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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 ROBERTO JAVIER FRISANCHO,

11 Plaintiff, *pro se*,

12 vs.

13 JAN BREWER, in her official capacity
as Governor of the State of Arizona; and
14 TERRY GODDARD, in his official
15 capacity as Attorney General of the State
of Arizona,

16 Defendants.
17

Case No: CV-10-926-PHX-SRB

**DEFENDANT ATTORNEY GENERAL
TERRY GODDARD'S MOTION TO
DISMISS**

18 Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant Attorney
19 General Terry Goddard moves to dismiss this action because Plaintiff's claims are not
20 ripe and he lacks standing to pursue them. This motion is supported by the following
21 memorandum of points and authorities.

22 **MEMORANDUM OF POINTS AND AUTHHORITIES**

23 **I. INTRODUCTION**
24

25 Plaintiff challenges the Support Our Law Enforcement and Safe Neighborhoods
26 Act (SB 1070). SB 1070 does not take effect until July 29, 2010 and, because of
27 legislative amendments approved after Plaintiff filed his lawsuit, it will never be
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implemented as it was originally enacted. Plaintiff's only claimed injury is that "[a]s a Hispanic, [he] is likely to be asked for his papers based on the 'reasonable suspicion' that he is undocumented on the basis of his ethnicity." Complaint ¶ 15. Plaintiff's assertion of injury rests on speculation about what may happen in the future. It also rests on an erroneous understanding of Arizona law because it fails to consider the amendments to SB 1070 that prohibit law enforcement officials from relying on race, color or national origin to formulate reasonable suspicion of unlawful presence unless permitted to do so by the United States or Arizona Constitution. This lawsuit presents no justiciable controversy and should be dismissed.

II. FACTUAL BACKGROUND

On April 23, 2010, Arizona's Governor signed SB 1070 which included a number of statutory changes intended to address the problem of illegal immigration in Arizona. *See* SB 1070, § 1.¹ Plaintiff's complaint focuses on A.R.S. § 11-1051, which requires law enforcement officers to, under certain circumstances, determine a person's immigration status based on "reasonable suspicion" that the person is not lawfully present in the United States. A.R.S. § 11-1051(B). As enacted in SB 1070, Section 11-1051(B) provided in part:

For any lawful contact made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. . . . A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not solely consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.

¹ A copy of SB 1070 is Exhibit A to Plaintiff's Complaint.

1 One week later, on April 30, 2010, the Governor signed HB 2162 (attached as
2 Exhibit 1 hereto), which amended A.R.S. § 11-1051(B) as it had been enacted in SB
3 1070. These subsequent amendments restrict the reach of A.R.S. § 11-1051(B) and
4 expressly prohibit the use of race, color or national origin in implementing this law,
5 except as permitted by the state of federal constitution. Now, as amended by HB 2162,
6 the pertinent portions of A.R.S. § 11-1051(B) read:

7 For any lawful stop, detention or arrest made by a law enforcement
8 official or a law enforcement agency of this state or a law
9 enforcement official or a law enforcement agency of a county, city,
10 town or other political subdivision of this state in the enforcement of
11 any other law or ordinance of a county, city or town or this state
12 where reasonable suspicion exists that the person is an alien and is
13 unlawfully present in the United States, a reasonable attempt shall
14 be made, when practicable, to determine the immigration status of
15 the person, except if the determination may hinder or obstruct an
16 investigation . . . *A law enforcement official or agency of this state
or a county, city, town or other political subdivision of this state
may not consider race, color or national origin in implementing the
requirements of this subsection except to the extent permitted by the
United States or Arizona Constitution.*

16 (Emphasis added.)

17 The provisions in SB1070, as amended by HB2162, will take effect July 29,
18 2010, which is 90 days after Arizona's Legislature adjourned its regular session.

19 See Ariz. Const. Art. 4, Pt. 1, §1(3). When she signed SB 1070, the Governor also
20 issued Executive Order 2010-09 which requires Arizona's Peace Officer Standards
21 and Training Board to prepare a training program for law enforcement officers
22 before SB 1070 takes effect.²

23 Plaintiff filed his Complaint on April 27, 2010—four days after the Governor
24 signed SB 1070 but before she approved the amendments in HB 2162 and three
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28 ² A copy of Executive Order 2010-09 is Exhibit B hereto.

1 months before the legislation’s July 29 effective date. Plaintiff describes himself
 2 as “a Hispanic, . . . a natural born citizen of the United States and a resident of the
 3 District of Columbia.” Complaint ¶ 5. According to the Complaint, he plans to
 4 come to Arizona in September 2010 and “return over the next few years” to
 5 research a 1997 “joint operation of the Chandler Police Department and the Tucson
 6 Border Patrol Sector to capture undocumented immigrants.” *Id.* His only alleged
 7 injury is that, because he is Hispanic, he “is likely to be asked for his papers based
 8 on the ‘reasonable suspicion’ that he is undocumented on the basis of his
 9 ethnicity.” Complaint ¶ 15.

