

No. 09-15281

**IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT**

**WE ARE AMERICAN/SOMOS AMERICA COALITION, *et al.*,
*Plaintiffs/Appellants,***

v.

**MARICOPA COUNTY BOARD OF SUPERVISORS, *et al.*,
*Defendants/Appellees.***

ON APPEAL FROM A FINAL ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
No. 2:06-CV-02816-RCB

BRIEF OF PLAINTIFFS/APPELLANTS

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JURISDICTIONAL STATEMENT

(a) The district court had jurisdiction over this cause pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1343(3) and (4) (jurisdiction over actions for violation of civil rights secured by 42 U.S.C. § 1983). Jurisdiction in the district court over plaintiffs' pendent state law claim was proper under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), because plaintiffs' state and federal claims arise from a common nucleus of operative fact such that both state law and federal claims would ordinarily be expected to be tried in one judicial proceeding.

(b) The district court's order of January 13, 2009 dismissing this action in its entirety, Clerk's Record 55 (CR), *reprinted in* Excerpts of Record (ER), and the final judgment entered pursuant thereto, CR 56, constitute a final decision within this Court's jurisdiction pursuant to 28 U.S.C. § 1291. Pursuant to Rule 54(b), Fed.R.Civ.Proc., this Court has jurisdiction to review the district court's interlocutory order of September 20, 2007, CR/ER 51, on appeal from the final judgment dismissing this action.

(c) The judgment appealed from was entered January 13, 2009; plaintiffs' notice of appeal, CR/ER 57, was filed February 6, 2009, and amended on March 12, 2009, CR/ER 61; the notice of appeal is timely pursuant to Rule 4(a)(1)(A), Fed.R.App.Proc., and the amendment proper pursuant to *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 772 (9th Cir. 1991), and *Lynn v. Sheet*

Metal Workers' International Asso., 804 F.2d 1472, 1481 (9th Cir. 1986), *aff'd on other grounds*, 488 U.S. 347 (1989).

(d) This appeal is from a final order or judgment that disposes of all parties' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Whether a federal court's granting relief against future arrests and prosecutions of non-smuggler migrants for conspiracy to transport themselves in violation of Ariz. Rev. Stat. § 13-2319 would interfere with preexisting state proceedings for purposes of abstention under *Younger v. Harris*, 401 U.S. 37 (1971).

2) Whether the district court properly abstained under *Younger* from deciding the claims of plaintiffs/appellants who are not parties to any state prosecution for conspiracy to transport themselves in violation of Ariz. Rev. Stat. § 13-2319.

3) Whether under the allegations of the complaint Maricopa County has an important state interest in arresting and prosecuting non-smuggler migrants for conspiracy to transport themselves such that *Younger* abstention is required.

4) Whether under the allegations of the complaint Maricopa County's arresting and prosecuting non-smuggler migrants for conspiracy to transport themselves is congenial to federal immigration law such that abstention under *Younger* is required.

STATEMENT OF THE CASE

Plaintiffs/appellants (plaintiffs) challenge the policy and practice of defendants/appellees Maricopa County Attorney Andrew Thomas and Sheriff Joe Arpaio (defendants) to arrest and prosecute non-smuggler migrants for conspiring to transport themselves in violation of Ariz. Rev. Stat. § 13-2319, a statute intended to penalize smugglers who transport unauthorized entrants for gain.

Plaintiffs contend that defendants' actions constitute unlawful regulation by a state of international migration—a matter committed to the exclusive prerogative of the federal government—and in practice actually conflict with federal immigration law.¹

Plaintiffs include several individuals arrested and prosecuted under defendants' policy, as well as a number prominent Arizona taxpayers and civil rights organizations not arrested or prosecuted for conspiring to violate Ariz. Rev. Stat. § 13-2319, but who assert standing to challenge such arrests and prosecutions on behalf of those whom defendants do arrest and prosecute.

¹ Plaintiffs also allege that defendants' policy (i) denies due process by failing to provide reasonable notice of what conduct is proscribed; (ii) violates the Fourteenth Amendment's bar against unreasonable searches and seizures because defendants arrest persons without probable cause to believe they have committed any cognizable criminal offense; and (iv) is inconsistent with and violates Ariz. Rev. Stat. § 13-2319 (a pendent state claim).

Plaintiffs filed this putative class action on November 21, 2006. On January 18, 2007, defendants moved to dismiss pursuant to Rule 12(b)(1) and (6), Fed.R.Civ.Proc. CR 32.

On September 20, 2007, the district court entered an interlocutory order granting defendants' Rule 12(b)(6) motion in part on the ground that abstention under *Younger v. Harris*, 401 U.S. 37 (1971), "may be required." CR/ER 43.

Insofar as it granted defendants' motion, the district court first held that "[a]s currently pled, the relief sought by Plaintiffs will by necessity interfere with prosecutions already underway at the time this action was filed." CR/ER 43 at 6. The Court discounted plaintiffs' argument "that the Court could fashion its relief in such a way that would not require enjoining any currently pending criminal cases" because "Plaintiffs make no such distinction in their complaint." *Id.*

The district court further held that defendants have "a vital state interest in the enforcement of [] criminal laws," *id.*, and that it was not "readily apparent" that they seek to regulate unauthorized immigration or that their actions actually conflict with federal law. *Id.* at 11 and 14, *discussing De Canas v. Bica*, 424 U.S. 351 (1976). The district court reserved decision on whether federal law fully occupies the field comprising defendants' challenged policy and practice such that preemption is readily apparent on that ground. *Id.* at 12.

On October 12, 2007, plaintiffs amended their complaint to make explicit that they seek no relief that would interfere with state proceedings preceding this action. CR/ER 45 at 28-29.

On October 9, 2007, plaintiffs filed their supplemental brief addressing field preemption, CR 44, and on October 24, 2007, defendants filed theirs. CR 47.

On January 13, 2009, the district court dismissed pursuant to Rule 12(b)(6) on the sole ground that it was required to abstain under *Younger* from hearing any claim of any plaintiff. CR/ER 55.

Under *Younger* federal courts will abstain from granting injunctive or declaratory relief that would interfere with ongoing state judicial proceedings. *Id.* at 40-41. *Younger* abstention is proper only if three requirements are met: (1) the plaintiff must seek to enjoin preexisting state judicial proceedings; (2) the state proceedings must implicate important state interests; and (3) the plaintiff must have available an adequate state forum within which to litigate his or her federal claims. *Woodfeathers, Inc. v. Wash. County, Or.*, 180 F.3d 1017, 1020 (9th Cir. 1999) (internal citations and quotations omitted). If any of these requirements is not satisfied, a federal court may not abstain. *Polykoff v. Collins*, 816 F.2d 1326, 1332-33 (9th Cir. 1987).

Finding the first of the *Younger* requirements satisfied, the district court ruled that because six of the individual plaintiffs had been prosecuted prior to their bringing this action, its granting relief against *future* arrests and prosecutions of

migrants for conspiring to transport themselves would impermissibly interfere with ongoing state proceedings against the prosecuted plaintiffs. CR/ER 55 at 6-7, 20-23.

As for the nine individual and organizational plaintiffs neither arrested nor prosecuted, the district court held their claims “sufficiently intertwined” with those of the prosecuted plaintiffs such that granting relief against future arrests and prosecutions of proposed class members would also improperly interfere with antecedent state proceedings against the prosecuted plaintiffs. CR/ER 55 at 11.

Finally, the court held it not readily apparent that federal law fully occupied the field of illicit alien transportation such that defendants’ policy and practice could be preempted under the second *De Canas* test. CR/ER 55 at 20.

