No. 18-____

IN THE

Supreme Court of the United States

MARICOPA, COUNTY OF, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *McMillian v. Monroe County, Alabama*, 520 U.S. 781 (1997), this Court held that counties cannot be liable in actions brought under 42 U.S.C. § 1983 for the actions of sheriffs acting in their law enforcement capacities, unless the sheriffs are found to have been acting as "policymakers" for the counties within the meaning of *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978). Here, the Ninth Circuit has misconstrued Arizona law to find sheriffs to be policymakers for Arizona's counties in the area of law enforcement, took the unprecedented step of applying that concept to claims arising under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. § 12601, and the held Maricopa County ("the County") bound by findings in a collateral case from which the County had been dismissed years before trial and entry of judgment in that case.

The questions presented are:

1. Under Arizona law, as evaluated or mandated by *McMillian,* are Arizona's sheriffs "final policymakers" for their respective counties with respect to matters of law enforcement?

2. Can "policymaker liability" properly be engrafted onto Title VI and § 12601?

3. Can courts, consistent with due process, apply non-mutual, offensive issue preclusion to bind a party to findings in a case when there is no evidence that another party remaining in that case had identical

interests and "understood herself to be acting in a representative capacity [for the dismissed party] or the original court took care to protect the interests of the non-party." *Taylor v. Sturgell*, 553 U.S. 880, 900 (2008).

PARTIES TO THE PROCEEDINGS

Defendants below were Maricopa County, Arizona, and Sheriff Joseph Arpaio (replaced by Sheriff Paul Penzone in January 2017), in his official capacity.

Plaintiff below was the United States.

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INTRODUCTION

Petitioner Maricopa County, Arizona, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, entered May 7, 2018, is available at 889 F.3d 648 (9th Cir. 2018); *see also* Pet. App. "A." The court of appeals decision denying the County's timely-filed Petition for Panel Rehearing and En Banc Consideration, entered on July 16, 2018, is available at Pet. App. "G." The decision granting the County's Motion to Stay the Mandate, entered on July 26, 2018, is available at Pet. App. "H."

The opinion of the district court granting summary judgment to respondent United States is reported at 151 F.Supp.3d 998; *see also* Pet. App. "C." The opinion of the district court denying the County's earlier motion to dismiss is reported at 915 F.Supp. 2d 1073; *see also* Pet. App. "B." The district court entered judgment in the case September 2, 2015. *See* Pet. App. "I." The district court subsequently entered three amendments to the judgment on September 3, 2015, and November 6, 2015. See Pet. App. "K" and "L."

JURISDICTION

The court of appeals entered its opinion May 7, 2018, subsequently denying the County's Petition for Panel Rehearing and En Banc Consideration on July 16, 2018. *See* Pet. App. "A" and "G." This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the Ninth Circuit was based on 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the following constitutional and statutory provisions are set forth at App. M to this petition:

1. U.S. Constitution, Art. 4, § 4 (Pet. App. "M" at 287);

2. U.S. Constitution, Amendment X (*Id.* at 287);

3. 34 U.S.C. § 12601 (formerly 42 U.S.C. § 14141) (*Id.* at 287);

4. 42 U.S.C. § 1983 (*Id.* at 288);

5. 42 U.S.C. § 2000d (*Id.* at 288);

6. Arizona Constitution, Art. 4, § 19 (*Id.* at 288);

7. Arizona Constitution, Art. 12, § 3 (*Id.* at 289);

8. Arizona Constitution, Art. 12, § 4 (*Id.* at 290);

9. Arizona Constitution, Art. 22, § 17 (*Id.* at 290);

10. Arizona Rev. Stat. § 1-201 (*Id.* at 291);

11. Arizona Rev. Stat. § 11-201 (*Id.* at 291);

12. Arizona Rev. Stat. § 11-251 (*Id.* at 292);

13. Arizona Rev. Stat. § 11-251.02 (*Id.* at 305);

14. Arizona Rev. Stat. § 11-401 (*Id.* at 306);

15. Arizona Rev. Stat. § 11-409 (*Id.* at 306);

16. Arizona Rev. Stat. § 11-441 (*Id.* at 306);

17. Arizona Rev. Stat. § 11-444 (*Id.* at 309);

18. Arizona Rev. Stat. § 41-1821 (*Id.* at 309); and,

19. Arizona Rev. Stat. § 41-1822 (*Id.* at 312).

STATEMENT

The United States commenced this case May 10, 2012, naming as defendants Sheriff Arpaio, the then elected Sheriff of Maricopa County ("the Sheriff"),[1] the Maricopa County Sheriff's Office ("MCSO"), and the County. The Complaint alleged violations of Title VI, 42 U.S.C. § 2000d ("Title VI"), and 34 U.S.C. § 12601 (formerly 42 U.S.C. § 14141) ("§ 12601(a)"). The allegations included assertions that the Sheriff and MCSO "routinely targeted Latino drivers and passengers for pretextual traffic stops aimed at detecting violations of federal immigration law." *U.S. v. Maricopa County*, 889 F.3d 648, 649 (9th Cir. 2018); *see also* App. "A" at 5. Other conduct alleged to have been unlawful was discriminatory law enforcement practices (Count One); unreasonable searches, arrests and detentions without probable cause (Count Two); unjustified law enforcement practices intended to discriminate and having a disparate impact on Latinos (Count Three); and intentional discrimination against Latinos and Latino LEP prisoners in policing and jail practices (Count Five). *U.S. v. Maricopa County*, 915 F.Supp.2d 1073, 1076-77 (D. Ariz. 2012); *see also* Pet. App. "B" at 15-16; R., Doc. 1.[2] There are no allegations that the County participated in, instigated, encouraged, or approved of any of the unlawful practices alleged.

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[1] Sheriff Arpaio lost a re-election bid to Paul Penzone in November of 2016; now Sheriff Penzone was substituted for Arpaio in this and other cases after taking office in January 2017.

[2] Citations to the district court record are preceded herein by the designation "R." Counts Four and Six, dealing with treatment of limited English proficiency prisoners and alleged retaliation were settled.

A. District Court Litigation

The Sheriff and MCSO, and the County moved for dismissal in separate motions. On December 12, 2012, the district court denied the County's motion in its entirety, and granted the Sheriff's and MCSO's motion in part, dismissing MCSO on the ground that it was a non-jural entity under Arizona law. *U.S. v. Maricopa County*, 915 F.Supp.2d 1073 (D. Ariz. 2012); Pet. App. "B." In denying the County's motion, the district court held:

> Under Arizona law, the Sheriff has final policymaking authority with respect to County law enforcement and jails, and the County can be held responsible for constitutional violations resulting from these policies. The policy maker analysis also supports Plaintiff's Title VI claims against the County because Title VI reaches the actions of relevant "decision makers."

Id. at 1084 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279) (1979)); *see also* Pet. App "B" at 31-32.

In its June 15, 2015, ruling on the remaining parties' cross-motions for summary judgment, the district court referenced its earlier holding that the Sheriff was a policymaker for the County, and pronounced it " [to be] the law of this case." Pet. App. "C" at 54. Later in its summary judgment decision, the

district court made passing reference to *McMillian*[3] conducted no rigorous analysis of State law as prescribed by the *McMillian* Court. The district court minimized the significance of control as a factor: "In analyzing . . . whether a policymaker may be associated with a particular government entity for purposes of liability – the amount of control the government entity, i.e. the county board of supervisors, possesses over the official is but one factor." S*ee* Pet. App. "C" at 65.

The district court acknowledged there was no precedent for applying the "policymaker liability" from § 1983 to cases under Title VI and § 12601. S*ee* Pet. App. "C" at 65-70. Nevertheless, the court found that Title IX "parallels Title VI," and that Title IX cases provide that principal liability can arise if an "appropriate person" is notified of employees' violations, and the principal fails to respond adequately, making the principal "directly liable for its 'own official decision[s].'" S*ee* Pet. App. "C" at 65-68. In this, the district court found the basis for the unprecedented step of engrafting § 1983 "policymaker" liability onto Title VI:

> This logic parallels the reasoning that undergirds the law establishing "policymaker" liability under § 1983 and applies with equal force to Title VI.

See Pet. App. "C" at 68.

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[3] *See* Pet. App. "C" at 65.

From this conclusion, with no further analysis as to Plaintiff's claims under § 12601, the district court concluded "again, the logic of policymaker liability . . . would render Maricopa County directly, not indirectly liable under the statute." S*ee* Pet. App. "C" at 69. Remarkably, the court supported its conclusion with the fact that the United States had "sued and *settled* [cases] under the statute with various governments for violations committed by law enforcement departments." *Id.* (emphasis added). Based on such settlements and the fact governments in those cases had not argued against vicarious or imputed liability, the district court concluded "the case law suggests liability is available to sue governments whose law enforcement violates the statute." *Id.*

In its cross-motion for partial summary judgment, the United States argued that the Sheriff and the County were both bound, by virtue of non-mutual, offensive issue preclusion, by judicial determinations in the separate case of *Melendres v. Arpaio*, 989 F.Supp.2d 822 (D. Ariz. 2013); *see also* Pet. App. "F." Those determinations included findings that MCSO had conducted "'saturation patrols . . . using traffic stops as a pretext to detect those occupants of automobiles who may be in this country without authorization,'" had used "'Hispanic ancestry or race as a factor in forming reasonable suspicion that persons have violated state laws related to immigration status,'" and had conducted "discriminatory traffic stops outside of saturation patrols." S*ee* Pet. App. "C" at 35.

With regard to claims on which the United States sought summary judgment against the County

on this basis,[4] the district court noted that the County had been dismissed from the *Melendres* litigation as not necessary to the plaintiffs' obtaining complete relief in 2009, some *four years* before findings were issued by the *Melendres* court. Pet. App. "C" at 83.[5] The court discussed this Court's decision in *Taylor v. Sturgell*, 553 U.S. 880 (2008), identifying two, potentially applicable exceptions to the general rule that non-parties are ordinarily not bound by the outcome in litigation in which they have not had a full and fair opportunity to litigate the claims and issues. S*ee* Pet. App. "C" at 80.

With respect to one of those exceptions – where the non-party was "adequately represented" by someone who was a party – the district court specifically mentioned *Sturgell's* requirements that: "(1) the interest of the nonparty and the party to the prior litigation were aligned in the litigation; (2) the party to the prior litigation either understood itself to be acting in a representative capacity *or* the original court took care to protect the interests of the nonparty . . . ." *See* Pet. App. "C" at 80-81. Finding that the County had, at one point prior to its dismissal, been represented by the same counsel as MCSO, and joint submissions had been made on behalf of them both, the court concluded that this was enough to "demonstrate both the alignment of their interests and

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[4] The district court noted, the United States sought to preclude the Sheriff and the County from contesting claims in Counts One, Three, and Five only to the extent those Counts embraced claims of discrimination in MCSO's traffic stops. S*ee* Pet. App. "C" at 75-76.

[5] The order dismissing the County from *Melendres* was entered October 13, 2009. *See* Pet. App. "E." The *Melendres* order setting forth findings was issued May 24, 2013. *See* Pet. App. "F."

their understanding of themselves as indistinguishable legal entities for purposes of defending the suit." *See Id.* at 83-84. No finding was made with respect specifically to *Sturgell's* requirement that the party remaining in the litigation (MCSO) "understood [itself] to be acting in a representative capacity or the original court took care to protect the interests of the non-party." *Sturgell*, 553 U.S. at 900.

The court also found that *Sturgell's* exception for parties with a "substantive legal relationship" was met because "MCSO is not a separate legal entity from the County." S*ee* Pet. App. "C" at 83. This conclusion appears to have been premised on the court's understanding that "[i]n its motion to dismiss in *Melendres*, Maricopa County called MCSO its political subdivision." *Id*. (citing R., Doc. 355-1). The district court was clearly mistaken. The document the court cited for this proposition, which was attached as an exhibit to the Plaintiff's Reply (R., Doc. 355), argued that MCSO was a non-jural entity and in that context stated only that: "*Plaintiff makes no allegation* that the MCSO is a corporate entity separate and apart from Maricopa County." R., Doc. 355-1 at 20 (emphasis added).

Ultimately, the district court found "[n]on-mutual, offensive issue preclusion bars relitigation of issues previously decided in *Melendres v. Arpaio*." *See* Pet. App. "C" at 101. Accordingly, the court granted summary judgment on the United States' claims of

discriminatory traffic stops asserted in Counts One, Three, and Five. *Id*.[6]

B. Ninth Circuit Decision

The Ninth Circuit entered its affirming decision in the County's appeal May 7, 2018. *See* Pet. App. "A." The court agreed that Sheriff Arpaio had acted as a "final policymaker for Maricopa County" in instituting traffic stop policies at issue, that application of policymaker liability paradigm developed under § 1983 to claims brought under Title VI and § 12601(a) was appropriate, and that the County was bound by pertinent findings in *Melendres v. Arpaio*.

1. Section 1983 Policymaker Liability.

With respect to the question of whether Arizona's sheriffs, when acting in their law enforcement capacity, are policymakers for their counties, the Ninth Circuit stated that it had already rejected this argument in an appeal in the *Melendres* case, *Melendres v. Maricopa County*, 815 F.3d 645 (9th Cir. 2016) ("*Melendres III*").[7] Recognizing, however,

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[6] The district court's Amended Judgment entered November 6, 2015, is worded somewhat more broadly: "judgment is entered in favor of plaintiff United States on the portions of Counts One, Three, and Five based on the unconstitutional discrimination found in *Melendres v. Arpaio*." Pet. App. "L" at 1.

[7] In *Melendres III*, having been drawn back into the *Melendres* litigation by the *sua sponte* ruling of the Ninth Circuit in *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015) ("*Melendres II*"), *cert denied*, ___ U.S. ___, 136 S.Ct. 799 (2016), the County sought to appeal the district court findings in *Melendres* adjudicated during its absence from the case. The *Melendres III* court held

that "that determination was arguably dicta,"[8] the court proceeded to do its own analysis of the question. S*ee* Pet. App. "A" at 7.

The Ninth Circuit's analysis began by noting Arizona's Constitution lists sheriffs among the officers created "'in and for each organized county of the state,'" and that there is an Arizona statute listing sheriffs among the "'officers of the county.'" S*ee* Pet. App. "A" at 7-8. Next, the Ninth Circuit observed: "Arizona statutes also empower counties to supervise and fund their respective sheriffs." S*ee* Pet. App. "A" at 8. In this regard, the court quoted selected portions of a statute providing that boards of supervisors for Arizona's counties may "'[s]upervise the official conduct of all county officers,' including the sheriff, to ensure that 'the officers faithfully perform their duties.'" S*ee* Pet. App. "A" at 8 and "M" at 292. Further, the Ninth Circuit found significant that Arizona's boards of supervisors "may also 'require any county officer to make reports under oath on any matter connected with the duties of his office,' and may remove an officer who neglects or refuses to do so." S*ee* Pet. App. "A" at 8. The Ninth Circuit also found a basis for holding Arizona's sheriffs are policymakers for the counties in the fact that counties must pay the sheriffs' expenses, holding that "[a] county's financial responsibility for the sheriff's unlawful actions is strong evidence that the sheriff acts on behalf of the county rather than the State." S*ee* Pet. App. "A" at 8.

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the County's appeal was untimely and dismissed on jurisdictional grounds. 815 F.3d at 647.

[8] *See Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 71 (1868) ("the court had no jurisdiction, for the want of a proper party to the bill. All beyond that was obiter dictum.").

2. Applicability of § 1983 Policymaker Liability to Title VI and § 12601

The Ninth Circuit acknowledged that "[w]hether either [Title VI or § 12601] authorizes policymaker liability is an issue of first impression." *Id.* at 9. Nevertheless, the court found the concept transfers readily from the Civil Rights Act of 1871 to Title VI and § 12601 enacted 93 years and 123 years, respectively, later.

Finding similarity in the facts that Title VI liability can arise out of the deliberate indifference of an official with the power to take corrective action to known acts of discrimination, and that entities can be held liable for their own acts of discrimination, the Ninth Circuit concluded that "the proper standard for determining which employees have the power to establish an entity's 'official policy' under Title VI is the standard that governs under §1983." S*ee Id.* at 11. As with Title VI, the court found that "Section 12601 shares important similarities with § 1983," in that they both were enacted to provide broad remedies for civil rights violations, and they both impose liability on local governments. S*ee Id.* at 12.

3. Non-Mutual, Offensive Issue Preclusion

Turning to the preclusive effects assigned by the district court to findings in *Melendres*, the Ninth Circuit briefly recounted the history of the County's intermittent involvement in the case. S*ee* Pet App. "A" at 11-14. As the court noted, the County was originally a co-defendant in *Melendres* with the Sheriff and

MCSO, was dismissed without prejudice early in the case, and was pulled back in when the Ninth Circuit dismissed MCSO as a non-jural entity.

With respect to the County having been voluntarily dismissed early on in the *Melendres* litigation, the Ninth Circuit stated: "In effect, the County agreed to delegate responsibility for defense of the action to Arpaio and MCSO, knowing that it could be bound by the judgment later despite its formal absence as a party." S*ee Id.* at 13.

The Ninth Circuit further inaccurately stated: "Pursuant to the parties' stipulation, we ordered that the County be rejoined as a defendant in lieu of MCSO." S*ee* Pet App. "A" at 13-14. In fact, the County was forced back into *Melendres* entirely on the Ninth Circuit's own motion. No party sought the County's reintroduction into the case, or asserted the County's rejoinder was necessary or even desired, and the issue was neither briefed nor argued. Without explanation, the court ordered the County rejoined. *See* Maricopa County's Petition for Writ of Certiorari, Case No. 15-376, filed Sept. 24, 2015, at 6.

REASONS FOR GRANTING PETITION

In contrast to other circuits, the Ninth Circuit appears not to have recognized that the prescribed *McMillian* analysis inevitably takes the federal courts into matters involving "'delicate issues of federal-state relationships.'" *Rizzo v. Goode*, 423 U.S. 362, 380 (1976) (quoting *Mayor v. Educational Equality League*, 415 U.S. 605, 615 (1974)). The determinations mandated by *McMillian* necessarily involve the

federal judiciary in making pronouncements on the structure of State and local governments, and the allocation of powers and responsibilities among their various institutions and officers, all of which are the product of sovereign State choices. This is a matter of supreme delicacy. "As Madison expressed it: '[T]he local or municipal authorities form distinct and independent portions of the supremacy, not more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Printz v. U.S.*, 521 U.S. 898, 920-21 (1997) (quoting The Federalist No. 39, at 245).

There is nothing in the United States Constitution giving the federal judiciary authority to instruct States on how their governmental institutions must be organized, how powers and authority must be distributed among those institutions, or how those institutions must interact with one another as they perform their respective functions.

> Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States."

Shelby County, Alabama v. Holder, 570 U.S. 529, 543 (2013) (quoting *Bond v. U.S.*, 564 U.S. 211, 221 (2011)).

When a federal court declares an individual to be a "final policymaker" for a specific State or local governmental entity, it risks disrupting or distorting the intentions of the authors of applicable State constitutional and statutory provisions, and usurping operational understandings of those who administer those laws and carry on the business of government. This case is one in which the Ninth Circuit's interpretations of policymaker liability concepts have done just that.

The Ninth Circuit's unprecedented appropriation of the § 1983 policymaker liability paradigm in order to shoehorn it into the construction of much more recent statutes only threatens to compound and expand this problem into new areas of the law, where it does not belong. The origins of this heretofore unique construct of vicarious liability as discussed in detail in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), are extraordinary. Dissimilarities in statutory language and in the contexts and legislative histories that led to the enactment of both Title VI and § 12601 counsel forcefully against the Ninth Circuit's cavalier presumptions for an issue such as vicarious liability to be treated uniformly among the three statutes.

The Ninth Circuit's willingness to employ a clear judicial fiction to get around this Court's stringent requirements for the application of non-mutual, offensive issue preclusion has major due process implications. The "agreement" the court simply imagined the County to have made to be bound by the *Melendres* litigation rulings finds no basis in the

record. For any court to employ an imaginary fact to negate a party's right to due process of law necessarily raises questions regarding that court's understanding of and respect for the "'the deep-rooted historic tradition that everyone should have his own day in court.'" *Sturgell*, 553 U.S. at 892-93 (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)).

I. THE NINTH CIRCUIT'S DECISION ON "POLICYMAKER LIABILITY" FLOUTS THIS COURT'S MANDATES IN *McMILLIAN* CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, AND INFRINGES ON STATES' SOVEREIGN RIGHTS.

A. The Ninth Circuit's Decision Is Irreconcilable With *McMillian*.

This Court's decision in *McMillian* announced important principles for the application of the § 1983 policymaker liability concept originating in the Court's earlier finding in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1976), that municipal governmental entities are among the "persons" whom Congress intended to make susceptible to suit under the Civil Rights Act of 1871, and that, in the case of a county, if a county officer's "actions constitute county 'policy,' then the county is liable for them." *McMillian*, 520 U.S. at 783 (citing *Monell*, 436 U.S. at 694). The Court in *McMillian* was confronted with the need to determine whether an Alabama county could be held liable for the constitutional violations of a sheriff committed while he was acting in a law enforcement capacity.

This inquiry, the Court held, "is dependent on an analysis of state law." *Id*. at 786. The Court made it clear, however, that it is the *function* of a governmental official, not the *label* given him by the State, that is determinative, but that "our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law." *Id*. (citations omitted). In determining that Alabama's sheriffs do not act as policymakers for the counties when performing law enforcement functions, the *McMillian* Court deemed "most important[]" the fact that "sheriffs are given complete authority to enforce the state criminal law in their counties," but the counties themselves have been given no law enforcement authority under Alabama law, and they "cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime." *Id*. at 790 (citations omitted).

In this case, the Ninth Circuit acknowledged that "sheriffs in Arizona are independently elected and that a county board of supervisors does not exercise complete control over a sheriff's actions." Pet. App. "A" at 9. The court of appeals nevertheless found that "sheriffs in Arizona act as final policymakers for the respective counties on law-enforcement matters," based primarily on four factors: (1) sheriffs are labeled as county officers in the Arizona Constitution and statutes; (2) there is some general supervisory authority conferred on Arizona's boards of supervisors over county officers involved in "assessing, collecting, safekeeping, managing or disbursing the public revenues" (A.R.S. § 11-251(1), Pet. App. "M" at 292); (3)

the board of supervisors is empowered to require county officers to submit reports on matters connected with their duties and remove them from office if they fail or refuse to do so (A.R.S. § 11-253(A); and (4) counties are required to pay the sheriffs' expenses (A.R.S. § 11-444(A), Pet. App. "M" at 309).

McMillian made it plain that the *functions* performed by State and local officials, not their labels, is critical. 520 U.S. at 786; *see also Goldstein v. City of Long Beach*, 715 F.3d. 750, 755 (9th Cir. 2013), *cert. denied*, 571 U.S. 1127, (2014) ("[T]he state's label of the district attorney as a county official informs but of course cannot determine the result of our functional inquiry."). With regard to the fact that counties supply the funding for their sheriffs' operations, *McMillian* said this "at most . . . would allow the [county] to exert an attenuated and indirect influence over the sheriff's operations." 520 U.S. at 791-92.

The Ninth Circuit's reliance on the fact that Arizona's boards of supervisors have authority to require report writing by county officers to support its conclusion that sheriffs are policymakers for the counties in the area of law enforcement is curious. 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 to amount to "quite limited" control over the district attorneys, and in any event insufficient to make them policymakers for the State. *Id.* at 756. In any event, 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.

With regard to the supervisory authority conferred by A.R.S. § 11-251(1) (Pet. App. "M" at 292), the Ninth Circuit's selective quotation of the language of the statute obscures its context, which reveals that this authority is concerned only with fiscal accountability. The Arizona courts that have considered the issue have concluded just that, and that the statute gives Arizona's boards of supervisors no control over the law enforcement activities of sheriffs and their deputies. *See Fridena v. Maricopa County*, 18 Ariz. App. 527, 530, 504 P.2d 58,61 (1972) (county has "no right of control" over law enforcement activities of sheriff and deputies, § 11-251(1) notwithstanding); *see also Dimmig v. Pima County*, 2009 WL 3465744, at *1 (Az. App. Oct.27, 2009) (unpublished opinion) (A.R.S. § 11-251(1) pertains to fiscal accountability, and *Fridena* rejected the notion that it gave sufficient control to impute liability for torts committed by law enforcement officers).

The Ninth Circuit also found that "[t]he limited guidance Arizona courts have provided on this topic further confirms that sheriffs act as policymakers for their respective counties." *See* Pet. App. "A" at 8. The only case cited by the court for this proposition is *Flanders v. Maricopa County*, 203 Ariz. 368, 54 P.3d 837 (App. 2002), which found that the Sheriff was the final policymaker for Maricopa County with regard to jail administration. *See* Pet. App. "A" at 8-9. The Ninth Circuit overlooked the fact, however, that the County had stipulated in *Flanders* "the sheriff was its chief policymaker for this jail facility." *Flanders*, 54

P.3d at 378. Accordingly, the *Flanders* court undertook no analysis applying the principles of *McMillian* because none was needed, making it dubious precedent for determining the role of Arizona's Sheriffs in other functional areas for any purpose other than the one there at issue. *See McMillian*, 520 U.S. at 785 ("Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government *in a particular area, or on a particular issue*.") (emphasis added) (citation omitted).

The Arizona district court has questioned the viability of *Flanders* based on the earlier Arizona court of appeals decision in *Fridena v. Maricopa County*, 18 Ariz. App. 527, 504 P.2d 58 (1972), in which the County was held not liable under a *respondeat superior* theory for conduct at issue that was in furtherance of the Sheriff's statutory law enforcement duties. *Kloberdanz v. Arpaio*, 2014 WL 309078 at *4 (D. Ariz. Jan. 28, 2014); *see also Nevels v. Maricopa County*, 2012 WL 1623217, *4 (D. Ariz. May 9, 2012) ("Because the duty to operate the jails has been statutorily delegated to the Sheriff and the County has no right to control operation of the jails, the County cannot be held vicariously liable . . . .") (citing *Fridena* and *Dimmig v. Pima County*). *Kloberdanz* concluded: "Thus, because the County has no control of Sheriff Arpaio or his deputies in the execution of these statutory duties, based on *Fridena*, the County cannot be liable for their actions under the doctrine of respondeat superior." *Id.* [9]

[9] The *Kloberdanz* court also found support for its conclusion in *Hounshell v. White*, 220 Ariz. 1, 202 P.2d 466 (App. 2009), which had held that "county governments in Arizona do not have the

The County highlights these cases for their holdings that Arizona's counties have *no control* over the State's sheriffs in the execution of State mandated law enforcement functions. In *McMillian*, this Court noted that, as is the case in Arizona, the Alabama courts had held counties not liable under a *respondeat superior* theory on claims brought against their sheriffs for torts committed in the course of official acts, all law enforcement authority at the county level was devolved upon Alabama's sheriffs, and there was no provision for the exercise of authority over law enforcement matters by Alabama's counties. *McMillian*, 520 U.S. at 789-790. The same is true in Arizona.[10]

It has long been a principle embedded in Arizona law that law enforcement is a State, not a local, function.

> "The police power inheres in the state and not in its municipalities. The latter are agencies of the state and exercise police and other powers only by grant given either directly or by necessary implication".

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legal power to hire, terminate, or discipline the sheriff's employees; only the sheriff possess [sic] such power." *Kloberdanz*, 2014 WL 309078 at *5; *see also* A.R.S. § 11-409 (Pet. App. "M" at 306) (deputies of elected county officers, including sheriffs, to be appointed by those officers).

[10] A.R.S. § 11-201 (Pet. App. "M" at 291), which enumerates the powers of Arizona's counties, contains no mention of authority over law enforcement matters.

State v. Jaastad, 43 Ariz. 458, 463, 32 P.2d 799 (1934) (quoting *Clayton v. State*, 38 Ariz. 135, 145, 297 P. 1037, 1041 (1931)); *see also Luhrs v. City of Phoenix*, 52 Ariz. 438, 448, 83 P.2d 283, 288 (1938) ("[T]he preservation of order and the protection of life and property and the suppression of crime are primary functions of the state . . . the entire state is interested in these matters, and . . . they are proper subjects for general laws.").

That this principle endures in Arizona law is confirmed by the Arizona Supreme Court's recent decision in *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 399 P.3d 663 (2017): "Unlike municipalities, which have 'no inherent police power', the state has broad police power, including '[t]he protection of life, liberty, and property, and the preservation of the public peace and order, in every part, division, and subdivision of the state.'" 242 Ariz. at 600, 399 P.3d at 675 (quoting *Luhrs*, 52 Ariz. at 444, 83 P.2d at 283).[11]

The essential point here is that, in Arizona, law enforcement is very much a *State* function, not a local one. Given that no law enforcement powers have been devolved upon Arizona's counties, *no one*, not Arizona's sheriffs or anyone else, could be a policymaker for the counties in the area of law enforcement, because *counties simply have been given no authority to make policy in that arena.* In short, under any reasonably

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[11] It is the State of Arizona, not the counties, that prescribes the minimum qualifications, sets minimum training requirements, and certifies all officers "appointed to enforce the laws of this state and political subdivisions of this states . . . ." A.R.S. §§ 41-1821 and 41-1822(A)(3) and (4) (Pet. App. "M" at 309 and 312).

rigorous analysis applying the standards enunciated in *McMillian*, Arizona's sheriffs are simply *not* policymakers for their counties on matters of law enforcement.

B. The Ninth Circuit's Decision Conflicts With Decisions Of Other Circuit Courts.

At least three other circuits have demonstrated their fealty to the standards enunciated in *McMillian* and rendered decisions with which the Ninth Circuit's decision in this case conflicts. In *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003) (en banc), the Eleventh Circuit rejected as irrelevant the argument embraced by the Ninth Circuit's opinion here: "The insurmountable hurdles for [plaintiff] are that, under *McMillian*, we must focus on *control*, not labels, and that, under Georgia law, counties lack authority and control over sheriffs' law enforcement functions." *Id.* at 1332 (emphasis added).[12] In another case, the Eleventh Circuit held: "[L]ocal governments can never be liable under § 1983 for the acts of those whom the local government has no authority to control." *Turquitt v. Jefferson County*, Alabama, 137 F.3d 1285, 1292 (11th Circ. 1998) (en banc), *cert. denied*, 525 U.S. 874.

Similarly, in *Franklin v. Zaruba*, 150 F.3d 682 (7th Circuit 1998), *cert. denied,* 525 U.S. 1141 (1999),

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[12] *See also King v. King*, 2017 WL 4018857 at *3 (M.D. Ga. Sept 12, 2017) (quoting *Grech*, 335 F.3d at 1344) ("[The lack of county control over sheriffs in Georgia law] requires our conclusion that the 'county officer' nomenclature contained in Georgia's Constitution reflects a geographic label defining the territory in which a sheriff is elected and mainly operates[,] and it does not make a sheriff a county policymaker.")

the court applied *McMillian's* principles to find that sheriffs in Illinois are "'independently elected officials not subject to the control of the county,'" 150 F.3d at 685 (quoting *Ryan v. County of DuPage*, 45 F.3d 1090, 1092 (7th Cir. 1995)). As a result and because counties are not liable under Illinois law for the actions of their sheriffs under *respondeat superior*, the court held that, in performing law enforcement functions, the sheriffs of Illinois act not on behalf of the county or the State, but "as an agent of the county sheriff's department, an independently-elected office that is not subject to the control of the county in most respects." *Id.* Accordingly, the Seventh Circuit held, the county could not be liable under § 1983 for the acts of the sheriff and his deputies.

The Fourth Circuit too has construed *McMillian* to similar effect. In *Knight v. C.D. Vernon*, 214 F.3d 544 (4th Cir. 2000), a detention officer brought suit under § 1983 alleging that her employment had been terminated in violation of her First Amendment rights. The Fourth Circuit found, however, that "North Carolina law vests the sheriff, not the county, with authority over the personnel decisions of his office,"[13] and affirmed on that basis the district court's grant of summary judgment on plaintiff's claim against the county.

The common element in the decisions of each of these three circuits is the emphasis placed on the lack of county control over the sheriff's actions at issue.

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[13] It is also the case in Arizona that sheriffs have the sole and exclusive authority to hire, fire, and discipline their deputies, and Arizona's boards of supervisors are without any authority in that area. *See Hounshell v. White*, 220 Ariz. 1, 202 P.2d 466 (App. 2009).

The Eleventh, Seventh, and Fourth Circuits clearly got it right. The focus is, and must be, on whether the county has any actual, meaningful control over law enforcement operations. Failing that, Arizona's counties cannot be held liable under § 1983 for activities in the law enforcement field by sheriffs and their deputies.

C. The Ninth Circuit's Decision Treads Impermissibly On The Sovereign Choices Of Arizona's Elected Representatives.

By declaring Arizona's sheriffs to be "policymakers" for the State's counties when performing law enforcement functions, the Ninth Circuit has all but guaranteed that counties will routinely be named as co-defendants in most or all of the cases brought by plaintiffs alleging § 1983 violations in connection with law enforcement activities. It will often be the case, as it was here, that the interests of the counties and the named law enforcement agents will be sufficiently divergent that joint representation will be deemed inadvisable or inappropriate, if it is not ethically precluded altogether. Thus, one practical effect of the Ninth Circuit's decision will be to impose substantial burdens on county taxpayers to fund the counties' defense of claims arising out of circumstances with which they had no direct involvement, and over which they had little or no control. This drain on the public fisc is particularly lamentable when, as in *Melendres*, the parties and the trial court agree that the county's presence as a party is not essential to the plaintiff's ability to obtain complete relief. *See* Pet. App. "D" at 105; Pet. App. "E."

More fundamentally, however: "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Such determinations lie within "power reserved to the States under the Tenth Amendment [Pet. App. "M" at 287] and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government." *Id*. at 463 (citations omitted) (quoting U.S. Const. art. IV, § 4 (Pet. App. "M" at 287)).

McMillian calls on the federal courts to make pronouncements on the structure of State and local governmental institutions, and on the functions of those who exercise governmental authority. Those pronouncements, if they do not comport with local understandings of State law on the subject, will regularly have a significant, even profound, impact on the institutions and officers whose roles are the subjects of federal judicial edicts.

The Constitution limited but did not abolish the sovereign powers of the States, which retained a 'residuary and inviolable sovereignty.'" *Murphy v. Natn'l Collegiate Athletic Ass'n*, ___ U.S. ___; 138 S.Ct. 1461, 1475 (2018) (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961)). If there is anything to the notion of "inviolable sovereignty," it surely encompasses a State's right to create its governmental institutions and have them work as the State and its citizens see fit, without interference from any branch of the federal government. Caution in this field is

doubly indicated by the fact that any change in the way State or local governments operate wrought by the pronouncement of life-tenured federal judges is inherently anti-democratic.

Unless *McMillian's* standards are applied by the federal courts with great delicacy and deference to the choices made by the States, federal interference with the operations of State governmental institutions will become the order of the day. In this and other cases, the Ninth Circuit has demonstrated that it has little, if any, understanding of the delicacy and deference *McMillian* inquiries require, even stating in one case that "*no deference* is due to the ultimate conclusion of [a State's highest] court that [applicable State constitutional and statutory] provisions, taken as a whole, indicate the district attorney was a state actor under Section 1983 for any particular function." *Goldstein*, 715 F.3d at 761 (emphasis added). Clearly, the Ninth Circuit has shown a sore need for instruction from this Court on that score, and this case provides an excellent vehicle for the delivery of that instruction.

II. THE NINTH CIRCUIT'S UNPRECEDENTED ATTEMPT TO ENGRAFT § 1983 POLICYMAKER LIABILITY ONTO TITLE VI AND § 12601 PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION, THE NINTH CIRCUIT'S ANSWER TO WHICH WILL ADD SIGNIFICANT COST BURDENS ON STATE AND LOCAL

GOVERNMENTS AND THEIR TAXPAYERS.

The problems associated with application of the § 1983 policymaker liability paradigm in this case enumerated above apply equally when that paradigm is transplanted into the jurisprudence of Title VI and § 12601. There is, however, another serious problem - the differences in statutory language and the contexts out of which the three statutes arose.

As the district court acknowledged, the application of the policymaker liability concept to Title VI and § 12601 claims is unprecedented. The district court conceded that it was "unable to find a case speaking directly to the question of various or imputed liability under [§ 12601]," that "Title VI does not explicitly provide liability for entities which cause others to violate the statute [as is the case with § 1983]," and that "[n]o court has directly confronted the question of whether [§ 1983] 'policymaker' liability applies under Title VI." S*ee* Pet. App. "C" at 65-66, 69. The Ninth Circuit also acknowledged the question of whether either Title VI or § 12601 "authorizes policymaker liability is an issue of first impression." S*ee* Pet. App. "A" at 9.

As with any statutory construction question, analysis begins with a comparison of the text of the the statutes. Section 12601 renders liable a "governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority" who "*engage[s] in* a pattern or practice of conduct" that deprives a person of constitutional rights. Pet. App. "M" at 287 (emphasis added). Title VI provides that no one "shall, on the ground of race, color, or national

origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in connection with programs receiving federal financial assistance. *Id*. at 288.

Section 1983, however, renders liable "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or *causes to be subjected*" any U.S. citizen to a constitutional deprivation. *Id*. (emphasis added). In *Monell*, this Court "reexamine[ed] the 1871 [Civil Rights Act] legislative history in detail," and concluded municipalities were among the "persons" who could be held liable under the Act, but not solely because they employed tortfeasors who violated it. *Los Angeles County, California v. Humphries*, 562 U.S. 29, 35-36 (2010).

> The Court's conclusion rested on the language of § 1983, read against the background of the same legislative history. Section 1983's causation language imposes liability on a person who . . . shall subject or cause to be subjected, any person to a deprivation of federal rights.

Id. at 35 (citations and quotation marks omitted). The Court in *Monell* concluded that "a municipality could be held liable only for its own violations of federal law," and it was this that laid the foundation for the now familiar theory of policymaker liability. *Id*. at 36.

The historical context in which the Civil Rights Act of 1871 was enacted, the immediate aftermath of

the Civil War, was rather different from the context 93 years later when the Civil Rights Act of 1964 was enacted, and the contextual surroundings yet another 30 years later when §12601 was passed. Nor is there anything in the legislative histories of the latter two statutes similar to the debates preceding enactment of the 1871 Act that contributed to this Court's conclusions in *Monell*.

Paying no heed to these historical differences, and only very little to differences in language between § 1983 and the two statutes enacted much later, the Ninth Circuit concluded: "We think this same concept of policymaker liability applies both under Title VI and § 12601." S*ee* Pet. App. "A" at 11.

The language of both Title VI and § 12601 strongly suggests Congress intended only to impose liability on those who are themselves involved in the proscribed activity. This Court has held that the relevant inquiry under Title VI is whether the defendant acted with a "[d]iscriminatory purpose," which means intentional discrimination is required. *See Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (Title VI reaches only intentional discrimination). The use of the phrase "engage[s] in" clearly indicates that, liability rests on actual direct participation in prohibited conduct.

"[W]ell established principles of statutory interpretation" require that, "'[W]here the legislature has inserted a provision in only one of two statutes that deal with closely related subject matter, it is reasonable to infer that the failure to include that provision in the other statute was deliberate rather than inadvertent.'" *In re Federal-Mogul Global, Inc.*,

684 F.3d 355, 373 (3d Cir. 1982) (quoting 2B SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.2). That Congress chose, in enacting Title VI and § 12601 not to include § 1983's phrase "causes to be subjected," along with the significant differences in legislative contexts and histories, makes the Ninth Circuit's attempt to freight the later statutes with meaning unique to § 1983's language and history untenable. Title VI and § 12601 are important statutes of national application, with significant implications for how State and local governmental entities conduct their business. Guidance from this Court is needed to avoid a deviation that promises to be as costly to State and local governments and their taxpayers as it is unjustified.

III. THE NINTH CIRCUIT'S HOLDING THE COUNTY BOUND BY NON-MUTUAL, OFFENSIVE ISSUE PRECLUSION TO FINDINGS MADE IN *MELENDRES* VIOLATED THE COUNTY'S DUE PROCESS RIGHTS, AS IT WAS BASED ON A JUDICIAL FICTION AND WITHOUT MEANINGFUL ANALYSIS AS TO WHETHER THE COUNTY'S INTERESTS HAD BEEN ADEQUATELY REPRESENTED.

It is fundamental that a defendant who was not a party to a litigation generally does not have a "full and fair opportunity to litigate" the matter…and, is generally not considered to be bound by the judgment. *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (citing,

inter alia, *Richards v. Jefferson Co.*, 517 U.S. 793, 798 (1996)). "The federal common law of preclusion is, of course, subject to due process limitations." *Sturgell*, 553 U.S. at 891 (citation omitted). There are narrow exceptions to the general rule that one cannot be bound by findings in a proceeding in which one did not participate, only two of which are pertinent here: (a) a nonparty may be bound based upon pre-existing substantive legal relationships, such as preceding and succeeding owners of property, bailee and bailor, and assignee and assignor; or (b) "'in certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit." *Sturgell*, 553 U.S. at 894 (quoting *Richards*, 517 U.S. at 798).

The district court in this case found the County to be bound by findings in *Melendres* years after its stipulated dismissal from the case as "not a necessary party at this juncture for obtaining the complete relief sought" (Pet. App. "D" at 105), on the alternative grounds that: (a) "MCSO [which remained as a party after the County's dismissal] is not a separate legal entity from the County;"[14] or (b) the County's interests

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[14] MCSO was dismissed from *Melendres* case by the Ninth Circuit in *Melendres II* on the ground that it was a non-jural entity. The court then ordered the County substituted as a party for MCSO *sua sponte*, without discussion and despite the fact that no party to the case had sought the County's rejoinder. The district court in this case inferred from this that "the Ninth Circuit appears to have assumed Maricopa County was adequately represented in the preceding *Melendres* litigation such that adding it as a party for purposes of injunctive relief was fair and reasonable." 151 F.Supp.3d at 1029. The district court thus *assumed* that the County had become a party to *Melendres* again because the Ninth

had received "adequate representation" after its departure from the case because of the "alignment of [its] interests" with those of MCSO. Pet. App. "C" at 83-84.

