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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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United Food and Commercial Workers)
Local 99 et al.,

No. CV-11-921-PHX-GMS

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Plaintiffs,

ORDER

11

-and-

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Arizona Education Association, et al.,

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Plaintiff-Intervenors

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vs.

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Jan Brewer, in her capacity as Governor of
the State of Arizona, et al,

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Defendant.

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Pending before this Court are the following motions: (1) a Motion to Dismiss filed by
21 Defendant Maricopa County Sheriff Joseph Arpaio (Doc. 40); (2) a Motion to Dismiss filed
22 by Defendants the State of Arizona, Secretary of State Ken Bennett, Governor Janice K.
23 Brewer, Attorney General Thomas Horne, and Director of the Department of Labor Randall
24 Maruca, (“State Defendants”) (Doc. 50); and (3) a Motion to Dismiss Intervenor’s Complaint
25 filed by State Defendants, which Defendant Arpaio joins. (Doc. 71). For the reasons
26 discussed below, the motions are granted in part and denied in part.

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1 **BACKGROUND**

2 In April 2011, the Arizona legislature passed Senate Bill 1363, 2011 Arizona Session
3 Laws, Chapter 153, which amended Sections 12-1809, 12-1810, 23-352, 23-1321, 23-1322,
4 23-1323 of the Arizona Revised Statutes (“A.R.S.”) and amended Title 23, Chapter 8, Article
5 2 of those statutes by adding sections 23-1325, 23-1326, 23-1327, 23-1328 and 23-1329.
6 Governor Janice K. Brewer signed the bill into law on April 18, 2011.

7 The law expands the definition of “harassment” under Arizona law to include
8 “unlawful picketing, trespassory assembly, unlawful mass assembly, concerted interference
9 with lawful exercise of business activity and engaging in a secondary boycott.” A.R.S. § 12-
10 1810®. The law expands the definition of “defamation” to include making a false statement
11 about an employer while “knowingly, recklessly, or negligently disregarding the falsity of
12 the statement.” A.R.S. § 23-1325(A)–(C). Further, the law makes labor unions liable for the
13 defamatory acts of their members. *Id.* § 23-1325(A)–(C).

14 The law also provides that employers may put their place of business on a “no trespass
15 public notice list” maintained by the Secretary of State through the county recorders. A.R.S.
16 § 23-1326(A). Should an employer whose premises are on the list ask law enforcement to
17 remove “any labor organization or individual or groups of individuals acting on employees’
18 behalf that are engaged in unlawful picketing, trespassory assembly or mass picketing,” the
19 law enforcement officer can order the group to leave the property and “may not require the
20 employer to provide any further documentation to establish the employer’s property rights.”
21 *Id.* § 23-1326(F).

22 The law defines “trespassory assembly” by referencing Arizona’s criminal trespass
23 statutes. A.R.S. § 23-1321(5); A.R.S. § 13-1502–04 (2010). In addition, it defines “unlawful
24 picketing” as picketing where the purpose is “to coerce or induce an employer or self-
25 employed person to join or contribute to a labor organization.” A.R.S. § 23-1322. Finally, it
26 defines “unlawful assembly” as, among other things, an assembly conducted “other than in
27 a reasonable and peaceful manner.” A.R.S. § 23-1327.

28 In April of, 2011, the legislature passed Senate Bill 1365, the “Protect Arizona

1 Employees' Paychecks from Politics Act," 2011 Arizona Session Laws, Chapter 251, which
2 Governor Janice K. Brewer signed into law on April 26, 2011. The law amended Title 23,
3 Chapter 2, Article 7 of the A.R.S. by adding section 23-361.02. This Court previously
4 described the provisions of this law and, on application of Plaintiff-Intervenors, enjoined
5 Defendant Horne from implementing it in its order of September 23, 2011. (Doc. 99).

6 Defendant Arpaio and the State Defendants have each filed motions to dismiss
7 Plaintiffs' complaint. (Docs. 40, 50). State Defendants have also moved to dismiss Plaintiff-
8 Intervenors' complaint, and Defendant Arpaio has joined their motion. (Doc. 71). Defendants
9 argue that Plaintiffs must demonstrate that the Court has subject-matter jurisdiction to hear
10 the claim, that Plaintiffs and Plaintiff-Intervenors lack standing, and that the claims are not
11 ripe for adjudication. (Docs. 40, 50, 71). Further, the State Defendants argue that the
12 Eleventh Amendment affords them immunity from this suit. (Docs. 50, 71).

