IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Angel Lopez-Valenzuela; Isaac Castro-Armenta,

Plaintiffs,

vs.

Maricopa County; Joe Arpaio, Maricopa County Sheriff, in his official capacity; Andrew Thomas, Maricopa County Attorney, in his official capacity; Barbara Rodriguez Mundell, Presiding Judge, Maricopa County Superior Court, in her official capacity,

Defendants.

No. CIV 08-660-PHX-SRB

ORDER

Pending before the Court are Defendants' Maricopa County, Arpaio, and Thomas's ("County Defs.") Motion to Dismiss Pursuant to Rules 12(b)(1), (6), and (7) of the Federal Rules of Civil Procedure ("County Defs.' Mot.") (Doc. 21), Defendant Judge Barbara Rodriguez Mundell's Motion to Dismiss Complaint ("Def. Mundell's Mot.") (Doc. 20), and Plaintiffs' Motion for Class Certification ("Pls.' Mot.") (Doc. 9). The Court will resolve all three motions at this time.

I. Background

In November 2006, Arizona voters approved a ballot measure known as Proposition 100, which amended the bail provisions of the state constitution. (Compl. ¶ 1.) Prior to the amendment, Article II, Section 22 of the Arizona State Constitution provided that all persons charged with crimes shall be eligible for bail, subject to exceptions for "particularly serious offenses or other indicia of dangerousness." (*Id.*) Proposition 100 amended the constitution

to provide that state courts shall not set bail "[f]or serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge." ARIZ. CONST. art. II, § 22(A)(4). The state legislature subsequently enacted Arizona Revised Statutes ("A.R.S.") § 13-3961, implementing Proposition 100. This case involves a challenge to the constitutional amendment and its implementing legislation ("the Proposition 100 laws"), brought by Angel Lopez-Valenzuela and Isaac Castro-Armenta. Both Plaintiffs, at the time the Complaint was filed, were charged with state crimes and being held in Maricopa County jails as a result of orders finding that they had entered or remained in the United States illegally.[1] (Compl. ¶¶ 15-16.) Defendants are 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 of Maricopa County, in her official capacity).

Plaintiffs claim that the Proposition 100 laws violate the U.S. Constitution in a number of ways. In Count One, Plaintiffs allege that the Proposition 100 laws violate the substantive due process guarantees of the Fourteenth Amendment, because Plaintiffs have a liberty interest in being released on bond pending resolution of the charges against them. Plaintiffs claim that the Proposition 100 laws are not narrowly tailored to serve a compelling governmental interest. (Compl. ¶¶ 55-58.) In Count Two, Plaintiffs claim that the Proposition 100 laws violate procedural due process under the Fourteenth Amendment because they require only that a state court commissioner find probable cause that the person entered or remained in the U.S. illegally before denying bail categorically. (Compl. ¶¶ 59-60.) Count Three alleges that the Defendants have implemented policies, practices, and procedures that do not comply with procedural due process requirements under the Fourteenth Amendment,

[1]As of the date of this Order, the Court is informed that Mr. Lopez-Valenzuela is no longer in pre-trial detention because he was convicted after a jury trial and sentenced on November 18, 2008. Mr. Castro-Armenta is still in pre-trial detention. (Pls.' Status Report Re Mot. for Class Certification 1.)

namely the right to counsel, the opportunity to testify and present evidence, the chance to cross-examine opposing witnesses, and the requirement that the prosecution make a sufficient showing that bail is not warranted. (Compl. ¶¶ 61-65.) Plaintiffs claim in Count Four that the Defendants have a policy, practice, and procedure of interrogating criminal defendants in custody about their immigration status without advising them of their right to counsel, in violation of the right against self-incrimination under the Fifth Amendment. (Compl. ¶¶ 66-70.) Count Five charges that Plaintiffs and other members of the proposed class have been denied their right to counsel under the Sixth Amendment during the initial appearance, where findings as to immigration status are made, pursuant to the Proposition 100 laws. (Compl. ¶¶ 71-74.) In Count Six, Plaintiffs claim that the Proposition 100 laws violate the Eighth Amendment's proscription of excessive bail. (Compl. ¶¶ 75-77.) Finally, in Count Seven, Plaintiffs allege that the Proposition 100 laws are preempted by federal law because the federal government has occupied the field of immigration and because they conflict with federal laws defining the legal status of non-citizens. (Compl. ¶¶ 78-82.) Plaintiffs seek individualized bail hearings and, as representatives of the proposed class, declaratory and injunctive relief. (Compl. ¶ 3.)

The Court heard oral argument at a hearing on the various motions on July 23, 2008 ("the Hearing"). At the Hearing, the Court authorized the parties to submit limited additional evidence on the procedures currently in place after the Court of Appeals issued its decision in *Segura v. Cunanan*, 2008 WL 1922308 (Ariz. Ct. App. Apr. 24, 2008), requiring evidentiary hearings in bail determinations. Plaintiffs submitted an affidavit from Robert McWhirter, Senior Attorney in the Maricopa County Legal Defenders Office ("McWhirter Aff."), and the County Defendants submitted an affidavit from Sally Wolfgang Wells, Maricopa County Chief Assistant County Attorney ("Wells Aff."). Based on this evidence, after *Segura*, a person denied bail at an initial appearance because of immigration status may request an evidentiary hearing. (McWhirter Aff. ¶ 3; Wells Aff. ¶ 5.) Those requests are routinely granted by Commissioner Cunanan. (*Id.*) At these hearings, the prosecution has the burden of proof to show that there is proof evident or presumption great that the defendant

committed the underlying offense and that there is probable cause that the defendant entered or remained in the U.S. illegally. (McWhirter Aff. ¶ 4; Wells Aff. ¶ 5.) The defendant has the right to representation by counsel, to cross-examine witnesses, and to offer evidence. (Wells Aff. ¶ 5.) If the prosecution meets its burden, the Maricopa County court will not consider whether the defendant should be released on bond based on any other factors, including risk of flight or danger to the community. (McWhirter Aff. ¶ 4.)

