

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 25 2021

FOR THE NINTH CIRCUIT

**MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

JACKIE CHAGOLLA, Parent on behalf of
B.C. on behalf of P.C.,

Plaintiff-Appellant,

v.

LIZ VULLO; et al.,

Defendants-Appellees,

and

AZ DCS; et al.,

Defendants.

No. 20-15078

D.C. No. 2:17-cv-01811-DGC

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Submitted January 20, 2021**

Before: McKEOWN, CALLAHAN, and BRESS, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Chagolla's request for oral argument, set forth in the reply brief, is denied.

Jackie Chagolla appeals pro se from the district court's summary judgment in her 42 U.S.C. § 1983 action alleging federal claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Kohler v. Bed Bath & Beyond, LLC*, 780 F.3d 1260, 1263 (9th Cir. 2015). We affirm.

The district court properly granted summary judgment on Chagolla's due process claim against defendant Solis stemming from the removal of Chagolla's children from her custody because Chagolla failed to raise a genuine dispute of material fact as to whether Solis lacked reasonable cause to believe the children were in imminent danger of serious bodily injury. *See Demaree v. Pederson*, 887 F.3d 870, 878-79 (9th Cir. 2018) (explaining circumstances in which officials may constitutionally remove children from their parents temporarily without prior judicial authorization).

The district court properly granted summary judgment on Chagolla's due process claim against defendant Solis related to Solis's investigation because Chagolla failed to raise a triable dispute as to whether the alleged conduct shocked the conscience. *See Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1111 (9th Cir. 2010) ("The Court has repeatedly spoken of the cognizable level of executive abuse of power as that which shocks the conscience." (citation and internal quotation marks omitted)); *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) (en banc) (no due process right to have a child abuse investigation

carried out in a particular way or have witnesses interviewed in a particular manner).

The district court properly granted summary judgment on Chagolla's defamation-plus claim against defendants Solis, Ward, and Holya because Chagolla failed to raise a triable dispute as to whether the contested statements were provably false assertions of fact. *See Crowe v. County of San Diego*, 608 F.3d 406, 443 (9th Cir. 2010) ("In order to fall outside the scope of First Amendment protection, an alleged defamatory statement must contain a provably false factual connotation." (citation and internal quotation marks omitted)).

The district court properly granted summary judgment on Chagolla's § 1983 claims against defendant Vullo because Chagolla failed to raise a triable dispute as to whether Vullo acted under color of state law. *See Kirtley v. Rainey*, 326 F.3d 1088, 1092-96 (9th Cir. 2003) (explaining that a § 1983 plaintiff must show the defendant "acted under color of state law" and the tests to determine state action; the central question is whether the alleged constitutional violation is fairly attributable to the government).

To the extent the district court erred by determining that the Arizona Department of Child Safety ("DCS") was not a party, any error was harmless because Chagolla's claims against DCS are barred by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) ("[I]n

the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.”).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Jackie Chagolla,

10 Plaintiff,

11 v.

12 Liz Vullo, Jessica Solis, Patricia Ward, and
13 Robert Holya,

14 Defendants.

No. CV17-01811-PHX-DGC

ORDER

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16 Plaintiff Jackie Chagolla alleges constitutional violations surrounding the removal
17 of her minor children, B.C. and P.C. *See* Doc. 1-1 at 2. Defendants separately move for
18 summary judgment. Docs. 104, 111. The motions are fully briefed, and oral argument has
19 not been requested. Docs. 115-118. The Court will grant both motions.¹

20 **I. Background.**

21 Defendants moved for summary judgment in April and May of this year.
22 Docs. 104, 111. Although Plaintiff has responded, she did not comply with Local Rule of
23 Civil Procedure 56.1. Despite being warned to do so, Plaintiff has not filed a separate
24 statement of facts with numbered paragraphs corresponding to Defendants' separate
25 statement of facts. *See* Doc. 108 at 2. The Court informed Plaintiff of her burden:

26 [Y]ou must set out specific facts in declarations, depositions, answers to
27 interrogatories, or authenticated documents, as provided in Rule 56(e) of the

28 ¹ This case was recently transferred to the undersigned judge with the motions
already pending.

