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17 **Counsel for Plaintiff Martin H. Escobar**

18 **IN THE UNITED STATES DISTRICT COURT**  
19 **FOR THE STATE OF ARIZONA**

20 **MARTIN H. ESCOBAR,**

21 **plaintiff,**

22 **v.**

23 **JAN BREWER, Governor of**  
24 **the State of Arizona, in her**  
25 **Official and Individual**  
26 **Capacity, and the CITY of**  
27 **TUCSON, a municipal**  
28 **corporation,**

**defendants.**

**CITY OF TUCSON,**  
**a municipal corporation,**

**cross-plaintiff,**

**v.**

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

**cross-defendants.**

**No. CV 10-249 TUC SRB**

**NOTICE OF APPEAL**

**[Fed. R. App. P. 3 & 9<sup>th</sup> Cir. R. 3-3.]**

1 Plaintiff, Martin H. Escobar, through his undersigned counsel, hereby provides  
2 notice of his appeal of the District Court's Order of August 31 29, 2010 (CD No. 96),  
3 copy attached hereto as Exhibit 1, granting Defendant Brewer's Motion to Dismiss and  
4 denying Plaintiff's Motion for Preliminary Injunction.

5 Respectfully submitted this 6<sup>th</sup> day of September 2010.

6  
7 s/Richard M. Martinez, Esq.  
Richard M. Martinez, Esq.

8 Stephen Montoya  
9 Augustine B. Jimenez III  
10 Montoya & Jimenez, P.A.  
Counsel for Plaintiff

11 **Certification of Service**

12 I hereby certify that on September 6, 2010, I electronically transmitted the  
13 foregoing document to the Clerk of Court using the CM/ECF System for filing and  
14 transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

15  
16 s/Richard M. Martinez, Esq.  
Richard M. Martinez, Esq.

Exhibit 1  
to  
Notice of Appeal

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Martin H. Escobar,  
Plaintiff,

vs.

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

No. CV 10-249-PHX-SRB

**ORDER**

This matter comes before the Court on Defendant Janice K. Brewer’s Motion to Dismiss the First Amended Complaint (“Def.’s Mot.”) (Doc. 55).

**I. BACKGROUND**

The Arizona Legislature enacted a set of statutes and statutory amendments in the form of Senate Bill 1070, the “Support Our Law Enforcement and Safe Neighborhoods Act,” 2010 Arizona Session Laws, Chapter 113, which Governor Brewer signed into law on April 23, 2010. Seven days later, the Governor signed into law a set of amendments to Senate Bill 1070 under House Bill 2162, 2010 Arizona Session Laws, Chapter 211.<sup>1</sup> S.B. 1070 had an effective date of July 29, 2010. Among other things, S.B. 1070 Subsection 2(B) requires

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<sup>1</sup> In this Order, unless otherwise specified, the Court refers to S.B. 1070 and H.B. 2162 collectively as “S.B. 1070,” describing the April 23, 2010, enactment as modified by the April 30, 2010, amendments.

1 officers to make a reasonable attempt, when practicable, to determine an individual's  
2 immigration status during any lawful stop, detention, or arrest where reasonable suspicion  
3 exists that the person is unlawfully present in the United States. S.B. 1070 § 2(B) (adding  
4 Ariz. Rev. Stat. ("A.R.S.") § 11-1051(B)). In addition, Subsection 2(A) prohibits Arizona  
5 officials, agencies and political subdivisions from limiting or restricting the enforcement of  
6 federal immigration laws, and Subsection 2(H) permits legal residents of Arizona to bring  
7 civil actions challenging "any official or agency of [Arizona] that adopts or implements a  
8 policy that limits or restricts the enforcement of federal immigration laws . . . to less than the  
9 full extent permitted by federal law." *Id.* § 11-1051(A), (H). Section 6 of S.B. 1070 amends  
10 A.R.S. § 13-3883 to permit an officer to arrest a person without a warrant if the officer has  
11 probable cause to believe that "the person to be arrested has committed any public offense  
12 that makes the person removable from the United States." *Id.* § 13-3883(A)(5).

