



1 defendant pursuant to Federal Rule of Civil Procedure 24(a) and (b).<sup>1</sup> As grounds  
2 therefor, Senator Pearce states as follows:

3  
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. Introduction**

6 In this case, Plaintiff, the United States of America, requests that this Court  
7 declare invalid and preliminarily and permanently enjoin enforcement of Senate Bill  
8 1070, as amended, on grounds that it is preempted by federal law and therefore violates  
9 the Supremacy Clause of the United States Constitution (“SB 1070”).

10 Proposed Intervenor/Defendant Russell Pearce is an Arizona State Senator and the  
11 sole legislative author and chief sponsor of the SB 1070. Senator Pearce seeks to enter  
12 this lawsuit on the side of the Defendants in order to defend SB 1070 as enacted by the  
13 Arizona Legislature. Intervention by Senator Pearce will ensure his interests, as the  
14 author and chief sponsor of SB 1070 as well as a member of the Arizona Senate, are  
15 presented and argued in the record for consideration before this Court.  
16

17 **II. Background**

18 On April 23, 2010, Defendant Janice K. Brewer, Governor of the State of Arizona,  
19 signed SB 1070 into law. On April 30, 2010, Governor Brewer signed House Bill (“HB  
20

21  
22  
23 <sup>1</sup> Due to the very early stage of this action, a responsive pleading does not accompany  
24 this motion as contemplated in Rule 24(c). If this motion is granted, Senator Pearce  
25 intends to file a motion to dismiss or answer at the appropriate time.

1 2162”), which amended various provisions of SB 1070. SB 1070, as amended, is  
2 scheduled to take effect on July 29, 2010.

3 Plaintiff, the United States of America, filed its Complaint on July 6, 2010, less  
4 than three weeks before SB 1070 is to take effect, and more than two months after the bill  
5 was signed into law. In the Complaint, Plaintiff asserts that SB 1070 violates the  
6 Supremacy Clause of the United States Constitution, is preempted by federal law, and  
7 violates the Commerce Clause of the United States Constitution. Also on July 6, 2010,  
8 Plaintiff filed a Motion for Preliminary Injunction, requesting that the Court preliminarily  
9 enjoin enforcement of SB 1070 to preserve the status quo until this matter can be  
10 adjudicated.  
11  
12

13 The defendants in this lawsuit are the State of Arizona and Janice K. Brewer,  
14 Governor of the State of Arizona, in her official capacity. By order dated July 7, 2010,  
15 the Court ordered Defendants to file their response to Plaintiff’s Motion for Preliminary  
16 Injunction by July 20, 2010. Plaintiff waived its right to a reply, and the hearing on the  
17 Motion for Preliminary Injunction is scheduled for July 22, 2010.  
18

19 **III. Proposed Intervenor**

20 Russell Pearce is the State Senator for the 18<sup>th</sup> Legislative District of Arizona and  
21 has been in the legislature since 2001. During his years in the Arizona Senate, Senator  
22 Pearce has authored numerous legislative bills and propositions similar to SB 1070.  
23 Several examples of Senator Pearce’s initiatives are: Arizona’s Fair and Legal  
24 Employment Act and Arizona’s Employer Sanctions legislation, which protect jobs for  
25 citizens of Arizona from persons unlawfully present in the United States; Proposition

1 100, which is a Constitutional Amendment to refuse bond to any person unlawfully  
2 present in the United States who commits a serious crime in Arizona; Proposition 102,  
3 which requires that a person unlawfully present in the United States who sues an  
4 American citizen cannot receive punitive damages; and Proposition 200, the “Arizona  
5 Taxpayers and Citizens Protection Act.”  
6

7 Besides authoring, sponsoring and voting for SB 1070, Senator Pearce also was an  
8 officer of the Maricopa County Sheriff’s Office for twenty-three years and rose to the  
9 rank of Chief Deputy Sheriff. As a former law enforcement official, Senator Pearce  
10 understands what is necessary to protect the safety of all Arizonians. Based on his  
11 experience, Senator Pearce authored SB 1070 to provide local law enforcement with  
12 additional tools to protect the citizens of Arizona.  
13

