John J. Bouma (#001358)
Robert A. Henry (#015104)
Joseph G. Adams (#018210)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren
Phoenix, AZ 85004-2202
Phone: (602) 382-6000
Fax: (602) 382-6070
jbouma@swlaw.com
bhenry@swlaw.com
jgadams@swlaw.com

Joseph A. Kanefield (#015838)
Office of Governor Janice K. Brewer
1700 W. Washington, 9th Floor
Phoenix, AZ 85007
Telephone: (602) 542-1586
Fax: (602) 542-7602
jkanefield@az.gov

Attorneys for Defendant Janice K. Brewer, Governor of the State of Arizona

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Roberto Javier Frisancho,

Plaintiff *pro se,*

v.

Jan Brewer, in her official capacity as Governor of the State of Arizona; and Terry Goddard, in his official capacity as Attorney General of the State of Arizona,

Defendants.

No. CV-10-926-PHX-SRB

GOVERNOR BREWER'S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1), Defendant Janice K. Brewer ("Governor Brewer") moves to dismiss plaintiff's Complaint because plaintiff does not have standing to pursue the claims set forth in his Complaint. Plaintiff asserts various constitutional challenges to the "Support Our Law Enforcement and Safe Neighborhoods Act," Senate Bill 1070 ("SB 1070" or the "Act"), which Governor Brewer signed into law on April 23, 2010. Three days after plaintiff filed his Complaint, Governor Brewer signed House Bill

2162 into law, which amended SB 1070 in several respects pertinent to plaintiff's claims. As a preliminary matter, therefore, it should be noted that plaintiff's Complaint does not challenge the constitutionality of the current SB 1070.

More significantly, however, plaintiff's Complaint is also defective because he fails to allege a justiciable case or controversy that would give him standing to pursue his claims. To have standing to challenge the constitutionality of SB 1070 on its face, plaintiff must demonstrate that he will suffer an actual, imminent injury in fact as a result of its enactment. Plaintiff's Complaint does not meet – indeed, falls far short – of this standard. Plaintiff is a natural-born citizen and a resident of Washington, D.C. Plaintiff alleges that he expects to visit Arizona in September 2010 and that, *if* he does so, SB 1070 makes it "likely" that he will be asked "for his papers" because he is Hispanic. Not only are plaintiff's allegations highly speculative, but they reflect a fundamental misunderstanding of SB 1070. The likelihood that plaintiff will suffer any cognizable injury related to SB 1070 is purely hypothetical and extremely remote. As a result, plaintiff lacks standing to pursue his claims and his Complaint must be dismissed under Fed. R. Civ. P. 12(b)(1).[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

On April 23, 2010, Governor Brewer signed SB 1070 into law to address the impact of unlawful immigration and to assist federal immigration agencies through "the cooperative enforcement of federal immigration laws." SB 1070, § 1; Compl. ¶ 2. Plaintiff commenced this action four days later, on April 27, 2010. Three days later, on April 30, 2010 Governor Brewer signed HB 2162 approving various amendments to SB 1070. Plaintiff has not amended his Complaint to account for the new revisions to the Act. SB 1070, as amended, is scheduled to take effect on July 29, 2010.

[1] If the Court finds that plaintiff's Complaint does allege a justiciable case or controversy, Governor Brewer reserves her right to attack the sufficiency of each of the claims plaintiff asserts in his Complaint under Fed. R. Civ. P. 12(b)(6).

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Plaintiff bases his constitutional challenges to SB 1070 entirely upon a misreading of the Act. Specifically, plaintiff alleges that Section 2 of SB 1070, which is codified at A.R.S. § 11-1051(B), violates various constitutional provisions because it "establishes a crime of being Hispanic." Compl. ¶ 39. Plaintiff further alleges that, if SB 1070 takes effect, he "is likely to be asked for his papers based on the 'reasonable suspicion' that he is undocumented" simply because he is Hispanic. *Id.* ¶ 15.

Notwithstanding plaintiff's hyperbole, nothing in the Act authorizes any individual to ask plaintiff for "his papers" because he happens to be Hispanic. Rather, A.R.S. § 11-1051(B) requires law enforcement officers to inquire into a person's immigration status in very limited circumstances. First, as amended, SB 1070 provides that there must be a "lawful stop, detention or arrest" by a law enforcement official or agency of the state.[2] Second, the officer must have reasonable suspicion "that the person is an alien and is unlawfully present in the United States." In other words, to trigger the provisions of A.R.S. § 11-1051(B), a law enforcement officer must have a reasonable suspicion that a person is: (1) engaged in criminal conduct; (2) an alien; ***and*** (3) in the country unlawfully.

