IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

National Coalition of Latino Clergy and Christian Leaders; et al., Plaintiffs, vs. State of Arizona; Janice K. Brewer; Richard M. Romley; Terry L. Goddard; and Joseph M. Arpaio, Defendants.	No. CV 10-943-PHX-SRB **ORDER**

At issue are Defendants Janice K. Brewer and the State of Arizona's Motion to Dismiss ("Brewer MTD") (Doc. 30), Defendant Terry L. Goddard's Motion to Dismiss ("Goddard MTD") (Doc. 31), and Defendant Joseph M. Arpaio's Motion to Dismiss ("Arpaio MTD") (Doc. 26). The Court also addresses Plaintiffs' Motion for Leave to File Second Amended Complaint ("Pls.' Mot. to Am.") (Doc. 35).

I. BACKGROUND

In April 2010, the Arizona Legislature enacted Senate Bill 1070, later modified by House Bill 2162 (collectively "S.B. 1070"), a set of statutes and statutory amendments intended to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." S.B. 1070 § 1. S.B. 1070 had

an effective date of July 29, 2010. Following the enactment of S.B. 1070, seven separate lawsuits were filed challenging its validity. (*See Escobar v. Brewer*, CV 10-249-PHX-SRB; *Frisancho v. Brewer*, CV 10-926-PHX-SRB; *Nat'l Coal. of Latino Clergy & Christian Leaders v. Arizona*, CV 10-943-PHX-SRB; *Salgado v. Brewer*, CV 10-951-PHX-SRB; *Friendly House v. Whiting*, CV 10-1061-PHX-SRB; *United States v. Arizona*, CV 10-1413-PHX-SRB; and *League of United Latin Am. Citizens v. Arizona*, CV 10-1453-PHX-SRB.) On July 28, 2010, the Court preliminarily enjoined certain provisions of S.B. 1070 in the related case *United States v. Arizona*, CV 10-1413-PHX-SRB. (*United States v. Arizona*, CV 10-1413-PHX-SRB, Doc. 87, Order ("USA Order") at 4.)

Plaintiffs filed the instant class action challenging the validity of S.B. 1070 on April 29, 2010. (Doc. 1, Compl. ¶¶ 63-79.) Plaintiffs include two organizations, the National Coalition of Latino Clergy and Christian Leaders ("CONLAMIC") and La Hermosa Church[1] ("La Hermosa") (collectively, "Organizational Plaintiffs"), and twelve identified individuals, Laura Madera, Carmen Galindo, Fermin Leon, Manuel Siguenza, Moises Herrera, Joe Rivera, Jane Does 1-3 and John Does 1-3 (collectively, "Individual Plaintiffs"). (*Id.* ¶¶ 14-44.) On June 9, 2010, Plaintiffs filed an Amended Complaint ("AC") asserting the following six causes of action on behalf of themselves and all similarly situated individuals: (Counts 1 and 5) violations of substantive Due Process under the Fourteenth Amendment of the United States Constitution; (Counts 2 and 4) violations of the Supremacy Clause; (Count 3) violation of the First Amendment; and (Count 6) violation of procedural Due Process under the Fourteenth Amendment. (Doc. 13, AC ¶¶ 66-79.) Plaintiffs assert claims against Governor Janice K. Brewer ("Brewer"), the State of Arizona ("Arizona"), Arizona Attorney

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[1] La Hermosa Church is not listed as a Plaintiff in the original Complaint or in Plaintiffs' AC. While La Hermosa is not technically a Plaintiff in the instant action, the Court will address Plaintiffs' allegations related to La Hermosa for purposes of standing. In addition, the Court notes that Plaintiffs seek to amend the AC and that the Proposed Second Amended Complaint ("Proposed SAC") includes La Hermosa Church as a Plaintiff. (Pls.' Mot. to Am. at 4; *Id.*, Ex. 2, Proposed SAC at 1.)

General Terry L. Goddard ("Goddard"), Maricopa County Sheriff Joseph Arpaio ("Arpaio"), and Maricopa County Attorney Richard M. Romley ("Romley"). (*Id.* ¶¶ 47-51, 66-79.)