STATEMENT OF FACTS

In 2005 the Arizona legislature enacted Ariz. Rev. Stat. § 13-2319, which provides in relevant part as follows:

A. It is unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose. ...

C. For the purposes of this section “smuggling of human beings” means the transportation or procurement of transportation by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state.

The bill’s sponsor, Rep. Jonathan Paton, described the enactment’s purpose as follows:

People who are involved in trafficking, referred to as *coyotes*, are operating with impunity in this area and there is a culture of lawlessness growing up around that. He stated that lawlessness is compromising national security and *exploiting people who are trying to enter into this country. . . .*

Mr. Paton stated that there are no state laws against the *actual coyote smuggling* activity. This bill attempts to give local law enforcement the ability to stop this activity from happening and to prosecute on both the federal and state level. He reminded Members that the U.S. Attorney's Office in southern Arizona has not been prosecuting *coyotes*.

Minutes of the Committee on Judiciary re: H.B. 2539, Arizona House of Representatives, 47th Legislature, First Regular Session (February 10, 2005) (emphasis added).

Despite this declaration of the legislature's intent, in September 2005 Maricopa County Attorney Thomas declared that his office would apply § 13-2319 not only against alien smugglers, but also against those they exploit: non-smuggler migrants. First Amended Complaint (FAC) at ¶ 36; CR/ER 45 at 21. He declared, "If [law enforcement has] probable cause to believe that illegal immigrants have intentionally allowed themselves to be smuggled by a paid human smuggler . . . [law enforcement] may arrest the illegal immigrants as well as the coyote."

Maricopa County Attorney Opinion 2005-002, Sept. 29, 2005; FAC at ¶ 36; CR/ER 45 at 17.

Thereafter, defendants Thomas and Arpaio embarked upon a zealous and ongoing campaign of arresting and prosecuting non-smuggler-migrants for conspiring to transport themselves. FAC at ¶¶ 41-43; CR/ER 45 at 19-20. They

have now arrested and prosecuted more than 1,000 individuals for conspiracy to violate § 13-2319. *Id.* at ¶ 43; CR/ER 45 at 20.

Mr. Thomas made clear that his aim in using § 13-2319 against non-smugglers was to do what he believed the federal government could or would not: stop unauthorized immigration from Mexico. As defendant Thomas put it, he was “frustrated ... [with the] problem of illegal immigration that the [Mexican] government is directly fomenting.” FAC at ¶ 44; CR/ER at 20-21. Defendant Arpaio was similarly candid: “There are [too] many illegals trying to make it into [Maricopa] county ...” *Id.*

Neither Thomas nor Arpaio are, however, competent or authorized to enforce federal immigration law. In carrying out Mr. Thomas’s policy, Maricopa County Sheriff’s deputies typically arrest persons solely upon their admitting to being “migrants who had entered the United States without inspection and were being transported for gain...” FAC at ¶¶ 26 and 31; CR/ER at 12-13, 15.

Federal law, in contrast, allows multiple categories of persons who may have entered without inspection to remain lawfully in the United States. Therefore, under the challenged policy defendants arrest and prosecute non-smuggler immigrants with a legal right to remain in the United States, just as they do migrants without such a right. *See, e.g.*, FAC at ¶¶ 9, 29; CR/ER at 7, 14 (plaintiff Rosa Diaz-Godinez jailed for three months awaiting trial for conspiracy to transport herself before adjusting status to that of a lawful permanent resident).

Thus, plaintiffs alleged, defendants' challenged policy actually conflicts with federal law and policy.

Plaintiffs also alleged that federal law fully occupies the fields of alien smuggling, including transportation. FAC at ¶¶ 45 and 47-48; CR/ER at 21, 22-23. The Immigration and Nationality Act (INA) includes detailed criminal provisions regulating the transportation of immigrants not authorized to be present in the United States. *See* 8 U.S.C. §§ 1321-27. This comprehensive scheme allows of no state supplementation.

SUMMARY OF THE ARGUMENT

The circumstances in which federal courts may abstain under *Younger* are “carefully defined” and “remain ‘the exception, not the rule.’” *New Orleans Pub. Serv. Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989), *quoting Hawaiian Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984)). Unless all requirements of abstention are met, “the federal courts’ obligation to adjudicate claims within their jurisdiction [is] ‘virtually unflagging.’” *Id.*, *quoting Deakins v. Monaghan*, 484 U.S. 193, 203 (1988).

In ruling on defendants' Rule 12(b)(6) motion to abstain, the district court was required to accept the well-pleaded allegations of the complaint as true. *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003).²

As has been seen, here plaintiffs affirmatively alleged as follows:

- Plaintiffs seek declaratory and injunctive relief against *future* arrests and prosecutions of non-smuggler migrants for conspiracy to transport themselves, and not against any judicial proceedings initiated *before* this action. CR/ER 45 at 28-29.
- Defendants' policy to arrest and prosecute non-smuggler migrants for conspiracy to transport themselves regulates international migration, a matter committed to the exclusive prerogative of the federal government. FAC at ¶ 36; CR/ER 45 at 17.
- Defendants' policy to arrest and prosecute non-smuggler migrants sweeps up persons with a lawful basis under federal law to remain in the United States, and thus stands as an actual obstacle to the fulfillment of federal law. FAC at ¶¶ 9, 29; CR/ER at 7, 14.

² *Younger* abstention is not jurisdictional, see *Woodfeathers, Inc. v. Washington County*, 180 F.3d 1017, 1020 (9th Cir. 1999), but rather concerns equity and comity. See *AG of Guam v. Torres*, 419 F.3d 1017, 1022-23 (9th Cir. 2005). Hence, the district court's order is properly deemed one dismissing for failure to state a claim upon which relief may be granted.

The court below erred in failing to accept these allegations as true and then abstaining under *Younger* on the basis of contrary factual assumptions. The court also failed apply *Younger* in a carefully defined way. Rather, it applied the abstention doctrine as though it were the rule, and not the exception, so as to bar virtually *any* challenge to state law enforcement practices brought in federal court. In so doing, it erred in the following ways:

First, *Younger* bars a federal court from interfering with *antecedent* state court proceedings. The district court held that its granting relief against *future* arrests and prosecutions of non-smuggler migrants would impermissibly interfere with the prosecutions against six of the individual plaintiffs.

Second, *Younger* abstention is proper only where the same *parties* to earlier state proceedings seek a parallel federal determination of their legal claims. The district court erroneously held that its hearing the claims of the nine named plaintiffs *not* charged or prosecuted would interfere with the proceedings against the six prosecuted plaintiffs.

Third, the trial court erred in holding that defendants have an important state interest in arresting and prosecuting non-smuggler migrants. The court conflated the *means* by which defendants pursue an interest—arrest and criminal prosecution—with the actual *interest* those prosecutions further.

On a motion to dismiss for failure to state a claim, the trial court was required to credit the allegations of the complaint, which explicitly charged

defendants with usurping an exclusive federal prerogative: regulating immigration. The district court's abstaining because defendants have an abstract interest in enforcing state criminal law not only ignored the complaint, it effectively empowered two state officials to elevate *any* parochial interest to that of a vital state interest simply by pursuing it through the enforcement of criminal law.

Finally, the trial court improperly ignored that defendants' arrests and prosecutions actually conflict with federal law by criminalizing persons with a right to pursue lawful immigration status, thereby intruding into areas that federal law fully occupies: the illicit transportation of unauthorized entrants.

