

1 Timothy J. Casey (#013492)
2 Casson Mathis (#025618)
3 SCHMITT, SCHNECK, SMYTH & HERROD, P.C.
4 1221 East Osborn Road, Suite 105
5 Phoenix, AZ 85014-5540
6 Telephone: (602) 277-7000
7 Facsimile: (602) 277-8663
8 timcasey@azbarristers.com
9 Counsel for Defendants Maricopa County,
10 Joseph M. Arpaio, and Andrew P. Thomas

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF ARIZONA

ANGEL LOPEZ-VALENZUELA and
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;
and BARBARA RODRIQUEZ
MUNDELL, Presiding Judge, Maricopa
County Superior Court, in her official
capacity,

Defendants.

NO.: CV08-660-PHX-SRB (ECV)

**DEFENDANTS MARICOPA COUNTY,
ARPAIO, AND THOMAS' MOTION TO
DISMISS PURSUANT TO RULES
12(b)(1), (6), and (7) OF THE FEDERAL
RULES OF CIVIL PROCEDURE**

(Oral Argument Requested)

Pursuant to Rules 12(b)(1), (6), and (7), Federal Rules of Civil Procedure, defendants Maricopa County, Hon. Joseph Arpaio, and Hon. Andrew Thomas respectfully move the Court for its Order dismissing plaintiffs' Complaint for lack of jurisdiction over the subject matter and/or for plaintiffs' failure to state a claim against these defendants upon which relief can be granted.

This Motion is supported by the following Memorandum of Points and Authorities, the Court's record in this case, and any oral argument the Court may wish to consider.

1 **MEMORANDUM OF POINTS AND AUTHORITIES.**

2 **I. INTRODUCTION.**

3 This case is a proposed class action lawsuit, brought by persons charged with crimes
4 under Arizona law and awaiting trial in Arizona state courts, to challenge the
5 constitutionality of Arizona State Constitution Article II, § 22(A)(4), (governing bailable
6 offenses), and A.R.S. § 13-3961 (governing offenses not bailable).

7 In short, the lawsuit asks this federal court to: (1) enjoin a local law enforcement
8 official (i.e., defendant Thomas) and the presiding Judge of Maricopa County Superior Court
9 (i.e., defendant Mundell) from complying with Arizona constitutional and statutory law
10 relating to the adjudication of bail determinations for the plaintiffs; (2) enjoin a local law
11 enforcement official (i.e., defendant Arpaio) from the exercise of his statutory duties in
12 arresting, booking, and detaining certain persons charged with crimes under Arizona law
13 because he might, in fulfilling his legal obligations, elicit incriminating statements or
14 admissions in the future from putative class members; and (3) enjoin defendant Thomas and
15 his office from complying in the future with Arizona constitutional and statutory law relating
16 to the adjudication of bail determinations in Maricopa County Superior Court for other
17 putative class members.

18 There are, however, five legal problems fatal to plaintiffs' lawsuit. First, plaintiffs'
19 Complaint fails to state a municipal liability claim against defendant Maricopa County under
20 Rule 12(b)(1) and (6), Fed. R. Civ. P. Second, plaintiffs have failed to join a party needed
21 for a just adjudication under Rules 12(b) (7) and 19, Fed. R. Civ. P. Third, plaintiffs'
22 Complaint fails to state a claim against defendant Arpaio upon which relief can be granted
23 under Rules 12(b) (1) and (6). Fourth, plaintiffs' Complaint fails to state a claim upon which
24 can be granted as to federal preemption of Arizona State Constitution Article II, § 22(A)(4),
25 and A.R.S. § 13-3961. Finally, and perhaps most important, this Court should abstain from
26 exercising jurisdiction to decide this matter under the abstention doctrine set forth in
27 *Younger v. Harris*, 401 U.S. 37 (1971). Federal courts, under the *Younger* abstention
28 doctrine, require criminal defendants in state court proceedings to bring their constitutional
and other legal challenges in the same state courts where their matters are already pending.

1 Accordingly, the Court must dismiss plaintiffs' Complaint with prejudice pursuant to Rules
2 12(b)(1) (6) and (7), F.R.C.P.

3 **II. PLAINTIFFS' COMPLAINT FAILS TO STATE A MUNICIPAL LIABILITY**
4 **CLAIM UNDER § 1983 AGAINST MARICOPA COUNTY.**

5 Plaintiff's Complaint names Maricopa County as a defendant. *See* Complaint at ¶ 17.
6 Maricopa County, however, is not liable under 42 U.S.C. § 1983 for the alleged derivative
7 liability of its employees.

