UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARSHA CASPAR, GLENNA DEJONG, CLINT MCCORMACK, BRYAN REAMER, FRANK COLASONTI, JR., JAMES BARCLAY RYDER, SAMANTHA WOLD, MARTHA RUTLEDGE, JAMES ANTEAU, JARED HADDOCK, KELLY CALLISON, ANNE CALLISON, BIANCA RACINE, CARRIE MILLER, MARTIN CONTRERAS, and KEITH ORR,

Plaintiffs,

v

RICK SNYDER, in his official capacity as Governor of the State of Michigan; MAURA CORRIGAN, in her official capacity as Director of the Michigan Department of Human Services; PHIL STODDARD, in his official capacity as Director of the Michigan Office of Retirement Services; and JAMES HAVEMAN, in official capacity as Director of the Michigan Department of Community Health;

Defendants.

No. 14-cv-11499

HON. MARK A. GOLDSMITH

DEFENDANTS' BRIEF IN REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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Dated: July 14, 2014

I. Plaintiffs' marriages will be rendered *void ab initio* in the event the Sixth Circuit Court of Appeals vacates *DeBoer*.

Plaintiffs argue that their marriages cannot be rendered *void ab initio* in the event *DeBoer* is overturned because "in the absence of a stay, action of a character which cannot be reversed by the court of appeals may be taken in reliance on the lower court's decree." (Plaintiffs' Brief, Doc #25, Pg ID 511.) Additionally, Plaintiffs argue that a marriage can be *void ab initio*, only if it was never valid to begin with. (*Id.* at Pg ID 513.) Plaintiffs assert that since their marriages were valid when entered into, they will be valid regardless of any subsequent court decision. Plaintiffs are both factually and legally incorrect in their assertions.

First, most of the cases Plaintiffs advance in support of their position are readily distinguishable in at least one critical aspect – they fail to address the legal protections (or lack thereof) afforded to a third-party actor who engages in conduct in reliance on a lower court decree. Here, Plaintiffs obtained marriage licenses as a result of the opinion of a district court judge in *DeBoer*; an opinion that has no precedential value outside of any future litigation involving the parties in *DeBoer,* (which Plaintiffs are not), is not binding on this court or any other and

has, in any event, been stayed by the Sixth Circuit. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n. 7 (2011) ("'A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.'" Citing, 18 J. Moore et al., Moore's Federal Practice § 134.02[1] [d], p. 134–26 (3d ed. 2011)). So, the protections that may flow to the parties in a lawsuit who act in reliance on a lower court's decree are not available to nonparties and are therefore not relevant in this matter.

Second, Plaintiffs dismiss the State Defendants' arguments by simply indicating that marriages, if valid when entered into, cannot later "become void upon the occurrence of some intervening event." (Plaintiffs' Brief Doc #25, Pg ID 514.) But Plaintiffs misunderstand the State's argument in this regard. If *DeBoer* is overturned, the legal authority upon which Plaintiffs' marriages resulted will be nullified as if it never had rendered.[1] Thus, the Sixth Circuit's decision would not be an intervening event serving to nullify the Plaintiffs' marriages after-the-fact; instead, the Sixth Circuit's decision would act to nullify

[1] "The effect of a general and unqualified reversal of a judgment, order, or decree by the court of appeals is to nullify it completely and to leave the cause standing as if it had never been rendered[.]" 36 C.J.S. Federal Courts § 739. *See also* 5 Am. Jur. 2d Appellate Review § 803.

the effect of the District Court's decisions in *DeBoer* at the time of its issuance. In other words, an adverse decision by the Sixth Circuit has the effect of a superseding, not intervening, event and would result in Plaintiffs' marriages being contrary to both law and public policy at the time they were entered into.

Third, and relatedly, the longstanding public policy of Michigan is that marriage is a contractual relationship between one man and one woman. See e.g., Mich. Comp. Laws § 552.1. *DeBoer* represented one district court judge's opinion that the public policy was unconstitutional. In the event that opinion is reversed on appeal, then Plaintiffs' marriages were contracted contrary to a valid public policy, and would be void *ab initio*. See generally, *Morris & Doherty, P.C. v. Lockwood*, 672 N.W. 2d 884, 893 (Mich. App. 2003) (stating that a contract in violation of public policy is void *ab initio*).

Defendants have made no error of logic. The continued validity of Plaintiffs' marriages is inextricably intertwined with *DeBoer*, and an appellate reversal of *DeBoer* renders the marriages void *ab initio*.

II. Plaintiffs' lawsuit is inextricably intertwined with *DeBoer*; and, to the extent it could exist independently, their claims are barred by *Baker v. Nelson*, 409 U.S. 810 (1972).

Plaintiffs argue that this case can be maintained independently of any decision by the Sixth Circuit in *DeBoer*. As the State Defendants set forth in their principal brief and this reply, the State Defendants disagree. Nonetheless, assuming arguendo that Plaintiffs' claims could be maintained independently of *DeBoer*, they are barred by the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972).

To invoke this Court's federal question jurisdiction, Plaintiffs must allege a claim under federal law, and that claim must be "substantial." *Metro Hydroelectric Co. v. Metro Parks*, 541 F.3d 605, 610 (6th Cir. 2008). Here, Plaintiffs claim that Michigan's constitutional amendment defining marriage violates their Fourteenth Amendment Due-Process and Equal-Protection rights. But according to the United States Supreme Court, this is not a "substantial federal question."

In *Baker v. Nelson*, 291 Minn. 310, 311-312 (1971), a same-sex couple was denied a marriage license in Minnesota, and claimed that the denial violated their Fourteenth Amendment rights to Due-Process

and Equal-Protection. After losing in the Minnesota Supreme Court, the couple appealed to the United States Supreme Court, which summarily dismissed the appeal "for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. 810 (1972). This summary dismissal is a decision on the merits by which "lower courts are bound…until such time as the Court informs (them) that (they) are not." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (internal quotations omitted); see also *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989))).

And, as discussed by several courts considering similar issues, the Supreme Court's decision in *Baker* prevents this Court from reaching the merits of Plaintiffs' claims here. See e.g. *Windsor v. United States* ("*Windsor I*"), 699 F.3d 169, 178 (2d Cir. 2012) (distinguishing *Baker* from the DOMA case before it by stating that "[t]he question whether

the federal government may constitutionally define marriage as it does in Section 3 of DOMA is sufficiently distinct from the question in *Baker*: whether same-sex marriage may be constitutionally restricted by the *states*." (Emphasis in original)); *Massachusetts v. U.S. Dep't Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) ("*Baker* does not resolve our own case [under DOMA] but it does limit the argument to ones that do not presume or rest on a constitutional right to same-sex marriage.")

Since, under *Baker*, marriage is an issue for the states to determine and do not present a "substantial federal question," to the extent this case could be pursued independently of *DeBoer*, this Court lacks jurisdiction over Plaintiffs' claims.

III. Plaintiffs' claims do not satisfy the *Ex parte Young* exception to the State's Eleventh Amendment immunity.

Plaintiffs allege that they may maintain this action under *Ex parte Young* because Governor Snyder has issued general statements to the press which Co-Defendants Corrigan, Haveman and Stoddard, as heads of state departments, must abide by. (Plaintiffs' Brief, Doc #25, Pg ID 506.) But, Plaintiffs' argument ignores the wealth of case law under the *Ex parte Young* doctrine, which requires a fairly direct causal connection between the constitutional harm complained of and the

action of the named-defendant. This causal connection must be more than just a general duty to oversee state law or the general supervisory authority over state personnel.[2] In this case, no such causal connection exists.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth herein as well as in their principal brief, Defendants respectfully request this Court grant their motion to dismiss the complaint, award Defendants costs and attorney fees in

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[2] See e.g. *NCO Acquisition, LLC v. Snyder*, 2012 WL 2072668 *7 (E.D. Mich. 2012); *United Food and Commercial Workers Local 99 v. Brewer*, 2011 WL 4801887 *4 (D. Ariz. 2011) (Governor's supervision of state department was insufficient to establish "fairly direct" relationship necessary for purposes of *Ex parte Young* liability); *Snell v. Brown*, 2012 WL 3867355 *4 (C.D. Cal. 2012) (finding general duty to enforce state law and supervise subordinates' execution of state law insufficient to fulfill *Ex parte Young* causation requirement); *Southern Pacific Trans. Co. v. Brown*, 651 F.2d 613, 615 (9th Cir. 1980) (holding that the Oregon Attorney General's "power to direct and advise" district attorneys "does not make the alleged injury fairly traceable to his action, nor does it establish sufficient connection with enforcement to satisfy *Ex parte Young* "); *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (general supervisory powers are insufficient for purposes of establishing sufficient connection with the enforcement required by *Ex parte Young*); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) (stating the "mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute").

defending this action, and deny Plaintiffs' claim for attorney fees and costs.

