No. 18-735

In the Supreme Court of the United States

MARICOPA COUNTY, ARIZONA,
PETITIONER
v.

MANUEL DE JESUS ORTEGA MELENDRES, et al.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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I. THE UNITED STATES ACKNOWLEDGES THAT THIS CASE RAISES "SERIOUS FEDERALISM CONCERNS."

The United States ("U.S.") candidly concedes that "[t]his case involves a uniquely intrusive injunction directed at a state law-enforcement agency," and that this "extensive federal oversight of state law-enforcement operations *raises serious federalism concerns*." U.S. Opp. at 16 (emphasis added).

Precisely.

The corrosive consequences of the Ninth Circuit's rulings disregarding the dual-sovereignty foundations of our Republic make intervention by this Court critical. The responding Briefs of the Plaintiffs-Respondents ("Plaintiffs" or, collectively with the U.S., "Respondents") and the U.S. reflect a fundamental refusal to respect the fact that federalism sets absolute and immutable boundaries on the exercise of federal power. These are constitutional boundaries not to be switched on or off by judicial fiat, or by the kind of case in which the issue arises.

The heart of federalism is preserving our system of dual sovereignty as a means of holding both federal and State sovereigns in check.

> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the

> accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Printz v. U.S., 521 U.S. 898 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Respondents, the Ninth Circuit, and the district court argue, however, that federalism principles ordinarily precluding massive intrusions by a federal court into the sovereign prerogatives of a local law enforcement agency somehow go by the wayside when that agency has failed to comply with prior court orders. But none of them can point to anything in the Constitution or this Court's jurisprudence supporting this novel view. Structural limitations on federal judicial power underscored in *Rizzo v. Goode*, 423 U.S. 362 (1976), as inherent in the precepts of federalism, stand as absolute barriers to exercises of injunctive powers that usurp local sovereign prerogatives, regardless of the factual circumstances of individual cases.

II. HOLDING SHERIFFS TO BE "FINAL POLICYMAKERS" FOR ARIZONA'S COUNTIES UNDER § 1983 REQUIRES A MISAPPLICATION OF ARIZONA LAW THAT OFFENDS PRINCIPLES OF FEDERALISM.

Respondents do not dispute that there is nothing in the Arizona Constitution or statutes that devolves upon counties any authority over law enforcement matters. Nor do they have an answer for the well-

established fact that law enforcement in Arizona is a State, not a local, function. *See* Pet. at 19-20. They nevertheless defend the Ninth Circuit's finding that Arizona's sheriffs are final policymakers for their counties in the law enforcement arena, based on a strained interpretation of Arizona statutes that, they say, give Arizona's counties sufficient "control" over their respective sheriffs to support policymaker liability under § 1983 jurisprudence.

Respondents assert that "the County Board of Supervisors does effectively control the Sheriff under Arizona law" (Pltf. Opp. at 19), citing the facts that: (a) "[t]he Board has the power to require reports from county officers, including the Sheriff, and to remove and replace them" (citing A.R.S. § 11-253(A) and *Fridena v. Maricopa County*, 504 P.2d. 58, 61 (Az. App. 1972)); (b) the Board "may '[s]upervise the official conduct of all county officers,'" (citing A.R.S. § 11-251(1)); (c) the County "determines the budget of the Sheriff" (citing A.R.S. § 11-201(A)(6)); and (d) the fact that "the Board meets monthly to allocate funds to the sheriff for the payment of expenses and 'the sheriff shall render a full and true account of such expenses' every month to the Board," (citing and quoting A.R.S. § 11-444(B)-(C)).

Respondents' reference to A.R.S. § 11-253(A) is misleading. While that provision does authorize the Board to require reports from County officers, the power "to remove and replace them" is narrowly limited to those situations in which an officer who has been required to submit a report, or to post a performance bond, neglects or refuses to do so. In *Goldstein v. City of Long Beach*, 715 F.3d 750 (9th Cir. 2013), the Ninth Circuit itself found that the

California Attorney General's authority to require the State's district attorneys to make reports and call them into conference to discuss the duties of their offices amounted to only 'quite limited' control over the district attorneys, and it is insufficient to make them policymakers for the State. *Id.* at 756. Moreover, it is self-evident that authority to require one to submit reports on one's activities is a far cry from the authority to exert meaningful control over those activities.