12 ARGUMENT

13 **I. PLAINTIFF’S COMPLAINT FAILS TO PRESENT A JUSTICIABLE** 14 **CASE OR CONTROVERSY.**

15 Under Article III of the United States Constitution, the federal courts may only
 16 adjudicate a “case or controversy.” *See, e.g., Allen v. Wright*, 468 U.S. 737, 750 (1984).
 17 The doctrines of standing and ripeness ensure that federal courts exercise jurisdiction
 18 only in cases that present a viable case or controversy. *See Thomas v. Anchorage Equal*
 19 *Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). Plaintiff has the burden
 20 to establish that the federal court has jurisdiction.. *Kokkonen v. Guardian of Life Ins.*
 21 *Co.*, 511 U.S. 375, 377 (1994). At the pleading stage, he may satisfy this burden by
 22 alleging facts that, if proven, establish the court’s jurisdiction. *Sacks v. Office of Foreign*
 23 *Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006).

24 The Complaint fails to establish that Plaintiff’s claims are ripe for judicial review
 25 or that he has the necessary standing to bring this action.

26 **A. Plaintiff’s Claims Are Not Ripe for Judicial Review.**

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Under Article III, a case or controversy over which a federal court may exercise jurisdiction must present issues that are “definite and concrete, not hypothetical or abstract.” *Thomas*, 220 F.3d at 1139 (quoting *Railway Mail Ass’n v. Corsi*, 326 U.S. 88, 93 (1945)). The ripeness doctrine “is . . . question of timing.” *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996) (quoting *Buckley v. Valeo*, 424 U.S. 1, 114 (1976)). The “basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 411 (3rd Cir. 1992) (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967)). Plaintiff’s Complaint presents no claim that is ripe for judicial review because Plaintiff does not allege an actual injury or a realistic danger of imminent injury.

1. Plaintiff’s Complaint Does Not Satisfy the Constitutional Requirements for Ripeness.

The constitutional component of ripeness, derived from the strictures of Article III, requires that Plaintiff “face ‘a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement,’” as opposed to merely “imaginary” or “speculative” injuries. *Thomas*, 220 F.3d at 1139 (quoting *Babbitt v. United Farm Workers nat’l Union*, 442 U.S. 289, 298 (1979)). The analysis of ripeness often mirrors that of the injury-in-fact prong of the standing doctrine, leading courts to characterize it as “standing on a timeline.” *Id.* at 1138. Accordingly, Plaintiff must demonstrate injury in fact “to a legally protected interest that is both ‘concrete and particularized’ and ‘actual or imminent,’ as opposed to ‘conjectural or hypothetical.’” *San Diego County*, 98 F.3d at 1126. When the claim involves prospective relief for a future injury, “[t]he question becomes whether any perceived threat to [the plaintiff] is sufficiently real and immediate to show an existing controversy.” *Long Beach Area Chamber of Commerce v. City of Long Beach*, 2010 WL 1729710, *3 (9th Cir, 2010) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1000, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1992)). Plaintiff’s complaint does not satisfy these requirements.

1 Plaintiff does not allege any present injury and, instead, bases his claims solely on
2 speculation that that, when he visits Arizona, he may be asked for documentation of his
3 lawful presence based only on his ethnicity. Complaint ¶¶ 5, 15. These allegations fail
4 to satisfy the requirements for a ripe claim. Plaintiff does not demonstrate that he has
5 suffered any actual harm or that he is at risk of imminent harm as a result of Arizona's
6 new law. Plaintiff's allegations do not demonstrate a real threat that a law enforcement
7 official or agency will stop him and question him about his immigration status.
8 Plaintiff's claim "rests upon contingent future events that may not occur as anticipated or
9 indeed may not occur at all." *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir.
10 2009) (finding lack of ripeness for challenge to city's discontinuing health care insurance
11 coverage to employees after they retire because plaintiffs had not yet retired and city had
12 not denied them benefits after retirement). Such a claim is not ripe for adjudication
13 because he has not and may never suffer a concrete and particularized injury.