Respectfully submitted,

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Dated: July 14, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2014, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

A courtesy copy of the aforementioned document was placed in the mail directed to:

Honorable Mark A. Goldsmith
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2014-0074408-A

Attachment 1

Westlaw.

Not Reported in F.Supp.2d, 2011 WL 4801887 (D.Ariz.), 192 L.R.R.M. (BNA) 2141
(Cite as: 2011 WL 4801887 (D.Ariz.))

H

United States District Court,
D. Arizona.
UNITED FOOD AND COMMERCIAL WORKERS LOCAL 99 et al., Plaintiffs,
and
Arizona Education Association, et al., Plaintiff–Intervenors,
v.
Jan BREWER, in her capacity as Governor of the State of Arizona, et al, Defendant.

No. CV–11–921–PHX–GMS.
Oct. 11, 2011.

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James Evans Barton, Michael King Goodwin, Office of the Attorney General, Ann Thompson Uglietta, J. Scott Dutcher, Phoenix, AZ, for Defendant.

ORDER

G. MURRAY SNOW, District Judge.

***1** Pending before this Court are the following motions: (1) a Motion to Dismiss filed by Defendant Maricopa County Sheriff Joseph Arpaio (Doc. 40); (2) a Motion to Dismiss filed by Defendants the State of Arizona, Secretary of State Ken Bennett, Governor Janice K. Brewer, Attorney General Thomas Horne, and Director of the Department of Labor Randall Maruca, ("State Defendants") (Doc. 50); and (3) a Motion to Dismiss Intervenor's Complaint filed by State Defendants, which Defendant Arpaio joins. (Doc. 71). For the reasons discussed below, the motions are granted in part and denied in part.

BACKGROUND

In April 2011, the Arizona legislature passed Senate Bill 1363, 2011 Arizona Session Laws, Chapter 153, which amended Sections 12–1809, 12–1810, 23–352, 23–1321, 23–1322, 23–1323 of the Arizona Revised Statutes ("A.R.S.") and amended Title 23, Chapter 8, Article 2 of those statutes by adding sections 23–1325, 23–1326, 23–1327, 23–1328 and 23–1329. Governor Janice K. Brewer signed the bill into law on April 18, 2011.

The law expands the definition of "harassment" under Arizona law to include "unlawful picketing, trespassory assembly, unlawful mass assembly, concerted interference with lawful exercise of business activity and engaging in a secondary boycott." A.R.S. § 12–1810 ®. The law expands the definition of "defamation" to include making a false statement about an employer while "knowingly, recklessly, or negligently disregarding the falsity of the statement." A.R.S. § 23–1325(A)—(C). Further, the law makes labor unions liable for the defamatory acts of their members. *Id.* § 23–1325(A)—(C).

The law also provides that employers may put their place of business on a "no trespass public notice list" maintained by the Secretary of State through the county recorders. A.R.S. § 23–1326(A). Should an employer whose premises are on the list ask law enforcement to remove "any labor organization or individual or groups of individuals acting on employees' behalf that are engaged in unlawful picketing, trespassory assembly or mass picketing," the law enforcement officer can order the group to leave the property and "may not require the em-

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ployer to provide any further documentation to establish the employer's property rights." *Id.* § 23–1326(F).

The law defines "trespassory assembly" by referencing Arizona's criminal trespass statutes. A.R.S. § 23–1321(5); A.R.S. § 13–1502 –04 (2010). In addition, it defines "unlawful picketing" as picketing where the purpose is "to coerce or induce an employer or self-employed person to join or contribute to a labor organization." A.R.S. § 23–1322. Finally, it defines "unlawful assembly" as, among other things, an assembly conducted "other than in a reasonable and peaceful manner." A.R.S. § 23–1327.

In April of, 2011, the legislature passed Senate Bill 1365, the "Protect Arizona Employees' Paychecks from Politics Act," 2011 Arizona Session Laws, Chapter 251, which Governor Janice K. Brewer signed into law on April 26, 2011. The law amended Title 23, Chapter 2, Article 7 of the A.R.S. by adding section 23–361.02. This Court previously described the provisions of this law and, on application of Plaintiff–Intervenors, enjoined Defendant Horne from implementing it in its order of September 23, 2011. (Doc. 99).

***2** Defendant Arpaio and the State Defendants have each filed motions to dismiss Plaintiffs' complaint. (Docs.40, 50). State Defendants have also moved to dismiss Plaintiff–Intervenors' complaint, and Defendant Arpaio has joined their motion. (Doc. 71). Defendants argue that Plaintiffs must demonstrate that the Court has subject-matter jurisdiction to hear the claim, that Plaintiffs and Plaintiff–Intervenors lack standing, and that the claims are not ripe for adjudication. (Docs.40, 50, 71). Further, the State Defendants argue that the Eleventh Amendment affords them immunity from this suit. (Docs.50, 71).

DISCUSSION

I. Legal Standard

"The party asserting jurisdiction has the burden of proving all jurisdictional facts." *Indus. Tectonics, Inc. v. Aero Alloy,* 912 F.2d 1090, 1092 (9th Cir.1990) (citing *McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936)). In effect, the court presumes lack of jurisdiction until the plaintiff proves otherwise. *See Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). The defense of lack of subject matter jurisdiction may be raised at any time by the parties or the court. *See* FED. R. CIV. P. 12(h)(3).

The Constitution grants the federal courts the power to hear only "Cases" and "Controversies." U.S. Const. art. III sec. 2. Therefore, to have standing under Article III, plaintiffs must satisfy three elements. First, "the plaintiff must have suffered an injury in fact" that is not "conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotations omitted). Next, the injury must be "fairly traceable to the challenged action of the defendant." *Id.* (internal quotations omitted). Finally, "it must be likely ... that the injury will be redressed by a favorable decision." *Id.* (internal quotations omitted).

For a claim to be justiciable, a plaintiff must not only meet the case or controversy requirements of Article III, but the claim must also be ripe for adjudication. Ripeness has "both a constitutional and a prudential component." *Potman v. Cty. of Santa Clara,* 995 F.2d 898, 902 (9th Cir.1993). The "constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry." *California Pro–Life Council, Inc. v. Getman,* 328 F.3d 1088, 1094 n. 2 (9th Cir.2003). In order to meet the prudential components of ripeness, courts must evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbot Laboratories v. Gardner,* 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

States are generally immune from suits filed by

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individuals in federal court. U.S. Const. amend. XI. State officials, however, can be sued in their official capacity for injunctive relief to prevent them from implementing state laws that violate the Constitution. *See Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Under the doctrine of *Ex Parte Young,* "relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Papasan v. Allain,* 478 U.S. 265, 278, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). Nevertheless, for a state officer to be subject to suit in her official capacity, "such officer must have some connection with the enforcement of the act." *Ex Parte Young,* 209 U.S. at 157. This connection must be "fairly direct." *Long v. Van de Kamp,* 961, F.2d 151, 152 (1992). For example, a state attorney general cannot be sued under *Ex Parte Young* when the statute complained of empowers local law enforcement agencies, even if those agencies operate under the supervision of the state attorney general. *Id.*

II. ANALYSIS

A. Subject–Matter Jurisdiction

***3** Plaintiffs allege that SB 1363 violates the First Amendment and that SB 1365 is pre-empted by the Supremacy Clause of the U.S. Constitution. (Doc. 8). Plaintiff–Intervenors allege that SB 1365 violates the First Amendment. (Doc. 77). Federal courts have subject-matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. [FN1] The Court has jurisdiction to hear claims challenging a state law on constitutional grounds. *See Bell v. Hood,* 327 U.S. 678, 681–82, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

> FN1. Although it is true that in their Amended Complaint Plaintiffs improperly state that jurisdiction is proper under 29 U.S.C. § 1332 (a section of the U.S.Code that does not exist), they properly cite 28 U.S.C. § 1331 in their Response. (Docs.8, 60). Plaintiff–Intervenors properly cite to 28 U.S.C. § 1331. (Doc. 52).

B. Standing and Ripeness

Defendants further allege that the Plaintiffs and Plaintiff–Intervenors lack standing, and that the claims represent pre-enforcement challenges that are not justiciable because they are not yet ripe. (Docs.40, 50, 71).

1. Standing

To suffer an injury in fact, it is not adequate that a party merely speculate that he will be the subject of an enforcement action to which he will have a constitutional defense. *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134 (9th Cir.2000) (en banc). The Ninth Circuit has recognized that "neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Id.* at 1139. However, "[c]onstitutional challenges based on the First Amendment present unique standing considerations." *Arizona Right to Life Political Action Comm. v. Bayless,* 320 F.3d 1002, 1006 (9th Cir.2003). Because parties are likely to restrict their own speech or assembly practices in reasonable fear that they may otherwise be found to have violated the law, "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *LSO, Ltd., v. Stroh,* 205 F.3d 1146, 1155 (2000).