REVIEWABILITY AND STANDARD OF REVIEW

This Court reviews *de novo* a ruling on a motion to dismiss for failure to state a claim. *Alonzo v. ACF Property Mgt., Inc.*, 643 F.2d 578, 579 (9th Cir. 1981). The district court's abstaining under *Younger* is also reviewed *de novo*. *Green v. City of Tucson*, 255 F.3d 1086, 1093 (9th Cir.) (*en banc*), *cert. dismissed*, 533 U.S. 966 (2001).

A complaint should not be dismissed under Fed.R.Civ.Proc. 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).

Plaintiffs raised each of the issues presented for review in their opposition to defendants' motion to dismiss: CR 38 (Opposition to Motion to Dismiss, March

15, 2007); CR 44 (Plaintiffs' Supplemental Briefing on Field Preemption, October 9, 2007); CR 52 (Plaintiffs' Supplemental Memorandum of Points and Authorities re: Preemption, October 14, 2008). The district court ruled on these issues in its interlocutory order of September 20, 2007, CR/ER 43, and final order of January 13, 2009 dismissing this action. CR/ER 55.

ARGUMENT

I *YOUNGER* ABSTENTION IS IMPROPER WHERE PLAINTIFFS SEEK RELIEF AGAINST FUTURE ARRESTS AND PROSECUTIONS OF OTHERS, NOT AGAINST ANTECEDENT JUDICIAL PROCEEDINGS INVOLVING THE NAMED PLAINTIFFS.

The two threshold requirements for *Younger* abstention are (i) that the state proceedings the plaintiff challenges were initiated before any proceedings of substance in the federal court, *Kitchens v. Bowen*, 825 F.2d 1337, 1341 (9th Cir.), *cert. denied*, 485 U.S. 934 (1988); and (ii) that the federal plaintiff is a party to the antecedent state proceedings. *Steffel v. Thompson*, 415 U.S. 452, 471 n.19 (1974).

The district court erred in holding these two threshold *Younger* requirements satisfied.

A *Younger* abstention is improper where plaintiffs seek no relief against antecedent judicial proceedings, but rather prospective relief only.

“The critical question for purposes of *Younger* abstention is ‘whether the state proceedings were underway before initiation of the federal proceedings.’”

Kitchens, supra, 825 F.2d at 1341.

Younger abstention is required, however, only when state court proceedings are initiated “before any proceedings of substance on the merits have taken place in the federal court.” *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them.

Hawaii Housing Authority v. Midkiff, *supra*, 467 U.S. at 237-38.

In its September 20, 2007, order, the district court ruled it must read plaintiffs’ complaint as demanding relief against defendants’ antecedent prosecutions against six of the 15 plaintiffs in this action. CR/ER 43 at 6.

Thereafter, plaintiffs amended their complaint to eschew any request for relief that would interfere with antecedent prosecutions. *See, e.g.*, CR/ER 45 at 25 (“Plaintiffs do not, however, seek to enjoin or interfere with state proceedings that were underway before initiation of this case or otherwise would require abstention under *Younger*...”); 28 (plaintiffs seek declaratory relief “[o]nly to the extent relief does not interfere with state proceedings that were underway before initiation of this case or otherwise require abstention under *Younger*...”); and 29 (plaintiffs seek injunctive relief barring “defendants ... from further [arrests and prosecutions], but only to the extent such injunctive relief does not interfere with state proceedings that were underway before initiation of this case or otherwise require abstention under *Younger*...”).

In its January 13, 2009, order dismissing this action, the district court no longer faulted plaintiffs’ complaint for seeking relief against pre-existing prosecutions. Instead, it held that “the relief sought by plaintiffs for the putative

class will necessarily interfere with *the continuous stream* of on-going state law enforcement” against non-smuggler migrants. CR/ER 55 at 22 (emphasis added).

The order never explains how its granting prospective relief against “the continuous stream” of arrests and prosecutions could interfere with the antecedent proceedings against the six prosecuted plaintiffs in a way *Younger* proscribes. *Id.* To the contrary, *Younger* presents no bar to plaintiffs’ challenging the very state proceedings the district court held immune from federal review: the “continuous stream” of arrests and prosecutions of non-smuggler migrants post-dating the commencement of this action.

In *Wiener v. County of San Diego*, 23 F.3d 263 (9th Cir. 1994), the district court abstained under *Younger* and dismissed the plaintiff’s action challenging a county’s prosecuting him for violating a zoning ordinance regulating adult bookstores.

Before this Court, the defendant county argued that a state court had convicted the plaintiff of violating a nearly identical ordinance, his appeal from that conviction was pending at the time the district court abstained, and *Younger* abstention was therefore proper. *Id.* at 265.

The plaintiff countered, *inter alia*, that *Younger* abstention was improper because his federal suit sought relief only against future prosecutions. This Court agreed:

... *Younger* abstention does not apply when, as here, a federal plaintiff seeks a *prospective* injunction against prosecutions under an allegedly unconstitutional ordinance. *Actions for prospective relief do not trigger abstention* ... Abstention is appropriate only on federal actions to restrain enforcement of a pending state proceeding or of an already-entered state court order.

Id. at 267 (citations omitted; emphasis added).

Similarly, in *Agriesti v. MGM Grand Hotels*, 53 F.3d 1000 (9th Cir. 1995), the plaintiff was arrested for distributing handbills on a sidewalk adjacent to the MGM Grand Hotel in Las Vegas; he sued to enjoin future prosecution. The district court abstained under *Younger*.

Again, this Court reversed: “This case offers only the potential for *future state judicial proceedings*, which does not trigger *Younger* abstention.” *Id.* at 1001-02 (emphasis added).

In *Wiener* the ongoing criminal prosecution involved a predecessor ordinance, whereas here the six prosecuted plaintiffs were charged under the same statute challenged in their federal action. In *Agriesti*, the plaintiff had been arrested, but not charged, at the time he initiated the federal suit. Neither of these differences, however, distinguishes those precedents from the case at bar.

In *Wooley v. Maynard*, 430 U.S. 705 (1976), the Supreme Court affirmed the plaintiffs’ right to sue to enjoin future prosecutions against him *even though he had previously been convicted for violating the same statute* he challenged in federal court:

Here, however, the suit is in no way “designed to annul the results of a state trial” since the relief sought is *wholly prospective*, to preclude *further prosecution* Maynard has already sustained convictions and has served a sentence of imprisonment for his prior offenses. He does not seek to have his record expunged, or to annul any collateral effects those convictions may have ... [He] seek[s] only to be *free from prosecutions for future violations* of the same statutes. *Younger* does not bar federal jurisdiction.

Id. at 711 (emphasis supplied); *see also Harmon v. City of Kansas City, Mo.*, 197 F.3d 321, 325 (8th Cir. 1999) (*Younger* abstention not required because “municipal court could not continue with a prosecution under an ordinance that a federal court has held to be unconstitutional”; “mere fact that a co-plaintiff has been charged under a statute that is being challenged as unconstitutional does not amount to federal intervention.”).

As against these authorities, the district court cites *San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose*, 546 F.3d 1087 (9th Cir. Cal. 2008), a case that does not contravene *Wooley* or support extending *Younger* to bar federal claims for purely prospective relief.

In *San Jose*, a city elections commission investigated the plaintiffs, concluded they had violated a municipal campaign finance ordinance, and resolved to reprimand and fine them. *Id.* at 1089. After the commission had issued its reprimand, but before it could assess a fine, the plaintiffs sued in federal court. *Id.*

In their federal suit the plaintiffs demanded, *inter alia*, (i) a declaratory judgment invalidating the elections commission’s decision to reprimand and fine them; and (ii) injunctive relief barring the commission from enforcing that

decision. *Id.* at 1091. The district court declined to abstain under *Younger*; the commission appealed.