II. Legal Standards and Analysis

A. Motion to Dismiss

The Federal Rules of Civil Procedure require "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997). Thus, dismissal for insufficiency of a complaint is proper if the complaint fails to state a claim on its face. *Lucas v. Bechtel Corp.*, 633 F.2d 757, 759 (9th Cir. 1980). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson* 355 U.S. 41, 45-46 (1957). A Rule 12(b)(6) dismissal for failure to state a claim can be based on either: (1) the lack of a cognizable legal theory; or (2) insufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). In determining whether an asserted claim can be sustained, all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). The Supreme Court has explained that factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). In ruling on a motion to dismiss, the issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. *Gilligan*, 108 F.3d at 249.

When deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court may weigh the evidence to determine whether it has jurisdiction. *Autery*

v. United States, 424 F.3d 944, 956 (9th Cir. 2005). "The district courts of the United States, as we have said many times, are 'courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.'" *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). The burden of proof is on the Plaintiff to show that this Court has subject matter jurisdiction. *See Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) ("The party asserting jurisdiction has the burden of proving all jurisdictional facts.") (citing *McNutt v. Gen. Motors Acceptance Corp*., 298 U.S. 178, 189 (1936)). And, unlike a Rule 12(b)(6) motion, there is no presumption of truthfulness attached to Plaintiff's allegations. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

Rule 12(b)(7) of the Federal Rules of Civil Procedure allows a court to dismiss a case for failure to join a party under Rule 19. Joinder under Rule 19 involves a multi-step inquiry:

> First, a court must determine whether an absent party should be joined as a "necessary party" under subsection (a). Second, if the court concludes that the nonparty is necessary and cannot be joined for practical or jurisdictional reasons, it must then determine under subsection (b) whether in "equity and good conscience" the action should be dismissed because the nonparty is "indispensable."

Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1042 (9th Cir. 1983); *see also Provident Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108-25 (1968) (explaining the reasoning behind Rule 19's joinder provisions); *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999) (outlining the same multi-step process as *Northrop Corp.*).

B. County Defendants' Motion to Dismiss

1. The Complaint Names the Proper Parties.

a. Maricopa County is a Proper Defendant.

The County Defendants argue in their Reply ("County Defs.' Reply") that Maricopa County is not a proper defendant in this case, because the Complaint alleges that the county "is responsible for enforcement and implementation of the Proposition 100 laws against persons in criminal proceedings within its jurisdiction . . . . [and] for the official decision to forbid the use of public funds for the appointment of counsel for indigent criminal defendants

at initial appearance proceedings." (Compl. ¶ 17.) The County Defendants contend that, while the County is a jural entity, it does not make such decisions. "Instead, as a matter of law, it is the Maricopa County Board of Supervisors that make those types of decisions." (County Defs.' Reply 2.)

A local government cannot be sued under § 1983 using a theory of vicarious liability. *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 691 (1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. Direct municipal liability can be shown by demonstrating either that the governing body intentionally deprived someone of a federally-protected right or that "the action taken or directed by the municipality *or its authorized decisionmaker* itself violates federal law." *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 405 (1997) (emphasis added). In the former case, a showing of "deliberate indifference" is required, whereas in the latter situation, the plaintiff need demonstrate no mental state. *Id.* at 407.

A.R.S. § 11-201(A) provides, "The powers of a county shall be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law." *See also* A.R.S. § 11-251 *et seq.* (outlining the powers of the Board of Supervisors, including "(31) [m]ake and enforce all local, police, sanitary and other regulations not in conflict with general law"). Plaintiffs allege that Maricopa County violated their rights by making a decision that led to their being denied counsel at the bail determination hearings. Under *Bryan County*, whether the decision is made by the county or its authorized decisionmaker, the municipality can be held liable. Under this theory, Maricopa County is a proper defendant.

b. Defendant Arpaio is a Required Defendant.

As the County Defendants conceded in oral argument, Defendant Arpaio is a required party for a petition for habeas corpus relief, because he is the custodian of the Plaintiffs. (Hr'g Tr. 18:19, July 23, 2008 ("Tr.").) *See also Smith v. Idaho*, 392 F.3d 350, 354-55 (9th

Cir. 2004); *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996); *Stanley v. Cal. Sup. Ct.*, 21 F.3d 359, 360 (9th Cir. 1994).

As to the other allegations in the Complaint against Defendant Arpaio, Plaintiffs claim that he "has promulgated unconstitutional policies and practices in connection with the Proposition 100 laws for the Maricopa County Sheriff's Department," namely that Sheriff's deputies question people about their immigration status (thereby eliciting incriminating information) without proper admonitions. (Pls.' Resp. 4; Compl. ¶¶ 18, 33, 36, 66-70.) The County Defendants have argued that because Defendant Arpaio has no role in bail determinations, he is not a proper defendant in this case. (County Defs.' Mot. 4.)