13 Plaintiff Martin Escobar is a police officer with the City of Tucson Police Department  
14 holding the rank of Lead Patrol Officer. (Doc. 4, 1st Am. Compl. ("FAC") ¶ 10.) Plaintiff  
15 challenges provisions found in Sections 2 and 6 of S.B. 1070. Plaintiff alleges that as a police  
16 officer he is obligated to enforce S.B. 1070 and that he "believes the Act . . . is unlawful  
17 [and] results in impermissible deprivations of rights guaranteed by the United States  
18 Constitution." (*Id.* ¶¶ 21, 57.) Plaintiff asserts that enforcement of S.B. 1070 will violate the  
19 rights of Latinos and Latinas as well as minors and school children and that he may be  
20 subject to civil liability for violating the rights of others in enforcing S.B. 1070. (*Id.* ¶¶ 69-70,  
21 77.) Plaintiff also alleges that, if he refuses to enforce S.B. 1070, he will be subject to  
22 discipline by his employer and civil actions brought pursuant to Subsection 2(H) of S.B.  
23 1070. (*Id.* ¶¶ 71-72.) According to Plaintiff's FAC, Plaintiff will also be "forced to expend  
24 his scarce time and resources in order to thoroughly familiarize himself with [S.B. 1070]'s  
25 requirements." (*Id.* ¶ 73.) Finally, Plaintiff alleges that he is being pressured to enforce S.B.  
26 1070 by "individuals within the Tucson Police Department" and that this pressure is chilling  
27 his First Amendment right to speak out against S.B. 1070. (*Id.* ¶¶ 74-75.)

28 Plaintiff filed the instant lawsuit on April 29, 2010, after S.B. 1070 was signed but

1 before it was modified by H.B. 2162. (*See* Doc. 1, Compl.) Plaintiff filed his FAC on May  
2 18, 2010. (*See* FAC.) Defendant Brewer challenges Plaintiff's standing to pursue his  
3 challenges to S.B. 1070 and argues that plaintiff has failed to state a claim upon which relief  
4 can be granted. (Def.'s Mot. at 1.)

## 5 **II. LEGAL STANDARDS AND ANALYSIS**

### 6 **A. Dismissal for Lack of Standing Pursuant to Rule 12(b)(1)**

7 Defendant Brewer moves to dismiss Plaintiff's FAC pursuant to Federal Rule of Civil  
8 Procedure 12(b)(1), arguing that Plaintiff does not have standing to bring this action. (*Id.* at  
9 4-9.) "In essence the question of standing is whether the litigant is entitled to have the court  
10 decide the merits of the dispute . . ." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citation  
11 omitted). The plaintiff has the burden of establishing standing and must "'allege[] such a  
12 personal stake in the outcome of the controversy' as to warrant [the] invocation of  
13 federal-court jurisdiction and . . . justify exercise of the court's remedial powers." *Id.* at 499  
14 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In evaluating standing, courts must accept  
15 all material allegations in the complaint as true and construe the complaint in favor of the  
16 plaintiff. *Graham v. FEMA*, 149 F.3d 997, 1001 (9th Cir. 1998) (quoting *Warth*, 422 U.S. at  
17 501).

18 Under Article III of the Constitution, a plaintiff does not have standing unless he can  
19 show (1) an "injury in fact" that is concrete and particularized and actual or imminent (not  
20 conjectural or hypothetical); (2) that the injury is fairly traceable to the challenged action of  
21 the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will  
22 be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61  
23 (1992); *see also Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009). Even when the  
24 constitutional minima of standing are present, prudential concerns may impose additional  
25 limitations. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). Prudential  
26 standing limitations embody "'judicially self-imposed limits on the exercise of federal  
27 jurisdiction.'" *Id.* at 12 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Prudential  
28 standing limitations include "'the general prohibition on a litigant's raising another person's

1 legal rights, the rule barring adjudication of generalized grievances more appropriately  
2 addressed in the representative branches, and the requirement that a plaintiff's complaint fall  
3 within the zone of interests protected by the law invoked." *Id.* (quoting *Allen*, 468 U.S. at  
4 750); *see also Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848-49  
5 (9th Cir. 2007) (quoting *Johnson v. Stuart*, 702 F.2d 193, 196 (9th Cir. 1983)).

6 **B. Plaintiff's Standing to Challenge S.B. 1070**

7 Plaintiff's FAC alleges several injuries arising from Plaintiff's obligation to enforce  
8 S.B. 1070. (FAC ¶¶ 69-77.) In addition, Plaintiff argues in his Response to Defendant's  
9 Motion to Dismiss that he has standing "[a]s a Hispanic residing in Arizona . . . exposed to  
10 all the dangers that [S.B. 1070] presents" and as a result of his pending Motions to  
11 Consolidate. (Pl.'s Resp. at 12, 16.) Defendant Brewer challenges each alleged injury as an  
12 insufficient basis for standing under both the constitutional and prudential standing  
13 limitations. (Def.'s Mot. at 5-9.)