This Court reversed, but did so because the plaintiffs explicitly sought to invalidate the elections commission's antecedent ruling against the plaintiffs:

... Plaintiffs bring both a facial challenge and an as-applied challenge; they *do* challenge the Commission's proceeding; and *they do seek retrospective relief*. And, critically, the relief that Plaintiffs request is inextricably intertwined with the Elections Commission's proceeding: Plaintiffs requested ... *that the Elections Commission be enjoined from collecting the fine that it decided to impose ...*

Id. at 1095 (emphasis added).

San Jose is inapposite because plaintiffs here specifically abjured retrospective relief affecting the convictions of the six prosecuted plaintiffs. As in *Wooley*, nowhere in the amended complaint is there any request that the federal court order the prosecuted plaintiffs' "record expunged, or to annul any collateral effects those convictions may have." *Wooley, supra*, at 711. *San Jose* is as readily distinguished as *Wooley* is not.

In sum, the district court's ruling that, once prosecuted, a plaintiff may never challenge the statute under which he or she was charged is consistent with neither this Court's precedent nor that of the Supreme Court. That defendants prosecuted six of 15 named plaintiffs is no bar to *any* plaintiff's seeking prospective relief against the continuous stream of arrests and prosecutions pursuant to defendants' challenged policy.

As will be seen next, it is even clearer that *Younger* is no bar to any of the nine plaintiffs never charged with conspiring to transport themselves from seeking relief against future arrests and prosecutions in federal court.

B The district court erred in abstaining from hearing the claims of the individual plaintiffs and organizations not parties to any state proceeding.

The second threshold requirement of *Younger* abstention is that the federal plaintiff must ordinarily be a defendant in a parallel state proceeding. *Steffel v. Thompson, supra*, 415 U.S. at 471 n.19.

Here it is undisputed that nine of the named plaintiffs have never been arrested or prosecuted for conspiring to transport themselves. The district court nevertheless found the second *Younger* threshold requirement met because these plaintiffs' "interests are sufficiently intertwined with those of the [prosecuted] plaintiffs, who are parties in state court, so that they should be 'subject to the *Younger* considerations which may govern any one of them.'" CR/ER 55 at 11, quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975).

The district court never explains why the interests of the prosecuted and unprosecuted plaintiffs are so intertwined as to require *Younger* abstention over the claims of all. In any event, the district court's reliance on *Doran* is wholly misplaced: if anything, that case supports a result diametrically opposed to that of the court below.

In *Doran*, three corporations sued to enjoin the defendants from prosecuting them for violating a county ordinance against topless dancing. The district court denied a temporary restraining order, but one of the three corporations nevertheless resumed presenting topless dancing and was prosecuted for doing so. *Id.* at 925. The other two corporations did not immediately resume topless entertainment. *Id.* The district court later entered a preliminary injunction barring the county from enforcing the ordinance, and the county appealed.

The court of appeals held that since *Younger* abstention was unavailable against the claims of the unprosecuted plaintiffs, neither should it abstain from hearing the claims of the prosecuted plaintiff. *Id.* at 928.

The Supreme Court, however, upheld the preliminary injunction as to the two establishments that were not parties to state proceedings, but reversed as to the prosecuted establishment:

We do not agree with the Court of Appeals, therefore, that all three plaintiffs should automatically be thrown into the same hopper for *Younger* purposes, and should thereby each be entitled to injunctive relief. *We cannot accept that view, any more than we can accept petitioner's equally Procrustean view that because M & L would have been barred from injunctive relief had it been the sole plaintiff, Salem and Tim-Rob should likewise be barred not only from injunctive relief but from declaratory relief as well.*

Id. at 928 (emphasis added).

The Court opined that where the prosecuted and unprosecuted parties are related “in terms of ownership, control, and management” *Younger* abstention

might apply to both, but absent such a relationship, the federal courts may not abstain from hearing the claims of the unprosecuted plaintiffs:

While there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them, this is not such a case—while respondents are represented by common counsel, and have similar business activities and problems, they are apparently *unrelated in terms of ownership, control, and management*. We thus think that each of the respondents should be placed in the position required by our cases as if that respondent stood alone.

Id. at 928-29 (emphasis added).

The issue here, therefore, is whether the relationship between the six prosecuted plaintiffs and the nine taxpayer and organizational plaintiffs is akin to “ownership, control, and management,” in which case abstention would be proper as to all, or whether their relationship is analogous to having “similar business activities and problems,” in which case the district court erred in abstaining from hearing the claims of the unprosecuted plaintiffs.

The district court, of course, never characterized the relationship between the prosecuted and unprosecuted plaintiffs as one of common ownership, control, or management. Indeed, there is absolutely nothing in the complaint to warrant such a characterization.

Rather, the district court seemed to believe that if it were to declare the arrests and prosecutions of non-smuggler migrants unlawful, and a state court were to conclude the contrary, that conflict would impermissibly interfere with the state

proceedings. *See* CR/ER 55 at 11. Of course, an identical potential for interference was present in *Doran*, yet the Supreme Court disallowed *Younger* abstention.

The principal precedent the district court cites for extending *Younger* beyond anything contemplated by *Doran* is an out-of-circuit case, *Hindu Temple Soc’y of N. Am. v. Supreme Court*, 335 F. Supp. 2d 369 (E.D. N.Y. 2004). Yet even that case lends scant support to the court below.

In *Hindu Temple*, two factions of a religious society litigated before the state courts for three years, each seeking control of the society and its temple. *Id.* at 369-70. When their position in the state case began to erode, members of one faction filed a federal action against the state court. The federal plaintiffs included members of the temple’s board of trustees “as well as a group of Temple devotees who are not Trustees or parties to the state action.” *Id.* at 371. The federal plaintiffs asked the district court to enjoin the state court from proceeding further. *Id.* at 370.

The district court abstained. It held “that this is one of those limited circumstances where it must abstain on all claims, despite the presence of plaintiffs not parties to the state action.” *Id.* at 377. “The non-Trustee plaintiffs,” the court reasoned, “raise claims inextricably linked to the claims of the Trustee plaintiffs. They ... ask this Court to *intervene directly in the ongoing state proceedings*. Indeed, *the non-Trustee plaintiffs have standing to raise [federal] constitutional claims because of the state court rulings.*” *Id.* (emphasis added).

Hindu Temple is readily distinguished from the case at bar.³ The plaintiffs in *Hindu Temple* were all “devotees” of the same temple.⁴ Here, no two plaintiffs are associated with any common organization whatsoever. And, of course, no two plaintiffs before this Court derive standing from the rulings of a state court in a single, antecedent judicial proceeding. Instead, the unprosecuted plaintiffs challenge “a continuous stream” of future arrests and prosecutions of unnamed class members with whom they have share no membership, ownership, control, or management.

³ The audacity of the *Hindu Temple* plaintiffs make that case largely *sui generis*. At bottom, the decision serves as a reminder that “bad facts make bad law.” *Haig v. Agee*, 453 U.S. 280, 319 (1981).

⁴ Under less unusual facts, however, common membership in an organization has been held short of the level of entanglement *Doran* requires:

A rule that denied an organization’s ability to sue in federal court when any one of its members was involved in a state court or administrative proceeding would be far reaching. In order to establish ripeness and to meet the case or controversy requirement, plaintiff would need to establish that the state was enforcing the challenged regulation against its members. The only way to establish this is if the state has been citing or arresting individuals. Once individuals became enmeshed in state proceedings, however, the organization would lose its ability to bring suit in federal court. The organization would be left in the impossible situation of not having standing to sue in federal court until its members are cited, but then losing the ability to sue in federal court on *Younger* grounds once its members become involved in state court proceedings. This rule would effectively deny the organization a federal forum. The Supreme Court has held that a federal forum must be available for those threatened with violations of federally protected rights and not presently parties to state court proceedings.