The district court's first rationale – that the County and MCSO are "indistinguishable legal entities" – was largely based on a faulty reading of the *Melendres* record. According to the district court, "[i]n its motion to dismiss in *Melendres*, Maricopa County called MCSO its political subdivision." Pet App. "C" at 83. What, in fact, was said in the motion was: "*Plaintiff makes no allegation* that the MCSO is a corporate entity separate and apart from Maricopa County." R., Doc. 355-1 at 20 (emphasis added). Beyond this, there is nothing in the record to support the district court's conclusion that "there is little doubt that Maricopa County would qualify for the 'substantive legal relationship' exception to the bar against nonparty issue preclusion." Pet. App. "C" at 83.

The second rationale, adequate representation, requires there to be facts establishing that the County's and MCSO's interests were "aligned," and either MCSO understood it was acting in a representative capacity or the *Melendres* court took care to protect the County's interests in its absence. *See Sturgell*, 553 U.S. at 900. There is nothing in the record of this case establishing either of these to have been the case.

Circuit *assumed* the County had been adequately represented during its lengthy absence from the case.

With regard to nonmutual, offensive issue preclusion, the Ninth Circuit took a different, and quite remarkable, tack. The court purported to find that "even though the County did not remain a party to *Melendres* throughout the litigation, it effectively agreed to be bound by the judgment in that action." Pet. App. "A" at 14. This is pure judicial fiction.[15]

"Adequate Representation" is a Due Process prerequisite to precluding a litigant from his day in court if he was not a party to the earlier litigation. *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1054 (9th Cir. 2005) (citing *Richards,* 517 U.S. at 800-01); *Sturgell*, *supra*, 553 U.S. at 891 (the "law of preclusion is, of course, subject to due process limitations.") (citation omitted). "A party's representation of a nonparty is 'adequate' for preclusion purposes ***only if***, at a minimum: (1) [interests align]…***and*** (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty". *Sturgell*, 553 U.S. at 900 (emphasis added) (citing *Richards*, 517 U.S. at 801-02).

In other cases, the Ninth Circuit has emphasized the importance of an in-depth evaluation of the record prior to applying preclusion. *Headwaters*, *Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1055 (9th Cir. 2005) ("Without factual development, there is no way to determine whether the adequate

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[15] Similarly, the Ninth Circuit's statement that the County's reintroduction to the *Melendres* case in the wake of the court's dismissing MCSO as a non-jural entity was "[p]ursuant to the parties' stipulation," (Pet. App. "A" at 13-14) is without any factual basis.

representation/due process requirements…were met"); *Id.*; *see also*, *Jack Faucett Assoc., Inc. v. American Tel. & Tel. Co.*, 744 F.2d 118, 132-33 (DC Cir 1984), *cert. denied*, 469 U.S. 1196 (Jan. 21, 1985), (finding an abuse of discretion when granting offensive estoppel "without first exploring th[e] evidentiary question" and explaining that a court's discretion "cannot" be used to "shield against meaningful inquiry into the premises underlying its decisions.").

As discovery proceeded in *Melendres*, it became clear that the interests of the County were sufficiently divergent from those of the Sheriff and MCSO as to require the County to obtain separate legal representation. The stipulation that provided the basis for the County's dismissal stated that the Sheriff and MCSO were not joining, but would not oppose it. These statements further indicate an alignment of interests cannot be lightly presumed without further factual inquiry.

There is certainly nothing in the stipulation, or in the *Melendres* court's order dismissing the County indicating, or even suggesting, that any of the remaining parties was assuming representation of the County's interests going forward, or that the court was putting in place any special measure to ensure those interests were protected. There is certainly nothing indicating the County agreed to be bound by whatever judgment might ultimately be issued in the case.

This Court has held that the mere existence of "some kind of relationship *between* the parties and nonparties, shorn of the procedural protections prescribed…would circumvent due process". *Sturgell*,

553 U.S. at 901. "The doctrine of offensive collateral estoppel is too fraught with drumhead potential to allow its application without the specific limitations that the Supreme Court, other courts, and legal scholars have enunciated." *Jack Faucett Assoc.,* 744 F.2d at 133.

Especially when considered against the backdrop of the other two issues on which this writ of certiorari is sought, with their implications for intrusion by the federal judiciary upon territory reserved by our Constitution to the States, this sacrifice of the County's due process rights through a gross misapplication of principles this Court has laid out for the application of non-mutual, offensive issue preclusion represents a departure from the accepted course of judicial proceedings in federal cases and warrants an exercise of this Court's supervisory powers.

CONCLUSION

The Ninth Circuit's decision raises issues that are central to preserving our federalist system. The court of appeals misconstrued Arizona law in a way that intruded upon the sovereign prerogatives reserved under the U. S. Constitution to the States. By applying this misguided application of the policymaker liability paradigm to claims arising under Title VI and § 12601, the Ninth Circuit has ignored differences in statutory language and origins that preclude its construction as if those differences did not exist. Finally, the Ninth Circuit's use of judicial fiction to negate due process rights with an application of non-mutual, offensive issue preclusion flies in the face

of this Court's announced principles on the use of that doctrine. For all these reasons, the County's Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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OCTOBER 15, 2018

APPENDIX

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APPENDIX A

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United States Court of Appeals
for the Ninth Circuit

UNITED STATES of America, Plaintiff-Appellee,
v.
COUNTY OF MARICOPA, ARIZONA, Defendant-Appellant,
and
Paul Penzone,* in his official capacity as Sheriff of Maricopa County, Arizona, Defendant.

No. 15-17558

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Argued and Submitted September 15, 2017 San Francisco, California

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Filed May 7, 2018

***649** Appeal from the United States District Court for the District of Arizona, Roslyn O. Silver, Senior District Judge, Presiding, D.C. No. 2:12-cv-00981-ROS

Before: Ronald M. Gould, Richard C. Tallman, and Paul J. Watford, Circuit Judges.

Attorneys and Law Firms

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D.C.; for Plaintiff-Appellee.

OPINION

WATFORD, Circuit Judge:

The United States brought this action to halt racially discriminatory policing policies instituted by Joseph Arpaio, the former Sheriff of Maricopa County, Arizona. Under Arpaio's leadership, the Maricopa County Sheriff's Office (MCSO) routinely targeted Latino drivers and passengers for pretextual traffic stops aimed at detecting violations of federal immigration law. Based on that and other unlawful conduct, the United States sued Arpaio, MCSO, and the County of Maricopa under two statutes: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 34 U.S.C. § 12601 (formerly codified at 42 U.S.C. § 14141).[1] The district court granted summary judgment in favor of the United States on the claims relating to the unlawful traffic stops; the parties settled the remaining claims. Maricopa County is the lone appellant here. Its main contention is that it cannot be held liable for the unlawful traffic-stop policies implemented by Arpaio.

We begin with a summary of the lengthy legal proceedings involving Arpaio's unlawful policing policies. In an earlier class action lawsuit, *Melendres v. Arpaio*, a group of plaintiffs representing a class of Latino drivers and passengers sued Arpaio, MCSO, and the County of Maricopa under 42 U.S.C. § 1983 and Title VI. They alleged that execution of Arpaio's racially ***650** discriminatory traffic-stop policies violated their rights under the Fourth and Fourteenth Amendments. Following a bench trial, the district court ruled in the plaintiffs' favor and granted broad injunctive relief, which we largely upheld on appeal. *See Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012);

Melendres v. Arpaio, 784 F.3d 1254 (9th Cir. 2015) (*Melendres II*).

While the *Melendres* action was proceeding, the United States filed this suit. Among other things, the United States challenged the legality of the same traffic-stop policies at issue in *Melendres*. The United States named as defendants Arpaio, in his official capacity as Sheriff of Maricopa County; MCSO; and Maricopa County. Early on, the district court dismissed MCSO from the action in light of the Arizona Court of Appeals' decision in *Braillard v. Maricopa County*, 224 Ariz. 481, 232 P.3d 1263 (Ct. App. 2010), which held that MCSO is a non-jural entity that cannot be sued in its own name. *Id.* at 1269.

Throughout the proceedings below, the County argued that it too should be dismissed as a defendant, on two different grounds. First, the County argued that when a sheriff in Arizona adopts policies relating to law-enforcement matters, such as the traffic-stop policies at issue here, he does not act as a policymaker for the county. He instead acts as a policymaker for his own office, or perhaps for the State. The County contended that, because Arpaio's policies were not policies of the County, it could not be held liable for the constitutional violations caused by execution of them. Second, the County argued that, even if Arpaio acted as a policymaker for the County, neither Title VI nor 34 U.S.C. § 12601 permits a local government to be held liable for the actions of its policymakers.

The district court rejected both of the County's arguments. The court then granted the United States' motion for summary judgment with respect to claims predicated on the traffic-stop policies found unlawful in *Melendres*. The court held that the County was barred by the doctrine of issue preclusion from relitigating the issues decided in the *Melendres* action,

which by that point had reached final judgment. The County does not contest that if the *Melendres* findings are binding here, they establish violations of Title VI and § 12601.

On appeal, Maricopa County advances three arguments: (1) Arpaio did not act as a final policymaker for the County; (2) neither Title VI nor § 12601 renders the County liable for the actions of its policymakers; and (3) the County is not bound by the *Melendres* findings. We address each of these arguments in turn.

I

[1]We have already rejected Maricopa County's first argument—that Arpaio was not a final policymaker for the County. In *Melendres v. Maricopa County*, 815 F.3d 645 (9th Cir. 2016) (*Melendres III*), we noted that "Arizona state law makes clear that Sheriff Arpaio's law-enforcement acts constitute Maricopa County policy since he 'has final policymaking authority.' " *Id.* at 650 (quoting *Flanders v. Maricopa County*, 203 Ariz. 368, 54 P.3d 837, 847 (Ct. App. 2002)). Because that determination was arguably *dicta*, we have conducted our own analysis of the issue, and we reach the same conclusion.

To determine whether Arpaio acted as a final policymaker for the County, we consult Arizona's Constitution and statutes, and the court decisions interpreting them. *See McMillian v. Monroe County*, 520 U.S. 781, 786, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997); *Weiner v. San Diego County*, 210 F.3d 1025, 1029 (9th Cir. 2000). Those ***651** sources confirm that, with respect to law-enforcement matters, sheriffs in Arizona act as final policymakers for their respective counties.

Arizona's Constitution and statutes designate

sheriffs as officers of the county. The Arizona Constitution states: "There are hereby created *in and for each organized county of the state* the following officers who shall be elected by the qualified electors thereof: a sheriff, a county attorney, a recorder, a treasurer, an assessor, a superintendent of schools and at least three supervisors...." Ariz. Const. Art. 12, § 3 (emphasis added). The relevant Arizona statute explicitly states that sheriffs are "officers of the county." Ariz. Rev. Stat. § 11-401(A)(1).

Arizona statutes also empower counties to supervise and fund their respective sheriffs. The county board of supervisors may "[s]upervise the official conduct of all county officers," including the sheriff, to ensure that "the officers faithfully perform their duties." Ariz. Rev. Stat. § 11-251(1). The board may also "require any county officer to make reports under oath on any matter connected with the duties of his office," and may remove an officer who neglects or refuses to do so. Ariz. Rev. Stat. § 11-253(A). In addition, the county must pay the sheriff's expenses. Ariz. Rev. Stat. § 11-444(A); *Braillard*, 232 P.3d at 1269 n.2. As Maricopa County conceded in *Melendres*, those expenses include the costs of complying with any injunctive relief ordered against Arpaio and MCSO. *See Melendres III*, 815 F.3d at 650. A county's financial responsibility for the sheriff's unlawful actions is strong evidence that the sheriff acts on behalf of the county rather than the State. *See McMillian*, 520 U.S. at 789, 117 S.Ct. 1734; *Goldstein v. City of Long Beach*, 715 F.3d 750, 758 (9th Cir. 2013).

The limited guidance Arizona courts have provided on this topic further confirms that sheriffs act as policymakers for their respective counties. Most on point is *Flanders v. Maricopa County*, 203 Ariz. 368, 54 P.3d 837 (Ct. App. 2002), which held that then-

Sheriff Arpaio acted as a final policymaker for Maricopa County with respect to jail administration. *Id.* at 847. *Flanders* relied in part on the fact that the statutory provision that specifies a sheriff's powers and duties lists "tak[ing] charge of and keep[ing] the county jail" as one of them. *Id.* (citing Ariz. Rev. Stat. § 11-441(A)(5)). That same provision also lists a wide array of law-enforcement functions that fall within the sheriff's powers and duties. Ariz. Rev. Stat. § 11-441(A)(1)–(3). Maricopa County does not explain why the Sheriff would be a final policymaker for the County with respect to jail administration but not with respect to the law-enforcement functions assigned to him in the same provision.

It is true that sheriffs in Arizona are independently elected and that a county board of supervisors does not exercise complete control over a sheriff's actions. Nonetheless, "the weight of the evidence" strongly supports the conclusion that sheriffs in Arizona act as final policymakers for their respective counties on law-enforcement matters. *See McMillian*, 520 U.S. at 793, 117 S.Ct. 1734. Because the traffic-stop policies at issue fall within the scope of a sheriff's law-enforcement duties, we conclude that Arpaio acted as a final policymaker for Maricopa County when he instituted those policies.

II

[2]Maricopa County next argues that, even if Arpaio acted as the County's final policymaker, neither Title VI nor 34 U.S.C. § 12601 permits the County to be held liable for his acts. Whether either ***652** statute authorizes policymaker liability is an issue of first impression. We conclude, informed by precedent governing the liability of local governments under 42 U.S.C. § 1983, that both statutes authorize policymaker liability.

The concept of policymaker liability under § 1983 is well developed. Section 1983 imposes liability on any "person" who, while acting under color of law, deprives someone of a right protected by the Constitution or federal law. In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that the term "person" includes municipalities, which had the effect of creating liability for local governments under § 1983. *See id.* at 690, 98 S.Ct. 2018. But the Court also limited the scope of that liability. It concluded that a local government may not be held vicariously liable for the acts of its employees under the doctrine of *respondeat superior*. *Id.* at 691, 98 S.Ct. 2018. Instead, liability arises only if a local government's own official policy or custom caused the deprivation of federal rights. *Id.* at 694, 98 S.Ct. 2018. As the Court later explained, this "official policy" requirement is intended to ensure that a municipality's liability "is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Under policymaker liability, only certain employees of a local government have the power to establish official policy on the government's behalf. The government's legislative body has such power, of course, but so do officials "whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694, 98 S.Ct. 2018. Such officials are those who exercise "final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *McMillian*, 520 U.S. at 784–85, 117

S.Ct. 1734 (internal quotation marks omitted). In essence, policymaker liability helps determine when an act can properly be deemed a government's own act, such that the government may be held liable for deprivations of federal rights stemming from it.

[3]We think this same concept of policymaker liability applies under both Title VI and § 12601. As to Title VI, the Supreme Court has held that an entity's liability is limited to the entity's own misconduct, as it is under § 1983. *See Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 640, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 285, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998).[2] Thus, while an entity cannot be held vicariously liable on a *respondeat superior* theory, it can be held liable under Title VI if an official with power to take corrective measures is "deliberately indifferent to known acts" of discrimination. *Davis*, 526 U.S. at 641, 119 S.Ct. 1661. An entity can also be held liable for acts of discrimination that result from its own "official policy." *Gebser*, 524 U.S. at 290, 118 S.Ct. 1989; *see Mansourian v. Regents of the University of California*, 602 F.3d 957, 967 (9th Cir. 2010); *Simpson v. University of Colorado Boulder*, 500 F.3d 1170, 1177–78 (10th Cir. 2007). Because this form of "official policy" liability resembles § 1983 policymaker liability, we think the proper standard for determining which employees have the power to establish an entity's "official policy" ***653** under Title VI is the standard that governs under § 1983.

We reach the same conclusion with respect to § 12601. As relevant here, the statute provides: "It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or

practice of conduct by law enforcement officers ... that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 34 U.S.C. § 12601(a).

[4]Section 12601 shares important similarities with § 1983. Section 1983 was enacted to create "a broad remedy for violations of federally protected civil rights." *Monell*, 436 U.S. at 685, 98 S.Ct. 2018. Section 12601 was also enacted as a remedy for violations of federal civil rights, specifically for violations that are systematically perpetrated by local police departments. *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 Geo. Wash. L. Rev. 453, 527–28 (2004). And, like § 1983, § 12601 imposes liability on local governments. Indeed, the language of § 12601 goes even further than § 1983, making it unlawful for "any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority" to engage in the prohibited conduct. 34 U.S.C. § 12601(a).

We need not decide whether the language of § 12601 imposes liability on the basis of general agency principles, as the United States urges here. It is enough for us to conclude, as we do, that § 12601 at least imposes liability on a governmental authority whose own official policy causes it to engage in "a pattern or practice of conduct by law enforcement officers" that deprives persons of federally protected rights. *Id*. Because of the similarity between § 12601 and § 1983, we again see no reason to create a new standard for determining which officials have the power to establish a governmental authority's official policy. The same standard that governs under § 1983 applies here as well.

In short, Maricopa County is liable for violations of Title VI and § 12601 stemming from its

own official policies. As discussed above, when Arpaio adopted the racially discriminatory traffic-stop policies at issue, he acted as a final policymaker for the County. Those policies were therefore the County's own, and the district court correctly held the County liable for the violations of Title VI and § 12601 caused by those policies.

III

[5]Lastly, Maricopa County challenges the district court's application of issue preclusion, which precluded the County from relitigating the lawfulness of Arpaio's traffic-stop policies. Given the nature of the County's involvement in the *Melendres* action, we conclude that the County is bound by the adverse findings rendered in that action.

The County was originally named as a defendant in the *Melendres* action, along with then-Sheriff Arpaio and MCSO. Early in the litigation, the parties stipulated to dismissal of the County as a named defendant, without prejudice to the County's being rejoined as a defendant later in the litigation if that became necessary to afford the plaintiffs full relief. *Melendres III*, 815 F.3d at 648. In effect, the County agreed to delegate responsibility for defense of the action to Arpaio and MCSO, knowing that it could be bound by the judgment later despite its formal absence as a party.

The case proceeded to trial against Arpaio and MCSO and resulted in judgment against them. On appeal, we concluded that MCSO had been improperly named as a defendant because it could not be sued in its own name following the Arizona Court ***654** of Appeals' intervening decision in *Braillard*. *Melendres II*, 784 F.3d at 1260 (citing *Braillard*, 232 P.3d at 1269). Pursuant to the parties' stipulation, we ordered that

the County be rejoined as a defendant in lieu of MCSO. *Id.* We later explained that we did so "[t]o assure a meaningful remedy for the plaintiffs despite MCSO's dismissal." *Melendres III*, 815 F.3d at 648. The County challenged this ruling in a petition for rehearing en banc and a petition for writ of certiorari, both of which were denied. *See id.*

Given this history, the district court properly applied issue preclusion to bar the County from relitigating the *Melendres* findings. Each of the elements of offensive non-mutual issue preclusion is satisfied: There was a full and fair opportunity to litigate the identical issues in the prior action; the issues were actually litigated in the prior action; the issues were decided in a final judgment; and the County was a party to the prior action. *See Syverson v. International Business Machines Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007). Indeed, the County contests only the last element, arguing that it was not in fact a party to *Melendres*. That is not accurate as a factual matter, because the County was originally named as a defendant in *Melendres* and is now one of the parties bound by the judgment in that action. Moreover, even though the County did not remain a party to *Melendres* throughout the litigation, it effectively agreed to be bound by the judgment in that action. Such an agreement is one of the recognized exceptions to non-party preclusion. *See Taylor v. Sturgell*, 553 U.S. 880, 893, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008).

AFFIRMED.

APPENDIX B

In the United States District Court
For the District of Arizona

United States of America,
Plaintiff,
v.
Maricopa, County of, et al.,
Defendants.

No. CV-12-00981-PHX-ROS

ORDER

Pending before the Court are Defendants' motions to dismiss. (Docs. 35 and 37). For the reasons below, Maricopa County Sheriff's Office ("MCSO") will be dismissed, but the claims against Sheriff Joseph M. Arpaio ("Arpaio") and Maricopa County, Arizona (the "County") will be allowed to proceed.

BACKGROUND

On May 10, 2012, the United States of America ("Plaintiff") filed a Complaint against the County, MCSO and Arpaio in his official capacity. The Complaint alleges six claims for relief: Count One for intentional discrimination on the basis of race, color or national origin in violation of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141") and the Due Process and Equal Protection clauses of the Fourteenth Amendment; Count Two for unreasonable searches,

arrests and detentions lacking probable cause or reasonable suspicion in violation of Section 14141 and the Fourth Amendment; Count Three for disparate impact and intentional discrimination on the basis of race, color or national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d – 2000d-7 ("Title VI"); Count Four for disparate impact and intentional discrimination against limited English proficient ("LEP") Latino prisoners in violation of Title VI; Count Five for disparate impact and intentional discrimination in violation of Defendants' contractual assurances under Title VI; Count Six for retaliation against Defendants' critics in violation of Section 14141 and the First Amendment. (Doc. 1, ¶¶ 165-188). Defendants move to dismiss.

ANALYSIS

A. Legal Standard

Under Rule 8 of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint must "give the defendant fair notice of what the…claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation omitted). A plaintiff must allege facts sufficient "to raise a right to relief above the speculative level." *Id.* The complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to

draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 at 555).

B. MCSO

The MCSO moves to dismiss because it is a non-jural entity, incapable of suing or being sued in its own name. State law generally determines a party's capacity to be sued. *See* Fed. R. Civ. P. 17(b)(3). Under Arizona law, "Government entities have no inherent power and possess only those powers and duties delegated to them by their enabling statutes. Thus, a governmental entity may be sued only if the legislature has so provided." *Braillard v. Maricopa County*, 232 P. 3d 1263, 1269 (Ariz. Ct. App. 2010) (citations omitted). In *Braillard*, the Arizona Court of Appeals recognized the question of "[w]hether MCSO is a nonjural entity is apparently an issue of first impression in our state courts." *Id.* The Court noted, "[a]lthough A.R.S. § 11-201(A)(1) provides that counties have the power to sue and be sued through their boards of supervisors, no Arizona statute confers such power on MCSO as a separate legal entity." *Id.* *Braillard* "therefore conclude[d] MCSO is a nonjural entity and should be dismissed from this case." *Id.* The

MCSO's motion to dismiss will be granted because the MCSO is a nonjural entity.[1]

C. Sheriff Arpaio

1. Disparate Impact Claims in Counts III, IV and V

Counts III, IV and V allege disparate impact and intentional discrimination under Title VI. The Sheriff seeks to dismiss the disparate impact portion of Counts III, IV and V for failure to allege sufficient statistical evidence of discriminatory effect.

A prima facie case of disparate impact requires the plaintiff: (1) identify the specific practices or policies being challenged; (2) show disparate impact; and (3) prove causation. *Rose v. Wells Fargo & Co.,* 902 F.2d 1417, 1424 (9th Cir. 1990). The second and third factors are generally shown with statistics. *Id.* To establish causation, the plaintiff must offer "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of [a particular group] because of their membership in a protected group." *Id.* (citing *Watson*

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[1] Prior to May 27, 2010, whether MCSO is a jural entity was not firmly decided in this Court. *See, e.g., Scotti v. City of Phoenix*, No. CV-09-1264-PHX-MHM, 2010 WL 994649, at *5 (D. Ariz. March 17, 2010) ("the Arizona state courts have not yet addressed the issue of whether police departments, sheriff's offices, and entities with similar legal identities are non-jural under Arizona state law, and decisions issued by courts within the District of Arizona have been conflicting"). On May 27, 2010, the Arizona Court of Appeals decided *Braillard*, resolving the issue. Since *Braillard*, courts have cited *Braillard* for the proposition that the MCSO is not a jural entity capable of being sued. *E.g., Abrah v. City of Scottsdale Police Dept.*, 2010 WL 4102563 at *1 (D. Ariz. Oct. 18, 2010) (dismissing MCSO).

v. Fort Worth Bank & Trust, 487 U.S. 977, 108 S.Ct. 2777, 2788-89 (1988)). "The statistical disparities 'must be sufficiently substantial that they raise such an inference of causation.'" *Id.* (quoting *Watson*, 108 S.Ct. at 2789)). "The 'significance' of 'substantially' of numerical disparities in judged on a case by case basis." *Id.* (citing *Watson,* 108 S.Ct. at 2789 n. 3).

At the motion to dismiss stage, a complaint need not allege statistical data. *McQueen v. City of Chi.*, 803 F. Supp. 2d 892 (N.D. Ill. 2011) ("A Title VII disparate impact claim need not allege statistical support to survive a motion to dismiss.")[2]; *Garcia v. Country Wide Fin. Corp*., No. EDCV-07-1161-VAP (JCRx), 2008 WL 7842104 (C.D. Cal. Jan. 17, 2008) (plaintiff "is not required at the pleading stage to produce statistical evidence proving a disparate impact") (citing *Twombly*, 127 S.Ct. at 1964-65). "It would be inappropriate to require a plaintiff to produce statistics to support her disparate impact claim before the plaintiff has had the benefit of discovery." *Jenkins v. N.Y. City Transit Auth*., 646 F. Supp.2d 464, 469-70 (D.S.N.Y. 2009). At the motion to dismiss stage, "there is no reason [a plaintiff] would have this kind of statistical yet." *Mata v. Ill. State Police*, No. 00 C 0676, 2001 WL 292804, at *4 (N.D. Ill. Mar. 22, 2001).

The Sheriff argues these cases are no longer good law because they rely on *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), which has subsequently been overruled. However, *Swierkiewicz* was overruled because it applied a standard less than the plausibility standard set forth in *Twombly* and *Iqbal.* Here, Plaintiff does not argue for a standard less than

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[2] "We look to Title VII disparate impact analysis in analyzing Title VI claims." *Darensburg v. Metro. Transp. Com'n*, 636 F.3d 511, 519 (9th Cir. 2011).

plausibility. Plaintiff acknowledges the plausibility standard. Although *Swierkiewicz* was overruled by *Twombly* and *Iqbal*, post-*Twombly* and *Iqbal* cases have held statistical data is still not required at the motion to dismiss stage. *See McQueen*, 803 F. Supp. 2d 892 (citing *Iqbal*); *Jenkins*, 646 F. Supp. 2d at 469-70 (citing *Iqbal* and *Twombly*); *Garcia*, 2008 WL 7842104 (citing *Twombly*).

The Complaint alleges MCSO officers routinely and unlawfully target Latinos through pretextual traffic stops. As a result, vehicles occupied by Latinos are far more likely to be stopped by MCSO officers than those occupied by non-Latinos.[3] The Complaint alleges: MCSO officers detain Latinos in cars or at worksites without probable cause; Defendants select locations for large-scale crime suppression sweeps based on complaints by non-Latino residents that Latinos are in those areas, resulting in extensive seizures of law-abiding Latinos who happen to be present; MCSO officers detain all Latinos during worksite raids and do not detain non-Latino employers during such raids; and when MCSO officers search suspected drop houses, they also detain law-abiding Latinos in neighboring houses with no probable cause or reasonable suspicion. As a result, Latinos are far more likely to be deprived of their constitutional rights

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[3] Although not required, Plaintiff has alleged statistical evidence for disparate impact claims based on pretextual traffic stops and crime suppression sweeps. Plaintiff alleges a 2011 study shows Latino drivers are four to nine times more likely to be stopped for traffic violations by MCSO officers than non-Latino drivers engaged in similar conduct. Specifically, Latino drivers are almost four times more likely to be stopped in the southwest portion of the County, over seven times more likely to be stopped in the northwest portion of the County, and nearly nine times more likely to be stopped in the northeast portion of the County.

than non-Latinos. The Complaint alleges Defendants failed to develop and implement policies and practices to ensure LEP Latino inmates have equal access to jail services such as sanitary needs, food, clothing, legal information and religious services. The Complaint alleges the discriminatory conduct of MCSO officers is facilitated by broad, unfettered discretion and lack of training and oversight.

Plaintiff has alleged (1) a practice or policy being challenged; (2) disparate impact; and (3) causation. *Rose*, 92 F.2d at 1424. Plaintiff has alleged "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal,* 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). As such, the Sheriff's motion to dismiss the disparate impact claims in Counts III, IV and V will be denied.

2. LEP Discrimination

The Sheriff moves to dismiss Count IV and part of Count V insofar as they allege discrimination against LEP Latino prisoners. The Sheriff argues Title VI's prohibition against intentional discrimination "on the ground of race, color, or national origin" does not cover language proficiency. 42 U.S.C. §§ 2000d. In other words, the Sheriff argues language is not a proxy for national origin.

However, longstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI. In *Lau v. Nichols*, 414 U.S. 563, 568 (1974) *abrogated on other grounds by Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the Supreme Court held Title VI's prohibition against

discrimination on national origin covered discrimination against LEP individuals. *See also Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1116-17 (9th Cir. 2009) (noting *Lau* concluded "discrimination against LEP individuals was discrimination based on national origin in violation of Title VI"). In *Lau*, the school district ran an English-operated system with no language assistance for 1800 Chinese LEP students. The Court ruled there was "no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.* at 566. Thus, the LEP students were denied "a meaningful opportunity to participate in the educational program – all earmarks of discrimination banned by the [Title VI] regulations." *Id.* at 568. Thus, under *Lau*, Title VI's prohibition against national origin discrimination covers language proficiency.

In addition, the DOJ has interpreted Title VI's prohibition against national origin discrimination requires funding recipients to ensure LEP persons have meaningful access to the recipient's programs. *See* Dep't of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Original Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2002) ("Under DOJ regulations implementing Title VI…recipients of Federal financial assistance have a responsibility to ensure meaningful access to their programs and activities by persons with limited English proficiency (LEP)."). The Department's regulations explicitly apply to sheriff's department and jails. *See id.* at 41459, 41466. An agency's interpretation of its own regulation is "controlling" unless plainly erroneous or inconsistent

with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The DOJ coordinates government-wide compliance with Title VI and its interpretation of Title VI is entitled to special deference. *See* Exec. Order No. 12250, 45 Fed. Reg. 72, 995 (Nov. 2 1980); *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984); *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979).

Further, federal agencies consistently interpret Title VI's prohibition on national origin discrimination to require federal funding recipients to provide LEP individuals meaningful access to their programs. *See*, e.g., Dep't of Health, Education, and Welfare, Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11, 595 (July 18, 1970); Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Race, Color, or National Origin Under Programs Receiving Federal Financial Assistance Through the Department of Health and Human Services, 45 Fed. Reg. 82,972 (Dec. 17, 1980); Exec. Order No. 13,166, Improving Access for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 11, 2000); Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (Dep't of Justice, June 18, 2002).

Defendants rely on two cases to support their argument that national origin does not cover LEP individuals under Title VI: *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789 (8th Cir. 2010), and *Franklin v. District of Columbia*, 960 F.Supp. 394 (D.D.C. 1997), *rev'd on other grounds*, 163 F.3d 625 (D.C. Cir. 1998). In *Mumid,* the school delayed special education testing of LEP students for three years for "a legitimate non-discriminatory reason…namely, that it did not believe that it could reliably assess

whether a student needed special-education services until the student had been in the country long enough to learn English." *Mumid*, 618 F.3d at 794. The School did not delay testing of other foreign-born students, and the English Circuit concluded the policy did not facially discriminate on the basis of national origin. In *Franklin*, the defendant offered programs for LEP inmates, and the programs were cut back because of budgetary restrictions, not individual reasons. *Franklin*, 960 F.Supp. at 432. Neither *Mumid* nor *Franklin* cite, let alone distinguish *Lau*. In light of the factual differences and the absence of any discussion of the Supreme Court's decision in *Lau,* the Court finds *Mumid* and *Franklin* distinguishable.

Plaintiff alleges Defendants conduct their jail operations in English and provide inadequate language assistance to its large Latino LEP population, thereby denying Latino LEP inmates meaningful access to jail programs such as sanitary needs, food, clothing, legal information and religious services. Under longstanding Supreme Court precedent and the DOJ's interpretation of Title VI regulations, the Court finds Plaintiff has stated a claim for national origin discrimination against the LEP population.

3. First Amendment Retaliation

Section 14141 prohibits law enforcement officers from engaging in a pattern or practice "that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. § 14141. The plain language of the statute allows for a Section 14141 claim based on a First Amendment deprivation. The First Amendment prohibits a government official from

retaliating against an individual for protected speech. *E.g., Hartman v. Moore*, 547 U.S. 250, 256 (2006). The First Amendment prohibits retaliation taken to chill future speech. *E.g., Skoog v. County of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006).

The Complaint alleges former County Attorney Andrew Thomas acted in concert with Defendants to file a baseless lawsuit accusing people who had publicly criticized Defendants and baseless Arizona State Bar complaints against attorneys who spoke out against Defendants. The Complaint alleges Defendants used unjustified arrests to intimidate and retaliate against critics of their immigration policies. These allegations state a claim for First Amendment retaliation under Section 14141.

The Sheriff argues these allegations are "inaccurate," but this is a factual determination not properly before the Court at the motion to dismiss stage. The Sheriff argues Section 14141 claims typically focus on police brutality. This does not forbid a Section 14141 claim based on the First Amendment that is permitted by the plain language of the statute.

The Sheriff argues Plaintiff lacks standing to bring such First Amendment claims on behalf of third parties. Plaintiff, however, does not assert claims on behalf of third parties. It asserts its own right to enforce Section 14141, as explicitly provided by Congress. 42 U.S.C. § 14141(b)(explicitly authorizing Attorney General to bring civil action in the name of the United States to obtain appropriate relief); *see also* H.R. Rep. 102-242(I), at 135 (1991) (explaining legislation would "grant [ ] standing to the United States Attorney General…to obtain civil injunctive relief").

Finally, the Sheriff argues the Complaint does not state a Section 14141 claim because not all of the First Amendment violations relate to immigration enforcement. Plaintiff's authority to enforce Section 14141 is not limited to immigration matters. Plaintiff may seek injunctive relief to address Defendants' alleged pattern and practice of constitutional violations by retaliating against critics regardless of whether the subject matter is immigration related. Therefore, the Court will deny the Sheriff's motion to dismiss Count VI for First Amendment retaliation.

4. Scope of Remedies

The Sheriff moves to dismiss a portion of Plaintiff's prayer for relief that seeks an order for Defendants to adopt and implement policies regarding its policing and jail operations. A 12(b)(6) motion to dismiss challenges the legal sufficiency of the pleadings, not the appropriateness of the relief sought. *See* Fed. R. Civ. P. 12(b)(6); *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 353 (E.D.N.Y. 2007) ("[A] motion for failure to state a claim properly addresses the cause of action alleged, not the remedy sought."). The scope of the relief must match the scope of the harm proven. *Lewis v. Casey*, 518 U.S. 343, 357 (1996). This will be determined after discovery.

The Sheriff cites *Casey* for the proposition that interference with prison operations is prohibited. But *Casey* does not stand for such a broad proposition. In *Casey*, the Supreme Court set aside an injunctive order developed without any input from state prison authorities, and remanded for further proceedings. *Casey*, 518 U.S. at 362-63. The Sheriff cites *Sensing v. Harris*, 172 P.3d 856, 859 (Ariz. Ct. App. 2007), for the

proposition that a court cannot override law enforcement priorities. Again, *Sensing* does not stand for such a broad proposition. In *Sensing*, the Arizona Court of Appeals affirmed the trial court's decision to dismiss a complaint seeking a mandamus directing the city police chief to enforce a soliciting ordinance. By contrast, here Plaintiff seeks to enforce federal anti-discrimination laws. Nothing in *Sensing* prohibits Plaintiff from pleading injunctive relief to remedy discriminatory law enforcement conduct. Therefore, the Court will deny the Sheriff's motion to dismiss a portion of Plaintiff's prayer for relief.

D. County

The County argues it should be dismissed because it has no authority over the MCSO and Sheriff and therefore has no liability for, or power to stop, the alleged discrimination by the MCSO and Sheriff. (Doc. 37).

Municipal liability arises where an alleged constitutional deprivation is caused by a policy or custom of the municipality. *Monell v. Dep't of Soc. Servs. Of New York*, 436 U.S. 658, 691-94 (1978); *Fogel v. Collins*, 531 F.3d 824, 834 (9th Cir. 2008). "[A] policy is a deliberate choice to follow a course of action…made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* (quoting *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002) (per curiam) (internal quotations omitted)). "Whether a state official is a final policy maker for purposes of the municipal liability is a question of state law that is to be determined by the district court." *Ortega Melendres v. Arpaio*, 598 F. Supp. 2d 1025 (D.

Ariz. 2009) (citing *Streit v. County of Los Angeles*, 236 F.3d 552, 560 (9th Cir. 2001)). "When determining whether an individual has final policymaking authority, courts ask whether the individual at issue has authority 'in a particular area, or on a particular issue.'" *Id.* (quoting *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997)).

By statute, Arizona law charges county sheriffs with the responsibility of conducting law enforcement and jail activity on the part of the county. Arizona Revised Statute § 11-441A provides the "sheriff shall":

> 1. Preserve the peace.
> 2. Arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense.
> 3. Prevent and suppress all affrays, breaches of the peace, riots and insurrections which may come to the knowledge of the sheriff…
> 5. Take charge of and keep the county jail, including a county jail under the jurisdiction of a county jail district, and the prisoners in the county jail.

A.R.S. § 11-441(A); see also Ariz. Const. art. XII, §§ 3-4 (providing that there shall be created in an for each County of the State a Sheriff and that the Sheriff's duties, powers, and qualifications shall be prescribed by law).

Under *Flanders v. Maricopa County*, 203 Ariz. 368 (Ct. App. 2002) and *Guillory v. Greenlee County*, No. CV-05-352 TUC DCB, 2006 WL 2816600 (D. Ariz. Sept. 28, 2006), Arizona Counties can be held liable for the Sheriff's discretionary acts related to jail

management and law enforcement policy. *Guillory* specifically held:

> The Sheriff is an enumerated officer of the Defendant County. 11-401(A)(1). As a matter of law, the County is liable for policies made by the Sheriff, pursuant to his designated powers and duties as provided for by statute: A.R.S. § 11-441. *See e.g., Flanders*, 54 P.3d at 847 (holding county liable because the sheriff is a county officer whose duties regarding jail operations are fixed by law, A.R.S. § 11-441(5)).
>
> Section 11-441(A)(2) provides that the Sheriff shall arrest and take before a magistrate for examination all persons who attempt to commit or who have committed a public offense. The purpose of this duty is the prompt and orderly administration of criminal justice, including the Sheriff's discretionary investigatory determination of when enough evidence has been obtained to make an arrest. *Cf. Arizona v. Monaco*, 207 Ariz. 75, 83 P.3d 553, 558-59 (Ariz. App. 2004) (explaining the statute does not create a constitutional right to be arrested upon first discovery of criminal activity because sheriff must be permitted to exercise discretion to conduct investigation until enough evidence is obtained for conviction). This makes the Sheriff the final policymaker regarding criminal investigations.

> Under A.R.S. § 11-444, actual and necessary expenses of the Sheriff must be allowed and paid by the County. The Court finds that this fiscal independence further demonstrates that the Sheriff is the designated and final policymaker for the County regarding the needs of its officers for the prompt and orderly administration of criminal justice…

Guillory, 2006 WL 5816600 at *4.

Moreover, courts routinely find the Sheriff is the final policymaking authority for the County in analogous § 1983 matters. *See Wilson v. Maricopa County*, 463 F. Supp. 2d 987, 991 (D. Ariz. 2006) (citing A.R.S. § 11-441A and holding "Arizona law makes clear that the Sheriff is the final policymaker for the County's jails. The Court accordingly concludes that Sheriff Arpaio is the County's final policymaker for purposes of municipal liability under § 1983 arising out of events at tent city."); *Flanders*, 54 P.3d 837 (holding in § 1983 case that Maricopa County is responsible for Sheriff Arpaio's jail policies); *see also Cortez v. County of L.A.,* 294 F.3d 1186, 1189 (9th Cir. 2002) ("[T]he County is subject to § 1983 liability for the Sheriff's actions taken here pursuant to his role as administrator of the county jail."); *Guillory*, 2006 WL 2816600 at *4 (D. Ariz. Sept. 28, 2006) ("Here, the alleged inadequate training was a policy of the County because the Sheriff was the policymaker for the County regarding the officer training…."); *United States v. City of Columbus*, No. 2:99-cv-1097, 2000 WL 1133166, at *8 (S.D. Ohio Aug. 3, 2000) (concluding that liability under § 14141 can be established by evidence that would establish liability under § 1983).

Municipalities create policies in three ways: first, in a "'policy statement, ordinance, regulation or decision officially adopted and promulgated'" by the municipality's lawmaking body; second, by "a single edict or act by a municipal officer with final policy making authority"; or third, by "a widespread custom or practice [that] creates a de facto municipal policy." *Greenawalt v. Sun City West Fire Dist.*, 250 F. Supp. 2d 1200, 1215 (D. Ariz. 2003) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978)). The focus here is on the Sheriff's policymaking authority.

Courts "must apply pleading standards in a realistic, common-sense fashion that recognizes that at the pleading stage (i.e., prior to discovery occurring) a plaintiff frequently lacks the actual details concerning a contested policy or custom." *Id.* at 1216. "In the Ninth Circuit, plaintiffs need not specifically allege a policy, it is enough if the policy may be inferred from the allegations of the complaint." *Id.* The Complaint satisfies this pleading requirement because it alleges Defendants failed to implement adequate policies, training or accountability mechanisms to remedy the pattern and practice of unlawful conduct and prevent discrimination against Latinos. Plaintiff alleges a custom, policy and practice of targeting, searching, arresting and detaining Latinos without probable cause or reasonable suspicion because of their race, color and national origin.