Defendants Brewer, Arizona, Goddard and Arpaio move to dismiss Plaintiffs' AC pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Brewer MTD at 2; Goddard MTD[2] at 1; Arpaio MTD at 1-2.) Defendant Romley joins the Brewer Motion to Dismiss. (Doc. 33, Maricopa Cnty. Att'y Richard M. Romley's Joinder in Brewer MTD ("Romley Joinder") at 1.) In addition, Plaintiffs move for leave to file a second amended complaint. (Pls.' Mot. to Am. at 1.)

II. LEGAL STANDARDS AND ANALYSIS

A. Defendants' Motions to Dismiss

Defendants Brewer, Arizona and Goddard move to dismiss Plaintiffs' AC pursuant to Rules 12(b)(1) and 12(b)(6), arguing that Arizona cannot be sued under the Eleventh Amendment and that Plaintiffs lack standing. (Brewer MTD at 2; Goddard MTD at 1.) Defendant Arpaio also moves to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), arguing that Plaintiffs lack standing and that Plaintiffs have failed to state a claim upon which relief may be granted. (Arpaio MTD at 1-2.)

1. Immunity

The Eleventh Amendment provides the states with immunity from suit by private parties in federal court. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Unless a state has waived its sovereign immunity, it cannot be subject to suit in federal court. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (citing *Welch v. Tex. Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 480 (1987)). Waiver of a state's sovereign immunity is "generally found either when the state makes a clear declaration that it intends to waive immunity, such as by statute . . . or when the state voluntarily invokes federal

[2] Goddard's Motion to Dismiss asserts only that Defendant Goddard "joins in Governor Janice Brewer's Motion to Dismiss and concurs with her position that the Court should dismiss this case because the Plaitniffs failed to establish standing to bring their claims." (Goddard MTD at 1.)

jurisdiction." *Tegic Commc'ns Corp. v. Bd. of Regents of the Univ. of Tex. Sys.*, 458 F.3d 1335, 1340 (9th Cir. 2006) (internal quotations and citations omitted); *see also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999). Intervention in litigation is considered a waiver of sovereign immunity. *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). A waiver of sovereign immunity in the litigation context, resulting from a litigation act such as the initiation of litigation, removal of litigation to federal court, or intervention in federal litigation, must be clear. *Tegic Commc'ns*, 458 F.3d at 1342 ("While waiver in the litigation context focuses on the litigation act, the waiver must nonetheless be 'clear.'" (quoting *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002))). Plaintiffs argue that Arizona waived sovereign immunity by filing a "Motion to Intervene as a Defendant" in the related case of *Friendly House v. Whiting*. (*See Friendly House v. Whiting*, CV 10-1061-PHX-SRB, Doc. 47, Mot. to Intervene as a Def.)

Arizona moved to intervene in *Friendly House* "in order to defend the constitutionality of state law," stating that S.B. 1070 "concerns a matter of statewide public importance." (*Id.* at 1-2.) Courts have found that litigation conduct is sufficiently clear to waive sovereign immunity where a state initiates the litigation in federal court, voluntarily intervenes in the litigation, or removes the litigation to federal court. *See Gardner v. New Jersey*, 329 U.S. 565, 574 (1947); *Clark*, 108 U.S. at 448; *Lapides*, 535 U.S. at 620. In considering whether a waiver of sovereign immunity in one case operated as a waiver in a separate but related case, the Ninth Circuit Court of Appeals has found that, although the state entity waived sovereign immunity by making itself a party to litigation in the first case, there was no "clear waiver" of sovereign immunity in the related case and the state entity "did not . . . voluntarily submit itself to a new action brought by a different party in a different state and a different district court." *Tegic Commc'ns*, 458 F.3d at 1343. Plaintiffs assert that the Ninth Circuit Court of Appeals has "implicitly [held] that a waiver of sovereign immunity in one lawsuit can carry over to another, related lawsuit when the waiver continues to have legal effect." (Pls.' Resp. at 5 (citing *City of S. Pasadena v. Mineta*, 284 F.3d 1154, 1157-58 (9th Cir. 2002).) The *Mineta* court considered whether a waiver of

sovereign immunity in a predecessor action carried over to a subsequent lawsuit filed as a "continuation" of the predecessor lawsuit. *Mineta*, 284 F.3d at 1156-58. Ultimately, the *Mineta* court found that a prior waiver of sovereign immunity did not carry over to a subsequent action. *Id.* at 1158. Plaintiffs do not cite any case law for the proposition that a waiver in similar or related litigation can act as a waiver in a wholly separate action. (*See* Pls.' Resp. at 4-5.) Arizona's intervention in related litigation challenging the constitutionality of S.B. 1070 is not a "clear waiver" of its sovereign immunity in this litigation, and Arizona did not voluntarily submit itself to a new action brought by different parties. *See Tegic Commc'ns*, 458 F.3d at 1343. The Court therefore dismisses all claims against Arizona in this action.