Respondents' invocation of A.R.S. § 11-251(1) in support of their contention that the Board of Supervisors has supervisory authority over all County officers completely ignores the fact that that provision has been held to pertain to fiscal matters only, and it delegates no control whatever over the traditional law enforcement activities of Arizona's sheriffs and their deputies. *See* Pet. at 26 (citing *Fridena v. Maricopa County*, 504 P.2d 58, 61 (Az. App. 1972) (county has "no right of control" over law enforcement activities of sheriffs and their deputies, § 11-251(1) notwithstanding); *Dimmig v. Pima County*, 2009 WL3465744 at *1 (Az. App. Oct. 27, 2009) (unpublished opinion) (same).

Respondents' reliance on the fact that, pursuant to A.R.S. § 11-201(A)(6), the Board determines the budget of the Sheriff to support their argument that the County effectively controls the law enforcement activities of the Sheriff flies in the face of this Court's decision in *McMillian v. Monroe County,* 520 U.S. 781 (1997). There, the Court held that a county governing body's discretion to deny funds to the county's sheriff "at most . . . would allow the commission to exert an attenuated and indirect influence over the sheriff's

operations." 520 U.S. at 791-92. Furthermore, the discretion of Arizona's counties to deny funds to their respective sheriffs is considerably more circumscribed than that of Alabama's counties by virtue of A.R.S. § 11-444(A), which provides that "[t]he sheriff shall be allowed actual and necessary expenses incurred by the sheriff in pursuit of criminals, for transacting all civil or criminal business and for service of all process and notices, and such expenses shall be a county charge . . . ." Pet. App. "K" at 384. Thus, the Arizona Legislature requires the State's counties to fund their respective sheriffs' law enforcement operations, leaving the counties with little discretion in setting the budgets for such activities.

A.R.S. § 11-444(B) and (C) also do nothing to give the County control over the Sheriff's traditional law enforcement operations. Those provisions do no more than prescribe a procedure by which the Sheriff makes the Board aware of his "traveling and other expenses . . . during the month," require the Board to "set apart from the expense fund of the county a sum sufficient to pay the estimated" expenses of the Sheriff, and require the Sheriff to pay any excess funds back into the County treasury.

Most fundamentally, there is nothing in any of the provisions touted by Respondents as giving the County "control" over the Sheriff that can be construed to override the undisputed fact that authority over matters of traditional law enforcement operations is delegated under Arizona law to the Sheriff alone, with no such authority delegated to the counties and their boards of supervisors. Accordingly, if the Maricopa County Board of Supervisors were to use its budgetary authority to coerce or influence the Sheriff to conduct

law enforcement activities in a particular way, it likely would meet with objections that law enforcement policy and practice are the Sheriff's sole province, and the Board, like Alabama's county commissions, "cannot instruct [him] how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime." *McMillian*, 520 U.S. at 790.

Respondents also too readily dismiss the several decisions finding that liability for torts committed by law enforcement officers in the course of executing law enforcement duties cannot be imputed to Arizona's counties. They offer no explanation as to how it is that counties can lack sufficient control to warrant imputing tort liability to them under a *respondeat superior* theory, but they have all the control necessary to saddle them with § 1983 policymaker liability.

By ascribing to Arizona's Counties authority over law enforcement matters they lack under State law, the Ninth Circuit has ridden roughshod over the State's right to organize its system of governance as it sees fit. Such judicial intermeddling in the very structure and allocations of responsibility and authority among local governmental institutions is irreconcilable with the principles of federalism.