Section 1983 "does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials." *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1056 (9th Cir. 2002). To prevail on a claim under § 1983, the plaintiff must show that "(1) the action occurred 'under color of state law' and (2) the action resulted in the deprivation of a constitutional right or federal statutory right." *Id.* Plaintiffs have alleged that, acting under color of state law, Defendant Arpaio has deprived them of their Fifth Amendment right against self-incrimination. (Pl.'s Resp. 4.) Assuming those factual allegations to be true, for the purposes of considering a motion to dismiss under Rule 12(b)(6), Plaintiffs have stated a claim against Defendant Arpaio under § 1983.

c. State Officers are not Required Defendants.

The County Defendants have also argued that the Complaint must be dismissed because "it is necessary as a legal and equitable matter that an officer of the state of Arizona appear in this litigation and defend [the Proposition 100 laws] on the merits." (County Defs.' Mot. 5.) Plaintiffs respond, "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." (Pls.' Resp. 5.)

A party should be joined in a lawsuit if: (1) that person's absence will prevent the court from according complete relief to the existing parties, or (2) disposition of the case

without that party will either impair that party from protecting their own interests or create a substantial likelihood that an existing party will be subject to "double, multiple, or otherwise inconsistent" legal obligations. Fed. R. Civ. P. 19(a)(1). In this case, nothing prevents this Court from according complete relief to the existing parties in the absence of an Arizona state official. Moreover, Arizona Attorney General Terry Goddard represents Judge Mundell in this action, so the Court presumes he is well aware of its existence. Plaintiffs assert that they have complied with Federal Rule of Civil Procedure 5.1, which requires notice to the state attorney general of a challenge to the constitutionality of a state statute. (Pls.' Resp. 7.) No Arizona state official is a necessary party to this action.[2] Arizona state officials are free to seek to intervene, under Rule 24 of the Federal Rules of Civil Procedure, should they so desire.

2. *Younger* Abstention is not Appropriate.

The doctrine created by *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny counsels against federal court interference in state judicial proceedings under certain circumstances. *Moore v. Sims*, 442 U.S. 415, 423 (1979). The principles underlying *Younger* abstention include "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 431 (1982) (citing *Younger*, 401 U.S. at 44). While "there are limited circumstances in which . . . abstention by federal courts is appropriate, those circumstances are 'carefully defined' and 'remain the exception, not the rule.'" *Gilbertson v. Albright*, 381 F.3d 965, 969 n.2 (9th Cir. 2004) (quoting *Green v. City of Tucson*, 255 F.3d 1086, 1089 (9th Cir. 2001) (en banc) (internal quotations and citations omitted)). The Supreme Court has articulated three elements that lead to a situation in which

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[2] Even if Arizona state officials were necessary parties, dismissal would not be the proper remedy. Pursuant to Rule 19(b), this Court could simply order them joined. Fed. R. Civ. P. 19(b).

Younger abstention is appropriate: (1) there is an ongoing state proceeding; (2) the federal proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal issues. *Middlesex County*, 457 U.S. at 432; *accord Gartrell Constr., Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991).

In *Younger*, the plaintiff sought to enjoin his state criminal prosecution because he challenged the underlying statute that defined the offense. 401 U.S. at 39. The Supreme Court held that the federal court had to abstain because otherwise, the federal proceeding would erode the role of the jury and because a challenge to the underlying law could have been raised by the plaintiff as an affirmative defense in the criminal case. *Id.* at 44-46. In *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975), however, the Supreme Court clarified that *Younger* abstention was *not* appropriate in a case challenging the legality of pre-trial detention without a hearing, "an issue that could not be raised in defense of the criminal prosecution." Moreover, "[t]he order to hold preliminary hearings could not prejudice the conduct of the trial on the merits." *Id.* In this case, likewise, Defendants' arguments that "there are numerous criminal actions pending involving the members of the proposed class . . . . that could involve the very issues that [P]laintiffs raise in this federal lawsuit" are unpersuasive. (County Defs.' Reply 4.) A ruling by this Court that the Proposition 100 laws are or are not constitutional will not affect the criminal actions, because as the Court noted in oral argument, the pre-trial bail determination is "something that is unrelated to whether the person is guilty or not guilty of the offense charged." (Tr. 31:20-21.) The County Defendants also cite *Dubinka v. Judges of the Super. Ct.*, 23 F.3d 218 (9th Cir. 1994) in support of their argument. In that case, though, the law being challenged was a California state law requiring reciprocal discovery in criminal cases. Discovery, unlike pre-trial bail determinations, could have an effect on the underlying trial on the merits, so the exception in *Gerstein* does not squarely apply to *Dubinka*. In the instant case, *Gerstein* is on point and holds that *Younger* abstention is not appropriate.

In their Reply, the County Defendants also argued that *Younger* abstention is appropriate because a decision has been issued by an Arizona state court on the merits of

some of Plaintiffs' claims. The Court of Appeals of Arizona ruled in *Hernandez v. Lynch*, 167 P.3d 1264, 1270-75 (Ariz. Ct. App. 2007) that the Proposition 100 laws were not facially unconstitutional under either the equal protection or due process clauses of the U.S. Constitution. The Arizona Supreme Court denied the petition for review on April 22, 2008. *Hernandez v. Lynch*, No. CV-07-424-PR, 2008 Ariz. LEXIS 58 (Ariz. Apr. 22, 2008). Under any possible formulation of the *Younger* doctrine, this court cannot be required to abstain under these circumstances, because there is no ongoing state action.[3] If anything, this has become an argument grounded in preclusion principles, an issue not before the Court in this Motion to Dismiss.