Not only are the constitutionality and requirements of the reasonable suspicion standard well-established, but the U.S. Supreme Court has made it clear that a person's "Mexican descent," does not constitute "a reasonable belief that [the person is an] alien[]," much less that the person is in the country unlawfully. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975). A.R.S. § 11-1051(B) further requires law enforcement officers to presume that persons who produce certain forms of identification, such as, in plaintiff's case, a valid Washington, D.C. driver's license, are in the country

[2] A lawful stop or brief detention requires "specific, articulable facts which, together with objective and reasonable inferences, form a basis for suspecting that a particular person is engaged in criminal conduct." *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). A prolonged detention or arrest requires probable cause. *United States v. Tarango-Hinojos*, 791 F.2d 1174, 1175-76 (5th Cir. 1986); *Muehler v. Mena*, 544 U.S. 93, 101 (2005).

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

1 lawfully.[3] Indeed, the statute expressly prohibits law enforcement officials from
2 "consider[ing] race, color or national origin in implementing the requirements of this
3 subsection except to the extent permitted by the United States or Arizona Constitution."

4 Even assuming plaintiff's anticipated future conduct would, in some unspecified
5 way, give rise to a lawful stop, detention or arrest, and assuming further that whatever
6 plaintiff would do creates reasonable suspicion that he was an alien and in the country
7 unlawfully, A.R.S. § 11-1051(B) requires only that the law enforcement official make "a
8 reasonable attempt . . . *when practicable*, to determine the immigration status of the
9 person . . ." (emphasis added). This, of course, also involves a variety of circumstances
10 presently unknown, and judgments the results of which cannot be presumed. Finally, and
11 very importantly, A.R.S. § 11-1051(L) requires that the statute "be implemented in a
12 manner consistent with federal laws regulating immigration, protecting the civil rights of
13 all persons and respecting the privileges and immunities of United States citizens."

14 **II. PLAINTIFF HAS NOT ALLEGED A JUSTICIABLE CASE OR CONTROVERSY.**

15 "[T]o invoke the jurisdiction of the federal courts," a plaintiff "must satisfy the
16 threshold requirement imposed by Article III of the Constitution by alleging an actual
17 case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (citation
18 omitted); *Allen v. Wright*, 468 U.S. 737, 750 (1984) (The case or controversy requirement
19 establishes the "fundamental limits on federal judicial power…."). The federal courts'
20 power, as defined by Article III, "is not an unconditioned authority to determine the
21 constitutionality of legislative or executive acts." *Valley Forge Christian Coll. v. Ams.*
22 *United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982).

23 Here, plaintiff has not alleged an actual case or controversy because: (1) plaintiff
24 lacks standing to pursue his claims, and (2) plaintiff's Complaint improperly seeks an
25 advisory opinion.
26
27
28

[3] *See* A.R.S. § 11-1051(B)(4); District of Columbia, Department of Motor Vehicles: Non-US Citizens Obtaining a DC Driver's License, http://dmv.dc.gov/serv/dlicense/get_non_us_citizen_dl.shtm (last visited June 2, 2010).

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

A. Plaintiff's allegations fail to demonstrate an injury in fact.

To possess standing under Article III, a plaintiff must allege facts that sufficiently establish "an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations and citation omitted).[4] This requires a plaintiff to show that he 'has sustained or is ***immediately in danger of*** sustaining some direct injury; as the result of the challenged official conduct and the injury or ***threat of injury*** must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Lyons*, 461 U.S. at 101-02 (emphasis added, internal citation omitted). When standing is premised upon an injury that *may* occur "at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control," a "high degree" of immediacy is required. *Lujan*, 504 U.S. at 564 n.2.