14 Plaintiff also wrongly asserts that "[t]he Act would essentially require racial and
15 ethnic profiling by police officers." Complaint at 8, ¶ 38. To the contrary, as amended
16 by HB 2162, A.R.S. § 11-1051 explicitly states that law enforcement officers "*may not*
17 *consider race, color or national origin in implementing . . . this subsection except to*
18 *the extent permitted by the United States or Arizona Constitution.*" The United States
19 Supreme Court has recognized that Mexican ancestry alone cannot provide reasonable
20 suspicion that a person has unlawfully entered the country. *United States v. Brignoni-*
21 *Ponce*, 422 U.S. 873, __ (1975). And the Ninth Circuit has held that Hispanic ancestry
22 is irrelevant to determining whether there is reasonable suspicion that a person is here
23 unlawfully when a substantial part of the population is Hispanic. *United States v.*
24 *Montero-Camargo*, 208 F.3d 1222 (9th Cir. 2000) (en banc). Thus, nothing in
25 Arizona's law or the Constitution support Plaintiff's fears.

26 The Court's role "is neither to issue advisory opinions nor to declare rights in
27 hypothetical cases, but to adjudicate live cases or controversies consistent with the
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1 powers granted the judiciary in Article III of the Constitution.” _____
 2 Because of its reliance on speculation and contingent events that may never occur, the
 3 Complaint fails to establish a real and immediate threat to Plaintiff of injury arising from
 4 operation of the Act and, therefore, presents no case or controversy ripe for judicial
 5 review.

6 **2. The Prudential Component of Ripeness Also Supports** 7 **Dismissing Plaintiff’s Claims.**

8 Because the case fails to satisfy the constitutional requirements for ripeness, the
 9 court need not reach analyze the prudential components. Nevertheless, the prudential
 10 components also support dismissing this lawsuit. Ripeness provides “a tool that courts
 11 may use to enhance the accuracy of their decisions and to avoid becoming embroiled in
 12 adjudications that may later turn out to be unnecessary or may require premature
 13 examination of, especially, constitutional issues that time may make easier or less
 14 controversial.” *American Sav. Bank v. UBS Fin. Servs.*, 347 F.3d 436, 440 (2d Cir.
 15 2003). In applying the prudential ripeness doctrine, the courts consider two factors: (1)
 16 the “fitness of the issues for judicial decision” and (2) “the hardship to the parties of
 17 withholding court consideration.” *Thomas*, 220 F.3d at 1141.

18 The first factor focuses on whether “the issues raised are primarily legal, do not
 19 require further factual development, and the challenged action is final.” *Stormans, Inc.*
 20 *v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009). “A claim is not ripe for adjudication if it
 21 rests upon ‘contingent future events that may not occur as anticipated, or indeed may not
 22 occur at all.’” *See Bova*, 564 F.3d at 1096. In conducting this analysis, the Court should
 23 look primarily to the factual situation presented for consideration. “A concrete factual
 24 situation is necessary to delineate the boundaries of what conduct the government may or
 25 may not regulate.” *Thomas*, 220 F.3d at 1141 (quoting *San Diego County*, 98 F.3d at
 26 1132).

27 When a plaintiff asserts claims that are not based on a concrete factual situation,
 28 as in the case at bar, the Court must rely on hypothetical and contingent scenarios in

1 reaching its decision and “applying it to actual controversies which subsequently arise
2 would be an ‘exercise in futility.’” *Armstrong*, 961 F.2d at 412. This reluctance to
3 decide important questions of law based on hypothetical situations springs from the
4 maxim that courts do not decide “constitutional questions in a vacuum.” *Thomas*, 220
5 F.3d at 1141 (citations omitted). For this reason, the Supreme Court has “emphasized
6 that, in our federal system, it is preferable that constitutional attacks on state statutes be
7 raised defensively in state-court proceedings rather than in proceedings initiated in
8 federal court.” *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 n.8
9 (1985). Federal courts are appropriately cautious about “premature adjudication” of
10 questions concerning the constitutionality of a “novel [s]tate Act.” *Arizonans for*
11 *Official English v. Arizona*, 520 U.S. 43, 79 (1997). If raised in a defensive posture at
12 the state court level, the reviewing court will have concrete facts and an actual
13 controversy to evaluate when it determines the issues presented.

14 The Plaintiff here relies entirely on a hypothetical interrogation that may never
15 occur. Prudential, as well as constitutional, principles support dismissing the claim
16 now. Plaintiff’s claims resemble those addressed in the *Thomas* case decided by the
17 Ninth Circuit. In *Thomas*, the plaintiffs challenged a statute prohibiting landlords from
18 considering marital status or refusing to rent, sell or lease real property to an unmarried
19 couple. *Thomas*, 220 F.3d at 1137. Other than a broad statement that they intended to
20 continue refusing to rent their property to unmarried couples, the plaintiffs could not
21 identify any unmarried couple they had turned away in the past or any specific
22 circumstances in the future in which they would turn such couples away. *Id.* at 1139.
23 Concluding that the plaintiffs’ claims rested on hypothetical situations and hypothetical
24 tenants, the court found the case was not ripe for review. *Id.* at 1142; *see also San Diego*
25 *County*, 98 F.3d at 1132. (“At this point, a decision on the merits of the plaintiffs’
26 constitutional claims would be devoid of any factual context whatsoever. Neither the
27 district court nor this court can ‘be umpire to debates concerning harmless, empty
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1 shadows.”) The Plaintiff in this case also relies entirely on a hypothetical stop or arrest
 2 that may never occur to support his claims that the Act is unconstitutional.

