IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

League of United Latin American Citizens; et al., Plaintiffs, vs. State of Arizona; Janice K. Brewer, in her Official Capacity as Governor of the State of Arizona, Defendants.	No. CV 10-1453-PHX-SRB **ORDER**

Pending before the Court is the Motion to Dismiss filed by Defendants Janice K. Brewer and the State of Arizona ("MTD") (Doc. 27).

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 new statutes and statutory amendments with an effective date of July 29, 2010. Following the enactment of S.B. 1070, seven separate lawsuits were filed challenging its constitutionality. (*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 on federal preemption grounds in *United States v. Arizona*. (CV 10-1413-PHX-SRB, Doc. 87, Order at 4.)

S.B. 1070 consists of a number of sections that create or amend statutes, and its stated intent is 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. Within S.B. 1070, Subsection 2(B) requires peace officers to make a reasonable attempt, when practicable, to determine an individual's immigration status during any lawful stop, detention, or arrest where reasonable suspicion exists that the person is unlawfully present in the United States, and it provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." Ariz. Rev. Stat. ("A.R.S.") § 11-1051(B). Subsection 2(A) prohibits Arizona officials, agencies and political subdivisions from limiting or restricting the enforcement of federal immigration laws, and Subsection 2(H) permits legal residents of Arizona to bring civil actions challenging "any official or agency of [Arizona] that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws . . . to less than the full extent permitted by federal law." *Id.* § 11-1051(A), (H). Section 3 creates a crime for the failure of an alien to apply for or carry registration papers, *id.* § 13-1509, Section 4 amends the crime for the smuggling of human beings, *id.* § 13-2319, and Section 5 creates crimes for the performance of work by unauthorized aliens and the transport or harboring of unlawfully present aliens, *id.* §§ 13-2928, 13-2929. Section 6 permits a peace officer to arrest a person without a warrant if the officer has probable cause to believe that "the person to be arrested has committed any public offense that makes the person removable from the United States." *Id.* § 13-3883(A)(5).

On July 9, 2010, Plaintiffs filed the instant class action against Defendants Governor Brewer and the State of Arizona challenging the validity of S.B. 1070 on its face. (Doc. 1, Compl.) The named Plaintiffs include one organization, the League of United Latin American Citizens ("LULAC"), and seven individuals. (*Id.* ¶¶ 13-20.) Plaintiffs raise the following Counts: (1) Sections 1-6 of S.B. 1070 violate the Supremacy Clause of the United

States Constitution; (2) Sections 1-6 of S.B. 1070 are preempted by federal law, including the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq.*; (3) the portion of Section 5 of S.B. 1070 adding A.R.S. § 13-2929 violates the Commerce Clause of the United States Constitution; (4) Sections 1-6 of S.B. 1070 violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. (*Id.* ¶¶ 55-63.)

According to the Complaint, Plaintiff LULAC is a national civil rights organization, and one of its goals is "the promotion and protection of the legal, political, social, and cultural interests of Latino people living in the United States." (*Id.* ¶ 13.) The Complaint further alleges:

> Members of [P]laintiff LULAC are being and will continue to be injured by the imminent or actual implementation of S.B. 1070 and the training materials prepared and distributed by the State of Arizona inasmuch as Hispanic members of LULAC face interrogation, temporary detention, or arrest because of the vague and ill-defined terms of S.B. 1070 and in Arizona's training materials relating to the formation of reasonable suspicion to detain or probable cause to arrest . . . . S.B. 1070 also reasonably caused Plaintiff LULAC to divert its limited resources to address the injuries faced by Hispanic residents of Arizona as a result of the imminent implementation of S.B. 1070.

