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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ANGEL LOPEZ-VALENZUELA and ISAAC CASTRO-ARMENTA,

Plaintiffs,

v.

MARICOPA COUNTY; JOE ARPAIO, Maricopa County Sheriff, in his official capacity; ANDREW THOMAS, Maricopa County Attorney, in his official capacity; and BARBARA RODRIGUEZ MUNDELL, Presiding Judge, Maricopa County Superior Court, in her official capacity,

Defendants.

No. CV-08-660-PHX-SRB

RESPONSE TO DEFENDANTS MARICOPA COUNTY, ARPAIO AND THOMAS' MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

[CLASS ACTION]

Judge: Hon. Susan R. Bolton

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INTRODUCTION

Defendants Maricopa County, Maricopa County Sheriff Joe Arpaio and Maricopa County Attorney Andrew Thomas ("the County Defendants") move to dismiss the Complaint. They do not offer any substantive arguments for dismissing Plaintiffs' core claims under the Fourteenth, Fifth, Sixth and Eighth Amendments. Instead, the County Defendants offer arguments for dismissal that are based upon a misapprehension of the Complaint, the controlling law, or both. The Motion should be denied in its entirety.

ARGUMENT

With the exception of their argument under Federal Rule of Civil Procedure 12(b)(7), discussed in Part III below, the County Defendants move for dismissal under Rule 12(b)(6), for failure to state a claim upon which relief may be granted.[1] To survive a Rule 12(b)(6) motion, Plaintiffs need only allege "'enough facts to state a claim to relief that is plausible on its face.'" *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage*, 524 F.3d 1090, 1096 (9th Cir. 2008) (citation omitted). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Id.* The County Defendants have failed to meet this standard.

I. DEFENDANTS FAIL TO ARTICULATE ANY BASIS TO DISMISS THE CLAIMS AGAINST MARICOPA COUNTY

The County Defendants argue that Plaintiffs fail to state a claim under 42 U.S.C. § 1983 for municipal liability against Maricopa County. They assert that the County is not subject to *respondeat superior* liability for violations caused by its employees and that the Complaint does not allege that the constitutional harm suffered by Plaintiffs is the result

[1] The County Defendants mention Rule 12(b)(1) only in passing and in reference to the claims against Maricopa County and Defendant Arpaio. Defs. Maricopa County, Arpaio, and Thomas' Mot. to Dismiss ("MTD") at 2. Because the County Defendants fail to set forth any theory as to why there is no subject-matter jurisdiction over those claims, the Court should deny the motion to dismiss under Rule 12(b)(1).

of a "deliberately indifferent municipal decision," policy or custom. MTD at 3-4. Defendants have misread both the complaint and the law.

Plaintiffs do not rely on a *respondeat superior* theory of liability. Rather, Plaintiffs claim that Maricopa County is *directly* liable for promulgating unconstitutional policies and practices in connection with the Proposition 100 laws. Specifically, the Complaint alleges that Maricopa County made the official decision to forbid the use of public funds for appointed criminal defense counsel at initial appearance proceedings, in which Proposition 100 laws are applied to impose mandatory pretrial detention. Compl. ¶¶ 10, 17, 37-41. The Complaint alleges that this official County policy directly causes constitutional injury. Compl. ¶¶ 61-64, 71-74.

As the County Defendants acknowledge, Maricopa County may be held liable under Section 1983 when "the county *itself* causes the alleged constitutional violation at issue." MTD at 3. Municipalities may be held liable under § 1983 where the challenged action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 690 (1978). "[T]he government as an entity is responsible under §1983" "when execution of a government's policy or custom, whether by its lawmakers or by those whose edicts may fairly be said to represent official policy, inflicts the injury." Plaintiffs' allegations, as outlined here, fit precisely within this framework for liability.[2]

[2] Maricopa County is also responsible for constitutional violations caused by official policy decisions of Defendants Arpaio and Thomas. As the County Sheriff and County Attorney, each is the authorized final decisionmaker for the County within his respective sphere. *See, e.g., Flanders v. Maricopa County*, 203 Ariz. 368, 378, 54 P.3d 837, 847 (App. Div. 1 2002) (finding county liable for jail conditions set by sheriff). "To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no more an application of the theory of *respondeat superior* than [i]s holding the municipality liable for the decisions of" a city council or county board of supervisors. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