1 Federal Rules of Civil Procedure, that contradict the facts set forth in the
2 declarations and documents filed by Defendant(s), and show that there is a
3 genuine issue of material fact for trial. If you do not submit your own
4 evidence in opposition, summary judgment, if appropriate, may be entered
against you. If summary judgment is granted, your case will be dismissed
and there will be no trial.

5 *Id.* Despite reiterating many of the arguments originally made in her complaint, Plaintiff
6 provides no declarations, depositions, answers to interrogatories, or authenticated
7 documents as allowed by Rule 56(e). *See* Docs. 115, 117. Nevertheless, the Court will
8 consider the arguments Plaintiff has provided and will address the motions on the merits.
9 The following facts state the parties' respective positions.

10 On July 2, 2015, Tempe Police officers made contact with Plaintiff's minor
11 daughters, B.C. and P.C. Doc. 104 at 1-2. B.C. and P.C. informed the officers that their
12 father, Robert Chagolla, regularly abused them and that Plaintiff had ignored the abuse.
13 *Id.* at 2. In response, the Tempe Police Department ("Tempe PD") contacted the Arizona
14 Department of Child Safety ("DCS"). *Id.* On July 6, 2015, DCS case worker Jessica Solis
15 interviewed Plaintiff, B.C., P.C., and Robert Chagolla. *Id.* On that same day, the Tempe
16 PD opened an investigation into allegations of the physical and sexual abuse of B.C. and
17 P.C. by Robert Chagolla. Doc. 104 at 2. Following the interviews, Solis determined that
18 B.C. and P.C. needed to be removed from the Chagolla home during the investigation into
19 the alleged abuse. Docs. 104 at 2, 111 at 2.

20 Rather than having B.C. and P.C. live in a group home during the investigation,
21 Plaintiff asked Liz Vullo, a family friend, if they could live with her. Doc. 111 at 2. Vullo
22 agreed and thereafter maintained custody of B.C. and P.C. for six months. *Id.* Vullo spoke
23 with a detective from the Tempe PD and later with a representative from La Frontera, a
24 mental health service, about B.C. and P.C. *Id.* at 3. Vullo claims that "she spoke truthfully"
25 to the representative from La Frontera, which Plaintiff disputes. *See* Docs. 111 at 3, 117
26 at 1-2. Vullo also maintains – and Plaintiff disputes – that she never received any mail
27 addressed to Plaintiff and that she did not publicly disclose any information about Plaintiff.
28 Docs. 111 at 3, 117 at 2-3.

1 Plaintiff now asserts constitutional claims against three state defendants and Vullo.
2 See Doc. 71.

3 **II. Summary Judgment Standard.**

4 A party seeking summary judgment “bears the initial responsibility of informing the
5 district court of the basis for its motion, and identifying those portions of [the record] which
6 it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v.*
7 *Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the evidence,
8 viewed in the light most favorable to the nonmoving party, shows “that there is no genuine
9 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
10 Fed. R. Civ. P. 56(a). Rule 56 further provides:

11 If a party fails to . . . properly address another party’s assertion of fact as
12 required by Rule 56(c), the court may . . . consider the fact undisputed for
13 purposes of the motion [or] grant summary judgment if the motion and
supporting materials – including the facts considered undisputed – show that
the movant is entitled to it[.]

14 Fed. R. Civ. P. 56(e)(3). Thus, a party opposing summary judgment “may not rest upon
15 the mere allegations or denials of [the party’s] pleadings, but . . . must set forth specific
16 facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith*
17 *Radio Corp.*, 475 U.S. 574, 586 n.11 (1986) (emphasis added); see LRCiv 56.1(b)
18 (requiring the party opposing summary judgment to present evidence that establishes a
19 genuine issue of material fact or otherwise precludes judgment in favor of the moving
20 party).