III. HOLDING THAT FEDERAL COURTS CAN ORDER A LOCAL GOVERNMENTAL ENTITY TO FUND REMEDIES FOR WHICH IT LACKS AUTHORITY UNDER STATE LAW VIOLATES FEDERALISM PRINCIPLES.

> A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts. ("Through the structure of its government, and the character of those who exercise government authority, a state defines itself as a sovereign").

Alden v. Maine, 527 U.S. 706, 752 (1999) (citing and quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991)).

In A.R.S. § 11-981, the Arizona Legislature has prescribed the scope of the only authority delegated to the State's counties to fund judgments for claims brought against county officers and employees, expressly confining that authority to remedies for claims arising out of conduct where such officers or employees acted "within the scope of employment or authority." A.R.S. § 11-981(A)(2). Respondents argue, however, that federal courts have the power to override this statutory limitation on the County's authority.

In support of this proposition, Plaintiffs cite three cases, two of which are inapposite because they

involved State laws enacted for the specific purpose of frustrating federal remedial decrees. *See North Carolina State Bd. of Education v. Swann*, 402 U.S. 43, 45-46 (1971) (statute enacted while issue of desegregation remedial measures was being litigated); *Hook v. Arizona Dept. of Corrections*, 107 F.3d 1397, 1400 (9th Cir. 1997), as amended (Apr. 22, 1997) (statute prohibiting payment of court-appointed special masters enacted after entry of federal remedial orders appointing master). In the third case, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, as modified, 444 U.S. 816 (1979), this Court acknowledged that a district court order compelling a State agency to promulgate certain regulations might be beyond the agency's authority under State law, and that whether a State agency "may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful." 443 U.S. at 692-93, 695. *Washington* thus also provides no support for Respondents' argument that federal courts are imbued with power to require of State agencies actions beyond their State law authority.

Respondents appear not to grasp the fact that the County's argument is not intended to suggest that federal courts cannot compel local agencies to fund remedies for constitutional violations, even those that are willful and intentional. Rather, the County's argument goes to the need for federal courts, which must act within the bounds set by the principles of federalism, to respect the allocations of authority among local institutions under State law. In this instance, it would have been well within the district court's authority to require that the *Sheriff* provide funding for all necessary and proper remedies. This

would have required the Sheriff to seek funds from the County for this, as well as for the operational needs of his office, and the County would have been required to consider this along with all other budgetary requests pursuant to its duty under State law to fund "actual and necessary expenses incurred by the sheriff in pursuit of criminals, [and] for transacting all civil or criminal business." A.R.S. 11-444(A). As a consequence, the matter would have been left to those elected to make hard decisions about balancing competing needs for limited public monies through the give-and-take of the budgetary political process, as Arizona law contemplates.

> While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc.
>
> * * *
>
> If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen. "It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place."

Alden, 527 U.S. at 751 (quoting *Louisiana v. Jumel*, 107 U.S. 711, 727-28 (1883)).

IV. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE APPLICATION OF THE ANALYTICAL CONSTRUCTS OF *McMILLIAN v. MONROE COUNTY*.

Respondents' denial of the existence of a conflict among the circuits in the application of the teachings of *McMillian v. Monroe County, Alabama*, 520 U.S. 781 (1997), is pure misdirection. They argue that only the Ninth Circuit has interpreted Arizona law to determine whether sheriffs in Arizona act on behalf of the State or the counties when carrying out law enforcement functions. Pltf. Opp. at 21-22; U.S. Opp. at 12-13. This cannot be allowed, however, to obscure the disparate applications of *McMillian's* analytical constructs. In cases in the Fourth, Seventh, and Eleventh Circuits cited in the County's Petition (Pet. at 27-28), decisions have been issued holding that the question of whether counties have sufficient authority to *control law enforcement functions* is paramount. In the Ninth Circuit, lack of county control over such functions is minimized or ignored. Respondents make no attempt to explain how the Ninth Circuit's treatment of this factor can be reconciled with the fact that *McMillian* deemed it "most important[]." 520 U.S. at 791.