(*Id.*)[1]

Individual Plaintiffs Anna Ochoa O'Leary and Cordelia Chavez Candelaria Beveridge are "state and local taxpayer[s]" in Arizona. (*Id.* ¶¶ 14-15.) They "challenge the illegal expenditure of funds by [D]efendants and their agents through implementation of S.B. 1070." (*Id.*)

Individual Plaintiffs Magdalena Schwartz, Jose David Sandoval, Jane C. H-P. Doe,

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[1] The Court notes that the Complaint alleges that LULAC's mission concerns the interests of "Latino" people but that S.B. 1070 has resulted in injury to LULAC's "Hispanic" members. (*Id.*) With regard to the definition of these terms, the Court takes judicial notice of the American Heritage Dictionary of the English Language, which comments that the terms are "often used interchangeably in American English," particularly when referring to residents of the United States who are of Latin American origin. American Heritage Dictionary of the English Language (4th ed. 2000). The Court further notes that both terms refer only to a region of origin (Latin America), not a race, and that neither term indicates a place of birth, nationality, or native language.

Jane E.C-J Doe and Jane E.O. Doe are foreign nationals residing in Arizona. (*Id.* ¶¶ 16-20.) All of these Plaintiffs allege that issues exist with their United States immigration status, but none of these Plaintiffs is subject to a final non-appealable order of removal issued by the United States. (*Id.*) They allege that, on account of their particular immigration issues, federal law does not require them to register with the Department of Homeland Security ("DHS"). (*Id.*) As a result, they allege that they do not "possess any documentary evidence issued by DHS establishing [their] right to seek employment or to be employed, or showing that [they are] lawfully present in the United States," even though they are authorized to be present in the United States. (*Id.*) These Plaintiffs seek injunctive relief to prevent their "unlawful detention, arrest, or prosecution under S.B. 1070" and a declaratory judgment that they "may not be prosecuted under S.B. 1070 for seeking employment or engaging in employment in Arizona." (*Id.*)

Defendants now move to dismiss Plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). (MTD at 1.) Defendants argue that the State of Arizona is immune from prosecution under the Eleventh Amendment. (*Id.*) Defendants also challenge Plaintiffs' standing to pursue their claims regarding the constitutionality of S.B. 1070. (*Id.*) Finally, Defendants contend that Plaintiffs have failed to state a claim upon which relief can be granted. (*Id.*)

II. LEGAL STANDARDS AND ANALYSIS

A. Sovereign 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)). Here, the State of Arizona has not waived its sovereign immunity, and, in their Opposition to the Motion to Dismiss, Plaintiffs agree. (Opp'n to MTD at 19 n.22.) The Court therefore dismisses all claims against the State of Arizona in this case.

B. Dismissal for Lack of Standing Pursuant to Rule 12(b)(1)

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute . . . ." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citation omitted). 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." *Id.* at 499 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). "'[A] plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. F.E.C.*, 128 S. Ct. 2759, 2769 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)); *see also Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009). Where claims are raised by one plaintiff who has standing, the court need not determine whether other plaintiffs asserting the same claims also have standing. *See, e.g.*, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1183 (9th Cir. 2010). 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) (quoting *Warth*, 422 U.S. at 501).

Under Article III of the Constitution, a plaintiff does not have standing unless he can 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). 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.'" *Id.* at 12 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Prudential standing limitations 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.* (quoting *Allen*, 468 U.S. at 750); *see also Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848-49 (9th Cir. 2007) (quoting *Johnson v. Stuart*, 702 F.2d 193, 196 (9th Cir. 1983)).

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*, 422 U.S. at 511. "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.'" *Redondo Beach*, 607 F.3d at 1183 (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 Realty*, 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)).

Plaintiffs assert various injuries arising from the future operation and enforcement of S.B. 1070. (Compl. ¶¶ 13-20, 54.) "A plaintiff who challenges a statute 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, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Id.* (internal quotation and citation omitted). 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 Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996).

C. Plaintiffs' Standing to Challenge S.B. 1070

1. LULAC

On behalf of itself, LULAC alleges that the enactment of S.B. 1070 has "reasonably caused Plaintiff LULAC to divert its limited resources to address the injuries faced by Hispanic residents of Arizona as a result of the imminent implementation of S.B. 1070." (Compl. ¶ 13.) Defendants argue that LULAC fails to identify the "particular resources" that have been diverted on account of S.B. 1070 or "any specific manner in which its mission would be impaired by enforcement of the statute" as required by *Havens Realty*, 455 U.S. at 379. (MTD at 7.) The Court agrees.

