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 State of Arizona, and Cross-Defendant The State of Arizona*

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

14 Martin H. Escobar,

15 Plaintiff,

16 v.

17 Jan Brewer, Governor of the State of
 Arizona, in her Official and Individual
 18 Capacity; the City of Tucson, a
 municipal corporation,
 19

20 Defendants.

21 The City of Tucson,

22 Cross-plaintiff,

23 v.

24 The State of Arizona, a body politic; and
 Jan Brewer, in her capacity as Governor
 25 of the State of Arizona,

26 Cross-defendants.
 27
 28

Case No. CV10-00249-TUC-SRB

**GOVERNOR BREWER'S REPLY IN
 SUPPORT OF MOTION TO DISMISS**

1 Defendant Janice K. Brewer (“Governor Brewer”) submits this Reply in support of
2 her Motion to Dismiss (the “Motion”) (doc. 55).

3 In his Response in Opposition to Brewer [sic] Motion to Dismiss (the “Response”)
4 (doc. 87), plaintiff fails to establish how he has standing to pursue his challenges to Senate
5 Bill 1070, as amended (“SB 1070” or the “Act”). Plaintiff fails to establish how the
6 allegations he made in his First Amended Complaint (doc. 4) give him standing to pursue
7 his claims (*e.g.*, his claims that he fears he *might* be disciplined if he enforces the Act, his
8 alleged concern that he *might* violate the constitutional rights of others if he enforces the
9 Act, *etc.*). Those allegations, of course, are all insufficient because they do not
10 demonstrate that *plaintiff* has suffered, or is likely to suffer, any *actual or imminent* injury
11 related to the enforcement of SB 1070.

12 Perhaps in recognition that his standing is tenuous, plaintiff in his Response now
13 asserts a new and additional “standing argument” that is not based on any of the
14 allegations set forth in his First Amended Complaint. Plaintiff now contends that he will
15 somehow also be harmed by SB 1070 based on his status “as a Hispanic residing in
16 Arizona.” Resp. at 12:2-10. Putting aside that plaintiff’s standing must be assessed based
17 on the allegations in his First Amended Complaint (the operative pleading), not what he
18 argues or alleges for the first time in his Response, this new general standing argument is
19 also insufficient. Plaintiff still fails to identify any concrete and particularized injury that
20 is actual and imminent that would entitle him to proceed with these claims.

21 Finally, plaintiff offers no more than a paragraph in his Response in rebuttal to
22 Governor Brewer’s argument that his First Amended Complaint fails to state a claim upon
23 which relief can be granted. Plaintiff merely assumes that this Court’s issuance of a
24 preliminary injunction in a related case moots Governor Brewer’s arguments. It does not.
25 With a single exception, plaintiff’s arguments are distinct from those offered by the
26 plaintiff in *United States v. Arizona, et al.*, Case No. CV10-1413-PHX-SRB (the “Federal
27 Case”). Plaintiff’s failure to respond to Governor Brewer’s Rule 12(b)(6) legal arguments
28 also serves as a ground for granting the Motion.

1 **I. PLAINTIFF HAS NOT DEMONSTRATED THAT HE HAS STANDING**

2 Plaintiff acknowledges in his Response that he has the burden of establishing
3 standing to pursue his claims. Resp. at 6:12. Thus, plaintiff must allege facts showing
4 that he has suffered a “concrete and particularized” injury, meaning one that it is “actual
5 or imminent” as opposed to “conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*,
6 504 U.S. 555, 560 (1992). Federal courts have repeatedly emphasized that “the injury that
7 a plaintiff alleges must be unique to that plaintiff, one in which he has a ‘personal stake’
8 in the outcome of the litigation seeking to remedy that harm.” *Schmier v. U.S. Court of*
9 *Appeals for the Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2001) (internal citations
10 omitted). Here, Plaintiff has failed to allege any personal stake in his challenge to
11 SB 1070 other than his apparent vehement disagreement with the wisdom of the
12 legislation. However, plaintiff’s personal disagreement with the wisdom of legislation is
13 insufficient to give plaintiff standing (as a police officer or otherwise, for that matter).