3. The Complaint States Claims Sufficient to Survive a Motion to Dismiss under Rule 12(b)(6) as to Counts One - Six, but not as to Count Seven.

a. Count Seven

The County Defendants move to dismiss Count Seven on the basis that "[P]laintiffs have failed to make allegations sufficient, if assumed true, to establish express or implied federal preemption."[4] (County Defs.' Mot. 8.) Plaintiffs respond that the Proposition 100

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[3]The County Defendants cite to the three-part test for *Younger* abstention applicability from *Middlesex County*, 457 U.S. at 431-32, which provides that a federal court should abstain where there are state court proceedings that (1) are ongoing, (2) implicate important state issues, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. (County Defs.' Mot. 11.) Plaintiffs argue that the *Middlesex* factors do not apply where the state proceedings in question are criminal cases and point instead to *Gerstein*'s focus on whether the challenge goes to the merits of the criminal case. (Pls.' Resp. 16-17 (citing *Gilbertson v. Albright*, 381 F.3d 965, 969, 978 (9th Cir. 2004).) For the purposes of this Order, it does not matter, because the state proceedings have concluded, and any formulation of the requirements of *Younger* would need to include an ongoing proceeding.

[4]Defendants argue that Counts One, Two, Three, Four, Six, and Seven all rely "either directly or indirectly" on an argument that the Proposition 100 laws are preempted by federal regulation of immigration. (County Defs.' Mot. 8.) However, Counts One, Two, Three, Four and Six of the Complaint are based on other constitutional claims under the Fifth, Eighth, and Fourteenth Amendments and are entirely unrelated to federal preemption. Therefore, the Court will not analyze them with respect to preemption.

laws are preempted for two reasons: (1) "they intrude on a field fully occupied by the federal government, in that they attempt a classification of unlawful immigrants that conflicts with federal classifications," and (2) "they are incompatible with the comprehensive federal scheme for immigration detention." (Pls.' Resp. 11-12.)

Many, but not all, state laws addressing immigration are preempted by federal law. The Supremacy Clause of the U.S. Constitution makes federal law "the supreme law of the land." U.S. CONST., art. VI, cl. 2. The Supreme Court has consistently ruled that the federal government has broad and exclusive power to regulate immigration, supported by both enumerated and implied constitutional powers.[5] However, in *DeCanas v. Bica*, 424 U.S. 351, 355 (1976), the Supreme Court held that not every state enactment "which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised." The Supreme Court outlined three possible types of preemption in this context: (1) constitutional preemption (if the state or locality is attempting to regulate immigration, a power the Constitution leaves to the federal government), (2) field preemption (if Congress intended to occupy the field and oust state power, demonstrated by the breadth of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1101, *et seq.*), and (3) conflict preemption (if the state or local law conflicts with federal law such that compliance with both schemes would be impossible). *DeCanas*, 424 U.S. at 355-57, 363; *see also League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995).

Plaintiffs have made several types of claims under the Supremacy Clause. (*See* Compl. ¶¶ 8, 9, 12, 24, 25, 27, 35, 36, 65, 78-82.) First, Plaintiffs claim that the Proposition 100 laws are constitutionally preempted because they are an impermissible attempted regulation of immigration by the state of Arizona, in that they are a state law attempt to "secure our

[5] A variety of enumerated powers implicate the federal government's long-recognized immigration power, including the Commerce Clause, the Naturalization Clause, and the Migration and Importation Clause. *See* U.S. CONST., art. I, § 8, cl. 3-4; art. I, § 9, cl. 1; *see, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889).

borders." (Compl. ¶ 27.) Plaintiffs also plead a claim based on field preemption, "in that [the Proposition 100 laws] attempt a classification of unlawful immigrants that conflicts with federal classifications." (Pls.' Resp. 11-12; Compl. ¶¶ 24-27, 35.) The Complaint also alleges that by instituting a system for determining a person's immigration status, the Proposition 100 laws conflict with the comprehensive scheme Congress created when it enacted the INA, including provisions setting forth when people should or should not be detained for immigration violations. (Pls.' Resp. 12 (citing 8 U.S.C. §§ 1225(b)(1)(B)(iii)(IV), 1225(d)(2), 1226, 1226A, 1231(a)(2) (INA provisions concerning immigration detention); Compl. ¶¶ 9, 35, 79-81.)

As to Plaintiffs' claim of express preemption, the Court concludes that the Proposition 100 laws are not an impermissible regulation of immigration by the state of Arizona. "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas*, 424 U.S. at 355. Whether or not the legislators who backed Proposition 100 or the voters who approved it were motivated by animus towards undocumented residents of Arizona, bail determinations are not regulations of immigration, as defined by *DeCanas*. They do not determine who should be admitted to the U.S., nor do they prescribe conditions under which a legal entrant may remain. While the INA does contain provisions describing the circumstances under which immigrants may be detained, those relate to detention for immigration violations, *not* criminal charges. Ultimately, people like the Plaintiffs, who are subject to the Proposition 100 laws, are being detained because of the crime they are accused of committing. Under the scheme created by the Proposition 100 laws, Arizona state officials do not directly facilitate the removal of people who in the country illegally, and they do not make decisions about immigration status that would be binding on Plaintiffs in a subsequent proceeding in the immigration system. The Plaintiffs' claim of express preemption is unavailing.