Here, plaintiff has not alleged that he has suffered any injury. Instead, plaintiff alleges that he *might* possibly suffer some *potential* injury in the future when – and if – he chooses to visit Arizona. Compl. ¶ 15. When a plaintiff premises his injury upon the mere *possibility* of prosecution, a court must consider: (1) whether the plaintiff "articulated concrete plans to violate" the statute in question; (2) whether the government has issued a "specific warning" or threat of its intent to prosecute the plaintiff under the statute; and (3) whether the plaintiff has been prosecuted under the statute in the past. *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-29 (9th Cir. 1996). "'[P]ersons having no fears of state prosecution except those that are ***imaginary or speculative***, are not to be accepted as appropriate plaintiffs.'" *Babbitt v. United Farm*

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[4] To have standing, plaintiff's allegations must also demonstrate "a causal connection between the injury and the conduct complained of" and that is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61. Because plaintiff's allegations have not demonstrated an injury in fact, however, he necessarily cannot demonstrate these additional requirements.

Workers Nat'l Union, 442 U.S. 289, 298 (1979) (emphasis added) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)).

The Supreme Court's analysis in *Lujan* makes it clear that plaintiff has no standing. In that case, the plaintiff organizations asserted that their members might travel to Egypt in the future and that federal government's actions might lead to a situation at that future time that would injure them. 504 U.S. at 555-60. The Court rejected the notion that standing could be based upon such hypothetical injuries on a future trip. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564 (emphasis in original). Such "conjectural" or "hypothetical" injuries cannot establish standing. *Id*. at 560.

In this case, plaintiff's allegation that he "is likely to be asked for his papers" if and when he visits Arizona in the future poses no real threat of an imminent injury. *See Lujan*, 504 U.S. at 556 ("Affidavits of members claiming an intent to revisit project sites at some indefinite future time, at which time they will presumably be denied the opportunity to observe endangered animals, do not suffice, for they do not demonstrate an 'imminent' injury."). Plaintiff's speculation about what might theoretically happen if he visits Arizona at an unspecified time in the future does not grant him standing.

In addition, plaintiff's complaint suffers the additional infirmity that his hypothetical future scenario cannot occur under SB 1070. As stated above, the circumstances in which A.R.S. § 11-1051(B) requires an Arizona law enforcement official to ask plaintiff "for his papers" are extremely limited. First, the law enforcement officer must, *at a minimum*, be able to articulate facts "which, together with objective and reasonable inferences, form a basis for suspecting that [plaintiff] is engaged in criminal conduct." *Hernandez-Alvarado*, 891 F.2d at 1416. Plaintiff has not alleged any facts suggesting *any* likelihood that, during plaintiff's potential future visits to Arizona, a law enforcement officer will have reasonable suspicion to believe that plaintiff is engaged in

Snell & Wilmer L.L.P. LAW OFFICES One Arizona Center, 400 E. Van Buren Phoenix, Arizona 85004-2202 (602) 382-6000

criminal conduct.

Second, the law enforcement officer must be able to articulate specific facts "which, together with objective and reasonable inferences, form a basis for suspecting that" plaintiff is an alien ***and*** in the country unlawfully. *Id.*; A.R.S. § 11-1051(B). Plaintiff alleges that law enforcement officers will suspect that he is in the country unlawfully ***solely*** because he is Hispanic. Compl. ¶ 15. This allegation is unfounded because both SB 1070 and well-established, binding precedent from the U.S. Supreme Court expressly prohibit officers from relying solely on plaintiff's "Hispanic appearance" in determining whether "reasonable suspicion" exists to believe that he is in the country unlawfully. *See Brignoni-Ponce*, 422 U.S. at 886; A.R.S. § 11-1051(B). Because Arizona's law enforcement officers cannot rely solely on plaintiff's Hispanic appearance in enforcing SB 1070, SB 1070 necessarily prohibits such officers from asking plaintiff for his "papers" based solely on plaintiff's appearance.

Third, the hypothetical scenario suggested by plaintiff is expressly prohibited by the text of SB 1070. "A law enforcement official … 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." A.R.S. § 11-1051(B). Plaintiff is speculating that a police officer might violate the *express terms* of SB 1070. In a facial challenge, the plaintiffs must offer a plausible argument that the statute on its face causes the unconstitutional conduct. Here, SB 1070 expressly prohibits the conduct imagined by plaintiff.

Fourth, even if the foregoing prerequisites were satisfied, law enforcement officers are required to make only a *reasonable* inquiry into a person's immigration status and *only* if practicable to do so. A.R.S. § 11-1051(B). Because the Act provides law enforcement officers some discretion in its enforcement, there is no basis for plaintiff to assume that Arizona's law enforcement officers would necessarily enforce its provisions against him.