Plaintiffs and Plaintiff–Intervenors satisfy the injury-in-fact requirement necessary for Article III standing. Both allege that the two laws restrict freedom of assembly and speech in violation of the First Amendment, and both plausibly state that they will curtail their protected speech and assembly activities in order to comply with the laws. (Docs.60, 86). The Court has already enjoined SB 1365 as a statute that, on its face, discriminates according to viewpoint in violation of the First Amendment. (Doc. 99). Plaintiffs have standing to continue to challenge a law that facially discrimin-

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ates against their speech activity. *LSO,* 205 F.3d at 1154–55. When parties seek to challenge laws that allegedly criminalize protected behavior, as Plaintiffs do with respect to SB 1363, the Supreme Court has written that they need not "risk prosecution to test their rights." *Dombrowski v. Pfister,* 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) . Plaintiffs and Plaintiff–Intervenors have adequately alleged that they suffer an injury in fact caused by SB 1363 and SB 1365.

Defendants do not claim that the alleged injuries are not fairly traceable to the challenged laws, or that the injuries would not be redressed were the laws struck down. (Docs.40, 50, 71). Thus, Plaintiffs and Plaintiff–Intervenors have demonstrated that their claim is fairly traceable to the law, and that their injury would be redressed were their suit successful.

2. Ripeness

***4** Since Plaintiffs and Plaintiff–Intervenors satisfy the injury-in-fact requirement for standing, their claim meets the constitutional prong of the ripeness test. *California Pro–Life Council,* 328 F.3d at 1094 n. 2. To meet prudential standing requirements, Plaintiffs must demonstrate the fitness of the issues for judicial decision and the hardship to the parties of withholding adjudication. *Abbot Laboratories,* 387 U.S. at 149. Plaintiffs mount a number of purely legal claims, including claims that SB 1363 is impermissibly vague on its face and impermissibly restricts First Amendment assembly rights. (Doc. 8). The attorney general has already been enjoined from enforcing SB 1365 on purely legal grounds, namely that it discriminates according to viewpoint. (Doc. 99). Likewise, the core issues of Plaintiffs' and Plaintiff–Intervenors' complaints are purely legal in nature. Plaintiffs and Plaintiff–Intervenors allege that the laws deprive them of their basic First Amendment rights. Dismissing the case on ripeness grounds would cause them to continue to suffer this alleged loss, which the Supreme Court has held "unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Plaintiffs' and Plaintiff–Intervenors' claims are ripe for review.

C. Eleventh Amendment

The fact that a governor is responsible for implementing state law does not subject her to liability in an *Ex Parte Young* suit unless the governor has some direct responsibility for implementing the law being challenged. *See National Audubon Society, Inc. v. Davis,* 307 F.3d 835, 847 (9th Cir.2002) (director of state fish and game department, not governor, is the proper subject of *Ex Parte Young* suit challenging state law restricting use of certain animal traps). The Governor of the State of Arizona is responsible for the operations of the Department of Public Safety, which is responsible for enforcing the criminal provisions of SB 1363. A.R.S. § 41–1711 (2011). However, such supervision does not constitute a "fairly direct" relationship subjecting the governor to liability under *Ex Parte Young. See, e.g., NAACP v. L.A. Unified Sch. Dist.,* 714 F.2d 946, 953 (9th Cir.1983) (school superintendent, not governor, is proper subject of suit alleging racial discrimination in schools); *Confederated Tribes & Bands of Yakama Indian Nation v. Locke,* 176 F.3d 467, 469 (9th Cir.1999) (governor not the proper subject of a suit alleging state was improperly running lottery on tribal lands in violation of federal law). Governor Brewer has mere supervisory authority over departments that implement SB 1363 and SB 1365, and is therefore not the proper subject of an *Ex Parte Young* suit challenging them.

Both laws specify that the Attorney General may levy fines and impose penalties for their violation; his relation to the law's enforcement is therefore "fairly direct." A.R.S. § 23–361.02(D); A.R.S. § 23–1324(C). Moreover, Plaintiffs seek a declaratory judgment that the laws are unconstitutional, and Arizona's Declaratory Judgments Act requires that they serve the Attorney General. A.R.S. § 12–1841(C) (2003). "Arizona courts have uniformly held that the Arizona Attorney General is an appropriate party to such cases." *Yes on Prop 200 v.*

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Napolitano, 215 Ariz. 458, 469, 160 P.3d 1216, 1227 (App.2007). The Eleventh Amendment does not prevent the Attorney General from being sued in his official capacity in a suit seeking to prevent him from enforcing an allegedly unconstitutional state law. *See Kentucky v. Graham,* 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

***5** Secretary of State Bennett is required, under SB 1363, to maintain the "no trespass public notice list" through the county recorders. A.R.S. § 23–1326(A). This lists forms the foundation of enforcement actions against those engaged in unlawful picketing, trespassory assembly, or mass picketing. *Id.* § 23–1326(F). As such, Secretary Bennet's connection to enforcing SB 1363 is "fairly direct." *Long v. Van de Kamp* 961, F.2d 151, 152 (1992). The statutes assign no direct enforcement role to the Department of Labor or to DOL Director Randall Maruca. Plaintiffs allege that as the Director of DOL, Maruca is "in charge of processing workers' wage claims when they have wages deducted in violation of law." (Doc. 60). Although Director Maruca may be responsible for resolving disputes that will arise if the SB 1363 and SB 1365 go into effect, he is not responsible for direct enforcement of the measures. His connection to the laws, therefore, is not "fairly direct" and he is dismissed as a party to this case. Likewise, the State of Arizona, named by Plaintiffs, is not a proper party to this suit, and is also dismissed as a party. *See* U.S. Const. amend XI.[FN2]

> FN2. Defendant Joe Arpaio made no argument that a claim against him was barred by the Eleventh Amendment.

Periodically in their Amended Complaint, Plaintiffs reference state law in addition to federal law. For example, they claim that SB 1365 "is invalid under the federal and state constitutional guarantees of the rights of speech, association, and petitioning," and that provisions of SB 1363 "violate the First and Fourteenth Amendments to the U.S. Constitution and violate free speech and due process rights under the Arizona Constitution." (Doc. 8, ¶¶ 59, 90). The Supreme Court has held that the Eleventh Amendment bars federal courts from ruling on whether state statutes violate state constitutions, stating that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). None of Plaintiffs' claims arise solely under state law, so none of them need to be dismissed. However, only the federal component of Plaintiffs' claims will be considered.

CONCLUSION

Because Plaintiffs and Plaintiff–Intervenors allege that SB 1363 and SB 1365 are unconstitutional, subject-matter jurisdiction is proper under 28 U.S.C. § 1331. In addition, because they allege that they will refrain from engaging in protected speech and assembly in order to comply with the unconstitutional law, they have standing and their claim is ripe for adjudication. Because the Attorney General of the State of Arizona and the Secretary of State of Arizona each have a fairly direct relationship to implementing the law, they are not provided immunity under the Eleventh Amendment. Governor Brewer, the State of Arizona, and Randall Maruca, however are immune from this suit pursuant to the Eleventh Amendment. Claims that the law is invalid under the Arizona constitution will not be considered.

***6 IT IS THEREFORE ORDERED** that Defendant Sheriff Joseph Arpaio's Motion to Dismiss (Doc. 40) is **DENIED.**

IT IS FURTHER ORDERED that State Defendants' Motion to Dismiss (Doc. 50) is **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED that State Defendants' Motion to Dismiss Plaintiff–Intervenor's Complaint (Doc. 71) is **GRANTED** in part and **DENIED** in part.

Parties State of Arizona, Governor Janice K. Brewer, and Director of the Department of Labor

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Randall Maruca are hereby dismissed from this suit.

Parties Attorney General Thomas Horne, Secretary of State Ken Bennett, and Maricopa County Sheriff Joseph Arpaio remain Defendants to this suit.

D.Ariz.,2011.
United Food and Commercial Workers Local 99 v. Brewer
Not Reported in F.Supp.2d, 2011 WL 4801887 (D.Ariz.), 192 L.R.R.M. (BNA) 2141

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Attachment 2

Westlaw.

Not Reported in F.Supp.2d, 2012 WL 3867355 (C.D.Cal.)
(Cite as: 2012 WL 3867355 (C.D.Cal.))

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Only the Westlaw citation is currently available.

United States District Court,
C.D. California,
Western Division.
Edwin Thomas SNELL, Plaintiffs,
v.
Edmund G. BROWN, et al., Defendants.

No. CV 12–6118 GAF (AJW).
Sept. 6, 2012.

Edwin Thomas Snell, Hesperia, CA, pro se.