8 A county may be held liable under 42 U.S.C. § 1983 only when the county itself
9 causes the alleged constitutional violation at issue; it may *not* be held liable under a
10 *respondeat superior* theory for a violation allegedly caused by its employees. *Montell v.*
11 *New York City Dept. of Social Services*, 436 U.S. 658, 694-95 (1978). For municipal
12 liability under 42 U.S.C. § 1983 to be found, a plaintiff must allege in the complaint that a
13 specific municipal decision that reflects deliberate indifference to the risk that a violation of
14 a particular constitutional or statutory right will follow the policy decision. *Board v. Bryan*
15 *County*, 520 U.S. 387, 411 (1997). The plaintiff, therefore, has the burden of alleging in the
16 complaint: (1) a deprivation of a constitutional right by the county government *itself*; (2) that
17 the county government *itself* had a custom or policy that amounted to deliberate indifference;
18 and (3) that the custom or policy of the county government *itself* was a moving force behind
19 the alleged constitutional deprivation. *Berry v. Baca*, 379 F.3d 764, 767 (9th Cir. 2004).

20 Here, plaintiffs' Complaint does not allege any facts that support the contention that
21 they suffered a deprivation of a constitutional right as a result of a deliberately indifferent
22 municipal decision, or that defendant Maricopa County, itself, had a custom or policy in
23 place with regard to bail that amounts to deliberate indifference. The mere broad allegation
24 by plaintiffs that Maricopa County, or any other named county employed defendant, "is
25 responsible for enforcement and implementation of the Proposition 100 laws against persons
26 in criminal proceedings within its jurisdiction" is legally insufficient to impose liability on
27 Maricopa County under 42 U.S.C. § 1983. *See* Complaint at ¶ 17. At most, plaintiffs have
28 merely alleged that defendants Thomas and Mundell, in their official governmental
employment relationship with Maricopa County, have such a custom or policy in place.

1 That is an improper attempt to vicariously hold Maricopa County responsible under 42
2 U.S.C. § 1983 for the actions of its employees. *Montell*, 436 U.S. at 694-95. Plaintiffs,
3 therefore, have failed to state a section 1983 claim against defendant Maricopa County upon
4 which relief can be granted. As a consequence, plaintiffs' Complaint as against defendant
5 Maricopa County should be dismissed.

6 **III. DEFENDANT ARPAIO IS NOT INVOLVED IN THE ADJUDICATION OF**
7 **BAIL DETERMINATIONS IN MARICOPA COUNTY SUPERIOR COURT**
8 **AS A MATTER OF LAW.**

9 Plaintiffs challenge the constitutionality of Arizona State Constitution Article II, §
10 22(A)(4), and A.R.S. § 13-396. At issue, therefore, is the legality of Arizona's manner and
11 methodology for adjudicating bail determinations for certain individuals (i.e., illegal aliens)
12 in Maricopa County Superior Court. *See* Complaint, *in toto*. The sole basis for naming
13 Arpaio as a named defendant, however, is the broad and non-specific allegation that he is:
14 "the custodian of Plaintiffs and members of the proposed class. In his official capacity,
15 Defendant Arpaio is responsible for implementation of the Proposition 100 laws by
16 Maricopa County Sheriff's Department deputies and other officers." *See* Complaint at ¶ 18.
17 This broad allegation, however, is not sufficient as a matter of law to prove a *prima facie*
18 case under 42 U.S.C. § 1983 against defendant Arpaio.

19 Nowhere in plaintiffs' Complaint do they make any allegation that defendant Arpaio
20 had, or has, any role, in the central issue in this case: adjudicating bail determinations in
21 Maricopa County Superior Court. Nowhere do plaintiffs make any allegation creating a
22 causal nexus between defendant Arpaio, the adjudication of bail determinations, and a
23 supposed violation of a constitutional right. The absence of such allegations is not surprising
24 because defendant Arpaio has no involvement in adjudicating bail determinations as a matter
25 of law. *See* A.R.S. § 11-441 (listing the sheriff's powers and duties); *cf.*, *Arizona Supreme*
26 *Court Administrative Order 2007-030*, effective until July 2007 (listing required procedures
27 for courts to follow in implementing the so-called Proposition 100); *Arizona Supreme Court*
28 *Order R-07-0003* (amending Form 4, Arizona Rules of Criminal Procedure, and Arizona
Rules of Civil Procedure 4.2, 7.2, 7.4, 27.7 and 31.6). To the contrary, the adjudication of

1 bail determinations is made by the Maricopa County Superior Courts in the pending state
2 criminal cases with input from, and argument by, prosecutors and defense counsel.