2. Standing

"Article III of the Constitution limits the judicial power of the United States to the resolution of [c]ases and [c]ontroversies, and Article III standing . . . enforces the Constitution's case-or-controversy requirement." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 597-98 (2007) (internal quotations and citations omitted). An analysis of standing requires an examination of "whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984). In order to have standing pursuant to Article III, a plaintiff must show (1) an "injury in fact" that is concrete and particularized and actual or imminent (not conjectural or hypothetical); (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009).

An organization has standing "to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). "An organization may establish a sufficient injury in fact if . . . a challenged statute or policy frustrates the organization's goals and requires the organization 'to expend resources in representing clients they otherwise would spend in other ways.'"

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 607 F.3d 1178, 1183 (9th Cir. 2010) (quoting *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1992)); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Where a statute "perceptibly impair[s]" an organization's ability to provide the services the organization was formed to provide, "there can be no question that the organization has suffered [an] injury in fact. Such concrete and demonstrable injury to the organization's activities–with the consequent drain on the organization's resources–constitutes far more than simply a setback to the organization's abstract social interests." *Havens*, 455 U.S. at 379. An organization also has "associational standing" to bring suit on behalf of its members "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

Even when the constitutional minima of standing are present, prudential concerns may impose additional limitations. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). Prudential standing limitations embody "'judicially self-imposed limits on the exercise of federal jurisdiction'" and include "'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" *Id.* at 12 (quoting *Allen*, 468 U.S. at 750-51); *see also Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848-49 (9th Cir. 2007).

In evaluating standing, courts must accept all material allegations in the complaint as true and construe the complaint in favor of the plaintiff. *Graham v. FEMA*, 149 F.3d 997, 1001 (9th Cir. 1998) (citing *Warth*, 422 U.S. at 501). The plaintiff has the burden of establishing standing and must "'allege[] such a personal stake in the outcome of the

controversy' as to warrant [the] invocation of federal-court jurisdiction and . . . justify exercise of the court's remedial powers." *Warth*, 422 U.S. at 498-99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

a. Injury in Fact

Plaintiffs assert various injuries arising from the operation and enforcement of S.B. 1070. (AC ¶¶ 11-12, 14-44.) An "injury in fact" is "an invasion of a legally protected interest which is [both] . . . concrete and particularized . . . and . . . actual or imminent," rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560. Plaintiffs "must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citation omitted). However, plaintiffs do not "have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Id.* Similarly, "'it is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [a criminal] statute that he claims deters the exercise of his constitutional rights.'" *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). In order to have standing to challenge a criminal statute prior to the statute's enforcement, a plaintiff must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and that a "credible threat" of prosecution exists. *Id.*; *see also San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996). The Court examines whether Plaintiffs' AC contains sufficient allegations of an injury in fact suffered by the Individual Plaintiffs, the Organizational Plaintiffs, and the Organizational Plaintiffs' members.

i. The Individual Plaintiffs

Plaintiffs allege that the operation and enforcement of S.B. 1070 will result in various injuries to the Individual Plaintiffs. (AC ¶¶ 14-37.) The Court addresses each type of alleged injury below.

(a). Fear of Racial Profiling

Several of the Individual Plaintiffs allege that they fear that the operation and enforcement of S.B. 1070 might result in their being stopped and arrested as a result of racial profiling based on their language ability, accent, or appearance. (AC ¶¶ 16, 17, 18, 19, 28, 30, 34, 35, 36; *see also id.* ¶ 32 (Plaintiff John Doe alleging that he "will not take his children to school or go to work as he is afraid of being arrested").)[3] However, a speculative fear of future harm does not constitute a sufficient injury in fact for purposes of standing. *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010) (citing *Friends of the Earth*, 528 U.S. at 184; *Lujan*, 504 U.S. at 560). Plaintiffs' allegations related to a fear of future racial profiling are speculative. Plaintiffs do not include any allegations making an injury resulting from racial profiling sufficiently imminent. Plaintiffs' speculative fears of racial profiling are not a sufficient injury in fact for purposes of standing. *See id.*; *Babbitt*, 442 U.S. at 298.