The County Defendants argue that in the absence of express preemption, there is a presumption against finding a state law preempted by federal law and that, in order to

maintain a claim of implied preemption, "the [P]laintiffs must allege sufficient facts to establish a *prima facie* case that it was 'the clear and manifest purpose of Congress' to oust state power from the field." (County Defs.' Mot. 10-11.) In support of this argument and the "clear and manifest purpose" standard, the County Defendants cite *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) and *DeCanas.* In response, Plaintiffs point to cases applying the "clear and manifest purpose" standard only to "'fields of traditional state regulation.'" (Pls.' Resp. 12-13 (citing *N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).) *See also Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003). Plaintiffs argue that whether these principles apply in the immigration context is "at best, doubtful." (Pls.' Resp. 12-13.) This dispute notwithstanding, the Supreme Court, in *DeCanas*, created a test for field preemption: a court must determine whether Congress intended to effect a "complete ouster of state power – including state power to promulgate laws not in conflict with federal laws." 424 U.S. at 357. Even relying on this less stringent standard, Plaintiffs have not alleged facts that support a conclusion that Congress intended to effect "a complete ouster of state power" with respect to bail determinations for state crimes. The INA provisions Plaintiffs cite regulate detention for immigration violations, not pre-trial detention for state crimes. The Proposition 100 laws are not preempted based on the federal government's occupation of the field of immigration regulation.

The final inquiry related to preemption is whether the Proposition 100 laws are preempted because they conflict with the federal statutory scheme or "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *DeCanas*, 424 U.S. at 357, 363. Plaintiffs argue that the Proposition 100 laws fly in the face of "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" and as to whether incarceration is appropriate punishment for unlawful presence. (Pls.' Resp. 12 (citing 8 U.S.C. § 1325).) Plaintiffs argue that these laws "effectively impose incarceration for unlawful presence" in the U.S. (*Id.*) As discussed above, however, the Proposition 100 laws do not impose incarceration for unlawful

presence or other federally-defined immigration violations. They merely deny release on bond after a person is charged with a serious crime. The Proposition 100 laws are not preempted by federal law on a conflict theory either. Accordingly, the Court will grant the County Defendants' Motion as to Count Seven.

b. Counts One, Two, Three, Four, Five, and Six

As discussed, the County Defendants' arguments about preemption as to claims other than Count Seven are incorrect and will not be analyzed in this Order. The County Defendants' Motion does not make any other arguments as to Counts One, Two, Three, Four, and Six, which rely on the Fifth, Eight, and Fourteenth Amendments to the U.S. Constitution. Therefore, the Motion is denied as to those Counts. As the Motion does not make mention of Count Five, it is also denied as to that Count.

C. Defendant Mundell's Motion to Dismiss

1. Immunity

Defendant Mundell moves to dismiss the Complaint against her pursuant to Rules 12(b)(1) and (6), arguing that she is immune from suit both as a judge and as a representative of the Superior Court of Maricopa County, an arm of the state of Arizona. (Def. Mundell's Mot. 3-5.) At oral argument, Plaintiffs agreed with the Court's statement that "the only claim against Judge Mundell that this Complaint asserts is that she is in charge of Pretrial Services, and she is the one that gave Pretrial Services the direction to ask these alleged . . . unconstitutional questions without the appropriate warnings[.]" (Tr. 12:6-10.) Plaintiffs seek to enjoin Judge Mundell from allowing Pretrial Services to ask the allegedly unconstitutional questions. (Tr. 12:16-19.)

It is well settled that judges are protected by absolute immunity where (1) the challenged act is judicial in nature and (2) the act was not performed in the absence of jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (per curiam); *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988). Judicial acts include those where "(1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers [or courtroom]; (3) the controversy centered around a case then pending before the judge; and (4) the events

at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity." *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1302 (9th Cir. 1989); *see also Duvall v. County of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001) (reiterating the *New Alaska* factors). The Ninth Circuit has explained that "in determining whether a particular action is judicial in nature, a court needs to focus on the relationship between the action and the adjudicative process." *Meek v. County of Riverside*, 183 F.3d 962, 967 (9th Cir. 1999). Moreover, § 1983 also provides that "injunctive relief shall not be granted" in an action brought against "a judicial officer for an act or omission taken in such officer's judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

Plaintiffs' claims against Judge Mundell are grounded in her actions as supervisor of Pretrial Services, in particular with respect to the questions asked of detainees in an allegedly unconstitutional manner. Looking at the relationship between Judge Mundell's implementation of the Proposition 100 laws as they relate to Pretrial Services and the adjudicative process and applying the *New Alaska* factors, this function does not appear to the Court to be judicial. Supervising Pretrial Services is not a traditional judicial function, and the controversy in this case does not arise out of a case pending before Judge Mundell. In *Partington v. Gedan*, 961 F.2d 852, 866-67 (9th Cir. 1992), the Ninth Circuit held that "[t]he promulgation and enforcement of a state's rules of ethics is frequently a function of the judiciary." However, in a more closely analogous situation, the Ninth Circuit upheld a claim against Chief Justice George, who was sued in his administrative capacity as Chair of the Judicial Council, while affirming the dismissal of claims against other judges who were sued in their judicial capacity. *Wolfe v. Strankman*, 392 F.3d 358, 366 (9th Cir. 2004) (citing *Sup.Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 736 (1980) ("We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities.")).

