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United States District Court, D. Arizona.

WE ARE AMERICA/SOMOS AMERICA COALITION OF ARIZONA, et al., Plaintiffs,
v.
MARICOPA COUNTY BOARD OF SUPERVISORS, et al., Defendants.

No. CIV 06–2816 PHX RCB.
|
Sept. 21, 2007.

Attorneys and Law Firms

Antonio D. Bustamante, Law Office of Antonio D. Bustamante PC, Phoenix, AZ, Carlos Holguin, Peter Anthony Schey, Center for Human Rights & Constitutional Law, Los Angeles, CA, Danilo Ballecer, Ballecer & Segal, LLP, H. Michael Clyde, Perkins, Coie, Brown & Bain PA, Phoenix, AZ, Ray Velarde, Law Office of Ray Velarde, El Paso, TX, for Plaintiffs.

Dennis Ira Wilenchik, Wilenchik & Bartness PC, Timothy James Casey, Schmitt, Schneck, Smyth & Herrod PC, Phoenix, AZ, for Defendants.

ORDER

ROBERT C. BLOOMFIELD, Senior United States District Judge.

***1** On November 21, 2006, Plaintiffs filed this action against Maricopa County Attorney Andrew Thomas, Maricopa County Sheriff Joseph Arpaio, the Maricopa County Board of Supervisors and its individual members, challenging the County Attorney and Sheriff's policy of prosecuting individual undocumented immigrants for conspiring to smuggle themselves in violation of Ariz.Rev.Stat. § 13–2319. Compl. (doc. # 1). Plaintiffs include five individual taxpayers who challenge Defendants' policy as an illegal diversion of taxpayer funds; six Mexican nationals who have been arrested, detained, and charged for conspiracy to violate Ariz.Rev.Stat. § 13–2319 pursuant to Defendants' policy; and four different community-based organizations. *Id.* ¶¶ 5–15.

Currently before the Court are Plaintiffs' motion for class certification (doc. # 20) and Defendants' motion to dismiss (doc. # 32). The motions have been fully briefed, and the Court finds the matter suitable for decision without oral argument. Having carefully considered the arguments raised, the Court now rules.

I. BACKGROUND

In review of a motion to dismiss, all allegations of material fact in the complaint are accepted as true, with all reasonable inferences drawn in favor of the nonmoving party. *Keams v. Tempe Technical Inst., Inc.,* 39 F.3d 222, 224 (9th Cir.1994); *Everest & Jennings, Inc. v. Am. Motorists Ins. Co.,* 23 F.3d 226, 228 (9th Cir.1994). The relevant facts for purposes of Defendants' motion to dismiss are as follows:

Under Arizona law enacted in 2005 it is a felony to engage in human trafficking that involves the smuggling of aliens. The relevant statute provides in pertinent part as follows:

> A. It is unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose.
>
> ...
>
> ...
>
> D. For purposes of this section:
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> ...
>
> 2. "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.

Ariz.Rev.Stat. § 13–2319.[1] Defendant Thomas has issued a statement declaring that, in his view, section 13–2319 applies not only to the conduct of actual smugglers and human traffickers accepting payment for transport, but

also to individual undocumented immigrants agreeing to pay for transport or on whose behalf others have agreed to pay for transport. Compl. (doc. # 1) ¶ 40. Defendant Thomas has declared a policy that, as the Maricopa County Attorney, he will prosecute individual undocumented immigrants for conspiring to violate section 13–2319 if they have been transported for gain by a third party. *Id.* This policy is the subject of Plaintiffs' action for declaratory and injunctive relief. *Id.*

In Plaintiffs' view, drawn from the legislative history and subsequent public remarks by lawmakers, section 13–2319 was intended only to criminalize the exploitative conduct of actual smugglers, often referred to as "coyotes," and was not intended to apply to individual undocumented immigrants paying for transport. *See id.* ¶¶ 42–43. Plaintiffs seek to enjoin the continued implementation of Defendants' policy, and assert four different claims for relief: (1) Defendants' policy is preempted by the Immigration and Naturalization Act, 8 U.S.C. §§ 1101, *et seq.* (the "Act"), (2) Defendants' policy violates their Fourth Amendment rights to be free from unreasonable searches and seizures, (3) Defendants' policy violates their Fourteenth Amendment right to due process of law, and (4) Defendants' policy conflicts with Ariz.Rev.Stat. § 13–2319. Compl. (doc. # 1) ¶¶ 56–64.