(b). Risk of Prosecution Under A.R.S. § 13-1509

Several Individual Plaintiffs also allege that they may be injured by the enforcement of S.B. 1070 if they forget or fail to carry documentation of their immigration status. (AC ¶¶ 18, 19, 32, 35; *see also id.* ¶ 34 (Plaintiff John Doe 3 alleging that he is a United States citizen but that he lost his passport and can only produce his driver's license and birth certificate if asked for proof of residency and that as a result he is afraid of being arrested because he looks Latino); *id.* ¶ 33 (Plaintiff John Doe 2 alleging that he lost his Green Card and that he "will be unable to rent, work, or obtain goods and services in Phoenix because he cannot prove his immigration status").)[4] A.R.S. § 13-1509 provides that "a person is guilty

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[3] Individual Plaintiff Jane Doe 1 also alleges that she fears going outside because "she has already been intimidated by individuals yelling at her to 'go back to [her] own country.'" (*Id.* ¶ 29.) Jane Doe 1 alleges a fear resulting not directly from the operation of S.B. 1070 but from the conduct of unidentified third-parties. Injuries resulting from the conduct of third-parties not before the court do not give rise to an injury in fact for purposes of standing. *See San Diego Cnty.*, 98 F.3d at 1130.

[4] Plaintiffs assert that Individual Plaintiffs Carmen Galindo and Laura Madera also "risk arrest for violating (or being charged with violating) . . . [A.R.S. § 13-1509]." (Pls.'

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)," federal statutes that require aliens to carry documentation of registration and penalize the willful failure to register. A.R.S. § 13-1509(A).

An injury in fact cannot be based on a "chain of speculative contingencies." *Lee v. Oregon*, 107 F.3d 1382, 1388 (1997). In order for the alleged injury to arise under the provisions of S.B. 1070, Plaintiffs, all of whom allege that they are either United States citizens or lawfully present in the United States, would have to first be lawfully stopped by a law enforcement officer, the law enforcement officer would then have to request documentation of Plaintiffs' legal presence after developing reasonable suspicion that Plaintiffs were unlawfully present in the United States, and finally, Plaintiffs would have to be unable to produce such documentation, either because they lack documentation of their immigration status or forgot to carry it, resulting in Plaintiffs' arrest. In addition, A.R.S. § 13-1509 "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). Plaintiffs alleging a risk of prosecution under A.R.S. § 13-1509 all also allege that they have authorization to remain in the United States. (AC ¶¶ 18-19, 32-35.) Plaintiffs' alleged injuries arising from the risk of prosecution under A.R.S. § 13-1509 are hypothetical and conjectural and not sufficiently "concrete and particularized . . . [or] . . . actual or imminent." *See Lujan*, 504 U.S. at 560.

(c). Risk of Prosecution Under A.R.S. § 13-2929

In addition, Individual Plaintiffs Manuel Siguenza and Joe Rivera allege that they "might be considered in violation of the law because their clients often stay for an extended period of time in their business and they often transport them to different locals [sic]." (AC ¶ 24; *see also id.* ¶¶ 22-23.) A.R.S. § 13-2929 provides that it is unlawful for a person who is in violation of a criminal offense to: (1) transport or move or attempt to transport or move

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Resp. at 9.) However, both Galindo and Madera allege only that they "appear[] Latina" and that they fear arrest. (AC ¶¶ 28, 30.) These allegations are evaluated above as alleged injuries related to arrest arising from racial profiling. *See supra* Part II.A.2.a.i.(a).

an alien in Arizona in furtherance of the alien's unlawful presence in the United States; (2) conceal, harbor, or shield or attempt to conceal, harbor, or shield an alien from detection in Arizona; and (3) encourage or induce an alien to come to or live in Arizona. A.R.S. § 13-2929(A)(1)-(3). In order to violate A.R.S. § 13-2929(A), a person must also know or recklessly disregard the fact that the alien is unlawfully present in the United States. *Id.*