Under Arizona law, the Sheriff has final policymaking authority with respect to County law enforcement and jails, and the County can be held responsible for constitutional violations resulting from these policies. The policymaker analysis also supports Plaintiff's Title VI claims against the County because Title VI reaches the actions of relevant

"decisionmakers." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that a successful showing of a Title VI violation rests on the actions of a decisionmaker). In light of the Arizona statutes and case law acknowledging the Sheriff's policymaking authority, the County's motion to dismiss will be denied.

Accordingly,

IT IS ORDERED the motion to dismiss filed by Maricopa County Sheriff's Office and Sheriff Joseph M. Arpaio **(Doc. 35)** is **GRANTED IN PART AND DENIED IN PART.** The Maricopa County Sheriff's Office is dismissed.

IT IS FURTHER ORDERED Maricopa County's motion to dismiss (Doc. 37) is **DENIED.**

DATED this 11th day of December, 2012.

Roslyn O. Silver
Chief United States District Judge

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APPENDIX C

In the United States District Court
For the District of Arizona

United States of America,
Plaintiff,
v.
Maricopa, County of, et al.,
Defendants.

No. CV-12-00981-PHX-ROS

ORDER

Before the Court are the parties' cross-motions for summary judgment (Doc. 332, 334, 345).

BACKGROUND
I. The Parties

Plaintiff the United States brought the present action alleging a pattern or practice of discrimination against Latinos in Maricopa County, Arizona by Defendants Joseph M. Arpaio ("Arpaio") and Maricopa County in violation of the Constitution and federal statutes. Defendant Arpaio is the Sheriff of Maricopa County and heads the Maricopa County Sheriff's Office ("MSCO"). As MCSO's chief officer, Arpaio directs law enforcement throughout Maricopa County.[4] He is responsible for MCSO's policies and

[4] MCSO is a non-jural entity, which the Arizona Court of Appeals had determined cannot be sued. *Braillard v. Maricopa County*, 232 P.3d 1263, 1269 (Ariz. Ct. App. 2010).

operations, which include all facets of policing and prison administration. MCSO is a subdivision of Maricopa County. Maricopa county's primary governing body is the Board of Supervisors (the "Board"). The Board consists of five Supervisors, each of whom is elected from one of Maricopa County's five districts. Maricopa County determinates the budgets and provides the funding for its subdivisions, including municipal courts, public schools, and law enforcement (i.e. MCSO). Maricopa County receives federal financial assistance from the United States, which it distributes to various county subdivisions, including MCSO.

II. The Prior Litigation: *Melendres v. Arpaio*

In 2007, private individual plaintiffs initiated a class action lawsuit against Arpaio, MCSO, and Maricopa County, alleging MCSO officers engaged in racial discrimination against Latinos "under the guise of enforcing immigration law." *Ortega-Melendres v. Arpaio*, 836 F.Supp.2d 959, 969 (D. Ariz. 2011), *aff'd sub nom. Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012) (hereinafter "*Melendres*"). The case focused on "saturation patrols," which were described as "crime suppression sweeps" in which officers saturate a given area and target persons who appeared to be Latino for investigation of their immigration status. (2:07-CV-02513-GMS, Doc. 26 at 10). Jose de Jesus Ortega-Melendres, the named plaintiff, was stopped in his vehicle by members of the MCSO's Human Smuggling Unit and detained without probable cause while officers investigated his immigration status, along with those of his passengers. *Melendres v. Arpaio*, 989 F.Supp.2d 822, 880 (D. Ariz. 2013); (2:07-CV-02513-GMS, Doc. 26 at 17). The certified class of plaintiffs

encompassed "[a]ll Latino persons who, since January 2007, have been or will be in the future stopped, detained, questioned or searched by [the defendants'] agents while driving or sitting in a vehicle on a public roadway or parking area in Maricopa County, Arizona." *Melendres v. Arpaio*, 695 F.3d 990, 995 (9th Cir. 2012). *See also Ortega-Melendres v. Arpaio*, 836 F.Supp.2d 959, 994 (D. Ariz. 2011).

In May 2009, Maricopa County requested a stay pending the outcome of the United States' investigation of Arpaio's practices, which had begun one month earlier. The United States opposed the motion, as did Arpaio, and the court denied the stay due to the timing and uncertainty regarding the outcome of the United States' investigation. *Melendres v. Maricopa Cnty.*, No. 07-cv-02513, 2009 WL 2515618, at *4 (D. Ariz. Aug. 13, 2009). Over the course of the *Melendres* litigation, the United States requested deposition transcripts and filed motions for protective orders regarding discovery. It also sought to transfer a 2010 Title VI enforcement action to the *Melendres* court.

On May 24, 2013, the *Melendres* court issued Findings of Fact and Conclusions of Law. *Melendres v. Arpaio*, 989 F.Supp.2d 822 (D. Ariz. 2013) ("*Melendres* Order"). The court held MCSO's "saturation patrols all involved using traffic stops as a pretext to detect those occupants of automobiles who may be in this county without authorization," *id.* at 826, and "MCSO's use of Hispanic ancestry or race as a factor in forming reasonable suspicion that persons have violated state laws relating to immigration status violates the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 899. The court also found MCSO conducted discriminatory traffic stops outside of saturation patrols. *Id.* at 844-845, 889-890. The

Melendres Order enjoined MCSO from "using Hispanic ancestry or race as [a] factor in making law enforcement decisions pertaining to whether a person is authorized to be in the country, and [ ] unconstitutionally lengthening [vehicle] stops." *Id.* at 827.

After the ruling, the United States filed a statement of interest concerning potential forms of relief.[5] On October 2, 2013, the court issued its Supplemental Permanent Injunction/Judgment Order. *Melendres v. Arpaio*, No. CV-07-02513-PHX-GMS, 2013 WL 5498218, at *1 (D. Ariz. Oct. 2, 2013) ("Supplemental Order"). The order permanently enjoined Defendants from: 1) "[d]etaining, holding or arresting Latino occupants of vehicle sin Maricopa County based on a reasonable belief, without more, that such persons are in the country without authorization"; 2) "[u]sing race or Latino ancestry as a factor in deciding whether to stop any vehicle" or in deciding whether a vehicle occupant was in the United States without authorization; (3) "[d]etaining Latino occupants of vehicles stopped for traffic violations for a period longer than reasonably necessary to resolve the traffic violation in the absence of reasonable suspicion that any of the vehicle's occupants have committed or are committing a violation of federal or state criminal law"; (4) "[d]etaining, holding or

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[5] The statement of interest was made pursuant to 28 U.S.C. § 517, which permits the Attorney General to send officers to the Department of Justice to "any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. *See M.R. v. Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2012) (comparing "statement of interest" under 28 U.S.C. § 517 to an amicus brief).

arresting Latino occupants of a vehicle…for violations of the Arizona Human Smuggling Act without a reasonable basis for believing the necessary elements of the crime are present"; and (5) "[d]etaining, arresting or holding persons based on a reasonable suspicion that they are conspiring with their employer to violate the Arizona Employer Sanctions Act." *Id.* The Supplemental Order also contained numerous provisions regarding the implementation of bias-free policing, including standards for bias-free detention and arrest policies and training, as well as detailed policies and procedures for ensuring and reviewing MCSO's compliance with the *Melendres* Order. The procedures included the appointment of an independent monitor to report on Arpaio and MCSO's compliance and collection of traffic stop data. *Id.*

Arpaio and MCSO appealed the *Melendres* Order and the Supplemental Order (collectively, the "*Melendres* injunction"), challenging provisions which addressed non-saturation patrol activities and arguing the evidence was insufficient to sustain the district court's conclusion that Arpaio and MCSO's unconstitutional policies extended beyond the context of saturation patrols. *Melendres v. Arpaio*, No. 13-16285, Opening Brief of Defendant/Appellant Arpaio, Doc. 32-1, at 2, 13-15, 17-18 (March 17, 2014). MCSO also argued it was not a proper party in the case. *Id.*

On April 15, 2015, the Ninth Circuit issued an opinion holding MCSO was not a proper party because it is a non-jural entity lacking separate legal status from Maricopa County. *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015). The Ninth Circuit ordered Maricopa County substituted as a party in lieu of MCSO. *Id.* at 1260. But the court also stated, "[o]n remand, the district court may consider dismissal of Sheriff Arpaio in his official capacity because 'an

official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.'" *Id.*[6] In addition, the court held the *Melendres* injunction was not overbroad because it applied to activities beyond saturation patrols: "Although the evidence largely addressed [the] use of race during saturation patrols, the district court did not clearly err in finding [Arpaio's] policy applied across-the-board to all law enforcement decisions – not just those made during saturation patrols."[7] *Id.* However, the court found the requirements for the independent monitor "to consider the 'disciplinary outcomes for *any* violations of departmental policy' and to assess whether Deputies are subject to 'civil suits or criminal charges…for off-duty conduct" were not narrowly tailored and ordered the district court "to tailor [these provisions] to address only the constitutional violations at issue. *Id.* at 1267.

III. The Litigation Before This Court: *U.S. v. Maricopa County*

On March 10, 2009, the United States Department of Justice ("DOJ") sent Arpaio a letter notifying him it was commencing an investigation of his office. (Doc. 333-3 at 6). Over a year later, on August 3, 2010, DOJ issued a "Notice of noncompliance with the obligation to cooperate with the Department of Justice investigation pursuant to Title VI of the Civil Rights Act of 1964." (Doc. 333-3 at

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[6] On May 15, 2015, Maricopa County filed a Petition for Rehearing on its substitution as a party in *Melendres.*

[7] The reference to "all law enforcement decisions" was referring to decisions made regarding vehicle stops outside of the context of official saturation patrols.

9) ("Notice Letter"). Although the Notice Letter appears to have been mailed only to counsel for MCSO, counsel for Maricopa County responded to it. (Doc. 333-3 at 9). On August 12, 2010, Maricopa County's private counsel wrote to the United States to express Maricopa County's "desire[ ] to cooperate in any way possible with the [United States'] investigation referenced in the Notice Letter," emphasizing, "[a]s a recipient of Title VI funds, Maricopa County believes it has an obligation to cooperate." Id. Maricopa County offered to use its subpoena power to procure documents in aid of DOJ's investigation. *Id.* at 10. The letter also stated Maricopa County would "[notify] MCSO that it [could] not expend any public funds, including on outside counsel, to resist any DOJ Title VI inquiry," and that "Maricopa County [would] not pay those bills as resisting a Title VI inquiry is outside the scope of the employment of any elected or appointed official." *Id.*

On December 15, 2011, DOJ sent Maricopa County Attorney Bill Montgomery ("Montgomery") a 22-page letter notifying him of the investigation into MCSO and announcing "the findings of the Civil Rights Division's investigation into civil rights violations by the [MCSO]." (Doc. 333-2 at 2) ("Findings Letter"). The Findings Letter did not reference Maricopa County, specifically. Montgomery immediately responded that DOJ had "noticed the wrong party." (Doc. 333-3 at 12). On January 17, 2012, DOJ responded it would continue to include Maricopa County in all correspondence because its "investigation potentially affect[ed] Maricopa County as the conduit of federal financial assistance to MCSO." (Doc. 333-3 at 14).

On May 9, 2012, DOJ advised Maricopa County:

> [I]n accordance with the notice requirements set forth in DOJ's Title VI regulations, 42 C.F.R. § 108(d)(3), it is the intention of the Department of Justice to file a civil action against Maricopa County, the Maricopa County Sheriff's Office, and Sheriff Joseph M. Arpaio in order to remedy the serious Constitutional and federal law violations, including noncompliance with Title VI, as noted in our December 15, 201[1] Findings Letter.

(Doc. 333-3 at 25). The following day, the United States filed a complaint in this Court, outlining six claims for relief against Arpaio, MCSO and Maricopa County:

(1) Intentional discrimination on the basis of race, color or national origin in violation of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141") and the Due Process and Equal Protection clauses of the Fourteenth Amendment.

(2) Unreasonable searches, arrests and detentions lacking probable cause or reasonable suspicion in violation of Section 14141 and the Fourth Amendment.

(3) Disparate impact and intentional discrimination on the basis of race, color or national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 ("Title VI").

(4) Disparate impact and intentional discrimination against limited English proficient ("LEP") Latino prisoners in violation of Title VI.

(5) Disparate impact and intentional discrimination in violation of Defendants' contractual assurances under Title VI.

(6) Retaliation against Defendants' critics in violation of Section 14141 and the First Amendment.

(Doc. 1).

Arpaio, MCSO, and Maricopa County moved to dismiss. On December 12, 2012, the Court denied Maricopa County's motion and granted Arpaio and MCSO's motion in part. (Doc. 56). MCSO was dismissed from the case based on the Arizona Court of Appeals decision, *Braillard v. Maricopa County*, which held MCSO is a non-jural entity, lacking the capacity to sue and be sued. 224 Ariz. 481, 487 (Ct. App. 2010).

The remaining parties proceeded with discovery. The United States and Arpaio now each move for partial summary judgment. (Doc. 332, 345). Maricopa County moves for summary judgment on all claims. (Doc. 334).

ANALYSIS

I. Legal Standard

Under Rule 56, summary judgment is appropriate when the moving party demonstrates the absence of a genuine dispute of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *United States v. Kapp*, 564 F.3d 1103, 1114 (9th Cir. 2009). A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248.

A party seeking summary judgment bears the initial burden of establishing the absence of a genuine dispute of material fact. *Celotex*, 477 U.S. 323. The moving party can satisfy this burden in two ways: either (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2)

by demonstrating the nonmoving party failed to establish an essential element of the nonmoving party's case on which the nonmoving party bears the burden of proof at trial. *Id.* at 322-23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Once the moving party establishes the absence of genuine disputes of material fact, the burden shifts to the nonmoving party to set forth facts showing a genuine dispute remains. *Celotex*, 477 U.S. at 322. The nonmoving party cannot oppose a properly supported summary judgment motion by "rest[ing] on mere allegations or denials of his pleadings." *Anderson*, 477 U.S. at 256. The party opposing summary judgment must also establish the admissibility of the evidence on which it relies. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) (a court deciding summary judgment motion "can only consider admissible evidence"); *see also Beyene v. Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988) ("It is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment."); Fed. R. Civ. P. 56, 2010 Advisory Committee Notes ("The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated.").

When ruling on a summary judgment motion, the court must view every inference drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 601 (1986). The court does not make credibility determinations with respect to evidence offered. *See T.E. Elec.*, 809 F.2d at

630-631 (citing *Matsushita*, 475 U.S. at 587). Summary judgment is therefore not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts." *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 (9th Cir. 1980).

II. Justiciability

A. Justiciability of Claims Against Arpaio

Arpaio argues the United States' claims involving discriminatory traffic stops in Counts One, Two, Three, and Five are moot.[8] He argues the *Melendres* injunction eliminated all threat of immediate and future discriminatory traffic stops, as well as the ability of this Court to provide redress for those claims.[9] The United States argues its traffic

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[8] In the "Introduction" of the complaint, the United States summarizes the basis of the lawsuit as "discriminatory police conduct directed at Latinos." (Doc. 1 at 1). This conduct includes: 1) stopping, detaining, and arresting Latinos on the basis of race; 2) denying Latino prisoners with limited English language skills constitutional protections; and 3) illegally retaliating against perceived critics through baseless criminal actions, lawsuits, and administrative actions. (Doc. 1 at 1-2). Specifically, Count One alleges violations of 42 U.S.C. § 14141 and the Fourteenth Amendment based on a pattern or practice of law enforcement practices, including traffic stops, workplace raids, home raids, and jail operations, with the intent to discriminate. Count Two alleges violations of 42 U.S.C. § 14141 and the Fourth Amendment based on a pattern or practice of unreasonable searches and seizures conducted without probable cause or reasonable suspicion. Count Three alleges violations of Title VI based on the use of federal financial assistance by persons alleged to be engaging in discriminatory law enforcement practices. Count Five alleges violations of Title VI's contractual assurances.

[9] Arpaio argues the same facts regarding redressability to claim the action is moot, the Court lacks subject matter jurisdiction, the

stop claims are not moot for four reasons: (1) the *Melendres* injunction does not reach all of the conduct challenged in the present suit because it is necessarily tied to and based upon the immigration-related operations at issue in *Melendres*; (2) the federal government has unique interests which warrant providing it with its own enforcement mechanism for the types of reforms and controls in the *Melendres* injunction; (3) Arpaio appealed the scope of the *Melendres* injunction; and (4) the *Melendres* injunction is years away from full implementation.

Mootness doctrine prevents courts from ruling "when the issues presented are no longer live and therefor the parties lack a cognizable interest for which the courts can grant a remedy." *Alaska Ctr. For Env't v. U.S. Forest Serv.*, 189 F.3d 851, 854 (9th Cir. 1999). "The party asserting mootness bears the burden of establishing that there is no effective relief that the court can provide." *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9TH Cir. 2006). And "[t]hat burden is 'heavy'; a case is not moot where any effective relief may be granted." *Id.* "Partial relief in another proceeding cannot moot an action that legitimately seeks additional relief." *Flagstaff Med. Ctr., Inc. v. Sullivan*, 962 F.2d 879, 885 (9th Cir. 1992).

As a general principle, "the government is not bound by private litigation when the government's

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United States lacks standing, and the action is not ripe. In doing so, he often conflates the standards pertaining to each doctrine. Because standing is measured at the time an action is commenced (in this case, May 10, 2012) and the *Melendres* injunction was not issued until over a year later (May 24, 2013), it appears the only cognizable justiciability argument Arpaio makes concerns mootness. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n. 5 (1992) ("[S]tanding is to be determined as of the commencement of suit"). Therefore, the Court will analyze the viability of the United States' claims under mootness doctrine.

action seeks to enforce a federal statute that implicates both public and private interests." *California v. IntelliGender, LLC*, 771 F.3d 1169, 1177 (9th Cir. 2014) (internal quotation marks and citation omitted). *See also Hathorn v. Lovorn*, 457 U.S. 255, 268 n. 23 (1982); *City of Richmond v. United States*, 422 U.S. 358, 373 n. 6 (1975). For example, in *E.E.O.C. v. Goodyear Aerospace Corp.*, the Ninth Circuit held the Equal Employment Opportunity Commission's ("EEOC") "interests in determining the legality of specific conduct and in deterring future violations are distinct from the employee's interest in personal remedy." 813 F.2d 1539, 1542 (9th Cir. 1987). For that reason, the Court held the EEOC's enforcement action was not mooted by a private plaintiff's lawsuit and settlement based on the same facts. *Id.* at 1543. ("[The private plaintiff's] settlement does not moot the EEOC's right of action seeking injunctive relief to protect employees as a class and to deter the employer from discrimination.").

Goodyear Aerospace Corp. involved a previous suit by an individual private plaintiff. But the court's analysis relied in part on *Secretary of Labor v. Fitzsimmons*, where the prior suit was a private class action. 805F.2d 682 (7th Cir. 1986). In *Fitzsimmons*, the Seventh Circuit held the Secretary of Labor was not barred by res judicata from bringing an ERISA enforcement action based on the same facts as a previously settled class action in which the Secretary had intervened. *Fitzsimmons*, 805 F.2d at 699. The decision was based in part on the history and structure of ERISA. The court noted ERISA arose out of concern over the "increasingly interstate" "operational scope and economic impact" of employee benefit plans and the direct effect such plans had on the "well-being and security of millions of employees and their dependents."

Id. at 689 (citing 29 U.S.C. § 1001(a)). Employee benefit plans were also thought to "substantially affect the revenues of the United States" and therefore to be "affected with a national public interest." *Id.* The status provided the Secretary of Labor the right to intervene in any action brought by a participant, beneficiary, or fiduciary. *Id.*

The defendants in Fitzsimmons argued the right to intervene in private lawsuits created privity between the Secretary of Labor and the private plaintiffs so as to bar the Secretary from bringing a separate enforcement action. In determining no privity existed between the government and the private class of plaintiffs, the court articulated compelling and unique government interests, which justified the Secretary's separate second lawsuit:

> [I]t is clear that the Secretary does have a unique, distinct, and separate public interest, duty and responsibility in bringing this ERISA action to enforce the trustees' fiduciary obligations and duties, to ensure public confidence in the private pension system that provides billions of dollars of capital for investments affecting federal tax revenues and interstate commerce, and most importantly, to protect the income of the retired workers and beneficiaries. Further, the Secretary of Labor has a separate interest when he intervenes so as to prevent the establishment of harmful legal precedent as well as to ensure uniformity in the enforcement and application of ERISA laws.

Id. at 696.[10] *See also Herman v. S. Carolina Nat. Bank*, 140 F.3d 1413, 1424 (11th Cir. 1998) (same) (citing

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[10] The Court went so far as to conclude "private parties can never be representatives of this clear, specific, and unambiguous

Beck v. Levering, 947 F.2d 639, 642 (2d Cir. 1991)); *Donovan v. Cunningham*, 716 F.2d 1455, 1462-63 (5th Cir. 1983)).

The Supreme Court has addressed the situation where the government seeks injunctive relief which is potentially duplicative of relief already afforded to a private party. In *United States v. Borden Co.*, the Supreme Court held a private plaintiff's injunctive relief did not bar the federal government from bringing suit for injunctive relief under the Clayton Act, 15 U.S.C. § 25. 347 U.S. 514, 520 (1954). The district court had held the violations described in the government's complaint and shown at the trial were, "for the most part, old violations…[and] the [private injunction] assure[d], as completely as any decree can assure, that there will be no new violations." *Id.* at 517-518 (internal quotation marks and citation omitted). The Supreme Court reversed, holding that the district court's reasoning ignored "the prime object of civil decrees secured by the Government – the continuing protection of the public, by means of contempt proceedings, against a recurrence of [ ] violations." *Id.* at 519. The Court continued:

> Should a private decree be violated, the Government would have no right to bring contempt proceedings to enforce compliance; it might succeed in intervening in the private action but only at the court's discretion. The private plaintiff might find it to his advantage to refrain from seeking enforcement of a

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national interest of the Secretary," *id.*, and "even if one were to assume that the interests of the Secretary and the class plaintiffs were the same…where the Secretary did not participate in structuring the settlement agreement it is impossible to conclude that the private plaintiffs had adequately represented the Secretary's interests." *Id.* at 695, n. 16.

> violated decree; for example, where the defendant's violation operated primarily against plaintiff's competitors. Or the plaintiff might agree to modification of the decree, again looking only to his own interest. In any of these events it is likely that the public interest would not be adequately protected by the mere existence of the private decree. It is also clear that Congress did not intend that the efforts of a private litigant should supersede the duties of the Department of Justice in policing an industry. Yet the effect of the decision below is to place on a private litigant the burden of policing a major part of the milk industry in Chicago, a task beyond its ability, even assuming it to be consistently so inclined." *Id.* at 519.

Thus, the Supreme Court recognized the government's interest in enforcing the provisions of a privately-held injunction, as well as its duty to enforce its laws may justify a second injunction. The private decree was to be considered in determining whether the government could show a likelihood of recurring illegal activity, but it was not dispositive of that question. *Id.* at 520.

The Supreme Court also determined that, in stating the United States district attorneys and the Attorney General had a duty to institute equity proceedings to enforce antitrust laws while also allowing private plaintiffs to obtain injunctive relief, the Clayton Act created a scheme in which "private and public actions were designed to be cumulative, not mutually exclusive." *Id.* at 518.

A similar conclusion applies to Title VI, one of the statutes under which the United States' brings its claims. Title VI is part of the Civil Rights Act of 1964, a sweeping piece of legislation which banned racial

discrimination in voting, schools, workplaces, and public accommodations and created mechanisms through which the federal government could enforce each provision. The Act was passed in the context of widespread conflict and unrest regarding racial desegregation, including resistance to desegregation by state and local governments and private individuals. Its purpose was to harness the power of the federal government to eradicate racial discrimination throughout the United States, regardless of local bias. The Supreme Court has held private plaintiffs may bring suit under Title VI for violations caused by intentional discrimination but not disparate impact discrimination. *Alexander v. Sandoval*, 532 U.S. 275 (2001). The federal government, by contrast, may sure for either intentional or disparate impact discrimination. *See infra*, Part III (A). And federal agencies which extend federal financial assistance are both "authorized and *directed* to effectuate [its] provisions." 42 U.S.C. § 2000d (emphasis added). Just as in *Borden Co*., the statutory scheme of Title VI and the Civil Rights Act of 1964 lends itself to and is enhanced by viewing private enforcement action as supplemental and cumulative to government enforcement action.

The other statute under which the United States brings these claims, the Violent Crime Control and Law Enforcement Act of 1964, may be best known for its crime prevention measures, including a federal ban on assault weapons and increased federal funding of local law enforcement. *See* Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 833 n. 35-36 (2015). But the Act also contains provisions directed at reforming law enforcement. For instance, under § 14141, the relevant section here, the Attorney General has

discretion to bring civil actions to obtain appropriate equitable and declaratory relief to eliminate the pattern or practice of law enforcement that violates constitutional rights and privileges.

Portions of the United States' claims of discriminatory policing involve conduct addressed in *Melendres* – discriminatory vehicle stops related to immigration enforcement. But the United States' claims also include allegations regarding discriminatory home raids, worksite raids, and non-motor vehicle related arrests and detentions, which are different in important respects from those presented in *Melendres*. For one, the United States' claims are not confined to immigration enforcement, but extend to discrimination in general law enforcement.

Despite this overlap, the United States possesses a unique interest, which supports the finding of a live controversy as to allegations regarding discriminatory traffic stops. Furthermore, the purposes of Title VI and § 14141 would be served by permitting the United States to bring its own enforcement actions, regardless of previous action taken by private plaintiffs. The United States' interest in this case is distinct from those of private plaintiffs' in *Melendres*. As with the Secretary of Labor in *Fitzsimmons*, the federal government has an interest in the uniform and robust enforcement of federal civil rights legislation nationwide. Its interest in preventing the type of discrimination charged in this case extends beyond the well-being of a defined class of plaintiffs to the safety, security, and just and harmonious coexistence of all citizens. The United States likewise has an interest in ensuring confidence in law enforcement activities which utilize federal funding and may affect interstate commerce. In

addition, the findings in Part III(A), *infra*, show congressional intent to permit the federal government to bring an enforcement action. To paraphrase *Fitzsimmons*, to hold mootness doctrine bars the Attorney General from independently pursuing enforcement of Title VI would effectively limit the authority of the Attorney General under the statute – something a court will not do in the absence of an explicit legislative directive. *See Fitzsimmons*, 805 F.2d at 691.

In addition, the *Melendres* injunction does not moot the portions of the United States' claims which overlap with *Melendres* because continued violations by Arpaio and MCSO following the issuance of the injunction demonstrate a real and immediate threat of future harm, as well as the importance of granting the United States authority to enforce injunctive relief addressing MCSO's discriminatory traffic stops. *See Borden Co.*, 347 U.S. at 519; (2:07-CV-2513-GMS, Doc. 948) (Arpaio's stipulation to violations of the *Melendres* injunction by Arpaio and MCSO); (2:07-CV-2513-GMS, Doc. 0127 at 118-125). In addition, in the context of the United States' broader claims, its claims regarding traffic stops may lead to different injunctive measures than those put forth in *Melendres*, where the allegations of discriminatory traffic stops were brought in isolation. In other words, the *Melendres* injunction may afford some, but only partial relief for the United States' claims. *See Flagstaff Med. Ctr., Inc.*, 962 F.2d at 885.

In sum, it is premature for the Court to conclude the United States' allegations would lead to a replica of the Melendres injunction. And, even if portions of the order were replicated, the United States' unique interest in enforcing those provisions and the

continuing threat of future harm it faces render the claims justiciable.

B. Justiciability of Claims Against Maricopa County

Maricopa County argues the United States does not have standing because it has failed to show "the harms it alleges are 'likely to be redressed' by a judgment against the County." (Doc. 334 at 8). The United States contends it has shown a likelihood of redress and that the "law of the case" precludes the County's argument. (Doc. 348 at 8).

To have Article III standing, a plaintiff must demonstrate: (1) it has suffered "injury in fact – an invasion of a legally protected interest which is…concrete and particularized"; (2) "a casual connection between the injury and the conduct complained of"; and (3) the likelihood "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks and citations omitted).

In a previous order, the Court held, "Under Arizona law, the Sheriff has final policymaking authority with respect to County law enforcement and jails, and the County can be held responsible for constitutional violations resulting from these policies," (Doc. 56 at 13), and denied Maricopa County's motion to dismiss, including the allegation of lack of standing.[11]

"Law of the case" doctrine "preclude[s a court] from reexamining an issue previously decided by the same court, or a higher court, in the same case."

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[11] The Court reaffirmed this decision in denying Maricopa County's motion for reconsideration. (Doc. 73).

United States v. Jingles, 702 F.3d 494, 499 (9th Cir. 2012) (citation omitted). The doctrine applies where an issue was "decided explicitly or by necessary implication in [the] previous disposition." *Id.* (internal quotation marks and citation omitted).

In finding Maricopa County could be held responsible for Arpaio's constitutional violations, the Court ruled, by necessary implication, the County was capable of redressing those violations. Nonetheless, Maricopa County now claims the Court's previous analysis was flawed because it relied on precedents from § 1983 cases involving claims for monetary, rather than injunctive relief. Maricopa County acknowledges A.R.S. § 11-201 gives it the power to determine MCSO's budget, but maintains that authority is insufficient to influence or control how MCSO is run. Maricopa County also claims: 1) the County cannot "cure the alleged violations here" (Doc. 356 at 10); 2) the United States has failed to show Arpaio and MCSO engage in "assessing, collecting, safekeeping, managing or disbursing the public revenues" such that they would fall under Maricopa County's supervisory authority pursuant to A.R.S. § 11-251(1); and 3) A.R.S. § 11-444 severely limits its authority to withhold funding.

Although the cases on which the Court's previous order relied involved claims under § 1983, which allows for monetary as well as injunctive relief, the reasoning applied to find Maricopa County potentially liable for MCSO's constitutional violations was not premised on the form of relief sought, but rather on the bases for "policymaker" liability. *See Flanders v. Maricopa Cnty.*, 203 Ariz. 368, 378 (Ct. App. 2002).

As will be discussed at greater length in Part III(B)(i), infra, the logic of "policymaker" liability

under § 1983 applies to produce institutional liability under Title VI and its sister statute, Title IX, as well. *See Pers. Adm'r of Mass v. Feeney*, 442 U.S. 256, 279 (1979) (holding that a successful showing of a Title VI violation rests on the actions of a decisionmaker). The Court's previous order relied on numerous state court decisions identifying the sheriff as a policymaker for Maricopa County, *United States v. Maricopa Cnty., Ariz*, 915 F.Supp.2d 1073, 1082-84 (D. Ariz. 2012), (Doc. 56), and that determination is the law of this case. *See United States v. Jingles*, 702 F.3d 494, 499 (9th Cir. 2012).

Regarding Maricopa County's argument that its inability to "cure the alleged violations" destroys the United States' standing, the United States is correct that it need only show the potential for partial redress. *See Meese v. Keene*, 481 U.S. 465, 476 (1987).[12]

The sheriff is independently elected. Ariz. Const. art. XII, § 3. And his duties are statutory required. A.R.S. § 11-441. Those duties range from "[p]reserve[ing] the peace" to "[a]rrest[ing]…persons who attempt to commit or who have committed a public offense" to "[t]ak[ing] charge of and keep[ing] the county jail." A.R.S. § 11-441.

However, A.R.S. § 11-251(1) provides:

> The board of supervisors, under such limitations and restrictions as are prescribed by

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[12] It is also worth noting that policymaker liability under § 1983 is not premised on complete control of the principal over the official in question. Rather, the amount of control the defendant, i.e. the county board of supervisors, possesses over the official is but one factor in the determination of whether that official qualifies as a policymaker for the municipal government. *Goldstein v. City of Long Beach*, 715 F.3d 750, 755 (9th Cir. 2013) *cert. denied sub nom. Cnty. of Los Angeles, Cal. v. Goldstein*, 134 S. Ct. 906, 187 L. Ed. 2d 778 (2014).

> law, may: …Supervise the official conduct of all county officers and officers of all districts and other subdivisions of the county charged with assessing, collecting, safekeeping, managing or disbursing the public revenues, see that such officers faithfully perform their duties and direct prosecutions for delinquencies.

A.R.S. § 11-251(1). And the Arizona Court of Appeals has held the sheriff is an "officer" within the definition provided in this subsection. *Fridena v. Maricopa Cnty.*, 18 Ariz. App. 527, 530 (Ct. App. 1972). Therefore, the Board of Supervisors is charged with supervising the sheriff under the statute.

The Board's authority over the sheriff's budget is somewhat constrained by A.R.S. § 11-444(A), which states: "The sheriff shall be allowed actual and necessary expenses incurred by the sheriff in pursuit of criminals, for transacting all civil or criminal business." But the statute also provides that the Board meet monthly to allocate funds to the sheriff for the payment of such expenses and that the sheriff "render a full and true account of such expenses" every month to the Board. A.R.S. § 11-444(B)-(C).

In 1965, the Arizona Attorney General's Office issued an opinion interpreting A.R.S. § 11-444, [13] which stated:

> [T]he board of supervisors, being the agency of the county vested with responsibility for allowing claims, must be satisfied in each instance when examining the claims of sheriffs…that the expenses claimed are for a public purpose and are the actual and necessary expenses thereof.

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[13] The relevant language of A.R.S. § 11-444 in 1965 was substantially similar to its present form.

Op. Atty. Gen. No. 65-18. This reading harmonizes the funding requirements of A.R.S. § 11-444 with the Board's duty under A.R.S. § 11-251(1) to "see that such officers faithfully perform their duties and direct prosecutions for delinquencies." A.R.S. § 11-251(1). *Cf. Pinal Cnty. V. Nicholas*, 179 P. 650, 651-652 (Ariz. 1919) (holding, in executing its duty to pay "necessary expenses" of the County Attorney, "the board of supervisors is charged with the duty of supervising all expenditures incurred by him, and rejecting payment of those which are illegal or unwarranted"). Therefore, the Board can refuse to fund inappropriate activities, which is exactly what the United States wants Maricopa County to do.

Maricopa County's argument centers on its purported inability to initiate any authorized action to affect Arpaio's compliance with the law or a court order, given the sheriff's statutory duties and electoral independence and the Board's statutory obligation to fund his activities. But Maricopa County admits it has the ability and duty "to facilitate compliance of the Sheriff and other constitutional officers with judicial orders." (Doc. 334 at 9, n. 2). And the United States identified numerous ways in which Maricopa County could, within its authority, exercise oversight and influence over Arpaio. For instance, Maricopa County could put the sheriff on a line-item budget and use its power to withhold approval for capital expenditures, salary increases and the like to encourage compliance with the court orders. (Docs. 348 at 10-12; 349 at ⁋ 13-26). The United States also discussed actions Maricopa County has already taken to oversee and control MCSO's fiscal management to ensure its compliance with county policy. (Docs. 348 at 13; 349 at ⁋ 13). In the name of sound fiscal management, and at least partially in response to constituent complaints,

the Board has, in the past, ordered audits and "operational efficiency reviews" of MCSO's vehicle use, extradition and travel policy, and staffing practices and ordered "oversight functions" be performed by the County Office of Management and Budget. (Docs. 349-2, 349-3). In fact, Maricopa County's own initial response to DOJ's investigation stated the County could deny MCSO reimbursement for funds expended in an effort to resist the investigation, as such resistance was "outside the scope of the employment of any elected or appointed official." (Doc. 333-3 at 10). This evidence and the Arizona Attorney General's interpretation of the relevant statutes, show Maricopa County has the ability to afford at least partial redress for violations committed by Arpaio, MCSO and Maricopa County.

In addition, another district court recently upheld taxpayers' standing to sue Maricopa County in challenging the expenditure of municipal funds for MCSO's enforcement of an allegedly discriminatory statute. *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2015 WL 58671 at *11 (D. Ariz. Jan 5, 2015) ("[A] favorable decision would…prevent[ ] further expenditures for enforcement of the identity theft laws.") (citing *Hinrichs v. Bosma*, 440 F.3d 393, 397-98 (7th Cir. 2006) ("Such an injury is redressed not by giving the tax money back…buy by ending the unconstitutional spending practice.")).[14] *See also We Are Am./Somos Am., Coal. Of Arizona v. Maricopa Cnty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1104 (D. Ariz. 2011) (finding plaintiffs had alleged injury sufficient to confer standing to sue county/Board of Supervisors, the sheriff, and others in action seeking

[14] Arpaio and Maricopa County's arguments against standing in that case focused on injury, not redressability.

suspension of the use of municipal funds for MCSO enforcement of discriminatory policy). In *Puente*, as here, Maricopa County argues its inability to control the County's criminal law enforcement meant that allowing Maricopa County to remain a party "could result in it being 'bound by an injunction that is not within its authority to comply with under Arizona law.'" 2015 WL 58671 at *25. The court held "[t]his fact might limit [Maricopa County's] exposure to contempt or other remedies if an injunction is disregarded, but it does not alter the fact that the County is a proper defendant." *Id*.

Even assuming Maricopa County's control over MCSO's operations is limited to control over funding, as opposed to direct and complete oversight and control of enforcement operations, that control establishes Maricopa County could contribute to the requested relief, which is all the law requires to create standing. Therefore, summary judgment on this issue will be denied.[15]

III. Maricopa County's Liability Under Title VI and 42 U.S.C. § 14141

Maricopa County advances several arguments for granting summary judgment in its favor with respect to the United States' claims under Title VI (Counts Three, Four, and Five) and § 14141 (Counts One, Two, and Six). First, Maricopa County claims Title VI does not authorize the United States to file

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[15] The Ninth Circuit's recent decision in substituting Maricopa County for MCSO in *Melendres*, although it does not discuss Maricopa County's capability of redressing the wrongs found in that case or implementing the *Melendres* injunction, supports a finding of standing against Maricopa County in this case. *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015).

suit to enforce its provisions. Next, Maricopa County claims neither Title VI nor § 14141 authorize imputation of liability from Arpaio and MCSO to Maricopa County. Alternatively, Maricopa County argues even if the statutes authorize imputation, the County would not be liable for the alleged violations. Finally, Maricopa County claims the United States failed to comply with the notice requirements of Title VI.[16]

A. Authorization to File Suit Under Title VI

Maricopa County argues summary judgment in its favor as to Counts Three, Four, and Five is required because Title VI does not authorize the United States to bring suit to enforce its provisions. Maricopa County draws a comparison between Title VI and Title IV, the latter of which explicitly authorizes the Attorney General "to institute…in the name of the United States a civil action…against such parties and for such relief as may be appropriate." 42 U.S.C. § 2000c-6. Maricopa County claims that because "Congress knew how to authorize a lawsuit by [the United States]," there is "'strong evidence' that no lawsuit was authorized here." (Doc. 334 at 6). The United States challenges this assertion through interpretation of the phrase "any other means authorized by law" in Title VI. 42 U.S.C. § 2000d-1.

Under Title VI, compliance may be effected "by termination of or refusal to grant or to continue assistance" or "by any other means authorized by law." 42 U.S.C. § 2000d-1. The parties focus on the

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[16] The standing argument raised by Maricopa County was addressed in the previous section. *See* Part II(B), *supra*.

interpretation of the phrase "any other means authorized by law." The United States relies on *National Black Police Association, Inc. v. Velde*, 712 F.2d 569, 575 (D.C. Cir. 1983) and *United States v. Baylor University Medical Center*, 736 F.2d 1039, 1050 (5th Cir. 1984), each of which recognizes "any other means authorized by law" as including enforcement options beyond administrative action. *See also Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 630 (1983) (J. Marshall, dissenting) ("[I]n extending grants the United States has always retained an inherent right to sue for enforcement of the recipient's obligation."). Maricopa County claims *Velde* and *Baylor University Medical Center* do not represent the current approach to statutory interpretation which was abandoned by the Supreme Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001).

In *Sandoval*, the Supreme Court condemned lower courts' liberal implication of private rights of action "to provide remedies as are necessary to make effective [ ] congressional purpose" and established a stricter standard requiring more explicit findings of congressional intent to support such causes of action. 532 U.S. 275, 287 (2001). In determining the congressional intent behind § 602 of Title VI the Court endeavored to discern the "focus" of the provision. *Sandoval*, 532 U.S. at 288-289.[17] The Court held: "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of

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[17] DOJ promulgated regulations under § 602 prohibiti8ng disparate impact racial discrimination in federally-funded programs. 28 CFR § 42.104(b)(2) (2000). *Sandoval* did not affect previous decisions establishing a private right of action to enforce § 601, which prohibits intentional discrimination based on race in federally-funded programs. *Id.* at 281.

persons.'" *Id.* at 289. It found § 602 focused neither on persons regulated nor individuals protected, but instead exclusively on federal agency enforcement. *Id.* ("[Section] 602 is 'phrased as a directive to federal agencies engaged in the distribution of public funds,'…When this is true, '[t]here [is] far less reason to infer a private remedy in favor of individual persons.'"). The implication, then, is that where a statutory provision focuses on a particular party, it is more likely Congress intended to confer a right of action on that party to enforce the provision. The logic of *Sandoval*, therefore, supports finding a right of action for federal agency enforcement under § 602 of Title VI.

The Sixth Circuit appears to be the only federal court of appeals to have addressed the meaning of "any other means authorized by law" as it applies to means of government enforcement following *Sandoval*. The Sixth Circuit acknowledged the pre-*Sandoval* understanding of the phrase and found it authorized the government to bring suit to enforce a statutory provision.[18] *United States v. Miami Univ.*, 294 F.3d 797, 808 (6th Cir. 2002) ("We believe that the fourth alternative ['take any other action authorized by law with respect to the recipient'] expressly permits the [agency] to bring suit to enforce the [statutory] conditions in lieu of its administrative remedies.") (citing *Baylor Univ. Med. Ctr.*, 736 F.2d at 1050; *Nat'l Black Police Ass'n*, 712 F.2d at 575). *Cf. United States v. Marion Cnty. Sch. Dist.*, 625 F.2d 607, 611 (5th Cir. 1980) ("[T]he government's right to sure to enforce its contracts exists as a matter of federal common law, without necessity of a statute…Congress may nullify

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[18] The phrase, as interpreted, appeared in the Family Educational Rights and Privacy Act ("FERPA").

the right, but, as the Supreme Court has repeatedly emphasized, courts are entitled to conclude that Congress has done so only if the evidence of Congress' intent is extremely, even unmistakably, clear.").