The primary problem with the County Defendants' argument against County liability is that it ignores the Complaint's allegations. But Defendants' repeated recitation of the phrase "deliberate indifference" and references to *respondeat superior* liability suggest that they have, in addition, confused the legal distinction between Plaintiffs' claim of direct municipal liability and a claim that a municipality has not directly inflicted the constitutional injury but has nonetheless caused an employee to do so. *See Bryan County v. Brown*, 520 U.S. 397, 405-07 (explaining distinction). Section 1983 itself "'contains no state-of-mind requirement independent of that necessary to state a violation of the underlying federal right.'" *Id.* at 405. However, a plaintiff seeking to hold a municipality liable "on the theory that a facially *lawful* municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." *Id.* at 406-07 (emphasis added). When – as here – the claim is that the County's deliberately adopted affirmative policy decision is the direct cause of the constitutional injury, Plaintiffs have alleged all that is needed to establish that the County is a culpable, and thus liable, party. *See id.* at 405.

II. DEFENDANTS FAIL TO ARTICULATE ANY BASIS TO DISMISS THE CLAIMS AGAINST MARICOPA COUNTY SHERIFF ARPAIO

The County Defendants next assert that Sheriff Arpaio is not a proper defendant in this action because he has no role in "adjudicating bail determinations in Maricopa County Superior Court." MTD at 4. Once again, they misunderstand the law and misread the Complaint. Sheriff Arpaio is a proper defendant on two independent grounds.

First, because jurisdiction is based in part on habeas corpus, 28 U.S.C. § 2241, not only is Sheriff Arpaio a proper defendant, he is a required defendant. Defendant Arpaio is the custodian of Plaintiffs and members of the proposed class. Compl. ¶ 18. That allegation alone suffices to name Sheriff Arpaio as a defendant-respondent in habeas corpus. *See Smith v. Idaho*, 392 F.3d 350 (9th Cir. 2004); *Stanley v. Cal. Supreme Court*,

21 F.3d 359, 360 (9th Cir. 1994). In fact, failure to name petitioner's custodian as respondent, or to serve petitioner's custodian, deprives federal courts of personal jurisdiction under 28 U.S.C. § 2241 when present physical custody is challenged. *See Smith*, 392 F.3d at 355; *Johnson v. Reilly*, 349 F.3d 1149, 1153 (9th Cir. 2003); *see also Rumsfeld v. Padilla*, 542 U.S. 426, 439 (2004).

Second, Sheriff Arpaio is a proper defendant because Plaintiffs have alleged that he has promulgated unconstitutional policies and practices in connection with the Proposition 100 laws for the Maricopa County Sheriff's Department. Compl. ¶¶ 18, 33, 36. In particular, Maricopa County sheriff's deputies, who are under Defendant Arpaio's direction and control, question arrestees about their immigration status without proper advisals for purposes of enforcing the Proposition 100 laws. *Id.* Plaintiffs claim that those Sheriff's Department policies and practices violate the Fifth Amendment right against self-incrimination. *Id.* ¶¶ 66-70.

In response to these allegations, the County Defendants merely assert, without any support or even argument, that these allegations are "insufficient to create a *prima facie* case against Arpaio, or impose liability on Arpaio, under 42 U.S.C. § 1983 because the possibility of obtaining incriminating statements from arrested persons is always present regardless of the existence or non-existence of [the Proposition 100 laws]." MTD 5. But this ignores the actual allegations in the Complaint – *i.e.*, that sheriff's deputies specifically question arrestees about immigration status without proper advisals, *for purposes of enforcing the Proposition 100 laws*, not that sheriff's deputies happen to discover information about arrestees' immigration status in the usual course of arresting or booking individuals. Moreover, even if it were the case that custodial questioning could extract incriminating statements in the absence of the Proposition 100 laws, the County Defendants offer no basis to conclude that such questioning without proper advisals would

be constitutional. Defendants fail to articulate any legal argument as to why, taking Plaintiffs' allegations as true, Sheriff Arpaio's actions do not violate the U.S. Constitution.

