson
10 admits that it is a municipal corporation in the State of Arizona and
11 affirmatively alleges that it is a charter city formed pursuant to Article
12 13, Section 2 of the Arizona Constitution with authority to exercise all
13 powers under its charter except where inconsistent with the Arizona
14 Constitution and general laws of the State.
15

16 3. Tucson admits paragraphs 6 through 33 of Plaintiff’s
17 complaint.
18

19 4. Tucson does not contest Plaintiff’s personal experience as
20 set forth in paragraphs 34 through 45. Tucson is without information
21 and belief as to the remaining allegations in these paragraphs and
22 therefore denies said allegations.
23

24 5. Tucson admits paragraphs 46 and 47 of Plaintiff’s
25 complaint.
26

27 6. Tucson denies paragraph 48 of Plaintiff’s complaint.

1 7. Tucson admits paragraphs 49 and 50 of Plaintiff's
2 complaint.

3 8. Tucson denies paragraph 51 of Plaintiff's complaint.

4 9. Tucson admits paragraphs 52 through 54 of Plaintiff's
5 complaint.
6

7 10. Tucson denies that it has announced or made clear any
8 intent to enforce any law that places Hispanics or any other persons at
9 substantial risk of loss of civil rights as alleged in paragraph 55 of
10 Plaintiff's complaint. Tucson admits that Defendant Jan Brewer has
11 stated and acted to implement Senate Bill ("SB") 1070, as amended by
12 House Bill ("HB") 2162 (the "Act"), and that such implementation will
13 violate the United States Constitution as set forth in Tucson's cross-
14 claim in this case. Tucson is without information or belief as to any
15 proposed actions by Defendant Barbara LaWall as alleged in paragraph
16 55.
17

18 11. Tucson does not have sufficient information or belief
19 regarding the allegations in paragraphs 56 and 57 of Plaintiff's
20 complaint and therefore denies said allegations.
21

22 12. Tucson admits paragraphs 58 through 61 of Plaintiff's
23 complaint.
24
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1 13. In response to paragraph 62, Tucson admits it is preparing
2 to implement the Act, if enforcement is not enjoined by this Court, and
3 states that it is pursuing its cross-claim in this case to have the Act
4 declared unconstitutional as preempted by and in conflict with the
5 Immigration and Naturalization Act and a violation of the commerce
6 clause of the United States Constitution.
7

8
9 14. Tucson admits paragraphs 63 through 67 of Plaintiff's
10 complaint.
11

12 15. Tucson does not contest the Plaintiff's beliefs as alleged in
13 paragraphs 68 through 70 of Plaintiff's complaint.
14

15 16. In response to paragraph 71, Tucson states that it seeks a
16 declaration that the Act is unconstitutional which will preclude any
17 disciplinary measures against the Plaintiff for failure to enforce the Act
18 and therefore denies the allegations in this paragraph.
19

20 17. In response to paragraph 72 of the Plaintiff's complaint,
21 Tucson alleges that it will be subject to lawsuits in the event an
22 injunction is not issued and that Tucson will be required to indemnify the
23 Plaintiff for claims brought pursuant to A.R.S. §11-1051 except if the
24 Plaintiff acts in bad faith. See A.R.S. §11-1051(K).
25
26
27

1 18. Tucson is without sufficient information and belief to
2 respond to paragraphs 73 through 77 and therefore denies said
3 allegations.

4
5 19. Tucson denies any factual allegation in the Plaintiff's
6 complaint not expressly admitted herein.

7
8 20. Tucson denies that it has or will engage in conduct
9 violating Plaintiff's civil rights as alleged in Counts One through Five of
10 Plaintiff's complaint.

11
12 21. Tucson incorporates its prior answers above and joins
13 Count Six of Plaintiff's complaint.

14
15 22. Tucson joins Plaintiff's request for a declaratory judgment
16 pursuant to 28 U.S.C. §2201.

17 **Tucson's Cross-claim**

18
19 23. Tucson is a municipal corporation in the State of Arizona
20 and affirmatively alleges that it is a charter city formed pursuant to
21 Article 13, Section 2 of the Arizona Constitution with authority to
22 exercise all powers under its charter except where inconsistent with the
23 Arizona Constitution and general laws of the State.

24
25 24. Cross-defendant State of Arizona has legal authority to
26 adopt general laws that Tucson is required to enforce to the extent such
27 laws comply with the U.S. Constitution and the Arizona Constitution.