Maricopa County claims Congress rejected an amendment to Title VI explicitly authorizing public judicial enforcement of Title VI. The rejected amendment provided that a recipient of federal funds "assume[d] a legally enforcible [sic] undertaking…[and the] United States district courts [would] have jurisdiction [over] civil actions brought in connection with such undertakings by either the United States or by any recipient aggrieved by action take under any such undertaking." 110 Cong. Rec. 2493-94 (1964). The author of the proposed amendment, Congressman Meader, envisioned such disputes being governed by the law of contracts. 110 Cong. Rec. 2493 (1964). But the amendment was rejected in favor of the broader provision for enforcement of contractual obligations not only through the courts, but by "any…means authorized by law." In the words of Congressman Celler, the Meader Amendment would have "den[ied] much needed flexibility to the Federal agencies to effectuate their nondiscrimination policy…[in contrast to the version using 'any other means authorized by law' which] seeks to preserve [ ] the maximum [ ] existing procedures…including any judicial review." 110 Cong. Rec. 2494 (1964). The record of the congressional debate surrounding this amendment clearly shows Congress's intent that the provisions of Title VI be enforceable through lawsuits to allow enforcement by judicial review.

Furthermore, to the extent the phrase "any other means authorized by law" may be ambiguous as it appears in Title VI, the Court must defer to DOJ's

interpretation. *See City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). DOJ regulations interpret the phrase "any other means authorized by law" in Title VI to include "[a]ppropriate proceedings brought by the Department to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking." 28 C.F.R. § 42.108(a)(1).

Based on the foregoing, summary judgment for Maricopa County regarding the United States' ability to enforce Title VI through lawsuits will be denied.

B. Imputation of Liability

Maricopa County claims neither Title VI nor § 14141 authorize imputation of liability from Arpaio and MCSO to Maricopa County. It contrasts these statutes with 42 U.S.C. § 1983, which explicitly creates liability for entities which cause others to commit constitutional violations. The United States claims the Court already decided Maricopa County can be held liable for Arpaio's violations in its order on the early motion to dismiss. It also contends Arpaio's actions constitute the actions of Maricopa County for purposes of liability under § 14141 and Title VI.[19]

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[19] In its recent *Melendres* decision, the Ninth Circuit held, on remand, the district court could consider whether dismissal of Sheriff Arpaio in his official capacity was warranted because, typically, a suit against a person in his official capacity is, "in all respects other than name, [ ] treated as a suit against the entity." *Melendres v. Arpaio*, 784 F.3d 1254, 1260 (9th Cir. 2015). Because the court did not specify whether Arpaio is or is not an appropriate party and because no party has argued this point, the Court will not decide it. The Ninth Circuit's statement does,

i. Title VI (42 U.S.C. §§ 2000d-2000d-7)

Maricopa County refers to itself as "the Board", as in, the Board of Supervisors. (Doc. 334 at 12). The United States argues for a broader understanding of persons comprising county government for purposes of Title VI liability. It argues Maricopa County's policymakers constitute the County under the statute and that Maricopa County violated Title VI in two ways: First, through the Board, by failing to live up to its contractual obligations, and second, through the pattern, practice, and policy of discrimination promulgated by Arpaio, the County's policymaker.

Section 1983 explicitly provides liability for government entities which cause others to violate constitutional rights. 42 U.S.C. § 1983. Under § 1983, municipal liability for officers' actions is not automatic but attaches "when execution of [the] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Dep't of Soc. Servs. Of City of New York*, 436 U.S. 658, 694 (1978). In other words, a violation caused by a municipal policy, e.g. a policy made by a municipal policymaker, is a violation by the municipality. *See Flanders v. Maricopa Cnty.*, 203 Ariz. 368, 378, 54 P.3d 837, 847 (Ct. App. 2002) ("Liability [under § 1983] is imposed, not on the grounds of *respondeat superior*, but because the agent's status cloaks him with the governmental body's authority.").

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however, bolster the Court's assessment of the relationship between Maricopa County and Arpaio and the potential for Maricopa County's liability.

"To hold a local government liable for an official's conduct [under § 1983], a plaintiff must first establish that the official (1) had final policymaking authority 'concerning the action alleged to have caused the particular constitutional or statutory violation at issue' and (2) was the policymaker for the local governing body for the purposes of the particular act." *Weiner v. San Diego Cnty.*, 210 F.3d 1025, 1028 (9th Cir. 2000) (citing *McMillian v. Monroe County Alabama*, 520 U.S. 781, 785 (1997)). In analyzing the second question – whether a policymaker may be associated with a particular government entity for purposes of liability – the amount of control the government entity, i.e. the county board of supervisors, possesses over the official is but one factor. *Goldstein v. City of Long Beach*, 715 F.3d 750, 755 (9th Cir. 2013) *cert. denied sub nom. Cnty. Of Los Angeles, Cal. v. Goldstein*, 134 S. Ct. 906, 187 L. Ed. 2d 778 (2014). Other factors include the county's obligation to defend or indemnify the official, the scope of the official's duties, and the official's definition in the state constitution. *Goldstein*, 715 F.3d at 755-762. The Court's previous order held Arpaio "has final policymaking authority with respect to County law enforcement and jails, and [based on that,] the County can be held responsible for constitutional violations resulting from these policies." *United States v. Maricopa Cnty., Ariz.*, 915 F.Supp.2d 1073, 1082-84 (D. Ariz. 2012); (Doc. 56).

Title VI does not explicitly provide liability for entities which cause others to violate the statute. Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The section is

enforceable through termination or refusal of federal funding or "by any other means authorized by law." 42 U.S.C. § 2000d-1. Termination or refusal of funding is "limited to the particular political entity, or part thereof, or other recipient as to whom [an express finding on the record…of a failure to comply] has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." 42 U.S.C. § 2000d-1.

No court has directly confronted the question of whether "policymaker" liability applies under Title VI. But case law on Title IX, which parallels Title VI,[20] is instructive. Like Title VI, Title IX does not explicitly provide liability for causing others to violate the statute, nor for classic respondeat superior liability. In *Gebser v. Lago Vista Independent School District*, the Supreme Court held "Congress did not intend to allow recovery [under Title IX] where liability rests solely on principles of vicarious liability or constructive notice." 524 U.S. 274, 288 (1998). *See also Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999) ("[A] recipient of federal funds may be liable in damages under Title IX only for its own misconduct."). Instead, a principal ca be held liable for "employees' independent actions" only if, after actual

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[20] *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 684 (1979) (stating Title IX was patterned on Title VI). Title IX prohibits discrimination in federally funded educational programs on the basis of gender instead of race. 20 U.S.C. § 1681. Like Title VI, Title IX authorizes termination or refusal of funding for "the particular political entity, *or part thereof*, or other recipient *as to whom [an express finding on the record…of a failure to comply] has been made* and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found," as well as enforcement through "any other means authorized by law." 20 U.S.C. § 1682.

notice to an "appropriate person,"[21] the principal fails to adequately respond to the employees' violations, thus demonstrating "deliberate indifference" to the alleged violation. *Gebser*, 524 U.S. at 289-291 ("It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its correction actions upon receiving notice.") (emphasis in original). This sort of "deliberate indifference" is a form of intentional discrimination by the employer/principal directly, not a form of vicarious liability. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005).

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[21] An "appropriate person," under Title IX is, "at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination." *Id.* at 290. In the context of schools (the primary entities governed by Title IX), "appropriate person" can refer to teachers, principals, or school boards, depending on the authority of those actors within a particular educational system. *See Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1020-21 (7th Cir. 1997) ("While a principal has some authority over the activities within his school, the [state] statutes place institutional control over 'program or activities' with the school district and school board…[and] does not give assistant principals administrative control over educational programs or activities….Thus neither a principal nor an assistant principal can be considered a grant recipient.").

Notice to an "appropriate person" is also required under Title VI. And at least one district court has extended the Supreme Court's interpretation of this phrase in Title IX to Title VI, holding a person with "authority to take corrective action to end the alleged discrimination" can be liable under Title VI if, after notice of another's violation of the statute, the authority fails to take corrective action. *Rubio ex. Rel. Z.R. v. Turner Unified Sch. Dist. No. 202*, 475 F.Supp.2d 1092, 1098-99 (D. Kan. 2007).

An institution is also directly liable for its "own official decision[s]." *Gebser*, 524 U.S. at 290-291. The Ninth Circuit and others have held a separate finding of "deliberate indifference" is not necessary when an institutional policy violates the statute. *Mansourian v Regents of Univ. of California*, 602 F.3d 957, 967-969 (9th Cir. 2010). *See also Simpson v. Univ. of Colorado Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007) ("[A] funding recipient can be said to have 'intentionally acted in clear violation of Title IX,' when the violation is caused by official policy.") (citing *Davis*, 526 U.S. at 642). Because a "policymaker" is not acting individually, but on behalf of the institution/entity, and his policies are the policies of the entity, no imputation takes place in charging the entity with violations stemming from those policies – they are the policies of the entity, not merely the individual.

This logic parallels the reasoning that undergirds the law establishing "policymaker" liability under § 1983 and applies with equal force to Title VI. Maricopa County is directly liable for violations resulting from its official policy, which includes policy promulgated by Arpaio. *See United States v. Maricopa Cnty., Ariz.,* 915 F.Supp.2d 1073, 1082-84 (D. Ariz. 2012). These policies constitute intentional acts by Maricopa County for which no imputation is required. Therefore, summary judgment on the grounds of impermissible imputation (i.e. vicarious liability) under Title VI will be denied.

ii. 42 U.S.C. § 14141

Maricopa County claims § 14141 imposes liability only on an entity which engages directly in conduct that results in constitutional injury.

The Violent Crime Control and Law Enforcement Act of which § 14141 is a part provides, among other things, grants for state and local law enforcement agencies to improve police training and practices and help prevent crime. Pub. L. 103-322, 42 U.S.C. Ch. 136 §§ 13701-14223. Section 14141, specifically, provides:

> It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, *to engage in* a pattern or practice of conduct by law enforcement officers or by officials…that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

42 U.S.C. § 14141 (emphasis added).

The Court is unable to find a case speaking directly to the question of vicarious or imputed liability under § 14141. However, again, the logic of policymaker liability discussed in the preceding section would render Maricopa County directly, not indirectly liable under the statute. In addition, the United States has sued and settled under the statute with various governments for violations committed by law enforcement departments. *See United States v. New Jersey, et al.*, 3:99-cv-05970-MLC-JJH; *United States v. City of New Orleans*, 731 F.3d 434 (5th Cir. 2013); *United States v. Puerto Rico*, 922 F. Supp. 2d 185 (D.P.R. 2013). All of these cases ended in settlement and in none did the defendant government challenge liability by arguing vicarious or imputed liability was unavailable under § 14141. Therefore, the case law suggests liability is available to sue governments whose law enforcement violates the statute. Summary judgment will not be granted to

Maricopa County on this issue of imputation of liability under § 14141.

C. Liability Under Title VI and 42 U.S.C. § 14141

Maricopa County argues it is entitled to summary judgment regarding its liability under Title VI and § 14141, even if imputation is permitted because "the County cannot control the Sheriff's policies and practices relating to law enforcement or jailing." (Doc. 334 at 18). This argument was addressed in Part II(B), *supra*. Maricopa County has sufficient authority to provide some redress for violations committed by Arpaio and MCSO. Therefore, the argument is without merit.

Maricopa County further claims its contractual assurances under Title VI must be read in accordance with Arizona law, including statutory limitations on the Board of Supervisors' authority regarding the Sheriff. To the extent Maricopa County entered into a contract for which it lacked the authority to agree, Maricopa County argues, the contract is void. (Doc. 351 at 13).

The United States has the power to sue and to enforce its contracts. *See Cotton v. United States*, 52 U.S. 229, 231, 13 L. Ed. 675 (1850); *Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956). And "[f]ederal law governs the interpretation of contracts entered pursuant to federal law where the federal government is a party." *Chickaloon-Moose Creek Native Ass'n., Inc. v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004).

Neither party offered authority addressing how courts treat the enforcement of an *ultra vires* contract between a county and the federal government. But the Court rejected the contention that Maricopa County

lacked *any* authority to enforce the nondiscrimination mandate that attaches to federal funds under Title VI. *See* Part II(B), *supra*; (Doc. 56). Even if "persons dealing with public officers are bound, at their peril, to know the extent and limits of their power," the United States is, at the very least, entitled to hold Maricopa County accountable for failing to take action it was authorized to take under Arizona law with respect to Arpaio and MCSO, which could have helped prevent violations of Maricopa County's contractual obligations under Title VI. *See Pinal Cnty. v. Pomeroy*, 60 Ari. 448, 455 (1943). Therefore, summary judgment will be denied on the issues of Maricopa County's liability for its contractual assurances and violations under § 14141.

D. Notice of Maricopa County's Violations

Finally, Maricopa County argues the United States failed to provide notice regarding "any alleged improper conduct on its [Maricopa County's] part," as required by Title VI. (Doc. 334 at 5). The United States claims it provided Maricopa County with proper notice of the violations for which it seeks to hold the County accountable.

Title VI provides: "no [ ] action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C.A. § 2000d-1. The regulations state notification of "failure to comply and action to be taken to effect compliance" must be given to the "[funding] recipient or other person." 28 C.F.R. § 42.108(d)(3). The Supreme Court has interpreted "appropriate person" under Title IX, a parallel statute, to mean "at a

minimum, an official of the recipient entity with authority to take corrective action to end the discrimination." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S 274, 290 (1998). The notice provision in Title IX, which requires actual, not constructive notice, however, only applies "when the alleged Title IX violation consists of an institution's deliberate indifference to acts that 'do not involve official policy of the recipient entity.'" *Mansourian v. Regents of Univ. of California*, 602 F.3d 957, 967 (9th Cir. 2010) (citing *Gebser*, 524 U.S. at 290). Again, the Court interprets the provisions of Title VI in parallel with those of its sister statute, Title IX. *See* n. 19, *supra*.

Maricopa County first responded to DOJ's notice of MCSO's noncompliance with its obligation to cooperate in DOJ's investigation in August of 2010. (Doc. 333-3 at 9). In that response, Maricopa County characterized DOJ's correspondence as a "Notice Letter" and appeared to embrace its own obligation to assist in the investigation, including by denying MCSO funding for expenses for activities contrary to the law. Id. But on December 15, 2011, in response to DOJ's Findings Letter, discussing the results of its investigation, Maricopa County Attorney Bill Montgomery ("Montgomery") responded that the United States had "noticed the wrong party" and directed DOJ to Jones, Skelton & Hochuli, P.L.C. ("Jones Skelton"), MCSO's counsel of record. (Doc. 333-3 at 12). Approximately one month after Montgomery sent his letter, on January 17, 2012, DOJ replied, stating:

> It has not always been clear who represents the [MCSO] with respect to different matters, so we felt it made sense to provide notice to both you and the attorneys who represented MCSO with respect to our [a previous] lawsuit. *Since our*

> *current investigation potentially affects Maricopa County as the conduit of federal financial assistance to MCSO, we will continue to carbon copy you on significant correspondence between us and [Jones Skelton].*

(Doc. 333-3 at 14) (emphasis added)

DOJ continued to copy Montgomery and Maricopa County on its correspondence with Jones Skelton, which revealed the United States' position that Jones Skelton and MCSO were not engaging in good faith negotiations with the federal government. (Doc. 333-3 at 15-20). On May 9, 2012, the United States wrote to Jones Skelton and Montgomery separately to advise each of its plans to file suit. In its letter to Montgomery, the United States stated MCSO's counsel had chosen to "cancel negotiations" and that the United States had "determined the [MCSO's] compliance…[could not] be secured through voluntary means." (Doc. 333-3 at 25). Finally, the letter stated:

Maricopa County argues that because the Findings Letter refers only to Title VI violations by MCSO, not Maricopa County, the letter cannot constitute proper notice to Maricopa County under the statute. The United States argues the notice provided to Maricopa County via the January 17, 2012 letter, "numerous communications" between attorneys for the United States and Maricopa County, and meetings between DOJ and "at least two county commissioners" was sufficient to place Maricopa County on notice of its liability and provide it with an opportunity to respond.[22] The United States also argues that because

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[22] DOJ's meeting with county supervisors highlights an issue which has yet to be resolved by the facts presented, but which is not necessary to the issue of notice. Maricopa County points out

MCSO is not a jural entity separate, for legal purposes, from Maricopa County, its communications with MCSO count towards notice to Maricopa County.[23]

To the extent Maricopa County attempts to defeat claims based on official policies which allegedly violated Title VI, its argument fails. The Supreme Court has held notice requirements like the one contained in Title VI only apply where the violation stems from the practices of individual actors or staff, not institutional decisions such as those embodied by official policy. See *Gebser*, 524 U.S. at 290 (holding notice required in case not involving official policy of recipient entity); *Mansourian*, 602 F.3d at 967-969 ("[T]he Supreme Court has made clear that no notice requirement is applicable to Title IX claims that rest on an affirmative institutional decision [such as the promulgation of institutional policies]").

Even if notice was required to hold Maricopa County liable for Arpaio and MCSO's actions (as

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that DOJ's meeting with supervisors took place without Montgomery or any representative from the Maricopa County Attorney's Office ("MCAO") and that this could mean one of two things: either (1) the United States did not believe the Board of Supervisors (in other words, Maricopa County) was represented by MCAO, or (2) the United States did believe the Board of Supervisors was represented by MCAO and committed an ethical violation by meeting with the Board without MCSO's presence, notification, or consent. If the first option is true, communications with Montgomery would be relevant, but the United States would have also committed an ethical violation. Maricopa County's motion does not clarify one way or another whether MCSO was representing Maricopa County at the time of the United States' communications or whether the United States believed it to be.

[23] All of the communications the United States claims constituted notice occurred after the Arizona Court of Appeals ruling in *Braillard v. Maricopa County*, 224 Ariz. 481, 487 (Ct. App. 2010) (establishing MCSO as a non-jural entity).

opposed to its policies), Maricopa County's argument that "[t]elling a party that an investigation 'potentially affects' them is a far cry from providing notice 'of the failure to comply with [Title VI],'" (Doc. 356 at 9), is not facially apparent from the correspondence, and Maricopa County cites no law to support it. On its face, the Findings Letter constitutes notice of Maricopa County's liability "as the conduit of federal financial assistance to MCSO" for violations of its contractual assurances under Title VI. Maricopa County concedes the Findings Letter put it on notice of MCSO's violations and does not argue this notification was sent to an "inappropriate person." Furthermore, earlier correspondence from August of 2010 indicates Maricopa County was fully aware not only of potential violations by MCSO, but also of its own obligation to cooperate with and assist DOJ in investigating and remedying those violations. Therefore, summary judgment on the issue of the adequacy of notice under Title VI will be denied.

IV. Non-Mutual, Offensive Issue Preclusion and Counts One, Three, and Five

Having resolved that liability is possible, the next issue is whether the United States has actually proven such liability.

The United States seeks to preclude Arpaio and Maricopa County from contesting the issues decided in *Melendres* which reappear in this case and argues those issues entitle the United States to summary judgment on portions of its discriminatory policing claims contained in Counts One, Three, and Five. These counts, as set forth in the complaint, are based on alleged discrimination in multiple areas of law enforcement: traffic stops, workplace raids, home raids,

and jail operations. The *Melendres* court found discrimination in one of those areas: traffic stops. In effect therefore, the United States is seeking summary judgment on a narrower form of the counts it outlined in its original complaint. It argues the Court can grant summary judgment on these narrow grounds and allow the United States to prove additional grounds at trial.

A. Application of Non-Mutual, Offensive Issue Preclusion to Arpaio

Arpaio claims applying non-mutual, offensive issue preclusion as to the findings from *Melendres* would be unfair and, therefore, cannot apply. The United States argues non-mutual, offensive issue preclusion should apply because an identity of issues exists, the issues were actually litigated and decided, and the United States did not improperly interfere in the previous litigation or adopt a "wait and see" strategy.

Issue preclusion, formerly known as collateral estoppel, has the "dual purpose of protecting litigants from the burden of relitigating an identical issue…and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). However, the offensive use of issue preclusion may have the opposite effect, encouraging plaintiffs to "wait and see" in a way which may "increase rather than decrease the total amount of litigation." *Id.* at 330. Thus, special case must be taken when considering whether to apply non-mutual, offensive issue preclusion.

Ordinary issue preclusion requires a party to show: "(1) the issue sought to be litigated is sufficiently similar to the issue presented in an earlier proceeding

and sufficiently material in both actions to justify invoking the doctrine, (2) the issue was actually litigated in the first case, and (3) the issue was necessarily decided in the first case." Appling v. State Farm Mut. Auto Ins. Co., 340 F.3d 769, 775 (9th Cir. 2003).[24] A plaintiff seeking non-mutual, offensive issue preclusion, however, must also show its application would not be unfair. *See Parklane Hosiery Co.*, 439 U.S. 322, 330-331 (1979). A number of circumstances may render offensive issue preclusion unfair and therefore impermissible. For instance, where a defendant "may have little incentive to defend vigorously, particularly if future suits are not foreseeable…[or] if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments…[or] where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." *Id.* at 330-331.

Arpaio does not contest the identity of issues between *Melendres* and certain aspects of the United States' complaint. Nor does he argue these issues were

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[24] An "identity of issues" exists where:

(1) There is substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first,

(2) The new evidence or argument involves the application of the same rule of law as that involved in the prior proceeding,

(3) Pretrial preparation and discovery related to the matter presented in the first action can reasonably be expected to have embraced the matter sought to be presented in the second,

(4) The claims involved in the two proceedings are closely related.

Kamilche Co. v. United States, 53 F.3d 1059, 1062 (9th Cir. 1995) *opinion amended on reh'g sub nom. Kamilche v. United States*, 75 F.3d 1391 (9th Cir. 1996).

not actually litigated or necessarily decided. Instead, Arpaio focuses entirely on the question of fairness. He first argues that United States adopted a "wait and see" strategy in the *Melendres* litigation and that it deliberately withheld suit until the *Melendres* decision so that it could use the findings from that case in this suit. "Wait and see" was explicitly denounced by the Supreme Court5 as contrary to judicial economy and a factor disfavoring application of non-mutual, offensive issue preclusion. *Id.* at 329. As proof of this strategy, Arpaio offers Maricopa County's motion to stay *Melendres* pending the outcome of DOJ's investigation. But Arpaio himself opposed the stay, as did the *Melendres* plaintiffs, and ultimately, the court denied the motion. The *Melendres* court reasoned: "[I]t is doubtful that the DOJ investigation will necessarily overlap with the issues of this case sufficient to prove markedly beneficial. Even if they did, the length of the stay proposed by the County undercuts any such utility." *Melendres v. Maricopa Cnty.*, No. 07-CV-02513-PHX-GMS, 2009 WL 2515618, at *2 (D. Ariz. Aug. 13, 2009). At the time of the court's ruling, discovery in *Melendres* was closed and the dispositive motion deadline had passed. It was unclear when DOJ's investigation, which had begun a few months prior, would be complete. Not only was the *Melendres* court's denial of the stay reasonable, it is not a basis for attributing a "wait and see" strategy to the United States now. In addition, despite being aware of DOJ's ongoing investigation, neither Arpaio nor any other party moved to join the United States as a party in *Melendres*.

The evidence also does not support Arpaio's argument that the United States was "heavily involved in the *Melendres* litigation" in such a way as would render application of non-mutual, offensive

issue preclusion unfair. (Doc. 346 at 8). Arpaio attempts to characterize the United States as seeking influence and control in *Melendres*, but the United States more accurately describes its actions as "routine efforts to stay apprised of related litigation." (Doc. 354 at 6). The United States requested and was denied the opportunity to attend depositions. *Melendres v. Arpaio*, No. CV-07-02513-PHX-GMS, 2009 WL 3489402, at *1 (D. Ariz. Oct. 28, 2009). It ordered transcripts, requested a protective order for documents the parties sought in discovery, attended status conferences relevant to its document production, and requested a related case be transferred to the judge who was handling *Melendres*. The United States' statement of interest, filed after the *Melendres* court published its decision, offered the services and suggestions of the federal government regarding addressing constitutional violations in law enforcement agencies. The statement even discussed the possibility of a "global settlement encompassing the United States' claims," an option the *Melendres* litigants, including Arpaio, failed to pursue. (2:07-CV-02513-GMS, Doc. 580).

Finally, contrary to the few non-controlling and distinguishable cases Arpaio cites, this is not a case in which the United States could have easily joined the prior litigation. *Cf. Charles J. Arndt, Inc. v. City of Birmingham*, 748 F.2d 1486, 1494 (11th Cir. 1984) (individual plaintiff was aware of and testified in the earlier suit); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987*, 720 F. Supp. 1505, 1523 (D. Colo. 1989) *rev'd on other grounds by Johnson v. Cont'l Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992) (plaintiffs were aware of, testified in, and were represented by the same counsel as plaintiffs in earlier suit). The timing issues discussed above, as

well as the differences between the federal government joining litigation versus an individual plaintiff doing so, indicate the difficulty that would have been involved in consolidating these two cases.

Because the United States did not "purpose[fully] elude[ ] the binding force of an initial resolution of a simple issue" nor improperly interfere in the initial proceeding such that this case would represent its second bite of the apple, non-mutual, offensive issue preclusion would not be unfair and, therefore, should be granted in this case. *Starker v. United States*, 602 F.2d 1341, 1349-1350 (9th Cir. 1979). Indeed, employing the doctrine here will promote judicial economy and all parties' interest in expeditious resolution. Therefore, summary judgment on this issue will be granted, and the United States will be permitted to offer the factual findings and rulings from *Melendres* in support of its claims.

B. Application of Non-Mutual, Offensive Issue Preclusion to Maricopa County

Maricopa County argues non-mutual, offensive issue preclusion should not apply to the County, which was not a party to *Melendres*. The United States argues non-mutual offensive issue preclusion should apply to Maricopa County because the County was only dismissed from the previous suit because of its identity with MCSO, which was a party and, further, that Maricopa County is in privity with MCSO and Arpaio with respect to the previous litigation and was adequately represented therein.

"A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). But the

Supreme Court has recognized six categories of exceptions to this general principle. A nonparty may be precluded from relitigating an issue from a prior case when: (1) the nonparty agreed to be bound by the determinations of the prior case; (2) the nonparty had a "pre-existing 'substantive legal relationship'" with a party bound by the judgment;[25] (3) the nonparty was "adequately represented by someone with the same interests who [wa]s a party";[26] (4) the nonparty "'assume[d] control' over the litigation in which [the] judgment was rendered;" (5) a party to the previous litigation was a "designated representative" or proxy of the nonparty; and (6) a special statutory scheme "expressly foreclose[es] successive litigation by nonlitigants."[27] *Sturgell,* 553 U.S. at 893-895. The third exception, adequate representation, requires: (1) the interests of the nonparty and the party to the prior litigation were aligned in the litigation; (2) the party to the prior litigation either understood itself to be acting in a representative capacity *or* the original court took care to protect the interests of the nonparty; and, in certain circumstances, (3) the nonparty had notice of the original suit. Id. at 900.[28]

The *Sturgell* decision represented a retreat from what the Supreme Court characterized as lower courts' expansive readings of "privity" doctrine as it applied to issue preclusion. The phrase "substantive legal

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[25] "Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor." *Id.* at 894.

[26] E.g. Class actions.

[27] I.e. Bankruptcy proceedings.

[28] *Sturgell* does not make clear whether the three additional factors articulated as the requirements of "adequate representation" apply to all of the categories for proper nonparty issue preclusion or just the one for "adequate representation."

relationship" was deliberately substituted for "privity" in an attempt to narrow the scope of the exception. *See id.* at 894, n. 8. Previously, the Supreme Court had held issue preclusion could be applied to a nonparty of the previous case when the nonparty was in privity with a party to the prior litigation. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-402 (1940). In *Adkins,* the Supreme Court held a suit involving the National Bituminous Coal Commission, a federal entity, was binding on the entire federal government. *Adkins*, 310 U.S. at 402 ("There is privity between officers of the same government."). "The crucial point," the Court stated, "[was] whether or not in the earlier litigation [the party] had authority to represent [the nonparty's] interests in a final adjudication of the issue in controversy." *Id.* at 403. The Ninth Circuit and other courts subsequently went further, holding that when interests are sufficiently aligned, there may even be privity between "government authorities as public enforcers of ordinances and private parties suing for enforcement as private attorneys general." *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997). In *Sturgell*, the Supreme Court reframed its precedent as "endeavor[ing] to delineate discrete exceptions [to the bar against nonparty preclusion] that apply in 'limited circumstances.'" *Sturgell*, 553 U.S. at 888.[29]

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[29] The Supreme Court rejected the concept of "virtual representation," which it described as a more "expansive" basis for nonparty preclusion. "Virtual representation" had various definitions in the lower courts. The D.C. Circuit's version held a nonparty was virtually represented for purposes of preclusion where the nonparty: (1) shared an identity of interests with a party to the litigation, (2) was adequately represented in the prior litigation, and (3) had either a close relationship with the putative representative, substantially participated in the prior case, or

The parties in *Melendres* jointly stipulated to dismiss Maricopa County as "'not…necessary' to obtain 'complete relief.'" *See* (2:07-CV-02513-GMS, Doc. 178); *Ortega Melendres v. Arpaio*, 598 F. Supp. 2d 1025, 1039 (D. Ariz. 2009). But the stipulation was made before the Arizona Court of Appeals ruled on MCSO's status as a non-jural entity. The stipulation was likely related to the County's funding structure. Because Maricopa County funds MCSO, "[w]hether the County or the Sheriff is liable is of no practical consequence…they both lead to the same money." *Payne v. Arpaio*, No. CV09-1195-PHX-NVW, 2009 WL 3756679, at *6 (D. Ariz. Nov. 4, 2009). MCSO is not a separate legal entity from the County. *Braillard v. Maricopa County*, 232 P.3d 1263, 1269 (Ariz. Ct. App. 2010). In its motion to dismiss in *Melendres*, Maricopa County called MCSO its political subdivision. (Doc. 355-1 at 20). Therefore, there is little doubt Maricopa County would qualify for the "substantive legal relationship" exception to the bar against nonparty issue preclusion.

Even if the requirements for the "adequate representation" exception also apply, Maricopa County qualifies for nonparty issue preclusion. Maricopa County argues its interests were not aligned with MCSO because "the County contested its responsibility for the Sheriff's actions." But MCSO *also* contested its liability for the Sheriff's actions and Maricopa County and MCSO together submitted a joint answer and joint motion to dismiss the complaint. Maricopa County argues MCSO could not have "'understood itself to be acting in a representative capacity' for the County." Again, Maricopa County

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was tactically maneuvering to avoid preclusion. *Sturgell*, 553 U.S. at 889-890.

and MCSO's joint representation by counsel in *Melendres* and their joint submissions, defenses, and arguments for dismissal demonstrate both the alignment of their interests and their understanding of themselves as indistinguishable legal entities for purposes of defending the suit. In fact, the Ninth Circuit recently ordered the *Melendres* court – post-trial and after the issuance of an injunctive order – to substitute Maricopa County for MCSO due to MCSO's status as a non-jural entity. *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015). Without discussing the issue, the Ninth Circuit appears to have assumed Maricopa County was adequately represented in the preceding *Melendres* litigation such that adding it as a party for purposes of injunctive relief was fair and reasonable.

Therefore, summary judgment on this issue will be granted. The same non-mutual, offensive issue preclusion that applies to Arpaio in this case as a result of *Melendres* will also apply to Maricopa County.[30]

C. The Effect of Non-Mutual, Offensive Issue Preclusion

Application of non-mutual, offensive issue preclusion here means the United States will not have to relitigate facts and issues decided in *Melendres* which also underlies parts of the United States' current claims. Instead, those issues will be given "conclusive effect" here. *See* Restatement (Second) of Judgments § 13 (1982). The issues include MCSO's performance of traffic stops in connection with purported immigration and human smuggling law

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[30] Neither party attempts to argue Maricopa County lacked notice of the previous case.

enforcement, including "crime suppression operations" and "saturation patrols," during which the officers unlawfully relied on race, color, or national origin, as well as MCSO's use of Hispanic ancestry or race as a factor in forming reasonable suspicion that persons violated state laws relating to immigration status in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013). In sum, in deciding the merits of the United States' claims, the Court will treat the *Melendres* findings relating to discriminatory enforcement of immigration laws through vehicle stops as findings of fact in this case.

The United States argues these findings from *Melendres* entitle it to summary judgment on its discriminatory policing claims contained in Counts One, Three, and Five.[31]

i. Count One

Count One claims violations of 42 U.S.C. § 14141 and the Fourteenth Amendment based on MCSO's law enforcement practices, including traffic stops, workplace raids, home raids, and jail operations.

Section 14141 provides: "It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers…that deprives persons of rights, privileges, or immunities secured or protected

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[31] The following analysis focuses on the *Melendres* court's findings as to Arpaio, but applies equally to Maricopa County because, as discussed in Part III(B), *supra*, Maricopa County is directly liable for the actions of Arpaio as its official policymaker on law enforcement matters and for MCSO, a non-jural subdivision of the County.

by the Constitution or laws of the United States." 42 U.S.C. § 14141. A "pattern or practice" is "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 336 n. 16 (1977). *See also Obrey v. Johnson*, 400 F.3d 691, 694 (9th Cir. 2005). In order to show a "pattern or practice," one must prove the conduct "was the [defendant's] standard operating procedure the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336.

There is no dispute that Arpaio is a "governmental authority" under the statute, and the *Melendres* court found Arpaio and MCSO violated the Constitution, specifically the Equal Protection Clause of the Fourteenth Amendment. *See Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013). Furthermore, the findings of *Melendres* amount to a "pattern or practice" under the statute. The *Melendres* court found Arpaio and MCSO at one time promulgated official policies which "expressly permitted officers to make racial classifications." *Melendres*, 989 F. Supp. 2d at 899. The court also found that even once these explicit policies were discontinued for facially race-neutral ones, intentional discrimination on the basis of race continued to influence MCSO's operations. *Id.* at 902-904 (finding MCSO continued to instruct officers that although race could not be the only basis for law enforcement action, it was a legitimate factor, among others, on which they could base decisions pertaining to immigration enforcement). Overall, the court concluded Arpaio and MCSO's policies and procedures "institutionalize[d] the systematic consideration of race as one factor among others in forming reasonable suspicion or probable cause in making law enforcement decision." *Id.* at 898. These findings

clearly show a "pattern or practice." The discrimination found by *Melendres* court was not of an isolated or accidental nature, but rather of standard operating procedure throughout MCSO.

The United States has thus satisfied all of the elements for proving a portion of Count One: violations of § 14141. However, the United States admits Count One is based not only on the pattern of discriminatory conduct found in *Melendres*, but also on "three other patterns or practices of unlawful conduct." (Doc. 332 at 9). Thus, any injunctive relief the Court ultimately grants will be based only on conduct it has found violated the law. *See Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105 1116 (9th Cir. 2012) ("Courts should not enjoin conduct that has not been found to violate any law."). Therefore, in order to obtain the full and greater relief it seeks under Count One, including for allegations not decided in *Melendres* (namely a pattern or practice of discrimination in workplace raids, home raids, and jail operations), the United States will have the burden of providing those allegations at trial.

ii. Count Three

Count Three alleges violations of Title VI and its implementing regulations based on Arpaio and MCSO's disparate impact and disparate treatment of Latinos and the office's receipt of federal financial assistance.

Title VI and its implementing regulations prohibit discrimination against any person on the basis of race, color, or national origin under "any program or activity receiving Federal financial assistance." 42 U.S.C. §§ 2000d; 28 C.F.R. §§ 42.104. A "program or activity" is defined as: "(i) A department,

agency, … or other instrumentality of a State or of a local government; or (ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government…" 28 C.F.R. § 42.102(d).

MCSO is clearly a department of local government under the statute, and Arpaio is its head. It is undisputed that MCSO and Arpaio received federal financial assistance. And the *Melendres* court found MCSO and Arpaio discriminated on the basis of race. Thus, the United States has again shown the *Melendres* findings satisfy the elements of its claim. Summary judgment on a portion of Count Three will be granted. Again, this ruling only potentially entitles the United State to relief tailored to the findings in *Melendres*. Any additional and greater relief will be contingent on the United States proving additional Title VI violations at trial.

iii. Count Five

Count Five is for violations of contractual assurances associated with Title VI and the receipt of federal financial assistance.

DOJ regulations under Title VI require each recipient of federal financial assistance to include an assurance that the recipient and subrecipients will comply with Title VI and its implementing regulations. *See* 28 CFR § 42.105(a), (b). Violations of Title VI, therefore, automatically violate these contractual assurances. Based on the foregoing, summary judgment on a portion of Count Five will be granted. Again, the relief granted will be based on the facts

found in *Melendres* and any further facts and violations the United States may prove at trial.[32]

V. Claims Related to LEP Inmates

Arpaio argues he is entitled to summary judgment on the allegations of intentional discrimination or disparate treatment regarding limited English proficient ("LEP") inmates in Counts Four and Five. In reply, he also argues he is entitled to summary judgment on allegations of disparate impact on LEP inmates. The United states claims it has submitted ample evidence that Arpaio has and continues to intentionally discriminate against LEP inmates in violation of Title VI. It also argues Arpaio did not initially move for summary judgment on the disparate impact claims.

Whether or not Arpaio raised it in his initial motion, his argument that Title VI applies only to intentional discrimination is not accurate. In *Alexander v. Sandoval*, the Supreme Court held § 601 of Title VI created a private cause of action only for intentional discrimination. 532 U.S. 275 (2001). But the Court chose to defer to regulations promulgated by DOJ under § 602 of the law, which prohibited activities having a disparate impact on the basis of race. *Sandoval*, 532 U.S. at 281-282. It assumed without deciding that these regulations were reasonable and, therefore, valid. Id. The focus in *Sandoval* was whether a private right of action existed to enforce the disparate impact regulations DOJ had created. The

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[32] In addition to liability based on the actions of Arpaio and MCSO, Maricopa County is also liable for this claim based on the contractual assurances given by its Board of Supervisors, the entity which distributes federal funds to various County departments, including Arpaio and MCSO.

Court held it did not, but declined to address whether a disparate impact cause of action under Title VI existed. *Id.* As discussed in Part III(A), *supra*, the Supreme Court's analysis implies a cause of action for disparate impact discrimination does lie. Therefore, summary judgment on the claim for disparate impact discrimination will not be granted.

Regarding Arpaio's motion with respect to intentional discrimination, Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. DOJ's implementing regulations specifically prohibit "[restricting] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program," 28 C.F.R. § 42.104(b)(1)(iv), or "[utilizing] criteria or methods of administration which have the *effect* of subjecting individuals to discrimination…[or] defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin." 28 C.F.R. § 42.104(b)(2) (emphasis added).

DOJ guidance provides, a federal funding recipient must "take reasonable steps to ensure 'meaningful' access to the information and services they provide [to LEP inmates]." Department of Justice, *Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency*; Policy Guidance, 65 FR 50123-01, 50124 (Aug. 16, 2000); Department of Justice, *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition*

Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41469-70 (Jun 18, 2002).

The *McDonnell Douglas* burden shifting framework applies to Title VI disparate treatment claims. *Rashdan v. Geissberger*, 764 F.3d 1179, 1182 (9th Cir. 2014). "First, the plaintiff has the burden of proving by [a] preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the [treatment].'" *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 248 (1981) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

Arpaio argues he has made reasonable efforts to provide LEP inmates with meaningful access to information and services, thus defeating the United States' claim. He cites his DI-6 Policy, which states LEP inmates are to have "the same rights and protections mandated by federal, state, and local laws." (Doc. 345 at 10). The United States attacks these assertions on three grounds: (1) the DI-6 Policy on which Arpaio relies was not enacted until October 2013 – eighteen months after the U.S. brought suit; (2) the pre-DI-6 Policy actions Arpaio took to address LEP discrimination were insufficient to meet the "reasonable steps" requirement; and (3) notwithstanding the enactment of the DI-6 Policy, evidence shows disparate treatment of a significant level of continuing harm to LEP inmates. The DI-6 Policy was, indeed, enacted in 2013. But Arpaio claims the policy memorialized "MCSO's long standing, reasonable efforts to ensure LEP inmates have meaningful access." (Doc. 358 at 6). He contests the claim that the United States' evidence proves "a

significant number of LEP beneficiaries" are being deprived of access. *Id.* at 7 (emphasis in original). The arguments are fact-based, and the facts are in dispute, namely how Arpaio and MCSO were treating LEP inmates prior and subsequent to the October 2013 enactment of the DI-6 Policy and the effects of that treatment. (See Doc. 353 beginning at ¶ 65). Therefore, this issue is not appropriate for summary judgment.

VI. Retaliation Claims

Arpaio argues he is entitled to summary judgment on Count Six: the United States' claim for retaliation pursuant to § 14141. Arpaio argues the claim is premised on bar complaints, which are absolutely privileged under state law, and lawsuits, for which the United States has failed to show he lacked reasonable suspicion or probable cause. The United States claims the Arizona privilege for state bar complaints does not bar suits for federal civil rights violations and that pleading a lack of probable cause is not required for a claim of retaliation in violation of the First Amendment.

A. Bar Complaints

Arpaio claims his complaints to the state bar cannot function as grounds for a claim for First Amendment violations. The United States contends the Arizona statute providing privilege for bar complaints cannot block a suit based on federal law and, by implication, can form the basis of such a suit.