3 The only allegation made by plaintiffs regarding defendant Arpaio's purported
4 involvement in this lawsuit is that, during the performance of his official duties, his deputies
5 might obtain incriminating statements in the future from putative members of the class.
6 Complaint at ¶ 36. That allegation, however, is insufficient to create a *prima facie* case
7 against Arpaio, or impose liability on Arpaio, under 42 U.S.C. § 1983 because the possibility
8 of obtaining incriminating statements from arrested persons is always present regardless of
9 the existence or non-existence of Arizona State Constitution Article II, § 22(A)(4), and
10 A.R.S. § 13-3961. In addition, plaintiffs have failed to assert any allegation that, even if
11 assumed true, constitutes a violation by Arpaio of either the plaintiffs' Fifth Amendment
12 self-incrimination clause right or the Sixth Amendment guarantee of right to counsel. In
13 summary, plaintiffs' Complaint has alleged no set of facts upon which a viable cause of
14 action under 42 U.S.C. § 1983 can be maintained against defendant Arpaio. Summary
15 dismissal is warranted as to defendant Arpaio.

16 **IV. ARIZONA STATE OFFICERS ARE PERSONS NEEDED TO HAVE A JUST**
17 **ADJUDICATION ON THE MERITS.**

18 As already mentioned, plaintiffs challenge the constitutionality of Arizona State
19 Constitution Article II, § 22(A)(4), and A.R.S. § 13-3961. For a just adjudication of the
20 constitutional issues to occur, it is necessary as a legal and equitable matter that an officer of
21 the state of Arizona appear in this litigation and defend Article II, § 22(A)(4), and A.R.S. §
22 13-3961 on the merits.

23 "The legislature has the exclusive power to declare what the law shall be." *State v.*
24 *Prentis*, 163 Ariz. 81, 85, 786 P.2d 932, 936 (1990). In contrast, whether a state law is good,
25 bad, or indifferent, defendant Thomas is statutorily charged with complying with, and
26 enforcing, the laws of the State of Arizona. *See* A.R.S. § 11-532(A) (1). He does not make
27 or pass the laws of the State of Arizona, and he cannot select which laws to comply with,
28 enforce, or to ignore. Defendant Arpaio, likewise, is statutorily charged with complying
with, and enforcing the laws of the State of Arizona. *See* A.R.S. § 11-441. He also does not
make or pass the laws, and lacks the discretion to ignore laws.

1 On the other hand, as the “chief legal officer of the state,” the Arizona Attorney
2 General “has a duty to uphold the Arizona and United States Constitutions.” *Fund Manager,*
3 *Pub. Safety Personnel Retirement System v. Corbin*, 161 Ariz. 348, 354, 778 P.2d 1244,
4 1250 (App. 1988); *see also Morrison v. Thomas*, 80 Ariz. 327, 297 P.2d 624 (1956) (Arizona
5 Attorney General “may, like the Governor, go to the courts for protection of the rights of the
6 people.”); A.R.S. § 41-192(A) (“The attorney general shall... serve as chief legal officer of
7 the state.”); A.R.S. § 38-231(G) (oath of office requiring the Arizona Attorney General to
8 “support... the Constitution and laws of the State of Arizona[.]” *Woods v. Block*, 189 Ariz.
9 269, 273-74, 942 P.2d 428, 432-33 (1997) (Arizona Attorney General has broad power to
10 argue in support of the constitutionality of a state statute). Moreover, in “any proceeding in
11 which a state statute... is alleged to be unconstitutional, the attorney general and the speaker
12 of the house of representatives and the president of the senate *shall be served* with a copy of
13 the pleading, motion or document containing the allegation at the same time the other parties
14 in the action are served and shall be entitled to be heard.” A.R.S. § 12-1841(A).¹

15 Complete relief is not possible in this litigation without an Officer of the State present
16 in this case and defending Arizona State Constitution Article II, § 22(A)(4), and A.R.S. § 13-
17 3961 on the merits. A.R.S. § 12-1841(C). Arizona law provides:

18 If the attorney general or the speaker of the house of representatives and the president
19 of the senate are not served in a timely manner with notice pursuant to subsection A,
20 on motion by the attorney general, the speaker of the house of representatives or the
21 president of senate **the court shall vacate any finding of unconstitutionality and
22 shall give the attorney general, the speaker of the house of representatives or the
23 president of the senate a reasonable opportunity to prepare and be heard.**

24 *Id.* (Emphasis added).

