IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

EDUARDO DIAZ-BERNAL, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 3:09-cv-1734-SRU
	§	
	§	
JULIE MYERS, *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS IN PART

Pursuant to Local Rule 7(a) and FED. R. CIV. P. 12(b)(1), Defendant United States hereby moves the Court to dismiss Plaintiffs' Tenth Amendment claim and request for a declaratory judgment against the United States. Plaintiffs lack standing to assert a claim under the Tenth Amendment, and their request for declaratory relief against the United States fails because the only relief available under the Federal Tort Claims Act ("FTCA") is money damages. Accordingly, these claims should be dismissed for lack of subject matter jurisdiction.

FACTS AND BACKGROUND

This action arises from efforts by Immigration and Customs Enforcement ("ICE") to remove illegal aliens from the United States – in particular, aliens who have committed crimes and those who have disregarded orders of removal. Compl. at ¶ 241, 274. Under

national enforcement initiatives developed by ICE headquarters, ICE's Hartford regional office planned and executed an operation to apprehend targeted aliens by obtaining consent to enter residences where agents believed the aliens would be found. Compl. at ¶ 241. The operation at issue occurred on June 6, 2007. On that date, ICE agents arrested and detained twenty-nine suspected illegal immigrants in Fair Haven, which is a suburb of New Haven. Compl. at ¶¶ 1-4. Plaintiffs were among those arrested or detained by ICE. *Id*. Under the Immigration and Nationality Act ("INA"), ICE agents may arrest without a warrant any person whom they have reason to believe is in the country illegally, whether such person is a target of an enforcement operation or someone they encounter while searching for the target. 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.5(c)(1).

Plaintiffs contend that ICE agents entered their residences without consent or other legal justification, and that their arrest, detention, and treatment by ICE was discriminatory and unconstitutional. Compl. at ¶ 6. In addition, Plaintiffs assert that the June 6, 2007 operation was retaliatory because it occurred just days after the Board of Alderman voted to approve funds for the Elm City Resident Card Program, which provides municipal identification cards to all New Haven residents regardless of their immigration status. Compl. at ¶ 181. Specifically, Plaintiffs allege violations of the Fourth Amendment, Equal Protection Clause and Due Process Guarantee of the Fifth Amendment, and Tenth Amendment, as well as false arrest, false imprisonment, privacy, abuse of process, civil conspiracy, and negligent hiring under the FTCA. Compl. at ¶¶ 309-97. Most pertinent

here, Plaintiffs allege that the United States violated the Tenth Amendment by interfering with the New Haven's ability to institute a municipal identification card program, which they contend is a matter of local sovereignty. Compl. at ¶ 357-64. Plaintiffs also seek, *inter alia*, a declaratory judgment "that the actions of . . . the United States, which resulted in the home-entry, detention, arrest, and post-arrest processing of the Plaintiffs, violated the United States Constitution and Connecticut common law." Compl. at p. 64.

ARGUMENT

I. DISMISSAL UNDER RULE 12(b)(1) IS APPROPRIATE WHEN THE COURT LACKS SUBJECT MATTER JURISDICTION.

It is a fundamental legal principle that federal courts are courts of limited jurisdiction. A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears. *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 551 (2005); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Dismissal is appropriate under Rule 12(b)(1) when the district court lacks subject matter jurisdiction over the claim. *See* Fed. R. Civ. P. 12(b)(1). Federal subject matter jurisdiction must exist at the time the action is commenced. *Durant, Nichols, Houston, Hodgson & Cortese-Costa, P.C. v. Dupont,* 565 F.3d 56, 64-65 (2d Cir. 2009). "A case is properly dismissed . . . under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Luckett v. Bure*, 290 F.3d 493, 496 (2d Cir. 2002) *citing Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

Plaintiffs bear the burden of establishing, by a preponderance of the evidence, that the Court has subject matter jurisdiction over their claims. *See Makarova*, 201 F.3d at 113

citing Malik v. Meissner, 82 F.3d 560, 562 (2d Cir. 1996). In considering a motion to dismiss for lack of subject matter jurisdiction, the Court may consider evidence outside of the pleadings without converting the motion to one for summary judgment. *Luckett*, 290 F.3d at 496-97; *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1011 (2d Cir. 1986). No presumptive truthfulness attaches to Plaintiffs' allegations, and the existence of disputed material facts will not preclude the Court from evaluating for itself the merits of jurisdictional claims. *Robinson v. Government of Malaysia*, 269 F.3d 133, 140 (2d Cir. 2001).