II. STANDARD OF REVIEW

***2** Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a party to seek dismissal of a claim if the claimant failed to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). Under Rule 12(b)(6), "dismissal for failure to state a claim is improper 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.' " *Schowengerdt v. Gen. Dynamics Corp.,* 823 F.2d 1328, 1332 (9th Cir.1987) (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957)). Factual argument is inappropriate in a Rule 12(b)(6) motion, which tests only the legal sufficiency of the complaint. Thus, in undertaking its analysis, the Court must limit its "review to the contents of the complaint, accepting the material factual allegations as true and construing them in the light most favorable to the [non-movant]." *Id.*

III. DISCUSSION

Defendants argue that this case should be dismissed on the basis that Plaintiffs lack Article III standing, and, in the alternative, urge the Court to refrain from hearing this matter under the abstention doctrine set forth in *Younger v. Harris,* 401 U.S. 37 (1971). Although the *Younger* abstention inquiry is prudential in nature, it is appropriately considered as a basis for decision prior to any determination regarding Article III standing. *Ruhrgas Ag v. Marathon Oil Co.,* 526 U.S. 574, 585 (1999).

Born out of principles of federalism and comity, the *Younger* abstention doctrine is a jurisdictional issue requiring federal courts to abstain from exercising jurisdiction over certain actions when proceedings are pending in state court. *See Gartrell Constr. Inc. v. Aubry,* 940 F.2d 437, 441 (9th Cir.1991); *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 100 n. 3 (1998). *Younger* abstention is appropriate when "(1) there are ongoing state judicial proceedings; (2) the proceedings implicate important state interests; and (3) the state proceedings provide the plaintiff with an adequate opportunity to raise federal claims." *Meredith v. Oregon,* 321 F.3d 807, 816–17 (9th Cir.2003) (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982)); *accord Gartrell Constr. Inc.,* 940 F.2d at 441.

Plaintiffs argue that the *Younger* abstention doctrine is not appropriate in this case, because (1) they do not seek to enjoin preexisting state prosecutions, (2) the proceedings brought pursuant to Defendants' policy do not further vital state interests, and (3) Plaintiffs do not have an adequate opportunity to raise their federal defenses in the state proceedings. Resp. (doc. # 38) at 9–15. Plaintiffs also claim that *Younger* abstention should not apply, because the prosecutions brought pursuant to Defendants' policy are undertaken in bad faith. *Id.* at 15. The Court does not find any indication that the state's prosecutions have been brought in bad faith or for purposes of harassment. Accordingly, the Court will focus the balance of its inquiry on the three elements required for *Younger* abstention.

A. Ongoing Judicial Proceedings

***3** The critical question for purposes of *Younger* abstention is "whether the state proceedings were underway before initiation of the federal proceedings." *Kitchens v. Bowen,* 825 F.2d 1337, 1341 (9th Cir.1987) (internal quotation and citation omitted). Although Plaintiffs now claim that the Court could fashion its relief in such a way that would not require enjoining any currently pending criminal cases, Defendants rightly point out that Plaintiffs made no such distinction in their