21 **III. State Defendants’ Motion.**

22 **A. Wrongful Removal Claim.**

23 Plaintiff argues that her constitutional right to parent her children was violated when
24 Solis removed B.C. and P.C. from her custody without a court order and on the basis of
25 “untrue information.” Doc. 71 at 1. Plaintiff alleges that Solis “stated that she would do
26 whatever it took to make sure that P.C. and B.C. never returned to [her family] again,” and
27 that this violated the Due Process Clause of the Fourteenth Amendment by depriving her
28 of a continued relationship with her children. *Id.* at 1-2. Solis – a state employee –

1 contends that this claim fails because she is entitled to qualified immunity. Doc. 104 at 3.
2 The Court agrees.

3 “Government officials are entitled to qualified immunity with respect to
4 discretionary functions performed in their official capacities.” *Ziglar v. Abbasi*, 137 S.
5 Ct. 1843, 1866 (2017). The Supreme Court has established a two-step inquiry for resolving
6 a qualified immunity defense: the constitutional inquiry and the qualified immunity
7 inquiry. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). The first step asks whether, taken
8 in the light most favorable to the plaintiff, the facts show that the officials’ conduct violated
9 a constitutional right. *Id.* at 201. The second step asks whether the right was clearly
10 established at the time of the violation. *Id.*

11 Solis is entitled to qualified immunity under the first step because – even when taken
12 in the light most favorable to Plaintiff – the facts show that she did not violate Plaintiff’s
13 constitutional rights. “Parents and children have a well-elaborated constitutional right to
14 live together without governmental interference.” *Wallis v. Spencer*, 202 F.3d 1126, 1136
15 (9th Cir. 2000). While parents have a Fourteenth Amendment right to the care, custody,
16 and control of their children, it is not absolute. *Troxel v. Granville*, 530 U.S. 57, 65 (2000);
17 *see Mueller v. Aufer*, 700 F.3d 1180, 1186 (9th Cir. 2012) (holding that a parent’s “rights
18 must bow to other countervailing interests and rights, such as the basic independent life
19 and liberty rights of the child and of the State acting as *parens patriae*[.]”); *Lassiter v.*
20 *Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (holding that the state “has an urgent interest
21 in the welfare of the child”). Officials violate parental rights if they remove a child from
22 the home absent “information at the time of the seizure that establishes ‘reasonable cause
23 to believe that the child is in imminent danger of serious bodily injury and that the scope
24 of the intrusion is reasonably necessary to avert that specific injury.’” *Mabe v. San*
25 *Bernardino Cty., Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101, 1106 (9th Cir. 2001).

26 Solis did not violate Plaintiff’s constitutional rights because, at the time of the
27 removal, she had specific, articulable evidence that provided reasonable cause to believe
28 that B.C. and P.C. were in imminent danger of abuse. *Croft v. Westmoreland Cty. Children*

1 *and Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997); *see Ram v. Rubin*, 118 F.3d 1306,
 2 1311 (9th Cir. 1997) (“[S]erious allegations of abuse which are investigated and
 3 corroborated usually gives rise to a reasonable inference of imminent danger.”). In their
 4 interview with Solis, B.C. and P.C. disclosed that their father had physically and verbally
 5 abused them prior to them running away and that Plaintiff had ignored the abuse. Doc. 105-
 6 3 ¶ 5. B.C. further disclosed that her father had recently physically assaulted her because
 7 she attempted to sneak out of the home the same day they ran away. *Id.* ¶ 7. Based on
 8 these allegations, Solis determined that it was necessary for DCS to take temporary custody
 9 of B.C. and P.C. to ensure their safety. *Id.* ¶ 9. Beyond a conclusory statement that Solis’s
 10 determination was based on untrue information, Plaintiff has presented no evidence from
 11 which a jury reasonably could find that Solis did not have reasonable cause to remove B.C.
 12 and P.C.