14 **A. Plaintiff Fails to Establish Standing Based on His Allegations of Harm**
15 **as a Law Enforcement Officer**

16 Based on the allegations in the First Amended Complaint, plaintiff’s challenges to
17 SB 1070 are based on (and arise out of) his position as a police officer for the City of
18 Tucson.¹ FAC ¶¶ 68-77. Plaintiff’s standing is based on an alleged “dilemma” that he
19 claims he faces: if he enforces SB 1070, plaintiff claims that he will be “subjected to
20 costly civil actions” from individuals, but if he refuses to enforce SB 1070, he will face
21 discipline from his employer or “costly private enforcement actions.” FAC ¶ 77.

22 This claimed dilemma does not give plaintiff standing. First, as set forth in the
23 Motion, the Ninth Circuit has specifically rejected this argument in *City of S. Lake Tahoe*
24 *v. Cal. Tahoe Reg’l Planning Agency*, 625 F.2d 231, 237 (9th Cir. 1980). Mot. at 7:27-
25 8:14. In *South Lake Tahoe*, members of a city council expressed disagreement with a
26 state law and asserted that they had standing to challenge the law because of their role as

27 ¹ Plaintiff’s new standing allegations and arguments that are based on (and which arise
28 out of) his status as a Hispanic citizen of the State of Arizona are addressed in Section B
below.

1 public officials. Like plaintiff in this case, the city council members argued that a failure
2 to enforce the law could result in “personal criminal liability” and “exposure to civil
3 claims” but that choosing to enforce the law would violate “their oaths of office to uphold
4 the U.S. Constitution and expose themselves to civil liability.” *Id.* at 233. The Ninth
5 Circuit held that plaintiff did not have standing either way. As the court observed, to
6 confer standing on public officials because they do not wish to enforce a statute would
7 “convert all officials charged with executing statutes into potential litigants, or attorneys
8 general, as to laws within their charge.” *Id.* at 238. Likewise, the council members’
9 concerns about civil liability was “wholly speculative” and depended on the occurrence of
10 “multiple contingencies,” none of which had happened. *Id.* at 238-39. The Ninth Circuit
11 concluded that the plaintiffs’ “abstract outrage” and personal disagreement with the state
12 law was insufficient.

13 Plaintiff does not (and cannot) distinguish this binding precedent in his Response.
14 Plaintiff relegates his argument regarding *South Lake Tahoe* to a footnote and argues only
15 that he has been “forced to live and work under the cloud of SB 1070” as a “Hispanic
16 police officer.” Resp. at 13 n.36. This argument is unavailing and ignores the central
17 holding of *South Lake Tahoe*. Plaintiff has simply not demonstrated that he faces any
18 actual or imminent injury from SB 1070. Moreover, here, plaintiff’s generalized concern
19 about being exposed to civil liability is unfounded. SB 1070 only imposes penalties for
20 violations of A.R.S. § 11-1051 upon “entities,” not individual police officers, and requires
21 the City of Tucson (plaintiff’s employer) to indemnify him for claims arising out of his
22 enforcement of the Act (unless he acts in bad faith). See A.R.S. §§ 11-1051(H), (K).

23 Plaintiff has also not alleged facts showing that he faces “a *genuine* threat of
24 *imminent* prosecution,” as required under Ninth Circuit case law. *San Diego Cnty. Gun*
25 *Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (internal quotes omitted,
26 emphases in original). Plaintiff’s speculation regarding the possibility that he will face
27 some type of undefined and speculative employment “discipline” – especially without
28 reference to any communication or threats by his employer – is not enough to grant him

1 standing. *See Friendly House v. Napolitano*, 419 F.3d 930, 932 (9th Cir. 2005) (finding
2 that plaintiffs lacked standing to bring a pre-enforcement challenge, because they did not
3 allege a “concrete plan to violate [the law],” did not identify a specific threat of
4 prosecution, and could not show a history of “past persecution.”) (citation omitted). This
5 is especially true where, as here, the acts necessary to make plaintiff’s injury materialize
6 “are almost entirely within plaintiff’s control.” *San Diego County*, 98 F.3d at 1127.

7 Further, plaintiff does not allege that enforcement of the Act will affect any of *his*
8 constitutional rights. Plaintiff also has not alleged a specific threat of professional
9 discipline if he refuses to enforce SB 1070. He alleges only that the City of Tucson and
10 Governor Brewer have made *general statements* that they intend to enforce the Act. Resp.
11 at 14. *See San Diego County*, 98 F.3d at 1127 (“[A] general threat of prosecution is not
12 enough to confer standing.”).² In the absence of specific allegations of imminent harm
13 and without a well-defined constitutional right being directly implicated by operation of
14 the Act, plaintiff’s abstract concern about professional discipline is insufficient to confer
15 standing.