complaint. *See* Resp. (doc. # 38) at 10–11; Reply (doc. # 42) at 6–8; *see also* Compl. (doc. # 1) ¶ 55 ("If the relief prayed for is not granted, plaintiffs ... will continue to be ... prosecuted pursuant to an unconstitutional and unlawful policy."). Plaintiffs' assertion that most of the putative class members were not subject to ongoing state proceedings at the start of this litigation is similarly unavailing. *See* Resp. (doc. # 38) at 10. It is evident from the complaint that at least six of the individual plaintiffs had been charged with violation of Ariz.Rev.Stat. § 13–2319 prior to the initiation of this action. *See* Compl. (doc. # 1) ¶¶ 9–10. Moreover, the prospective class that Plaintiffs seek to have certified includes "[a]ll individuals stopped, detained, arrested, incarcerated, *prosecuted,* or penalized for conspiring to transport themselves, and themselves only, in violation of Ariz.Rev.Stat. § 13–2319." *Id.* ¶ 25 (emphasis added). As currently pled, the relief sought by Plaintiffs will by necessity interfere with prosecutions already underway at the time this action was filed.

B. Important State Interest Implicated

There can be little question that a state has a vital interest in the enforcement of its criminal laws. *See Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 13 (1987). Nevertheless, Plaintiffs maintain that there are no important state interests served by Defendants' manner of interpreting and enforcing section 13–2319, arguing that the policy of prosecuting individual migrants as conspirators under the statute is both contrary to the legislative intent of its sponsors and preempted by federal law in a manner that is readily apparent.

1. *Ultra Vires* Interpretation of State Law

Plaintiffs maintain that Defendants' policy of prosecuting migrants as conspirators under section 13–2319 constitutes an *ultra vires* interpretation and enforcement of the state's alien smuggling law. *See* Resp. (doc. # 38) at 11–13. In support of this argument, Plaintiffs cite to legislative history suggesting that the bill's sponsor intended for the law to provide an avenue for state prosecutions of actual smugglers as distinguished from the persons whom they transport. *Id.* at 11–12. Plaintiffs believe that their view is also vindicated by the fact that Defendants are apparently the only state law enforcement officers prosecuting migrants for conspiracy to smuggle themselves in violation of Ariz.Rev.Stat. § 13–2319.

***4** While these arguments would be appropriately received in adjudicating the merits of some of Plaintiffs' claims, they do not demonstrate such an abuse of prosecutorial discretion that would impel the Court to conclude at this juncture that the state lacks an important interest in Defendants' enforcement of its alien smuggling law. As Defendants point out, the actions of other state law enforcement officials may be attributable to any number of factors such as the availability of resources, and do not exclusively lend themselves to the inferences Plaintiffs would draw regarding the legality of Defendants' policies. *See* Reply (doc. # 42) at 9 n. 3. Moreover, as the Ninth Circuit has observed, arguments such as those asserted by Plaintiffs could easily be raised "in any federal litigation in which a plaintiff seeks to enjoin allegedly unconstitutional state proceedings, and, if accepted, would render *Younger* a nullity." *See Worldwide Church of God, Inc. v. California,* 623 F.2d 613, 616 (9th Cir.1980). Accordingly, the Court approaches Plaintiffs' claim regarding Defendants' allegedly *ultra vires* interpretation and enforcement of Ariz.Rev.Stat. § 13–2319 with the same measured skepticism, and finds it to be an insufficient basis to decline abstention.

2. Federal Preemption that is Readily Apparent

Plaintiffs also argue that Defendants' policy cannot serve an important state interest, because it "intrude[s] into an area reserved to the federal government by the United States Constitution ." *Id.* at 13. The Ninth Circuit has emphasized that no significant state interest is served, and therefore *Younger* abstention is unnecessary, where the state law at issue is preempted by federal law in a manner that is "readily apparent." *Woodfeathers, Inc. v. Washington County,* 180 F.3d 1017, 1021 (9th Cir.1999); *Gartrell Constr. Inc.,* 940 F.2d at 441. However, because questions of federal preemption frequently abound in cases where *Younger* abstention is sought, it is important for a court to refuse to abstain only when the preemptive force of the federal law at issue is readily discernable from the pleadings. *See Fresh Int'l Corp. v. Agric. Labor Relations Bd.,* 805 F.2d 1353, 1361 (9th Cir.1986) (citation omitted).