Cornwell v. California Bd. of Barbering & Cosmetology, 962 F. Supp. 1260, 1270 n.5 (S.D. Cal. 1997).

Yet even were *Hindu Temple* to enlarge *Younger* as much as the district court concludes, this Court should decline to follow it: too many courts have too often held that “the [mere] pendency of an action in state court is no bar to proceedings concerning the same subject matter in the Federal court having jurisdiction.” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). “The presence of two parallel suits . . . does not run afoul of *Younger*,” *Schall v. Joyce*, 885 F.2d 101, 112 (3d Cir. 1989), even where there exists a “potential for conflict in the results of adjudications.” *Colorado River*, *supra*, 424 U.S. at 816.

In *Steffel v. Thompson*, *supra*, for example, two men distributing pamphlets were ordered to desist. One desisted; the other did not; he was arrested and prosecuted for criminal trespass. *Id.* at 455-56. The uncharged pamphleteer then filed a class action in federal court to have the statute declared unconstitutional. 415 U.S. at 458 & n.5.

The district court dismissed on standing grounds. The court of appeals ruled it should have instead abstained under *Younger* because the district court’s issuing declaratory relief against threatened prosecution of the uncharged plaintiff would “disrupt the state criminal justice system...” *Id.* at 456-57. The Supreme Court reversed:

In the instant case, principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff

would turn federalism on its head. When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)—as they are here—we have not required exhaustion of state judicial or administrative remedies... *But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution had been commenced.*

Id. at 472-73 (citations omitted; emphasis added).⁵

Similarly in *Wooley v. Maynard, supra*, the Court held that a federal court may not abstain under *Younger* from hearing the claims of a plaintiff whose co-plaintiff (and husband) had been prosecuted in state court for violating the state law both challenged as unconstitutional. The Court observed that abstaining from hearing the claims of both prosecuted and unprosecuted plaintiffs would insulate state laws from federal review entirely:

If the totality of appellants’ arguments were accepted, a § 1983 action could never be brought to enjoin state criminal prosecutions. According to appellants, *Younger* principles bar Mr. Maynard from seeking an injunction because he has already been subjected to prosecution. As to Mrs. Maynard, they argue, in effect, that the action is premature because no such prosecution has been instituted. Since the two spouses were similarly situated but for the fact that one has been prosecuted and one has not, we fail to see where appellants’ argument would ever leave room for federal intervention under § 1983.

430 U.S. at 712 n.9; accord *Benavidez v. Eu*, 34 F.3d 825, 832 (9th Cir. 1994)

(“[T]he presence of co-plaintiffs representing identical interests in state

⁵ The Supreme Court expressly rejected the defendants’ argument that the state courts should be allowed to decide the plaintiff’s constitutional claim in the course of his companion’s criminal case. *Id.* at 471 n19 (“The pending prosecution of petitioner’s handbilling companion does not affect petitioner’s action for declaratory relief.”)

proceedings does not extend *Younger* to parties not actually involved in those proceedings.”).

Here, the district court’s broad expansion of *Younger* creates precisely the dilemma *Wooley* condemns. Since plaintiffs include the entire universe of possible plaintiffs—both those prosecuted and those not—the district court would effectively deny a federal forum to *any* plaintiff who would challenge defendants’ arrests and prosecutions.

The foregoing has shown that a federal court’s disagreeing with a state court over the legality of defendants’ arrests and prosecutions does not warrant *Younger* abstention. The law is clearly to the contrary: (i) courts should be reluctant to expand *Younger* at all; (ii) *Younger* should not be applied to close off all federal review of state laws and practices; and (iii) prosecuted and unprosecuted co-plaintiffs who present a common federal challenge to state action are not so intertwined as to warrant *Younger* abstention against all. The district court erred in all four respects; this Court should reverse.

II DEFENDANTS THOMAS AND ARPAIO LACK AN IMPORTANT STATE INTEREST IN PROSECUTING NON-SMUGGLER MIGRANTS FOR CONSPIRACY TO TRANSPORT THEMSELVES.

The next requirement of *Younger* abstention is that defendants’ challenged actions must implicate important state interests. *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 431-32 (1982). “The importance of the [state] interest is measured by considering its significance broadly, rather than by

focusing on the state's interest in the resolution of an individual's case." *Baffert v. Cal. Horse Racing Bd.*, 332 F.3d 613, 618 (9th Cir. 2003).

Finding this requirement satisfied, the district court identified one—and only one—state interest undergirding defendants' arrests and prosecutions: "There can be little question," the court opined, "that a state has a vital interest in the enforcement of its criminal laws." CR/ER 43 at 6; CR/ER 55 at 20, *citing Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). Here, the court does not, correctly speaking, articulate a substantive state interest at all, but rather a *means* by which government may opt to further its substantive interests.

In *Pennzoil Co.* the Supreme Court did write that a state's interest in enforcing its criminal laws is important. *Id.* at 13. But underlying the criminal statute at issue in *Pennzoil Co.* was the state's substantive interest in "compel[ling] compliance with the judgments of its courts." *Id.* at 13, *citing Juidice v. Vail*, 430 U.S. 327, 334 (1977). Thus, in *Pennzoil Co.* the *purpose* of the state law—securing compliance with the judgments of its courts—was an important and legitimate state interest.

Elsewhere, the Court had made clear that the *means* by which a state pursues its substantive interests—whether by enforcement of criminal law, quasi-criminal proceedings, or civil or administrative action—is not the "vital consideration" for purposes of *Younger* abstention. *See Juidice, supra*, 430 U.S. at 334 ("[T]he 'more vital consideration' behind the *Younger* doctrine of

nonintervention lay not in the fact that the state criminal process was involved but rather in ... a proper respect for state functions...”).

Of course, in most cases enforcing state laws does indeed further important and legitimate substantive interests. *E.g.*, *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1094 (9th Cir. Cal. 2008) (regulating local elections); *Baffert v. Cal. Horse Racing Bd.*, *supra*, 332 F.3d at 618 (“[p]reserving the integrity of [horse] racing”); *World Famous Drinking Emporium, Inc. v. Tempe*, 820 F.2d 1079, 1082-83 (9th Cir. 1987) (abating public nuisance); *Delta Dental Plan v. Mendoza*, 139 F.3d 1289, 1295 (9th Cir. 1998) (regulating insurance industry); *Columbia Basin Apt. Ass’n v. City of Pasco*, 268 F.3d 791, 801 (9th Cir. 2001) (regulating land-use and housing conditions); *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998) (land-use ordinance and zoning); *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359, 361 (9th Cir. 1993), *overruled on other grounds*, *Green v. City of Tucson*, *supra*, 255 F.3d 1086 (rent control); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998) (land use planning).

But conflating means with substantive interests would permit state actors to elevate *any* parochial interest to an importance meriting *Younger* abstention merely by pursuing it through the criminal justice system. That is not an approach this Court has ever sanctioned.

In *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), *cert. denied*, 516 U.S. 912 (1995), a county sheriff prosecuted four Indians for alleged violations of the Indian Gaming Regulatory Act, which applied state gambling laws to Indian reservations. The tribe brought an action in federal court for declaratory and injunctive relief, which was granted.