1 25. Cross-defendant Jan Brewer is the Governor of the State
2 of Arizona and as such is the highest ranking state constitutional officer
3 who is the chief executive responsible for implementing the laws of
4 Arizona in conformance with the United States Constitution and the
5 Arizona Constitution.
6

7 26. This Court has jurisdiction over the cross-claim pursuant to
8 28 U.S.C. §§1331 and 1343 and the court's ancillary jurisdiction to the
9 Plaintiff's claims. This Court has authority to grant declaratory relief
10 pursuant to 28 U.S.C. §2202. This Court has pendent jurisdiction over
11 any state law claims.
12

13 27. Pursuant to Article VI, Section 2 of the United States
14 Constitution, the laws of the United States are the supreme law of the
15 land and all states are required to be bound thereby.
16

17 28. Pursuant to Article 2, Section 3 of the Arizona Constitution,
18 the Cross-defendants are required to recognize that the United States
19 Constitution is the supreme law of the land.
20

21 29. The Cross-defendants are legally required to recognize
22 and enforce the supremacy of the federal laws and Constitution.
23

24 30. The United States has plenary authority to control and
25 regulate immigration which is exclusive of any state authority.
26
27

1 31. The United States has fully occupied the field of
2 immigration control and regulation through the adoption of the
3 Immigration and Naturalization Act and subsequent amendments.
4

5 32. The State of Arizona, through the enforcement of SB 1070,
6 as amended by HB 2162 (the "Act"), seeks to control and regulate
7 immigration in a manner that conflicts with federal immigration laws,
8 policies and practices. If the Act is not enjoined, Tucson will be
9 required by the Act to implement an unconstitutional law and will incur
10 liability for that conduct.
11

12 33. Governor Jan Brewer in executing Executive Order 2010-
13 09 has acknowledged that the Act "establishes a statewide policy to
14 discourage and deter unlawful entry and presence of aliens" and that
15 the Act provides for immigration enforcement by local police agencies.
16

17 34. Executive Order 2010-09 further acknowledges that the
18 Governor is responsible for the supervision of the executive department
19 and is obligated and empowered to see that the Act is enforced.
20

21 35. As part of that enforcement, Executive Order 2010-09
22 declares that the Act prohibits cities, which includes the Cross-plaintiff,
23 "from limiting or restricting the enforcement of federal immigration laws
24 to less than the full extent permitted by federal law . . ."
25
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1 36. Tucson does not, and cannot under the supremacy clause,
2 restrain or limit federal enforcement of immigration law within the City
3 limits. Tucson cannot, however, enforce federal immigration law to the
4 fullest extent permitted by federal law since it lacks the resources and
5 training to do so and since such enforcement will conflict with federal
6 law, policies and priorities for enforcement.
7

8
9 37. Tucson does not have an agreement with the Immigration
10 and Customs Enforcement Department pursuant to 8 U.S.C. §1357(G)
11 (a “Section 287(g) agreement”). Such agreements provide the
12 exclusive basis for delegation of federal immigration authority to local
13 police agencies and provide for the training and supervision of local
14 authorities to ensure that enforcement complies with federal law and
15 constitutional rights.
16
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18 38. A.R.S. §13-3903 provides a procedure for the citation and
19 release of a person arrested for a misdemeanor to be released at the
20 site of the arrest in lieu of transporting the person to a law enforcement
21 facility. Tucson used this procedure during fiscal year 2009 for the
22 immediate release upon citation of 36,821 persons arrested for criminal
23 misdemeanors. These included citations for criminal speeding, driving
24 under the influence, under age drinking and liquor offenses, minor drug
25 offenses, assault, trespass, disorderly conduct, and similar offenses.
26
27

1 Tucson does not currently condition these releases on the verification of
2 the individual's immigration status with the federal government prior to
3 their release.

4
5 39. The Act provides in A.R.S. §11-1051(B) that:

6 "Any person who is arrested shall have the person's
7 immigration status determined **before the person is**
8 **released.** The person's immigration status shall be
9 verified with the federal government . . ." (emphasis
added)

10 40. The Act mandates the detention and verification of the
11 immigration status of arrestees without any reasonable suspicion,
12 probable cause or other independent legal basis for continued detention
13 in violation of the Fourth Amendment to the United States Constitution.

14
15 41. The Act mandates the detention and verification of the
16 immigration status of arrestees regardless of other more urgent police
17 duties and thereby usurps the local discretion over the exercise of the
18 police power.

19
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21 42. Tucson currently cooperates with federal immigration
22 agents when individuals are identified as aliens unlawfully in the United
23 States in the course of police investigations. Most of the time, Border
24 Patrol can respond while an investigation is in process so that the
25 Tucson police are not detaining the individual solely on immigration
26 grounds. Occasionally, Border Patrol is unable to respond in a timely
27

1 manner. In those instances, the individual is released and a report is
2 forwarded to Border Patrol.

3 43. Tucson alleges on information and belief that the United
4 States Border Patrol cannot guarantee that it can respond to every local
5 law enforcement request to verify an individual's status or take custody
6 of every undocumented alien from local law enforcement.
7

8
9 44. On information and belief, Tucson alleges that the federal
10 Immigration and Customs Enforcement agents will not be able to
11 respond with an immediate verification of the immigration status of
12 every person who receives a criminal misdemeanor citation within the
13 City of Tucson and within the State of Arizona as required by A.R.S.
14 §11-1051(B).
15

16
17 45. As a result, Tucson will be required to incarcerate persons
18 who would have been released at the time of citation pending federal
19 verification of the person's immigration status. That verification will be
20 particularly difficult for natural born citizens who do not have a passport
21 or other record with federal immigration agencies. The federal
22 verifications may take days or weeks, substantially increasing the costs
23 of incarceration for Tucson.
24