25 Plaintiffs directly challenge a state constitutional provision and a law passed by the
26 Legislature. More specifically, plaintiff allege that Arizona Constitution Article II, §
27 22(A)(4) and A.R.S. § 13-3961 “are an unconstitutional attempt by **state** and county

28 ¹ The Court may take judicial notice that plaintiffs have not complied with A.R.S. § 12-1841(A). While it appears that plaintiffs have provided the required Notice of Constitutional Claim to Attorney General Goddard, there is no evidence that they have provided the required Notice to the Speaker of the House of Representatives or the President of the Senate.

1 **government** to regulate immigrations.” Complaint at ¶ 8 (Emphasis added). They further
2 allege that the Arizona laws at issue in this litigation “are based on an unfair intent to
3 discriminate between one disfavored group and all others similarly situated.” *Id.* at ¶ 11.
4 Arizona, therefore, has an unquestionably important state interest at issue in this litigation;
5 the defense of its own laws and constitution.

6 Defendants Arpaio and Thomas respectfully submit that to achieve a just result on the
7 constitutional merits, it is essential for the Arizona Attorney General, the Speaker of the
8 House, and/or the President of the Senate to defend: (a) the intent of the Arizona Legislature
9 in passing A.R.S. § 13-3961, which plaintiffs now boldly characterize as intentionally
10 discriminatory; (b) the will of the Arizona electorate in November 2006 wherein they voted
11 for the ballot measure that led to the constitutional amendment, which plaintiffs would
12 perhaps also now characterize as being motivated by electoral discriminatory intent
13 throughout the entire state of Arizona; and (c) defending the Governor for signing into law
14 and/or approving Article II, § 22(A)(4) and A.R.S. § 13-3961.

15 A court should dismiss a plaintiff’s complaint if the plaintiff fails to join a necessary
16 party pursuant to Rule 19, Federal Rules of Civil Procedure. *ADi Motorsports, Inc. v.*
17 *NAPIS, Inc.*, 2007 U.S. Dist. LEXIS 95854 (Dist. AZ 2007). There is a three-step process
18 for determining whether the Court should dismiss an action for failure to join a necessary
19 party. The Court is to determine if joinder is necessary, feasible, and if not feasible, whether
20 the absent party is indispensable. *United States v. Bowen*, 172 F.3d 682 (9th 1999). A party
is necessary if:

21 (1) in the person’s absence complete relief cannot be afforded among those already
22 parties, or (2) the person claims an interest relating to the subject of the action and is
23 so situated that the disposition of the action in the person’s absence may (i) as a
24 practical matter impair or impede the person’s ability to protect that interest of (ii)
leave any of the persons already parties subject to a substantial risk of incurring
double, multiple, or otherwise inconsistent obligations by reason of the claimed
interest.

25 *Fed. R. Civ. P. 19(a).*

26
27 Each of the foregoing elements is satisfied. A.R.S. § 12-1841(C) prohibits a binding
28 constitutional ruling from this Court until and unless certain state officers are on notice of

1 the constitutional challenge and have the opportunity to prepare and be heard. The State of
2 Arizona, through the Attorney General, the House Speaker, and/or the Senate President, if
3 not the Governor, have a strong interest in the outcome of this case, protecting and
4 preserving the will of the Arizonans, and seeking to uphold the constitutionality of Arizona
5 State Constitution Article II, § 22(A)(4) and A.R.S. § 13-3961. The absence of the Attorney
6 General, the House Speaker, and/or the Senate President will, as a practical matter impair or
7 impede, Maricopa County, Arpaio, and Thomas's ability to protect the interest of the State,
8 and the Legislature. The State is in the best position to defend its own laws, or the
9 Constitutional Amendment approved by Arizonans. Finally, the parties to this case will face
10 substantial risk of inconsistent obligations in the event there is a ruling from this Court
11 absent Arizona Officers appearing and defending on the merits. On these grounds, therefore,
12 the Court should dismiss plaintiffs' Complaint for failing to join parties that are necessary,
13 from both a legal and equitable standpoint, to obtain a just adjudication of the constitutional
14 issues on the merits.

14 **V. PLAINTIFFS HAVE FAILED TO ALLEGE SUFFICIENT FACTS THAT**
15 **CONGRESS CLEARLY AND MANIFESTLY INTENDED TO PREVENT**
16 **ARIZONA FROM REGULATING THE BAIL OF ALIENS.**