The sheriff argued on appeal that the district court should have abstained under *Younger*. This Court disagreed, finding that the state failed to demonstrate an important state interest. *Id.* at 541 (“The State fails to meet the second [*Younger*] requirement. . . . While the State may well have an interest in seeing that the federal government enforces the State’s laws in Indian country, it can have no legitimate interest in intruding on the federal government’s exclusive jurisdiction to prosecute.”); *accord Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428, 431-32 (9th Cir. 1994) (“Although there is no question that Montana has a legitimate interest in the enforcement of its liquor laws through criminal prosecution, the primary issue here is whether the state has jurisdiction to prosecute Indians who violate Montana liquor law on an Indian reservation.”).

The question for *Younger* abstention, then, is not whether defendants have an abstract interest in enforcing state law, but whether such enforcement serves an important and legitimate underlying state interest.

Here, the complaint alleges—and on a motion to dismiss, the district court was required to accept—that Arizona’s interest in enforcing § 13-2319 is to

penalize professional alien smugglers, not their human cargo. FAC at ¶¶ 38-39, CR/ER 45 at 17-19. Defendants' challenged policy does not, therefore, further Arizona's declared interest, but rather the parochial preferences of one county attorney and one county sheriff. FAC at ¶ 40, CR/ER 45 at 19 (Maricopa county alone among 15 Arizona counties to arrest and prosecute non-smuggler migrants for conspiracy to transport themselves).

The district court not only failed to credit the allegations of the complaint, it failed to identify *any* substantive state interest underlying defendants' arresting and prosecuting non-smuggler migrants. Indeed, as will be seen next, defendants have none.

III *YOUNGER* ABSTENTION IS IMPROPER WHERE DEFENDANTS' ARRESTING AND PROSECUTING NON-SMUGGLER MIGRANTS IS PREEMPTED BY FEDERAL LAW.

"No significant state interest is served where the state law is preempted by federal law and that preemption is 'readily apparent.'" *Gartrell Const., Inc. v Aubry*, 940 F.2d 437, 441 (1991). "In such a case, the state tribunal is acting beyond its authority and *Younger* abstention is not required." *Id.*

Whether defendants' actions are preempted is determined by applying the tri-partite test set out in *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976); if a statute fails any one of the three tests, it is preempted.

The court below held it readily apparent that federal law preempts defendants' policy to arrest and prosecute non-smuggler migrants under none of

the *De Canas* tests. As will be seen, crediting the allegations of the complaint, defendants' actions are *prima facie* preempted under all three.

A Defendants' arresting and prosecuting non-smuggler migrants is an attempt to control unauthorized immigration.

Under the first *De Canas* test, a court asks whether a state statute is a "regulation of immigration." Since the "power to regulate immigration is unquestionably exclusively a federal power," 424 U.S. at 354, a state official's regulating immigration is "constitutionally proscribed." *Id.* at 356; *see also Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting) ("A state has no power to prevent unlawful immigration, and no power to deport illegal aliens, those powers are reserved exclusively to Congress and the Executive").⁶

Of course, merely because a state enactment touches incidentally upon immigration or immigrants does not make it unconstitutional. *De Canas*, 424 U.S. at 355.⁷ States may, for example, penalize employers who knowingly hire

⁶ Whether a non-citizen is authorized to enter or remain in the United States is determined purely by federal law. *See* 8 U.S.C. §§ 1101, *et seq.*

⁷ For example, there is no constitutional barrier to states' differentiating based on immigration status when voting rights and the holding of political offices are at issue. *See e.g., Cabell v. Chavez-Salido*, 454 U.S. 432, 436-41 (1982).

This Court has also held that local police enforcement of federal criminal immigration statutes is within "[t]he general rule is that local police are not precluded from enforcing federal statutes." *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled in part on other grounds, Hodgers-Durgin v. De La Vina*, 199 F.3d 1037(9th Cir. 1999).

undocumented workers in the course of exercising “their police powers to regulate the employment relationship to protect workers within the State.” *Id.* at 356.

Here, however, plaintiffs explicitly allege that defendants are seeking to control unauthorized immigration and have no true state interest in criminalizing non-smuggler migrants. FAC at ¶ 44, CR/ER 45 at 21 (“The challenged ... Policy is an attempt by defendants to control undocumented migration, a purely federal function, by arresting and punishing suspected undocumented migrants who enter, pass through, or remain in Maricopa County.”).

The district court discounted these allegations, opining without citation to any pertinent authority that defendants’ subjective intent in arresting and prosecution non-smuggler migrants is immaterial. CR/ER 43 at 10-11. In determining whether a state enactment is preempted, however, the enactment’s intent is indeed pertinent. *See, e.g., Tillison v. City of San Diego*, 406 F.3d 1126, 1129 (9th Cir. 2005) (“The focus of ... preemption must be on the legislative intent and whether the legislature was acting out of [permissible] concerns.”).

On a motion to dismiss on *Younger* abstention grounds, then, it was error for the district court to discount plaintiffs’ allegations. *Cf. Aluminum Co. of America v. Utilities Comm’n of North Carolina*, 713 F.2d 1024, 1029-30 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984) (*Burford* abstention in preemption claim inappropriate where conflict between challenged state action and federal law “readily discernible *from the pleadings*” (emphasis added)); *Int’l Brotherhood of*

Electrical Workers v. Public Service Comm'n of Nevada, 614 F.2d 206, 212 n.1 (9th Cir. 1980) (“[A] court cannot abstain under *Burford* in a preemption case without implicitly ruling on the merits of the action.” (emphasis added)).

Even aside from defendants’ declared intent, it can hardly be doubted, on the one hand, that arresting and prosecuting unauthorized entrants for conspiring to transport themselves transparently seeks to deter migrants from entering or traveling through Maricopa County. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984) (state law damage remedies inherently regulatory). On the other, neither the district court nor defendants identified *any* reason for arresting and prosecuting non-smuggler migrants *other* than regulating immigration.

In sum, even were it proper for the district court to resolve factual conflicts on a motion to dismiss, plaintiffs’ allegations of impermissible immigration regulation are wholly uncontested. If plaintiffs’ characterization of the purpose and effect of defendants’ policy are to be rejected, defendants must surely articulate *some* legitimate state interest underlying their policy. They have never done so.

B Defendants’ arresting and prosecuting non-smuggler migrants actually conflicts with federal law.

Under the third *De Canas* test, a state law is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *De Canas*, 424 U.S. at 363.

Defendants’ arresting and prosecuting unauthorized entrants for conspiring to transport themselves is preempted because it actually conflicts with federal law and policy by criminalizing individuals who, despite having entered the United States without authorization,⁸ nevertheless have a right under federal law to be and remain in the United States.

Federal law provides numerous and often complex avenues by which an unauthorized entrant may remain lawfully in the United States. *See generally Plyler v. Doe, supra*, 427 U.S. at 226 (noting inherent difficulty of knowing whether school children whose presence here may conflict with federal law will win permission to reside in the United States indefinitely).

Persons fearing persecution in their home countries, for example, are entitled to apply for political asylum notwithstanding their having entered without inspection. 8 U.S.C. § 1158. While their applications for asylum are being adjudicated, asylum applicants are generally permitted to remain in the United States. 8 C.F.R. § 208.5(a) (2009) (“Except as provided in paragraph (c) of this

⁸ The Immigration and Nationality Act (INA) prescribes numerous classes of aliens subject to removal: *inter alia*, those who overstay nonimmigrant visas, commit a crime, fail to comply with immigration-related reporting requirements, and enter without inspection. *See* 8 U.S.C. § 1227.

Defendants clumsily single out one of the classes of removable aliens—those who have entered without inspection—for arrest and prosecution. FAC at ¶¶ 26 and 31; CR/ER at 12-13, 15.

section, such alien shall not be excluded, deported, or removed before a decision is rendered on his or her asylum application.”).