Standing tests whether the particular litigant is the proper party to raise the issues involved. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). Standing is an "essential and unchanging part" of Article III's case or controversy requirement and a key factor in dividing the power of the government between the courts and the two political branches. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). If a plaintiff does not have standing, the case lies outside the authority given to the federal courts by Article III and must be dismissed. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The Court "is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990). If a litigant "lacks standing" to assert a claim, then the Court "lack[s] subject matter jurisdiction to entertain a request for relief." *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004) *citing Whitmore*, 495 U.S. at 154-55.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW PLAINTIFFS' TENTH AMENDMENT CLAIM BECAUSE PRIVATE PARTIES LACK STANDING TO ASSERT THAT THE FEDERAL GOVERNMENT IS ENCROACHING ON STATE SOVEREIGNTY.

Plaintiffs' Tenth Amendment claim should be dismissed for lack of standing. The Tenth Amendment provides, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Reasoning that ICE's June 6, 2007 operation interfered with the New Haven's ability to institute a municipal identification card program, Plaintiffs insist that the United States unacceptably intruded on state sovereignty. Compl. at ¶¶ 357-363.

Plaintiffs cannot assert a Tenth Amendment violation because they are private parties. The Second Circuit has concluded that private parties lack standing to assert that the federal government is encroaching on state sovereignty in violation of the Tenth Amendment absent the involvement of a state or its instrumentalities. *Brooklyn Legal Servs. Corp. B. v. Legal Servs. Corp*., 462 F.3d 219, 234-36 (2d Cir. 2006). A majority of circuit courts of appeal have held the same. *See e.g., United States v. Shanandoah,* --- F.3d ----, 2010 WL 431897, at *8 (3d Cir. Feb. 9, 2010) (private parties lack standing to bring claims under the Tenth Amendment); *United States v. Hacker*, 565 F.3d 522, 526 (8th Cir. 2009) (same); *Oregon v. Legal Servs. Corp*., 552 F.3d 965, 972 (9th Cir. 2009) (same); *Medeiros v. Vincent*, 431 F.3d 25, 33-36 (1st Cir. 2005) (same); *United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004) (same); *cf. United States v. Guzman*, 591 F.3d 83, 95 (2d Cir. 2010) (same). These

Courts have concluded that "rights under the Tenth Amendment are properly raised by the states and their officers, and by them alone." *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 148 (D.D.C. 2002).

In *Brooklyn Legal Servs*, the Second Circuit affirmed that the Supreme Court's holding on standing in *Tenn. Elec. Power Co. v. Tenn. Valley Auth*., 306 U.S. 118 (1939) is still good law. *Brooklyn Legal Servs*, 462 F.3d at 234. In *Tenn Elec. Power Co.*, the Supreme Court concluded that state representation is a prerequisite for a federal court to exercise jurisdiction over a Tenth Amendment challenge. *Tenn Elec. Power Co.*, 306 U.S. at 144. In that case, state-chartered utility companies argued that the sale of electric power by a federally chartered corporation violated the Tenth Amendment because the federal sales lowered electricity prices. *Id.* at 143. The federal power sales forced the state-chartered companies to lower their prices, and the companies argued that such a scheme was an impermissible federal regulation of a local matter. *Id*. In rejecting the utility companies' argument, the Supreme Court stated:

> The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any questions under the [Tenth] [A]mendment.