III. ARIZONA STATE OFFICIALS ARE NOT NECESSARY DEFENDANTS AND EVEN IF THEY WERE, DISMISSAL IS NOT THE PROPER REMEDY FOR FAILURE TO JOIN

The County Defendants argue that the Complaint should be dismissed for failure to join the "Arizona Attorney General, the Speaker of the House, and/or the President of the Senate." MTD at 5. This argument is unsupported by authority, misreads Federal Rule of Civil Procedure 19, and is premised on the mistaken belief that a state procedural statute applies in this case. Under relevant federal law, all persons necessary to afford complete relief have been joined. In any event, even if some absent state officer were found to be a necessary party, the remedy would be an order joining that person, not dismissal of the Complaint. Fed. R. Civ. P. 19(a)(2), (b).

Federal Rule of Civil Procedure 19(a)(1) provides that a party is necessary and must be joined if either:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

As set forth below, neither of these conditions is present in this case.

A. Complete Relief and a Just Adjudication Can be Obtained from the Present Defendants and Thus Unnamed State Officials Are Not Necessary Parties Pursuant to Rule 19(a)(1)(A).

The County Defendants advance two arguments in support of their contention that the Arizona Attorney General, the Speaker of the House and/or the President of the Senate are necessary for a just adjudication of the merits of this lawsuit. Both are without merit.

First, County Defendants suggest that the Arizona Attorney General is a necessary party owing to his generalized duty to uphold Arizona law. MTD at 5. Under Rule 19,

this argument must be rejected. It is well-settled that when a lawsuit challenges a state law, the state attorney general and other state officers are not necessary parties unless they have a specific duty to enforce the challenged law. *See, e.g.*, *Warden v. Pataki*, 35 F. Supp. 2d 354, 359 (S.D.N.Y. 1999) (general duty to ensure that laws are faithfully executed is insufficient to make governor a necessary or proper party in suit challenging constitutionality of state law); *Mallory v. Harkness*, 923 F. Supp. 1546, 1553 (S.D. Fla. 1996) ("It has long been recognized that the AG is not a necessary party each time the constitutionality of a statute is drawn into question."); *Florida East Coast Ry. Co. v. Martinez*, 761 F. Supp. 782, 784-85 (M.D. Fla. 1991) (governor and state attorney general were not necessary parties where they had no specific duty to enforce challenged statute); *Liquifin Aktiengesellschaft v. Brennan*, 383 F. Supp. 978, 984 (S.D.N.Y. 1974) (state attorney general was not a necessary party in action brought against city and sheriff, even though constitutionality of state law was at issue). A general duty to uphold state law, therefore, does not make the Arizona Attorney General, or any other state official, a necessary party to this action. Because they have no specific obligation to enforce the Proposition 100 laws, they are not necessary parties.

The named Defendants are the only necessary parties under Rule 19. Indeed, the County Defendants *concede* that "[o]ur county attorneys are specifically tasked with th[e] responsibility" "of enforcing Arizona's criminal laws … and complying with the law on bail." MTD at 12. Thus, this Court may provide complete relief by finding that the Proposition 100 laws violate the Constitution and issuing an order enjoining the named Defendants from enforcing those laws; no other state-level officials are required.

Second, the County Defendants argue that the Court cannot accord complete relief among the existing Defendants or otherwise render a just adjudication on the theory that an Arizona procedural statute, A.R.S. § 12-1841, somehow strips the Court of its authority to rule on the constitutionality of the Proposition 100 laws. The County Defendants assert

that "A.R.S. § 12-1841(C) prohibits a binding constitutional ruling from this Court until and unless [the Arizona Attorney General, Speaker of the House and President of the Senate] are on notice" of this action and have been given an opportunity to be heard. MTD at 7-8. This argument should be rejected. The Arizona state procedural statute, Section 12-1841, does not apply in this federal-question action before a U.S. District Court, much less divest the Court of its authority to grant binding relief.[3] "Where, as here, jurisdiction is premised on a *federal question*, the *federal rules control*." *Bd. of Trustees of Leland Stanford Univ. v. Roche Molecular Sys., Inc*., 487 F. Supp. 2d 1099, 1112 (N.D. Cal. 2007) (emphasis added) (citing *Benny v. Pipes*, 799 F.2d 489, 493 (9th Cir. 1986)).

It is undisputed that Plaintiffs complied with the federal notice requirement of Federal Rule of Civil Procedure 5.1 and notified the Arizona Attorney General of this action.[4] Dkt. No. 17. Plaintiffs were not required to do more.

B. County Defendants Will Adequately Represent Any State Interests and Thus State Officials Are Not Necessary Parties Under Rule 19(a)(1)(B).