Pursuant to 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p), certain crime victims and their close family members may qualify for lawful status as “U” nonimmigrants despite an initial unlawful entry. Three years after being issued U visas, such crime victims and their close family members are eligible for lawful permanent residence.

Under 8 U.S.C. §§ 1101(a)(15)(T), 1184(o), 1255(l) and 22 U.S.C. § 7102 survivors of human trafficking and their close family members are entitled to lawful “T” nonimmigrant status, again, despite an initial unauthorized entry. Upon conclusion of the investigation or prosecution of the crimes against T nonimmigrants, or three years after they are issued T nonimmigrant status, trafficking survivors are eligible for lawful permanent residence. 8 U.S.C. § 1255(l).

8 U.S.C. §§ 1101(a)(27)(J) and 1255, provide abused, abandoned or neglected immigrant minors who enter without authorization a path to lawful permanent residence. Pursuant to § 1101(a)(27)(J), an abused, abandoned, or neglected minor may petition to be classified as a “special immigrant juvenile.” If such classification is granted, the minor may then apply under § 1255 to adjust his or her status to that of a lawful permanent resident.

Though by no means exhaustive, the above examples serve to illustrate that defendants' arresting and prosecuting unauthorized entrants actually conflicts with federal law.⁹ Indeed, by securing convictions against otherwise eligible crime victims, trafficking survivors, abused youth, and those similarly situated, defendants not only criminalize persons whom federal law may in fact welcome, they also cloud such immigrants' eligibility for the very immigration benefits Congress has said they deserve. *See* 8 U.S.C. § 1182(a)(2)(A) (aliens convicted of crimes involving moral turpitude inadmissible to the United States).¹⁰

In sum, defendants' arresting and prosecuting non-smuggler migrants because they may have entered unlawfully actually conflicts with federal law. The district court's contrary holding should be reversed.

⁹ Nor is this conflict merely hypothetical. In September 2006, defendants arrested and imprisoned plaintiff Rosa Diaz upon charges that she had conspired to transport herself. FAC ¶¶ 25-29, CR/ER 45 at 11-14. Ms. Diaz thereafter remained incarcerated at the Maricopa County Jail for some three months. FAC ¶ 9, CR/ER 45 at 7.

In March 2007, an immigration judge granted her lawful permanent residence pursuant to 8 U.S.C. §§ 1101(a)(27)(J) and 1255 as an abused, abandoned or neglected minor. FAC ¶ 29, CR/ER 45 at 14.

¹⁰ Defendants' arresting and prosecuting non-smuggler migrants has the potential to impact on foreign relations and may "embroil us in disastrous quarrels with other nations." *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (California law to regulate immigration unconstitutionally impacted on international relations).

C Defendants’ arresting and prosecuting non-smuggler migrants intrudes into a field federal law fully occupies: transportation of unauthorized entrants.

Under the second *De Canas* test, a state statute is preempted if the “clear and manifest purpose of Congress” is to effect a “complete ouster of state power— including state power to promulgate laws not in conflict with federal laws,” with respect to the subject matter which the statute attempts to regulate. *De Canas*, *supra*, 424 U.S. at 357. An intent to preclude state action may be inferred “where the system of federal regulation is so pervasive that no opportunity for state activity remains.” *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983).

The task in evaluating a field-preemption claim is “to determine whether state regulation is consistent with the structure and purpose” of the federal statutory scheme “as a whole.” *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 98 (1992) (plurality opinion of O’Connor, J.). Courts look to “the provisions of the whole law, and to its object and policy.” *Id.*, quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987).

In *Hines v. Davidowitz*, 312 U.S. 52 (1941), the Supreme Court identified the following three factors as important in determining whether federal enactments preclude state laws on the same subject: “[i] The nature of the power exerted by Congress, [ii] the object sought to be attained, and [iii] the character of the obligations imposed by the law ...” *Id.* at 70.

The federal government, in the exercise of its traditional and exclusive power over immigration, has long regulated transporting unauthorized aliens. 8 U.S.C. § 1324(a)(1)(A)(ii) and (v) make it unlawful to knowingly “transport[], or move[] or attempt[] to transport or move” undocumented immigrants in furtherance of their violation of law, or to conspire to do the same.

In contrast, defendants’ foray into such regulation is but a few years old and lacks any discernable link to any traditional state concern. *Compare Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985) (state blood plasma enactment supplementing federal standards not preempted because “regulation of health and safety matters is primarily, and historically, a matter of local concern.”), and *Hines v. Davidowitz, supra*, 312 U.S. at 68-70 (state law duplicative of federal alien registration requirement preempted because “the state’s power here is ... is in an entirely different category from ... pure food laws ...”).

In *Hines*, a state enactment required aliens to register with a state agency. 312 U.S. at 56. The law further required aliens to present their state registration card upon demand by police and when obtaining a driver’s license or buying an automobile. *Id.* Violators were subject to fines and imprisonment. *Id.* at 60.

The federal government subsequently enacted an alien registration statute, which did not require aliens to carry registration cards or to exhibit such cards to police or others. *Id.* 60-61. Violators of the federal law act were also subject to

finer and imprisonment. *Id.* at 61. The Supreme Court held the state enactment preempted:

[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or *complement the federal law, or enforce additional auxiliary regulations.*

Id. at 66 (emphasis added); *see also Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956) (federal criminal law on sedition occupies field so as to preempt parallel state criminal statute).

In *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997), the court struck down a California statute that denied public benefits to unauthorized entrants. The court held that the federal Personal Responsibility and Work Opportunity Reconciliation Act (“PRA”), preempted the state statute because “[t]he PRA creates a comprehensive statutory scheme for determining aliens’ eligibility for federal, state and local benefits or services,” *id.*, and “states have no power to effectuate a scheme parallel to that specified in the PRA, even if the parallel scheme does not conflict with the PRA.” *Id.* at 1253-55; *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (state law is preempted when “the object sought to be obtained by the federal law and the character of obligations imposed by [the state law] reveal the same purpose”).

In *Lozano v. Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), a city enacted ordinances regulating immigrant employment. *Id.* at 484-85. The court struck down the ordinances, holding that they were expressly *and* impliedly preempted. *Id.* at 554-55. The court recognized that the federal government had already enacted laws regulating immigrant employment and that the city’s ordinances were duplicative of these federal laws. *Id.* at 523-24. The court noted the federal government’s “especially strong interest in immigration matters.” *Id.* at 522.

Like the state laws in *Hines* and *League of United Latin American Citizens* and the city ordinance in *Lozano*, plaintiffs allege that defendants are here attempting to supplement federal law and, in so doing, are intruding into an area the federal government has traditionally regulated. On a motion to dismiss, the district court should have credited the uncontested allegations of the complaint and decline to abstain under *Younger*. This Court should reverse.

IV PLAINTIFFS HAVE STANDING TO CHALLENGE DEFENDANTS’ ARRESTING AND PROSECUTING NON-SMUGGLER MIGRANTS.

Although the district court declined to reach the issue, CR/ER 43 at 16,¹¹ this Court has “an independent obligation to consider mootness *sua sponte*.” *In re*

¹¹ The district court did note, however, that this “case could not be dismissed in its entirety solely on the basis of standing ... [because] the municipal taxpayer plaintiffs have sufficiently pled the injury of improper expenditures of municipal funds.” CR/ER 43 at 16 n.3.

Burrell, 415 F.3d 994, 997 (9th Cir. 2005); *Pritikin v. Dep't of Energy*, 254 F.3d 791, 796 (9th Cir. 2001) (same; standing).

Plaintiffs' standing is determined by the allegations of the complaint. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (“For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint.”).

A The individual plaintiffs may continue to challenge the continuous stream of arrests and prosecutions of non-smuggler migrants.