Courts have often held that when a judge is acting as an employer or in a strictly administrative capacity, his or her actions are not protected by absolute immunity. *See, e.g.*, *Wolfe*, 392 F.3d at 366 (claim allowed against judge in his administrative capacity as Chair of the Judicial Council); *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987) (judge not shielded by judicial immunity for act of firing confidential personal secretary); *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir. 1986) (firing court reporter is not a judicial act); *Goodwin v. Circuit Ct. of St. Louis County*, 729 F.2d 541 (8th Cir. 1984) (decision to remove a hearing officer was an administrative rather than a judicial act); *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir. 1982) (act of appointing state judges involves an executive not a judicial act). In *Forrester v. White*, 484 U.S. 219 (1988), a former probation officer sued a state judge for damages resulting from her demotion, allegedly in violation of § 1983. The Supreme Court stressed that, in determining the scope of judicial immunity, the focus must be on the "*functions* it protects and serves." *Id.* at 227 (emphasis in original). "Judges are granted absolute immunity for their judicial actions in order to safeguard independent and principled judicial decision making." *Meek*, 183 F.3d at 966. Judge Mundell, in her capacity as supervisor of Pretrial Services, acts in an administrative capacity, *not* a judicial capacity, so granting her absolute immunity in this case would not protect her judicial independence. Thus, she is not immune in her administrative capacity.[6]

Judge Mundell cites language from *Wolfe* stating that "'a court should not enjoin judges from applying statutes when complete relief can be afforded' by enjoining other parties, because 'it is ordinarily presumed that judges will comply with a declaration of a

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[6]Judge Mundell also argues that the claims against her should be dismissed because there is no "case or controversy" between her and the Plaintiffs. This argument rests on the contention that "a party challenging the constitutionality of a state law cannot sue a state court judge whose role is deciding cases in accordance with the challenged law." (Def. Mundell's Reply 4.) The court in *Wolfe* also considered this contention and rejected it with respect to the judge who was sued in his administrative capacity, as Judge Mundell is here. *Wolfe*, 392 F.3d at 365-66. In this case, the argument is equally unavailing, because Judge Mundell is not being sued for any actions related to her adjudicative duties.

statute's unconstitutionality without further compulsion.'" 392 F.3d at 366 (quoting *In re Justices of Sup. Ct. of P.R.*, 695 F.2d 17, 23 (1st Cir. 1982)). However, in *Wolfe*, the Ninth Circuit affirmed the dismissal of the judges who were sued in their judicial capacity in part *because* it upheld the claim against Chief Justice George in his administrative capacity. The court in *Wolfe* held that if the plaintiff was "successful on the merits, he [could] obtain complete relief in his suit against Chief Justice George in his administrative capacity as Chair of the Judicial Council and [another defendant]." *Id.* In the instant case, Plaintiffs have argued, "Judge Mundell is the only [defendant] responsible for supervising Pretrial Services. Therefore, to the extent that this Court finds that the policy and practice adopted by Pretrial Services is unconstitutional, it must have before it a party responsible for that policy." (Pls.' Resp. to Def. Mundell's Mot. 5.) Unlike the situation in *Wolfe*, none of the other parties in this case has supervisory authority over Pretrial Services. Accordingly, Judge Mundell must remain a defendant.

Judge Mundell also argues that she is immune under the Eleventh Amendment's guarantee of sovereign immunity. (Def. Mundell's Reply 2-4.) *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (holding that states cannot be sued in federal court unless they waive sovereign immunity). Also, "[a] state and its officials sued in their official capacity are not considered 'persons' within the meaning of § 1983." *Wolfe*, 392 F.3d at 364 (citing *Cortez v. County of L.A.*, 294 F.3d 1186, 1188 (9th Cir. 2002)). However, under *Ex parte Young*, 209 U.S. 123 (1908), "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). *See also Pittman v. Or., Employment Dep't*, 509 F.3d 1065, 1071 (9th Cir. 2007) ("Sovereign immunity also does not bar suits for prospective injunctive relief against individual state officials acting in their official capacity."); *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250, 253 (9th Cir. 1974) (same). Plaintiffs here sue Judge Mundell in her official capacity as supervisor of Pretrial Services, for prospective injunctive relief. Therefore, Judge

Mundell is not protected by sovereign immunity for this claim. Her Motion to Dismiss is denied.

2. *Pullman* Abstention

Judge Mundell also argues that this Court should abstain on the basis that Plaintiffs failed to take advantage of an adequate state remedy, pursuant to *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 499-501 (1941). In *Pullman*, the Supreme Court held that federal courts should refrain from deciding questions of state law where a state court ruling could clarify the law and render a federal court decision unnecessary. *Id.* at 500. Judge Mundell argues that, pursuant to the recent decision by the Court of Appeals of Arizona in *Segura*, 2008 WL 1822308, people like the Plaintiffs have the opportunity to request an individualized bail hearing if they are denied bail at their initial appearances. (Def. Mundell's Mot. 11 n.4, n.5.) This, Judge Mundell contends, creates a state remedy to the constitutional claims Plaintiffs make with respect to the Proposition 100 laws and their implementation, a remedy neither of the Plaintiffs have pursued. (Def. Mundell's Mot. 11.) As the Ninth Circuit has explained, *Pullman* abstention is not appropriate in situations where "the driving force behind each of the Plaintiffs' claims is a right guaranteed by the United States Constitution, and state court clarification of state law would not make a federal court ruling unnecessary." *Hydrick v. Hunter*, 500 F.3d 978, 987 n.6 (9th Cir. 2007). In this case, if Plaintiffs were to receive hearings under *Segura*, it would not necessarily obviate the need for a federal court to examine their federal constitutional claims. Where, as here, the claim involves federal constitutional law, *Pullman* abstention is not appropriate.