Defendants believe that Plaintiffs' "charge of preemption is attenuated at best," and are quick to point out that neither the United States Department of Justice nor any federal agency has sought intervention. Reply (doc. # 42) at 9. Much like Plaintiffs' effort to portray Defendants' policies as being unlawful by comparison to the conduct

of other state law enforcement officials, the Court does not see any significant inferences that may be drawn from the apparent inaction of the federal government to intervene in this case. The decision of any federal agency not to intervene in this case may be attributable to a lack of resources—just as Defendants have said in response to Plaintiffs' argument regarding the conduct of other state law enforcement officials—or may simply reflect other political motivations that are not relevant here. But it does not bear upon the question of federal preemption that the Court must address in deciding whether it may decline to exercise jurisdiction under the *Younger* abstention doctrine.

***5** The supremacy of federal power in the field of immigration is made clear by the Constitution and has been repeatedly recognized by the Supreme Court. *See* U.S. Const., art. I, § 8, cl. 4 and art. II, cl. 6; *De Canas v. Bica,* 424 U.S. 351, 354 (1976); *Hines v. Davidowitz,* 312 U.S. 52, 62 (1941). However, it is equally well settled that, "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration" that is "*per se* preempted by th[e] [federal] constitutional power, whether latent or exercised." *De Canas,* 424 U.S. at 355.

Pursuant to the Supreme Court's decision in *De Canas,* federal preemption of immigration-related state statutes and policies may be shown in three ways. First, federal law preempts any state statute or policy that constitutes a regulation of immigration, "which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain...." *Id.* Second, even if the state law or policy does not regulate immigration, it may be preempted if Congress intended to "occupy the field" the state has attempted to regulate, *i.e.,* if it was "the clear and manifest purpose of Congress" to effect a "complete ouster of state power" that would "preclude even harmonious state regulation touching on aliens in general." *Id.* at 357. Third, a state law or policy is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 363.

I. First *De Canas* Test

Plaintiffs maintain that Defendants, through their policy of charging and prosecuting individual migrants for conspiring to smuggle themselves in violation of section 13–2319, "ha[ve] intruded into an area reserved to the federal government by the United States Constitution." Resp. (doc. # 38) at 13. As an initial matter, it should be repeated that the Constitution does not of its own force require the preemption of all state laws dealing with aliens. *See De Canas,* 424 U.S. at 355. The thrust of Plaintiffs' argument appears to be that Defendants' manner of enforcing the state's alien smuggling law constitutes an impermissible regulation of immigration. To support this position, Plaintiffs cite to statements allegedly made by Defendants to the media, expressing "frustrat[ion] ... [with the] problem of illegal immigration that the government [of Mexico] is directly fomenting," and presenting the view that "[t]here are many illegals trying to make it into [Maricopa] [C]ounty." Resp. (doc. # 38) at 9; Compl. (doc. # 1) ¶ 48. Regardless of Defendants' subjective views, their opinions alone do not transform their policies and official conduct into an impermissible regulatory scheme for "determin[ing] ... who should or should not be admitted into the country." *See De Canas,* 424 U.S. at 355. Therefore, under the first *De Canas* test, the Court cannot conclude that the preemption of Defendants' policies is so readily apparent as to render abstention under *Younger* improper.

ii. Second *De Canas* Test

***6** Under the second *De Canas* test, Defendants' policies may still be preempted if Congress intended to occupy the field that the state has attempted to regulate. *See De Canas,* 424 U.S. at 357. Congressional 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), *overruled on other grounds by Hodgers–Durgin v. De La Vina,* 199 F.3d 1037 (9th Cir.1999) (en banc); *De Canas,* 424 U.S. at 357.