In order to assert standing based on a risk or threat of prosecution, a plaintiff "must show a 'genuine threat of imminent prosecution' under the [challenged statute]." *San Diego Cnty.*, 98 F.3d at 1126 (citing *Wash. Mercantile Ass'n v. Williams*, 733 F.2d 687, 688 (9th Cir. 1984)). Here, Plaintiffs fail to allege a genuine threat of imminent prosecution. First, Plaintiffs' allegations do not clearly indicate that Plaintiffs intend to violate A.R.S. § 13-2929 or that Plaintiffs face any specific threat of prosecution. *See id.* at 1127. In addition, Plaintiffs specifically allege that it is "difficult if not impossible for Plaintiffs Siguenza and Rivera to determine whether each of their clients is or is not an 'authorized alien.'" (AC ¶ 22.) A.R.S. § 13-2929 only applies if the individual "knows or recklessly disregards the fact that the alien has come to, entered or remains in the United States in violation of law." A.R.S. § 13-2929(A)(1)-(3). Plaintiffs have not alleged a sufficient injury in fact based on risk of prosecution under A.R.S. § 13-2929 because Plaintiffs' allegations fail to establish a "genuine threat of imminent prosecution under [S.B. 1070]." *See San Diego Cnty.*, 98 F.3d at 1126.

(d). Loss of Business or Membership

While an economic injury is a sufficient basis for standing, the alleged economic injury must be "fairly traceable" to the challenged statute. *Id.* at 1130. Several Individual Plaintiffs allege that they fear they will lose significant business, patronage or membership, or believe that they already have lost business, as a result of the operation of S.B. 1070. (AC ¶¶ 14-17, 20-27.) Plaintiffs allege that their businesses or churches primarily serve Latinos and that they have lost or will lose customers and members because of S.B. 1070. (*Id.*) S.B. 1070 does not directly regulate or restrict the Plaintiffs' business or religious activities. Plaintiffs' allegations do not explain how S.B. 1070 will result in a loss of business or

membership. (*See id.*) To the extent that Plaintiffs' alleged losses are based on a diminished or decreasingly active Latino population as a result of S.B. 1070, the economic and membership injuries alleged are "th[e] result [of] the independent action of . . . third part[ies] not before the [C]ourt." *See San Diego Cnty.*, 98 F.3d at 1130 (finding no standing where the increases in gun prices that resulted from statutory restrictions on gun supply were the result of decisions by manufacturers and dealers and not directly mandated by the statute); *see also Roe 1 v. Prince William Cnty.*, 525 F. Supp. 2d 799, 806-07 (E.D. Va. 2007) (finding no standing where the challenged law did not have a direct impact on the regulation of business). Here, Plaintiffs have not alleged sufficient facts indicating that the alleged economic injury is fairly traceable to S.B. 1070. *See San Diego Cnty.*, 98 F.3d at 1130.

(e). Prolonged Separation of Family Members

Finally, Plaintiffs allege generally that they are or will be injured because S.B. 1070 prolongs the separation of family members. (AC ¶ 12; Pls.' Resp. at 13.)[5] Any family separation caused by deportation is at this point purely speculative and not directly traceable to S.B. 1070. *See Prince William Cnty.*, 525 F. Supp. 2d at 805 (finding that allegations that an immigration law would increase familial separation by deportation were "unduly speculative"). To the extent S.B. 1070 may cause undocumented family members to leave or refuse to come to Arizona, the separation is the "result [of] the independent action of . . . third part[ies] not before the [C]ourt." *See San Diego Cnty.*, 98 F.3d at 1130. Plaintiffs' allegations of injuries resulting from separation of family members are hypothetical and conjectural and not sufficiently "concrete and particularized . . . [or] . . . actual or imminent" to justify standing. *See Lujan*, 504 U.S. at 560.

ii. The Organizational Plaintiffs' Members

Plaintiffs may also seek to establish standing on behalf of the members of the Organizational Plaintiffs. The Organizational Plaintiffs have standing to bring suit on behalf

[5] Plaintiffs withdraw any allegations related to violations of the Fair Housing Act and day laborers. (Pls.' Resp. at 14.)

of their members if their members "would otherwise have standing to sue in their own right," the interests at stake in the litigation are related to the Organizational Plaintiffs' purposes, and the litigation does not require the participation of individual members in the lawsuit. *See Friends of the Earth*, 528 U.S. at 181.