Arizona courts have established "an absolute privilege extended to anyone who files a compliant with the State Bar alleging unethical conduct by an attorney." *Drummond v. Stahl*, 127 Ariz. 122, 126 (Ct.

App. 1980) ("[P]ublic policy demands the free reporting of unethical conduct"). However, the Supreme Court and the Ninth Circuit have held that "state law cannot provide immunity from suit for federal civil rights violations." *Wallis v. Spencer*, 202 F.3d 1126, 1144 (9th Cir. 2000); *Martinez v. State of Cal.*, 444 U.S. 277, 285, n. 8 (1980) ("A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced"). For example, in *Imbler v. Pachtman*, the Court held common law prosecutorial immunity applies to cases under § 1983. 424 U.S. 409 (1976).[33] But the Fifth Circuit refused to extend prosecutorial immunity to decisions to bring complaints before state ethics commissions, even where a state law also provides absolute privilege for those complaints. *Lampton v. Diaz*, 639 F.3d 223, 229 (5th Cir. 2011) ("Lampton likely enjoys immunity from the state law claims under Mississippi law…[H]owever, federal law does not provide immunity to complainants before state ethics committees…In the absence of congressional action, we should not create that immunity merely because it may be desirable for some policy reason.").

Arpaio cites *Donahoe v. Arpaio* in support of his position. 869 F. Supp. 2d 1020 (D. Ariz. 2012) *aff'd sub nom. Stapley v. Pestalozzi*, 733 F.3d 804 (9th Cir. 2013). In *Donahoe*, Arpaio had filed suit against various Maricopa County officials – including members of the Board of Supervisors and judges – under the federal Racketeer Influenced and Corrupt Organization Act

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[33] The Court also held the scope of that immunity was fixed at what it was in 1871, the year § 1983 was enacted.

("RICO"). He claimed the officials were improperly using their power to obstruct a criminal investigation. Arpaio's allegations spanned a variety of conduct and included his adversaries' filing of bar complaints against the County Attorney. *Id.* The officials sued Arpaio for retaliation for the exercise of their First Amendment rights. *Id.* The district court held Arpaio's alleged injuries were not actionable under RICO, nor was the conduct on which the claim was based, including bar complaints. *Id.* at 1053.

Donahoe is an anomaly. The case law cited above strongly indicates state law immunities do not bar federal suits or prevent those suits from being based on elements immune from suit under state law. The *Donahoe* court did not consider previous decisions regarding the interaction between state law immunities and federal causes of action, nor the Supremacy Clause issues on which those decisions were based. As an outlier, *Donahoe* is not a proper basis on which to grant this motion. Therefore, summary judgment will be denied on Arpaio's claim that bar complaints cannot form the basis of a retaliation claim.

B. Probable Cause

Arpaio argues the United States' retaliation claim must fail because the United States does not and cannot show Arpaio lacked probable cause for the lawsuits it claims were retaliatory. The United States argues it is not required to show lack of probable cause to succeed in a claim for retaliatory law enforcement action.

To prove a claim for retaliation in violation of the First Amendment, a plaintiff must show: (1) the defendant "took action that 'would chill or silence a

person of ordinary firmness from future First Amendment activities'" and (2) the defendant's "desire to cause the chilling effect was a but-for cause of the defendant's action." *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006) (citing *Mendocino Envtl. Ctr. V. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999); *Hartman v. Moore*, 547 U.S. 250 (2006)).

At the time *Skoog* was decided, whether a plaintiff had to plead a lack of probable cause in order to satisfy the second requirement was "an open question in [the Ninth Circuit] and the subject of a split in other circuits." *Id.* The *Skoog* court held "a plaintiff need not plead the absence of probable cause in order to state a claim for retaliation." *Id.* The court contrasted this with the Supreme Court's ruling in *Hartman v. Moore*, where the Supreme Court held plaintiffs claiming retaliatory prosecution must plead lack of probable cause. 547 U.S. 250 (2006). The reason, the *Hartman* Court stated, was that a claim for retaliatory prosecution involves showing "an official bent on retaliation" convinced a prosecutor to filed suit. *Id.* at 260-266. In an "ordinary" retaliation claim, by contrast, the retaliatory action is performed directly by the retaliation-driven official. The causal link between retaliatory animus and retaliatory action, therefore, is more readily apparent in a case of pure retaliation than in a case of retaliatory prosecution where "some evidence must link the allegedly retaliatory official to a prosecutor whose action has injured the plaintiff[, and t]he connection, to be alleged and shown, is the absence of probable cause." *Id.* at 263.

The United States' claim against Arpaio includes ordinary retaliation, as well as retaliatory prosecution. It alleges, with retaliatory motive, Arpaio complained to the Arizona commission on Judicial Conduct, ordered arrests, and initiated lawsuits

through then County Attorney Andrew Thomas ("Thomas"). (Doc. 1 at 23-25). Arpaio acknowledges *Skoog*, but argues "the Ninth Circuit has shifted away from [its] conclusion." (Doc. 345 at 14). He cites *Acosta v. City of Costa Mesa*, for the proposition that the Ninth Circuit has "affirmatively stated that the existence of probable cause is dispositive of a retaliatory *arrest* claim." (Doc. 345 at 14) (emphasis added); *see Acosta v. City of Costa Mesa*, 718 F.3d 800, 825 (9th Cir. 2013). *Acosta* addressed the question of whether arresting officers were entitled to qualified immunity for claims of retaliatory arrest. The Ninth Circuit held, for purposes of qualified immunity, "there [was no] *clearly established* First Amendment right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Acosta*, 718 F.3d at 825 (citing *Reichle v. Howards*, 132 S. Ct. 2088, 2097 (2012)) (emphasis added). The United States argues, whether or not this right would have been clear to an arresting officer, it exists and applies here. The United States is correct.

As the Ninth Circuit's analysis in *Ford v. City of Yakima* shows, the question of the substance of a constitutional right is distinct from the question of whether that right was clearly established for purposes of qualified immunity. 706 F.3d 1188 (9th Cir. 2013). The Supreme Court has held *Hartman's* impact on the requirements for a claim of retaliatory arrest was "far from clear" at the time it was decided. Thus, an officer accused of retaliatory arrest could assert the defense of qualified immunity because *Hartman's* rule regarding probable cause did not necessarily extend to the area of retaliatory arrests. *Reichle v. Howards*, 132 S. Ct. 2088, 2095-96 (2012). But the Court specially noted, unlike in a claim for retaliatory prosecution, "in many retaliatory arrest cases, it is the

officer bearing the alleged animus who makes the injurious arrest." *Id.* at 2096. Nevertheless, the Court stopped short of providing a definitive answer as to whether proving lack of probable cause was necessary to succeed on a claim for retaliatory arrest. Instead, the Court simply stated, "*Hartman* injected uncertainty into the law governing retaliatory arrests." *Id.* Since *Hartman* and *Reichle*, the Ninth Circuit has continued to hold "an individual has a right 'to be free from police action motivated by retaliatory animus but for which there was probable cause.'" *Ford*, 706 F.3d at 1193 (citing *Skoog*, 469 F.3d at 1235).

Arpaio does not assert the defense of qualified immunity in this motion (nor could he in an action for declaratory or injunctive relief). The single issue is whether the United States' claim fails because it does not plead lack of probable cause. It does not. First, again the claim is premised, in part, on conduct for which the United States would not have to prove a lack of probable cause: judicial complaints and arrests. Second, Arpaio has not shown as a matter of law there *was* probable cause for the lawsuits in question, nor that the United States is incapable of proving there was not probable cause for the suits. Therefore, summary judgment on these grounds will be denied.

C. Justiciability: Standing and Mootness

Arpaio denies he retaliated against his critics for voicing their disapproval of his practices. He also claims the United States lacks standing to bring a retaliation claim because the alleged conduct represents a past wrong with no real or immediate threat of future retaliation. The United States argues standing does not require the immediate threat of unlawful *conduct*, but rather *injury*, and that the harm

caused by Arpaio's past retaliation persists. It also claims the "voluntary cessation" exception to mootness doctrine applies, maintaining this claim's justiciability.

In order for a case to be justiciable, "[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (citations omitted).

"It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). A case only becomes moot in the context of a voluntary cessation "if subsequent events [make] it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (citing *United States v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 203 (1968)) (emphasis added). "[A] voluntary governmental cessation of possibly wrongful conduct [may be treated] with some solicitude." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009). But courts warn the solicitude should only be applied where the "self-correction…appears genuine." *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988).

Arpaio does not contest that he and MCSO filed the lawsuits, submitted bar complaints, and performed the arrests the United States alleges. What Arpaio contests is the allegation that these actions were performed in retaliation for criticism he and his office received. In other words, that they were done with retaliatory animus. But the United States' facts

are sufficient to raise a reasonable inference that Arpaio's actions were performed out of retaliatory animus. Arpaio's conclusory denials do not defeat this evidence. Therefore, summary judgment will not be granted on these grounds.

Arpaio's second argument – even if he at one time retaliated against critics in the manner alleged, there is insufficient proof the threat continues – is not persuasive. If the United States' allegations of past retaliation are true, there is a genuine issue of material facts as to the ongoing effect of those actions. Arpaio remains Sheriff of Maricopa County and retains the power he allegedly misused to perform acts of retaliation. He has offered no facts showing any fear or chilling his actions may have caused has permanently ended or abated since his claimed cessation. Therefore, summary judgment on this issue will be denied.

VII. Obey the Law Injunction

Arpaio claims the United States' prayer for relief is an improper "obey the law" injunction, which entitles him to summary judgment on all counts. The United States argues the Court has broad discretion to shape remedies and it "would be premature to determine the availability of any injunctive relief without first hearing the evidence in dispute." (Doc. 350 at 17).

Under the federal rules, "[e]very order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required." Fed. R. Civ. P. 65(d). As such, "blanket injunctions to obey the law

are disfavored." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1226 (C.D. Cal. 2007) (quoting *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 852 n. 1 (8th Cir. 2004)) (internal quotation marks omitted). But district courts have broad discretion to shape equitable remedies. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 175 (2010). When an appellate court finds a trial court abused its discretion by issuing an overly broad order, it may strike those provisions "dissociated from those [acts] which a defendant has committed." *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426, 435 (1941). *See, e.g., S.E.C. v. Smyth*, 420 F.3d 1225, 1233 (11th Cir. 2005) (holding general "obey-the-law" injunctions unenforceable).

The purpose of Rule 65(d) is to ensure defendants have fair notice of what conduct is prohibited and to avoid undue restraint. The Ninth Circuit has "not adopted a rule against 'obey the law' injunctions per se." *F.T.C. v. EDebitPay, LLC*, 695 F.3d 938, 944 (9th Cir. 2012). Instead the court recognizes, in certain circumstances, "injunction[s]…framed in language almost identical to the statutory mandate…[are not] vague" because they "adequately describe the impermissible conduct." *United States v. Miller*, 588 F.2d 1256, 1261 (9th Cir. 1978). *See also E.E.O.C. v. AutoZone, Inc.*, 707 F.3d 824, 842 (7th Cir. 2013) (holding "obey-the-law" injunctions *may* be an "appropriate" form of equitable relief where evidence suggests the proven illegal conduct may continue or be resumed, for example, when those responsible for workplace discrimination remain with the same employer or some other factor "convinces the court that voluntary compliance with the law will not be forthcoming").

A request for an injunction is not determinative of the type of relief the court will ultimately issue. Only if the court ultimately *issues* an inappropriately broad or non-specific injunction might a defendant be entitled to relief from that order. Hence, an overbroad *request* does not entitle the defendant to judgment as a matter of law on the underlying claims. Furthermore, in the Ninth Circuit, injunctions tracking statutory language are not *per se* invalid. Therefore, it is premature for Arpaio to challenge an injunctive order that has yet to be issued in a case in which numerous matters remain to be decided. Summary judgment on these grounds will not be granted.

Accordingly,

IT IS ORDERED Defendant Maricopa County's Motion for Summary Judgment, (Doc. 334), is **DENIED**.

IT IS FURTHER ORDERED Defendant Arpaio's Motion for Partial Summary Judgment, (Doc. 345), is *DENIED*. His prior motion for partial summary judgment, which exceeded page limits, (Doc. 336), is *STRICKEN*.

IT IS FURTHER ORDERED Plaintiff the United States' Motion for Partial Summary Judgment, (Doc. 332), is **GRANTED**. Non-mutual, offensive issue preclusion bars relitigation of issues previously decided in *Melendres v. Arpaio*. As a result, summary judgment is granted regarding the discriminatory traffic stop claims in Counts One, Three, and Five.

Dates this 15th day of June, 2015.

Honorable Roslyn O. Silver
Senior United States District Judge

APPENDIX D

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No. PHX–CV–07–02513–GMS.

In the United States District Court
For the District of Arizona

Manuel de Jesus Ortega MELENDRES, et al., Plaintiffs,

v.

Joseph M. ARPAIO, et al., Defendants.

JOINT MOTION AND STIPULATION TO DISMISS MARICOPA COUNTY WITHOUT PREJUDICE

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WHEREAS, Plaintiffs respectfully submit that Defendant Maricopa County is not a necessary party at this juncture for obtaining the complete relief sought in the First Amended Complaint;

WHEREAS, in the interests of judicial economy and efficiency, Plaintiffs have proposed the dismissal of Defendant Maricopa County, without prejudice to rejoining Defendant Maricopa County as a Defendant in this lawsuit at a later time if doing so becomes necessary to obtain complete relief;

WHEREAS, Defendant Maricopa County has agreed to stipulate to its dismissal without prejudice; and

WHEREAS, Plaintiffs and Defendant Maricopa County have informed Defendants Joseph M. Arpaio ("Arpaio") and Maricopa County Sheriff's Office ("MCSO"), through counsel, of their intent to submit this Joint Motion and Stipulation, and counsel for Arpaio and MCSO, while not having agreed to affirmatively join in the submission, has not indicated an intent to oppose the relief requested herein.

THEREFORE, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, Plaintiffs and

Defendant Maricopa County hereby jointly move for, and stipulate to, the dismissal without prejudice of all of Plaintiffs' claims asserted against Defendant Maricopa County only, with the moving parties to bear their own attorneys' fees and costs regarding Plaintiffs' claims against Defendant Maricopa County only (but not regarding their claims against Defendants Arpaio and MCSO).

RESPECTFULLY SUBMITTED this 21st day of September 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21st, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmitted a Notice of Electronic Filing to the following parties who are CM/ECF registrants:

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APPENDIX E

No. PHX–CV–07–02513–GMS.

In the United States District Court
For the District of Arizona

Manuel de Jesus Ortega MELENDRES, et al., Plaintiffs,

v.

Joseph M. ARPAIO, et al., Defendants.

ORDER

Pending before the Court is a Joint Motion and Stipulation of Plaintiffs and Defendant Maricopa County to Dismiss Maricopa County Without Prejudice (Dkt. # 178). After consideration, and good cause appearing,

IT IS HEREBY ORDERED dismissing Defendant Maricopa County from this action without prejudice. Plaintiffs and Defendant Maricopa County shall bear their own attorneys' fees and costs regarding Plaintiffs' claims against Defendant Maricopa County only, but not regarding Plaintiffs' claims against Defendants Joseph M. Arpaio and Maricopa County Sheriff's Office.

Dated this 13th day of October, 2009

G. Murray Snow
United States District Judge

APPENDIX F

989 F.Supp.2d 822
No. PHX–CV–07–02513–GMS. | May 24, 2013.

In the United States District Court
For the District of Arizona

Manuel de Jesus Ortega MELENDRES, on behalf of himself and all others similarly situated; et al., Plaintiffs,

v.

Joseph M. ARPAIO, in his individual and official capacity as Sheriff of Maricopa County, AZ; et al., Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Holdings: The District Court, G. Murray Snow, J., held that:

Attorneys and Law Firms

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*825 FINDINGS OF FACT AND CONCLUSIONS OF LAW

G. MURRAY SNOW, District Judge.

At issue in this lawsuit are: 1) the current policies and practices of the Maricopa County Sheriff's Office ("MCSO") by which it investigates and/or detains persons whom it cannot charge with a state crime but whom it believes to be in the country without authorization, and 2) the operations the MCSO claims a right to use in enforcing immigration-related state criminal and civil laws, such as the Arizona Human Smuggling Statute, Ariz.Rev.Stat. ("A.R.S.") § 13–2319 (Supp.2010), and the Arizona Employer Sanctions Law, A.R.S. § 23–211 et seq. (Supp.2010). According to the position of the MCSO at trial, it claims the right to use the same type of saturation patrols to enforce state laws that it used during the time that it had authority delegated from the federal government to enforce civil violations of federal immigration law.

During the time relevant to this lawsuit, the Immigration and Customs Enforcement Office of the Department of Homeland Security ("ICE") delegated authority to enforce federal immigration law to a maximum of 160 MCSO deputies pursuant to Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g) ("the 287(g) program"). In the 287(g) training that ICE provided, and in other policies and

procedures promulgated by the MCSO, MCSO deputies were instructed that they could consider race or "Mexican ancestry"1 as one factor among others in making law enforcement decisions during immigration enforcement operations without violating the legal requirements pertaining to racial bias in policing. Pursuant to its 287(g) authority, the MCSO used various types of saturation patrols described below in conducting immigration enforcement. During those patrols, especially the large-scale saturation patrols, the MCSO attempted to leverage its 287(g) authority by staffing such operations with deputies that both were and were not 287(g) certified.

ICE has since revoked the MCSO's 287(g) authority. In response, the MCSO trained all of its officers on immigration law, instructed them that they had the authority to enforce it, and promulgated a new "LEAR" policy. The MCSO continues to follow its LEAR policy, which requires MCSO deputies to detain persons believed to be in the country without authorization but whom they cannot arrest on state charges. Such persons are either delivered directly to ICE by the MCSO or detained until the MCSO receives a response from ICE as to how to deal with them. Until December 2011, the MCSO operated under the erroneous assumption that being an unauthorized alien in this country established a criminal violation of federal immigration law which the MCSO was entitled to enforce without 287(g) authorization. However, in the absence of additional facts, being within the country without authorization is not, in and of itself, a federal criminal offense. The LEAR policy, however, remains in force.

*826 Pursuant to this policy and the MCSO's enforcement of state law that incorporates immigration elements, the MCSO continues to

investigate the identity and immigration status of persons it encounters in certain situations. In undertaking such investigations, MCSO deputies continue to apply the indicators of unlawful presence (including use of race as one amongst other factors) they received in the 287(g) training from ICE. Further, in enforcing immigration-related state laws, the MCSO either continues to use, or asserts the right to continue to use, the same type of saturation patrols that it used when it had full 287(g) authority. Those saturation patrols all involved using traffic stops as a pretext to detect those occupants of automobiles who may be in this country without authorization. The MCSO asserts that ICE's termination of its 287(g) authority does not affect its ability to conduct such operations because a person's immigration status is relevant to determining whether the Arizona state crime of human smuggling—or possibly the violation of other state laws related to immigration—are occurring.

Plaintiffs challenge these policies and practices. The Court certified a Plaintiff class of "[a]ll Latino persons who, since January 2007, have been or will be in the future stopped, detained, questioned or searched by MCSO agents while driving or sitting in a vehicle on a public roadway or parking area in Maricopa County Arizona." Ortega–Melendres v. Arpaio, 836 F.Supp.2d 959, 992 (D.Ariz.2011) (internal quotation marks omitted). The issues in this lawsuit are: (1) whether, and to what extent, the Fourth Amendment permits the MCSO to question, investigate, and/or detain Latino occupants of motor vehicles it suspects of being in the country without authorization when it has no basis to bring state charges against such persons; (2) whether the MCSO uses race as a factor, and, if so, to what extent it is

permissible under the Fourth Amendment to use race as a factor in forming either reasonable suspicion or probable cause to detain a person for being present without authorization; (3) whether the MCSO uses race as a factor, and if so, to what extent it is permissible under the equal protection clause of the Fourteenth Amendment to use race as a factor in making law enforcement decisions that affect Latino occupants of motor vehicles in Maricopa County; (4) whether the MCSO prolongs traffic stops to investigate the status of vehicle occupants beyond the time permitted by the Fourth Amendment; and (5) whether being in this country without authorization provides sufficient reasonable suspicion or probable cause under the Fourth Amendment that a person is violating or conspiring to violate Arizona law related to immigration status.

As is set forth below, in light of ICE's cancellation of the MCSO's 287(g) authority, the MCSO has no authority to detain people based only on reasonable suspicion, or probable cause, without more, that such persons are in this country without authorization. The MCSO lost authority to enforce the civil administrative aspects of federal immigration law upon revocation of its 287(g) authority. And, in the absence of additional facts that would provide reasonable suspicion that a person committed a federal criminal offense either in entering or staying in this country, it is not a violation of federal criminal law to be in this country without authorization in and of itself. Thus, the MCSO's LEAR policy that requires a deputy (1) to detain persons she or he believes only to be in the country without authorization, (2) to contact MCSO supervisors, and then (3) to await contact with ICE pending a determination how to

proceed, results in an unreasonable *827 seizure under the Fourth Amendment to the Constitution.

Further, in determining whom it will detain and/or investigate, both with respect to its LEAR policy, and in its enforcement of immigration-related state law, the MCSO continues to take into account a suspect's Latino identity as one factor in evaluating those persons whom it encounters. In Maricopa County, as the MCSO acknowledged and stipulated prior to trial, Latino ancestry is not a factor on which it can rely in arriving at reasonable suspicion or forming probable cause that a person is in the United States without authorization. Thus, to the extent it uses race as a factor in arriving at reasonable suspicion or forming probable cause to stop or investigate persons of Latino ancestry for being in the country without authorization, it violates the Fourth Amendment. In addition, it violates the Plaintiff class's right to equal protection under the Fourteenth Amendment to the Constitution and Title VI of the Civil Rights Act of 1964.

Moreover, at least some MCSO officers, as a matter of practice, investigate the identities of all occupants of a vehicle when a stop is made, even without individualized reasonable suspicion. Further, MCSO policy and practice allow its officers to consider the race of a vehicle's occupants in determining whether they have reasonable suspicion to investigate the occupants for violations of state laws related to immigration, or to enforce the LEAR policy. In some instances these policies result in prolonging the traffic stop beyond the time necessary to resolve the issue that initially justified the stop. When the deputies have no adequate reasonable suspicion that the individual occupants of a vehicle are engaging in criminal conduct to justify prolonging the stop to

investigate the existence of such a crime, the extension of the stop violates the Fourth Amendment's prohibition against unreasonable seizures.

Finally, the knowledge that a person is in the country without authorization does not, without more, provide sufficient reasonable suspicion that a person has violated Arizona criminal laws relating to immigration, such as the Arizona Human Smuggling Act, to justify a Terry stop for purposes of investigative detention. To the extent the MCSO is authorized to investigate violations of the Arizona Employer Sanctions law, that law does not provide criminal sanctions against either employers or employees. A statute that provides only civil sanctions is not a sufficient basis on which the MCSO can arrest or conduct Terry stops of either employers or employees.

For the reasons set forth above, Plaintiffs are entitled to injunctive relief to protect them from usurpation of rights guaranteed under the United States Constitution. Therefore, in the absence of further facts that would give rise to reasonable suspicion or probable cause that a violation of either federal criminal law or applicable state law is occurring, the MCSO is enjoined from (1) enforcing its LEAR policy, (2) using Hispanic ancestry or race as any factor in making law enforcement decisions pertaining to whether a person is authorized to be in the country, and (3) unconstitutionally lengthening stops. The evidence introduced at trial establishes that, in the past, the MCSO has aggressively protected its right to engage in immigration and immigration-related enforcement operations even when it had no accurate legal basis for doing so. Such policies have apparently resulted in the violation of this court's own preliminary injunction entered in this action in December 2011. The Court will therefore, upon further

consideration and after consultation with the parties, order additional *828 steps that may be necessary to effectuate the merited relief.

FINDINGS OF FACT

I. General Background

A. Maricopa County

According to the trial evidence, approximately 31.8% of the residents of Maricopa County are Hispanic or Latino.2 (Tr. at 157:21–158:4.)3 As even the testimony of Defendant's expert demonstrated, the considerable majority of those residents are legal residents of Maricopa County and of the United States.4 (Id. at 1301:14.) Due to the large number of authorized residents of Maricopa County who are Latino, the fact that someone is Latino in Maricopa County does not present a likelihood that such a person is here without authorization.

Nevertheless, it is also true that the overwhelming majority of the unauthorized aliens in Maricopa County are Hispanic. As Defendant's expert report notes, the Pew Hispanic Center estimates that 94% of illegal immigrants in Arizona are from Mexico alone.5 (Ex. 402 at 14.)

As trial testimony further demonstrated, MCSO officers believe that unauthorized aliens are Mexicans, Hispanics, or Latinos. (Tr. at 359:11–14, 991:23–992:4.) As Defendants acknowledged at the summary judgment stage and in their post-trial briefing, many MCSO officers—as well as *829 Sheriff Arpaio—testified at their depositions that most of the unauthorized immigrants they have observed in Maricopa County are originally from Mexico or

Central or South America.6 (Doc. 453 at 150, 151 ¶¶ 28–30, 36.)

B. The MCSO

The MCSO is a law enforcement agency operating within the confines of Maricopa County. (Doc. 530 at 4 ¶ 1.) It employs over 800 deputies. (Id. ¶ 17.) Sheriff Joseph Arpaio serves as the head of the MCSO and has final authority over all of the agency's decisions. (Id. ¶ 18.) He sets the overall direction and policy for the MCSO. The MCSO is composed of multiple bureaus, including the detention bureau, the patrol bureau, and the patrol resources bureau. (Id. ¶ 19.)

The Sheriff of Maricopa County is elected, thus the Sheriff has to be responsive to his constituents if he desires to remain in office. In the words of the MCSO's Chief of Enforcement Brian Sands, Sheriff Arpaio is a political person, who receives significant popular support for his policies. (Tr. at 808:14–809:12.) A chief element of Sheriff Arpaio's popular support is his prioritization of immigration enforcement. (Id.) The MCSO receives federal funding and federal financial assistance. (Doc. 530 at 4 ¶¶ 173–74.)

C. Prioritization of Immigration Enforcement and the ICE Memorandum. In 2006, the MCSO created a specialized unit—the Human Smuggling Unit ("HSU")—to enforce a 2005 human smuggling law, A.R.S. § 13–2319 (2007). (Doc. 530 at 4 ¶¶ 27–28.) The HSU is a division within the patrol resources bureau and makes up a part of the larger Illegal Immigration Interdiction Unit (the "Triple I" or "III"). (Id. ¶¶ 27–29.) The HSU unit consisted of just two deputies when it was created in April of 2006. (Id. ¶ 44.)

In 2006, the Sheriff decided to make immigration enforcement a priority for the MCSO. In early 2007, the MCSO and ICE entered into a Memorandum of Agreement ("MOA") pursuant to which MCSO could enforce federal immigration law under certain circumstances. (Id. ¶ 40.) After the MOA was signed, the HSU grew. By September of 2007 it consisted of two sergeants, 12 deputies, and four detention officers, all under the leadership of a lieutenant. (Id. ¶ 44.) In September 2007, Lieutenant Sousa assumed command of the HSU. (Tr. at 988:13–14.) He remained in charge of the unit and later the Division including the unit, until April 1, 2012. (Tr. at 988:12–23.) He reported to Chief David Trombi, who is the commander of the Patrol Resources Bureau. (Doc. 530 at 1, ¶ 33.) Chief Trombi reported to Chief of Enforcement Brian Sands. (Id. ¶ 31.) For most of the period relevant to this lawsuit, Chief Sands reported to Deputy Chief David Hendershott, who reported directly to Sheriff Arpaio. (Id. ¶¶ 21, 23.)

Sergeant Madrid was one of the two supervising sergeants from the founding of HSU until he was transferred in February 2011. (Id. at 1131:19–25.) Sergeant Palmer was the other HSU supervising sergeant. He joined the HSU in April of 2008, apparently succeeding Sergeant Ryan Baranyos. He remained as a supervising sergeant until May of 2012. (Id. at 661:20–21.) According to the testimony of Sgts. Madrid and Palmer, each of them supervised their own squad of deputies and also cross-supervised the other's squad. (Id. at 663:23–25.)

*830 The MOA permitted up to 160 qualified MCSO officers to enforce administrative aspects of federal immigration law under the 287(g) program.[7] (Ex. 290.) It required MCSO deputies that were to be certified for field operations to complete a five-week

training program. (Id.) Witnesses who took the training program testified that the topic of race in making decisions related to immigration enforcement covered an hour or two of the five-week course. (Tr. at 948:8–20, 1387:23–1388:7.)

All or virtually all of the deputies assigned to the HSU became 287(g)-trained and certified. A number of other MCSO deputies did as well. The MCSO generically designated all non-HSU officers who were certified under 287(g) as members of the Community Action Team or "CAT." According to an MCSO policy memo "CAT refers to all 287(g) trained deputies who are not assigned to HSU." (Ex. 90 at MCSO 001887–88.) Members of the HSU, CAT and MCSO detention officers who were 287(g) certified constituted the Triple I Strike Team. (Id.)

Nevertheless, according to ICE Special Agent Alonzo Pena, under the MOA, 287(g) certified officers could not use their federal enforcement authority to stop persons or vehicles based only on a suspicion that the driver or a passenger was not legally present in the United States. (Tr. at 1811:15–16, 1854:8–11, 1856:15–23.) Rather, the 287(g) power was appropriately used as adjunct authority when Sheriff's deputies made an otherwise legitimate stop to enforce provisions of state law. (Id.) Special Agent Pena further testified that he "would definitely be concerned if traffic stops were being used as pretext" to investigate immigration violations. (Id. at 1859:17–22.)

Still, nothing in the text of the MOA prohibits the MCSO from making pre-textual traffic stops in order to investigate the immigration status of the driver of a vehicle. The MCSO Triple I Strike Team Protocols, however, did specify that before investigating a person's immigration status, a 287(g)-trained deputy "must have probable cause or

reasonable suspicion" to stop a person for violation of "state criminal law and civil statutes." (Ex. 92 at MCSO 001888.) As the testimony at trial also established, MCSO deputies are generally able, in a short amount of time, to establish a basis to stop any vehicle that they wish for some form of Arizona traffic violation. (Tr. at 1541:8–11 (Armendariz: "You could not go down the street without seeing a moving violation."), 1579:20–23 ("Armendariz: [I]t's not very difficult to find a traffic violation when you're looking for one."); see also Doc. 530 at ¶ 86 ("Deputy Rangel testified that it is possible to develop probable cause to stop just about any vehicle after following it for two minutes.").)

The necessity of having a state law basis for the stop prior to engaging in immigration enforcement did not appear in MCSO news releases. At the February 2007 press conference announcing the partnership between MCSO and ICE, Sheriff Arpaio described the MCSO's enforcement authority in the presence of ICE officials as unconstrained by the requirement that MCSO first have a basis to pursue state law violations. He stated: "Actually, ..., ours is an operation, whether it's the state law or the federal, to go after illegals, not the crime first, that they happen to be illegals. My program, my philosophy is a *831 pure program. You go after illegals. I'm not afraid to say that. And you go after them and you lock them up." (Tr. at 332:19–25; Ex. 410d.)

Upon completion of the first 287(g) training course for deputies in March 2007, Sheriff Arpaio described the duties of CAT certified patrol deputies in a news release as "arresting suspects even solely for the crime of being an illegal alien, if they are discovered during the normal course of the deputies' duties." (Ex. 184.) In July 2007, in describing the

MCSO as "quickly becoming a full-fledged anti-illegal immigration agency" he also announced that MCSO had created a dedicated hotline for citizens to "use to report illegal aliens" to the MCSO. (Ex. 328.) In this same news release, the Sheriff further announced a policy that when his deputies stopped any vehicle for suspicion of human smuggling, the immigration status of all of the occupants of the vehicle would be investigated. (Id.)

D. MCSO's Immigration Enforcement Operations

In approximately July of 2007, at the same time it implemented its illegal immigrant hotline, the MCSO also announced that the HSU would begin conducting "saturation patrols," in which MCSO officers would conduct traffic enforcement operations with the purpose of detecting unauthorized aliens during the course of normal traffic stops. (Tr. at 1136:7–9.) There were several different types of traffic saturation patrols, including day labor operations, small-scale saturation patrols, and large-scale saturation patrols. HSU deputies sometimes recruited other deputies and MCSO posse members to assist in day labor and small-scale saturation patrols. Other deputies were always a part of large-scale saturation patrols. There is no evidence that all deputies participating in such patrols from other units were 287(g) certified. All of these saturation patrols were supervised by the HSU command structure, and HSU deputies conducted, or at least participated in, all of the saturation patrols at issue in this lawsuit.

1. Day Labor Operations

In a typical day labor operation, undercover HSU officers would station themselves at locations where

Latino day laborers assembled and identify vehicles that would pick up such day laborers. Once a vehicle was identified, the undercover officers notified patrol units that were waiting in the area. (Id. at 242:7–23; Exs. 123, 126, 129, 131.) The patrol units located the vehicle, followed it, and "establish[ed] probable cause for a traffic stop." (Id.) Once the MCSO deputy had stopped the vehicle, HSU deputies would proceed to the scene to investigate the immigration status of any passengers. (Tr. at 242:24–244:6.) The patrol officer would either issue a traffic citation or give the driver a warning, while the HSU deputies would investigate the immigration status of the passengers and detain them if there was a basis to do so.

Day labor operations took place on: (1) September 27, 2007, at the Church of the Good Shepherd of the Hills in Cave Creek, (2) October 4, 2007, in Queen Creek, (3) October 15, 2007, in the area of 32nd Street and Thomas ("Pruitt's Furniture Store") in Phoenix, and (4) October 22, 2007, in Fountain Hills. (Exs. 123, 126, 129, 131.)

According to the arrest reports of the four day labor operations, all of the 35 arrests were for federal civil immigration violations, and the arrestees were turned over to ICE for processing. (Id.) None of the 35 persons were arrested for violating state laws or municipal ordinances. (Id.) Further, they were all passengers in the vehicle, not drivers. (Id.) Thus, their identity *832 and immigration status were investigated during the course of a stop based on the driver's violation of traffic laws, even when that stop resulted in the driver only receiving a warning. The MCSO made 14 total traffic stops, 11 of which resulted in the 35 arrests. (Id.) Thus, only three of the 14 stops did not result in immigration arrests, all of those coming from the Fountain Hills operation. (Id.)

None of the arrest reports of these operations contains any description of anything done by the passengers once the vehicle was stopped that would create reasonable suspicion that the passengers were in the country without authorization. The stops were made purely on the observation of the undercover officers that the vehicles had picked up Hispanic day laborers from sites where Latino day laborers were known to gather. It was the nature of the operation that once the stop had been made, the HSU officers proceeded to the scene to conduct an investigation of the Latino day laborer passengers.

The two news releases that covered the day labor operations communicated that the operations were designed to enforce immigration laws, ("Starting at 4:00 am this morning, September 27, 2007, Sheriff's deputies began cracking down on illegal immigration in Cave Creek"), and were directed at day laborers whom the MCSO perceived as coming from Mexico (quoting Sheriff Arpaio to the effect that "[a]s far as I am concerned the only sanctuary for illegal aliens is in Mexico"). (Exs. 307–08.) They further encouraged citizens to report day labor locations to the MCSO as part of its illegal immigration enforcement operations. (Id.)

2. Small–Scale Saturation Patrols

There was testimony and evidence introduced at trial concerning 25 patrols that were described as saturation patrols but were neither explicitly identified as day labor operations nor as one of the 13 large-scale saturation patrols whose arrest reports were admitted at trial. During 15 of the 25 small-scale saturation patrols, all of the persons arrested were unauthorized aliens.8 During six of the patrols, the

great majority of all persons arrested were unauthorized aliens.9 During four of these patrols, the MCSO made very few total arrests and of that number only a few of the arrests or no arrests were of unauthorized aliens.10

The small-scale saturation patrols seem to be divisible into two different types of *833 operations. As with day labor operations, many of these small-scale saturation patrols, particularly those conducted before May 2008,11 show an extremely high correlation between the total number of traffic stops executed in an operation and the number of those stops that resulted in one or more immigration arrests. These small-scale patrols with high arrest ratios seem to have been either day labor operations or had targeting elements very similar to day labor operations in that the patrols targeted vehicles that picked up Latino day laborers.

The second type of small-scale patrol (post-May 2008) appears to principally rely on traffic patrols which, while using traffic stops as a pretext for enforcing immigration laws, did not uniquely target vehicles who picked up day laborers. These patrols thus had a higher number of stops during the operation. Both types of small-scale patrols were conducted at locations either where the MCSO had previously conducted day labor operations or day laborers were known to congregate. (Exs. 76, 80, 81, 108, 112, 114, 117, 119, 120, 125, 175, 286.)

Participating deputies kept track of certain figures during their patrols. Although there was some variation in the categories of information kept by the deputies, the deputies were always required to keep track at least of the number of persons arrested for federal immigration violations and the number of unauthorized aliens who were arrested on state

charges. (See, e.g., Exs. 97, 102, 111.) After the patrol, supervising officers would collect the individual stat sheets and summarize the activity during the patrol by statistical category.12 (Tr. at 1009:11–23.) After the patrol statistics were tallied, Lt. Sousa, Sgts. Madrid or Palmer, or another MCSO officer would send out an e-mail briefing describing the total officer activity during the patrol. (Id. at 1010:7–12, 1133:13–14, 690:23–691:3.) Sgt. Madrid would brief Sheriff Arpaio personally on how many unauthorized aliens had been arrested during the patrol. (Id. at 1133:13–15.) He would relay the number of people arrested for not being legally present in the country up his chain of command, because he was asked for this information by his supervisors. (Id. at 1153:16–25.) Sgt. Palmer would do likewise. (Id. at 690:23–691:3.)

During both types of small-scale patrols, the MCSO issued news releases that emphasized that their purpose was immigration enforcement.

a. Small–Scale Patrols with High Arrest Ratios

After the day labor operation at Pruitt's Furniture Store, the Pruitt's area remained a focal point for activists. In response to the protests and the continuing presence of day laborers, the MCSO conducted 11 small-scale traffic saturation patrols in that area in the months between November 2007 and February 2008.13 Its *834 first two large-scale saturation patrols were also centered on the same area.14

As a whole, the individual reports of the small-scale operations around Pruitt's show an extremely high correlation between total stops and stops that resulted in immigration arrests. Only about half of the Pruitt's arrest reports kept track of the exact number

of stops made during an operation. Others made general estimates of the total number of stops, stated the number of immigration arrests resulting from the total stops, or stated the number of citations issued to other vehicles from which no arrest was made. This information is probative of the correlation that existed between total stops and stops that resulted in immigration arrests during these operations.

Reports of the October 30 and November 7 operations were written by Sgt. Baranyos, who preceded Sgt. Palmer at HSU. These reports, while not specifying the total number of stops,15 nevertheless show that all recorded stops resulted in one or more immigration arrests.16 (Ex. 114.)

The next four of the small-scale operations at Pruitt's (taking place between November 21 and December 10) specified both the total number of traffic stops made during each operation and the number of traffic stops that resulted in the arrest of unauthorized aliens. 24 stops were made, and 21 resulted in immigration arrests.17 (Id.)

*835 After the first six operations, the number of stops and immigration arrests at Pruitt's declined.18 (Id.)

These reports suggest that as the Pruitt's location became known for constant immigration patrols, both small and large scale, the success rate of such operations declined. But prior to that time, the MCSO made an extraordinary number of immigration arrests per vehicle pulled over. The MCSO kept the public apprised of its efforts to combat illegal immigration at Pruitt's. (Ex. 309 ("Illegal immigration activists have protested at Pruitt's every Saturday in the last six weeks since Sheriff Arpaio's deputies began patrolling the vicinity of the furniture store near

36th Street and Thomas Road. Already, 44 illegal aliens have been arrested by Sheriff's deputies, including eight illegals arrested this past Saturday during the weekly protest.").)

Several of the remaining small-scale saturation patrols that occurred in the same time frame, but did not occur at Pruitt's, such as the small-scale patrols at Mesa,19 Cave Creek and Bell Roads,20 35th Avenue and Lower Buckeye Road,21 and in Avondale, *836 22 similarly involved operations that demonstrated a remarkably high correlation between the number of stops made by deputies in an operation and the number of stops that result in an immigration arrest.

Based on the high arrest to stop ratios in the 17 small-scale saturation patrols discussed above, if the MCSO was not conducting day labor operations, it was conducting operations very similar to them with comparable targeting elements.23 As with the day labor operations, these high-ratio small-scale saturation patrols all involve only "several" stops at most. Yet the MCSO deputies participating in these operations made immigration arrests on a considerable majority of their recorded traffic stops. Many of the stops resulted in the arrest of multiple illegal aliens for each stop. All or a considerable number of these small-scale patrols may in fact have been day labor operations. But even if not, the high stop to arrest ratio leads the Court to conclude that the targeting factors used by the MCSO in these operations to determine whether to stop the vehicles included the race and work status of the vehicle's occupants.

b. Small–Scale Operations Without High Arrest Ratios

The remaining eight operations[24] continued, for the most part, to be located in areas where, based at least on their past operations, the MCSO knew Latino day laborers assembled. While many arrests were made, they arose out of a smaller percentage of total stops.

For example, the December 14, 2007 Aguila operation produced 29 arrests, 26 of which were for immigration violations with all the immigration arrests processed administratively through ICE. (Ex. 76.)[25] Those arrests, however, came from only five of the 35–40 stops. (Id.) Still, the nature of the arrests demonstrates that the operation, no matter how it was carried out, was designed to engage in immigration enforcement. Therefore, the persons who were stopped, contacted or cited, were all contacted with the premier goal of enforcing immigration laws.