The six individual plaintiffs arrested and prosecuted under defendants' policy and practice retain standing because they all had live claims at the time this action commenced and defendants continue to arrest and prosecute non-smuggler migrants pursuant to written policy.

There is no question that defendants' arresting and prosecuting non-smuggler migrants is pursuant to written policy. Maricopa County Attorney Opinion 2005-002, Sept. 29, 2005; FAC at ¶ 36, CR/ER 45 at 16-17. Accordingly, there exists a threat of recurrent injury to the six prosecuted plaintiffs sufficient to preserve standing:

In order to assert claims on behalf of a class, a named plaintiff must have personally sustained ... “some direct injury as a result of the ... official conduct.” The harm suffered by a plaintiff must constitute “actual injury.” Moreover, where, as here, a plaintiff seeks prospective injunctive relief, he must demonstrate “that he is realistically threatened by a repetition of [the violation].”

There are at least two ways in which to demonstrate that such injury is likely to recur. First, a plaintiff may show that the defendant had, at the time of the

injury, a written policy, and that the injury “stems from” that policy. In other words, *where the harm alleged is directly traceable to a written policy, there is an implicit likelihood of its repetition in the immediate future.*

Armstrong v. Davis, 275 F.3d 849, 860-61 (9th Cir. 2001) (emphasis supplied; citations and quotations omitted); *accord Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1118 (9th Cir. 2003) (“The continued and uncontested existence of the policy that gave rise to [plaintiffs’] legal challenge forecloses [any] mootness argument.”).

The six prosecuted plaintiffs also have standing to represent the claims of the proposed plaintiff class.

In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court held, “There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to ‘relate back’ to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.” *Id.* at 403 n.11.

This principle has often been applied where the claim of a class representative becomes moot after the filing of a motion for class certification, but before resolution of that motion:

[S]everal courts have considered the effect of a defendant governmental agency’s voluntary performance of a specific action demanded in the lawsuit. In each of these cases the court has held that the defendant could not

prevent a decision on the plaintiff's motion for [class] certification by rendering the individual plaintiff's demand for injunctive relief moot before the court had reasonably been able to consider the motion ... [R]efusal to certify the class "would mean that the (agency) could avoid judicial scrutiny of its procedures by the simple expedient of granting hearings to plaintiffs who seek, but have not yet obtained, class certification." ...

We conclude that a suit brought as a class action should not be dismissed for [lack of standing] upon tender to the named plaintiffs of their personal claims, at least when ... there is pending before the district court a timely filed ... motion for class certification.

Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1051 (5th Cir. 1981)

(citations and quotations omitted).¹²

Plaintiffs moved for class certification on December 13, 2006. CR 20.¹³ At that time, the six prosecuted plaintiffs continued to face charges. Thus, they all have standing to continue to represent the proposed class.

B The organizational plaintiffs have standing because defendants' policy and practice adversely affect their work and the attainment of their organizational goals.

An organization suffers actual injury sufficient to confer standing when a policy impairs its ability to provide services. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding standing for organization that alleged its organizational purpose had been frustrated and that it had devoted significant

¹² *Accord Lusardi v. Xerox Corp.*, 975 F.2d 964, 975 (3d Cir. 1992); *Reed v. Heckler*, 756 F.2d 779, 786 (10th Cir. 1985); *DeBrown v. Trainor*, 598 F.2d 1069, 1072 (7th Cir. 1979); *White v. Mathews*, 559 F.2d 852, 857 (2d Cir. 1977); *Basel v. Knebel*, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977).

¹³ The district court declined to certify a class pending resolution of defendants' motion to dismiss. CR/ER 43 at 17.

resources to counteract the actions of the defendant); *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1106 (9th Cir. 2004) (same; organization had standing in its own right to enforce violations of the Fair Housing Amendments Act.)

In this case, the organizational plaintiffs allege that defendants' arresting and prosecuting non-smuggler migrants frustrates their mission and diverts their limited resources to defending migrants defendants Thomas and Arpaio unlawfully arrest and prosecute. FAC at ¶¶ 5-8, CR/ER at 4-7. To the extent the individuals served by the organizational plaintiffs are free from such arrest prosecution, the plaintiff organizations are able to devote greater time and effort to assisting others. Such an injury is sufficient to confer representative standing. *See Or. Advocacy Ctr. v. Mink, supra*, 322 F.3d at 1112 (affirming standing of public interest advocacy center because it devoted resources to helping aggrieved clients such that the needs of other constituents went unmet).

C Taxpayer plaintiffs have standing to challenge the diversion of county taxes to fund defendants' arresting and prosecuting non-smuggler migrants.

Although payment of *federal* taxes confers no standing to challenge the diversion of federal tax receipts, *Doremus v. Bd. of Educ. of Boerough of Hawthorne*, 342 U.S. 429, 433 (1952), local taxpayers do have standing to challenge the misuse of *county or municipal* taxes. *Cammack v. Waihee*, 932 F.2d 765, 770 (9th Cir. 1991); *see generally Dist. of Columbia Common Cause v.*

District of Columbia, 858 F.2d 1, 3-8 (D.C. Cir. 1988) (analyzing taxpayer standing and collecting cases).

Here, the taxpayer plaintiffs challenge defendants' misuse of county tax receipts. FAC ¶¶ 11-15, CR/ER at 8-9. Property taxes paid by Maricopa County residents are paid into the county treasury. *See* Ariz. Rev. Stat. § 11-492. Maricopa County has unquestionably expended taxpayer funds to arrest, jail and prosecute over 1,000 non-smuggler migrants.

In sum, each of the three groups of plaintiffs herein retains standing to challenge defendants' arresting and prosecuting non-smuggler migrants.

CONCLUSION

In applying the *Younger* test, we adhere to the basic principle that abstention is an "extraordinary and narrow exception" to a district court's role as adjudicator of a ripe controversy. Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction granted them by Congress. In a potential abstention case, the Supreme Court says we are "not to find some substantial reason for the exercise of federal jurisdiction" but rather to determine if "exceptional" circumstances exist to justify surrender of jurisdiction.

Fort Belknap Indian Community v. Mazurek, 43 F.3d 428, 431 (9th Cir. 1994)

(citations omitted).

The court below dramatically and improperly expanded *Younger* abstention in holding that the six prosecuted plaintiffs are barred from seeking purely prospective relief against the continuous stream of arrests and prosecutions of non-smuggler migrants.

The trial court again distended *Younger* in abstaining from hearing the claims of the taxpayer and organizational plaintiffs, who have never been prosecuted for conspiring to transport themselves and who are not related to the prosecuted plaintiffs through common ownership, management, or control.

The district court further erred in failing to identify any substantive state interest underlying the idiosyncratic policy of one county prosecutor and one county sheriff targeting non-smuggler migrants for arrest and prosecution despite the state legislature's declared intent to target alien smugglers only.

Finally, the district court erred in ruling against the merits of plaintiffs' preemption challenge to defendants' arrests and prosecutions on a motion to abstain.

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

CENTER FOR HUMAN RIGHTS
& CONSTITUTIONAL LAW
Carlos R. Holguín

Dated: April 13, 2009.

STATEMENT OF RELATED CASES

Appellants know of no related cases, as defined by Circuit Rule 28-2.6, pending before this Court.

* * * * *

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 09-15281

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, Appellants' principal brief is proportionately spaced, has a typeface of 14 point and contains 10,956 words, excluding the parts of the brief exempted by Fed.R.App.Proc. 37(a)(7)(B)(iii).

April 13, 2009.

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CERTIFICATE OF SERVICE

I certify that on this date I served the foregoing by first class mail, addressed

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