Here, Plaintiffs allege only that La Hermosa's "membership and constituency . . . includes individuals–many but not all of whom are Latino–who reside and who are employed in and around Phoenix, some of whom have school-aged children," and individuals who speak Spanish and have limited English proficiency. (AC ¶ 39.) Similarly, Plaintiffs allege that CONLAMIC's "membership and constituency . . . includes individuals–many, but not all, are [sic] Latino or who service Latino and other customers–who reside or operate businesses in and around Arizona, some of whom have school-aged children," and individuals who speak Spanish and have limited English proficiency. (*Id.* ¶¶ 42-43.) Plaintiffs go on to allege that the interests that La Hermosa and CONLAMIC "seek[] to protect through this action are germane to [their] purpose[s], and neither the claims asserted nor the relief requested herein require the personal participation of [their] members." (*Id.* ¶¶ 39, 44.) These allegations fall short of establishing the standing of the Organizational Plaintiffs' members. The allegations contain insufficient details regarding any alleged harm to any member. (*See id.* ¶¶ 39, 41-42.) Plaintiffs allege only that S.B. 1070 has "created great hostility towards the Latino community" and that La Hermosa and CONLAMIC have many Latino members. (*Id.*) These generalized allegations fail to establish a sufficiently concrete and actual or imminent injury to any of the Organizational Plaintiffs' members. *See Lujan*, 504 U.S. at 560.

iii. The Organizational Plaintiffs

Finally, the Organizational Plaintiffs may also "establish a sufficient injury in fact if . . . a challenged statute or policy frustrates the [Organizational Plaintiffs'] goals and requires the [Organizational Plaintiffs] 'to expend resources in representing clients they otherwise would spend in other ways.'" *See Redondo Beach*, 607 F.3d at 1183 (quoting *El Rescate Legal Servs.*, 959 F.2d at 748); *see also Havens*, 455 U.S. at 379. In addition, if S.B. 1070

"perceptibly impair[s]" the Organizational Plaintiffs' ability to provide the services they were formed to provide, "there can be no question that the [Organizational Plaintiffs have] suffered [an] injury in fact." *See Havens*, 455 U.S. at 379.

Plaintiffs allege that La Hermosa's "primary purpose is to promote Christian values and spread the gospel of Jesus Christ." (AC ¶ 39.) Plaintiffs also allege that CONLAMIC has over 30,000 affiliated churches throughout the United States and that CONLAMIC's "purpose is to promote the interests of its members." (*Id.* ¶¶ 40-41.) Plaintiffs assert that S.B. 1070 "has created great hostility towards the Latino community in Arizona and therefore adversely affects the work [that both La Hermosa and CONLAMIC] perform[]" in Arizona. (*Id.* ¶¶ 39, 41.) However, Plaintiffs do not allege that S.B. 1070 requires the Organizational Plaintiffs to expend or divert resources. (*See id.* ¶¶ 39-44.) In addition, it is not at all clear how S.B. 1070 would frustrate the Organizational Plaintiffs' religious purposes. *See Havens*, 455 U.S. at 379. Unlike the plaintiffs in *Redondo Beach*, *Havens*, and *Friendly House*, Plaintiffs allegations here imply only a tenuous relationship between Plaintiffs' alleged missions and the challenged statute. *See Redondo Beach*, 607 F.3d at 1183; *Havens*, 455 U.S. at 379; *Friendly House*, 10-CV-1061-PHX-SRB. Based on Plaintiffs allegations and the Organizational Plaintiffs' stated purposes, the alleged adverse effects on the Organizational Plaintiffs' work are too speculative. As a result, Plaintiffs have not established that the Organizational Plaintiffs have suffered an injury in fact. *See Havens*, 455 U.S. at 379.

Since the Court concludes that Plaintiffs have failed to allege sufficient injuries in fact to confer standing, the Court will not address whether Plaintiffs' allegations meet the causation, redressability, or prudential requirements of standing. Similarly, the Court will not reach the question of whether Plaintiffs have stated claims upon which relief may be granted.