*837 On May 6–7, 2008, the MCSO returned to Fountain Hills, where it had previously conducted a day labor operation, and conducted a two-day saturation patrol there. During the first day of this operation, MCSO made seven traffic stops with four of those seven stops resulting in immigration arrests, thus reflecting a high ratio of stops to immigration related arrests. (Ex. 108.) Seven of the eight unauthorized persons arrested were processed through ICE while one was arrested on state charges for an outstanding felony warrant and an ICE detainer was attached. (Id.) During the operation's second day, Sgt. Palmer estimated that MCSO made approximately 20 stops. (Id.) Only seven of those stops resulted in arrests. (Id.) Four of those seven stops resulted in the immigration arrest of seven unlawful residents who were processed through ICE. (Id.) While eight of the total of approximately 27 stops that occurred during the two-day operation may still be an impressive ratio of stops to immigration arrests, it is

not as high as the ratios for the other small-scale saturation patrols previously discussed.

That trend continued during the subsequent Cave Creek,26 7th Street and Thunderbird,27 and Avondale28 operations. The MCSO had previously conducted day labor operations in Cave Creek, and Avondale was the site of a prior small-scale patrol and two large-scale patrols. Of note is that during the September 4, 2008 operation in Cave Creek, ten of the 11 persons arrested provided their names, all of which were Hispanic.29 (Ex. 112.) The single *838 person arrested who did not provide his name was nevertheless arrested on immigration charges, as were the ten others. (Id.) All were administratively processed through ICE. (Id.)

Despite the lower stop to immigration arrest ratios, the MCSO specifically identified some of these operations in news releases as an integral part of Sheriff Arpaio's "illegal immigration stance." (Ex. 316; see also Exs. 315 (May 8, 2008 news release describing arrests of "illegal aliens" in Fountain Hills), 186 (July 8, 2008 news release describing Sheriff's Illegal Immigration Interdiction Unit responding to complaints from Cave Creek citizens and announcing that "in a matter of five hours, deputies conducted 81 interviews, in the process of making 59 traffic violation stops. During those traffic stops, 19 people were arrested and taken into custody, including the 18 illegal aliens"), 332 (news release dated September 4, 2008 stating, "Early this morning Sheriff Arpaio's Illegal Immigration Interdiction unit (Triple I) saturated the towns of Cave Creek and Carefree. In four short hours, eleven illegal aliens were arrested; ... In the last two weeks deputies have arrested twenty three illegal aliens in Cave Creek.").)

3. Large–Scale Saturation Patrols

The first 13 large-scale saturation patrols that the MCSO conducted were the principal focus of trial testimony. The large scale saturation patrols were preceded by, and to some extent conducted simultaneously with, the smaller-scale saturation patrols. The large-scale saturation patrols began in January 2008. They continued until well after the period that arrest reports for such operations were provided in evidence. Like the last eight small-scale saturation patrols discussed above, large-scale saturation patrols mostly consisted of enforcing traffic and other laws. Participating deputies made stops for minor infractions of the traffic code that departed from MCSO's normal traffic enforcement priorities. Again, once a vehicle was stopped, the deputies would determine whether to investigate the identities of the occupants of the vehicle.

Unlike the small-scale saturation patrols, the large-scale operations involved many more patrol deputies and covered larger areas. Lt. Sousa, who supervised the HSU as of September 2007, oversaw most of the large-scale saturation patrols either as Operations Commander or Deputy Operations Commander. The two HSU supervising sergeants-for most such patrols, Sgts. Madrid and Palmer, and before Sgt. Palmer, Sgt. Baranyos—were typically "Operations Supervisors" for such patrols. Deputies participating in the large scale patrols were frequently assigned from multiple divisions of the MCSO, whether or not the deputies were 287(g) certified. (Tr. at 697:19–23, 1135:20–24.) Both HSU and non HSU deputies who participated in such patrols investigated the identity of a vehicle's passengers.30 If non–287(g) certified officers encountered persons they believed to be in the United States without authorization, they

were supposed to detain the person and place a radio call for a 287(g) certified deputy to respond and handle the matter.

Deputies assigned to participate in large-scale saturation patrols were expected to sign-in at a briefing that would take *839 place at the command post prior to the patrol and read all or parts of the operation plans at that time. (Id. at 995:6–11.) Lt. Sousa did not distribute many copies of such operation plans because he did not want them to become available to the general public. (Id. at 1059:2–12.) Deputies were also frequently given an oral briefing at the command post by Lt. Sousa, or other members of the MCSO command structure at the time of sign-in. Not all participating deputies attended the briefings, signed in to the operation, or read all of the operations plans.31

After conducting each large-scale saturation patrol, MCSO created records documenting arrests made on those patrols. (Exs. 77, 79, 82, 87, 90, 97, 102, 111, 168, 170, 174, 176, 179–82.) There are not complete arrest records for all such patrols, but the arrest reports generally contain the names of the persons arrested, the charges on which they were arrested, the initial reason for stopping the vehicle in which the arrested person(s) were occupants, and whether the person was an unauthorized alien.

The first two large-scale patrols are exceptions. The report for the January 18–19, 2008 large-scale saturation patrol at Pruitt's contains no names of arrestees, arresting officers, or the probable cause that justified the initial stop. (Ex. 77.) Consequently, that report is not included in many of the calculations that appear later in this Order. The report for the second large-scale saturation patrol at Pruitt's (March 21–22, 2008) contains a list of arrestees that includes their

names, but it does not identify arresting officers or the probable cause supporting the initial stop.32 (Ex. 79.)

The reports from the 11 large-scale patrols that took place between March 27, 2008, and November 18, 2009, generally include the name of an arresting officer, the alleged probable cause supporting the stop, the name of the person arrested, the charge for which the person was arrested, and whether the person was processed under 287(g) for not being legally present in the country.33 (Exs. 82, 87, 90, 97, 102, 111, 168, 170, 174 178.)

Most of the MCSO administrators and deputies who testified acknowledged that immigration enforcement was at least a primary purpose—if not the primary purpose—of such operations. Insofar as any *840 MCSO officers testified that there was no particular purpose associated with the large scale saturation patrols at issue other than general law enforcement, their testimony is outweighed by substantial, if not overwhelming, evidence to the contrary.34

As with the day labor operations and small-scale saturation patrols, participating The MCSO public relations department issued news releases discussing the large-scale saturation patrols that either emphasized that their purpose was immigration enforcement, or prominently featured the number of unauthorized aliens arrested during such operations. (Exs. 310 (dated January 18, 2008, announces Central Phoenix operation in which "Illegal Immigration Arrests [are] Anticipated"), 311 ("The Thomas Road crime suppression operation around Pruitt's Furniture Store occurred over a two month time period and resulted in 134 people arrested, 94 of whom were determined to be in the United States illegally."), 312 (dated March 28, 2008, announces ongoing Bell Road

Operation and announces 21 arrests, 12 of whom are illegal immigrants five of whom were arrested on state charges), 313 (dated April 3, 2008, announcing crime suppression operation in Guadalupe because "tensions are escalating between illegal aliens and town residents," and further referring to Bell Road/ Cave Creek and 32nd Street and Thomas operations at which 79 of 165 arrests were determined to be illegal aliens), 314 (dated April 4, 2008, announcing 26 arrests of which five were of suspected illegal aliens), 316 (dated June 26, 2008, describing Mesa "illegal immigration" operation, and recent similar operations in Phoenix, Guadalupe and Fountain Hills), 330 (dated July 15, 2008, describing Mesa crime suppression/illegal immigration operation), 331 (dated August 13, 2008, describing West Valley operation designed to capture human smugglers and their co-conspirators), 333 (dated January 9, 2009, announcing Buckeye operation to capture human smugglers and their co-conspirators, and "in the course of their law enforcement duties, where illegal immigrants are found, they will be arrested and booked into jail"), 334 (dated April 23, 2009, announcing Avondale operations targeting "criminal violations including drugs, illegal immigration and human smuggling"), 349 (dated October 16, 2009, announcing operation in Northwest Valley targeting "all aspects of illegal immigration laws such as employer sanctions, human smuggling, and crime suppression"), 350 (dated October 19, 2009, announcing 66 arrests, 30 of whom were suspected of being in the country illegally).)

a. Operations Plans

The operations plans for the first three large-scale saturation patrols (two at Pruitt's, and the third at Cave Creek and Bell Roads) were very rudimentary.

Those plans did not include any language *841 regarding officers' use of race, or their discretion (or lack thereof) in making stops and arrests. (Exs. 75, 79, 82.) They included the following instructions: 1) "All criminal violations encountered will be dealt with appropriately," and 2) "Contacts will only be made with valid PC". (Id.; see also Tr. at 996:14–17.)

The operations plan for the MCSO's fourth large-scale saturation patrol on April 3–4, 2008, at Guadalupe contained more detail. It gave brief instruction on the primary (criminal and traffic enforcement) and secondary (public relations contacts with citizens in the community) objectives of the patrol. (Ex. 86.) It provided separate paragraphs on "Conducting traffic stops on saturation patrol," and "Conducting interviews reference a contact or violator's citizenship." (Id. (emphasis in original).) The revised instructions also included a sentence that required MCSO officers to book anyone that they observed committing a criminal offense. (Id.)

1) Instructions on Conducting Stops

A paragraph in the instructions specified that "[a]ll sworn personnel will conduct all traffic stops in accordance with MCSO Policy and Procedures, as well as training received at the basic academy level. Note: At no time will MCSO personnel stop a vehicle based on the race of the subjects in the vehicle (racial profiling is prohibited)." (Ex. 86.) That general instruction remained in operation plans for many of the operations thereafter, (Exs. 90, 97, 102, 111, 169, 174), and was further incorporated into the Triple I team protocols, (Ex. 90 at MCSO 001888).

2) Instructions on Investigating Citizenship

The next paragraph in the operations plans contained specific instructions both to officers who were 287(g) certified, and those who were not, about "[c]onducting interviews reference a contact or violator's citizenship" during a large scale saturation patrol. (Ex 86 (emphasis in original).) Certified 287(g) officers were instructed that they could conduct interviews regarding a person's citizenship status only "when indicators existed per the U.S. Immigration and Nationality Act, Title 8 U.S.C. § 1324, 287(g) and training received during the 287(g) training course." (Exs. 86, 90, 97, 102, 111, 169.) The plans did not include the indicators set forth in § 1324, but provided as an example that "[t]he violator does not have a valid identification and does not speak English."35 (Ex. 86.)

"287(g)" refers to the section of the act, codified at 8 U.S.C. § 1357(g), that authorizes ICE to certify local law enforcement *842 authorities to enforce federal immigration law. That section itself, however, provides no indicators as to unauthorized presence. Nonetheless, as will be further discussed below, the plan's reference to "training received [by MCSO officers] during the 287(g) training course" explicitly authorized MCSO deputies to consider race as one factor among others in forming reasonable suspicion in an immigration enforcement context that a person is in the country without authorization.

The instructions also noted that a non–287(g) certified officer could detain persons she or he believed were violating immigration law pending the arrival of a 287(g) officer, but "at no time" could such a "deputy call for a 287(g) certified deputy based on race." (Exs. 86, 97.) However, this instruction was modified for subsequent saturation patrols to indicate that "at no time will a deputy call for a 287(g) certified deputy based just [or only] on race." (Exs. 90 at MCSO 001898,

(Mesa saturation patrol in June 26–27, 2008) (emphasis added), 102 (Sun City saturation patrol in August 2008) ("at no time will a deputy call for a 287(g) certified deputy based just on race"), 111 (January 2009 in Southwest Valley), 169 (September 2009 in Southwest Valley) ("at no time will a deputy call for a 287(g) certified deputy based only on race").) These instructions were also incorporated into the III strike team protocols. (Ex. 90 at MCSO 001888.) This modification made the MCSO's policy on how race could be considered consistent with the instructions given to 287(g) certified officers about conducting interviews.

When presented with an operation plan which stated that officers could not call for a 287(g) certified deputy "based just on race," Sgt. Palmer confirmed that this meant that officers could call a 287(g) certified officer based on race in combination with other factors. (Tr. at 783:3.)

3) Instruction to Book All Criminal Offenders

The operation plan also contained limited instruction concerning those individuals deputies were required to arrest during saturation patrols. This instruction specified in bold print that "All criminal offenders will get booked." (Ex. 87.) These instructions, then, while not indicating how deputies should handle civil violations, presumably removed the discretion to issue criminal citations or give only warnings for minor criminal conduct. According to the instruction, if the deputy witnessed or became aware of criminal conduct during the operation, she or he must arrest and book the criminal offender. A similar instruction appeared in the operation plans for many of the large-scale

saturation patrols thereafter. (Exs. 86, 90, 97, 102, 111, 169, 174.)

b. Large–Scale Saturation Patrol Results

By the Court's count, of the 727 arrests recorded during large scale saturation patrols, 347—nearly half—were of persons who were not in the country legally. (Exs. 77, 79, 82, 87, 90, 97, 102, 111, 168, 170, 174, 176, 179–82.) The MCSO itself arrived at an even higher figure. (Ex. 359 (March 18, 2010 news release stating that, "[a]ccording to the Sheriff, the 13 previous two-day crime-suppression operations netted a total of 728 arrests. Some legal U.S. residents were arrested but of the 728 total arrests, 530 or 72% were later determined to be illegal aliens.").)

During the large scale saturation patrols for which arrest records were placed in evidence and last names were available, 496 out of 700 total arrests or 71% of all persons arrested, had Hispanic surnames. (Exs. 79, 82, 87, 90, 97, 102, 111, 168, 170, 174, 176, 179–82.) 341 of those arrests involved immigration-related offenses. (Id.) Of the 583 people who were arrested during *843 saturation patrols that took place while the MCSO had 287(g) authority, and where records of the last names were kept, 414, or 71%, appeared to have Hispanic surnames. (Exs. 79, 82, 87, 90, 97, 102, 111, 168, 170.) That percentage remained consistent after ICE revoked the MCSO's 287(g) authority—even then, 82 of the 117 arrests (70%) involved a person with a Hispanic surname. (Exs. 174, 176, 179–82.)

c. ICE's Revocation of the MCSO's 287(g) Authority

Prior to the actual revocation of 287(g) authority (announced in early October and effective on October

16, 2009) MCSO began noting in its news releases that "a move is underway to suspend [Sheriff Arpaio's] 287 G agreement." (Ex. 353.) ICE began refusing to accept some of the persons that were arrested during MCSO saturation patrols. (Exs. 128, 342.) And in saturation patrols the MCSO began for what appears to be the first time to arrest some unauthorized aliens on the charge of conspiring to violate the Arizona human smuggling law instead of making an arrest on federal immigration charges. (Ex. 168.)

Moreover, sometime before July 15, 2009, 2009 WL 2132693, Chief Sands asked Sgt. Palmer to conduct legal research into whether the MCSO had authority to enforce immigration law absent the authorization of the Department of Homeland Security. (Tr. at 702:19–24.) Sgt. Palmer conducted an internet search, and copied his findings into an e-mail to Chief Sands on July 15, 2009. (Id. at 703:11.) The e-mail stated that "State and local law enforcement officials have the general power to investigate and arrest violators of federal immigration statutes without INS knowledge or approval, as long as they are authorized to do so by state law." (Ex. 269.) It continued, "[t]he 1996 immigration control legislation passed by Congress was intended to encourage states and local agencies to participate in the process of enforcing federal immigration laws." (Id.) The e-mail provided as a citation for this proposition "8 U.S.C. § 1324(a)(1)(A)(iv)(b)(iii)."[36]

That section of the United States Code did not then and does not now exist. Nevertheless, it apparently provided the impetus for Sheriff Arpaio's public statements that the MCSO maintained the authority to make immigration arrests despite ICE's suspension of 287(g) authority. In his interview with Glenn Beck a few days after the effective date of the

ICE revocation, Sheriff Arpaio stated that MCSO officers retained the authority to enforce federal immigration law because it had been granted by "that law in 1996, part of the comprehensive law that was passed, it's in there." (Tr. at 364:24–363:5.)

In such interviews the Sheriff stated that the revocation of 287(g) authority did not end the MCSO's attempts to enforce federal immigration law. At the time of the revocation the MCSO had approximately 100 field deputies who were 287(g) certified. (Exs. 356, 359, 360.) Shortly after the revocation of his 287(g) authority, Sheriff Arpaio decided to have all of his deputies trained on illegal immigration law. According to the MCSO, that training enabled all MCSO deputies to make immigration arrests. An MCSO news release dated March 18, 2010 notes:

Arpaio recently ordered that all 900 sworn deputies be properly trained to enforce illegal immigration laws, a move *844 made necessary after the recent decision by Department of Homeland Security to take away the federal authority of 100 deputies, all of whom had been formally trained by ICE (Immigration and Customs Enforcement) to enforce federal immigration laws.

"They took away the ability of 100 federally trained deputies to enforce immigration laws, and so I replaced them with 900 sworn deputies, all of whom are now in a position to enforce illegal immigration laws in Maricopa County," Arpaio said.

(Ex. 359; see also Exs. 356, 358 (MCSO news release dated March 1, 2010 stating that "[t]hese arrests are a result of Sheriff Joe Arpaio's recent promise to ensure that all 900 of his sworn deputies receive training on the enforcement of illegal immigration laws."), 360, 362.)

This training erroneously instructed MCSO deputies that a person within the country without authorization was necessarily committing a federal crime, and they thus maintained the authority to detain them for criminal violations. (Tr. 699:3–700:17.) Sgt. Palmer continued to provide such instruction and training until December 2011, when this Court entered its injunctive order preventing the MCSO from detaining persons on the belief, without more, that those persons were in this country without legal authorization. Ortega–Melendres, 836 F.Supp.2d at 994.

At the same time, Sheriff Arpaio gave interviews to the national and local press in which he asserted that if a person is in the country without authorization that person has necessarily committed a criminal offense. "They did commit a crime. They are here illegally." (Tr. at 362:17–21.)

After the revocation of his 287(g) authority the Sheriff continued to run numerous saturation patrols that focused on arresting unauthorized immigrants. (Exs. 350 ("[D]eputies turned over a total of 19 of the 30 suspected illegal aliens who were not charged for any state violations to Immigration and Custom Enforcement officials without incident."), 358, 359 (in the 13 previous operations 530 of 728 arrests were of illegal aliens), 361, 362 (in the 14 previous operations, 436 of 839 arrests were of illegal aliens, 78 of 111 arrests in most recent operation were of illegal aliens), 363 (63 of 93 arrests of illegal aliens), 367.) In such operations he continued to arrest and turn over to ICE the unauthorized aliens that his deputies arrested during these patrols. (Ex. 360 ("MCSO news release noting that 47 of 64 people arrested in a post-revocation saturation patrol were illegal aliens. 27 of those 47 were arrested on state charges with the

remainder being turned over to ICE").) At trial, Sheriff Arpaio testified that he has continued to enforce "the immigration laws, human smuggling, employer sanction" as he did previously. (Tr. at 473:23–474:2.)

In sum, according to the Sheriff, the loss of 287(g) authority did not affect how the MCSO conducted its immigration related operations, including the saturation patrols. (Id. at 469:23–470:5). The Sheriff still maintains the right and intention to conduct such operations today. (Tr. at 330:9–14, 469:20–470:2; 473:5–474:7; 474:20–24.) Sheriff Arpaio testified that the last saturation patrol the MCSO conducted prior to trial occurred during October 2011 and was conducted in southwest Phoenix. (Id. at 474:8–13.) Nevertheless, the Sheriff testified that the MCSO continues to engage in immigration enforcement even though not using saturation patrols to do so. (Id. at 474:14–24.) He noted during his testimony that in the two weeks prior to trial, the MCSO arrested approximately 40 unauthorized aliens, and those that it couldn't charge with a state violation *845 it successfully turned over to ICE. (Id. at 502:25–503:6.)

Once the MCSO lost its 287(g) authority, it revised its operation plans for saturation patrols. See Section I.D.3.a, supra. While the MCSO continued to assert the authority to arrest and detain persons it believed to be in the country without authorization but could not arrest on state charges, it had no practical authority to process them absent the participation of ICE.37 Neither the MCSO, nor any state authority, had any prerogative to initiate removal proceedings, authorize voluntary departure or, in appropriate cases, bring criminal immigration charges against such persons. See, e.g., Arizona v. United States, —— U.S. –––, ———, 132 S.Ct. 2492, 2506–07, 183 L.Ed.2d 351

(2012); Reno v. Am.–Arab Anti–Discrimination Comm., 525 U.S. 471, 483–484, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (federal government retains exclusive discretion on these matters); Martinez–Medina v. Holder, 673 F.3d 1029, 1036 (9th Cir.2011).

Accordingly, the MCSO revised its operation plans for the large scale saturation patrols. Lt. Sousa directed either Sgt. Palmer or Sgt. Madrid to draft what became known as the LEAR Protocol. (Tr. at 1056:14–23.) The LEAR protocol states that "IF a Deputy Sheriff believes with reasonable suspicion he has one or more illegal aliens detained AND there are no state charges on which to book the subject(s) into jail THEN the Deputy will follow the LEAR Procedures outlined below." (Ex. 174.) An officer is to call a field supervisor to location when he "has indicators as outlined above leading him to believe (Reasonable Suspicion) a violator or other subject he is in lawful contact with is in fact an illegal alien in the United States." (Id.) Thus the LEAR protocol authorized the deputy to detain the individual prior to further processing from ICE.

Thereafter, the protocol requires the MCSO field supervisor to obtain and "provide a brief summary of the contact, including how the contact was made and what indicators exist that lead to the belief the person is an illegal alien."38 (Id.) The operational plans continue to specify that "ICE LEAR will want to talk with the suspected illegal alien via cell phone in order to confirm illegal alien status in the United States. ICE LEAR will determine if their unit will respond to take custody of the illegal alien." (Id.) The policy further specifies that "[a]ny person detained solely for illegal alien status in the U.S. whom LEAR refuses to respond for AND for which there is no other

probable cause to detail WILL be immediately released from custody." (Id.)

MCSO drafted, placed in effect, and trained all of its deputies on this policy. (Tr. at 1055:14–1056:13, 1069:17–1070:18, 1076:11–18.) This policy remains in force at the MCSO. In determining who may be present without authorization for purposes *846 of application of the LEAR Policy, Lt. Sousa noted that MCSO officers "still had the [287(g)] training," so they could "definitely" still use the indicators from that training in carrying out the LEAR policy. (Id. at 1007:6–11.)

II. SPECIFIC FINDINGS

Based on the facts presented at trial, the Court draws the following factual conclusions:

1. The purpose of the saturation patrols discussed above was to enforce immigration laws.

Many MCSO administrators and deputies who testified acknowledged that immigration enforcement was at least a primary purpose, if not the primary purpose, of saturation patrols. During all types of saturation patrols discussed above, all participating deputies were required to keep track of the number of unauthorized aliens they arrested and report these figures to their supervising sergeants. The supervising sergeants compiled and summarized these figures to emphasize the number of unauthorized aliens arrested and the reports were sent to the MCSO command structure, including the public relations department.

The MCSO public relations department issued news releases discussing the saturation patrols. These news releases either emphasized that the patrols' purpose was immigration enforcement, or prominently

featured the number of unauthorized aliens arrested during such operations. Most of the time, the reports ignored any other arrests that took place.

The large-scale operation plans contained instructions on initiating investigations into the citizenship status of persons contacted during the operation.

The arrest records also support this conclusion. Every person arrested during the day labor operations was arrested on immigration charges. The vast majority of persons arrested during small-scale saturation patrols were unauthorized aliens. Finally, a significant number of persons arrested during the large-scale saturation patrols were unauthorized aliens.

2. ICE trained HSU officers that it was acceptable to consider race as one factor among others in making law enforcement decisions in an immigration context.

The testimony of MCSO officers and deputies makes clear that ICE training allowed for the consideration of race as a factor in making immigration law enforcement decisions. At trial, Sgt. Palmer testified that ICE training permitted the use of race as one factor among many in stopping a vehicle, (Tr. at 715:3–19), and that ICE trained him that "Mexican Ancestry" could be one among other factors that would provide him reasonable suspicion that a person is not lawfully present in the United States (id. at 715:9–12). Sgt. Madrid testified that he was trained by ICE that a subject's race was one relevant factor among others that officers could use to develop reasonable suspicion that a subject was unlawfully present in the United States. (Id. at 1164:4–12.)

Lt. Sousa testified at his deposition that since he was not 287(g) certified and his sergeants were, when it came to what ICE taught in 287(g) training regarding the use of race, "I would have to rely on my sergeants," and that "when we start getting into all the specifics, that's when I lean on my sergeants." (Doc. 431–1, Ex. 90 at 56:15–19.) Nevertheless, Lt. Sousa testified at trial that it was his understanding that ICE officers taught MCSO deputies in their 287(g) training that while race could not be used even as one factor when *847 making an initial stop, it could be used as one of a number of indicators to extend a stop and investigate a person's alienage. (Tr. at 1016:3–7.)

Similarly, the ICE 287(g) training manual expressly allows for consideration of race. The 287(g) training manual for January 2008 that was admitted in the record cites to United States v. Brignoni–Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), for the proposition that "apparent Mexican ancestry was a relevant factor" that could be used in forming a reasonable suspicion that a person is in the country without authorization "but standing alone was insufficient to stop the individuals." (Ex. 68 at 7.) In referring to Brignoni–Ponce, the ICE materials go on to observe that "[t]his is an administrative case but it also applies in criminal proceedings" and further notes that "[a]n example of this in action in the criminal context is that a LEA Officer cannot stop a vehicle for an investigation into smuggling just because the occupants appear Mexican." (Id.)

Alonzo Pena, ICE's Special Agent in Charge of Arizona at the time that ICE began its 287(g) certification training of MCSO officers, testified that it was his understanding that officers with 287(g) authority can form a reasonable suspicion that a person is unlawfully present when "several factors in

combination" are present, with race being one of those factors. (Tr. at 1831:17–832:19.) Agent Pena does not believe that race is sufficient in and of itself to give rise to such suspicion, but he does believe that race can be a factor in forming such a suspicion. (Id.)

3. In an immigration enforcement context, the MCSO did not believe that it constituted racial profiling to consider race as one factor among others in making law enforcement decisions. Its written operational plans and policy descriptions confirmed that in the context of immigration enforcement, the MCSO could consider race as one factor among others.

The MCSO has no general written policy concerning racial profiling. (Id. at 465:18–24.) In his trial testimony the Sheriff acknowledged that he had earlier testified that the MCSO does not need a training program to prevent racial profiling because he did not believe the MCSO engages in racial profiling. (Id. at 466:16–19.) He further testified that he believes that the MCSO is "the most trained law enforcement agency in the country with the five weeks of training from the government, [presumably the 287(g) training for those deputies who received it], academy training, in-house training." (Id. at 465:21–24.)

The large-scale saturation patrol operation plans written after April 2008 refer deputies to the MCSO Academy training they received about racial profiling. MCSO witnesses who testified concerning the Academy training stated that they received brief and generalized instruction regarding racial profiling, but could remember nothing else about it.39 There was no *848 testimony that such training defined racial profiling or provided any instruction to officers on how to proceed in the circumstances present in

Maricopa County when the MCSO decided to enforce immigration laws.

In addition to the Academy training, Sgt. Madrid testified that Lt. Sousa would also "yell" at the briefings prior to the large-scale saturation patrols that "we don't racially profile ... several times to make sure everybody was clear." (Id. at 1191:5–7.) Again, no definition of "racial profiling" was provided during those instructions, and no examples of what would constitute "racial profiling" were offered. (Id. at 1215:5–12.) Further, as Lt. Sousa himself testified, when he issued such oral instruction he also told those assembled that he knew that they were not racially profiling, but that he was giving the briefing "to remind you of what people are saying out there and being proactive." (Id. at 1024:18–21, 1025:6–8.) According to his testimony a primary reason he issued the instruction was not because he deemed it necessary, but so he could demonstrate to the public that his officers were receiving such instruction and testify during this lawsuit that he had in fact issued such instructions. (Id. at 1025:12–17.)

The MCSO introduced in evidence an electronic bulletin board posting on the MCSO's electronic "Briefing Board" for October 21, 2008, where the MCSO published its Illegal Immigration Enforcement Protocols. That posting repeated the instruction that also appeared in the large-scale saturation patrol operations plans after April 2008. "At no time will sworn personnel stop a vehicle based on the race of any subject in a vehicle. Racial profiling is prohibited and will not be tolerated." (Ex. 92 at 3 (emphasis in original).) All those who testified in this lawsuit agreed that it constituted impermissible "racial profiling" for a law enforcement officer to stop a person for a law enforcement purpose based uniquely or primarily on a

person's race.40 Nevertheless, a number of MCSO witnesses also testified it was appropriate to consider race as one *849 factor among others in making law enforcement decisions in an immigration enforcement context.

As the operations plans themselves and other public pronouncements of the MCSO make plain, while officers were prohibited from using race as the only basis to undertake a law enforcement investigation, they were allowed as a matter of policy and instruction to consider race as one factor among others in making law enforcement decisions in the context of immigration enforcement. For example, while prohibiting racial profiling generally, the operations plans simultaneously instruct MCSO officers that they may consider the race of persons they encountered as one factor among others in making law enforcement decisions. First, according to the operations plans, a 287(g) certified officer should initiate investigations into a person's citizenship status "when indicators existed per ... the training received during the 287(g) training course." (Exs. 86, 90, 92, 97, 102, 111, 169.) The testimony at trial was uniform that during their 287(g) training course MCSO officers were taught that they could use race as one indicator among others in forming reasonable suspicion that a person was in the country without authorization.

Second, the operations plans instructed MCSO officers who were not 287(g) certified that they should not summon a 287(g) certified officer to the scene to investigate a person's immigration status based only on that person's race. (Ex. 90 at MCSO 001898; Exs. 102, 111, 169.) In discussing this instruction at trial, both Sgts. Palmer and Madrid testified that, under such instruction, MCSO officers could consider the

race of the subject as one factor among others in making such a determination; they just could not consider the subject's race as the only factor. (Tr. at 782:8–11, 783:3, 1162:14–23, 1170:5–15.) This testimony reasonably acknowledged the obvious: that while MCSO policy prohibits using race as the only or sole factor, it still permits an officer to use race as a factor in making a law enforcement decision.

The MCSO's frequently-issued news releases reflect this understanding. In one, the MCSO described its policy pertaining to decisions about whom to pull over during these operations. (Ex. 342.) Like the operation plans, the policy described in the news release prohibits racial profiling without defining the term, while at the same time permitting the use of race as a factor in an officer's decision to pull over a vehicle. (Id.) In the news release the Sheriff is quoted as saying, "All stops will be made in full accordance with Sheriff's Office policy and procedures and at no time will any vehicle be stopped solely because of the race of the occupants inside that vehicle. Racial profiling is strictly prohibited, Arpaio says." (Id. (emphasis added).) In interpreting similar language in the operations plans that governed when a non-certified deputy should summon a certified deputy to initiate an immigration investigation, Sgts. Palmer and Madrid noted that in prohibiting such a deputy from acting solely based on the race of the subject, the policy permitted the deputy to consider race as one factor among others in deciding to act. (Tr. at 782:8–11, 783:3, 1162:14–23, 1170:5–15.) This same understanding would apply to the MCSO policy that prohibits using race as the sole factor in deciding to pull over a vehicle during a saturation patrol. (Ex. 342.)

Further, as is discussed below, both Sgts. Palmer and Madrid testified that so long as there was a legitimate basis for an officer to pull over a vehicle for a traffic infraction, there was by definition no racial profiling involved in the stop. For example, Sgt. Palmer testified that if, in reviewing *850 arrest reports, he saw that a deputy had reported that he had reasonable suspicion to justify a stop that meant the deputy did not engage in "racial profiling." (Tr. at 724:22–725:1.) Sgt. Madrid testified that if he determined that an officer had probable cause to make a stop, he "wouldn't even suspect" that the officer had engaged in racial profiling. (Id. at 1172:20–23.)

Thus, as illustrated by these operation plans and news releases, while the MCSO did prohibit racial profiling, it understood racial profiling to mean making law enforcement decisions based exclusively on racial factors. The MCSO did not understand this term, in an immigration context, to prohibit the use of race as a factor among others in making a law enforcement decision. Thus, MCSO deputies could consider race as one factor in stopping a vehicle or initiating an investigation so long as race was not the sole basis on which deputies made that decision. Accordingly, the Court finds that the MCSO operated pursuant to policies that, while prohibiting "racial profiling," did not require MCSO officers to be race-neutral in deciding how to act with respect to immigration investigations; the policies merely required that race not be the sole reason for their decision.

4. The MCSO considered Latino ancestry as one factor among others in choosing the location for saturation patrols.

The MCSO almost always scheduled its day labor and small-scale saturation patrols where Latino day laborers congregated; the same is true for a considerable number of its large-scale saturation patrols.

The MCSO witnesses uniformly testified that there is nothing about being a day laborer per se that is illegal. But, as both the testimony at trial and a number of MCSO's news releases demonstrate, in selecting locations for day labor, small-scale and large-scale saturation patrols, the MCSO equated being a day laborer with being an illegal alien. (Exs. 307 (news release describing a crackdown on illegal aliens at a day labor center), 308 (news release entitled "Sheriff Arpaio Goes After Day Laborers"), 309 (news release referring to "illegal immigrant day laborers" and "pro-illegal day laborer supporters" who "continue to protest the Sheriff's MCSO policies at Pruitt's Furniture Store"), 310 (anticipating the arrest of many unauthorized aliens in the Pruitt's location because it remains a popular spot for day laborers), 311 (news release which noted "there are two legal day laborer centers in the Bell Road area which are 'magnets for more illegal aliens' "); see also Doc. 453 at 150 ¶ 36 (the MCSO acknowledges that many MCSO officers thought day laborers were illegal aliens).) It is presumably for this reason that the MCSO news releases invited Maricopa County citizens to report day laborers to the MCSO on its immigration hotline. (Ex. 309 ("The Sheriff recently initiated an Illegal Immigration Hot Line ... to help citizens report information regarding illegal aliens.

Since the tip line was implemented, over 120 calls of 2,100 have been received specifically about day laborers.").)

Theoretically, the MCSO could have selected sites for operations due only to the presence of day laborers absent any racial considerations. A day laborer is neither necessarily Latino nor unauthorized. And there is nothing about being a day laborer that is, in and of itself, illegal. (Tr. at 386:17–22, 1193:8–9, 864:2–4.) But the MCSO did not conduct operations in which it simply checked the identity and immigration status of all day laborers. Nor did it present at trial evidence that would suggest *851 that during the time it had 287(g) authority, it had a reasonable basis on which to form a suspicion that any day laborer, regardless of race, was an unauthorized alien. Rather, pursuant to at least its own policy, the MCSO had to have a basis under Arizona law to stop and question persons prior to checking their immigration status. When the MCSO's underlying purpose was immigration enforcement and not traffic enforcement it implemented that policy by directing patrol vehicles to follow and strictly enforce all requirements of the traffic code against vehicles that picked up Latino day laborers. Sgt. Madrid, and Deputies Rangel and DiPietro confirmed that the purpose of the day labor and small-scale operations was "to investigate day laborers for their immigration status." (Tr. at 1152: 12–14, 792:1–24, 908:8–11, 1137:6–8.)

The evidence demonstrates that the MCSO specifically equated being a Hispanic or Mexican (as opposed to Caucasian or African–American) day laborer with being an unauthorized alien. (Exs. 308 (MCSO news release asserting that the only sanctuary for illegal alien day laborers is in Mexico), 310 (MCSO news release asserting that despite the anticipated arrest of many "illegal aliens" the MCSO is not engaged in racial profiling.), 311; see also Doc 453 at

150 ¶¶ 28–30 (the MCSO acknowledging that the Sheriff and MCSO deputies believed the overwhelming number of illegal aliens in Maricopa County are from Mexico and South America).) In his testimony Sheriff Arpaio acknowledged that he would not investigate Caucasians for immigration compliance because it would not have occurred to him that they were in the country without authorization. (Tr. at 441:22–442:3.) For the totality of all of the MCSO operations in which it targeted and arrested day laborers, Chief Sands could not identify a single instance in which the MCSO arrested a day laborer who was not Hispanic on any charge. (Doc. 530 at 1 ¶ 84.) Similarly, there is no evidence that undercover officers directed patrol officers during day labor operations to stop vehicles that had picked up day laborers that were not Latino. Thus, the Court concludes as a matter of fact that MCSO officers, who believed that Latino day laborers were unauthorized, centered day labor operations in locations where specifically Latino day laborers assembled, and where MCSO deputies perceived they had a higher likelihood of encountering persons present in the country in violation of immigration laws. The logistics of such operations, together with other evidence introduced at trial, show that the MCSO used this combination of race and work status in determining where to locate operations in which it would target vehicles for pretextual enforcement of traffic regulations to investigate immigration status.

However, several MCSO witnesses testified that the locations for these operations were selected in response to complaints about day laborers being involved in other illegal activity, and not principally to enforce immigrations laws against Hispanics. While the Court recognizes that a single law enforcement

operation can serve multiple purposes, and that law enforcement officials are entitled to considerable deference in locating and conducting their operations, the Court does not credit such testimony because, among other reasons, there are in the record some direct connections between a citizen complaint regarding Hispanics and Latinos congregating in a certain area and an MCSO enforcement action.

A. The Cave Creek day labor operation was not in response to public safety issues presented by the gathering of day laborers.

According to the news release issued by the MCSO after the first Cave Creek operation, *852 the genesis for that operation was "tips received on [Sheriff Arpaio's] newly implemented illegal immigration hotline" about a local church providing assistance to day laborers. (Ex. 307.) According to the news release, the day laborers also caused "public safety issues along Cave Creek Road." (Id.) However, on September 19 and 22, 2007, several days previous to the September 27 operation, Latino HSU officers went undercover to the church, signed up for work, and verified the presence of day laborers inside the church parking lot. The undercover reports detailed that the Good Shepherd of the Hills congregation allowed day laborers to "sign-in" and wait "inside their property" to be employed, in turn, by those who wished to hire day laborers. (Ex. 122.) The Church would post a sign outside on the street, noting the availability inside the property of day laborers for hire. (Id.) The undercover investigation discovered "no information pertaining to forced labor, human smuggling, or possible 'drop houses.' "41 (Id.) And, of course, the reports contained nothing about the day laborers in the church parking lot causing public safety problems along Cave Creek

Road. Nevertheless, on the September 27, the MCSO conducted a day labor operation at the church.

As the undercover reports indicated, the day laborers gathered inside the parking lot of the church. Thus, the day labor operation at the church was not conducted because the day laborers presented public safety issues on Cave Creek Road. Further, no arrests were made or citations issued during the operation on such a basis.42 Thus while the Court credits the news release to the extent that it announced the results of an operation launched at a Church that assisted day laborers, it does not credit the statement that the operation was in response to traffic problems along Cave Creek Road.

B. The Queen Creek day labor operation was a response to citizen complaints about the presence of Hispanic day laborers. The second day labor operation in Queen Creek on October 4, 2007, was also connected to a specific complaint regarding Hispanic day laborers. Two days before the operation, the Queen Creek Town Manager had forwarded a complaint to Lieutenant D'Amico—who was the MCSO lieutenant in charge of the MCSO district incorporating Queen Creek—that had been originally sent to the Queen Creek Mayor and town council.43 (Ex. 219.) In the complaint, the author states that a Hispanic man jeered at her on the corner of Ocotillo and Ellsworth. (Id.) According to the e-mail "He then ran back to another Hispanic man and exchanged high fives while both laughed." (Id.) The e-mail further *853 stated "[t]hen as I turned right another Hispanic man on the same corner, gave me what I would describe as a very intimidating look. Kids passing this area when on the school bus have seen Hispanic man [sic] take out cell phones and look like they were taking a picture of the

kids. These men have whistled or made other noises at very young teenage girls." (Id.)

The next day, October 3, Lieutenant D'Amico forwarded the complaint to Lieutenant Sousa, the commander of the HSU. (Id.) The day after that, October 4, the HSU conducted a day labor operation at the corner detailed in the complaint-Ocotillo and Ellsworth. (Id.)

When he was presented with the exhibit containing the e-mail complaint and its transmission history at trial, Sheriff Arpaio testified that he could not tell whether any of the conduct complained of in the exhibit was criminal, but would have referred the matter for investigation. (Tr. at 390:16–391:5.) He further testified that the e-mail complaint would not have resulted in the Queen Creek operation by the MCSO without some conclusion that a crime had been committed because the MCSO does not just "go grabbing people on street corners unless we have a crime committed." (Id. at 392:14–15.) He further testified that the MCSO would not have had time to mount the Queen Creek operation between the time that it received the complaint and the time that the operation occurred two days later, because it takes three to four weeks to plan such an operation. (Id. at 393:6–14.) At any rate, he testified, those who were arrested in the Queen Creek operation were arrested by the MCSO for committing state crimes, (id. at 392:16–93:5), and thus their arrest presumably did not demonstrate that MCSO was conducting operations against Latino day laborers purely on the basis that they were Latino day laborers.

However, as the contemporaneous records and other testimony demonstrate, Sheriff Arpaio's testimony in this respect is incorrect. On the same day as the Queen Creek operation, Lt. Sousa forwarded the

e-mail complaint to Paul Chagolla, who ran the MCSO's public relations, with a designation of high importance. The MCSO swiftly issued a news release that day titled "Sheriff Arpaio Goes After Day Laborers." It confirmed that the operation was in response to the citizen's complaint. The news release noted: "[t]oday, Maricopa County Sheriff's Joe Arpaio's Office [sic] Illegal Immigration Interdiction Unit (Triple I), responding to Queen Creek citizen complaints regarding day laborers harassing school children at a bus stop, arrested 16 more illegal aliens under the federal immigration laws." The news release further noted "[c]itizens complained that day laborers are shouting at the children and photographing them at the bus stop. Sheriff's deputies contacted the 16 illegals during traffic investigations."44 (Ex. 308.)