17 Plaintiff's Count One (alleged Substantive Due Process violation), Counts Two and
18 Three (alleged Procedural Due Process violations at various stages of the criminal
19 proceedings), Count Four (alleged Fifth Amendment violation), Count Six (alleged Eight
20 Amendment violation), and Count Seven (alleged Supremacy Clause violation) are all based,
21 either directly or indirectly, on the premise that Arizona's bail determinations for illegal
22 aliens is preempted by federal immigration law. Plaintiffs, however, have failed as a matter
23 of law to allege sufficient facts demonstrating that Congress has so thoroughly occupied the
24 field of immigration, including the determination of bail for illegal aliens charged with state
25 crimes, that federal law necessarily preempts Arizona State Constitution Article II, §
26 22(A)(4) and A.R.S. § 13-3961. In other words, plaintiffs have failed to make allegations
27 sufficient, if assumed true, to establish express or implied federal preemption.
28

1 A. **Federal Preemption is Never Presumed Merely Because a State**
2 **Regulation Involves Aliens or May Indirectly Impact Immigration.**

3 Federal preemption of state law is never assumed. “Federal regulation of a particular
4 field **should not be presumed** to preempt state enforcement activity ‘in the absence of
5 persuasive reasons -- either that the nature of the regulated subject matter permits no other
6 conclusion, or that the Congress has unmistakably so ordained.’” *Gonzales v. City of Peoria*,
7 722 F.2d 468, 474 (9th Cir. 1983) (emphasis added) *quoting from De Canas v. Bica*, 424
8 U.S. 351, 356 (1975). To the contrary, state law is presumed not to be preempted:

9 Despite the variety of these opportunities for federal preeminence, we have never
10 assumed lightly that Congress has derogated state regulation, **but instead had**
11 **addressed claims of preemption with the starting presumption that Congress**
12 **does not intend to supplant state law.**

13 *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514
14 U.S. 645, 654-55 (1995) (emphasis added); *Doty v. Frontier Communications, Inc.*, 36 P.3d
15 250 (Kan. 2001) (“In the absence of express preemption in a federal law, there is a strong
16 presumption that Congress did not intend to displace state law.”). Additionally, in the
17 absence of express preemptive language by Congress, federal courts should be “reluctant to
18 infer preemption.” *Building & Constr. Trades Council v. Assoc. Builders & Contractors*,
19 507 U.S. 218, 224 (1993).

20 The fact that a state law may deal with the bail of illegal aliens, or even indirectly
21 impacts immigration, also is not dispositive. The United States Supreme Court “has never
22 held that every state enactment which in any way deals with aliens is a regulation of
23 immigration and thus *per se* pre-empted by this constitutional power, whether latent or
24 exercised.” *De Canas*, 424 U.S. at 355. Indeed, the U.S Supreme Court clearly holds:

25 standing alone, **the fact that aliens are the subject of a state statute does not**
26 **render it a regulation of immigration**, which is essentially a determination of who
27 should or should not be admitted into the country, and the conditions under which a
28 **legal entrant may remain.... [E]ven if such local regulation has some purely**
speculative and indirect impact on immigration, it does not thereby become a
constitutionally proscribed regulation of immigration....

Id. at 355-56 (emphasis added). In other words, the Court cannot assume that Arizona State

1 Constitution Article II, § 22(A)(4) and A.R.S. § 13-3961 are preempted by federal law
2 merely because they involve the regulation of bail for illegal aliens within Arizona, or more
3 specifically within Maricopa County. To the contrary, the Court is to presume that the state
4 constitution and regulation is not preempted by federal law. It is the plaintiffs' burden to
5 *allege* and then *prove* that the Congress either expressly or impliedly preempted Arizona
6 law.

7 **B. Plaintiffs Have Failed to Meet their Burden of Alleging Sufficient Facts**
8 **regarding Federal Preemption.**

9 Plaintiffs allege that federal law preempts Arizona State Constitution Article II, §
10 22(A)(4) and A.R.S. § 13-3961 because Congress "has occupied the field of immigration."
11 Complaint at ¶ 80; *see also* ¶¶ 8-9, 11-12, 35-36, and 79-82. This broad and conclusory
12 allegation, however, does not establish a *prima facie* case needed to successfully oppose a
13 Rule 12(b) motion to dismiss, nor is it helpful in determining whether state law is preempted.

14 Little aid can be derived from the vague and illusory but often repeated formula that
15 Congress 'by occupying the field' has excluded from it all state legislation. Every
16 Act of Congress occupies some field but we must know the boundaries of that field
17 before we can say that it has precluded a state from the exercise of any power
18 reserved to it by the Constitution. To discover the boundary we look to the federal
19 statute itself, read in light of its constitutional setting and its legislative history.
20 *De Canas v. Bica*, 424 U.S. 351, 360 n. 8 (1975) *quoting Hines v. Davidowitz*, 312 U.S. 52,
21 78-79 (1941) (Stone, J. dissenting)