13 DISCUSSION

14 I. Legal Standard

15 "The party asserting jurisdiction has the burden of proving all jurisdictional facts."
16 *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) (citing *McNutt v.*
17 *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In effect, the court presumes lack
18 of jurisdiction until the plaintiff proves otherwise. *See Kokkonen v. Guardian Life Ins. Co.*
19 *of America*, 511 U.S. 375, 377 (1994). The defense of lack of subject matter jurisdiction may
20 be raised at any time by the parties or the court. *See* FED. R. CIV. P. 12(h)(3).

21 The Constitution grants the federal courts the power to hear only "Cases" and
22 "Controversies." U.S. Const. art. III sec. 2. Therefore, to have standing under Article III,
23 plaintiffs must satisfy three elements. First, "the plaintiff must have suffered an injury in
24 fact" that is not "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555,
25 560 (1992) (internal quotations omitted). Next, the injury must be "fairly traceable to the
26 challenged action of the defendant." *Id.* (internal quotations omitted). Finally, "it must be
27 likely . . . that the injury will be redressed by a favorable decision." *Id.* (internal quotations
28 omitted).

1 For a claim to be justiciable, a plaintiff must not only meet the case or controversy
2 requirements of Article III, but the claim must also be ripe for adjudication. Ripeness has
3 “both a constitutional and a prudential component.” *Potman v. Cty. of Santa Clara*, 995 F.2d
4 898, 902 (9th Cir. 1993). The “constitutional component of ripeness is synonymous with the
5 injury-in-fact prong of the standing inquiry.” *California Pro-Life Council, Inc. v. Getman*,
6 328 F.3d 1088, 1094 n.2 (9th Cir. 2003). In order to meet the prudential components of
7 ripeness, courts must evaluate “the fitness of the issues for judicial decision and the hardship
8 to the parties of withholding court consideration.” *Abbot Laboratories v. Gardner*, 387 U.S.
9 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

10 States are generally immune from suits filed by individuals in federal court. U.S.
11 Const. amend. XI. State officials, however, can be sued in their official capacity for
12 injunctive relief to prevent them from implementing state laws that violate the Constitution.
13 *See Ex Parte Young*, 209 U.S. 123 (1908). Under the doctrine of *Ex Parte Young*, “relief that
14 serves directly to bring an end to a present violation of federal law is not barred by the
15 Eleventh Amendment even though accompanied by a substantial ancillary effect on the state
16 treasury.” *Papasan v. Allain*, 478 U.S. 265, 278 (1986). Nevertheless, for a state officer to
17 be subject to suit in her official capacity, “such officer must have some connection with the
18 enforcement of the act.” *Ex Parte Young*, 209 U.S. at 157. This connection must be “fairly
19 direct.” *Long v. Van de Kamp*, 961, F.2d 151, 152 (1992). For example, a state attorney
20 general cannot be sued under *Ex Parte Young* when the statute complained of empowers
21 local law enforcement agencies, even if those agencies operate under the supervision of the
22 state attorney general. *Id.*

23 **II. ANALYSIS**

24 **A. Subject-Matter Jurisdiction**

25 Plaintiffs allege that SB 1363 violates the First Amendment and that SB 1365 is pre-
26 empted by the Supremacy Clause of the U.S. Constitution. (Doc. 8). Plaintiff-Intervenors
27 allege that SB 1365 violates the First Amendment. (Doc. 77). Federal courts have subject-
28 matter jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of

1 the United States.” 28 U.S.C. § 1331.¹ The Court has jurisdiction to hear claims challenging
2 a state law on constitutional grounds. *See Bell v. Hood*, 327 U.S. 678, 681–82 (1946).

3 **B. Standing and Ripeness**

4 Defendants further allege that the Plaintiffs and Plaintiff-Intervenors lack standing,
5 and that the claims represent pre-enforcement challenges that are not justiciable because they
6 are not yet ripe. (Docs. 40, 50, 71).