14 To further the interests of his legislative district and all citizens of Arizona,  
15 Senator Pearce authored SB 1070. On January 13, 2010, Senator Pearce introduced SB  
16 1070 into the Arizona Senate. Over several months, Senator Pearce worked with his  
17 colleagues to enact a statutory scheme that made SB 1070 the public policy of all state  
18 and local government agencies in Arizona. Senator Pearce was the chief sponsor of SB  
19 1070 and voted in favor of its passage. Senator Pearce’s efforts came to fruition when  
20 Governor Brewer signed SB 1070 and HB 2762 into law.  
21

22 **IV. SENATOR PEARCE IS ENTITLED TO INTERVENE AS A MATTER OF**  
23 **RIGHT.**

24 Federal Rule of Civil Procedure 24(a)(2) provides that:

25 On timely motion, the court must permit anyone to intervene  
who: (1) is given an unconditional right to intervene by

1 federal statute; or (2) claims an interest relating to the  
2 property or transaction that is the subject of the action, and is  
3 so situated that disposing of the action may as a practical  
4 matter impair or impede the movant's ability to protect its  
interest, unless existing parties adequately represent that

5 The Ninth Circuit has stated the test for intervention of right as follows:

6 (1) the intervention must be timely; (2) the applicant has a  
7 significant protectable interest relating to the property or  
8 transaction that is the subject matter of the action; (3) the  
9 disposition of the action may, as a practical matter, impair or  
10 impede the applicant's ability to protect its interest; and (4)  
the existing parties may not adequately represent the  
applicant's interest.

11 *Prete v. Bradbury*, 438 F.3d 949, 954 (9<sup>th</sup> Cir. 2006). This intervention test is to be

12 "broadly construed in favor of applicants for intervention." *United States ex rel.*

13 *McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9<sup>th</sup> Cir. 1992).

14 **A. Intervention is timely.**

15 Plaintiff filed its Complaint and its Motion for Preliminary Injunction on July 6,  
16 2010. Defendants have until July 20 to respond. This motion is submitted just over one  
17 week after the Complaint and motion were filed, and nearly one week prior to when  
18 Defendant's response is due. *See Prete*, 438 F.3d at 954 (motion to intervene filed six  
19 days after plaintiff brought action was timely); *Kozak v. Wells*, 278 F.2d 104, 109 (8<sup>th</sup>  
20 Cir. 1960) (a filing for intervention that occurs before the case is truly at issue is  
21 considered timely). Moreover, Senator Pearce should not be penalized because Plaintiff  
22 waited more than two months before filing suit.  
23  
24  
25

1           **B.     Senator Pearce Has a Direct and Protectable Interest.**

2           As the sole legislative author and driving force behind the enactment of SB 1070,  
3 Senator Pearce has the right to defend it. It is not unusual for a court to allow legislators  
4 to intervene in defense of a statute. *See Karcher v. May*, 479 U.S. 72, 82 (1987)  
5 (legislators could intervene to defend an act passed by the New Jersey legislature);  
6 *Coleman v. Miller*, 307 U.S. 433, 438 (1939); *Yniguez v. State of Arizona*, 939 F.2d 727,  
7 732 (9<sup>th</sup> Cir. 1991) (“[T]he Supreme Court held that state legislators who intervened in  
8 their official capacities to defend a lawsuit challenging the constitutionality of a statute”  
9 only lacked standing after they left office); *Flores v. State of Arizona*, Case No. CV-92-  
10 596-TUC-RCC (D. Ariz.) (Order of March 15, 2006 (Dkt. Entry No. 390)) (granting  
11 legislators’ motion for permissive intervention); *Powell v. Ridge*, 247 F.3d 520, 522 (3<sup>rd</sup>  
12 Cir. 2001) (granting leaders of the legislature motion to intervene as defendants to  
13 “articulate to the Court the unique perspective of the legislative branch of the  
14 Pennsylvania government.”); *Clairton Sportsmen’s Club v. Pennsylvania Turnpike*  
15 *Comm.*, 882 F. Supp. 455, 462-463 (W.D. Pa. 1995) (permitting intervention of state  
16 legislators to submit briefs and make arguments concerning the decision to build a  
17 highway system); *see also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9<sup>th</sup> Cir.  
18 1983) (a public interest group that merely supported a ballot initiative has a “significant  
19 protectable interest” in defending legality of the measure). Based on the long-standing  
20 Supreme Court precedent as well as the precedent of this circuit, Senator Pearce has a  
21 right to intervene as a defendant on account of his role not just as a legislator who voted  
22 in favor of the bill, but in particular as the author and chief sponsor of SB 1070. Senator  
23  
24  
25