MEMORANDUM AND ORDER DISMISSING COMPLAINT WITH LEAVE TO AMEND

ANDREW J. WISTRICH, United States Magistrate Judge.

Proceedings

***1** Plaintiff paid the filing fee and filed a complaint pro se under 42 U.S.C. section 1983 against the following defendants: Edmund G. Brown, Governor of California; Kamala D. Harris, Attorney General of the State of California; Steve Cooley, Los Angeles County District Attorney; the Director of the California Department of Corrections and Rehabilitation ("CDCR"); C.P. Andicochen, a parole supervisor; and J. McKeller, a parole officer. Defendants are sued in their official capacity for injunctive relief.

Because the complaint fails to state a federal claim on which relief can be granted, it is dismissed with leave to amend. Plaintiff has three options:

(1) Plaintiff **may continue this action in this court** by filing a document labeled **"First Amended Complaint"** within **twenty-one (21) days** of the date of this order. To withstand dismissal, the amended complaint must attempt to correct the factual and legal defects described below.

(2) Plaintiff **may file a "Notice of Intent Not to Amend Complaint"** within **twenty-one (21) days** of the date of this order. The timely filing of a notice of intent not to amend will be construed as an indication that plaintiff wishes to challenge dismissal of the complaint by seeking review of this order in the Ninth Circuit Court of Appeals. If the court receives timely written notice of plaintiff's intent not to file an amended complaint, this action will be dismissed with prejudice, and plaintiff will be free to appeal the order of dismissal. *See Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1063–1066 (9th Cir.2004); *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir.1995).

(3) Plaintiff **may do nothing in response to this order.** If plaintiff does not respond to this order by filing either a timely amended complaint or a timely notice of intent not to amend, plaintiff will be deemed to have consented to the dismissal of this action with prejudice under Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute and failure to comply with this order. *See Edwards*, 356 F.3d at 1063–1066.

Plaintiff's Allegations

The complaint and attached exhibits allege as follows. Plaintiff was "falsely arrested in October 2010 for political reasons." [Complaint 9–10]. Plaintiff was a community activist who was "leading the attack against the City of Bell, seeking election recalls." [Complaint 6]. The City of Bell obtained a restraining order using "false charges" against plaintiff to silence him and "take the momentum" out of the recall movement. In addition, plaintiff was charged with making a criminal threat against the clerk of the City of Bell when requesting election recall documents. On July 6, 2011, defendants "forced" plaintiff, aged 64, to accept a plea deal "to save himself from a process that operates under an unlawful policy that misuses the 3–strikes law ..." [Complaint 6]. Defendants alleged that plaintiff had two prior strikes "they could never

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prove" in order to increase the amount of the bond that plaintiff was required to post to make bail. [Complaint 6].

***2** During the preliminary hearing on that charge, City of Bell officials gave false testimony to justify the restraining order and ensure that plaintiff was banned from city council meetings. A commissioner rather than a judge presided over the preliminary hearing. The commissioner lacked jurisdiction to issue a "holding order," which therefore was void. Plaintiff received ineffective assistance of counsel during the preliminary hearing. [Complaint 7].

After plaintiff was arraigned in superior court, he moved to proceed in propria persona, for discovery regarding the prior strike allegations, to reduce his bail, and to dismiss the charges against him. Operating under an "unlawful policy," defendants "ignore[d] the court rule requiring them to respond to motions filed ..." [Complaint 7]. "[R]elying on their normal procedure," defendants told plaintiff he was facing a 35–year prison term and "called [plaintiff's] 'bluff' because of serious health issues, forc[ing] him into taking" a 3–year plea bargain. [Complaint 7]. Defendants have a "ministerial duty to correct the error made in the preliminary hearing .... " [Complaint 9].

Once plaintiff was incarcerated, defendants "ignored the doctor's orders" for a lower tier and bottom bunk. Defendants housed plaintiff with gang members who beat him so badly that plaintiff now walks with a cane. [Complaint 8]. Plaintiff served nineteen months in prison. [Complaint 10].

Plaintiff filed a petition for a writ of habeas corpus to vacate the judgment against him. The state procedures are inadequate to protect federal rights, and the plaintiff presently is exhausting his state remedies to satisfy federal habeas jurisdictional requirements. [Complaint 8]. At the time plaintiff filed his section 1983 complaint, his habeas petition was pending before the California Supreme Court. [Complaint 10]. The lower state courts denied his petition and "failed to issue show cause order[s] to allow any factual development." [Complaint 10 & Exhibits A through C].

Defendants have imposed " 'high control' parole reporting" requirements on plaintiff. Plaintiff must report approximately nine times a month and attend meetings. Defendants McKeller and Andicochen also make plaintiff's daughter "jump through hoops" in order to make her withdraw her support from plaintiff and to force plaintiff to move out of her house, in order to cause plaintiff to violate his parole and justify sending him back to prison. [Complaint 8–9].

Plaintiff alleges that his allegations meet the test for injunctive relief regarding defendants' failure to respond to his motion under California Penal Code section 995 and his allegation that defendants had a "statutory and constitutional duty to dismiss the charges rather than seek a plea [.]" [Complaint 9].

Plaintiff claims that defendants' conduct violated his Fourteenth Amendment due process rights and his rights to free speech and freedom of assembly. [Complaint 5–6]. He seeks the following relief, as well as any additional relief the Court deems proper: (1) an order enjoining enforcement of plaintiff's parole conditions until a federal court considers the merits of his habeas petition; (2) an order that defendants show cause why the criminal judgment against him should not be vacated; (3) an order enjoining enforcement of the restraining order issued by the "Norwalk Superior Court"; (4) an order directing state parole supervisor Andicochen and state parole officer McKeller to stop harassing and punishing plaintiff's daughter; and (5) an order requiring defendants to seek leave of this Court before taking action against plaintiff or his family.

Discussion

***3** A complaint may be dismissed on the court's own motion for failure to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6); *Lee v. City of Los Angeles,* 250 F.3d 668,

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688 (9th Cir.2001). To survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and citing *Twombly,* 550 U.S. at 556). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly,* 550 U.S. at 555 (internal quotation marks and ellipsis omitted). The court must accept as true all factual allegations contained in the complaint. That principle, however, "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678. A *pro se* complaint, however, is "to be liberally construed," and "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus,* 551 U.S. 89, 93–94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam) (citing *Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)); *see Hebbe v. Pliler,* 627 F.3d 338, 342 (9th Cir.2010) (stating that "we continue to construe *pro se* filings liberally when evaluating them under *Iqbal,*" and "particularly in civil rights cases, ... to afford the [plaintiff] the benefit of any doubt") (quoting *Bretz v. Kelman,* 773 F.2d 1026, 1027 n. 1 (9th Cir.1985) (en banc)).

Section 1983 standard

A section 1983 plaintiff bears the burden of pleading and proving two essential elements: (1) conduct that deprived the plaintiff of a right, privilege, or immunity protected by the Constitution or laws of the United States; and (2) the alleged deprivation was committed by a person acting under the color of state law. *See West v. Atkins,* 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) ; *Johnson v. Knowles,* 113 F.3d 1114, 1119 (9th Cir.), *cert. denied,* 522 U.S. 996, 118 S.Ct. 559, 139 L.Ed.2d 401 (1997); *Leer v. Murphy,* 844 F.2d 628, 632–33 (9th Cir.1988).

Official capacity claims

Defendants Brown, Harris, Andicochen, McKeller, and the Director of the CDCR are all state officials sued in their official capacities for injunctive relief. As a California district attorney, Cooley also functions as a state officer when acting in his prosecutorial capacity. *Del Campo v. Kennedy,* 517 F.3d 1070, 1073 (9th Cir.2008).

State officers acting in their official capacities receive Eleventh Amendment immunity from claims for monetary relief. *Hafer v. Melo,* 502 U.S. 21, 25, 27, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991); *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 65, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Romano v. Bible,* 169 F.3d 1182, 1185 (9th Cir.), *cert. denied,* 528 U.S. 816, 120 S.Ct. 55, 145 L.Ed.2d 48 (1999). The Eleventh Amendment does not, however, bar suits for prospective injunctive relief against state officials in their official capacity. *See, Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 267–269, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997); *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 102–106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Ex parte Young,* 209 U.S. 123, 159–160, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Doe v. Lawrence Livermore Nat. Lab.,* 131 F.3d 836, 839 (9th Cir.1997). "[I]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.' " *Virginia Office for Protection & Advocacy,* —— U.S. ——, 131 S.Ct. 1632, 1639, 179 L.Ed.2d 675 (2011) (quoting *Verizon Md. Inc. v. Public Serv. Comm'n of Md.,* 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002)). "An allegation of an ongoing violation of federal law is ordinarily

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sufficient." *Verizon Md. Inc.,* 535 U.S. at 646 (quoting *Coeur d'Alene,* 521 U.S. at 281) (emphasis in original; ellipsis omitted).