The County Defendants also argue that the "absence of the Attorney General, the House Speaker, and/or the Senate President will, as a practical matter impair or impede [their] ability to protect the interest of the State." MTD at 8. No argument is provided in support of this contention and it should be rejected.

> A non-party is adequately represented by existing parties if: (1) the interests of the existing parties are such that they would undoubtedly make

[3] Even if the Arizona procedural rule were held to apply, it would not result in dismissal of the Complaint. A.R.S. § 12-1481 merely provides that if the required notice is not given to the Attorney General, the Speaker or the Senate President, upon their motion, the state court shall vacate any finding of unconstitutionality to give the state officials an opportunity to be heard.

[4] Indeed, Plaintiffs were not even required to provide this notice under Rule 5.1 because a state official, the Hon. Barbara Mundell, is a named defendant. Fed. R. Civ. P. 5.1(a)(1)(B) (notice to state attorney general not required unless "parties do not include the state" or a state agency or officer in an official capacity). Defendant Mundell is represented by the Attorney General.

> all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect.

Sw. Ctr. for Biological Diversity v. Babbitt, 150 F.3d 1152, 1153-54 (9th Cir. 1998). Here, the interests of the County Defendants in upholding the Proposition 100 laws are aligned with the State of Arizona's interest in preserving the Proposition 100 laws. Indeed, as Defendants concede, MTD at 12, the Maricopa County Attorney represents the state in criminal proceedings, *see* A.R.S. § 11-532(A), and thus is capable of making any arguments that might be advanced by unnamed state officials. In cases such as this, courts routinely find that state officials are not necessary parties to actions challenging the constitutionality of state laws.[5] *See, e.g., Welsch v. Likins*, 550 F.2d 1122, 1130-31 (8th Cir. 1977) (governor and legislators were not necessary parties where the state's interest was adequately represented by commissioners of administration and finance); *Liquifin*, 383 F. Supp. at 984 (state attorney general was not a necessary party to action brought against city and sheriff, even though constitutionality of state law was at issue); *In re Pontes*, 280 B.R. 20, 29 (Bankr. D. R.I. 2002) (state was not necessary party where its interest was the same as the city-official defendant and thus adequately protected by the city) (citing *Venturi v. Riordan*, 702 F.2d 6, 7-9 (1st Cir. 1983) (same)).

C. Even If The Arizona Attorney General Were A Necessary Party, Dismissal Would Not Be the Proper Remedy.

As set forth above, the Attorney General is not a necessary (or even proper) defendant under Rule 19. But even if he were, this action cannot be dismissed under Rule 12(b)(7) for failure to join him. The County Defendants misstate the law on this point. Rule 19 does not require an action to be dismissed, as the County Defendants assert, for failure to join a necessary party. Where an absent person is deemed to be necessary under

[5] The County Defendants also state, without explanation, that an adverse ruling will subject the present defendants to "inconsistent obligations." This contention is meritless. A finding of unconstitutionality by a federal court would bind the County Defendants and trump any conflicting state authorities under the Supremacy Clause.

Rule 19, the district court is merely instructed to issue an "order that the person be made a party." Fed. R. Civ. P. 19(a)(2). It is only where a necessary person *cannot feasibly be joined* that the court must go on to determine, "in equity and good conscience," whether the person is an indispensable party without whom the action should not proceed. Fed. R. Civ. P. 19(b);[6] *see also Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1042 (9th Cir. 1983).

The County Defendants have failed to demonstrate that any absent state official is a necessary party to this lawsuit. There is no need, therefore, to proceed to the next steps of determining whether joinder is feasible and, if not, whether the absent party is indispensable. Nevertheless, even if the necessary party test were met, this action cannot be dismissed because there is no impediment to joining any necessary state official.

IV. DEFENDANTS FAIL TO ARTICULATE ANY REASON TO DISMISS PLAINTIFFS' FEDERAL PREEMPTION CLAIM OR ANY OTHER CONSTITUTIONAL CLAIM UNDER RULE 12(b)(6)

The County Defendants offer only one substantive ground for dismissal of Plaintiffs' multiple constitutional claims, arguing that they "are all based, either directly or indirectly, on the premise that Arizona's bail determinations for illegal aliens is [sic] preempted by federal constitutional law." MTD at 8. The County Defendants then assert that Plaintiffs have failed to allege sufficient facts in support of federal preemption. These arguments fundamentally misconstrue the Complaint and the law of federal preemption. They should be rejected for several reasons.