22 In order to prove that federal law preempts a state constitutional provision or state
23 regulatory power, the plaintiffs must allege in their complaint facts sufficient to allow the
24 Court to conclude that either: (a) "the Congress has unmistakably so ordained" preemption
25 (i.e., express preemption); or (b) the "nature of the regulated subject matter permits no other
26 conclusion" than preemption (i.e., implied preemption). *Florida Lime & Avocado Growers*
27 *v. Paul*, 373 U.S. 132, 142 (1963); *see also De Canas*, 424 U.S. at 357 (party challenging
28 state law or policy has burden of proving federal preemption). To establish that Congress
impliedly preempted state power from the field of regulating criminal activities involving
aliens, the plaintiff must allege sufficient facts to establish a *prima facie* case that it was "the

1 clear and manifest purpose of Congress” to oust state power from the field. *Florida Lime*,
2 373 U.S. at 146 (emphasis added); *De Canas*, 424 U.S. at 357.

3 Plaintiffs have completely failed to allege facts sufficient to establish a *prima facie*
4 case for federal preemption. Accordingly, the Court should grant dismissal in favor of
5 Maricopa County, Arpaio, and Thomas.

6 **VI. THE FEDERAL COURT MUST ABSTAIN FROM DECIDING THIS CASE IN**
7 **FAVOR OF RESOLUTION OF THE PENDING ARIZONA STATE COURT**
8 **ACTIONS.**

9 There is another reason the Court must dismiss this case: it is required to do so by the
10 abstention doctrine set forth under *Younger v. Harris*, 401 U.S. 37 (1971).

11 **A. Younger Abstention is Appropriate Here.**

12 The *Younger* abstention doctrine is, in its simplest terms, the federal courts’ deference
13 to litigation pending in state court. *Younger* abstention is appropriate if: “(1) there are
14 ongoing state judicial proceedings, (2) the proceedings implicate important state interests,
15 and (3) there is an adequate opportunity in the state proceedings to raise federal questions.”
16 *Gartrell Contr., Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991); *see also Ploykoff v.*
17 *Collins*, 816 F.2d 1326, 1332 (9th Cir. 1987); *Dubinka v. Judges of the Superior Court*, 23
18 F.3d 218, 223 (9th Cir. 1994). All three requirements are present in this case.

19 The first requirement for *Younger* abstention -- that there be ongoing judicial
20 proceedings -- is clearly met. It is undisputed that defendant Thomas is prosecuting in
21 Maricopa County Superior Court the plaintiffs on state criminal charges. *See* Complaint at
22 ¶¶ 15-16. It is also undisputed that other “proposed class members are awaiting trial on
23 criminal charges in Maricopa County and are being held in custody without” bail as a result
24 of Arizona law. *Id.* at “*Nature of the Case*, at p. 1, lns. 4-7. In short, there are numerous
25 ongoing state judicial proceedings over the very issues that plaintiffs raise in this federal
26 lawsuit, including ongoing proceedings against the plaintiffs. *Dubinka*, 23 F.3d 218 (district
27 court’s order dismissing plaintiffs’ suit for declaratory and injunctive relief for failure to
28 state a claim is affirmed because plaintiffs were the subjects of pending criminal
(*Younger* abstention prevents federal intervention in a state judicial proceeding in which a

1 losing litigant has not exhausted his state appellate remedies.).

2 The second requirement for *Younger* abstention -- that the state proceedings implicate
3 important state interests -- is also satisfied. Arizona, via its most populated county, Maricopa,
4 has important state interests at issue in the state court litigation. First, there is an important
5 state interest in law enforcement officials actually enforcing Arizona's criminal laws enacted
6 by the state legislature and complying with law on bail. Our county attorneys are
7 specifically tasked with this responsibility. *See* A.R.S. § 11-532(A) (1) (the "county attorney
8 is the public prosecutor of the county and **shall ... conduct**, on behalf of the state, all
9 prosecutions for public offenses.") (emphasis added). Second, there is an important state
10 interest in protecting the validity of bail determinations rendered by our state courts under
11 Arizona law. When a county grand jury returns an indictment on a public offense, and
12 appropriate bail is determined by the county court, there is a legal presumption that sufficient
13 evidence exists to prosecute the indicted person and to maintain bail as determined by the
14 state court. *Cf.*, *United States v. Prescott*, 581 F.2d 1343, 1347 (9th Cir. 1978); *McCarthy v.*
15 *Mayo*, 827 F.2d 1310, 1317 (9th Cir. 1987); *Simpson v. Owens*, 207 Ariz. 261, 276, 85 P.3d
16 478, 493 (App. 2004); *Baines v. Superior Court*, 142 Ariz. 145, 152, 688 P.2d 1037, 1044
17 (App. 1984). Third, there is an important state interest in enforcing the provisions of the
18 Arizona State Constitution and Arizona statute.