***4** Plaintiff's requests for an order requiring defendants to show cause why the criminal judgment against him should not be vacated is not properly characterized as a request for prospective injunctive relief. Instead, that request amounts to a request for relief for past unlawful conduct. *See United Mexican States v. Woods,* 126 F.3d 1220, 1223 (9th Cir.1997) (rejecting the argument that challenges to the validity of a criminal conviction and sentence "can give rise to prospective relief under *Ex parte Young,"* and explaining that while a conviction and sentence can be "examined *post hoc* in state post-conviction proceedings and federal habeas," they cannot "be examined in a prospective fashion"; whether a conviction and sentence met constitutional requirements "must be viewed through a retrospective lens").

Plaintiff also asks for an order enjoining future enforcement of the restraining order issued against him by a California state court. The *Ex parte Young* exception authorizes prospective injunctive relief against state officials, but not against a state court. *See Ex parte Young,* 209 U.S. at 163 ("The right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated does not include the power to restrain a court from acting in any case brought before it ...."); *Agua Caliente Band of Cahuilla Indians v. Hardin,* 223 F.3d 1041, 1048 (9th Cir.2000) (stating that the *Ex parte Young* exception "has always distinguished between a suit against a State qua State and a suit against a state official to enjoin the enforcement of a state act that violates federal law: the [*Ex parte Young*] doctrine has always permitted the latter to avoid the sovereign immunity bar"); *Greater Los Angeles Council on Deafness v. Zolin,* 812 F.2d 1103, 1110 (9th Cir.1987) (holding that a suit against the superior court is a suit against the State of California and therefore is barred by the Eleventh Amendment).

Accordingly, plaintiff's section 1983 claims for injunctive relief arising from his allegedly unlawful plea bargain and conviction, and from the state court's issuance of a restraining against him, are barred by the Eleventh Amendment and are dismissed.

Additionally, plaintiff's section 1983 claims against Brown, Harris, Cooley and the Director of the CDCR fail because the *Ex parte Young* exception contains a "causation requirement," *Artichoke Joe's v. Norton,* 216 F.Supp.2d 1084, 1110 (E.D.Cal.2002), *aff'd,* 353 F.3d 712 (9th Cir.2003), and plaintiff's allegations fail to satisfy that requirement.

> [N]ot every state officer is subject to suit simply by virtue of being a state officer. Rather, the "officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." Further, the "connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit."

***5** *Artichoke Joe's,* 216 F.Supp.2d at 1110 (quoting *Ex parte Young,* 209 U.S. at 157; *Los Angeles County Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir.1992)); *see Long v. Van de Kamp,* 961 F.2d 151, 152 (9th Cir.1992) (per curiam); *Los Angeles Branch NAACP,* 714 F.2d 946, 953 (9th Cir.1983).

Plaintiff alleges that Brown violated his constitutional duty as governor to "take care that the laws be faithfully executed," and to oversee the operations of the attorney general's office and the district attorneys. Plaintiff alleges that Harris violated her duty as the "chief law officer of the state" to see that all laws of the state are adequately enforced, and that she failed to train and supervise the district attorneys and failed to implement sufficient policies to prevent violations by district attorneys. Plaintiff alleges that Cooley engaged in an "unlawful exer-

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cise of discretion," had an unspecified conflict of interest, and operated under an unlawful policy and procedure. [Complaint 3, 5]. Plaintiff alleges that the Director of the CDCR failed to train and supervise his staff and to implement sufficient policies to stop violations of plaintiff's rights. [Complaint 4].

The general duty of Brown, Harris, Cooley, and the Director of the CDCR to enforce California law or supervise their subordinates execution or enforcement of the law "does not establish the requisite connection between [them] and the unconstitutional acts alleged by" plaintiff, and therefore those claims are dismissed. *Los Angeles Branch NAACP,* 714 F.2d at 953 (holding that the Eleventh Amendment barred the plaintiff's section 1983 suit against the governor of California seeking to enjoin him to perform affirmative acts); *see Long,* 961 F.2d at 152 (holding that "the general supervisory powers of the California Attorney General" were not sufficient "to establish the connection with enforcement required by *Ex parte Young"*); *S. Pac. Trans. Co. v. Brown,* 651 F.2d 613, 614 (9th Cir.1981) (holding that the Oregon attorney general's "power to direct and advise" district attorneys "does not make the alleged injury fairly traceable to his action, nor does it establish sufficient connection with enforcement to satisfy *Ex parte Young"*); *cf. Artichoke Joe's,* 216 F.Supp.2d at 1110 (holding that the governor was subject to suit under *Ex parte Young* where the plaintiffs' claims were "not based on any general duty to enforce state law," but rather alleged "a specific connection to the challenged statute," in that the governor "negotiated and approved the compacts that give rise to the plaintiffs' alleged injuries," and the plaintiffs alleged ongoing violations of federal law due to his approval of the compacts).

Challenge to legality of conviction

Alternatively, plaintiff's section 1983 claim challenging the legality of his plea bargain and criminal conviction fail because such claims must be brought in a petition for a writ of habeas corpus.

***6** In general, a person seeking to challenge the lawfulness of his criminal conviction or sentence must seek relief by filing a petition for a writ of habeas corpus. *See Wilkinson v. Dotson,* 544 U.S. 74, 81, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005); *Preiser v. Rodriguez,* 411 U.S. 475, 499–500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). In his complaint, plaintiff alleges that he is currently exhausting state remedies, and that his state habeas petition is pending before the California Supreme Court. [Complaint 8]. If plaintiff seeks relief from the fact or duration of his conviction and confinement, he must do so in a petition for a writ of habeas corpus after exhausting his state remedies. *See Preiser,* 411 U.S. at 498; *Young v. Kenny,* 907 F.2d 874, 875 (9th Cir.1990). Where a claim is brought under section 1983 but should properly be brought in a habeas petition, the proper remedy is to dismiss the claim without prejudice, rather than to convert it to a habeas action. *See Trimble v. City of Santa Rosa,* 49 F.3d 583, 586 (9th Cir.1995); *Blueford v. Prunty,* 108 F.3d 251, 255 (9th Cir.1977); *see also Bunn v. Conley,* 309 F.3d 1002, 1008–1009 (7th Cir.2002).

Accordingly, plaintiff's section 1983 claims challenging the legality of his plea bargain and conviction are dismissed.

Challenge to parole conditions

Plaintiff also seeks an order enjoining enforcement of his parole conditions. Neither the United States Supreme Court nor the Ninth Circuit has decided whether a section 1983 action may be brought to challenge parole conditions "preemptively" (that is, in the absence of parole revocation for violating those conditions), or whether such challenges instead must be brought in a habeas petition. The Seventh Circuit has held that a challenge to conditions of parole or probation must be brought by means of a habeas petition. *See Williams v. Wisconsin,* 336 F.3d 576, 570–580 (7th Cir.2003) (parole); *Drollinger v. Milligan,* 552 F.2d 1220, 1224 (7th Cir.1977) (probation). Several district courts within the Ninth Circuit have reached the same conclusion. These courts have reasoned that a habeas peti-

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tion is the proper vehicle to challenge parole conditions because those conditions are the exclusive means by which a parolee remains "in custody," and because those conditions properly are considered part of the parolee's sentence. *Thornton v. Schwarzenegger,* 2011 WL 2173652, at *12–*14 (S.D.Cal. June 1, 2011); *Moore v. Schwarzenegger,* 2010 WL 2740323. *2–*3 (C.D.Cal. May 28, 2010), *report and recommendation adopted,* 2010 WL 2740320 (C.D.Cal. July 5, 2010); *Cordell v. Tilton,* 515 F.Supp.2d 1114, 1121–1122 (S.D.Cal.2007); *Moreno v. California,* 25 F.Supp.2d 1060, 1061 (N.D.Cal.1998); *see also United States v. Brown,* 59 F.3d 102, 104–105 (9th Cir.1995) (explaining that parole and probation are part of the original sentence, that their continuance is conditioned on compliance with stated conditions, and that if the defendant does not comply with those conditions, parole and probation may be revoked); *Bagley v. Harvey,* 718 F.2d 921, 923 (9th Cir.1983) (affirming denial of habeas petition challenging special parole condition).

*7 Other district courts within the Ninth Circuit, however, have concluded that parole conditions are not properly considered part of a criminal sentence, and that a suit regarding such conditions does not necessarily call into question the "fact or duration of confinement," but rather is analogous to a suit challenging prison conditions under section 1983. *See Loritz v. Dumanis,* 2007 WL 1892109, at *3 (D.Nev. Jun.27, 2007); *Ford v. Washington,* 2007 WL 1667141, *4 (D.Or. June 1, 2007), *aff'd,* 411 Fed.Appx 968 (9th Cir.2011); *see also Bowman v. Schwarzenegger,* 2009 WL 799274, at *10–*11 (E.D.Cal. Mar.23, 2009) (assuming, without deciding, that the plaintiff could seek injunctive relief with respect to parole conditions in section 1983 action).