3 Under the second factor, the court examines whether “withholding review would
 4 result in direct and immediate hardship and would entail more than possible financial
 5 loss.” *Stormans*, 586 F.3d at 1126 (9th Cir. 2009). The Court also determines whether
 6 the “regulation requires an immediate and significant change in the plaintiffs’ conduct of
 7 their affairs with serious penalties attached to noncompliance.” *Id.* (citing *Ass’n of Am.*
 8 *Med. Colls. v. United States*, 217 F.3d 770, 783 (9th Cir. 2000)). “Although the
 9 constitutional and prudential considerations are distinct, the absence of any real or
 10 imminent threat of enforcement, particularly criminal enforcement, *seriously undermines*
 11 any claim of hardship.” *Id.* (emphasis added); *see also San Diego County*, 98 F.3d at
 12 1132-33 (concluding that, in light of absence of any criminal charges or threat of
 13 prosecution, any hardship “does not justify the exercise of jurisdiction”). Additionally,
 14 Arizona’s law does not require Plaintiff that to alter his conduct in any way. Plaintiff is
 15 welcome to travel as Arizona in September and Arizona law imposes no new obligations
 16 on him.

17 For these reasons, the prudential aspects of ripeness also support dismissing this
 18 action. *See San Diego County*, 98 F.3d at 1133.

19 **B. Plaintiff Lacks Standing To Bring His Claims.**

20 As is true of the ripeness doctrine, the standing requirement also ensures that
 21 federal courts exercise jurisdiction only in cases that present a constitutional case or
 22 controversy that is definite and concrete. *Thomas*, 220 F.3d at 1139. Plaintiff must
 23 demonstrate three elements to establish Article III standing: (1) it has suffered an injury-
 24 in-fact to a legally protected interest that is (a) concrete and particularized and (b) actual
 25 or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the
 26 challenged action of the defendant; and (3) that it is likely, as opposed to merely
 27 speculative, that the injury will be redressed by a favorable decision. *Long Beach*
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1 *Chamber of Commerce*, 2010 WL 1729710, at *3 (9th Cir. 2010). Because they seek
2 declaratory and injunctive relief, Plaintiff must also establish a “very significant
3 possibility of future harm.” *San Diego County*, 98 F.3d at 1126.

4 As discussed above, the Plaintiff failed to allege an injury-in-fact that satisfies the
5 first standing requirement because he did not articulate a concrete and particularized
6 injury resulting from operation of the Act.

7 Additionally, Plaintiff fails to establish the required causal nexus between the
8 alleged injury and the operation of SB 1070. because the statute’s language and the
9 constitutional principles that must be applied when it is implemented prohibit racial
10 profiling. According to the Supreme Court, “the injury has to be fairly traceable to the
11 challenged action of the defendant, and not the result of the independent action of some
12 third party not before the court.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560
13 (1992). In the context of suits challenging the provisions of a state law, the Court
14 should consider “whether the plaintiffs face a ‘realistic danger of sustaining a direct
15 injury as a result of the statute’s operation or enforcement.’” *Thomas*, 220 F.3d at 1139
16 (citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301,
17 60 L.Ed.2d 895 (1979). If Plaintiff were, in fact, confronted by a law enforcement
18 officer in Arizona solely because he is Hispanic, this conduct would not be authorized
19 SB 1070, as amended by HB 2162. Instead, it would be the result of “the independent
20 action of a third party not before the court” and would not satisfy the causation prong of
21 the standing analysis. Neither Arizona’s law nor constitutional principles authorize the
22 conduct that Plaintiff fears.

23 The absence of injury-in-fact, together with the lack of any causal nexus between
24 the Defendants and the potential injuries claimed by the Plaintiffs, establish that the
25 Plaintiffs lack standing in this case and their claims should be dismissed.
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CONCLUSION

For the reasons set forth above, the Court should dismiss this action because it is not ripe for adjudication and Plaintiff lacks standing to assert the claims in the Complaint.

Respectfully submitted this 28th day of June, 2010.

Terry Goddard
Attorney General

s/ Christopher A. Munns
Mary G. O'Grady
Solicitor General
Christopher A. Munns
Assistant Attorney General
Attorneys for Defendant Terry Goddard

ORIGINAL filed and **COPY**
of the foregoing hand-delivered
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