B. Plaintiffs' Motion to Amend

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); *accord Foman v. Davis*, 371 U.S. 178, 182 (1962); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). The Ninth Circuit Court of Appeals has recognized a "strong policy permitting

amendment." *Moore*, 885 F.2d at 537 (citation omitted). In determining "whether justice requires leave to amend," courts consider "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *Moore*, 885 F.2d at 538 (citing *Foman*, 371 U.S. at 182). The party opposing amendments bears the burden of showing prejudice, futility, or one of the other permissible reasons for denying a motion to amend. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). Defendants object to Plaintiffs' Proposed SAC, arguing that it should be denied because the amendment is futile and Plaintiffs unduly delayed amendment. (Defs.' Resp. to Pls.' Mot. to Am. ("Defs.' Resp.") at 3-4.)

Plaintiffs seek leave to amend in order to make several changes to their AC including: adding claims for violations of the First Amendment and the Equal Protection Clause; consolidating and clarifying their Supremacy Clause and Fourteenth Amendment claims; withdrawing Plaintiff Fermin Leon, one of the Jane Doe Plaintiffs, and all of the class allegations; adding La Hermosa as a named plaintiff; and supplementing Plaintiffs' factual allegations, including the allegations related to standing. (Pls.' Mot. to Am. at 3-4.) Plaintiffs' Proposed SAC adds allegations relevant to Plaintiffs' standing. (Proposed SAC ¶¶ 14-40.) Plaintiffs assert that the Proposed SAC "[c]larif[ies] [the] basis for standing [and] supplement[s] the organizational plaintiffs' allegations regarding their purpose, mission, and activities, as well as the harms to them caused by S.B. 1070." (Pls.' Mot. to Am. at 4.)

1. Futility of Amendment

An amendment is futile if it fails to state a claim upon which relief can be granted. *Newland v. Dalton*, 81 F.3d 904, 907 (9th Cir. 1996); *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983). "Leave to amend need not be given if a complaint, as amended, is subject to dismissal." *Moore*, 885 F.2d at 538. As discussed above, Plaintiffs' AC fails to allege sufficient facts demonstrating standing. The Court will not grant leave to amend if Plaintiffs' Proposed SAC is itself subject to dismissal because of a lack of standing. *See id.*

a. Individual Plaintiffs' Standing in the Proposed SAC

Plaintiffs' Proposed SAC contains additional allegations related to injuries to the Individual Plaintiffs. (Proposed SAC ¶¶ 14-30.) Specifically, the Proposed SAC includes allegations related to the potential loss of business or members. (*Id.* ¶¶ 15-17, 19, 20.) Plaintiffs also include additional allegations related to Plaintiffs' fears that, as a result of S.B. 1070, they might be stopped and arrested as a result of racial profiling based on their appearance. (*Id.* ¶¶ 16-18.) Plaintiffs also include additional, though similar, allegations related to risk of prosecution under A.R.S. § 13-1509. (*Id.* ¶¶ 17, 18, 25.) Finally, Plaintiffs re-allege that Plaintiffs Siguenza and Rivera risk prosecution under A.R.S. § 13-2929. (*Id.* ¶¶ 21, 22.) The additional allegations in Plaintiffs' Proposed SAC suffer from the same defects as Plaintiffs' AC. *See supra* Part II.A.2.a.i. Plaintiffs' allegations of a speculative fear of future harm are insufficient for purposes of standing. *See Mayfield*, 599 F.3d at 970; *see also supra* Part II.A.2.a.i.

b. Organizational Plaintiffs' Standing in the Proposed SAC

The Proposed SAC also includes additional allegations related to the Organizational Plaintiffs. (Proposed SAC ¶¶ 31-40.) Specifically, Plaintiffs allege that "La Hermosa's religious mission is to reach out to and embrace all members of the community . . . provide food, shelter and access to services, including transportation, to those in need—regardless of immigration status." (*Id.* ¶ 32.) Plaintiffs further allege that S.B. 1070 will force La Hermosa and its parishioners to "go against their religious beliefs by limiting certain of their activities (such as providing shelter and transportation to those in need) . . . or risk prosecution." (*Id.* ¶ 33.) In addition, Plaintiffs assert that, as a result of S.B. 1070, "certain parishioners will be unable or unwilling to leave their houses to come to Church, which interferes with the Church and its members' rights to freedom of association in the practice of their religion." (*Id.*) Finally, Plaintiffs assert that La Hermosa "has had to divert resources from its religious mission to defending against the harms caused by this legislation both to the Church and to the community it serves" and that S.B. 1070 has "created great hostility

towards the Latino community[,] . . . adversely affect[ing] the work La Hermosa performs . . . [and] forcing it to divert resources away from its mission." (*Id.* ¶¶ 34-35.)