Assuming, without deciding, that plaintiff's challenge to his parole conditions is cognizable in this section 1983 action, plaintiff has not alleged any facts plausibly suggesting that his parole conditions violate his federal rights. Plaintiff alleges that he is subject to "high control" reporting requirements pursuant to which he must report nine times a month and attend meetings. "To accomplish the purpose of parole," parolees "are subjected to specified conditions" that "restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen," typically including restrictions on a parolee's association with certain persons and on his or her ability to engage in specified activities. *Morrissey v. Brewer,* 408 U.S. 471, 478, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). "Additionally, parolees must regularly report to the parole officer to whom they are assigned." *Morrissey,* 408 U.S. at 478.[T]hrough the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parole[e] and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development." *Morrissey,* 408 U.S. at 478 (footnote omitted). Plaintiff's allegations that he must report to his parole officer nine times a month and attend meetings are insufficient to state a section 1983 claim. Therefore, plaintiff's section 1983 claims seeking to enjoin enforcement of his parole conditions are dismissed.

Plaintiff further alleges that defendants McKeller and Andicochen made his daughter "jump through hoops" in an effort to make plaintiff move out of her home and violate his parole, and that Andicochen failed to stop McKeller from engaging in "abusive practices" that "victimized" plaintiff and his family. To the extent that plaintiff is attempting to assert or vindicate his daughter's rights in this action, his complaint fails to state a cognizable claim. *See Johns v. County of San Diego,* 114 F.3d 874, 876–877 (9th Cir.1997) (explaining that constitutional claims are personal and cannot be asserted vicariously, and that a non-attorney may appear pro se on his own behalf but has no authority to appear as an attorney for others). Furthermore, plaintiff's vague and conclusory allegations that McKeller and Andicochen "victimized" plaintiff or his daughter

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are devoid of supporting factual allegations and are not accepted as true. *See Icibal,* 556 U.S. at 679 (stating that the court can identify allegations in a complaint that are "no more than conclusions" and therefore "are not entitled to the assumption of truth").

Prison conditions claims moot

***8** In addition to the other grounds for dismissing plaintiff's section 1983 claims, his claims seeking injunctive relief with respect to the conditions of confinement during his incarceration are moot because plaintiff has been released from prison. *See Mitchell v. Dupnik,* 75 F.3d 517, 527–528 (9th Cir.1996); *Dilley v. Gunn,* 64 F.3d 1365, 1368 (9th Cir.1995).

Conclusion

For the reasons described above, the complaint fails to state a cognizable federal claim. Accordingly, the complaint is dismissed in its entirety pursuant to Rule 12(b)(6). Although some of plaintiff's claims fail as a matter of a law, it is not absolutely clear that plaintiff cannot salvage any of his claims by pleading additional facts. Accordingly, plaintiff is granted leave to amend in accordance with the instructions set forth at the beginning of this order. *See Lopez v. Smith,* 203 F.3d 1122, 1130 (9th Cir.2000) (en banc) (stating that leave to amend should be granted when a complaint is dismissed under 28 U.S.C. § 1915(e) "if it appears at all possible that the plaintiff can correct the defect").

IT IS SO ORDERED.

C.D.Cal.,2012.
Snell v. Brown
Not Reported in F.Supp.2d, 2012 WL 3867355 (C.D.Cal.)

END OF DOCUMENT

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Attachment 3

Westlaw.

Not Reported in F.Supp.2d, 2012 WL 2072668 (E.D.Mich.)
(Cite as: 2012 WL 2072668 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
NCO ACQUISITION, LLC, et al., Plaintiffs,
v.
Richard D. SNYDER, et al., Defendants.

No. 12–10122.
June 8, 2012.

Michael F. Jacobson, David W. Williams, Jaffe, Raitt, Southfield, MI, for Plaintiffs.

Margaret A. Nelson, Michael F. Murphy, Michigan Department of Attorney General, Lansing, MI, for Defendants.

AMENDED OPINION AND ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS AND CANCELLING THE JUNE 6, 2012 MOTION HEARING[FN1]

FN1. This amended order corrects a formatting error contained on page ten of the court's June 6, 2012 order.

ROBERT H. CLELAND, District Judge.

***1** Before the court is a motion to dismiss filed by Defendants Governor Richard Snyder, State Treasurer Andy Dillon, and Emergency Manager of the Detroit Public Schools Roy Roberts, in which Defendants contend that the court should decline to exercise jurisdiction over this declaratory judgment action on various grounds. The motion alternatively argues that Plaintiffs have failed to state a claim against Governor Snyder. The motion has been fully briefed, and the court finds a hearing to be unnecessary. *See* E.D. Mich. LR 7.1(f)(2). For the reasons stated below, the court will grant in part Defendants' motion and dismiss the claims without prejudice against Governor Snyder. The court, however, will deny the motion to the extent it seeks dismissal on abstention grounds.

I. BACKGROUND

Plaintiffs are four real estate companies that entered into lease and sublease agreements with the Detroit Public Schools ("DPS") between 2002 and 2004. (First Amend. Compl. 57¶ % 9–23, Dkt. # 18 .) In each agreement, DPS agreed to rent properties from Plaintiffs for a finite period of time, normally ten years. (*Id.*) In September 2011, following Governor Snyder's appointment of Roberts to the position of Emergency Manager of DPS, Roberts unilaterally modified the relevant lease agreements to include a provision that permitted him to terminate the leases after sixty days notice, and notified Plaintiffs that the lease agreements would be terminated on November 30, 2011. (*See, id.* 57¶ % 30–41.) On November 30, 2011, the original date of termination, Plaintiffs NCO Acquisition, LLC, FK South, LLC, and Lothrop Associates, LP, received revised notices of termination, indicating that the leases would be terminated on January 30, 2012. (*Id.* 57¶ % 42–46.) Plaintiff FK North, LLC, received a letter the same day rescinding the September 2011 notice of termination but not establishing a new termination date. (*Id.* 57% 47.)

In his initial correspondence to Plaintiffs, Roberts cited Michigan's Local Government and School District Fiscal Accountability Act (the "Act"), Mich. Comp. Laws § 141.1501 –.1531, as the source of his authority to unilaterally modify, and ultimately terminate, the lease agreements. (First Amend. Compl. 57% 30.) Enacted on March 16, 2011, and taking effect the same day, the Act establishes, *inter alia,* the process by which the Governor of Michigan may declare a financial emergency in a given local government or school district, *see* Mich. Comp. Laws §§ 141 .1512–.1515, and the authority of the Governor to "appoint an emergency manager to act for and in the place and stead of the governing body and the office of chief administrative officer of the local

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government," *id.* at § 141.1515(4). At issue in this case is the Act's grant of broad authority to an emergency manager "to rectify the financial emergency and to assure the fiscal accountability of the local government." *Id.* Specifically, in their first amended complaint, Plaintiffs seek a declaratory judgment that § 141.1519(1)(j), which authorizes an emergency manager to "[r]eject, modify, or terminate 1 or more terms and conditions of an existing contract," violates the Contracts Clause of Article I, Section 10 of the United States Constitution and the Takings Clause of the Fifth Amendment, both as written and as applied (by Roberts) to the lease agreements.

***2** Defendants have moved to dismiss the complaint, asserting three bases on which the court should decline to exercise jurisdiction over the case: (1) the *Burford* abstention doctrine; (2) the doctrine enunciated in *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); and (3) the Declaratory Judgment Act's grant of discretion to a district court to decline jurisdiction in a declaratory judgment action. Defendants argue separately that Governor Snyder is not a proper party.

II. DISCUSSION

A. *Burford* Abstention

Defendants, citing *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), argue that the court should abstain from exercising jurisdiction to avoid disrupting the State of Michigan's efforts to develop a coherent policy to effectively address the fiscal crises local governments and school districts are presently experiencing in the State. *Burford* abstention

> provides that where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result on the case then at bar"; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Adrian Energy. Assocs. v. Mich. Public Serv. Comm'n, 481 F.3d 414, 423 (6th Cir.2007) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 361, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989)). The doctrine is fundamentally concerned with preventing "federal courts from bypassing a state administrative scheme and resolving issues of state law and policy that are committed in the first instance to expert administrative resolution." *Id.* (citing *New Orleans Pub. Serv., Inc.,* 491 U.S. at 361–64; *Bath Mem. Hosp. v. Maine Health Care Fin. Comm'n,* 853 F.2d 1007, 1014–15 (1st Cir.1988)). The balance struck between a "strong federal interest in having certain classes of cases ... adjudicated in federal court" and a state's interest in "maintaining uniformity in the treatment of an essentially local problem" rarely favors abstention, as "the power to dismiss recognized in Burford represents an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 728, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (citations and quotations marks omitted).