7 **1. Standing**

8 To suffer an injury in fact, it is not adequate that a party merely speculate that he will
9 be the subject of an enforcement action to which he will have a constitutional defense.
10 *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134 (9th Cir. 2000) (en banc). The
11 Ninth Circuit has recognized that “neither the mere existence of a proscriptive statute nor a
12 generalized threat of prosecution satisfies the ‘case or controversy’ requirement.” *Id.* at 1139.
13 However, “[c]onstitutional challenges based on the First Amendment present unique standing
14 considerations.” *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002,
15 1006 (9th Cir. 2003). Because parties are likely to restrict their own speech or assembly
16 practices in reasonable fear that they may otherwise be found to have violated the law, “when
17 the threatened enforcement effort implicates First Amendment rights, the inquiry tilts
18 dramatically toward a finding of standing.” *LSO, Ltd., v. Stroh*, 205 F.3d 1146, 1155 (2000).

19 Plaintiffs and Plaintiff-Intervenors satisfy the injury-in-fact requirement necessary for
20 Article III standing. Both allege that the two laws restrict freedom of assembly and speech
21 in violation of the First Amendment, and both plausibly state that they will curtail their
22 protected speech and assembly activities in order to comply with the laws. (Docs. 60, 86).
23 The Court has already enjoined SB 1365 as a statute that, on its face, discriminates according
24 to viewpoint in violation of the First Amendment. (Doc. 99). Plaintiffs have standing to
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26 ¹ Although it is true that in their Amended Complaint Plaintiffs improperly state that
27 jurisdiction is proper under 29 U.S.C. § 1332 (a section of the U.S. Code that does not exist),
28 they properly cite 28 U.S.C. § 1331 in their Response. (Docs. 8, 60). Plaintiff-Intervenors
properly cite to 28 U.S.C. § 1331. (Doc. 52).

1 continue to challenge a law that facially discriminates against their speech activity. *LSO*, 205
2 F.3d at 1154–55. When parties seek to challenge laws that allegedly criminalize protected
3 behavior, as Plaintiffs do with respect to SB 1363, the Supreme Court has written that they
4 need not “risk prosecution to test their rights.” *Dombrowski v. Pfister*, 380 U.S. 479, 486
5 (1965). Plaintiffs and Plaintiff-Intervenors have adequately alleged that they suffer an injury
6 in fact caused by SB 1363 and SB 1365.

7 Defendants do not claim that the alleged injuries are not fairly traceable to the
8 challenged laws, or that the injuries would not be redressed were the laws struck down.
9 (Docs. 40, 50, 71). Thus, Plaintiffs and Plaintiff-Intervenors have demonstrated that their
10 claim is fairly traceable to the law, and that their injury would be redressed were their suit
11 successful.

12 2. Ripeness

13 Since Plaintiffs and Plaintiff-Intervenors satisfy the injury-in-fact requirement for
14 standing, their claim meets the constitutional prong of the ripeness test. *California Pro-Life*
15 *Council*, 328 F.3d at 1094 n.2. To meet prudential standing requirements, Plaintiffs must
16 demonstrate the fitness of the issues for judicial decision and the hardship to the parties of
17 withholding adjudication. *Abbot Laboratories*, 387 U.S. at 149. Plaintiffs mount a number
18 of purely legal claims, including claims that SB 1363 is impermissibly vague on its face and
19 impermissibly restricts First Amendment assembly rights. (Doc. 8). The attorney general has
20 already been enjoined from enforcing SB 1365 on purely legal grounds, namely that it
21 discriminates according to viewpoint. (Doc. 99). Likewise, the core issues of Plaintiffs’ and
22 Plaintiff-Intervenors’ complaints are purely legal in nature. Plaintiffs and Plaintiff-
23 Intervenors allege that the laws deprive them of their basic First Amendment rights.
24 Dismissing the case on ripeness grounds would cause them to continue to suffer this alleged
25 loss, which the Supreme Court has held “unquestionably constitutes irreparable injury.”
26 *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Plaintiffs’ and Plaintiff-Intervenors’ claims are
27 ripe for review.