1 Pearce has worked exhaustively in seeing SB 1070 become law. He has a direct interest  
2 in seeing that the law, including all provisions of SB 1070, as amended, are defended  
3 consistent with his objectives as the author and chief sponsor of the law.  
4

5 Plaintiff has acknowledged the vital role Senator Pearce has played in the  
6 enactment of SB 1070. In its memorandum in support of its motion for preliminary  
7 injunction, Plaintiff singles out Senator Pearce as instrumental in authoring the  
8 legislation. *See* “Plaintiff’s Motion for Preliminary Injunction and Memorandum of Law  
9 in Support Thereof” at 38, fn. 34. In fact, Senator Pearce is the only state legislator in  
10 which Plaintiff singles out in its fifty-four page memorandum. Senator Pearce, as author  
11 of the legislation, has experience and knowledge different from Defendants and any other  
12 interested party. It is because Senator Pearce was author and chief sponsor of SB  
13 1070 that it is necessary for him to appear in this action.  
14

15 **C. The Disposition in This Case Will Directly Affect Senator Pearce.**

16 An unfavorable disposition in this action will directly affect Senator Pearce, as the  
17 author and chief sponsor of SB 1070. Senator Pearce’s significant efforts, in authoring  
18 and shepherding SB 1070 to enactment, will be for naught if the Court rules in favor of  
19 Plaintiff. *See Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory*  
20 *Comm’n*, 578 F.2d 1341, 1345 (10<sup>th</sup> Cir. 1978) (“[a] question of impairment is not  
21 separate from the question of existence of an interest.”).  
22

23 **D. Adequacy of Representation**

24 The burden under this prong has been described as “minimal,” as a party seeking  
25 to intervene needs to show only that representation of his interest “may be inadequate.”

1 *Natural Resources Defense Council*, 578 F.2d at 1345; *Trbovich v. UMW*, 404 U.S. 528,  
2 538 n.10 (1972). As the Sixth Circuit has held:

3 [T]he applicant [for intervention] should be treated as the best  
4 judge of whether the existing parties adequately represent his  
5 or her interests, and that any doubt regarding adequacy of  
6 representation should be resolved in favor of the proposed  
7 intervenors.

7 *Stupak-Thrall v. Glickman*, 226 F.3d 467, 482 (6<sup>th</sup> Cir. 2000).

8 In this case, Senator Pearce is concerned that defendants may not adequately  
9 represent his interests, both as a member of the legislature, and in particular as the author  
10 and chief sponsor of SB 1070. First, this case is unusual as the law is being defended not  
11 by the Arizona Attorney General, but by a private law firm retained by the Governor. At  
12 a minimum, this raises questions as to whether the law will be defended consistent with  
13 the views of the legislature, and in particular Senator Pearce, who authored SB 1070 and  
14 shepherded it through to enactment.

15 Moreover, Senator Pearce has noted that the Governor's likely legal defense of SB  
16 1070 does not address certain aspects of the law that Senator Pearce views as critical.  
17 For instance, the pleadings submitted by the Governor in other cases (*Friendly House v.*  
18 *Whiting*, No. 10-1061-PHX-JWS (D. Az.) (Dkt Entry 208 filed June 18, 2010,  
19 Intervenor-Defendant Governor Brewer); *Salgado v. Brewer*, No. 10-951-PHX-ROS (D.  
20 Az.) (Dkt Entry 39 filed June 11, 2010, Governor Brewer's Motion to Dismiss), do not  
21 address the key issue of severability. Plaintiffs in these other cases are seeking to have  
22 SB 1070 struck down in its entirety for various constitutional reasons. To date, however,  
23 the Governor has not addressed the significance of the severability clause included in SB  
24  
25

1 1070 by Senator Pearce, which provides that any provision found to be unconstitutional  
2 should be severed from the remainder of SB 1070. This provision of the legislation,  
3 which is of particular significance to Senator Pearce, is just one example of how this  
4 intervention in defense of SB 1070 is important to ensure that his interests are adequately  
5 defended.  
6

7 As the author and chief sponsor of SB 1070, Senator Pearce has unique interest in  
8 and perspective on SB 1070, and he is entitled to assist in its defense.