16 Neither *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) nor *Bland v.*
17 *Fessler*, 88 F.3d 729 (9th Cir. 1996) – the two cases primarily relied upon by plaintiff –
18 support plaintiff’s argument that his alleged fear of potential discipline gives him standing
19 to challenge SB 1070. In both of those cases, unlike this case, the plaintiffs faced
20 concrete, specific penalties for engaging in particular conduct that jeopardized *their own*
21 constitutional rights. In *Stormans*, for instance, two pharmacists and a pharmacy
22 challenged a regulation that prohibited pharmacies “from refusing to deliver a lawfully
23 prescribed or approved medicine,” including Plan B, an emergency contraceptive. *See*
24 *Stormans*, 586 F.3d at 1115-16. The pharmacy would “not be able to avoid stocking Plan

25 ² Although plaintiff attempts to cure this pleading deficiency by arguing in the Response
26 that the Arizona Peace Officer Standards and Training Board (“AzPOST”) “can restrict,
27 suspend, or revoke his license as a[n] Arizona law enforcement officer,” Resp. at 14-15,
28 this allegation is not in the First Amended Complaint and, even if it were, it is insufficient
for the same reason – it is not an allegation of actual or imminent harm to plaintiff by
AzPOST or anyone else.

1 B” as required by the regulations. *Id.* at 1121. Likewise, the individual pharmacists had
2 already changed jobs to avoid dispensing Plan B, and one of them expected to be fired
3 because her employer had already told her that it could not accommodate her
4 constitutional freedom of religion rights and issues. *Id.* at 1117.

5 Similarly, in *Bland*, the Ninth Circuit found that a business owner had alleged a
6 claim to protect *his* First and Fourteenth Amendment rights regarding automated
7 advertising. *Bland*, 88 F.3d at 732. There, the plaintiff business owner established
8 standing by showing that: (1) the statute’s explicit enumeration of fines and authorization
9 of citizen suits against him for violations of the statute compelled him to refrain from
10 using automated advertising, and (2) that his “compliance with the civil statute ... cut his
11 income by 50% and caused him to lay off three employees.” *Id.* at 737.³

12 The other cases relied upon by plaintiff are equally inapposite or distinguishable.
13 For example, in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010), the
14 plaintiffs demonstrated their intent to engage in the specific conduct the challenged statute
15 proscribed and the government’s history of prosecuting such individuals under the statute.
16 In *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 618 (9th Cir.1999),
17 plaintiffs challenged a statute that “criminalize[d] the willful and malicious making of
18 derogatory statements about banks” after “the attorney general undisputedly threatened
19 the union with enforcement ... and fervently continued to do so until after the district
20 court granted the union’s request for a TRO.” *MedImmune, Inc. v. Genentech, Inc.*, 549
21 U.S. 118, 122 (2007) did not involve a statutory challenge; in any event, it was a case in
22 which the plaintiff had received “a clear threat” from another business to enforce a royalty
23 agreement between the parties.

24
25 _____
26 ³ Plaintiff also relies on *Canatella v. California*, 304 F.3d 843 (9th Cir. 2002) and
27 *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501 (9th Cir.
28 1992). These cases are readily distinguishable. The plaintiffs in both cases belonged to
the class of persons whose conduct the challenged statutes proscribed and, in both cases,
the challenged statutes had been enforced against the plaintiffs. *See Canatella*, 304 F.3d
at 852-53; *Thornburgh*, 970 F.2d at 509-10.

1 **B. Plaintiff Failed to Establish Standing Based on His Allegations of Harm**
2 **as a Citizen of Arizona**

3 As noted above, plaintiff now contends for the first time in his Response that he
4 also has standing because he faces personal harm from SB 1070 based on his status as a
5 naturalized citizen and “the fact that he is a Spanish-speaking Mexican 24 hours a day.”
6 Resp. at 5:17 – 6:9. He argues that “[i]f stopped or subjected to detention, he is
7 undoubtedly within the ‘suspect group’ for which ‘reasonable suspicion’ *may* exist in the
8 mind of another officer.” Resp. at 12:2-10 (emphasis added). As such, plaintiff believes
9 he is exposed to harm in his personal life to the same extent as all other Hispanics in
10 Arizona, and “has standing to challenge the constitutionality of SB 1070 before it is
11 actually enforced against him....” Resp. at 2 n.3, 13 n.36, 16. These new standing
12 allegations fail for at least two reasons.