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1 **C. Eleventh Amendment**

2 The fact that a governor is responsible for implementing state law does not subject her
3 to liability in an *Ex Parte Young* suit unless the governor has some direct responsibility for
4 implementing the law being challenged. *See National Audubon Society, Inc. v. Davis*, 307
5 F.3d 835, 847 (9th Cir. 2002) (director of state fish and game department, not governor, is
6 the proper subject of *Ex Parte Young* suit challenging state law restricting use of certain
7 animal traps). The Governor of the State of Arizona is responsible for the operations of the
8 Department of Public Safety, which is responsible for enforcing the criminal provisions of
9 SB 1363. A.R.S. § 41-1711 (2011). However, such supervision does not constitute a “fairly
10 direct” relationship subjecting the governor to liability under *Ex Parte Young*. *See, e.g.,*
11 *NAACP v. L.A. Unified Sch. Dist.*, 714 F.2d 946, 953 (9th Cir. 1983) (school superintendent,
12 not governor, is proper subject of suit alleging racial discrimination in schools);
13 *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467, 469 (9th Cir.
14 1999) (governor not the proper subject of a suit alleging state was improperly running lottery
15 on tribal lands in violation of federal law). Governor Brewer has mere supervisory authority
16 over departments that implement SB 1363 and SB 1365, and is therefore not the proper
17 subject of an *Ex Parte Young* suit challenging them.

18 Both laws specify that the Attorney General may levy fines and impose penalties for
19 their violation; his relation to the law’s enforcement is therefore “fairly direct.” A.R.S. § 23-
20 361.02(D); A.R.S. § 23-1324(C). Moreover, Plaintiffs seek a declaratory judgment that the
21 laws are unconstitutional, and Arizona’s Declaratory Judgments Act requires that they serve
22 the Attorney General. A.R.S. § 12-1841(C) (2003). “Arizona courts have uniformly held that
23 the Arizona Attorney General is an appropriate party to such cases.” *Yes on Prop 200 v.*
24 *Napolitano*, 215 Ariz. 458, 469, 160 P.3d 1216, 1227 (App. 2007). The Eleventh Amendment
25 does not prevent the Attorney General from being sued in his official capacity in a suit
26 seeking to prevent him from enforcing an allegedly unconstitutional state law. *See Kentucky*
27 *v. Graham*, 473 U.S. 159, 167 n.14 (1985).

28 Secretary of State Bennett is required, under SB 1363, to maintain the “no trespass

1 public notice list” through the county recorders. A.R.S. § 23-1326(A). This lists forms the
2 foundation of enforcement actions against those engaged in unlawful picketing, trespassory
3 assembly, or mass picketing. *Id.* § 23-1326(F). As such, Secretary Bennet’s connection to
4 enforcing SB 1363 is “fairly direct.” *Long v. Van de Kamp* 961, F.2d 151, 152 (1992). The
5 statutes assign no direct enforcement role to the Department of Labor or to DOL Director
6 Randall Maruca. Plaintiffs allege that as the Director of DOL, Maruca is “in charge of
7 processing workers’ wage claims when they have wages deducted in violation of law.” (Doc.
8 60). Although Director Maruca may be responsible for resolving disputes that will arise if
9 the SB 1363 and SB 1365 go into effect, he is not responsible for direct enforcement of the
10 measures. His connection to the laws, therefore, is not “fairly direct” and he is dismissed as
11 a party to this case. Likewise, the State of Arizona, named by Plaintiffs, is not a proper party
12 to this suit, and is also dismissed as a party. *See* U.S. Const. amend XI.²

13 Periodically in their Amended Complaint, Plaintiffs reference state law in addition to
14 federal law. For example, they claim that SB 1365 “is invalid under the federal and state
15 constitutional guarantees of the rights of speech, association, and petitioning,” and that
16 provisions of SB 1363 “violate the First and Fourteenth Amendments to the U.S. Constitution
17 and violate free speech and due process rights under the Arizona Constitution.” (Doc. 8, ¶¶
18 59, 90). The Supreme Court has held that the Eleventh Amendment bars federal courts from
19 ruling on whether state statutes violate state constitutions, stating that “it is difficult to think
20 of a greater intrusion on state sovereignty than when a federal court instructs state officials
21 on how to conform their conduct to state law.” *Pennhurst State School & Hosp. v.*
22 *Halderman*, 465 U.S. 89 (1984). None of Plaintiffs’ claims arise solely under state law, so
23 none of them need to be dismissed. However, only the federal component of Plaintiffs’
24 claims will be considered.

25 CONCLUSION

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28 ² Defendant Joe Arpaio made no argument that a claim against him was barred by the
Eleventh Amendment.