9 **V. Permissive Intervention Should Be Granted.**

10 Fed. R. Civ. P. 24(b)(1) governs permissive intervention and provides:

11  
12 On timely motion, the Court may permit anyone to intervene  
13 who: (A) is given a conditional right to intervene by a federal  
14 statute; or (B) has a claim or defense that shares with the  
main action a common question of law or fact.

15 This test is met here. As shown above, Senator Pearce, from his unique position as  
16 author and chief sponsor of SB 1070, has a defense to the main action that shares both  
17 common questions of law and fact, albeit with a different perspective as described above.  
18 The Court will need to examine the same law and the same facts to adjudicate these  
19 claims.

20 Rule 24(b)(3) requires the Court to consider whether permissive intervention  
21 would cause undue delay or prejudice the adjudication of the rights of the existing  
22 parties. In this instance, as described above, there will be neither prejudice or delay.  
23 Senator Pearce intends to comply with briefing schedule already in place in this matter,  
24  
25

1 and his addition as a defendant will not affect the scheduling of this case in any way.  
2 Thus, at a minimum, Senator Pearce should be granted permissive intervention.

3 **VI. Senator Pearce Requests that the Court Expedite its Consideration of the**  
4 **Motion for Permissive Intervention.**

5 Senator Pearce respectfully seeks a ruling on his Motion for Intervention in  
6 advance of July 20, 2010. While Senator Pearce recognizes the limited time remaining  
7 before this date, he submits that this accelerated schedule was necessitated by Plaintiff's  
8 decision in this case not to file its motion for preliminary relief until less than three weeks  
9 before SB 1070 takes effect.  
10

11 As the author and chief sponsor of SB 1070, Senator Pearce seeks to ensure his  
12 interests are presented and argued in the record for consideration before this Court. To  
13 that end, Senator Pearce seeks to file a response to Plaintiff's Motion for Preliminary  
14 Injunction by July 20, 2010 and be permitted to participate in oral argument on July 22,  
15 2010.  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 **VII. Conclusion**

2 For the forgoing reasons, Senator Pearce respectfully requests that this Court grant  
3 leave to Senator Pearce to intervene as a Defendant in this action.

4 Dated: July 14, 2010

Respectfully Submitted,

6 KERCSMAR & FELTUS PLLC

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

11 JUDICIAL WATCH, Inc.

12 Paul J. Orfanedes  
13 (Motion for admission *pro hac vice* to be filed)  
14 James F. Peterson  
(Motion for admission *pro hac vice* to be filed)  
15 425 Third Street, S.W., Suite 800  
Washington, DC 20024  
16 Tel: (202) 646-5172

17 *Attorneys for Proposed Intervenor/Defendant*  
18 *Russell Pearce*

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 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](mailto:joshua.i.wilkenfeld@usdoj.gov)

Varu Chilakamarri  
[varudhini.chilakamarri@usdoj.gov](mailto: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](mailto:jbouma@swlaw.com)

Joseph G. Adams  
[jgadams@swlaw.com](mailto:jgadams@swlaw.com)

Joseph Andrew Kanefield  
[jkanefield@az.gov](mailto:jkanefield@az.gov)

Robert Arthur Henry  
[bhenry@swlaw.com](mailto:bhenry@swlaw.com)

Amicus Center on the  
Administration of Criminal Law  
Represented by Anne Milgram  
[anne.milgram@nyu.edu](mailto:anne.milgram@nyu.edu)

Anthony S. Barkow  
[anthony.barkow@nyu.edu](mailto:anthony.barkow@nyu.edu)

Ellen London  
[elondon@fklaw.com](mailto:elondon@fklaw.com)

Jessica Alexandra Murzyn  
[jmurzyn@fklaw.com](mailto:jmurzyn@fklaw.com)

1 Ricardo Solano, Jr.  
2 [rsolano@kflaw.com](mailto:rsolano@kflaw.com)

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

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

17  
18  
19  
20  
21  
22  
23  
24  
25  
By     s/ Geoffrey S. Kerckmar