13 First, these new allegations are untimely. To survive a motion to dismiss, a
14 plaintiff “must allege facts in his Amended Complaint that, if proven, would confer
15 standing upon him.” *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th
16 Cir. 2006) (citing *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir.
17 2003)); *Skaff v. Meridien North America Beverly Hills, LLC*, 506 F.3d 832, 837 (9th Cir.
18 2007) (“We must follow the rule that if a plaintiff does not allege standing in its
19 complaint, we have no jurisdiction to hear the case.”). Plaintiff cannot assert a new theory
20 of standing in his Response. *See Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107
21 (7th Cir. 1984) (“[I]t is axiomatic that the complaint may not be amended by the briefs in
22 opposition to a motion to dismiss.”)

23 Second, even if plaintiff had included these allegations in the First Amended
24 Complaint, he still cannot establish that he will suffer any injury-in-fact from enforcement
25 of the Act. Plaintiff is correct in noting “that a party seeking prospective equitable relief
26 in the form of either a declaratory judgment or an injunction need[s] ... [to] establish a
27 ‘credible’ or ‘genuine’ threat of enforcement in order to satisfy Article III standing
28 requirements.” Resp. at 10:4-8. However, “‘persons having no fears of state prosecution

1 except those that are *imaginary or speculative*, are not to be accepted as appropriate
2 plaintiffs.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)
3 (emphasis added) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). In determining
4 whether a genuine threat of imminent prosecution exists, courts review the following
5 factors: (1) whether the plaintiff “articulated concrete plans to violate” the statute in
6 question; (2) whether the government has issued a “specific warning” or threat of its intent
7 to prosecute the plaintiff under the statute; and (3) whether the plaintiff has been
8 prosecuted under the statute in the past. *San Diego County*, 98 F.3d at 1126-29.

9 Plaintiff fails to allege facts supporting any of these factors (in his First Amended
10 Complaint or otherwise). Rather, plaintiff bases his alleged harm on “some day”
11 hypothetical scenarios that may never come to pass. He claims that *if* he is arrested or *if*
12 he is stopped he *may* suffer harm. Resp. at 12:2-10. The conduct that may subject
13 plaintiff to a threat of prosecution under the Act is “almost entirely within [his] own
14 control,” and yet he has failed to articulate facts that give an inference of the high degree
15 of immediacy necessary for standing. *See San Diego County*, 98 F.3d at 1127. Likewise,
16 plaintiff cannot identify any specific threats that the Act will be enforced against him
17 individually. He claims that Governor Brewer is “unequivocal in her intention to enforce
18 the Act,” but does not explain why *he* faces any particular threat. Resp. at 14:16-17. As
19 the Ninth Circuit observed in *San Diego County*, “a general threat of prosecution is not
20 enough to confer standing.” 98 F.3d at 1127. Finally, there are no allegations that
21 plaintiff has been the victim of unlawful enforcement of the Act in the past.

22 C. **Plaintiff is Not Entitled to Standing Based on His Pending Motion to**
23 **Consolidate**

24 In a last ditch effort to salvage standing, plaintiff refers this Court to his pending
25 motions to consolidate this case with the Federal Case and *Salgado v. Brewer et al.*,
26 CV10-0951-PHX-SRB. Plaintiff argues that this Court should consider the consolidated
27 standing of all the cases, rather than each case separately. Resp. at 16:15-17:2. However,
28 for the reasons set forth in Governor Brewer’s Response to Plaintiff’s Motion to

1 Consolidate (doc. 83), consolidation prior to determining standing would be premature
2 and would undermine considerations of judicial economy.