In *Havens Realty*, the organizational plaintiff identified a "concrete and demonstrable injury" by alleging that its particular mission "to assist equal access to housing through counseling and other referral services" was frustrated. 455 U.S. at 379. In the instant case, LULAC alleges only what its mission is–"the promotion and protection of the legal, political, social, and cultural interests of Latino People living in the United States"–and not what specific effort is frustrated by S.B. 1070. (*See* Compl. ¶ 13.) Unlike the plaintiffs in *Havens Realty*, as well as *Redondo Beach* and *Friendly House*, LULAC's allegations are not sufficiently specific with regard to a connection between LULAC's alleged mission and the enforcement of S.B. 1070. *See Havens Realty*, 455 U.S. at 379; *Redondo Beach*, 607 F.3d

at 1183; *Friendly House*, 10-CV-1061-PHX-SRB, Doc. 447, Order at 8-9.

Furthermore, LULAC fails to allege that it was forced to divert resources, let alone what specific resources were diverted, on account of the enactment of S.B. 1070. An organization suing on its own behalf establishes injury when it shows it has suffered "'both a diversion of its resources and a frustration of its mission.'" *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, Nos. 08-56564, 09-55215, 2010 WL 4146114, at *4 (9th Cir. Oct. 22, 2010) (quoting *Fair Hous.of Marin v. Combs*, 285 F.3d 899, 202 (9th Cir. 2002)). The organization must be forced to divert resources to avoid suffering injury resulting from the challenged policy. *Id.* (noting that, in *Havens Realty*, "housing discrimination threatened to make it more difficult for [the organizational plaintiff] to counsel people on where they might live if the organization didn't spend money fighting it," so the organization "could not avoid suffering one injury or the other"). LULAC alleges only that S.B. 1070 "reasonably caused" it to divert resources to "address the injuries faced by Hispanic residents of Arizona" resulting from S.B. 1070. (Compl. ¶ 13.) This allegation lacks the required specificity and does not rise to the level required in *Havens Realty* and *Lake Forest* of an organizational injury resulting from enforcement of S.B. 1070. *See Havens Realty*, 455 U.S. at 379; *Lake Forest*, 2010 WL 4146114, at *4.

LULAC also raises claims on behalf of its members. (Compl. ¶ 13.) Associational standing requires, among other things, that the organization's members "would otherwise have standing to sue in their own right." *Friends of the Earth*, 528 U.S. at 181. LULAC alleges that its members "are being and will continue to be injured by the imminent or actual implementation of S.B. 1070" because "Hispanic members of LULAC face interrogation, temporary detention, or arrest because of the vague and ill-defined terms in S.B. 1070." (Compl. ¶ 13.) Such generalized and speculative statements do not demonstrate that LULAC's individual members would have standing to challenge S.B. 1070. To have standing, LULAC's members must face a "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298. But LULAC does not allege that its members have an "intention to engage in a course of conduct" that would

trigger S.B. 1070 much less result in injury from S.B. 1070's enforcement. *See id.* For example, for an individual to be injured by the enforcement of the "reasonable suspicion" provision of Subsection 2(B) of S.B. 1070, the following would have to happen in succession: (1) the individual would have to be lawfully stopped, detained, or arrested; and (2) the peace officer would have to develop reasonable suspicion that the individual was both an alien and unlawfully present in the United States. *See* A.R.S. § 11-1051(B). LULAC does not allege facts to show that such a succession of events is imminent for its individual members, and LULAC's allegations on behalf of its members do not rise to the level of concrete, particularized, actual, imminent injury as required to find standing. Therefore, based on the allegations in the Complaint, LULAC does not have organizational standing to bring this lawsuit at this time.

2. Individual Taxpayer Plaintiffs

Individual Plaintiffs Ms. O'Leary and Ms. Beveridge allege that they are "state and local taxpayer[s]," and they "challenge the illegal expenditure of funds by defendants and their agents through implementation of S.B. 1070." (Compl. ¶¶ 14-15.) As both Plaintiffs and Defendants agree, with the exception of Establishment Clause cases, federal or state taxpayers have no standing to challenge federal or state tax or spending decisions just because they are taxpayers. (MTD at 4-5; Opp'n to MTD at 2-3 (citing *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 433 (1952) (federal taxes); *DaimlerChrysler*, 547 U.S. at 346 (state taxes)).) In their brief, Plaintiffs explain that they are asserting claims as local taxpayers because they "pay taxes into the county treasury" and "Arizona's counties *must* expend taxpayer funds to enforce S.B. 1070." (Opp'n to MTD at 2-3.) The Supreme Court has stated that "resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation." *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923).