Moreover, the federalism and comity concerns from which the doctrine arose do not provide the State with a shield against all litigation that may result in a federal court striking down a state administrative or regulatory regime as unconstitutional. *See Zablocki v. Redhail,* 434 U.S. 374, 379–80 n. 5, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) ("[T]here is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy."); *Bath Mem. Hosp.,* 853 F.2d at 1013 ("The threatened interference [does] not consist merely of the threat that the federal court might declare the *entire state system* unconstitutional; that sort of risk is present whenever one attacks a state law on constitutional

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grounds in a federal court."). *Burford* abstention presupposes the constitutionality of the administrative or regulatory regime, and seeks to mitigate the possibility that federal courts might "create a parallel, additional, federal, 'regulatory review' mechanism" that would interfere with the State's administration of a *constitutional* state regime aimed at developing a coherent policy to address a substantially local concern. *Bath. Mem. Hosp.,* 853 F.2d at 1013.

***3** Even if the court were to assume, *arguendo,* that Plaintiffs' complaint implicates "the proceedings or orders of [a] state administrative agenc[y]," *Adrian Energy. Assocs.,* 481 F.3d at 423 —a threshold issue untouched here by the parties, *see Rouse v. DaimlerChrysler Corp.,* 300 F.3d 711, 716 (6th Cir.2002) (reversing the district court's stay on *Burford* abstention grounds because no proceeding or order of an administrative agency was involved in the dispute)— *Burford* abstention is not appropriate in this case.

First, no difficult questions of state law are present that would outweigh the strong federal interest in adjudicating Plaintiffs' constitutional challenge. Plaintiffs have not asserted any state-law claims, and the underlying law at issue is unambiguous in its grant of authority to an emergency manager to "[r]eject, modify, or terminate 1 or more terms and conditions of an existing contract." Mich. Comp. Laws § 141.1519(1)(j). Thus, the case falls well within a federal court's area of expertise of hearing federal constitutional challenges to legislative enactment by states.

Second, adjudication of Plaintiffs' declaratory judgment request will not impermissibly disrupt the State's effort to formulate a comprehensive and uniform regime to restore fiscal order. The heart of the first amended complaint is a facial challenge to the Act's grant of authority to emergency managers to modify existing contracts, and although Plaintiffs also argue Roberts's specific invocation of the Act's grant of authority violated the Constitution, adjudication of this latter claim does not demand a highly "individualized review of fact—(or cost-) specific regulatory decision making." *Bath Mem. Hosp.,* 853 F.2d at 1015. Plaintiffs contend that Roberts's decision to modify and terminate the lease agreements violates the Constitution because the Act delegates legislative power to emergency managers without any limiting standards, (Compl. 57¶ % 52, 71), and does not require emergency managers "to abide by the same restrictions as the Legislature in order to constitutionally effectuate an impairment of a contract," (Compl. 57% 56). Such an argument challenges the very structure of the Act, not the specific fact-based variables that underlie a particular manager's decision to modify or terminate contractual agreements. See *Vaqueria Tres Monjitas, Inc. v. Irizarry,* 587 F.3d 464, 474 (1 st Cir.2009) (finding *Burford* abstention inappropriate where "the heart of plaintiffs' action lies in the constitutional challenge to [an administrative agency's] decision-making process as a whole, and not to the reasonableness of their [sic] particular determinations"). Where no substantial inquiry beyond the four corners of a legislative enactment is necessary, the Supreme Court has held that a case will "not unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity." *New Orleans Pub. Serv., Inc.,* 491 U.S. at 363. Any threat of disruption to the State's ability to efficaciously address municipal fiscal crises caused by this case is solely based on the risk that the court may determine that the Act's grant of authority to modify existing contracts is unconstitutional. Such a risk is obviously inherent whenever a litigant challenges the constitutionality of state law in federal court and is not the type of disruption that *Burford* abstention is aimed at mitigating. *See id.* (quoting *Zablocki,* 434 U.S. at 380 n. 5).

***4** Accordingly, Defendants' claim that an adjudication unfavorable to the State will strike at the heart of the State's ability to restore fiscal order is unpersuasive. The principles of *Burford* are inapplicable to this case and abstention on *Burford* grounds is not warranted.

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B. *Colorado River* Doctrine

Defendants next argue that the court should dismiss the complaint pursuant to the *Colorado River* Doctrine. Like *Burford,* the *Colorado River* doctrine creates a narrow exception to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River,* 424 U.S. at 817. Unlike *Burford,* the doctrine is not principally based on concerns for federal-state relations, but instead on "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *Id.* (quoting *Kerotest Mfg. Co. v. C–O–Two Fire Equip. Co.,* 342 U.S. 180, 183, 72 S.Ct. 219, 96 L.Ed. 200 (1952)). Under the doctrine, "a district court may sometimes be justified in abstaining from exercising jurisdiction in deference to a parallel state-court proceeding." *Great Earth Cos. v. Simons,* 288 F.2d 878, 886 (6th Cir.2002). The following factors have been identified by the Supreme Court and the Sixth Circuit as relevant to a district court's consideration of whether abstention is appropriate under *Colorado River.*

> (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; and (4) the order in which jurisdiction was obtained[;] ... (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction.

Romine v. Compuserve Corp., 160 F.3d 337, 340–41 (6th Cir.1998) (citations omitted). A threshold "requirement for application of [the] *Colorado River doctrine,* however, is the presence of a *parallel,* state proceeding." *Crawley v. Hamilton Cnty. Comm'rs,* 744 F.2d 28, 31 (6th Cir.1984). A state-court proceeding is not necessarily parallel to a federal proceeding merely because it arises out of the same basic facts as the federal proceeding. *See Baskin v. Bath Twp. of Zoning Appeals,* 15 F.3d 569, 572 (6th Cir.1994). "In deciding whether a state action is parallel for abstention purposes, the district court must compare the issues in the federal action to the issues actually raised in the state court action, *not those that might have been raised." Id.* (emphasis added). The court must examine the qualitative nature of the claims raised in the state and federal proceedings to determine whether there exists an "identity of parties and issues" so as to make the proceedings parallel. *Id.* Generally, "when the state and federal cases present different theories of recovery, courts do not ... characterize the proceedings as parallel." *Gentry v. Wayne Cnty.,* No. 10–11714, 2010 WL 4822749, at *2 (E.D.Mich. Nov.22, 2010) (internal quotation marks and citations omitted).

***5** Here, despite seeking to invoke an extraordinary exception to the court's "nearly unflagging" obligation to exercise the jurisdiction given to it, Defendants have not proffered pleadings or any other documentation from the three state-court cases to which they refer to in order to substantiate the argument that these proceedings are parallel. Supplementation of the record is unnecessary though, as both sides agree that the state cases "are for back rent only and do not specifically raise the constitutionality of [the Act], nor the validity of the terminations of each lease." (Defs.' Br. Supp. Mot. Dismiss 10, Dkt. # 19; *see also* Pls.' Resp. Opp'n to Defs.' Mot. Dismiss 13, Dkt. # 21 ("[T]he state cases are limited to the discrete issue of unpaid rent for the period that the DPS occupied space and only include claims for breach of contract and account state.").) It is evident from the parties' characterizations of the issues in the state cases that the claims in those cases are substantively and temporally distinct from the constitutional challenge in this case. They are based only upon DPS's alleged failure to pay rent, and predate any decision by Roberts to modify and terminate the lease agreements. Put simply, save for arising out of the same lease agreements ultimately terminated by Roberts, the state-court proceedings do not involve the same basic

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facts as this case and are qualitatively different in that they assert state law contract claims unrelated to Roberts's authority to terminate the lease agreements. Thus, no identity of issues exists and resolution of the state court cases will not resolve Plaintiffs' constitutional challenge.

Defendants' assertion that Plaintiffs could easily amend their respective statecourt complaints to incorporate the constitutional challenge to the Act does not alter the court's conclusion that the proceedings are not parallel. Parallel-proceeding analysis under *Crawley* and *Baskin* does not turn on whether the state court proceedings could be modified to incorporate the claims asserted in the federal proceeding. Instead, a district court must compare the claims actually raised in the federal and state proceedings, without consideration of what claims *could* have been, or may yet be raised in the state court. *Crawley,* 744 F.2d at 31 ("While it may be true ... that [the state case] *could* be modified so as to make it identical to the current federal claim, that is not the issue here. The issue is whether [the state case], as it *currently* exists, *is* a parallel, state-court proceeding."). Because the claims actually raised in the state-court proceedings are fundamentally different from the constitutional claim in this case, dismissal pursuant to the *Colorado River* doctrine is not warranted.