The news release directly refers to the complaint received by Lieutenant Sousa only a day before as the reason for the operation regarding Hispanic day laborers, and notes that the operation was run by *854 the Illegal Immigration Interdiction Unit. (Id.) As the news release also states, the 16 persons were arrested not for state crimes, but for federal immigration violations and turned over to ICE. (Id.; Ex. 129.) Thus, the evidence demonstrates that on October 4, 2007, the MCSO conducted a small-scale saturation patrol on the corner of Ellsworth and Ocotillo, based on a complaint transmitted to the MCSO on October 2 that Hispanic day laborers congregated there.

C. The Pruitt's day labor operations were a response to complaints of day laborers and illegal immigration.

By October 2007, the MCSO had been aware for two years that the area around Pruitt's Furniture Store

was a significant gathering spot for Latino day laborers. In late November 2005, the Sheriff received a letter from the Minuteman Civil Defense Corps, a group of citizens concerned about illegal immigration who conducted "protest rallies" at day labor sites and pick up points throughout the valley. (Ex. 385.) In their letter to Sheriff Arpaio they identified two significant day laborer centers, one at 36th Street and Thomas ("Pruitt's"), and the other at Cave Creek and Bell Roads. (Id.) The letter described how the past weekend there had been around 100 day laborers, 30 minuteman protestors, six members of the American Civil Liberties Union ("ACLU"), and members of the media to report on "the day[']s activities" at the Pruitt's site. (Id.) The letter further informed the Sheriff that "[w]e will hold these rallies every Saturday until the end of the year," and complained that neither Phoenix Police nor ICE would respond to the Minutemen's request to investigate day laborers. (Id.)

The letter, which equated day laborers with illegal immigrants, stated that the Minutemen "want to work with an organization that is willing to investigate and deport illegal immigrants when they are spotted in our cities," and further asked "[i]s it unreasonable to ask our police to question day laborers about their immigration status?" (Id.) Sheriff Arpaio suggested an internal meeting about how to respond to this group. (Tr. 329:7–11; Ex. 385.) Although the MCSO's actions at these locations almost two years after the date of the letter is hardly a direct response to the letter, the letter and Sheriff Arpaio's notations on it demonstrate the MCSO's knowledge of the group, the day labor centers of which it complained, and that these locations were areas of activism and press coverage regarding immigration issues.

The Friday before the Monday, October 15 operation occurred, MCSO Detective Gabriel Almanza had a conversation with a doctor whose office was located in the commercial complex adjacent to Pruitt's and who was also aware of an apparent successful operation previously conducted by the MCSO at the day labor locations at Cave Creek and Bell Road. The detective asked the doctor to send him an e-mail memorializing their conversation. (Ex. 124.) The doctor did so.

After commenting that "what you did out at 25th St. and Bell was wonderful!"45 the e-mail complained of the high concentration of day laborers who were illegal immigrants and congregated in the commercial complex at 36th Street and Thomas. (Id.) According to her e-mail, the day laborers were all illegal "because they admit it when asked." (Id.) She complained that they harassed her patients, made sexual *855 innuendos, trespassed, loitered, littered, blocked sidewalks, urinated and defecated on the property and "showed their bellies" to everyone. (Id.) The doctor also complained that the neighborhood had become a focal point in which neighborhood residents had regular showdowns with Hispanic Rights advocates since the owner of Pruitt's Furniture Store had forced the day laborers off of his property. (Id. ("Reza & Gutierrez staged a large chanting protest at Pruitt's to shut Pruitt's out of business for kicking them off his property," and "Salvador Reza & Alfredo Gutierrez come out here every other week & tell these workers they can do anything they want anytime and are protected. We know this because [O]fficer Ruelas said they told him this & we see Reza out here all the time.").)

The following Monday, October 15, 2007, the HSU conducted a day labor patrol in this location. (Ex. 131.) Although MCSO successfully sought to have the

complainant document her complaint in an e-mail, MCSO's resulting operation was not targeted at those persons who committed the acts complained of. Rather, during the day labor operations at Pruitt's, just as with the previous operations, the MCSO targeted vehicles picking up day laborers and arrested them only on federal immigration charges. (Id.)

A week later, the MCSO also conducted a day labor operation in Fountain Hills based on information provided by local businesses that day laborers were in the area with no other specific complaint being made. (Doc. 123) All persons were arrested on federal violations and turned over to ICE.

Despite the yield from the Pruitt's operation being disappointing to Sgt. Madrid, (see, e.g., Ex. 131 ("It should be noted that this area had far less day laborers in the area than our two previous details completed by HSU.")), the MCSO continued to run its small-scale saturation patrols at and around that location because of the activism and resulting media focus that the location had drawn. (Ex. 309.)

In its December 5, 2007 news release, the MCSO noted that Sheriff "Arpaio is set to increase the presence at Pruitt's of his Illegal Immigration Interdiction Unit (Triple I) this weekend, as pro-illegal immigration demonstrators and illegal immigrant day laborers continue to protest his illegal immigration policies on the driveways of the Pruitt's Furniture Store." (Ex. 309.) The news release further observed that "[i]llegal immigration activists have protested at Pruitt's every Saturday in the last six weeks since Sheriff Arpaio's deputies began patrolling the vicinity." (Id.) In response, Sheriff Arpaio pledged to keep running such operations until the activists stopped their protests. "This weekend, I will increase the number [of] deputies to patrol the Pruitt's area, and I

promise that my deputies will arrest all violators of the state and federal immigration laws.... I will not give up. All the activists must stop their protest before I stop enforcing law in that area.' " (Id.; see also Ex. 124 (noting the repeated presence of press, and Hispanic activists Alfredo Gutierrez and Salvador Reza).) This scheduling of small-scale patrols in response to the activities of activists may be equally or more indicative of Sheriff Arpaio's desire to generate media attention of his immigration enforcement activity than of the MCSO's use of race in selecting locations for patrols. Nevertheless, the selection of this location because of the presence of Hispanic activists is indicative of the MCSO's focus on illegal immigration on conducting patrols, and its general association of day laborers with illegal immigration.

*856 D. The Mesa small-scale patrols were in response to complaints about illegal immigration and "Mexicans."

Contemporaneous with the small-scale operations scheduled at Pruitt's, the MCSO began conducting similar small-scale patrols in Mesa in response to citizen complaints. In late September 2007, Sheriff Arpaio reviewed transcribed comments from the MCSO's immigration hot line. One of the callers stated: "[w]e have called the non-emergency and illegal hot line numerous times and nobody gets all the Mexicans hanging out at Mesa Dr. between Southern and Broadway. Why isn't anything being done?" (Ex. 375.) The Sheriff highlighted that hot line entry and sent the comment and his annotation to Chief Sands and Deputy Sheriff Hendershott, and placed a copy of the comment in his immigration file. (Id.)

Beginning on November 15, 2007, the MCSO conducted three separate saturation-patrols in that same neighborhood (Broadway and Stapley), with stops and arrests occurring in the several square miles surrounding that intersection. Almost all persons arrested during these operations were transported to ICE and processed for violating federal immigration law, although a few were also processed on state charges.

E. The large-scale patrols were conducted to target Hispanic unauthorized immigrants.

As with the day labor and small-scale saturation patrols, many of the large-scale saturation patrols were centered either on locations where day laborers gathered, or on locations that had a high concentration of Latino residents. Chief Sands testified at trial that although he would take direction from Sheriff Arpaio if he ever gave it in designating a location for a large-scale saturation patrol, it was generally Chief Sands that selected the locations. (Tr. at 707:16–18, 809:20–810:3, 814:21–815:1, 824:24–825:6.) He acknowledged that in selecting some of the locations he considered complaints from members of the public and from businesses about day labor activity. (Id. at 790:5–791:11, 814:21–25.) However, he testified that that he would not conduct a saturation patrol based solely on a complaint that did not allege violations of law. (Id. at 795:18–21.)

When considered in light of the reasons the MCSO contemporaneously gave in the news releases that announced the pending operations, this testimony is not quite as persuasive. As the news release announcing the first large scale saturation patrol demonstrates, the principal reason the site was chosen

was because, even after the departure of the activists, the location remained a gathering spot for day laborers which the MCSO knew to be Hispanic. The news release quoted the Sheriff as saying that [t]he protestors who support the illegal immigration movement may have left the area, but the problems that caused Pruitt's Furniture Store to contract with the Sheriff's Office for security still exist.... The posse volunteers and deputy sheriffs will not racially profile anyone in this operation.... Still, I anticipate that many illegal immigrants will be arrested as this central Phoenix neighborhood remains a popular spot for day laborers. All criminal violations will be subject to arrest which means if we come across illegals, properly trained officers will be there to enforce the state and federal immigration laws. (Ex. 310.) The next large-scale saturation patrol operation likewise centered on this same location.

When the MCSO initiated its third large-scale saturation patrol at the intersection of Cave Creek and Bell Road, the *857 MCSO news releases again demonstrate that this site was chosen because of the presence of Latino day laborers. The MCSO stated that the site had two day laborer centers which are "magnets for more illegal aliens" and which create an atmosphere detrimental to business. (Ex. 311 ("Hundreds of the Sheriff's volunteer armed posse member and deputies will migrate today ... from central Phoenix and the Thomas Road area to 25th Street and Bell Road" to assist with the atmosphere detrimental to business created by "the growing number of day laborers in the area.").) The news release goes on to note that the operation would address at least "two day laborer centers in the Bell Road area which are 'magnets for more illegal aliens."46 (Id.) Further, this was the location that,

together with the Pruitt's location, the Minuteman had identified to the MCSO two years earlier as a frequent day labor location. Finally, the MCSO had previously conducted the January 4, 2008 small-scale saturation patrol at this location (Ex. 114) and at least one earlier operation for which records were not submitted at trial.

The fourth large-scale saturation patrol occurred on April 3–4, 2008, at Guadalupe. (Ex. 87.) The MCSO also considered race as one factor among others in selecting Guadalupe as the site for a large-scale saturation patrol. Although the news release announcing the operation stated that Guadalupe was selected because "tensions are escalating between illegal aliens and town residents," (Ex. 313), there was no testimony or evidence as to how the MCSO came to that conclusion. Chief Sands testified that he does not necessarily consult crime data to select saturation patrol locations, and would not use an increase in crime to determine where to have a saturation patrol. (Tr. at 787:25–788:8.) He testified that any crime analysis he did conduct would be attached to the saturation patrol operation plans. (Id. at 789:10–13.) The operations plans for the saturation patrol in Guadalupe have no crime analysis attached.47

Further, the only document in evidence that even suggests a reason for the operation is an e-mail written by Lt. Siemens to various contacts in the police departments of the adjacent municipalities in advance of the patrol that describes the operation as a response to the MCSO District 1 Commander's complaint of increased criminal and gang activity in the area. (Ex. 87 at MCSO 001876–7.) No mention of "illegal aliens" is made.

It is also clear that the MCSO did not conduct the saturation patrol at the request *858 of the town. In fact, during the middle of the operation, the town mayor asked the MCSO to cease the operation and leave. (Ex. 314 (dated April 4, 2008, announcing that the results of the first day of the saturation patrol, and further noting that the Mayor had asked the Sheriff to leave town).) In response to the Guadalupe Mayor's request to leave, the MCSO issued a news release quoting Sheriff Arpaio as saying that "the Sheriff still has jurisdiction here and I will still enforce the illegal immigration laws in Guadalupe." (Id.) This appears to be a more frank assessment of the MCSO's purpose for the operation. Because the MCSO's purpose for the operation was to enforce immigration law, and it believed that the vast majority of illegal immigrants in Maricopa County were Hispanic, the Court concludes the MCSO desired to conduct such an operation in a neighborhood densely populated with Hispanic residents.48

After conducting its small-scale patrols in Guadalupe, the MCSO conducted the fifth and sixth large scale operations in Mesa,49 the eighth and ninth large scale saturation patrols in Avondale (MCSO's District II)50 (Ex. 111), and the eleventh large-scale patrol, in the Durango area on the 35th Ave. corridor in September 2009 (Exs. 169–70).51 Due to its previous day labor and small-scale saturation operations, the MCSO at least knew that Latino day laborers assembled in these areas. Unlike the first three large-scale saturation patrols, however, there is no evidence in the record that these patrols were covered by advance news releases that directly stated that the reason for the site selection was the presence of day laborers. To the extent that these large-scale patrols included more officers and covered larger

geographic areas than the small-scale patrols that preceded them, the fact that the large-scale operations covered areas in which the MCSO had previously conducted *859 successful smaller-scale operations makes considerations of race in their selection somewhat more attenuated.

Of the additional large-scale patrols that followed, the record is clear that at least three of them—the seventh and twelfth in the far northwest valley and the tenth in the southeast valley—occurred in locations for which the Sheriff had received previous complaints about the presence of Mexicans or day laborers or both. The MCSO held the first of its two operations in the Sun City area on August 13–14, 2008, and the second slightly more than a year later on October 16–17, 2009. (Exs. 102, 103, 174.) While this general area had not been the location of a reported small-scale saturation patrol, the operation occurred slightly more than a week after Sheriff Arpaio reviewed correspondence from two separate constituents. The first correspondence, dated August 1, 2008, came from a Sun City woman who complained of Spanish being spoken in a McDonald's at Bell Road and Boswell and requested that the Sheriff rid the area of illegal immigrants. (Ex. 237.) The Sheriff annotated the memorandum indicating he would look into it and copied it to Brian Sands on August 5, noting that the letter was "for our operation." (Id.) On August 8, 2008, the Sheriff was sent another e-mail that stated, "I would love to see an immigrant sweep conducted in Surprise, specifically at the intersection of Grand and Greenway. The area contains dozens of day workers attempting to flag down motorists seven days a week." The Sheriff reviewed the e-mail on August 13 and had a copy sent to Brian Sands and Lita at the PLO on that same date. (Ex. 235.)

The first day of the two-day operation, however, was on the same day the Sheriff annotated the second e-mail and sent it to Chief Sands. Thus, he would not have had time to plan the operation after having read the e-mail. Further, Sheriff Arpaio's notation on August 5 that the complaint was "for our operation," suggests that an operation had already been planned and that the letter served to justify it, rather than serving as the motivation for the site selection. Moreover, in announcing the operation, the MCSO news release stated in part that during the operation it would be "traveling well known smuggling routes" on I–17 in the north county area. (Ex. 331.) The operation did appear to result in the arrest of five separate human smuggling loads with at least three of those loads being stopped on I–17 and thus not in locations that were the subject of the correspondence. (Ex. 102 at MCSO 001974.) The tenth saturation patrol occurred on July 23–24, 2009, in the Southeast valley. (Exs. 128, 168.) To be sure, the Sheriff had received and referred for action at least one previous letter which complains of day labor locations in the southeast valley areas that were covered by this patrol. (Ex. 244.) Nevertheless, the letter had been sent a full year earlier. (Id. (dating the letter at May 25, 2008).) Thus, while the MCSO was aware of day labor locations in the southeast valley area covered by the patrol, the July 23–24, 2009 patrol was not a direct response to the May 24, 2008 complaint.

The thirteenth and final large-scale saturation patrol discussed in detail at trial occurred on a countywide basis. (Ex. 176.) Such a generalized location can support no inference that it was selected as a result of the race of the persons who inhabit it.

At trial, Plaintiffs attempted to draw a direct link between citizen complaints received by the MCSO that referred to racial or ethnic characteristics of persons in particular locations and the corresponding scheduling by MCSO of a saturation patrol in those locations. Plaintiffs have established *860 such a direct link between the day labor operations in Cave Creek and Queen Creek in October 2007, and the three small-scale saturation patrols in Mesa in November and December 2007. In those patrols, the MCSO responded directly with saturation patrols to complaints about the gathering of "Hispanic" and "Mexican" day laborers without sufficient indication that they were otherwise engaged in violations of state or municipal law. To the extent that Plaintiffs attempted to establish such a direct link between citizen complaints about operations in Sun City and or elsewhere, they have not met their burden of proof that the operations were planned in response to the specific citizen complaints about ethnicity. Nevertheless, due to the MCSO's conflation of racial and work status indicators in locating these operations, Plaintiffs have established that as a whole, in the site selection for all of the MCSO's day labor operations, most of their small-scale patrol operations, and many of their large-scale patrol operations, race was a factor, among others, to the extent that the MCSO sought to base such operations around locations at which Latino day laborers were known to assemble.

5. All saturation patrols relied on pre-textual stops as a basis to investigate the occupants of a vehicle.

Even when it had 287(g) authority, the MCSO, pursuant to its own policy, did not directly stop persons that it believed to be in the country without authorization.

287(g) trained deputies can't contact someone just because they think they are here illegally. 287(g) deputies can only screen people reference their immigration status that they come across during their duties as a Deputy Sheriff and then indicators must exist per the U.S. Immigration and Nationality Act, Title 8 U.S.C., 287(g), before screening can take place (must have probable cause or reasonable suspicion to contact a violator or suspect for state criminal and civil statutes). (Ex. 92.)

Thus, even when the purpose of an operation was to enforce federal immigration laws, as with the operations at issue in this lawsuit, MCSO deputies first needed a basis in state law to contact and detain the persons they sought to screen. The saturation patrols at issue in this lawsuit all involved traffic stops used as a pretext to detect those occupants of automobiles who may be in this country without authorization. (Tr. at 837:1–17.) Defendants have never asserted that they stopped vehicles during the saturation patrols based solely on a reasonable suspicion that the drivers or passengers were not legally present in the country. Instead, they stopped the vehicles because of traffic violations and then investigated occupants for immigration offenses once the stops had been made.

6. During saturation patrols, participating deputies conducted many stops for minor violations of the traffic code, including minor equipment violations. This departs from MCSO's traffic enforcement priorities during regular patrols.

The MCSO so stipulated prior to trial. (Doc. 530 ¶ 85 at 12.)

7. Generally, MCSO officers had no difficulty in finding a basis to stop any vehicle they wished for a traffic infraction.

MCSO witnesses who testified at trial acknowledged that "if you follow any vehicle on the roads of this country for even a short amount of time, you will be able to *861 pull that person over for some kind of violation." (Tr. at 696:17–21, 1541:8–11 ("You could not go down the street without seeing a moving violation."), 1579:20–23; Doc. 530 at ¶ 86 ("Deputy Rangel testified that it is possible to develop probable cause to stop just about any vehicle after following it for two minutes.").) Chief Sands also testified that it is not feasible to require officers to stop every driver whom they observe committing a traffic violation. (Tr. at 830:10–14.)

8. The MCSO provided no race-neutral criteria for deputies to use in determining whom to pull over for traffic violations during the three types of saturation patrols.

One of the MCSO's chief defenses against the arguments of the Plaintiff class was that during saturation patrols it used a zero tolerance policy that required participating MCSO officers to pull over every vehicle that they observed committing any traffic infraction, no matter how slight. The MCSO represented to the Court that this policy ensured that there was no racial bias in the selection of vehicles that MCSO pulled over during saturation patrols. After having reviewed the evidence of the parties and heard the testimony, the Court concludes that no such policy was ever clearly promulgated or understood by MCSO deputies participating in such patrols.

As an initial matter, no written instructions were given for small-scale saturation patrols or day labor operations. (Id. at 1155:10–20.) The first several large-scale saturation patrols also occurred before the promulgation of any policy that was subsequently identified as a zero tolerance policy. (Id. at 996:15–17.) Even after the large-scale saturation patrol instructions were modified in April 2008, they specified only that all persons committing a criminal violation should be booked. (Id. at 996:21–25.) The operations plans contained no specific instruction to deputies about how to determine, in a race-neutral way, which vehicles to pull over for traffic or equipment infractions.52

Other than the written instructions explaining that all criminal offenders should be booked, there was no consistent understanding about the substance of any zero tolerance policy. Lt. Sousa, who identified himself as the author of the policy, testified that it pertained only to what a deputy could do after he had already made a stop. He testified: "[I]f we made a lawful traffic stop, and you had a criminal defendant with an arrestable charge, they would get booked. And whoever we stopped, we would write a citation for the probable cause for the stop."53 (Id. at 996:21–25). *862 He testified that the policy did not remove officer discretion as to making the decision as to which cars to stop in the first instance. (Id. at 998:18–25, 999:4–7.)

The testimony of other command personnel and deputies participating in saturation patrols varied considerably as to what the zero tolerance policy was. Sheriff Arpaio, Chief Sands and Deputies Armendariz, Beeks, and DiPietro described the policy as did Lt. Sousa—it did not specify which vehicles deputies

should stop and deputies retained discretion on that matter.

Sheriff Arpaio, for example, in an MCSO news release, described a "zero tolerance law enforcement operation" as requiring deputies to arrest any person found to have committed a criminal offense. "All violators of any law ... will be booked into his jails with no one getting a 'get out of jail free card.' " (Ex. 342.) Chief Sands testified that the policy did not require officers to stop every vehicle they observed violating the traffic laws, but that officers were required to arrest any person whom they had probable cause to believe committed a criminal offense. (Tr. at 830:18–831:8.) Unlike Lt. Sousa, he testified that deputies were not required to issue a citation to every vehicle they stopped for violating the traffic law. (Id.) He further testified that the MCSO did not analyze officer activity to determine whether officers in fact followed this definition of the "zero tolerance" policy. (Id. at 831:1–4.) Lt. Sousa expressly conceded that one of the reasons he included language prohibiting racial profiling in operations plans and directives was so that he could testify to it in any subsequent litigation. (Id. at 1025:12–1026:7.) Chief Sands confirmed that the phrase "zero tolerance" policy is "rhetoric used by Lt. Sousa." (Id. at 831:1.)

Although Deputy Armendariz could not remember what he was instructed as to the particulars of the "zero tolerance" policy, (id. at 1581:2–21), he testified that he understood that he still had discretion as to whether or not to stop a particular vehicle, (id. at 1579:24–1580:2). Nevertheless, it was his understanding that the policy required him to take a person into custody instead of issuing a citation when "an arrest is likely." (Id. at 1581:17–21.) Deputy Beeks agreed that the zero tolerance policy did not take away

a deputy's discretion when it came to deciding which traffic offender to stop. He understood that under the "zero tolerance" policy, "[w]e were told to be proactive, and if we saw violations, to address them," but that "[w]e were given discretion" to make stops. (Id. at 1475:2–6.) Deputy DiPietro testified that while on saturation patrols, he was not given any instruction about which vehicle to pull over and answered affirmatively when asked whether the decision to stop a vehicle on a saturation patrol was "completely within your discretion." (Id. at 303:24–25.)

On the other hand, both HSU sergeants and Deputies Rangel and Kikes offered definitions of a zero tolerance policy that dictated to deputies on patrol who must be pulled over in the first place. Sgt. Palmer testified that the "zero tolerance" policy required officers to stop any car which they observed to be in violation of any traffic law, and to issue a citation for that violation. (Id. at 694:2–6.) Sgt. Madrid also stated that the "zero tolerance" policy took away the "ordinary officer discretion to let things slide" and required officers to pull over any vehicle on the road that had committed any traffic infraction. (Id. at 1155:21–1156:6.) Sgts. Madrid and Palmer did not often participate in arrests during *863 large-scale saturation patrols, however, as they were both engaged in supervisory functions with Sgt. Madrid mostly stationed at the command post and Sgt. Palmer doing field supervision. (Id. at 1160:5–8, 759:4–10.)

Deputies Rangel and Kikes also described the policy as removing discretion from the deputies as to which vehicles to stop. Deputy Rangel testified that, under the policy, he would stop every person he saw committing a traffic violation, ask every person in the car for identification, and investigate those passengers who did not provide identification. (Id. at 944:4–

947:11.) Deputy Kikes testified that under the policy officers were to stop "anybody and everybody who had a violation," and issue citations. (Id. at 612:10–19.)

Both officers who testified that the "zero tolerance" policy required them to stop every car that committed any traffic infraction, and other MCSO officers who testified, acknowledged, however, that such a policy would be impossible to enforce because it would involve stopping nearly every car on the road. For example, Deputy Kikes testified that so many people on the road commit minor traffic or equipment infractions that stopping every person who commits a violation, and therefore following the policy as he understood it, is "impossible." (Id. at 613:3–6.) Sgt. Palmer acknowledged that "if you follow any vehicle on the roads of this country for even a short amount of time, you will be able to pull that person over for some kind of violation." (Id. at 696:17–21.) Chief Sands testified that it is not feasible to require officers to stop every driver whom they observe committing a traffic violation. (Id. at 830:10–14.)

Deputy Kikes' own arrest record while participating on saturation patrols suggests that in practice he followed no such policy. Deputy Kikes participated in at least three large-scale saturation patrols over the course of at least four days.54 There is no record of any civil citations he issued during the patrol, because the MCSO kept no such records, but, according to the operations plans, he was under an obligation to arrest anyone for any criminal violation he observed during any part of his patrols including traffic stops. In the three saturation patrols in which Deputy Kikes participated, comprising at least four patrol days, he arrested a total of five people. All of the persons he arrested had Hispanic surnames and all arrested were classified as 287(g) and thus in the

country without authorization. (Exs. 82, 87, 111.) To accept Deputy Kikes's testimony in its entirety would mean that Deputy Kikes spent at least four days on traffic patrol in an environment where so many people commit traffic or equipment infractions it would be impossible to stop them all. He nevertheless followed the zero tolerance policy and stopped "anybody and everybody" he could. (Tr. at 612:12–13.) Once he made a stop, he arrested every person with an outstanding warrant or who was otherwise committing a criminal violation. (Id. at 14–23.) And all of that resulted in five arrests over four days, all of which just happened to be of Hispanic persons who were in the country without authorization. The Court rejects such a factual proposition. In the face of such facts, the Court concludes that Deputy Kikes, in fact, was not following the zero tolerance policy that he described during trial.

*864 The same is true, although less starkly so, for Deputy Rangel. Deputy Rangel participated in at least seven large-scale saturation patrols, some of which took place over multiple days. By the Court's calculations, 54 of the 60 arrests made by Deputy Rangel during the large-scale saturation patrols, or 90% of the total arrests he made, were of persons with Hispanic names.55 If the human-trafficking loads intercepted by Deputy Rangel during the August 2008 Sun City and the November 2009 countywide patrols are excluded, then 11 of 16 arrests or 68.7% had Hispanic names. To accept Deputy Rangel's testimony in its entirety would mean that Deputy Rangel spent at least nine to ten days on traffic patrol in an environment where so many people commit traffic or equipment infractions it would be "possible to develop probable cause to stop just about any vehicle after following it for two minutes." (Doc. 530 at ¶ 86.) In accordance with the zero tolerance policy, Deputy

Rangel stopped all such vehicles, and investigated the identity of every passenger in every vehicle he stopped. He subsequently arrested every person with an outstanding warrant or who were otherwise committing a criminal violation. Nevertheless, during the nine to ten days, he made only 16 arrests (excluding the four van loads from two patrols that resulted in 44 arrests). Of the 16 arrests 11 just happened to be of Hispanic persons who were in the country without authorization, and four of them were arrested on immigration charges. In the face of such facts, the Court concludes that Deputy Rangel, in fact, was not following the zero tolerance policy that he described during trial.

A look at the arrest reports in general also demonstrates that officers exercised individual discretion regarding stops. More often than not, the disparities of arrest rates between officers participating in saturation patrols cannot be easily explained. For example, 47 officers signed in for the July 14, 2008 saturation patrol in Mesa. (Ex. 97.) Of these 47, 13 arrested at least one person, and 41 total people were arrested.56 (Id.) Deputy Armendariz arrested 18 of the 41 people arrested, including the drivers and passengers of 11 different cars. (Id.) 11 of the persons arrested by Deputy Armendariz, and five of the six of the passengers he arrested, were processed for not being legally present in the country. (Id.) Ten of the arrestees had Hispanic surnames.57 (Id.) The *865 next-highest arrest total for any officer was for Deputies Silva and Roughan, who both arrested four people. (Id.) Six of the eight people whom Deputies Silva and Roughan arrested had Hispanic surnames, and seven were processed for not being legally present in the country.58 (Id.) These statistics again do not suggest that officers were following a zero tolerance

policy in which they pulled over every vehicle for an infraction no matter how small and arrested every person they encountered who had committed a criminal violation.

Further, the activity of at least some officers suggests a definite focus on vehicles with Hispanic occupants. For example, during the April 23, 2009 operation in Avondale, Deputy Armendariz arrested 12 people, 11 of whom had Hispanic surnames and 10 of whom were processed through the 287(g) program. (Ex. 111.) These arrests came from a total of seven vehicle stops, and included the arrests of five passengers, all of whom were Hispanic and all of whom were processed through the 287(g) program. (Id.) The deputies arresting the next-highest number of people during this saturation patrol arrested only two. (Id.)

Few of the "stat sheets" documenting the activity of individual officers remain. Those stat sheets that do remain, however, also suggest that the number of stops made by individual officers varied widely during the same saturation patrol. For example, individual stat sheets for the November 16, 2009 saturation patrol, which were preserved, show that officers working the same patrol during the same twelve-hour shift made the following number of traffic stops: 5, 15, 0, 9, 5, 6, 0, 4, 12, 2, 3, 12, 4, 2, 6, 24, 10, and 10. (Doc. 235, Ex. 10.) If an officer could stop virtually any vehicle for a traffic infraction after following it for a minute or two, these statistics demonstrate that no zero tolerance policy was uniformly followed that would provide neutral criteria about which cars should be stopped by participating deputies. The reports, therefore, establish that MCSO personnel were not following the zero tolerance policy as described by Sgts. Palmer and Madrid.

Based upon the contradictory testimony regarding the effect and definition of the zero tolerance policy, that the MCSO shredded individual officers stat sheets while under a discovery obligation to preserve them, that most witnesses testified that it would be impossible to follow a policy that required them to stop every vehicle they observed committing a traffic or equipment violation, that the MCSO conducted no analysis to determine whether officers were in fact following any "zero tolerance" policy, and that those records which were preserved suggest that officers did not follow a "zero tolerance" policy based on any of the definitions suggested, the Court concludes that to the extent any "zero tolerance" was in effect, it was merely the sentence of instruction contained in the operation plans that required MCSO deputies to book all criminal offenders, and contained no race-neutral criteria for deputies to follow in saturation patrols.

9. The MCSO used race as one factor among others in making law enforcement decisions during saturation patrols.

A. The MCSO used race as a factor in choosing vehicles to pull over during day labor and high-ratio small-scale operations.

As has been previously set forth in the discussion relating to the selection of locations *866 for saturation patrols, during the day labor and small-scale saturation patrols with high arrest ratios, participating MCSO officers determined which vehicles they would pull over for traffic enforcement based, at least in part, on their observations of the Latino ancestry of the persons that entered the vehicles. After the vehicles were pulled over, the

immigration status of the Latino passengers was investigated as a matter of course.

The arrest statistics from the day labor operations demonstrate that race was used as such a factor in a way that does not merely rely on the total number or total percentage of Hispanics arrested during such operations. All 35 arrests of unauthorized persons resulted from 11 traffic stops. A total of 14 traffic stops were made during all day labor operations. It is extraordinary that with only 9% of the Maricopa County population being unauthorized, the MCSO could make arrests of unauthorized aliens on 11 of the 14 traffic stops it made, with virtually all such stops resulting in multiple arrests. This extremely high ratio of stops resulting in immigration arrests to the total stops made during the operations shows that the MCSO used targeting factors including both race and work status to achieve this ratio.

The same is true for the small-scale saturation patrols with high arrest ratios, in which 115 out of 124 arrests were of persons unauthorized. See Section I.D.2.a, supra. While an exact number of total stops resulting in these arrests of unauthorized persons is not specifically ascertainable based on the reports, the reports do reveal that a great majority of all stops during such operations resulted in the arrest of unauthorized aliens and frequently multiple unauthorized aliens per stop. Id. The day labor and small-scale saturation patrols with high arrest ratios, due to the nature of the operations, considered race and work status as factors of a vehicle's occupants in determining which ones would be stopped.

B. The MCSO used race as a factor in determining whom to investigate and arrest during the small-scale patrols without high arrest ratios.

The arrest reports for these eight operations did not, for the most part, permit the Court to determine the number of stops that resulted in immigration arrests. To the extent that such determinations could be estimated by the reports kept, with one exception, they did not demonstrate the high ratio between stops and arrests that the previous operations had demonstrated.59 Thus the evidence that verified that the MCSO used race in the day labor and small-scale saturation patrols with high arrest ratios was not present in these eight operations.

Nevertheless, the arrest reports provide strong evidence that the purpose of most such operations was arresting unauthorized aliens. 85 out of 107 persons arrested were unauthorized aliens. See Section II.D.2.b, supra. To the extent it was disclosed by the reports, the remaining 22 authorized residents arrested during such operations were arrested for driving on a suspended license, or having outstanding misdemeanor or felony warrants. Id. *867 There is little to no evidence in the record that would indicate how many of these authorized residents arrested were Latino.

Still, three of the eight arrest reports from these operations provide information from which the number of passengers actually arrested from an estimated number of stops can be derived. Two of those three reports further list the names of all persons arrested.60 They demonstrate that during these three operations MCSO deputies stopped a total of approximately 95 to 100 vehicles. During these stops a total of 55 persons were arrested. 51 of the 55 persons were unauthorized aliens, and 36 of these were

passengers.61 During the two operations for which the names of persons arrested were kept, all passengers and drivers arrested for immigration offenses had Hispanic names.

Thus the Court can conclude from the three saturation patrols with sufficient records that 51 of the 55 arrests were of unauthorized persons, most if not all of whom had Hispanic surnames. 52 of these persons have names that indicate Latino descent. There is no evidence from these arrest reports from which it can be determined that the MCSO investigated or arrested any passenger during these operations who was not of Latino descent. Of the three persons arrested without Hispanic names, two had to be drivers because they were arrested for driving without a license. The reports provide no information about the other person, including whether she was in a motor vehicle at all, or, if so, whether she was a driver or a passenger, other than that she was arrested on an outstanding felony warrant.62 *868 While these numbers do come from a limited sample, and are not definitively indicative of racial bias, they do strongly suggest that in at least these three operations the MCSO was both: (1) principally looking to arrest unauthorized aliens whom they believed to be Hispanic persons; and (2) they were more likely to investigate the identities of Hispanic passengers than non-Hispanic passengers.

C. The MCSO used race as a factor in law enforcement decisions during large-scale saturation patrols.

As discussed, beginning in April 2008, the large-scale saturation patrols were subject to different and more specific instructions than were small-scale or day labor saturation patrols. The operational plans were

revised in at least three important particulars, and a comparison of those revisions with the patrol results shows that the MCSO relied on race as a factor in making law enforcement decisions.

1. During large-scale patrols, participating MCSO deputies were instructed to not racially profile and were obliged to book all criminal offenders. Yet arrest records show a disproportionate number of arrests of persons with Hispanic surnames.

Because the purpose of the saturation patrols was to arrest unauthorized aliens, and because the great majority of unauthorized aliens in Maricopa County are persons of Hispanic descent, it would not be in and of itself indicative of a racial bias in an operation for a disproportionate number of Hispanic persons to be arrested. Nevertheless, when the plans prohibit racial profiling, and further require that all persons committing crimes be arrested regardless of race, and yet a highly disproportionate percentage of the persons arrested during the operation are nevertheless persons with Hispanic names, the disconnect between the operational plans and instructions and the observable results of the large-scale patrols demonstrates that the deputies are not following their instructions, or that a racial bias is permitted, or even systematically implemented, in such operations.63

The overall arrest rates of persons with Hispanic names arising from the large-scale saturation patrols are very disproportionate to the population as a whole. Beginning with the large scale patrol held near Pruitt's on March 21–22, 2008, 42 out of the 43 arrests (97%) were of persons with Hispanic names. (Ex. 79.) For the Cave Creek operation on

March 27–28, 2008, 36 of the 54 arrestees (67%) of the arrestees had Hispanic names. (Ex. 82.) (These two operations, however, were conducted prior to the issuance of the new instructions). At the Guadalupe patrol of April 3–4, 2008, the operation during which the new instructions were first implemented, 33 of the 47 arrestees (70%) had Hispanic names. (Ex. 87.) At the first large-scale Mesa patrol, the deputies arrested 63 people, 35(57%) of whom had Hispanic names (Ex. 90); during the second Mesa patrol, 26 out of 41 persons arrested (63%) had Hispanic names (Ex. 97). During the first Sun City patrol, 88 of the 105 arrests (84%) were of persons with Hispanic names.64 (Ex. 102.) In the first Southwest *869 Valley operation on January 9–10, 2009, 34 of 53 arrests (64%) had Hispanic names. (Ex. 111.) In the West Valley operation on April 23–24, 2009, 30 of 41 arrests (73%) were of persons with Hispanic names. (Id.) During the Southeast Valley operation of July 23–24, 2009, 30 of the 41 arrestees (59%) had Hispanic surnames. (Exs. 128, 168.) Then, in the operation at Durango and 35th Ave. on September 5–6, 2009, 37 of the 51 persons arrested (72%) had Hispanic surnames. (Ex. 170.)

Two more large-scale patrols occurred following revocation of the MCSO's 287(g) authority. In the October 2009 Sun City operation, 45 out of 66 persons arrested (68%) had Hispanic surnames. (Ex. 174.) During the final county-wide operation for which arrest reports were filed, 37 out of the 51 persons (73%) arrested had Hispanic surnames. (Exs. 176, 178–82.) In total 700 offenders were arrested during these operations.65 496 out of 700 arrests or 71% of all persons arrested, had Hispanic surnames. This 71% arrest rate occurred in a county where between 30 and 32% of the population is Hispanic, and where, as the MCSO's expert report acknowledges, the rates of

Hispanic stops by the MCSO are normally slightly less than the percentage of the population that they comprise. (Ex. 402 at 3.) This arrest rate further occurred in operations in which deputies were instructed to arrest all persons committing any kind of criminal offense, and were instructed that they should not racially profile.

While a disproportionate number of persons with Hispanic names were generally arrested during such operations, that gulf widens when the arrest rate of Latino passengers is considered. According to the large-scale saturation patrol arrest reports, 184 passengers in vehicles were arrested on some charge other than the traffic pre-text given for stopping the vehicle. 175 of these passengers, or 95%, had Hispanic surnames. Even removing all of passengers who were arrested on immigration charges from the equation (141 total, 140 Hispanic),66 35 of the 43, or 81% of the passengers arrested on non-immigration charges had Hispanic surnames. Only nine passengers who did not have a Hispanic surname were ever arrested on any charge. The Court recognizes that there were several human smuggling loads that the MCSO intercepted: some on the August 2008 Sun City patrol (70 passengers), the October 2009 Sun City patrol (20), and the November 2009 countywide patrol (25). (Exs. 102, 174, 178–82.) Exclude the passenger tallies from those vanloads (115, 114 of which were Hispanic), and 61 of the 69 passengers (88%) were Hispanic. Clearly a disproportionate number of passengers with Hispanic surnames were arrested during the large-scale saturation patrols. This indicates that the MCSO was more likely to investigate and arrest passengers if they were Hispanic.

In sum, a remarkably high percentage of arrests during the large scale patrols were of people with Hispanic surnames. These results occurred while the MCSO claimed to be operating under a policy that forbade racial profiling and required deputies to arrest all criminal offenders. In light of the arrest numbers, the Court finds that either the MCSO was in fact not operating under those policies during the *870 large-scale saturation patrols or MCSO's policy forbidding racial profiling nevertheless permitted the consideration of race as a factor in executing the operations.

2. MCSO officers were instructed that during large-scale saturation patrols they could use race, as one factor among others, in initiating investigations into the immigration status of a person contacted.

And, in fact, the MCSO deputies operated under the idea that they were allowed to consider race in making immigration-related law enforcement decisions. The large-scale saturation plans contained a paragraph prohibiting racial profiling and specifically prohibiting deputies from making a decision to stop a vehicle based on the race of its occupants. Nevertheless, as previously discussed, the MCSO determined that it did not constitute racial profiling to base decisions in part on race, so long as race was not the sole basis for that decision. The operations plans for the large-scale saturation patrols explicitly instructed the MCSO officers who were 287(g) certified that they could use the indicators taught them in their 287(g) training in deciding whether to initiate investigations into a contact's immigration status. And all MCSO officers testified that ICE taught them that one such indicator, among others, was a person's race. The operations plans also

instructed non–287(g)–certified officers that they should not summon a 287(g) officer to initiate such an investigation based on race alone. But, as at least Sgts. Palmer and Madrid testified, this instruction meant that officers could consider race as one amongst a number of factors in making such a determination.

Further, all of the MCSO command staff including Sheriff Arpaio, Chief Sands, Lt. Sousa, and Sgts. Madrid and Palmer, acknowledged that the MCSO uses race as one factor in assessing whether an immigration investigation should be conducted after a stop has been made. At trial, Sheriff Arpaio was referred to media interviews in which he commented that a factor the MCSO considered in evaluating whether a person is in the country legally is whether "they look like they came from another country," (Ex. 410b), or "look like they just came from Mexico," (Ex. 410c). He explained that when he made these comments he meant that such appearance could be a factor for an MCSO officer to consider in determining whether further investigation of immigration status was appropriate once a vehicle had already been stopped. (Tr. at 498:22–503:6.) Chief Sands, Sgt. Madrid, and Sgt. Palmer also acknowledged that the MCSO did use and continues to use Hispanic ancestry in this manner in deciding which occupants of a vehicle should be investigated for immigration compliance. Chief Sands confirmed that the MCSO does not prohibit officers from relying on the race of a vehicle's occupant as one factor when initiating an immigration investigation once the vehicle has been stopped, so long as race was not a factor in the stop itself. (Id. at 782:5–16.) Lt. Sousa testified at trial that it was his understanding that ICE officers taught MCSO deputies in their 287(g) training that while race could not be used even as one factor when making an initial

stop, it could be used as one of a number of indicators to extend a stop and investigate a person's alienage. (Id. at 1016:3–6.)

The Court thus determines that as a matter of both policy and practice, the MCSO allowed its deputies participating in saturation patrols to consider race as one factor among others in determining whom it should investigate during large-scale saturation patrols.

*871 3. MCSO officers were instructed that they could use race as one factor among others in making a decision to stop vehicles during large-scale saturation patrols, and did so.