A. Plaintiffs' Constitutional Claims Under the Fourteenth, Fifth and Eighth Amendments Do Not Rest Upon a Preemption Theory and Defendants Have Asserted No Basis to Dismiss Those Claims.

First and most fundamentally, of the seven causes of action in this case, Defendants simply do not address the six claims resting on constitutional grounds that are

[6] The case cited by the County Defendants in support of dismissal, *ADi Motorsports, Inc. v. Hubman*, No. CV-07-1932-PHX-DGC, 2007 U.S. Dist. LEXIS 95854 at *4 (D. Ariz. Dec. 11, 2007), merely sets out the Rule 19 analysis. It does not hold that dismissal is proper when a necessary party can feasibly be joined.

entirely unrelated to federal preemption. Plaintiffs claim that the Proposition 100 laws violate substantive due process (Count One), procedural due process (Counts Two and Three), the Fifth Amendment right against self-incrimination (Count Four), the Sixth Amendment right to counsel (Count Five), and the excessive bail clause of the Eighth Amendment (Count Six). Only Count Seven of the Complaint sets forth a claim of federal preemption, which is independent of the other claims.

Defendants offer no argument as to why Counts One, Two, Three, Four and Six should be dismissed, other than mischaracterizing them as preemption arguments.[7] In fact, those claims raise constitutional questions that are totally distinct from federal preemption questions. *See*, *e.g.*, *Graham v. Richardson*, 403 U.S. 365, 370, 376-77 (1971) (separate analysis of equal protection claim under Fourteenth Amendment and federal preemption); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141, 152 (1963) (separate analysis of federal preemption claim and equal protection and commerce clause claims); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1054, 1057 (S.D. Cal. 2006) (separate analysis of federal preemption claim and Fourteenth Amendment due process claim). In short, Defendants have not offered any argument at all for dismissing Plaintiffs' claims under the Fourteenth, Fifth, Sixth and Eighth Amendments and the Court should deny the motion to dismiss those claims.

B. Defendants Fail To Meet Their Burden for Dismissal of Plaintiff's Federal Preemption Claim.

In any event, as to Count Seven, which does assert a federal preemption claim, the County Defendants have failed to set forth any basis for dismissal. Plaintiffs assert that two distinct, general categories of federal preemption apply against the Proposition 100 laws. First, the Proposition 100 laws are impliedly preempted under the Supremacy Clause, U.S. Const. art. VI, cl. 2. Compl. ¶¶ 9, 12, 27, 35, 36, 65, 80, 81. Second, and

[7] The County Defendants do not even mention Count Five, much less offer any basis to dismiss it. MTD at 8.

independent of the implied preemption theory based on the Supremacy Clause, which applies to state laws of any subject matter, the Proposition 100 laws are constitutionally preempted because they are an attempted regulation of immigration, which is an area committed exclusively to the federal government by Article I of the U.S. Constitution. Compl. ¶¶ 8, 27, 79. The Supreme Court has repeatedly struck down state laws that interfere with federal immigration laws and policies. *See, e.g.*, *Toll v. Moreno*, 458 U.S. 1, 9-10 (1982) (invalidating denial of student financial aid to visa holders); *Graham*, 403 U.S. at 377-80 (invalidating state welfare restriction); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418-20 (1948) (invalidating restriction on fishing licenses); *Hines v. Davidovich*, 312 U.S. 52, 62-68 (1941) (invalidating state registration requirement for noncitizens); *Truax v. Reich*, 239 U.S. 33, 42-43 (1915) (invalidating state law prohibiting employment of noncitizens).

Like the state laws invalidated in these numerous cases, the Proposition 100 laws impermissibly intrude upon federal interests and policies. Proposition 100 is a state law that defines a new immigration classification and attaches state-imposed consequences to that state-defined classification. Compl. ¶¶ 24-27. Specifically, based upon a state-court finding of probable cause to believe that a person has "entered or remained in the United States illegally," the Proposition 100 laws impose mandatory detention. This finding by a state court is not based upon federal standards. *Id.* ¶ 9. Defendants' procedures, for example, adopt the term "undocumented," which is not a term of art in federal immigration law. *Id.* ¶ 35. In addition, the Proposition 100 laws effectively impose detention for immigration violations in conflict with a comprehensive federal scheme setting forth standards and procedures for immigration detention. *Id.* ¶¶ 79-80.