In the present case, preemption under the second *De Canas* test should be considered in the context of the statute Defendants' policy is intended to enforce. It is evident from the plain language of section 13–2319 that the ambit of the state regulation in question relates solely to the smuggling of aliens.[2] Therefore, the decisive inquiry is whether Congress intended to occupy the field of regulating criminal activities involving the smuggling of aliens. This question should be distinguished from the issue decided in *Gonzales v. City of Peoria,* 722 F.2d 468 (9th Cir.1983). In that case the Ninth Circuit held that state law enforcement officers in Peoria, Arizona could enforce federal criminal immigration statutes, provided they had the authority to make such arrests under relevant state law. *Gonzales,* 722 F.2d at 474–75. The court concluded that Congress did not intend to occupy the field

of criminal immigration enforcement, relying on the general rule that local police are not precluded from enforcing federal crimes. *Id.* at 474. Moreover, it was clear from the language and legislative history of the relevant federal statutes that Congress did not intend to preclude state law enforcement officers from enforcing federal criminal immigration statutes. *Id.* at 475. By contrast, in the present case, the state is not attempting to enforce any federal criminal immigration statutes—instead, it has enacted its own criminal immigration statute, which Defendants are enforcing pursuant to the policy challenged by Plaintiffs.

In briefing the issue of federal preemption, the parties have not addressed the important question raised by the second *De Canas* test. Accordingly, the Court will retain Defendants' motion to dismiss under advisement pending the parties' decision to submit supplemental briefing on the issue as permitted by this Order.

iii. Third *De Canas* Test

Plaintiffs argue that Defendants' policy "is also preempted because it actually conflicts with federal law and policy." Resp. (doc. # 38) at 13 n. 21. Under the third De Canas test, preemption is readily apparent if a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 363.

As Plaintiffs have noted, federal immigration law permits multiple categories of migrants to remain in the United States while applying for lawful status although they may have entered without inspection or documentation. For example, aliens seeking refugee or asylee status, *see* 8 U.S.C. §§ 1101(a)(42), 1157, 1158, may not be removed from the country if the United States Attorney General determines that such removal would threaten the life or freedom of that alien. *See* 8 U.S.C. § 1231(b)(3). Similarly, the Attorney General may adjust certain battered spouses and children to lawful status and cancel their removal. *See* 8 U.S.C. §§ 1154, 1229b(b)(2).

***7** In Plaintiffs' view, Defendants' policy of charging and prosecuting migrants for conspiracy to smuggle themselves in violation of Ariz.Rev.Stat. § 13–2319, without regard to the possibility of such status determinations, impedes the Attorney General's accomplishment and execution of the objectives set out by Congress in the Immigration and Naturalization Act. To better evaluate the merits of this argument it is necessary to elaborate on the process by which an alien may become ineligible for those favorable status determinations. Generally, the commission of an "aggravated felony" renders an alien ineligible for the withholding or cancellation of removal pursuant to a status determination by the Attorney General. *See, e.g.,* 8 U.S.C. §§ 1229(b)(2)(A)(iii)-(iv) and (C), 1231(b)(3)(B)(ii). For purposes of the Immigration and Naturalization act, Congress has defined specific categories of offenses that qualify as "aggravated felonies," including

> [the] offense described in [8 USCS § 1324(a)(1)(A) or (2)] (relating to alien smuggling), *except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act.*

8 U.S.C. § 1101(a)(43)(N) (emphasis added).

Although Ariz.Rev.Stat. § 13–2319, particularly as enforced pursuant to Defendants' policy, provides no such exception to the imposition of state felony liability, the Court is not convinced that the state law stands as an obstacle to the accomplishment of the full purposes of the federal immigration laws. For the special purpose of deciding whether an applicant has committed a disqualifying "aggravated felony," there is no reason that the Attorney General's status determination cannot take into account the same exception set forth at 8 U.S.C. § 1101(a)(43)(N), which is merely a definitional statute, with respect to any alien smuggling convictions under Ariz.Rev.Stat. § 13–2319. Therefore, the Court cannot find that Defendants' policy is preempted in a manner that is readily apparent on account of these perceived conflicts with federal law and policy.

Although Plaintiffs have not succeeded in establishing federal preemption under either the first or third *De Canas* tests, the Court will retain the motion under advisement, as indicated above, pending the parties' decision to submit supplemental briefing on the second *De Canas* test for federal preemption in the area of immigration....