19 Despite the law, the plaintiffs ask this Court to enjoin local governmental compliance
20 with Arizona State Constitution Article II, § 22(A)(4) and A.R.S. § 13-3961. *See* Complaint
21 at ¶¶ 51-54, Prayer for Relief at ¶¶ (c) and (g) at p. 22-23. They further ask this federal
22 Court to interject itself into ongoing Arizona state criminal proceedings and "redo" the
23 Maricopa County Courts' prior adjudication of the plaintiffs' individualized bail
24 determinations. *Id.* Such extraordinary injunctive relief, however, is not allowed. The
25 Supreme Court expressly held that "federal equity power must refrain from staying State
26 prosecutions...." *Kulger v. Helfant*, 421 U.S. 117, 130 (1975) quoting *Stefani v. Minard*,
27 320 U.S. 117, 123 (1951); *Younger*, 401 U.S. at 43, 45 (there is a "longstanding public
28 policy against federal court interference with state court proceedings" such that "the normal
thing to do when federal courts are asked to enjoin pending proceedings in state courts is

1 not to issue such injunctions.”); *see also* 401 U.S. at 53 (stressing the “settled doctrine that
2 have always confined narrowly the availability of injunctive relief against state criminal
3 prosecutions.”); *Samuels v. Mackell*, 401 U.S. 66, 72 (1971) (federal stays affecting ongoing
4 state criminal proceedings would “result in precisely the same interference with and
5 disruption of state proceedings that the long-standing policy limiting injunctions was
6 designed to avoid.”).

7 The third requirement for *Younger* abstention -- there is an adequate opportunity in
8 the state court proceedings to raise federal questions -- is also satisfied. There are no
9 Arizona state law procedural barriers to plaintiffs raising their constitutional claims in the
10 pending state court proceedings. *Moore v. Sims*, 442 U.S. 415, 430 & n.12 (1979). The
11 plaintiffs can raise them at any time in state court. All that is required to meet this
12 requirement is that the plaintiffs have an opportunity to raise their claims in state court:

13 Here it is abundantly clear that appellees had an **opportunity** to present
14 their federal claims in the state proceedings. **No more is required to invoke**
15 ***Younger* abstention** Appellees need be accorded only an opportunity to fairly
pursue their constitutional claims in the ongoing state proceedings.

16 *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (emphasis in original); *see also Pennzoil Co. v.*
17 *Texaco, Inc.*, 481 U.S. 1, 14-16 (1987) (holding that *Younger* applies where state court had
18 power to consider constitutional challenge to enforcement provision, and that the burden is
19 on the federal plaintiff to show that the state procedural law barred presentation of his
20 claims). The proper procedure for plaintiffs to challenge Arizona State Constitution Article
21 II, § 22(A)(4) and A.R.S. § 13-3961 would be to plead not guilty and then to challenge the
22 constitutionality of the foregoing law at the trial court level, and through direct Arizona state
23 court appeal or special action review.

24 Each of the three *Younger* abstention requirements is satisfied in this case. The
25 constitutional issues before this Court are ripe for resolution in Arizona state courts. There
26 are pending matters on these very issues in state court. Federal court oversight of state court
27 criminal proceedings is inappropriate. Accordingly, the Court must abstain from this case
28 and dismiss it with prejudice.

1 **B. There are No Exceptions Applicable Here to *Younger* Abstention.**

2 In *Younger*, the Supreme Court held that federal courts may enjoin pending state
3 court proceedings only in “extraordinary circumstances.” Such extraordinary circumstances
4 exist when the state law at issue is “flagrantly and patently violative of express constitutional
5 prohibitions in every clause, sentence and paragraph, and in whatever manner and against
6 whomever an effort might be made to apply it.” *Younger*, 401 U.S. at 53-53 (quoting *Watson*
7 *v. Buck*, 313 U.S. 387, 402 (1941); *see also Juidice*, 430 U.S. at 338; *Huffman*, 420 U.S. at
8 611. “The requirement that a statute must be unconstitutional in every ‘clause, sentence and
9 paragraph, and in whatever manner’ it is applied, **demonstrates that this exception to**
10 ***Younger* abstention is very narrow.”** *Dubinka*, 23 F.3d at 225 (emphasis added); *Trainor*
11 *v. Hernandez*, 431 U.S. 434, 447 (1977) (confirming the narrowness of the exception).