The Proposition 100 laws are therefore preempted on several grounds. First, they intrude upon a field fully occupied by the federal government, in that they attempt a classification of unlawful immigrants that conflicts with federal classifications. *See* 8

U.S.C. § 1227 (setting forth categories of "deportable aliens"); *Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("The States enjoy no power with respect to the classification of aliens."); *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 772, 778 (C.D. Cal. 1995) (state law preempted because definition of lawful immigrant status was not tied to federal standards). Second, the Proposition 100 laws are preempted because they are incompatible with the comprehensive federal scheme for immigration detention, which reflects Congress's considered judgment as to when noncitizens should or should not be detained for federally-defined immigration violations, including when local governments may detain noncitizens for immigration purposes. *See, e.g.*, 8 U.S.C. §§ 1225(b)(1)(B)(iii)(IV), 1225(d)(2), 1226, 1226A, 1231(a)(2) (Immigration and Nationality Act provisions governing immigration detention); 8 C.F.R. § 287.7 (setting forth conditions for detention of non-citizens by state and local law enforcement agencies at federal immigration agency's request). Third, the Proposition 100 laws effectively impose incarceration for unlawful presence in the United States, thus conflicting with Congress's determination that such conduct should not be a criminal offense. *See* 8 U.S.C. § 1325 (criminalizing illegal *entry* but not illegal presence). And finally, the Proposition 100 laws are a state-law attempt to "secure our borders," Compl. ¶ 27, and thus are a *per se* preempted regulation of immigration, rather than a permissible state law that merely touches upon immigration. *See DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

In the face of longstanding precedents striking down state immigration laws, the County Defendants offer only boilerplate statements about preemption. The County Defendants state that in the absence of express preemption (*i.e.*, a federal statute explicitly voiding state regulation on a subject), there is no presumption that Congress has impliedly preempted state law, MTD at 9 – even though Plaintiffs do not rely upon any presumption. The County Defendants also state that implied preemption will only be found when there is a "clear and manifest" statement by Congress. MTD at 11. Whether

those general principles apply in the immigration context is, at best, doubtful. *See, e.g.*, *New York Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (applying "clear and manifest" standard "in fields of traditional state regulation"); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (same); *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) ("Ordinarily, we also apply a presumption against preemption. However, when 'when the State regulates in an area where there has been a history of significant federal presence, … the presumption usually does not apply.") (citations omitted). But in any event, even under the standards asserted by the County Defendants, the Proposition 100 laws are preempted by federal law.

Other than reciting boilerplate preemption standards, the only argument offered by the County Defendants is that Plaintiffs have failed to allege sufficient facts in support of the federal preemption claim. MTD at 10-11. This argument misapprehends preemption doctrine. Whether a state law is preempted by federal law is a legal question and thus Plaintiffs are not required to allege facts.[8] *See New York State Conference*, 514 U.S. at 655 (noting that preemption claims turn on congressional intent and are matter of statutory construction). Preemption doctrine simply requires an inquiry into whether the subject matter and scope of the challenged state law is preempted under federal laws. In any event, as set forth above, the Complaint adequately pleads a federal preemption claim. Compl. ¶¶ 9, 8, 12, 27, 35, 36, 65, 78-82.

V. *YOUNGER* ABSTENTION DOES NOT APPLY IN THIS CASE UNDER BINDING SUPREME COURT PRECEDENT

Finally, the County Defendants argue for dismissal of this action based on the *Younger* abstention doctrine. That argument is foreclosed by a controlling Supreme Court decision, *Gerstein v. Pugh*, 420 U.S. 103 (1975), which Defendants fail even to mention.

[8] While Plaintiffs need not allege any facts in support of their federal preemption claim, they have. The Complaint sets forth facts relating to the Defendants' policies and practices implementing Proposition 100 laws (*see, e.g.*, Compl. ¶¶ 35, 36), which Plaintiffs also challenge on federal preemption and other constitutional grounds.

Gerstein specifically holds that constitutional challenges to state pretrial detention laws are not subject to *Younger* absention. The *Younger* doctrine applies only when a plaintiff seeks to stay, enjoin, or otherwise interfere with a pending state prosecution. Because Plaintiffs challenge only the legality of their pretrial detention – an issue independent from the merits of their criminal prosecutions – and seek injunctive and declaratory relief directed solely at their pretrial detention, *Younger* abstention does not apply.