13 Because Plaintiff’s constitutional rights were not violated, the Court need not
 14 address the second step of the qualified immunity analysis. *See Pearson v. Callahan*, 555
 15 U.S. 223, 236 (2009). The Court will grant summary judgment on Plaintiff’s wrongful
 16 removal claim.

17 **B. Fraud and Defamation Claims.**

18 Plaintiff alleges a Fourteenth Amendment violation because the State Defendants
 19 allegedly reported false information to juvenile court regarding the existence of a sexual
 20 abuse investigation into Robert. Doc. 71 ¶¶ 6, 9-12. The State Defendants argue this claim
 21 fails because the Tempe PD did investigate allegations of sexual abuse during the relevant
 22 time frame. Doc. 104 at 7.

23 The evidence Defendants have presented is clear: the Tempe PD Special Victims
 24 Unit opened an investigation into the potential abuse of B.C. and P.C. by Robert
 25 (Doc. 105 ¶ 17); this investigation included specific allegations of physical and sexual
 26 abuse (*id.* ¶ 19); and the investigation was deemed inactive on September 7, 2015
 27 (*id.* ¶ 22).² Aside from unsupported statements regarding the presentation of false

28 ² In a separate filing, Plaintiff alleges that a statement by Detective Erik Hernandez
 of the Tempe Police Department that “the case was deemed inactive on September 7, 2015”

1 information, Plaintiff has presented no evidence to indicate that State Defendants
 2 committed fraud by reporting the sexual abuse investigation to the juvenile court. *See*
 3 Doc. 115 at 7. Plaintiff does not indicate how the disclosure of these facts by Solis, Ward,
 4 and Holya to juvenile court rises to the level of fraud or defamation. *See Matsushita*, 475
 5 U.S. at 586 n.11 (holding that the party opposing summary judgment “must set forth
 6 specific facts showing that there is a genuine issue for trial”). The Court will grant
 7 summary judgment on these claims.

8 C. Other Claims.

9 Plaintiff also claims violations of the Fourteenth Amendment because (1) Solis
 10 interviewed other children residing with Plaintiff and did not include that information in
 11 her report to juvenile court, (2) Solis spoke to Vullo about the sexual abuse investigation,
 12 (3) Solis blocked an independent reviewer from speaking to anyone other than Vullo, B.C.,
 13 or P.C., and (4) DCS failed to provide medical care for B.C. and P.C. Doc. 71 ¶¶ 3-5, 14.
 14 Defendants argue that, as a matter of law, these allegations do not rise to the level of
 15 Fourteenth Amendment violations.

16 The first three allegations are related to the manner in which Solis conducted the
 17 DCS investigation. As mentioned, the state “has an urgent interest in the welfare of the
 18 child[.]” *Lassiter*, 452 U.S. at 27. And while there is an established right to family
 19 integrity, there is no “constitutional right to be free from child abuse investigations.”
 20 *Watterson v. Page*, 987 F.2d 1, 8 (1st Cir. 1993) (citing *Stanley v. Illinois*, 405
 21 U.S. 645, 649 (1972)). In order to rise to the level of a Fourteenth Amendment violation,
 22 official conduct must “shock the conscience.” *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th
 23 Cir. 2008). An official’s conduct shocks the conscience when he or she acts with
 24 “deliberate indifference,” which means “conscious or reckless disregard of the
 25 consequences of one’s acts or omissions.” *Gantt v. City of Los Angeles*, 717 F.3d 702, 708

26 _____
 27 is false. Doc. 114 ¶ 3. In support, Plaintiff cites a letter from Detective Hernandez, dated
 28 August 19, 2015, informing her that the case was inactive. But the investigation was in
 fact officially deemed inactive on September 7, 2015. *See* Doc. 105-1 at 14. Regardless,
 Plaintiff has failed to identify any other facts or legal authority indicating how her
 Fourteenth Amendment rights were violated here.