The additional allegations in the Proposed SAC are insufficient to demonstrate standing. The Proposed SAC does not contain sufficient additional allegations demonstrating that La Hermosa's members have standing. In addition, the Proposed SAC does not include any allegations demonstrating how S.B. 1070 frustrates La Hermosa's goals or forces La Hermosa to expend or divert resources. La Hermosa's primary purpose is to "promote Christian values." (*Id.* ¶ 31.) S.B. 1070 does not directly target or impact La Hermosa's mission and, without additional allegations, Plaintiffs have not alleged a perceptible impairment to La Hermosa's ability to promote Christian values or assist others in need. In addition, Plaintiffs do not allege how S.B. 1070 has forced La Hermosa to divert resources other than to "defend[] against the harms caused by this legislation" and address "hostility towards the Latino community." (*Id.* ¶¶ 34-35.) The connection between S.B. 1070 and La Hermosa's work is too tenuous to give rise to an injury in fact without additional allegations that La Hermosa's mission is frustrated in some specific and identifiable way by S.B. 1070 and that La Hermosa has diverted resources for some identified purpose. *See Redondo Beach*, 607 F.3d at 1183. Similarly, Plaintiffs' allegation that parishioners will be unable or unwilling to leave their houses to attend services at La Hermosa is insufficient to establish an injury in fact because a speculative fear of future harm is inadequate. S.B. 1070 is not directed at religious practices, and any incidental effect on La Hermosa's attendance is too speculative and indirect for purposes of standing. *See Mayfield*, 599 F.3d at 974.

Plaintiffs' Proposed SAC also contains additional allegations related to CONLAMIC. (Proposed SAC ¶¶ 36-40.) Specifically, Plaintiffs now allege that CONLAMIC's mission is to "educate and empower Latino churches" and that S.B. 1070 has forced CONLAMIC to "divert its resources away from its core mission to spend countless hours educating members about the effects and impact of the law." (*Id.* ¶ 37.) CONLAMIC's mission is not directly impacted or regulated by S.B. 1070, nor is it clear how S.B. 1070 frustrates CONLAMIC's religious mission to educate and empower Latino churches. Without more, Plaintiffs have

not demonstrated that S.B. 1070 has frustrated CONLAMIC's goals and required CONLAMIC to divert resources. *See Redondo Beach*, 607 F.3d at 1183. In addition, Plaintiffs do not allege, and it is not clear from CONLAMIC's organizational mission, that S.B. 1070 has perceptibly impaired CONLAMIC's ability to provide the services that CONLAMIC was formed to provide. *See Havens*, 455 U.S. at 379.

Plaintiffs' Motion for Leave to File Second Amended Complaint is denied because Plaintiffs' Proposed SAC fails to allege sufficient facts establishing standing and is, as a result, subject to dismissal. *See Moore*, 885 F.2d at 538. Since the deficiencies in Plaintiffs' pleadings could be cured by amendment, Plaintiffs' Motion to Amend is denied without prejudice.

IT IS ORDERED granting Defendants Brewer, Arizona, Goddard and Arpaio's Motions to Dismiss (Docs. 30, 31, 26). Plaintiffs' Amended Complaint is dismissed without prejudice for lack of standing. Plaintiffs are directed to file any amendments to their pleading within 30 calendar days of the date of this Order.

IT IS FURTHER ORDERED granting Defendants Brewer and Arizona's Motion to Dismiss the State of Arizona (Doc. 30). All claims against the State of Arizona are dismissed with prejudice because Arizona has not waived sovereign immunity in this case.

IT IS FURTHER ORDERED denying without prejudice Plaintiffs' Motion for Leave to File Second Amended Complaint (Doc. 35).

DATED this 10th day of December, 2010.

Susan R. Bolton
United States District Judge