V. PLAINTIFFS' WAIVER ARGUMENTS REST ON FACTUAL DISTORTIONS.

Plaintiffs assert that the County "waived its arguments both as to county liability and the merits of the second supplemental injunction" by stipulating to

being dismissed from this case "'without prejudice to rejoining [the County] . . . at a later time in this lawsuit if doing so becomes necessary to obtain complete relief.'" Pltf. Opp. at 26 (quoting Dist. Ct. Docs. 178, 194). This is a glaring non sequitur. It hardly needs saying that agreement to be re-joined "if doing so becomes necessary to obtain complete relief" is a far cry from a waiver of substantive objections to whatever transpires subsequent to the County's dismissal. Further, neither the Respondents, nor the Ninth Circuit, nor the district court have ever attempted to articulate how the essential prerequisite for the County's re-joinder was ever met. None of the burdens imposed on the County in the district court's post-contempt orders were such that they could not have been just as easily imposed on the contemnor Sheriff. *See* Pet. App. "E" at ¶¶ 262, 308, 321; *see also* Pet. App. "F."

Plaintiffs also argue that the County's failure to object to remedies agreed to by the Sheriff effected a waiver of "objections to the bulk of the second supplemental injunction." Pltf. Opp. at 28 (footnote omitted). The record plainly shows, however, that Defendants' agreement to certain remedial measures was subject to their rights of appeal, as the Ninth Circuit acknowledged:

> . . . MCSO and the district court understood that the proposal was not an intentional relinquishment of appeal rights. Further, the County stated in response to the district judge's findings of fact that it intended to retain all of its appeal rights as to those findings and their implications.

Melendres v. Maricopa County, 897 F.3d 1217, 1221 n. 1 (9th Cir. 2018); *see also* Dist. Ct. Doc. 1747 at 4; Doc. 1740, at 28, 175.

VI. PLAINTIFFS' LAW OF THE CASE ARGUMENT MISAPPREHENDS THAT DOCTRINE.

Plaintiffs argue that the Ninth Circuit "was bound by its previous rulings [on the question of whether the Sheriff is the final policymaker for the County on law enforcement matters, making the County a proper party] under the law of the case doctrine." Pltf. Opp. at 27. This argument reflects a fundamental misunderstanding of the doctrine it invokes. First, "[t]he doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (citation omitted). Second, "[t]he law of the case doctrine presumes a hearing on the merits." *U.S. v. Hatter*, 532 U.S. 557, 566 (2001) (citation omitted).

Here, the Ninth Circuit's original decision re-joining the County was made *sua sponte* and without benefit of briefing or argument. *See Melendres v. Arpaio*, 784 F.3d 1254, 1260 (9th Cir. 2015), cert. denied 136 S.Ct. 799 (2016). The Ninth Circuit's second occasion for declaring the County a proper party under its policymaker theory was in *Melendres III*, but that case was decided on jurisdictional grounds making the court's pronouncement on policymaker liability obiter dictum. *See Melendres v. Maricopa County*, 815 F.3d 645, 649-650 (9th Cir. 2016). The third occasion was not in this case at all, but in *U.S. v.*

Maricopa County, 889 F.3d 648, 651 (9th Cir. 2018), cert. denied No. 18-408 (Mar. 25, 2019). A decision in a collateral case is not in any sense the law of this case.

VII. CONCLUSION.

The Ninth Circuit transgressed the bounds of its authority under the precepts of federalism by misconstruing Arizona law and ascribing to the County authority over the Sheriff that does not exist, failing to apply faithfully the analytical constructs of *McMillian*, failing to respect limitations on the County's ability to provide remedies beyond its statutory authority, and usurping much of the Sheriff's authority over the internal workings of MCSO, thus enmeshing the court in the minutiae of those operations. All this does violence to the dual sovereignty concept on which our Republic is grounded, and it is critical for this Court to restore the vital constitutional balance.

Respectfully submitted,

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