14 **1. Standing Based on Plaintiff's Alleged Injuries as a Law**  
15 **Enforcement Officer**

16 Plaintiff alleges that, as a law enforcement officer obligated to enforce S.B. 1070, he  
17 is faced with "a dilemma." (FAC ¶ 77.) Plaintiff alleges that "if he refuses to enforce [S.B.  
18 1070], he can be disciplined by his employer or subjected to costly private enforcement  
19 actions under [S.B. 1070]" and that, "if he enforces [S.B. 1070], he can be subjected to costly  
20 civil actions alleging the deprivation of the civil rights of the individual against whom he  
21 enforces [S.B. 1070]." (*Id.*)

22 As an initial matter, the Ninth Circuit Court of Appeals addressed a similar dilemma  
23 in *City of South Lake Tahoe v. California Tahoe Regional Planning Agency* and ultimately  
24 determined that the dilemma did not give rise to standing. 625 F.2d 231, 237-238 (9th Cir.  
25 1980). In *City of South Lake Tahoe*, city councilmembers challenged planning and  
26 development regulations. *Id.* at 233. The councilmembers asserted that, while they were  
27 required by law to enforce the challenged regulations and a refusal to enforce the regulations  
28 could result in criminal penalties, enforcement of the regulations would violate the

1 councilmembers' oaths of office to uphold the United States Constitution and would expose  
2 the councilmembers to civil liability. *Id.* The court recognized the councilmembers'  
3 "personal dilemma" but noted that "the source of the . . . complaint . . . [was] just abstract  
4 outrage at the enactment of an unconstitutional law" and that "the councilmembers will lose  
5 nothing by enforcing the [challenged legislation] save an abstract measure of constitutional  
6 principle." *Id.* at 237. The court concluded that, because the councilmembers could act to  
7 enforce the regulations without any real threat of concrete harm, "the councilmembers ha[d]  
8 available a course of action which subjects them to no concrete adverse consequences." *Id.*  
9 Ultimately, the court held that the abstract injuries were insufficient to support standing. *Id.*

10 Plaintiff's alleged dilemma similarly fails to provide a sufficient basis for standing.  
11 Plaintiff asserts that enforcement of S.B. 1070 will subject him to costly civil actions. (FAC  
12 ¶ 77.) However, standing requires the plaintiff to allege that he "has sustained or is  
13 immediately in danger of sustaining some direct injury." *City of S. Lake Tahoe*, 625 F.2d at  
14 238. The *City of South Lake Tahoe* court found that the plaintiffs' allegations that they would  
15 be exposed to civil liability if they acted to enforce the allegedly unconstitutional regulations  
16 were "wholly speculative." *Id.* In addition, the court noted that "multiple contingencies"  
17 preclude standing where "there is no immediate threat of suit nor reason to believe suit is  
18 inevitable." *Id.* at 239. Here, not only is the threat of potential suit wholly speculative, but  
19 it is also not clear that Plaintiff would be civilly liable for actions taken in enforcing S.B.  
20 1070. Generally, law enforcement officers are not liable for actions committed "insofar as  
21 their conduct does not violate clearly established statutory or constitutional rights of which  
22 a reasonable person would have known." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009)  
23 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); see also *Grossman v. City of*  
24 *Portland*, 33 F.3d 1200, 1209-10 (9th Cir. 1994) (finding that "an officer who reasonably  
25 relies on the legislature's determination that a statute is constitutional should be shielded  
26 from personal liability"). In addition, S.B. 1070 § 2(K) provides:

27 Except in relation to matters in which the officer is adjudged to have acted in  
28 bad faith, a law enforcement officer is indemnified by the law enforcement  
officer's agency against reasonable costs and expenses, including attorney



1 fees, incurred by the officer in connection with any action, suit or proceeding  
2 brought pursuant to this section in which the officer may be a defendant by  
3 reason of the officer being or having been a member of the law enforcement  
4 agency.

5 S.B. 1070 § 2(K) (adding A.R.S. § 11-1051(K)). In light of these limits on officer liability,  
6 “the threat of civil liability is too attenuated and conjectural” to provide Plaintiff with a basis  
7 for standing. *See City of S. Lake Tahoe*, 625 F.2d at 239.