Finally, plaintiff has not articulated why, if he is lawfully stopped, detained or arrested in Arizona, he would not be entitled to a presumption of lawful presence. If plaintiff travels from Washington, D.C. to Arizona by plane or car, he would likely need either a passport or driver's license to do so. Once plaintiff presents either document to a law enforcement officer, the officer must presume that plaintiff is in the country lawfully. *See* A.R.S. § 11-1051(B). Indeed, as a matter of law, a mere request for plaintiff's identification would not infringe upon plaintiff's civil rights because it is well-established that "'[e]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage.'" *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (finding that, because the plaintiff was lawfully detained, "no justification for inquiring about [her] immigration status was required.") (quoting *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)).

Because plaintiff's Complaint fails to allege any concrete injury he is likely to suffer as a result of SB 1070, he lacks standing to pursue his claims.

B. Plaintiff improperly seeks an advisory opinion.

Without standing, plaintiff is seeking an impermissible advisory opinion. It has long been settled that "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947). "When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III." *Flast v. Cohen*, 392 U.S. 83, 96 (1968). "For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." *Mitchell*, 330 U.S. at 89.

The Supreme Court's decision in *Mitchell* is instructive. There, as here, the plaintiffs expressed their concerns about enforcing a law and sought "a declaration of the

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

1 legally permissible limits of regulation." *Mitchell*, 330 U.S. at 83-84. The Court found
2 that the plaintiffs' allegations were "closer to a general threat by officials to enforce those
3 laws which they are charged to administer … than they [were] to the direct threat of
4 punishment against a named organization for a completed act…." *Id.* at 88. The
5 Supreme Court considered such general objections requests for an "advisory opinion"
6 and therefore "beyond the competence of courts to render … a decision." *Id.* at 89.
7 The same holds true here. As in *Mitchell*, plaintiff is not facing any actual harm
8 and, instead, has alleged purely speculative harm under purely speculative conditions.
9 The only threat of harm plaintiff alleges is his abstract fear that he will be "asked for his
10 papers." Compl. ¶ 15. These allegations of "general threat[s] of possible interference"
11 with constitutional rights "do[] not make a justiciable case or controversy." *Mitchell*, 330
12 U.S. at 89. Without allegations of concrete, actual harm faced by plaintiff, plaintiff has
13 not alleged a case or controversy. Plaintiff's desire for an advisory opinion confirming
14 the constitutionality of a state law is not authorized by Article III.

15 **III. CONCLUSION**

16 Plaintiff's Complaint reflects his mistaken belief that SB 1070 requires Arizona's
17 law enforcement officials to investigate the immigration status of all Hispanic persons.
18 Nothing in SB 1070 or the well-established principles upon which it is based supports
19 such a conclusion. In fact, SB 1070 requires Arizona's law enforcement officers to
20 investigate a person's immigration status in very specific situations set forth in the statue.
21 By its terms, it prohibits law enforcement officers from taking any action based solely on
22 a person's racial or ethnic background. Not only has plaintiff substantially misconstrued
23 SB 1070's provisions, but, because plaintiff is a resident of Washington, D.C. with no
24 concrete plans to travel to Arizona, plaintiff has alleged only an extremely attenuated and
25 remote possibility that SB 1070 will be enforced against him. Accordingly, plaintiff
26 cannot demonstrate an injury in fact and, instead, improperly seeks an advisory opinion.
27 For these reasons, plaintiff's Complaint must be dismissed for lack of subject-matter
28 jurisdiction.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

1 Respectfully submitted this 11th day of June, 2010.

2 SNELL & WILMER L.L.P.

3

4 By s/John J. Bouma
John J. Bouma
5 Robert A. Henry
Joseph G. Adams
6 One Arizona Center
400 E. Van Buren
7 Phoenix, AZ 85004-2202

8 and

9 By s/Joseph A. Kanefield with permission
10 Joseph A. Kanefield
Office of Governor Janice K. Brewer
11 1700 W. Washington, 9th Floor
Phoenix, AZ 85007

12 *Attorneys for Defendant Janice K. Brewer,*
13 *Governor of the State of Arizona*

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Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2010, I electronically transmitted the attached 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 and served the document by U.S. mail on the following, who is not a registered participant of the CM/ECF System:

Roberto Javier Frisancho
1311 Delaware Avenue., S.W., Apt. S 337
Washington, D.C. 20024

s/John J. Bouma