12 Plaintiffs “face a heavy burden in seeking to have [the Act] invalidated as facially
13 unconstitutional.” *Rust v. Sullivan*, 500 U.S. 173, 183 (1991). “A facial challenge to a
14 legislative Act is, of course, the most difficult challenge to mount successfully, since the
15 challenger must establish that no set of circumstances exists under which the Act would be
16 valid.” *Engine Mfrs. Ass’n v. S. Coast Air Quality Maint. Dist.*, 498 F.3d 1031, 1048 (9th
17 Cir. 2007) (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)). “The fact that the
18 regulations might operate unconstitutionally under some conceivable set of circumstances is
19 insufficient to render them wholly invalid.” *Rust*, 500 U.S. at 183 (*quoting Salerno*, 481
20 U.S. at 745).

21 Plaintiffs cannot argue that the narrow “extraordinary circumstances” exemption
22 exists in this litigation for two reasons. First, plaintiffs do not even allege that Arizona State
23 Constitution Article II, § 22(A)(4) and A.R.S. § 13-3961 are “flagrantly and patently
24 violative of express constitutional prohibitions in every clause, sentence and paragraph, and
25 in whatever manner and against whomever an effort might be made to apply it.” *Younger*,
26 401 U.S. at 53-53. On this ground alone, the narrow “extraordinary circumstances”
27 exemption is not available to plaintiffs.

28 Second, plaintiff cannot now argue that there is bad faith prosecution or harassment
on the part of Maricopa County, Arpaio, or Thomas. *Younger*, 401 U.S. at 53-54. In this

1 case, plaintiffs have made no allegation whatsoever that there is bad faith or harassment on
2 the part of Maricopa County, Arpaio, or Thomas. *See* Complaint. There simply is no
3 exception to the application of the *Younger* abstention doctrine in this litigation.

4 **VII. CONCLUSION**

5 Based on the foregoing, defendants Maricopa County, Arpaio, and Thomas
6 respectfully request that the Court dismiss plaintiffs' lawsuit pursuant to Rules 12(b)(1), (6),
7 and (7), and/or abstain from deciding this case.

8 RESPECTFULLY SUBMITTED this 14th day of May, 2008.

10 SCHMITT, SCHNECK, SMYTH
11 & HERROD, P.C.

12 By: s/Timothy J. Casey
13 Timothy J. Casey
14 1221 East Osborn Road, Suite 105
15 Phoenix, AZ 85014
16 Attorney for the County Defendants

18 **CERTIFICATE OF SERVICE**

19 I hereby certify that on May 14, 2008, I electronically transmitted the attached
20 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
21 Notice of Electronic Filing to the following CM/ECF registrants:

21 Charles A. Blanchard, Esq.
22 Kevin B. Wein, Esq.
23 Steven J. Monde, Esq.
24 PERKINS COIE BROWN & BAIN P.A.
25 2901 North Central Avenue, Suite 2000
26 Phoenix, Arizona 85012
27 Attorneys for Plaintiffs

25 Daniel Pochoda, Esq.
26 ACLU FOUNDATION OF ARIZONA
27 P.O. Box 17148
28 Phoenix, Arizona 17148
Phoenix, Arizona 85011
Attorneys for Plaintiffs

1 Cecillia D. Wang, Esq.
Monica M. Ramire, Esq.
2 Robin L. Goldfadden, Esq.
AMERICAN CIVIL LIBERTIES UNION
3 FOUNDATION IMMIGRANTS' RIGHT PROJECT
39 Drumm Street
4 San Francisco, CA 94111
Attorneys for Plaintiffs

5 Cynthia Valenzuela, Esq.
6 Kristina Campbell, Esq.
MEXICAN AMERICAN LEGAL DEFENSE
7 AND EDUCATION FUND
634 South Spring Street 11th Floor
8 Los Angeles, CA 90014
Attorneys for Plaintiffs

9 Eryn McCarthy, Esq.
10 ARIZONA ATTORNEY GENERAL
1275 West Washington Street
11 Phoenix, Arizona 85007
Attorney for defendant Hon. Barbara Rodriquez Mundell

12 **Courtesy Copy** mailed this same date to:

13 Hon. Terry Goddard
14 ARIZONA ATTORNEY GENERAL
1275 West Washington Street
15 Phoenix, Arizona 85007

16 Hon. Tim Bee
PRESIDENT, ARIZONA STATE SENATE
17 Capitol Complex
1700 West Washington Street
18 Phoenix, Arizona 85007-2290

19 Hon. Jerry Weiers
SPEAKER OF ARIZONA HOUSE
20 OF REPRESENTATIVES
Capitol Complex
21 1700 West Washington Street
Phoenix, Arizona 85007-2290

22
23 s/Eileen Henry, Paralegal
24
25
26
27
28