8 Plaintiff also asserts that if he refuses to enforce S.B. 1070 he will be subject to  
9 discipline by his employer and “costly lawsuits by private parties” pursuant to the  
10 enforcement provision found in Subsection 2(H) of S.B. 1070. (FAC ¶¶ 71-72.) Subsection  
11 2(H) provides:

12 A person who is a legal resident of this state may bring an action in superior  
13 court to challenge any official or agency of this state or a . . . political  
14 subdivision of this state that adopts or implements a policy that limits or  
15 restricts the enforcement of federal immigration laws . . . [and that] [i]f there  
16 is a judicial finding that an *entity* has violated this section, the court shall order  
17 that the *entity* pay a civil penalty.

18 S.B.1070 § 2(H) (adding A.R.S. § 11-1051(H)) (emphasis added). On its face, Subsection  
19 2(H) does not appear to impose liability on individual law enforcement officers. As a result,  
20 Plaintiff’s allegation that he will be subject to private actions brought pursuant to Subsection  
21 2(H) of S.B. 1070 fails to give rise to a “concrete and particularized” injury sufficient to  
22 support Plaintiff’s standing. *See Lujan*, 504 U.S. at 560. In addition, the allegation that  
23 Plaintiff will be subject to discipline by his employer if he refuses to enforce S.B. 1070 also  
24 fails because the threat of discipline is too abstract and speculative. “A party facing  
25 prospective injury has standing to sue where the threatened injury is real, immediate, and  
26 direct.” *Davis v. Fed. Election Comm’n*, 128 S. Ct. 2759, 2769 (2008) (citing *City of L.A. v.*  
27 *Lyons*, 461 U.S. 95, 102 (1983); *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289,  
28 298 (1979)). While Plaintiff alleges that Defendants Brewer and the City of Tucson have  
expressed an intent to enforce the law, this does not provide any information about the  
likelihood that Plaintiff will be subject to discipline for a refusal to enforce the law. (*See*  
FAC ¶ 55.) Plaintiff has not alleged any facts making the alleged injury resulting from  
discipline for a failure to enforce S.B. 1070 imminent, rather than conjectural or hypothetical.

1 Moreover, the fact “[t]hat an alternative course exists [(i.e. refusing to enforce the statute)]  
2 which might result in criminal liability does not transform the [plaintiffs’] abstract  
3 disagreement with the legislature . . . into [a] judicially cognizable concrete injury.” *City of*  
4 *S. Lake Tahoe*, 625 F.2d at 237-38. Here, the fact that Plaintiff might be subject to discipline  
5 for refusing to perform his obligations as a law enforcement officer does not transform his  
6 “abstract disagreement” with S.B. 1070 into a “judicially cognizable concrete injury.” *See*  
7 *id.*

8 Plaintiff also alleges that “he does not believe that he can enforce [S.B. 1070] because  
9 he believes that in so doing” he would violate the rights of Latinos and Latinas as well as  
10 minors and school children. (FAC ¶¶ 69-70.) A “plaintiff generally must assert his own legal  
11 rights and interests, and cannot rest his claim to relief on the legal rights or interests of third  
12 parties.” *Warth*, 422 U.S. at 499; *see also City of S. Lake Tahoe*, 625 F.2d at 239 n.8 (noting  
13 that city councilmembers could not raise constitutional rights of third parties where the  
14 councilmembers’ injuries were abstract rather than not concrete and particularized). Here,  
15 the injury alleged is actually an injury to the constitutional rights of others. (*See* FAC ¶¶ 69-  
16 70.) Plaintiff cannot meet the standing requirements by asserting an injury based on  
17 violations of the rights of others. *See Warth*, 422 U.S. at 499.<sup>2</sup>

18 In addition, Plaintiff alleges that he “will be forced to expend his scarce time and  
19 resources in order to fully familiarize himself with [S.B. 1070].” (FAC ¶ 73.) It is not clear  
20 how Plaintiff will be harmed by learning about S.B. 1070 or how learning about S.B. 1070  
21 would be any different from Plaintiff’s regular work duties. The allegation that Plaintiff, a  
22 law enforcement officer, will have to spend time to learn about and understand the  
23 enforcement of a new law is simply insufficient to state an injury for purposes of standing.

24 Finally, Plaintiff alleges that he is being pressured to enforce S.B. 1070 by  
25 “individuals within the Tucson Police Department and . . . various political entities” and that

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26  
27 <sup>2</sup> To the extent Plaintiff alleges an injury to his own rights based on the obligation to  
28 violate the rights of others, Plaintiff’s injury is the type of “abstract constitutional  
grievance[]” rejected as a basis for standing in *City of South Lake Tahoe*. 625 F.2d at 238.

