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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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12 We Are America/Somos America,)
Coalition of Arizona, et al.)

13)
14 Plaintiffs,)

No. CIV-06-2816-PHX-RCB

15 vs.)

O R D E R

16 Maricopa County Board of)
Supervisors, et al.)

17)
18 Defendants.)

19

20 Currently pending before the court is "The Maricopa County
21 Defendants' Motion to Dismiss the Claims of the Organizational and
22 Taxpayer Plaintiffs" (Doc. 68), filed in accordance with this
23 court's prior order.¹ It has been approximately three and a half

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¹ In We Are America/Somos America Coalition of Arizona v. Maricopa Co. Bd. of Supervisors, 386 Fed.Appx. 726 (9th Cir. 2010), the Ninth Circuit affirmed this court's dismissal of the claims of six Mexican nationals who were arrested and detained pursuant to the "Maricopa Migrant Conspiracy Policy," which is at the center of this lawsuit. The Ninth Circuit held that this court "correctly determined that it lacked jurisdiction under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), to consider the claims" of such plaintiffs. Id. at 727. Finding, however, that this court "erred . . . in concluding that *Younger* abstention barred it from considering the organizational and taxpayer claims[,] the Ninth Circuit remanded for this court to "determine whether the organizational and taxpayer plaintiffs have standing to pursue their claims." Id. This court

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1 years since the filing of the amended complaint. Additionally,
2 Andrew Thomas, who was originally named as a defendant in his
3 official capacity as Maricopa County Attorney, is no longer serving
4 in that capacity. Thus, it is possible that this case has become
5 moot; and if so, this court would lack subject matter jurisdiction.
6 The court will, therefore, require supplemental briefing on that
7 issue.

8 **Background**

9 The Amended Complaint ("the complaint") filed on October 12,
10 2007, alleges that "defendants have embraced a policy and practice
11 to arrest, detain, and punish non-smuggler migrants for conspiring
12 to transport themselves through Maricopa County" ("the Policy").
13 Am. Compl. (Doc. 45) at ¶ 1. The complaint further alleges that
14 "[d]efendants' sole legal basis for said policy and practice is an
15 *ultra vires* interpretation of Ariz. Rev. Stat. § 13-2319, a statute
16 enacted to impose criminal penalties on professional smugglers who
17 transport migrants not authorized to be in the United States under
18 federal law." Id. As the complaint alleges "[m]ost recently, on
19 or about September 26, 2007, defendants arrested and detained about
20 . . . (27) individuals pursuant to the . . . Policy." Id. at 20,
21 ¶ 43 (emphasis added).

22 The complaint names eight defendants. The first is the
23 Maricopa County Board of Supervisors ("the County Board"), which
24 allegedly "has acquiesced in, condoned, and through local tax
25 revenues financed the adoption and implementation of the . . .

26 _____
27 ordered that "any motions directed to the standing issue" were to be "filed not
28 later than November 8, 2010." Doc. 67. Hence, the pending defense motion was
filed. Also in accordance with that order, plaintiffs timely filed and served
their response. No reply was filed though.

1 Policy." Id. at 9, ¶ 16. Next, the complaint names as defendants
2 Fulton Brock, Don Stapley, Andrew Kunasek, Max W. Wilson, and Mary
3 Rose Wilcox, as "members" of the County Board, who are being "sued
4 in their official capacities[.]" Id. at 9, ¶ 17. Joseph Arpaio
5 is also being sued in his "official capacity[]" as "the Maricopa
6 County Sheriff" who, "as such[,] is vested with the legal authority
7 and duty to enforce the Arizona Criminal Code, including Ariz. Rev.
8 State. § 13-2319." Id. at 10, ¶ 19.

9 The eighth defendant which the complaint names is Andrew
10 Thomas, who at the time of filing, was the Maricopa County Attorney
11 and "[a]s such" was "responsible for the enforcement of the Arizona
12 Criminal Code, including prosecuting violations of Ariz. Rev. Stat.
13 § 13-2319." Id. at 9, ¶ 18. Since the filing of the complaint,
14 however, after the resignation of Mr. Thomas, in accordance with
15 FED.R.CIV.P. 25(d), Richard M. Romley, serving as Interim Maricopa
16 County Attorney, was substituted for defendant Thomas. See also
17 Substitution Order (Doc. 65). The pending defense motion was filed
18 on November 8, 2010, six days after the Maricopa County Attorney
19 election.

20 Thereafter, on December 16, 2010, Deputy County Attorney White
21 filed a "Notice of Name Change and Substitution of Maricopa County
22 Attorney," notifying the court that "William G. Montgomery is now
23 the Maricopa County Attorney, and should be substituted for
24 Defendant Richard M. Romley." Doc. at 70:21-22. Despite the
25 foregoing, the defendants' motion is brought on behalf of every
26 defendant except the Maricopa County Attorney, whether by name or
27 position. See Mot. (Doc. 68) at 1:5-6; and 19-23.

28 . . .

1 Discussion

2 "If the controversy is moot, both the trial and appellate
3 courts lack subject matter jurisdiction, see [*North Carolina v.*]
4 *Rice*, 404 U.S. [244,] 246, 92 S.Ct. 402, [30 L.Ed.2d 413 (1971)],
5 and the concomitant 'power to declare the law' by deciding the
6 claims on the merits." *In re Burrell*, 415 F.3d 994, 998 (9th Cir.
7 2005). That is because if a case is moot there is no longer a live
8 controversy as Article III of the United States Constitution
9 requires. Indeed, "Article III requires that a live controversy
10 persist throughout *all* stages of the litigation." See *Gator.com*
11 *Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129-30 (9th Cir. 2005)
12 (emphasis added) (citing *Steffel v. Thompson*, 415 U.S. 452, 459 n.
13 10, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) ("an actual controversy
14 must be extant at all stages of review, not merely at the time the
15 complaint is filed")). "Hence, the district court must, either *sua*
16 *sponte* or at the request of the parties, evaluate the issue[] of
17 . . . mootness." *San Luis & Delta Mendota Water Authority v. U.S.*
18 *Dep't of Interior*, 637 F.Supp.2d 777, 786 (E.D.Cal. 2008) (citing,
19 *inter alia*, *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567,
20 593, 124 S.Ct. 1920, 158 L.Ed.2d 866 (2004) ("It is the obligation
21 of both district court and counsel to be alert to jurisdictional
22 requirements."))


23 Based upon the foregoing, the court hereby ORDERS that no
24 later than twenty (20) days from the date hereof the defendants
25 shall file and serve a supplemental brief on the issue of whether
26 this action has become moot. Additionally, within that same time
27 frame defendant Montgomery shall advise the court as to whether or
28 not he is joining in "The Maricopa County Defendants' Motion to

1 Dismiss the Claims of the Organizational and Taxpayer Plaintiffs"
2 (Doc. 68).

3 IT IS FURTHER ORDERED that a responsive memoranda, if any, as
4 well as a reply memoranda, if any, shall be filed and served and in
5 all ways comply with the Rules of Practice of the United States
6 District Court for the District of Arizona.

7 DATED this 11th day of April, 2011.

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Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record