Id. at 144. This is consistent with the requirement of prudential standing, which requires that a plaintiff "generally must assert his own legal rights and interests, and cannot rest his

claim to relief on the legal rights or interests of third parties." *Heckler*, 565 F.3d at 527, *citing Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

In this case, the requisite representation by the state or their officers is notably absent. Plaintiffs do not assert the "involvement of a state or its instrumentalities." Compl. at ¶¶ 357-364; *Brooklyn Legal Servs*, 462 F.3d at 234. Indeed, no Plaintiff in this action represents the state. *Id*. While Plaintiffs contend that New Haven Mayor John DeStefano "forcibly objected to the infringement by Defendant ICE officers . . . upon city policies," the city is not a party to this action. Compl. at ¶¶ 362. Moreover, Plaintiffs have brought suit against ICE officials in their personal capacity only. Compl. at ¶¶ 32-52. Plaintiffs have not alleged interference by federal government officials. Rather, they merely allege interference by certain individuals in their private capacity.[1] *Id*. For these reasons, Plaintiffs lack standing to assert a claim under the Tenth Amendment.[2]

III. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW PLAINTIFFS' DECLARATORY JUDGMENT CLAIM AGAINST THE UNITED STATES BECAUSE THE FTCA ONLY ALLOWS FOR MONEY DAMAGES.

Plaintiffs' request for declaratory relief should be dismissed as to the United States because the only relief available in a FTCA action is money damages. The FTCA contains a

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[1] Plaintiffs do not allege that ICE's June 6, 2007 operation had a direct or palpable impact on the Elm City Resident Card program. Indeed, the program is alive and well. *See* Office of New Haven Residents Elm City Resident Card, http://www.cityofnewhaven.com/Government/NewHavenResidents.asp (last visited Feb. 25, 2010).

[2] While undersigned counsel only represent the United States, Plaintiffs' Tenth Amendment claim should be dismissed as to all Defendants because the same reasoning applies. Since they are private parties, Plaintiffs lack standing to assert a Tenth Amendment violation. *Brooklyn Legal Servs*, 462 F.3d at 234.

general waiver of sovereign immunity. *See* 28 U.S.C. §§ 1364(b), 2671-2680. In particular, section 1364(b) directs that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act of omission of any employee of the Government. . . . ." However, the only relief provided for in the Act is "money damages." *Id*. This precept is well-settled. *See Birnbaum v. United States*, 588 F.2d 319, 335 (2d Cir. 1978) (only money damages available under FTCA); *Steel, Inc. v. United* States, 970 F.2d 648, 651 (9th Cir. 1992) (same); *Talbert v. United States*, 932 F.2d 1064, 1065-66 (4th Cir. 1991) (same); *Frankel v. Heym*, 466 F.2d 1226, 1228 (3d Cir. 1972) (same). Therefore, to the extent that Plaintiffs are seeking declaratory relief against the United States, the Court lacks jurisdiction under the FTCA to accord it. While Plaintiffs may argue their request for declaratory relief is merely a device to predicate damages in this case, this Court cannot make such a statement, nor would such a pronouncement be required. The Court's determination on the merits of Plaintiffs' FTCA claim is *ipso facto* a declaration of its judgment.[3]

[3] This motion tolls the United States' time to file an answer in this case. FED. R. CIV. P. 12(a)(4) provides that the service of a motion pursuant to Rule 12 suspends the movant's time to file a responsive pleading until 10 days following the disposition of the motion. Interpreting Rule 12(a)(4), several district courts in the Second Circuit have held that "filing a partial motion to dismiss will suspend the time to answer those claims or counterclaims that are not subject to the motion." *Gortat v. Capala Bros. Inc.*, 275 F.R.D. 353, 366 (E.D.N.Y. 2009) *citing Finnegan v. Univ. of Rochester Med. Ctr.*, 180 F.R.D. 247, 249-50 (W.D.N.Y. 1998) (collecting cases); *see also Brown & Sons v. Marine Midland Bank*, No. 96-2549, 1997 WL 97837, at *6-7 (S.D.N.Y. Mar. 6, 1997) *citing* Wright & Miller, *Federal Practice and Procedure* § 1346 (stating the view that "a partial Rule 12(b) motion expands the time for answering the entire pleading . . . .").

CONCLUSION

WHEREFORE, Defendants respectfully request that the Court dismiss this action pursuant to FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction.

Dated March 1, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2010, I electronically filed the foregoing ***Memorandum in Support of Motion to Dismiss*** with the clerk of court for the United States District Court for the District of Connecticut, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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