In *Younger v. Harris*, 401 U.S. 37 (1971), the plaintiff sought to enjoin his state criminal prosecution, challenging on First Amendment grounds the substantive criminal statute that defined the charged offense. The Supreme Court held that such an action to stay or to enjoin a state criminal prosecution was barred absent special circumstances. *Id.* at 41. The Court based its holding upon comity principles and "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id*. at 43-44. In *Younger*, the federal civil action was barred because an injunction would have eroded the jury's role and the plaintiff could have challenged the legality of the criminal statute by raising an affirmative defense in the course of his criminal prosecution. *Id.* at 44-46.

In *Gerstein v. Pugh*, the Supreme Court held that *Younger* abstention does not apply in a federal case challenging the constitutionality of pretrial detention laws and procedures. In *Gerstein*, inmates at a county jail brought a class action against county prosecutors and judicial officials to challenge pretrial detention procedures. The *Gerstein* defendants argued before the Supreme Court that *Younger* compelled abstention because the federal action would interfere with state criminal proceedings by requiring the prosecution to grant hearings on whether detention was justified, contrary to state criminal procedure law. The Court unanimously rejected that argument on the ground that "[t]he injunction was not directed at the state prosecutions as such, but only at the legality of

pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *Id*. at 108 n.9. Thus, the requested injunctive relief "could not prejudice the conduct of the trial on the merits."[9] *Id*. *Gerstein* is on all fours with the instant case, which also challenges the constitutionality of a pretrial detention law.

The County Defendants nevertheless insist that *Younger* abstention applies because Plaintiffs could present their federal claims by "plead[ing] not guilty and then … challeng[ing] the constitutionality of [Proposition 100] at the trial court level, and through direct Arizona state court appeal or special action review." MTD at 13. This argument fails for two reasons. First, Plaintiffs cannot challenge their mandatory pretrial detention by "plead[ing] not guilty," going to trial and taking a direct appeal; the finding of ineligibility for bail has nothing to do with the merits of the criminal prosecution. No direct appeal can provide a remedy for unconstitutional pretrial detention, which ends upon conviction, long before any direct appeal would be heard.

Second, even if Plaintiffs could challenge Proposition 100 through a special action, *Younger* still would not apply. The Ninth Circuit has specifically rejected Defendants' reasoning, holding that Younger applies when "(1) the plaintiffs [seek] to enjoin the continuation of a state proceeding or [seek] to enjoin state officials from enforcing a state statute, and (2) the basis for federal relief could have been raised as *a complete or partial defense* to a pending or ongoing state enforcement action during the normal course of the state proceeding." *L.H. v. Jamieson*, 643 F.2d 1351, 1352-53 (9th Cir. 1981) (emphasis added). "When these characteristics are not present, however, the Supreme Court has refused to find the *Younger* concerns sufficiently compelling to warrant federal equitable restraint, even where a plaintiff could have raised his claim in a pending state proceeding." *Id*. at 1354. As the Sixth Circuit puts it: "Unless the issue in the plaintiff's

[9] Indeed, cases cited by the County Defendants confirm that *Younger* applies only when the federal action seeks to enjoin or otherwise to interfere with the state criminal prosecution. *See Kulger v. Helfant*, 421 U.S. 117, 130 (1975); *Samuels v. Mackell*, 401 U.S. 66, 71-72 (1971).

federal suit would be resolved by the case-in-chief or as an affirmative defense to the state court proceedings that exist, it cannot be said that the state proceedings afford the federal plaintiff an adequate opportunity to have his or her claim heard for *Younger* purposes." *Habich v. City of Dearborn*, 331 F.3d 524, 532 (6th Cir. 2003). "*Gerstein* itself involved federal plaintiffs who could have filed their § 1983 suit in state court, but the Court was apparently unmoved that such a possibility provided sufficient opportunity." *Id.* at 532. *See also Stewart v. Abraham*, 275 F.3d 220, 225 (3d Cir. 2001) (*Younger* does not apply where plaintiffs, who were under state criminal prosecution, brought federal class action challenging arrest and pretrial detention policies). Thus, *Gerstein* and its progeny instruct that when the federal action does not challenge the merits of the criminal prosecution (and thus cannot be resolved through the criminal trial), the availability of some collateral state-court proceeding does not render *Younger* abstention applicable.[10]