1 this pressure is chilling his First Amendment right to speak out against S.B. 1070. (*Id.* ¶¶  
2 74-75.) In order to give rise to standing, an “injury has to be ‘fairly ... trace[able] to the  
3 challenged action of the defendant, and not ... th[e] result [of] the independent action of some  
4 third party not before the court.’” *Lujan*, 504 U.S. at 560. The alleged chilling of Plaintiff’s  
5 First Amendment rights results not from S.B. 1070 itself but from the alleged pressure to  
6 enforce S.B. 1070 exerted on Plaintiff by unidentified third parties. (*See* FAC ¶¶ 74-75.) As  
7 a result, the alleged injury to Plaintiff’s First Amendment rights is insufficient to act as a  
8 basis for Plaintiff’s standing.

9 Plaintiff’s FAC fails to allege sufficient facts demonstrating that Plaintiff has standing  
10 to bring this action.

## 11 **2. Standing Based on Plaintiff’s Alleged Injuries as a “Hispanic 12 Residing in Arizona”**

13 A plaintiff must allege facts in the complaint demonstrating the plaintiff’s standing.  
14 *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006) (citing *Warren*  
15 *v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003)); *see also City of S. Lake*  
16 *Tahoe*, 625 F.2d at 237 n.7 (“[T]he facts [that] demonstrate a plaintiff’s standing must be  
17 alleged in the plaintiff’s complaint.” (citing *Jenkins v. McKeithen*, 395 U.S. 411, 422 (1969))).  
18 Plaintiff’s FAC does not include any allegations indicating that Plaintiff’s claims are based  
19 on his status as a “Hispanic residing in Arizona.” Plaintiff cannot establish standing by  
20 asserting a new theory of injury in his Response to the Motion to Dismiss. *See Sacks*, 466  
21 F.3d at 771; *City of S. Lake Tahoe*, 625 F.2d at 237 n.7.

## 22 **3. Standing Based on Plaintiff’s Motions to Consolidate**

23 Plaintiff argues that “so long as one plaintiff has standing, the [standing] requirement  
24 is satisfied.” (Pl.’s Resp. at 16 (citing *Constr. Indus. Ass’n of Sonoma Cnty. v. City of*  
25 *Petaluma*, 522 F.2d 897, 903 (9th Cir. 1975).) Plaintiff asserts that, since he has filed  
26 Motions to Consolidate, “this Court should consider the issue of standing as consolidated  
27 cases.” (*Id.* at 16-17.) Standing is a threshold question, and the instant litigation has not been  
28 consolidated with any other pending suit. *See Farrakhan v. Gregoire*, 590 F.3d 989, 1001

1 (9th Cir. 2010) (noting that standing is a threshold question designed to ensure “that the  
2 plaintiff is the correct party to bring suit”).<sup>3</sup> Plaintiff cites no law for the proposition that the  
3 Court should evaluate his standing in light of pending motions to consolidate. Plaintiff’s  
4 pending Motions to Consolidate do not alter the Court’s analysis of Plaintiff’s standing.

5 **III. CONCLUSION**

6 Plaintiff has not alleged “non-conclusory ‘factual content,’” from which the Court can  
7 draw reasonable inferences that are “plausibly suggestive of a claim entitling the plaintiff to  
8 relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Ashcroft v.*  
9 *Iqbal*, 129 S. Ct. 1937, 1952 (2009)). Therefore, and for the reasons stated above, the Court  
10 finds that Plaintiff does not have standing to bring this lawsuit at this time.

11 **IT IS ORDERED** granting Defendant Janice K. Brewer’s Motion to Dismiss (Doc.  
12 55). Plaintiff’s First Amended Complaint is dismissed for lack of standing.

13 **IT IS FURTHER ORDERED** denying Plaintiff’s First Motion to Consolidate (Doc.  
14 20), Plaintiff’s Second Motion to Consolidate (Doc. 79), and Plaintiff’s Motion for  
15 Preliminary Injunction (Doc. 71).

16 **IT IS FURTHER ORDERED** directing Defendant City of Tucson to show cause,  
17 within 14 days from the date of this Order, why the entire action, including the City of  
18 Tucson’s Crossclaim (Doc. 9), should not be dismissed.

19  
20 DATED this 31<sup>st</sup> day of August, 2010.

21  
22  
23 

24 Susan R. Bolton  
United States District Judge

25  
26 <sup>3</sup> In addition, consolidation is a discretionary determination based on a weighing of  
27 the “judicial convenience against the potential for delay, confusion and prejudice caused by  
28 consolidation.” *Sw. Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 807 (N.D.  
Cal. 1989). Consolidation of cases where there is no standing does not promote judicial  
efficiency.