D. Plaintiffs' Motion for Class Certification

The procedure for establishing a class action is set forth in Rule 23 of the Federal Rules of Civil Procedure, which outlines four requirements: (1) the proposed class must be so numerous that joinder of all members as parties would be impracticable; (2) common questions of law and fact must exist as to all members of the class; (3) the claims of the proposed named plaintiffs must be typical of those of the class, and (4) the named plaintiffs and their counsel must fairly and adequately protect the interests of the class. Fed. R. Civ.

P. 23(a). These requirements are referred to as numerosity, commonality, typicality, and adequacy. "In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(b)(2) provides that class certification is appropriate when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Plaintiffs seek to certify a class defined as follows: "[a]ll persons who have been or will be ineligible for release on bond by an Arizona state court in Maricopa County pursuant to Section 22(A)(4) of the Arizona Constitution and A.R.S. § 13-3961(A)(5)." (Pls.' Mot. 3.) Defendants respond that the Court should refrain from ruling on Plaintiffs' Motion until Defendants are able to conduct discovery on whether the named Plaintiffs can adequately protect the interests of the parties or, in the alternative, deny the motion without prejudice.[7] (County Defs.' Resp. 4-8.) In their Response, the County Defendants did not contest the numerosity, commonality, or typicality requirements of Rule 23(a), nor did they challenge Plaintiffs' assertion that they satisfy the requirements of Rule 23(b)(2). (Pls.' Mot. 4.) At the Hearing, counsel for the County Defendants requested time to conduct discovery on whether or not the named Plaintiffs had requested or received individualized bail determinations under *Segura*, for the purposes of establishing commonality and typicality. (Tr. 39:23-24.) The Court authorized the parties to submit limited additional evidence after the Hearing on the factual issues related to these proceedings. (Tr. 43:3-10; Docs. 41, 44.) Considering this evidence and the arguments of counsel, this Court grants Plaintiffs' Motion to Certify Class for the following reasons.[8]

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[7] Defendants also argue that the Court should refrain from deciding Plaintiffs' Motion until it rules on Defendants' Motion to Dismiss. (County Defs.' Resp. 3-4.) This argument is moot because the Motions are both being considered in this Order.

[8] As the County Defendants do not contest the Plaintiffs' assertion that they satisfy the numerosity requirement or the requirements of Rule 23(b)(2), the Court will not analyze

1. Commonality

Plaintiffs must show that there is a common issue of law or fact among the members of the proposed class. Fed. R. Civ. P. 23(a)(2). "Commonality focuses on the relationship of common facts and legal issues among class members." *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 (9th Cir. 2007). The commonality factor "has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "[N]ot all questions of fact and law need to be common to satisfy [Rule 23(a)(2)]." *Parra v. Bashas', Inc.*, 536 F.3d 975, 978 (9th Cir. 2008) (citing *Hanlon*, 150 F.3d at 1019).

This case raises numerous issues of both law and fact that are common to the members of the proposed class. For instance, all members of the putative class are being held in custody by Maricopa County based on a finding of ineligibility for bail under the Proposition 100 laws. The named Plaintiffs and the proposed class members "seek a fair and individualized bail hearing as required by the U.S. Constitution." (Pls.' Mot. 8 n.3.) Plaintiffs have advanced a variety of constitutional claims with respect to the Proposition 100 laws, including alleged violations of the Sixth Amendment right to counsel, of the right against self-incrimination under the Fifth Amendment, of the substantive and procedural due process guarantees of the Fifth and Fourteenth Amendments, and of the Supremacy Clause.

In her affidavit, Sally Wolfgang Wells, Chief Assistant County Attorney for Maricopa County, states that any person who receives an adverse bail determination is able to request an "individualized bail determination," as required by the *Segura* decision. (Wells. Aff. ¶ 5.) Such requests are "routinely" granted, and "the accused is entitled to a full hearing at which the State has the burden of proof on the bail issue, the accused has the right to representation

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those issues in depth. Plaintiffs' arguments on numerosity are compelling, and the Court finds that Plaintiffs have established that element. The Court also finds that the Plaintiffs have established that they meet the requirements of Rule 23(b)(2).

of counsel, and the accused has the right to cross examine witnesses and offer evidence." (*Id.*) However, Ms. Wells' affidavit does not explain which issues are taken into consideration at the *Segura* hearings. Robert McWhirter, Senior Attorney in the Maricopa County Legal Defenders Office agrees with Ms. Wells' statement that requests for *Segura* hearings are granted. (McWhirter Aff. ¶ 3.) However, he further states that the focus of the hearing is on whether the government has met its burden of showing, under the Proposition 100 laws, that "there is proof evident and presumption great that the defendant committed the offense[] and whether there is probable cause to believe that the defendant entered or remained in the United States unlawfully." (*Id.* at ¶ 4.) "If the prosecution meets its burden, then the Maricopa County court will not consider whether the defendant should be released based upon an individualized evaluation of flight risk and danger to the community." (*Id.*)

Ms. Wells states that neither named Plaintiff "has ever requested an individualized bail determination hearing but [both] have filed numerous other motions." (Wells. Aff. ¶ 7.) Whether or not the named Plaintiffs or any other similarly-situated people have received hearings pursuant to *Segura*, common issues of law and fact still remain among all the members of the putative class because Plaintiffs challenge the Proposition 100 laws as being unconstitutional. Hearings under *Segura* merely apply those laws, according to both the Wells and McWhirter Affidavits. As the Court noted at the Hearing, members of the proposed class "still haven't gotten . . . [a] determination, defendant by defendant, of dangerousness or flight risk." (Tr. at 40:25-41:1.) Plaintiffs have established commonality, based on the common issues of law and fact affecting all members of the proposed class.