To begin with, Plaintiffs did not name any local Defendants to challenge the alleged local expenditure of tax funds on the enforcement of S.B. 1070. Instead, Plaintiffs assert their claims against "defendants and their agents." (Compl. ¶¶ 14-15.) Governor Brewer is the only remaining Defendant, and Arizona's counties and municipal corporations are not

agents of Governor Brewer for this purpose. Moreover, Plaintiffs allege no facts to show that their counties have expended any money on S.B. 1070. As Defendants point out, "[t]he mere fact that counties may enforce [S.B. 1070] does not mean that any additional local taxes are expended." (Reply to MTD at 2 (citing *Dist. of Columbia Common Cause v. Dist. of Columbia*, 858 F.2d 1, 4 (D.C. Cir. 1988) ("As the teachers in *Doremus* would be paid their salaries whether or not they read from the Bible, the challenged practice did not injure the taxpayers.")).) Plaintiffs have failed to allege facts sufficient for the Court to confer local taxpayer standing on Ms. O'Leary and Ms. Beveridge**.**

3. Individual Foreign National Plaintiffs

Individual Plaintiffs Ms. Schwartz, Mr. Sandoval, Ms. C. H-P. Doe, Ms. E.C-J Doe and Ms. E.O. Doe allege that they are foreign nationals residing in Arizona who are not subject to a final non-appealable order of removal issued by the United States. (Compl. ¶¶ 16-20.) However, they allege that they do not "possess any documentary evidence issued by DHS establishing [their] right to seek employment or to be employed, or showing that [they are] lawfully present in the United States," even though they are authorized to be present in the United States. (*Id.*) These Plaintiffs seek injunctive relief to prevent their "unlawful detention, arrest, or prosecution under S.B. 1070" and a declaratory judgment that they "may not be prosecuted under S.B. 1070 for seeking employment or engaging in employment in Arizona." (*Id.*)

Like the members of LULAC, these Plaintiffs fail to allege any facts showing that the risk of injury to them resulting from S.B. 1070 is particularized or imminent. *See Babbitt*, 442 U.S. at 298; *San Diego Gun Rights Comm.*, 98 F.3d at 1126-27. These Plaintiffs allege no facts regarding their intent to engage in conduct that may trigger S.B. 1070. (*See* Compl. ¶¶ 16-20.) Moreover, an injury in fact cannot be based on a "chain of speculative contingencies." *Lee v. Oregon*, 107 F.3d 1382, 1388 (1997). With regard to their fear of prosecution for seeking employment, the Complaint contains no allegations as to whether the Plaintiffs have the right to seek employment or intend to seek employment, much less how the enforcement of S.B. 1070 will injure them if they do. (*See* Compl. ¶¶ 16-20.) Because

these Plaintiffs' allegations of injury are merely hypothetical and conjectural and not sufficiently "concrete and particularized . . . [or] . . . actual or imminent," they are insufficient for standing. *See Lujan*, 504 U.S. at 560.

Because the Court finds that Plaintiffs have no standing to bring this action at this time, the Court need not address Defendants' argument that Plaintiffs fail to state a claim upon which relief can be granted under Rule 12(b)(6).

IT IS ORDERED granting the Motion to Dismiss filed by Defendants Janice K. Brewer and the State of Arizona (Doc. 27). Plaintiffs' claims against the State of Arizona are dismissed with prejudice because the State of Arizona is immune from prosecution in this case. Plaintiffs' claims against Governor Brewer are dismissed without prejudice for a lack of standing. Plaintiffs are directed to file any amendments to their pleading within 30 calendar days of the date of this Order.

DATED this 15th day of December, 2010.

Susan R. Bolton
United States District Judge