C. Opportunity to Raise Federal Defenses in State Proceedings

Plaintiffs argue that *Younger* abstention is also inappropriate, because they believe that state proceedings will not provide an adequate opportunity to raise their federal defenses. Resp. (doc. # 38) at 14–15.

Plaintiffs fail to explain why the state courts would be incompetent to adjudicate the merits of their federal defenses. They suggest that in the context of a putative class action such as this the Court should be more willing to find the state proceedings inadequate to eliminate the threat to the entire class. *See id.* at 14 (citing *Riley v. Nev.Super. Ct.,* 763 F.Supp. 446, 451 (D .Nev.1991)). However, the holding of the case on which Plaintiffs rely was not predicated on the class action context. Rather, it was based on unique circumstances, not applicable here, in which the plaintiff class was challenging the rules of the Nevada courts. *Riley,* 763 F.Supp. at 451. In the instant case, Plaintiffs do not challenge any rules of the Arizona courts that would render them an inadequate forum for the resolution of their federal defenses.

***8** Plaintiffs also complain that the possibility of inconsistent lower court rulings somehow denies them an adequate safeguard for their federal constitutional rights. Resp. (doc. # 38) at 14. Plaintiffs have simply observed one reason that many judicial systems have developed higher courts of review. It does not, however, render the state courts inadequate or incompetent to hear their federal defenses.

Finally, Plaintiffs maintain that, as a practical matter, many members of the putative class may enter guilty pleas to end their incarceration as they await trial. *Id.* at 15. The fact that Plaintiffs may choose not to avail themselves of their federal defenses in the state courts does not render them an inadequate forum. In sum, Plaintiffs have failed to demonstrate any reason why they could not adequately present their federal claims in the state proceedings.

IV. CONCLUSION

Because it appears that *Younger* abstention may be required, pending the parties' decision to submit supplemental briefing on federal preemption under the second *De Canas* test, the Court need not address questions of Article III standing at this time.[3] For the same reason, it may prove unnecessary to resolve the issues of class of certification that have been raised by Plaintiffs. Therefore,

IT IS ORDERED that Defendants' motion to dismiss (doc. # 32) is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED permitting Plaintiffs, if they choose, to file within 15 (fifteen) days from the date of entry of this Order a brief addressing the applicability of the second *De Canas* test, discussed at Part III.B.2.ii, *supra,* to the issue of federal preemption. If Plaintiffs file a supplemental brief on the second *De Canas* test, Defendants may file a brief addressing the same issue within 10(ten) days from the date of filing of Plaintiffs' supplemental brief. Further briefing is not permitted unless hereafter allowed by the court.

IT IS FURTHER ORDERED that Plaintiffs' motion for class certification (doc. # 20) is DENIED without prejudice.

All Citations

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Footnotes

1 The federal criminal offense of alien smuggling is defined in more detailed terms at 8 U.S.C. § 1824.

2 Under the statute, it is a felony "for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose." Ariz.Rev.Stat. § 13–2319(A)–(C). For purposes of the statute, the "[s]muggling of human beings" is defined as "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." Ariz.Rev.Stat. § 13–2319(D)(2).

3 The Court notes that the case could not be dismissed in its entirety solely on the basis of standing. For instance, the municipal taxpayer plaintiffs have sufficiently pled the injury of improper expenditures of municipal funds. *See Cammack v. Waihee,* 932F.2d 765, 770 (9th Cir.1991) (concluding "that municipal taxpayer standing simply requires the 'injury' of an allegedly

improper expenditure of municipal funds."). Plaintiffs have alleged that they object to Defendant Maricopa County's use of tax funds for the arrest, detainment, prosecution, and imprisonment of migrants for conspiracy to smuggle themselves in violation of Ariz.Rev.Stat. § 13–2319. Compl. (doc. # 1) ¶¶ 11, 13–15. While Defendants may be correct that arrests, detainments, and prosecutions will not increase the fixed salary expenditures for the employees carrying out those duties, the same cannot be said for the additional incremental costs of housing and feeding individuals in the county jails. Therefore, Plaintiffs have pled sufficient facts to demonstrate their standing as municipal taxpayers.

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