Ignoring the binding decisions in *Gerstein* and *L.H.*, the County Defendants rely on recitation of a particular rule that *Younger* abstention applies when there are state court proceedings that (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. MTD at 11. That three-part test, however, does not apply here. In *Gilbertson v. Albright*, 381 F.3d 965, 969, 978 (9th Cir. 2004), the Ninth Circuit explained that these factors, known as the *Middlesex* factors, "guide considerations of whether *Younger* extends to *noncriminal* proceedings" (emphasis added).[11] The *Middlesex* factors do not apply here because the state

[10] None of the cases cited by the Defendants overrules *Gerstein*. *Moore v. Sims*, 442 U.S. 415 (1979), *Juidice v. Vail*, 430 U.S. 327 (1977), and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), are all cases involving noncriminal judicial proceedings in which the plaintiff had an opportunity to press his claims directly in the ongoing state proceedings. The holding of *Gerstein* was not at issue in any of these cases.

[11] The three-part test arises from *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431-32 (1982), which involved a constitutional challenge to state bar disciplinary rules while the plaintiff was subject to a pending disciplinary action. *Middlesex* held that *Younger* abstention can extend to a noncriminal context, but only if the underlying state case "constitute[s] an ongoing state judicial proceeding," the

proceedings at issue in this case are criminal.[12] But even if the *Middlesex* test did apply, it is not met here because Plaintiffs do not have an adequate opportunity to challenge the constitutionality of Proposition 100 in the ongoing state court proceeding, as set forth in *L.H.* and *Habich*, *supra*. More fundamentally, whether or not the *Middlesex* test applies, *Gerstein* squarely forecloses the County Defendants' motion to dismiss this case on *Younger* abstention grounds.[13]

CONCLUSION

The County Defendants' Motion to Dismiss should be denied in its entirety. If the Court should hold that the Arizona Attorney General is a necessary party pursuant to Federal Rule of Civil Procedure 19, it should simply join him as a defendant pursuant to Rule 19(a)(2).

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proceeding "implicate[s] important state interests," and "there is an adequate opportunity in the state proceeding[ ] to raise constitutional challenges." *Id.* at 432.

[12] Among the cases cited by the County Defendants in support of the *Middlesex* test, all but one concern underlying civil proceedings. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Gartrell Constr., Inc. v. Aubry*, 940 F.2d 437 (9th Cir. 1991); *Polykoff v. Collins*, 816 F.2d 1326 (9th Cir. 1987). The one case involving an underlying criminal case, *Dubinka v. Judges of the Superior Court*, 23 F.3d 218 (9th Cir. 1994), predates *Gilbertson* and also is distinguishable regardless of the test applied. In *Dubinka*, state criminal defendants sought to enjoin a state law that provided for reciprocal discovery in criminal cases. The Ninth Circuit applied *Younger* abstention because the injunction sought by plaintiffs would have interfered with the underlying state criminal trials, even if it would not have enjoined them. Here, the relief sought by Plaintiffs would not interfere with their criminal trials in any way. In any event, none of the cases cited by the Defendants is applicable because *Gerstein* did not apply.

[13] In addition, the Court could reject Defendants' *Younger* argument on two other grounds, even if *Gerstein* were not dispositive. First, the "extraordinary circumstances" exception to *Younger* applies here because, as pled in the Complaint, the Proposition 100 laws are "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply [them]." *Younger*, 401 U.S. at 53 (quotation omitted). Second, the Court should not dismiss on *Younger* abstention grounds because the Proposition 100 laws are preempted by federal law. *Gartrell Constr.*, 940 F.2d at 441. "In such a case, the state tribunal is acting beyond its authority and *Younger* abstention is not required." *Id.*

Dated: June 13, 2008

PERKINS COIE BROWN & BAIN P.A.

ACLU FOUNDATION IMMIGRANTS' RIGHTS PROJECT

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

ACLU FOUNDATION OF ARIZONA

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CERTIFICATE OF SERVICE

☒ I hereby certify that on June 13, 2008, I electronically transmitted the attached Response to Defendants Maricopa County, Arpaio and Thomas' Motion to Dismiss to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Timothy James Casey Schmitt Schneck Smyth & Herrod PC	Via ECF at timcasey@azbarristers.com & eileen@azbarristers.com
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I declare under penalty of perjury that the above is true and correct.

Dated: June 13, 2008
San Francisco, California

_____/s/_____
JESSICA PAZ-CEDILLOS