2. Typicality

Plaintiffs must also demonstrate that their claims are typical of the claims of the proposed class, in order to comply with Rule 23(a)(3). "Typicality requires that the named plaintiffs be members of the class they represent." *Dukes,* 509 F.3d at 1184 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982)). Named plaintiffs must "possess the same interest and suffer the same injury as the class members." *Id.* (citing *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (internal citation omitted)). "[T]ypicality

focuses on the relationship of facts and issues between the class and its representatives." *Dukes*, 509 F.3d at 1184. The Ninth Circuit has held that "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Id.* (citing *Hanlon*, 150 F.3d at 1020). As discussed above, Plaintiffs are members of the proposed class, regardless of whether they have requested or received a *Segura* hearing. All the members of the proposed class are similarly incarcerated based on the categorical bar on bail created by the Proposition 100 laws. Their constitutional claims are largely the same, and even if there were slight variations from case to case, the claims of the named Plaintiffs would still be "reasonably coextensive with those of absent class members." Plaintiffs have established typicality.

3. Adequacy

The adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods.*, 521 U.S. at 625. The adequacy requirement "'tend[s] to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Id.* at n.20 (quoting *Falcon*, 457 U.S. at 157 n.13). "This factor requires: (1) that the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) that Plaintiffs are represented by qualified and competent counsel." *Dukes*, 509 F.3d at 1185. The test of typicality "'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v. Harp*, 108

F.R.D. 279, 282 (C.D. Cal. 1985)). The adequacy requirement also "factors in competency and conflicts of class counsel." *Amchem Prods.*, 521 U.S. at 625 n.20.[9]

County Defendants argue that "there is antagonism between [the named Plaintiffs], as alleged current claimants, versus those future illegal immigrants that are future claimants." (County Defs.' Resp. 8 (emphasis in original).) In cases involving monetary damages, courts have sometimes held that named Plaintiffs cannot adequately represent the class of future plaintiffs because there will be an inevitable conflict of economic interest. *See, e.g.*, *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 855-57 (1999) (noting conflict of interest between present and future tort claim holders with regard to settlement of suit for money damages). In this case, however, the Plaintiffs are seeking injunctive and declaratory relief, so no such financial motivation prevents them from adequately representing the interests of the proposed class.

The County Defendants have also argued that Plaintiffs cannot adequately represent the class members (1) because their liberty is at stake in their criminal cases, making their interests antagonistic to those of the other class members, and (2) because Plaintiffs might face immigration consequences based on the criminal charges pending against them, giving them a strong incentive to act in their own self-interest, to the potential detriment of class members. (County Defs.' Resp. 7.) The Court fails to see how either of those two motives might prevent the Plaintiffs from adequately representing the proposed class. Plaintiffs will, of course, make numerous decisions in defending the criminal charges against them, but they are challenging the County's procedures related to bail determinations, which would not be affected by the progress of the named Plaintiffs' individual cases. Also, many members of the proposed class will face immigration consequences related to the criminal charges against them, and all members of the class would benefit equally from a favorable decision in this case. The County Defendants have not presented any reasons related to immigration law to

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[9]The County Defendants have not challenged the competency or conflicts of class counsel.

explain why the named Plaintiffs cannot represent the class. The Court concludes that the named Plaintiffs are adequately able to represent the interests of the absent class members.

III. Conclusions

For the foregoing reasons, the Court concludes as follows:

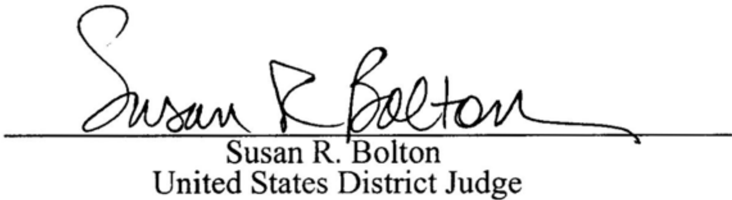
- Maricopa County is a proper defendant in this case, and the Board of Supervisors need not be sued.
- Defendant Arpaio is a required defendant, both as custodian of the Plaintiffs for purposes of habeas corpus relief and because of his actions in implementing the Proposition 100 laws.
- No Arizona state officer need be joined in order to accord complete relief in this case.
- *Younger* abstention is not appropriate in this case because a determination regarding the constitutionality of the Proposition 100 laws will not affect the ongoing criminal cases and because there is no other ongoing state proceeding.
- Plaintiffs have not alleged facts sufficient to state a claim against Defendants based on federal preemption (Count Seven).
- Judge Mundell is not immune, either by virtue of judicial immunity or under the Eleventh Amendment, in her official capacity as supervisor of Pretrial Services, where she acts in an administrative capacity.
- Plaintiffs have established numerosity, commonality, typicality, and adequacy for purposes of their Motion to Certify Class. They have also established that they meet the requirements of Rule 23(b)(2).

IT IS THEREFORE ORDERED granting in part and denying in part the County Defendants' Motion to Dismiss (Doc. 21).

IT IS FURTHER ORDERED denying Defendant Mundell's Motion to Dismiss (Doc. 20).

IT IS FURTHER ORDERED granting Plaintiffs' Motion to Certify Class (Doc. 9).

DATED this 8th day of December, 2008.



Susan R. Bolton
United States District Judge