3 **II. PLAINTIFF HAS NOT DEMONSTRATED THAT HIS AMENDED**
4 **COMPLAINT STATES A CLAIM FOR RELIEF**

5 **A. Plaintiff Fails to Provide a Substantive Response to Governor Brewer’s**
6 **Rule 12(b)(6) Arguments**

7 Plaintiff did not include a substantive response to Governor Brewer’s Rule 12(b)(6)
8 arguments in his Response. Instead, in a single paragraph, he asserts only that his First
9 Amended Complaint “provides a detailed factual basis for the claims asserted therein” and
10 (in footnote 23) he attempts to incorporate by reference his entire motion for preliminary
11 injunction. This decision to ignore Governor Brewer’s 12(b)(6) arguments is striking in
12 light of plaintiff’s choice to spend nearly four pages of his 17-page Response on a
13 “Preliminary Statement” with his general views on the immigration debate.⁴

14 This District’s Local Rules of Civil Procedure expressly require plaintiff to respond
15 by a responsive memorandum to arguments raised in a motion. *See* LRCiv 7.2(i) (failure
16 to serve and file the required answering memorandum may be deemed consent to the
17 granting of the motion). By using a footnote to refer this Court to other general,
18 previously filed documents instead of responding directly to Governor Brewer’s
19 arguments, plaintiff leaves Governor Brewer and this Court with no specific substantive
20 response to consider regarding the 12(b)(6) issues. The memorandum to which plaintiff
21 refers the Court does not even touch upon many of the key issues that Governor Brewer
22 raised in her Motion. For example, plaintiff’s Motion for Preliminary Injunction does not
23 address, among other things: (1) the specific pleading deficiencies Governor Brewer
24 identified in her Motion; (2) the high burden that plaintiff faces in seeking to invalidate
25 SB 1070 on its face; (3) the numerous specific arguments Governor Brewer raised to

26 ⁴ In his preliminary statement, plaintiff also references books, news articles, and a
27 YouTube video. *See* Resp. at 4-6 nn. 9-14, 17. The inclusion of these materials is not
28 proper in evaluating the sufficiency of the First Amended Complaint. *Cf. Safe Air for
Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (“In a facial attack, the
challenger asserts that the allegations contained in a complaint are insufficient on their
face to invoke federal jurisdiction.”).

1 support her argument that federal law does not preempt SB 1070; and (4) the absence of
2 any plausible allegations of constitutional harm. *See* Mot. at 10:1-17:1.⁵

3 **B. This Court’s Order in the Federal Case Does Not Render Governor**
4 **Brewer’s 12(b)(6) Arguments Moot**

5 Plaintiff asserts that this Court’s Order in the Federal Case “confirms the viability
6 of plaintiff’s claims” rendering Governor Brewer’s 12(b)(6) arguments moot. Resp. at
7 7:17-19. But a claim is not moot when “there is a present controversy as to which
8 effective relief can be granted.” *Nw. Env’tl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th
9 Cir. 1988) (citing *United States v. Geophysical Corp.*, 732 F.2d 693, 698 (9th Cir. 1984)).
10 “As long as effective relief may still be available to counteract the effects of the violation,
11 the controversy remains live and present.” *Id.* at 1245. Governor Brewer’s motion
12 challenges the sufficiency of *plaintiff’s* First Amended Complaint, which has not been
13 dismissed or withdrawn.

14 In addition, the legal theories raised in the Federal Case are notably different from
15 those raised by plaintiff here. As set forth in Governor Brewer’s Response to Plaintiff’s
16 Motion for Preliminary Injunction (doc. 86) (at page 10 and footnote 6), plaintiff’s
17 preemption argument are largely distinct from those raised in the Federal Case. Plaintiff
18 also raises claims under the First, Fourth, Fifth, and Fourteenth Amendments, and the
19 Supreme Court’s finding in *Plyler v. Doe*. FAC ¶¶ 70, 78-92. None of these legal claims
20 was raised in the Federal Case. Accordingly, plaintiff’s First Amended Complaint
21 remains viable and Governor Brewer is entitled to challenge it by way of her Motion.

22 **III. CONCLUSION**

23 For these reasons and the reasons Governor Brewer raised in her Motion to
24 Dismiss, plaintiff has failed to properly allege that he has standing and plaintiff has failed
25 to state a claim for relief. Plaintiff’s First Amended Complaint should be dismissed.

26
27 ⁵ Plaintiff’s Memorandum focuses almost exclusively on issues related to preemption, and
28 specifically fails to provide any arguments in support of four of plaintiff’s claims – Count
Two (Equal Protection), Count Three (First Amendment: Free Speech), Count Four
(Fourth Amendment), and Count Five (Fifth Amendment).

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RESPECTFULLY SUBMITTED this 20th day of August, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2010, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

11879239 s/John Bouma