1 (9th Cir. 2013). Aside from conclusory statements implying disagreement with the manner
2 of the investigation, Plaintiff provides no facts suggesting that Solis's conduct shocks the
3 conscience. *Gantt*, 717 F.3d at 708. The Court will grant summary judgment on these
4 claims.

5 Plaintiff also argues that DCS failed to provide medical care for B.C. and P.C.
6 Doc. 71 ¶ 14. The right to family association includes the rights of parents to make
7 important medical decisions for their children and of children to have those decisions made
8 by their parents rather than the state. *See Parham v. J.R.*, 442 U.S. 584, 602, (1979)
9 (holding that it is in the interest of the parents and children that parents have ultimate
10 authority to make medical decisions for their children unless "neutral fact finder"
11 determines, through a due process hearing, that parent is not acting in the child's best
12 interests). But Plaintiff's allegation is directed at DCS, which is not a party to this case,
13 and its alleged inaction is unrelated to the named Defendants here. *See* Doc. 71 at 8. The
14 Court will grant summary judgment on these claims.

15 **IV. Defendant Vullo's Motion.**

16 Plaintiff alleges Vullo violated the Fourteenth Amendment because she (1) had a
17 conversation with Solis which "may have included an allegation of a police sexual abuse
18 investigation" (Doc. 71 ¶ 4), (2) stated falsehoods to an independent investigator and
19 prevented that investigator from speaking to anyone else but herself or B.C. and P.C.
20 (*id.* ¶ 5), and (3) either destroyed or did not return mail addressed to Plaintiff that had been
21 inadvertently sent to Vullo (*id.* ¶ 7).

22 The Fourteenth Amendment applies to state actors, not private parties. *Rendell-*
23 *Baker v. Kohn*, 457 U.S. 830, 837 (1982) (citations omitted). To determine whether a
24 person is a state actor, the Ninth Circuit recognizes four tests: (1) public function; (2) joint
25 action; (3) governmental compulsion or coercion; and (4) governmental nexus. *Kirtley v.*
26 *Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (quoting *Sutton v. Providence St. Joseph Med.*
27 *Ctr.*, 192 F.3d 826, 835-36 (9th Cir. 1999)). "Satisfaction of any one test is sufficient to
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1 find state action, so long as no countervailing factor exists.” *Id.* (quoting *Lee v. Katz*, 276
2 F.3d 550, 554 (9th Cir. 2002)).

3 Plaintiff provides no evidence that would support a conclusion that Vullo was a state
4 actor. First, Vullo is not a state actor under the public function test. “Under the public
5 function test, when private individuals or groups are endowed by the State with powers or
6 functions governmental in nature, they become agencies or instrumentalities of the State
7 and subject to its constitutional limitations.” *Lee*, 276 F.3d at 554–55 (internal quotation
8 marks omitted). The public function test is satisfied only on a showing that the function at
9 issue is “both traditionally and exclusively governmental.” *Id.* at 555. Vullo’s custody of
10 Plaintiff’s children is not “traditionally and exclusively governmental.” *Id.* In fact, this
11 Circuit has held that even a court-appointed guardian of a minor does not have powers that
12 are governmental in nature. *See Kirtley*, 326 F.3d at 1096. This test is not satisfied.

13 Under the joint action test, courts consider whether “the state has so far insinuated
14 itself into a position of interdependence with the private entity that it must be recognized
15 as a joint participant in the challenged activity.” *Id.* at 1093. A private party must be a
16 “willful participant,” whose actions are “inextricably intertwined” with those of the
17 government. *Brunette v. Humane Soc’y of Venura Cty.*, 294 F.3d 1205, 1211 (9th
18 Cir. 2002). The joint action test is thus not satisfied where, as here, a guardian takes
19 custody of a child. *See Kirtley*, 326 F.3d at 1093-94.