25
26 46. Other individuals arrested by the Tucson Police
27 Department ("TPD") may be ordered released by a court following an

1 initial appearance. These releases may also come before there is
2 verification of the person's immigration status by federal immigration
3 officers, requiring continued detention of an individual, including natural
4 born citizens and others lawfully in the United States, after a prosecutor
5 or a judge has determined that the person should be released
6 according to applicable law violates the separation of governmental
7 powers and the individual's civil rights.
8
9

10 47. Enforcement of the Act by Tucson and other cities and
11 counties will have the effect of dictating the enforcement of federal
12 immigration law in accordance with state law instead of following
13 enforcement priorities, policies, and direction of the federal government.
14

15 48. Tucson police regularly encounter persons from New
16 Mexico and other states in the course of police stops, detentions and
17 arrests.
18

19 49. The Act establishes in A.R.S. §11-1051 that for a person
20 who is stopped, detained or arrested, there is a presumption that
21 person is not an alien unlawfully in the United States if the person
22 produces an Arizona driver's license. For persons from New Mexico
23 and other states where proof of citizenship is not required for a driver's
24 license, there is no such presumption. Persons with New Mexico or
25 other out-of-state licenses engaged in interstate commerce are thus
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1 required by the Act to obtain and carry additional documentation such
2 as a passport or birth certificate, proving that they are citizens or lawful
3 aliens. Such documentation is not normally carried by all persons
4 engaged in interstate commerce.
5

6 50. If the Act is not enjoined, Tucson will be required to
7 impose a burden of requiring additional proof of citizenship or lawful
8 status upon persons from New Mexico and other states and required to
9 give a preference to Arizona residents by recognizing the Arizona
10 driver's license as the sole documentation necessary to establish a
11 presumption of lawful status.
12
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14 51. The imposition of a burden on out-of-state commerce and
15 a preference for in-state commerce discriminates against interstate
16 commerce and violates the commerce clause of the United States
17 Constitution.
18

19 52. Tucson has suffered several years of reduced revenues
20 that have resulted in layoffs, furloughs, and elimination of positions and
21 services. The reduced revenues have also forced TPD to carefully
22 prioritize its method and manner of implementing law enforcement.
23
24

25 53. Tucson is required by state law to adopt an annual budget
26 effective July 1 of each year. The City Manager has recommended that
27 Tucson adopt a budget that does not include sufficient funds for the

1 enforcement of federal immigration laws to the fullest extent permitted
2 by federal law.

3 54. The reduced revenues have forced the TPD to carefully
4 prioritize its method and manner of implementing law enforcement.
5 Compliance with the Act will require TPD to change those priorities and
6 may result in decreased investigation and prosecution of violent crimes
7 against persons and other major felonies.
8
9

10 55. Tucson believes that there will be one or more court
11 challenges under the Act by private individuals to contest its budget
12 policies and other policies as adopted by the City to set priorities for law
13 enforcement and policies regarding Tucson's executive authority over
14 its local government.
15
16

17 56. The Act provides in A.R.S. §11-1051(H) that any legal
18 resident may bring a claim in superior court to challenge any City official
19 or agency that implements a policy that limits or restricts the
20 enforcement of federal immigration laws to the fullest extent permitted
21 by federal law. Section 11-1051(H) interferes with the exercise of police
22 power and prosecutorial discretion by Tucson by delegating control over
23 these functions to individual legal residents of the State of Arizona
24 whose motives may or may not be consistent with the governing body
25 and public officials responsible for law enforcement.
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Count Three

62. In the alternative, Cross-plaintiff is entitled to declaratory relief that the budget policies and other policies lawfully adopted by Tucson which do not enforce federal immigration law to the full extent permitted by federal law do not violate the Act.

Count Four

63. The Act requires Tucson to impose a burden on out-of-state commerce and a preference for in-state commerce that discriminates against interstate commerce and violates the commerce clause of the United States Constitution. Cross-plaintiff is entitled to declaratory and injunctive relief prohibiting the Cross-defendants from enforcing the Act.

WHEREFORE, the City of Tucson prays that this Court grant judgment to the City as follows:

A. Declaring that enforcement of SB 1070 would violate the United States Constitution as set forth herein;

B. Preliminarily enjoining Cross-defendants from any enforcement of SB 1070 or enforcement of such provisions as the Court determines to be unconstitutional;

1 C. Permanently enjoining Cross-defendants from any
2 enforcement of SB 1070 or enforcement of such provisions as the Court
3 determines to be unconstitutional;

4
5 D. Awarding the City its costs and attorneys' fees; and

6 E. Awarding such other and further relief as may be just and
7 appropriate.
8

9 RESPECTFULLY SUBMITTED this 26th day of May, 2010.

10
11 MICHAEL G. RANKIN
12 City Attorney

13
14 By: /s/ Michael W.L. McCrory
15 Michael W.L. McCrory
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17 Copies of the foregoing mailed on
18 this 26th day of May, 2010, to:

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