C. Declaratory Judgment Act

Plaintiffs limit their request for relief to a declaratory judgment that the Act's provision authorizing an emergency manager to modify a contract contravenes the United States Constitution. Under the Declaratory Judgment Act, a district court may "[i]n a case of actual controversy within its jurisdiction ... declare the rights of and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. Exercise of jurisdiction in a declaratory judgment action, however, is discretionary. *Wilton v. Seven Falls Co.,* 515 U.S. 277, 286, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995) (stating that the Declaratory Judgment Act "confer[s] on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants"). Guiding a district court's determination as to whether to hear such a case are the following factors:

> ***6** (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide a arena for a race for res judicata;" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

Grand Trunk W. R.R. Co. v. Consolidated Rail Co., 746 F.2d 323, 326 (6th Cir.1984). In spite of Defendants' contentions to the contrary, the court finds each of the factors militate in favor of exercising jurisdiction in this case.

As to the first and second factors, a declaratory judgment will both settle the controversy between the parties and clarify the constitutionality of Mich. Comp. Law § 141.1519(1)(j). The court does not accept Defendants' argument that a declaratory judgment will not settle this controversy simply because Plaintiffs may at some point in the future seek damages related to the termination of the lease agreements. Such an argument, logically extended, leads to an irrational conclusion: a declaratory judgment *never* settles a controversy where damages or other relief may be sought down the road. In its current form, the controversy between Plaintiffs and Defendants will be substantially settled by a declaratory judgment. Additionally, there is little concern that this action is simply a "race to res judicata." As is discussed in more detail above, there exist no other proceedings in which the termination of the lease agreements have been raised, and Defendants' contention that Plaintiffs' brought the constitutional challenge in federal court

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to avoid state-court adjudication of the constitutional claim is, without more, not a sufficient basis on which to decline jurisdiction.

Neither of the final two factors weigh against exercising jurisdiction. Any friction caused by this case will be no greater than the friction necessarily created when a federal court hears a constitutional challenge to a state law. Such friction is inherent in a dual-federalism system. In *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), the Supreme Court pointed to Federalist No. 28, to make the point:

> "[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.... *If [the people's] rights are invaded by either, they can make use of the other as the instrument of redress."*

501 U.S. at 459 (emphasis added) (citing The Federalist No. 28, at 180–81 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Finally, although the state court proceedings may offer an adequate remedy in the form of a state-court declaratory judgment, Defendants have not shown that such remedy is "better or more effective" than the remedy Plaintiffs seek here. Accordingly, a balancing of the five factors supports exercising jurisdiction over Plaintiffs' complaint.

D. GOVERNOR SNYDER AS A PARTY

*7 Defendants argue that if abstention is not appropriate, Plaintiffs have failed to state a claim against Governor Snyder. The court agrees. To state a claim upon which relief may be granted, a complaint must allege enough facts that, when assumed true, "raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), by "stat[ing] a claim to relief that is plausible on its face," *id.* at 570. A claim is facially plausible when the plaintiff pleads facts "allow[ing] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," rather than showing only "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Twombly,* 550 U.S. at 556). Here, the complaint makes one fleeting reference to Governor Snyder. In paragraph twenty-nine, Plaintiffs allege that "Governor Rick Snyder appointed Defendant Roberts to replace Robert Bobb as the District's Emergency Manager." (Compl.¶ 29.) This allegation alone does not support a reasonable inference that Governor Snyder, while acting under the color of state law, violated the Contracts and Takings Clauses of the United States Constitution.

Although not entirely clear from the complaint or Plaintiffs' response brief, Plaintiffs seem to suggest that Governor Snyder is an appropriate defendant in this case simply because the Michigan Constitution vests in a governor the authority to execute and enforce the laws of Michigan. (*See* Pls.' Resp. Opp'n to Defs.' Mot. Dismiss 16–17 ("If this Court is to decide the constitutionality of [the Act] 'as written,' Governor Snyder, in his official capacity, is an appropriate party. It seems logical that Governor Snyder would have an interest in defending the constitutionality of the legislation 'as written.' ").) Even assuming that a governor would have an interest in the outcome of such a case, a governor's constitutional duty to enforce the laws of the state is generally not a sufficient basis on which to name the governor in a lawsuit challenging the constitutionality of a state law. *See Children's Healthcare is a Legal Duty, Inc. v. Deters* 92 F.3d 1412 (6th Cir.1996) (" 'General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law.' Holding that a state official's obligation to execute the laws is a sufficient connection to the enforcement of a challenged statute would extend [*Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)] beyond what the Supreme Court

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has intended and held." (citations omitted) (quoting *1st Westco Corp. v. Sch. Dist. of Philadelphia,* 6 F.3d 108, 113 (3d Cir.1993))); *see also Fitts v. McGhee,* 172 U.S. 516, 519–20, 19 S.Ct. 269, 43 L.Ed. 535 (1899) (holding that to name a state's governor solely on the theory that "as the executive of the state, [he or she is], in a general sense, charged with execution of all its laws," is inconsistent "with the fundamental principle that [states] cannot, without their assent, be brought into any court at the suit of private persons"); *Weinstein v. Edgar,* 826 F.Supp. 1165, 1167 (N.D.Ill.1993) ("[A] theory of liability predicated on a governor's general obligations as the executive of the state is insufficient to avoid the consequences of the Eleventh Amendment."). To be sure, the proposition that a governor may never be sued based on a general duty to enforce the laws of a state is not without controversy. The Supreme Court in *Young* appeared to contradict, without overruling, *Fitts,* in holding that "[t]he fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of general law, or is specially created by the act itself, is not material so long as it exists." *Ex Parte Young,* 209 U.S. at 157; *see also Johnson v. Rockefeller,* 58 F.R.D. 42, 45–46 (S.D.N.Y.1972) (denying Governor of New York's motion to dismiss and holding that a governor's constitutional duty to faithfully execute the laws of a state "without more, provides a sufficient connection with the enforcement of the statute to make Governor Rockefeller a proper defendant in this suit").

***8** Ultimately, the apparent confusion among federal courts with respect to what constitutes the appropriate connection between a state official and the enforcement of a state law so as to permit suit against that official does not influence this court's determination that, in this case, the complaint against Governor Snyder must be dismissed. Even accepting that a general duty to enforce the laws of a state may, in some cases, provide a sufficient basis on which to name a governor in a lawsuit challenging the constitutionality of a state law, Plaintiffs have not satisfactorily stated a claim against Governor Snyder under 42 U.S.C. § 1983. Independent of any proscription found in *Fitts* and *Deters* against naming a governor as a defendant solely on the basis of his general duty to enforce the laws of a state, § 1983 requires a plaintiff to plead factual allegations that establish that a particular defendant, while acting under the color of state law, violated the plaintiff's constitutional rights. *See Sigley v. City of Parma Heights,* 437 F.3d 527, 533 (6th Cir.2006) ("[A] plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law." (citing *West v. Atkins,* 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988))). Plaintiffs' lone factual allegation that Governor Snyder appointed a person to a position is insufficient to create a reasonable inference that he deprived Plaintiffs of any rights guaranteed by the Contracts and Takings Clauses of the United States Constitution. Were Plaintiffs challenging the Act's provision authorizing Governor Snyder to appoint emergency managers, or perhaps arguing that the entire emergency manager regime violates the Constitution, Plaintiffs' single factual averment that Governor Snyder appointed an emergency manager *might* be sufficient to state a claim under § 1983. Plaintiffs' challenge, however, is limited to the Act's provision authorizing an emergency manager to modify existing contracts, and the complaint is devoid of any allegation that Governor Snyder was involved in the modification and termination of such lease agreements. Thus, Plaintiffs have not stated a § 1983 claim against Governor Snyder upon which relief can be granted. [FN2]

FN2. As a practical matter, Governor Snyder's involvement in this case appears to be unnecessary. Dismissal of Governor Snyder will not deprive Plaintiffs of an opportunity to vindicate any infringement of their constitutional rights. Defendants con-

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> cede that Roberts is a proper defendant and that any judgment that the Act's provision authorizing

III. CONCLUSION

For the reasons set forth above, IT IS ORDERED that Defendants' "Motion to Dismiss" [Dkt. # 19] is GRANTED IN PARTED and DENIED IN PART. It is GRANTED to the extent that the complaint is DISMISSED as against Governor Rick Synder. It is DENIED to the extent that dismissal on the basis of *Burford* abstention, the *Colorado River* doctrine, and the Declaratory Judgment Act is unwarranted.

IT IS FURTHER ORDERED that the June 6, 2012 motion hearing is CANCELLED.

E.D.Mich.,2012.
NCO Acquisition, LLC v. Snyder
Not Reported in F.Supp.2d, 2012 WL 2072668 (E.D.Mich.)

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