20 Nor can Plaintiff satisfy the governmental compulsion test. This test considers
21 whether the coercive influence or “significant encouragement” of the state effectively
22 converts a private action into a government actor. *Id.* at 1094. As a temporary guardian,
23 Vullo was not under such government compulsion that she was required to act on behalf
24 of the state; rather – as indicated by the interviews she gave to DCS, Tempe PD, and La
25 Frontera – her role was merely to ensure the safety of the children and to report facts to
26 juvenile court. *See id.*

27 Finally, the nexus test asks whether “there is a such a close nexus between the State
28 and the challenged action that the seemingly private behavior may be fairly treated as that

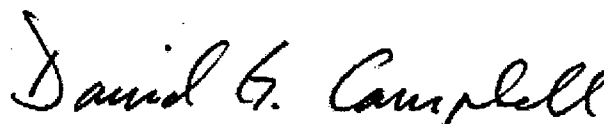
1 of the State itself.” *Id.* at 1095 (citations omitted). Plaintiff argues that Vullo’s decision
 2 to take custody of B.C. and P.C. created a “verbal contractual agreement” with the state
 3 which made her its agent. But Plaintiff does not cite, and the Court has not found, any
 4 authority for this argument. What is more, Vullo volunteered to care for B.C. and P.C.
 5 *after* the decision to remove B.C. and P.C. had been made. Vullo could have refused to
 6 take in Plaintiff’s children, with no effect on the State’s decision to remove them from the
 7 Chagolla home. Vullo’s behavior cannot “be fairly treated as that of the State itself.” *Id.*

8 Aside from claiming that Vullo is an agent of the state because she had a “verbal
 9 contractual agreement” with DCS, Plaintiff provides no facts or legal authority indicating
 10 that temporary guardians are state actors for purposes of constitutional claims.³ The law is
 11 clearly to the contrary. *See Kirtley*, 326 F.3d at 1096. The Court will grant summary
 12 judgment on Plaintiff’s claims against Vullo.

13 **IT IS ORDERED:**

- 14 1. Defendants’ motions for summary judgment (Docs. 104, 111) are **granted**.
- 15 2. The Clerk is directed to terminate this action and enter judgment.

16 Dated this 16th day of December, 2019.

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20 David G. Campbell
 21 Senior United States District Judge
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28 ³ Plaintiff also alleges a § 1983 violation for defamation based on her belief that Vullo published information about Plaintiff’s court dealings at Plaintiff’s church, school, and neighborhood. Doc. 71 ¶¶ 7-8. Because Vullo is not a state actor, this claim also fails.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-001125

07/07/2017

HON. ROSA MROZ

CLERK OF THE COURT
B. Randhawa
Deputy

JACKIE CHAGOLLA, et al.

JACKIE CHAGOLLA
408 E LOMA VISTA DR
TEMPE AZ 85282

v.

LIZ VULLO, et al.

KHANRAT PIENSOOK
JACKIE CHAGOLLA
408 E LOMA VISTA DR
TEMPE AZ 85282

RULING

The Court has received Plaintiff's "Request/Motion to Not Remove Case from Maricopa County Superior Court filed on June 26, 2017, and Correction on Request filed on June 27, 2017. The Court notes that the Defendants in this case have filed a Notice of Removal from State Court Under 28 U.S.C. § 1441(a) on June 14, 2017. Pursuant to 28 U.S.C. § 1446(d), once the Notice has been filed, "the State court shall proceed no further unless and until the case is remanded." The proper court to challenge the removal of this case from the state court is with the federal court. Accordingly,

IT IS ORDERED denying Plaintiff's "Request/Motion to Not Remove Case from Maricopa County Superior Court filed on June 26, 2017, and Correction on Request filed on June 27, 2017.