As indicated above, the large-scale saturation plans contained a paragraph specifically prohibiting deputies from making a decision to stop a vehicle based on the race of its occupants. Nevertheless, as has been previously discussed, the MCSO determined that it did not constitute racial profiling to base decisions to stop a vehicle in part on the race of its occupants, so long as race was not the sole basis for that decision. When the MCSO described its own policy as it pertained to stops during such operations, it stated that MCSO officers in making stops during saturation patrols, could not use race as the sole factor on which to pull a vehicle over so as to avoid "racial profiling." (Ex. 342 ("at no time will any vehicle be stopped solely because of the race of the occupants inside that vehicle").) It pointedly did not prohibit officers from using race as a consideration in deciding to make such a stop.

Sgt. Palmer testified that if there was a legitimate basis to pull a vehicle over, for a traffic infraction or otherwise, then, by definition, a deputy would not be racially profiling. (Tr. at 724:22–725:1.)

And Sgt. Madrid testified that so long as there was a legitimate basis to pull over a vehicle, it would never occur to him that a deputy could be racially profiling by doing so.67 (Id. at 1172:20–24.)

With such understandings, once an MCSO deputy had identified a particular vehicle with Hispanic occupants, he or she could develop a legitimate basis under the Arizona traffic code to pull over that vehicle with very little difficulty without "racially profiling." Once they observed a traffic infraction, MCSO deputies had a factor in addition to race on which to pull the vehicle over. Their decision would never be reviewed nor racial bias suspected by their supervising sergeants because the stop was not made solely on the basis of race.

At trial, Sheriff Arpaio and much of the rest of the MCSO command staff testified that the MCSO could use race as a factor in deciding to interrogate vehicle passengers once a vehicle had been pulled over, but could not use race as a factor in deciding whether to pull the vehicle over. That distinction, however, is a very fine one. There is no evidence, in the operations plans or otherwise, that once MCSO deputies had been instructed that it was acceptable to consider race as one factor among others in an immigration context, they were further instructed that they nevertheless could not consider race as any factor in determining whether to stop a vehicle. Further, Sheriff Arpaio's testimony in this respect seems contradictory to his quote from the MCSO news release, in which he indicates it would constitute racial profiling if the only reason a vehicle was pulled over was because of the race of the occupants. (Ex. 342.)

Despite Lt. Sousa's understanding to the contrary, at least one of his sergeants testified that ICE specifically trained MCSO deputies that they could use race or Mexican ancestry as one consideration among others in deciding whether or not to stop a vehicle, and that MCSO deputies in fact did so. (Tr. at 715:3–19, 1164:4–12.) And Sgt. Madrid acknowledged that he could not know whether one of his deputies used *872 race as a factor in making a stop unless he was actually present at the stop. (Id. at 1171:10–14.) He also testified that he would not typically be present at a stop during saturation patrols, since he was usually assigned to the command post during such operations. (Id. at 1160:1–25.)

Nevertheless, Deputy Rangel, and to some extent Sgt. Madrid, testified that due to tinted windows and headrests an officer could not always perceive the race of the occupants of vehicles before making a stop. (Id. at 927:9–21, 1192:4–15.) Thus, the MCSO argues, it was impossible for its officers to be racially profiling. While the Court accepts the testimony of Deputy Rangel and Sgt. Madrid, it rejects the assertion that such obstructions always or even regularly prevented deputies from making an assessment of the race of the occupants of a vehicle in which they are interested. The large-scale patrols were conducted in an environment in which MCSO deputies knew that the operations were designed to enforce immigration laws. (Id. at 1136:15–20; see also id. at 786:14–18, 787:5–14, 901:4–902:17.) The deputies were required to keep track of the number of unauthorized aliens they arrested during such patrols and report that figure to their supervisors. (See, e.g., Exs. 102 at MCSO 001978–001986, 111 at MCSO 056988–056998; see also Tr. at 690:23–691:1, 1153:13–18.) They correctly believed that the vast majority of

unauthorized residents of Maricopa County are of Hispanic origin. They were trained to use race as one factor among others when investigating immigration status. While some MCSO pronouncements indicated that it constituted racial profiling to stop vehicles based on the race of its occupants, others stated that it constituted racial profiling only when race was the sole consideration in making the decision to stop a vehicle. Further, their supervising sergeants did not believe that racial profiling could exist in a stop so long as there was a legitimate basis to stop the vehicle. And every time Lt. Sousa instructed participants in large scale saturation patrols not to racially profile, he assured them that he knew they were not doing so. (Id. at 1025:6–8.) There was no policy or race-neutral criteria that governed which vehicles to stop on saturation patrols. Due to the pervasive nature of traffic or equipment infractions that exist on the road, an MCSO deputy could stop virtually any vehicle he or she wished to stop on a legitimate basis. Based upon these policies, practices, and, to a lesser extent, the arrest records from the operations, the Court finds that MCSO officers emphasized the enforcement of traffic and vehicle infractions against vehicles that had Hispanic occupants, and in so doing, considered and incorporated the use of race as a factor in deciding which vehicle to pull over during large-scale saturation patrols.

This determination is fortified by the testimony of Dr. Ralph Taylor. Dr. Taylor conducted a study of the MCSO's CAD records related to MCSO large-scale saturation patrols to determine whether stops during large scale saturation patrols focused on vehicles with Hispanic occupants. The MCSO's CAD database provides detail of those incidents during which MCSO officers contact their dispatch. (Id. at 69:4–9.) When an

MCSO deputy asks dispatch to run a name through the MCSO database, the name is captured in the CAD database. The CAD database also records categories for individual stops, and type "T" is the category for a traffic stop or a traffic violation. (Id. at 69:8–9.) A stop that begins as a traffic stop but during which an officer makes an arrest on another charge, such as a drug arrest, will have a different final call than type T. (Id. at 130:22.) Thus, presumably, stops during which any arrests, including immigration *873 arrests, were made, were not counted in the totals arrived at by Dr. Taylor. This means that Dr. Taylor's statistics reflecting an increase in inquiries in Hispanic names during large-scale saturation patrols did not include those stops in which Hispanic names were checked and immigration arrests resulted.

Dr. Taylor only had complete information on 11 of the 13 large-scale saturation patrols on which testimony was offered at trial. (Id. at 76:24–77:3.) He had no information concerning the individual officers signed in to the first two large-scale saturation patrols at Pruitt's on which to run an analysis.68 In addition to the CAD database, Dr. Taylor relied on independent U.S. Census data correlating the likelihood that a person with any given name self-identified as Hispanic. He did a differential analysis that focused particularly on names whose owners identified as Hispanic more than 90% of the time, more than 80% of the time, and more than 70% of the time. (Id. at 193:2–7.) He also included names whose owners self-identified as Hispanic at a 60% threshold as "a type of robustness analysis."69 (Id. at 193:6–7.)

Dr. Taylor compared the names that MCSO officers called in to central dispatch during saturation patrols to the names called in by MCSO officers during non-saturation patrol days. (Id. at 99:22–100:3.)70 He

also compared the names called in by MCSO officers who worked on saturation patrols, regardless of whether they were working a saturation patrol, to the names called in by MCSO officers who did not work on saturation patrols. (Id. at 100:25–101:6.) Further, he compared the names called in on days when saturation patrols took place, regardless of whether the name was called in as part of a saturation patrol, to names called in on all other days. (Id. at 155:1–4.) Finally, Dr. Taylor studied the relative lengths of stops involving at least one likely-Hispanic surname.

He concluded that, depending on which threshold of Hispanic surname was used, names checked by an officer participating in a saturation patrol during a saturation patrol were between 46% and 54% more likely to be Hispanic than those checked by other officers operating on the same day. (Id. at 96:12–20.) He also found that, depending on the name threshold, names checked by all MCSO officers on saturation patrol days were between 26% to 39% more likely to be Hispanic than names checked on non-saturation patrol days. (Id. at 91:22–25.) Compared to names checked one week before and one week after a saturation patrol, names checked on a saturation patrol day were between 28.8% and 34.8% more likely to be Hispanic, (id. at 93:20–25), and names checked by saturation patrol officers operating on saturation patrol days were between 34% and 40% more likely to be Hispanic than names checked by officers who were never involved in a saturation patrol, (id. at 97:22–98:5). Finally, Dr. Taylor found that stops in which an officer checked at least one Hispanic name lasted *874 between two and three minutes longer than comparable stops in which no Hispanic names were run. (Id. at 109:14–16.)

Defendants called Dr. Steven Camarota to rebut Dr. Taylor's conclusions. Although, for the most part, Dr. Camarota did not take issue with Dr. Taylor's tabulations from the CAD records maintained by the MCSO, he did question several of the assumptions underlying Dr. Taylor's analysis and the adequacy of the information on which it was based. He further offered alternative explanations for the results of Dr. Taylor's analysis.

While Dr. Camarota did not independently verify Dr. Taylor's findings, he agreed that officers checked Hispanic names at a higher rate during saturation patrols. (Id. at 1310:6–9.) He further agreed that the Hispanic surname tables Dr. Taylor used are reliable. (Id. at 1305:22–1306:2.) In his own analysis, Dr. Camarota found that on days in which a saturation patrol was underway, the share of names checked that was Hispanic was 4.8% higher than on other days of the year. (Id. at 1309:22–1310:1.) Dr. Camarota speculated that different poverty rates could result in disparate stop rates between Hispanics and non-Hispanics, because "people with low incomes are going to have more difficulty ... meeting the equipment standards." (Id. at 1260:16–21.) Dr. Camarota presented no analysis of the stop rates corrected for poverty rates to support his speculation.

As between Dr. Taylor and Dr. Camarota in this respect, the Court credits the opinion of Dr. Taylor. Dr. Camarota testified that his opinions were based in part on Lt. Sousa's description to him of the zero tolerance policy that was followed on saturation patrols. Dr. Camarota testified that Lt. Sousa told him that on such patrols officers "attempt when practicable, and when it's viable, to pull over during saturation patrol anybody they see in violation making equipment violations or violating the rules of the road."

(Id. at 1334:22–1335:5.) As the Court has already determined, however, the MCSO followed no such policy during large-scale saturation patrols, and the description of the zero tolerance policy Dr. Camarota testified that he received from Lt. Sousa is different than Lt. Sousa's description given during trial. Thus, Dr. Camarota's conclusions that relied on the existence of the zero tolerance policy as he understood it are impaired. Dr. Camarota himself acknowledged in his testimony that if his understanding of the zero tolerance policy was inaccurate and if "that's not what happens during a saturation patrol, then that can matter" with respect to his analysis that socioeconomic factors could account for different stop rates. (Id. at 1336:4–15.) The Court, therefore, gives more weight to the opinion of Dr. Taylor.71

Regarding the length of stops, Dr. Camarota suggested that the need to translate information for the person stopped may contribute to stops of Hispanics taking more time. (Id. at 1297:11–15.) Dr. Taylor agreed that if officers translate information during a stop, the stop could take longer than a stop where no translation is required. (Id. at 175:9–17.) Dr. Camarota testified that Hispanics are *875 more likely to have hyphenated last names, which would require officers to check both alternate last names and could also increase the length of a stop. (Id. at 1298:9–23.) While the Court agrees that both of these alternative explanations carry weight, as multiple MCSO officers admitted, once they stopped a vehicle with Latino passengers, they used the race of the occupants of the vehicle as one factor among others to prolong the stop and investigate the immigration status of the vehicle's passengers. The Court believes that the MCSO's pursuit of this practice, even if it did not ultimately result in an arrest, is a more likely explanation for the

increased stop time resulting from stops with Hispanic names.

Further, Dr. Camarota testified that missing data could affect the reliability of Dr. Taylor's conclusions. In conducting his analysis, Dr. Taylor recorded only those stops in which the CAD Database recorded the fact that an officer had checked at least one name. (Id. at 75:17–19.) In approximately 30% of the recorded stops in the CAD Database, the officer did not check any names at all. (Id. at 1236:9–10.) In conducting his analysis, Dr. Taylor included only those stops in which the CAD Database recorded that the stop was categorized as final call type T. (Id. at 75:14–15.) Slightly over 80% of the stops for each year were categorized as final call type T. (Id. at 78:15.) Dr. Taylor's data set therefore did not include data for a number of stops conducted by the MCSO, apparently including those that would have resulted in immigration arrests. Further, the MCSO does not review the CAD data for quality control, and makes no attempt to verify the accuracy of the CAD data. (Id. at 1265:20–25, 1252:19–24.)

While the Court does weigh the incompleteness of the available information, there is no question that all of the information used was provided to the Plaintiffs by the MCSO, and was all the information that it kept on the topic.72 Since the data that was excluded did not include any name that could be evaluated, the Court concludes that drawing conclusions from limited data sets is still probative when complete data are not available. Further, the non-T stops that were excluded from Dr. Taylor's analysis involved a collection of stops which, in the aggregate, involved a lower degree of officer discretion than stops designated as a traffic stop or a traffic violation. The Court thus credits Dr. Taylor's analysis

and finds it credible and probative as to whether MCSO deputies used race as a factor among others in stopping vehicles with Latino occupants on saturation patrols.

Despite the voluminous evidence to the contrary, the MCSO argues that a number of specific deputies testified at trial that they never used race in the law enforcement decisions they made, even in an immigration context. For example, Deputy Armendariz testified that he never used race or ethnicity to make a decision to stop a vehicle, detain a driver or occupant, or to initiate questioning of anyone. (Id. at 1507:11–20.) Similarly, Detective Beeks testified that race and ethnicity are not criteria for a traffic stop. (Id. at 1436:8–10.) Deputy Kikes also testified that he never tries to determine anything about the race, ethnicity, or demographics of vehicle occupants in deciding who to pull over. (Id. at 625:10–14.) Deputy Rangel joined Deputy Armendariz in testifying that, as a matter of course, they and other deputies investigate the identity of every *876 occupant of every vehicle they stop, regardless of race. (Id. at 1518:14–19, 1543:4–12 (Deputy Armendariz testifies that its typical for all law enforcement officers to ask all passengers to volunteer their identification after pulling over a car, and he always does this whether it's a routine traffic stop or a saturation patrol), 931:2–13, 944:9–16 (Deputy Rangel testifies that he asks everybody in a vehicle for identification as a matter of habit, and not only while conducting saturation patrols).)

While the Court does not doubt the work ethic of these deputies, nor their desire to follow the various directives pertaining to their operations, it is difficult to reconcile their testimony in this respect with their actual performance during large-scale saturation

patrols. That analysis demonstrates that it is unlikely that Deputy Armendariz, Deputy Rangel, Deputy Beeks, or Deputy Kikes engaged in the race-neutral policing that they claimed.

Deputy Armendariz participated in at least nine of the large-scale saturation patrols, some of which took place over multiple days. 75 of the 97 arrests made by Deputy Armendariz during the large-scale saturation patrols, or 77.3% of his total arrests, were of persons with Hispanic names.73 Further, at least 35 of these arrests were made of passengers. 33 of them were determined to be unauthorized aliens, although only 32 of them had names that are listed as Hispanic in Exhibit 320.74 Deputy Armendariz did arrest two passengers with non-Hispanic names.

Such statistics as exist regarding Deputy Armendariz's performance in small-scale patrols are even more indicative of racial disproportionality, albeit in a smaller sample.75 Looking at the records for those *877 operations that identify arresting officers, Officer Armendariz participated in at least the first day of the Fountain Hills operation, and in the September 2008 Cave Creek operation. The Fountain Hills operation lasted six hours. (Ex. 108.) During those six hours, seven stops were made, four of which resulted in immigration arrests. (Id.) Of the four stops that resulted in immigration arrests, three were made by Deputy Armendariz, the other was made by Deputy Cosme. (Id.) All of the recorded stops made by Deputy Armendariz resulted in the arrest of unauthorized aliens.76 (Id.)

The records for the September 2008 Cave Creek operation also reveal which officers made the stops that resulted in immigration arrests. Four of the 33 stops made on that day resulted in immigration arrests. (Ex. 112.) Deputy Armendariz made two of

those four stops. (Id.) The ratio of stops to immigration arrests made does not serve to demonstrate whether Deputy Armendariz may have been using race as a criteria on which to stop traffic violators. Nevertheless, during these two days of operations, Deputy Armendariz made five traffic stops that resulted in ten arrests of unauthorized residents. (Id.) All of the persons arrested by Deputy Armendariz had Hispanic surnames and each of them was arrested on federal immigration charges. (Id.) At least six, but possibly as many as eight of these persons were passengers in vehicles. (Id.) During these two days, it is clear that Deputy Armendariz made no effort to pull over every vehicle he observed committing a traffic violation because during the entire first day of the Fountain Hills operation, both units of the MCSO pulled only over seven vehicles. During the September 2008 Cave Creek operation, although more vehicles were stopped, and more vehicles may have been stopped by Deputy Armendariz, he never arrested anyone on either day, other than Hispanic drivers or passengers. (Id.)

When asked to explain his disparate arrest rate of Hispanic persons, Deputy Armendariz testified that the majority of Maricopa County's population is Hispanic. (Tr. at 1504:10–1505:2.) That assertion is simply wrong. Approximately 30% of the population of Maricopa County is Hispanic. See United States Census, State & County QuickFacts, Maricopa County, Arizona, http://quickfacts.census.gov/qfd/states/04/04013.html (last visited May 21, 2013). Approximately 77% of the arrests made by Deputy Armendariz during large-scale saturation patrols had Hispanic surnames. 100% of the persons he arrested during the limited sampling of small-scale patrols had Hispanic surnames. The Court concludes that Deputy Armendariz considered

race as one factor among others in making law enforcement decisions during both large—and small-scale saturation patrols.

Deputy Beeks participated in at least four of the large-scale saturation patrols. (Id.) From the Court's calculations 14 of the 15 arrests made by Deputy Beeks during the large-scale saturation patrols, or 93.3% of the total arrests he made were of persons with Hispanic names.77 Further, during these large scale saturation patrols, Deputy Beeks arrested 11 passengers. *878 (Exs. 82, 90, 174.) Nine of them were determined to be unauthorized aliens, and all of them had names that are listed as Hispanic in Exhibit 320. It is likely that the ten arrests Deputy Beeks made during the second Sun City patrol stemmed from a human smuggling load. All ten came from the same vehicle.78 (Ex. 174.) Excluding those numbers, Deputy Beeks made five other arrests, four of whom had Hispanic last names and were in the country without authorization. The Court concludes that Deputy Beeks considered race as one factor among others in deciding whom he would stop.

The large-scale patrol arrest statistics for both Deputy Rangel and Deputy Kikes have been previously discussed. See Section II.8, supra. As noted, Deputy Kikes participated in three large-scale saturation patrols over four days and made a total of five arrests on all such patrols. All five had Hispanic names. Thus 100% of all persons he arrested during a minimum of three days of saturation patrols were Hispanic. Similarly, Deputy Rangel participated in seven large-scale saturation patrols in which 54 out of the 60 people he arrested had Hispanic surnames.79 The Court concludes that Deputies Kikes and Rangel considered race as one factor among others in making law enforcement decisions in an immigration context.

To the extent that the MCSO invites the Court to find that the MCSO saturation patrols did not incorporate racial bias in design or execution based on the testimony of these officers that they did not so engage, the Court declines to do so. The great weight of the evidence is that all types of saturation patrols at issue in this case incorporated race as a consideration into their operations, both in design and execution, the vehicles the deputies decided to stop, and in the decisions made as to whom to investigate for immigration violations.

The day labor operations and similar small-scale patrols with high arrest ratios specifically required the investigation of passengers that were Latino day laborers, which meant a disproportionate number of Latino passengers had their identities investigated, regardless of whether that investigation resulted in arrest. The number and types of resulting arrests for each of these operations demonstrates that their principal purpose was the investigation and arrest of persons likely to be unauthorized residents. As shown above, members of the MCSO believe that virtually all unauthorized residents in Maricopa County are Hispanic. Because (1) the MCSO was involved in an operation whose principal purpose was to investigate and arrest unauthorized residents, (2) it was trained by ICE that it could take into account Hispanic background as one factor among others leading to the reasonable suspicion that a person is not here legally, and (3) individual deputies were required during such operations to keep track specifically *879 of the number of people they arrested who were not authorized, the Court concludes that those deputies emphasized stopping and investigating the identities of Hispanic persons during such operations.

In the large-scale patrols, MCSO policy instructed officers to rely on their 287(g) certification training in making similar decisions and consequently allowed the officers to consider the passenger's race in making the decision to investigate the passenger's identity. That direction would have resulted in the disproportionate investigation of passengers of Latino background, regardless of whether probable cause or reasonable suspicion otherwise existed to justify such a search. Dr. Taylor's analysis confirms that Hispanic names were more likely to be checked. During the T–Stops that included names called into dispatch during the 11 operations that were the subject of Dr. Taylor's analysis, 308 people were arrested for being present in the country without authorization. (Tr. at 1311:20–1313:3). Further, according to Dr. Taylor, depending on the threshold of name used, between an additional 1,312 and 1,988 Hispanic names were checked during the CAD stops that he monitored. (Id. at 90:12–16.)

Further, as demonstrated below, in its ongoing enforcement of state laws related to immigration and the LEAR policy, the MCSO continues to consider race as one indicator, among others, that a person is in the country without authorization. Therefore, MCSO officers continue to stop and check the identities of a disproportionate number of Hispanic persons.

10. The MCSO stops a vehicle for the length of time it takes to investigate its occupants, not the amount of time necessary to dispose of the traffic infraction that resulted in the stop.

MCSO traffic stops at issue lasted as long as it took to check the identity of the Hispanic occupants of a vehicle. Some of these stops lasted much longer than

it would have taken to handle the traffic infraction that justified pulling the vehicle over in the first place. This is demonstrated by comparing two similar stops during which the MCSO took the same enforcement action.

At trial, David Vasquez testified that he was pulled over by Deputy Ratcliffe of the MCSO during the first large-scale saturation patrol in Mesa. (Tr. at 199:20–22, 201:24–202:2.) Mr. Vasquez acknowledged that the stated purpose for the stop was a very small if not imperceptible chip in his windshield. (Ex. 54.) Mr. Vasquez is Hispanic and his wife is not Hispanic. (Tr. at 198:15–17, 1992–3.) Deputy Ratcliffe asked Mr. Vasquez for his identification but did not make the same inquiry of his wife. (Id. at 200:21–201:6.) After Deputy Ratcliffe checked Mr. Vasquez's identification, he was released without being issued a citation for the chipped windshield or any other reason. (Id. at 201:1–6.) Although Mr. Vasquez estimated in his testimony that the stop took ten or 15 minutes, he was confronted on cross-examination with the CAD record of the stop that demonstrated that it took just over four minutes. (Id.) Upon cross-examination Mr. Vasquez acknowledged that the stop could have taken as little as four minutes. (Id. at 206:13–14, 208:2–7.) The Court credits the CAD record.

By contrast, although the stop that resulted in the arrest of Jose de Jesus Ortega–Melendres also resulted in only an oral warning to the driver, it lasted approximately 40 minutes. Considerable trial testimony concerned that stop. On that day, Deputy Louis DiPietro, a member of the canine unit, was recruited by the HSU and assigned to follow cars the HSU officers *880 targeted until he could develop probable cause to stop the car for a traffic violation. (Id. at 242:10–20.) Members of the undercover team

observed Mr. Ortega–Melendres and other Hispanic individuals get into a vehicle, and radioed to Deputy DiPietro that he should follow the car and develop probable cause to stop it. (Id. at 244:18–24.) Deputy DiPietro followed the car for between one and three miles, then pulled it over for speeding. (Id. at 245:8–24.)

The evidence established that Sgt. Madrid and Deputy Rangel, both HSU officers, came to the scene after they heard that Deputy DiPietro had stopped the car. Deputy DiPietro testified that he did not believe that he had probable cause to detain the passengers for any state crime,80 but he held all of the occupants of the vehicle pending the arrival of Sgt. Madrid and Deputy Rangel and their completion of an investigation into the immigration status of the passengers. (Id. at 256:9–18.) It took up to ten minutes for Deputy Rangel and Sgt. Madrid to arrive.81 The Court so concludes because Deputy Rangel testified that the driver would have been at the scene a total of between 30 and 40 minutes, and that the driver would have been at the scene for approximately 30 minutes after Deputy Rangel arrived. (Id. at 952:4–6.) It then took Deputy Rangel and Sgt. Madrid, operating in tandem, approximately 30 minutes to conduct their investigation into the immigration status of the three passengers that were in the car before placing the passengers under arrest. (Id. at 952:9–11.) Deputy DiPietro then released the driver. (Id. at 246:6–8.)

Upon arrival, Deputy Rangel, who had no reason to believe that the passengers had violated any state law accordingly to his own testimony, asked the passengers in the vehicle for their identification.82 (Id. at 910:3–20.) Deputy Rangel and Sgt. Madrid began questioning the passengers. Sometime thereafter they received from Mr. Ortega–Melendres his B–1/B–2 visa.

They may have also received from him his valid I–94 form.83 (Id. at 910:19–25.) At some point, after examining the documentation provided by Ortega–Melendres and the information provided by his fellow passengers, Deputy Rangel determined to *881 arrest the Hispanic passengers. He handcuffed them and arranged for their transportation to ICE. (Id. at 915:5–7.)

Neither Deputy Rangel nor Deputy Madrid ever spoke to the driver. Deputy DiPietro alone had contact with him. (Id. at 952:14–15, 246:20–25, 247:23–24.) Deputy Rangel testified that he never spoke with the driver because it was not HSU's job to clear the driver. (Id. at 910:11–18.) Although Deputy DiPietro vacillated several times in his testimony, and was confronted with contrary testimony from his deposition, the Court ultimately credits Deputy DiPietro's testimony that he held the driver until HSU had completed its investigation. Therefore, 40 minutes after the initial stop, after the investigation of the vehicle's passengers was complete and the HSU had determined to detain the passengers, Deputy DiPietro gave the driver a verbal warning and let him go. (Id. at 246:11–16.) Yet, as the stop of Mr. Vasquez demonstrates, it would only have taken approximately four minutes to issue a warning to the driver. That Deputy DiPietro retained the driver until the investigation of the passengers was complete does not establish that it would have reasonably taken forty minutes to give the driver an oral warning for speeding.

A brief review of the arrest reports shows that a great number of the arrests during the saturation patrols involved the arrest of multiple passengers during a stop when drivers received only a traffic warning or citation. In many such cases, merely investigating the identities of the passengers would

have dwarfed the amount of time necessary to issue a traffic citation. For example, during the first day labor operation at Cave Creek, Deputy DiPietro issued only warnings to both drivers he stopped. As with the driver of the Ortega–Melendres vehicle, Deputy DiPietro also issued only a traffic warning to the second driver he stopped on that day. There were, however, six passengers who were investigated and arrested during that stop. (Ex. 126.) The Court finds that it would have taken longer than 40 minutes, and certainly longer than four, for the MCSO officers to investigate the identities of those six passengers.

Similarly, during the balance of the day labor operations, and apparently the small-scale saturation patrols, many of the immigration arrests arose from traffic stops during which multiple passengers were arrested. (Exs. 76, 80, 81, 108, 112, 114, 117, 119, 120, 123, 125, 129, 131, 175, 286.) Based on the Ortega–Melendres stop, it would take three deputies approximately 40 minutes to issue a citation or a warning to the driver and investigate the identity of three passengers who did not have ready identification in their possession. Thus, the Court finds that many of the traffic stops conducted during those operations would have taken around 40 minutes.

There was, however, additional evidence about how much time it takes to investigate the identity of a passenger. Deputies Rangel and Armendariz both testified about the process. As discussed above, they testified that MCSO deputies ask all passengers for identification during every traffic stop. If an occupant provides them with identification they run the identification through the standard database accessible from their patrol vehicles. If a passenger provides no identification, they next ask the passenger to provide his or her name and date of birth. They then

run the provided name and date of birth in the standard database.

Deputy Rangel testified that if the standard MVD database contained no information concerning a person with that name and date of birth, he returns and asks the vehicle's occupant(s) for another form of identification and/or asks questions concerning *882 their identity and status. (Tr. at 946:5–9.) If he received no further identification, and Deputy Rangel was on a saturation patrol, he would then arrest the person for an immigration violation. (Id. at 947:2–20.) Since the termination of MCSO's 287(g) authority, when he encounters an individual who he suspects is undocumented but he has no basis to take into custody for violation of a state crime, he takes that person into MCSO custody, pending their transfer to ICE. (Id. at 958:23–959:7.)

Deputy Armendariz testified that if the database accessible from his patrol vehicle provided no information on a person with the name and date of birth supplied, he then takes the person into custody until their identity could be ascertained. (Id. at 1544:7–9, 1585:7–1586:12.) In such a circumstance, he accesses other databases that may or may not be available through the MVD database such as the JWI, NCIC, and ACIC. (Id. at 1520:25–1524:4.) If these databases are not accessible to him from his patrol vehicle, or if, for other reasons it would be beneficial to have dispatch run the searches, he contacts dispatch and has dispatch run the supplied identity through other databases, including PACE—a system maintained by the City of Phoenix. (Id. at 1526:21–24.) He acknowledged that such a process takes time, and it would be impossible to calculate an average. Nevertheless, he testified that such an inquiry takes a while because the dispatchers-the dispatcher that we

have that we run on that particular channel runs information for the entire county ... You have to base it on the fact that when-we're on the satellite or we're on a mobile system and the computers run real slow. There are a lot of cases where DPS, the DPS system itself is down and the queue is down.

There is when we go to our info channel and we run them on our information channel where the dispatcher is backlogged because, as I said, she runs—it's one dispatcher for the entire county, whoever transfers over to that channel that needs information. And also I request a PACE check, which is through the City of Phoenix. So she has to call—the dispatcher that is to contact the City of Phoenix for more information. (Id. at 1525:21–23, 1526:12–24.)

Deputy Armendariz acknowledged that while he is waiting for a response, he returns to the vehicle and asks further questions to the passenger, or requests other forms of identification including the passenger's social security number. (Id. at 1525:4–14, 1585:23–1586:12.) He further noted, consistent with other testimony, that such inquiries can prolong the stop because Hispanic surnames are often hyphenated, requiring a check of each permutation of the same name. (Id. at 1508:4–1509:3, 1527:13–18.)

Deputy Armendariz does not believe that it has ever taken him more than a half hour to run such a database check, but acknowledged that an identification check would run approximately fifteen minutes. (Id. at 1590:5–12.) Deputy Armendariz then twice confirmed that it is still his practice to go through this process of investigating passengers during all of his stops. (Id. at 1526:1–3, 1546:3–17.) After the lunch break in his testimony, however, he seemed to contradict himself in part when he testified

that now that he does not have 287(g) authority, if he is unable to figure out a passenger's identity he just lets them go. (Id. at 1589:12–18.) The Court finds that such testimony is not credible especially in light of the LEAR policy, discussed below, which would require Deputy Armendariz to detain such *883 persons if he develops reasonable suspicion that they are not in the country legally.

As the investigation of Deputy Rangel and Sgt. Madrid into the identity of Mr. Ortega–Melendres and his fellow passengers demonstrates, investigating the identity of multiple persons per stop extends the duration of the time that it takes to conduct such stops, even when multiple officers are conducting the inquiries.

While writing a citation would take somewhat longer than issuing a warning, it would not take considerably longer. Many cases suggest that such stops last around ten minutes. See, e.g., Illinois v. Caballes, 543 U.S. 405, 406, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) (noting that the issuance of a warning ticket, arrival of another officer, tour around the car with a narcotics-detection dog, search of the trunk and resulting arrest took "less than 10 minutes" in total). Yet, Deputy DiPietro estimated that it typically could take up to twenty minutes to issue a citation. (Tr. at 297:16–22.) Even accepting this higher estimate, many of the arrests during saturation patrols resulted in the arrest of multiple passengers, and thus their investigation would have taken significantly more time than it would have taken to issue a ticket to the driver. Although most arrest reports of the operations show that a traffic stop resulted in at most a citation to the driver, during a few the driver was arrested on criminal charges. Even so, the majority of the evidence indicates that investigating the identities of

passengers occurred frequently during MCSO operations and that such investigations took significantly longer than it would take to warn or cite the driver. Thus, the Court finds that for most stops conducted by the MCSO, the length of the stop lasted the time it took to investigate the passengers rather than to deal with the traffic citation.

11. Some MCSO deputies claim to conduct identity checks on all vehicle occupants. Due to MCSO policy that allows officers to consider race in determining whether to initiate an immigration investigation, vehicle occupants who are Latino are more likely to have their identity checked as a matter of operational procedure and policy.

The MCSO acknowledges that there is no legal requirement in this state that passengers in vehicles carry identification. Nevertheless, Sheriff Arpaio stated in a national press interview that when persons were passengers in a vehicle with a driver stopped on criminal suspicion, MCSO deputies were entitled to investigate the passengers in the vehicle as a matter of course. (Ex. 410a (stating that if unauthorized aliens were passengers in a vehicle with a driver stopped for an immigration violation or other crime, "we have the right to talk to those people").) Some MCSO witnesses at trial, including Deputy Armendariz, testified that, as a matter of continuing practice, MCSO officers investigate the identity of all passengers in every vehicle they stop regardless of whether the stop was made during a saturation patrol. (Tr. at 1518:14–19, 1543:4–12 (Deputy Armendariz testifies that its typical for all law enforcement officers to ask all passengers to volunteer their identification after pulling over a car, and he always does this whether it's a routine traffic stop or a saturation

patrol), 923:12–14, 931, 944:9–16 (Deputy Rangel testifies that he asks everybody in a vehicle for identification as a matter of habit, and not only while conducting saturation patrols).) Further, Chief Click stated in his report that it was his understanding that "all passengers in vehicles that had been stopped would be contacted" because of the zero tolerance policy. (Ex. 1070 at 46.) At least some *884 deputies understood the purpose of saturation patrols to be making contact with as many people as possible during the course of each traffic stop. (Tr. at 302:16–22.) Thus, many stat sheets requested the number of contacts made during patrol stops. To the extent that the deputies understood this to be the purpose of saturation patrols, they would have likely asked for the identity of every person stopped as a matter of course, as Deputy Armendariz suggested.

Regardless of whether individual officers routinely investigated the identity of every person in every car they stopped, Sgt. Madrid testified that officers participating in day labor operations were instructed that when they responded to a vehicle that had been stopped, they were to investigate all passengers for immigration violations. (Id. at 1144:1–14.) As set forth above, investigating passengers' identities was a basic element of a day labor operation. None of the reports made any attempt to set forth reasonable suspicion to investigate the passengers once a stop was made.84 Rather, they confirm that the investigation of the passengers' identifies followed the traffic stop as a matter of course. (Exs. 123, 129, 131.) Three of the four reports state: traffic stops [were] made from UC [undercover] vehicles relaying that day laborers were picked up from the area. Once the pick up vehicle was located by MCSO marked patrol units, detectives would establish probable cause for a traffic

stop. Once the vehicle was stopped HSU detectives would interview the subjects in the vehicles in reference to their legal status to be in the US.

(Exs. 123, 129, 131; Tr. at 1144:1–8; 1151:4–11.)

As with the reports of the day labor operations, the great majority of the small-scale saturation patrol reports, especially those with high arrest ratios, set forth for every traffic stop that resulted in the arrest of an unauthorized alien: (1) the basis for the traffic stop, (2) whether and for what the driver was cited and/or arrested, (3) the number of unauthorized aliens arrested during the stop, and (4) the number of persons, including unauthorized aliens, that were arrested on state charges as opposed to federal immigration charges. It is clear from these arrest reports that officers investigated passengers because many of the stops resulted in multiple arrests per stop. In any small-scale patrol where the deputy developed reasonable suspicion during the traffic stop that another state crime was being or had been committed, the MCSO arrested the vehicle's occupant on that basis. The reports, however, do not state any observations made after the vehicle was pulled over that would provide reasonable suspicion that the passengers were in the country without authorization.

The arrest reports for large-scale saturation patrols confirm that separate probable cause or reasonable suspicion as to passengers was not considered a necessity prior to investigating their identities. Those reports contain a column listing the probable cause that lead to each arrest. Again, in almost all cases involving passengers who were arrested, the only probable cause listed is that the person was a passenger in a vehicle stopped for a traffic violation. (Exs. 79, 82 (particularly the arrests of Deputies Ruiz, Almanza, Smith, *885 Calderon,

Armendariz, Romney, Sloup and Seclacek), 90, 97 (particularly the arrests of Deputies Armendariz, Schmizer, Doyle, Beeks, Brockman, Trombi, Komoroski, Cosme, Templeton, Silva, Summers, Roughan and Rangel); 102, 111, 174, 178, 180.) Thus, as with the small-scale patrols, these arrest reports do not delineate any individualized reasonable suspicion or probable cause on which an MCSO deputy could detain a passenger or prolong a stop to investigate a passenger's authorization for being in the United States.

Based on the weight of the evidence and testimony, the Court concludes that officers in the MCSO operations frequently detained passengers to investigate their immigration status as a matter of course, whether based in part on the race of the occupants or otherwise. In some of those stops, some officers may have had an objectively reasonable suspicion with respect to individual passengers sufficient to prolong detention for a reasonable time to conduct a brief investigation. Nevertheless, MCSO practice and some of its operational procedures do not require its deputies to have such suspicion beyond the initial traffic stop or to document their bases to routinely investigate the identities of a vehicle's occupants.

12. The MCSO never made an evaluation to determine whether its saturation patrols were being implemented with racial bias.

MCSO command personnel uniformly testified that they did not conduct any sort of investigation or monitoring to determine whether the saturation patrols were being implemented in a racially-biased fashion. For example, Chief Sands testified that the

MCSO does not collect data on those people it stops or detains to determine whether officers are engaging in racial profiling.85 (Id. at 833:6–8.) Sgt. Palmer testified that if he saw that a deputy had reported that he had reasonable suspicion to justify a stop, he knew that the deputy did not engage in "racial profiling." (Id. at 724:22–725:1.) He further testified that he socializes with other officers in the MCSO off-duty, and based on knowing them socially and knowing them as well as he does, he knows that they do not engage in "racial profiling." (Id. at 778:25–779:2.) He also testified that he believes there is no need to investigate whether MCSO officers improperly use race in the course of their law enforcement duties because "quite frankly, sir, I know my brothers, and we abide by the law."86 (Id. at 779:17–18.) Because he is certain that the *886 other members of the HSU would never engage in racial profiling, Sgt. Palmer never took any action to determine whether HSU deputies engaged in racial profiling and never put any system in place to monitor for racial profiling. (Id. at 780:15–22.)

Sgt. Madrid has never reviewed his deputies' incident reports for the purpose of checking whether they are engaged in racial profiling. (Id. at 1172:12–15.) If Sgt. Madrid determined that an officer had probable cause to make a stop, he "wouldn't even suspect" that the officer had engaged in racial profiling. (Id. at 1172:20–24.) Lt. Sousa did not review citations, stat sheets, or any other documents to determine whether racial profiling was occurring in the Human Smuggling Unit because he believed that racial profiling was a "non-issue." (Id. at 1022:12–16.) Lt. Sousa is not aware of the MCSO ever disciplining an officer for racial profiling. (Id. at 1023:23–25.)

13. After the revocation of its 287(g) status, the MCSO erroneously trained all of its 900 deputies that they could enforce federal immigration law. The MCSO further erroneously trained its deputies that unauthorized presence in the country, without more, was a criminal as opposed to an administrative violation of federal immigration law. The MCSO operated under that misunderstanding during most of the period relevant to this lawsuit.

Until December 2011, the MCSO continued to operate under the erroneous premise that being an unauthorized alien in this country in and of itself established a criminal violation of federal immigration law which the MCSO was entitled to enforce without 287(g) authorization. (Tr. at 699:3–702:17.) At the time of revocation, the MCSO had approximately 100 field deputies who were 287(g) certified. (Exs. 356, 359, 360.) Shortly after the revocation of his 287(g) authority, Sheriff Arpaio decided to have all of his deputies trained on immigration law. Being so trained, the MCSO asserted, all MCSO deputies could make immigration arrests. (Exs. 359 (MCSO news release dated March 18, 2010 stating that because ICE revoked the ability of 100 287(g)-trained officers to enforce immigration law, the MCSO would now use all 900 of its deputies to enforce immigration laws in Maricopa County), 356, 358 (MCSO news release dated March 1, 2010 stating that "[t]hese arrests are a result of Sheriff Joe Arpaio's recent promise to ensure that all 900 of his sworn deputies receive training on the enforcement of illegal immigration laws"), 360, 362.)

This training erroneously instructed MCSO deputies that a person within the country without authorization was necessarily committing a federal crime, and the MCSO thus maintained the authority

to detain them for criminal violations. (Tr. at 699:3–702:17.) Further, Sheriff Arpaio gave interviews to the national and local press in which he asserted that if a person is in the country without authorization, that person has necessarily committed a criminal offense. (Id. at 362:17–21 ("[T]hey did commit a crime. They are here illegally.").) Sgt. Palmer continued to provide such instruction and training until December 2011, when this Court enjoined the MCSO from detaining persons on the belief, without more, that those *887 persons were in this country without legal authorization. Ortega–Melendres, 836 F.Supp.2d at 994.

Moreover, the Sheriff continued to run numerous saturation patrols focused on arresting unauthorized immigrants generally. (Exs. 350 ("[D]eputies turned over a total of 19 of the 30 suspected illegal aliens who were not charged for any state violations to Immigration and Custom Enforcement officials without incident."); 358–62 (emphasizing the number of illegal immigrants arrested in these operations).) In such operations, he continued to arrest and turn over to ICE the unauthorized aliens that his deputies arrested during these patrols. (Ex. 360 (MCSO news release noting that 47 of 64 people arrested in a post-revocation saturation patrol were illegal aliens. 27 of those 47 were arrested on state charges with the remainder being turned over to ICE).)

14. When enforcing state laws related to immigration the MCSO continues to use race as an indicator, among others, of unauthorized presence, as it did in its previous operations.

At trial, Sheriff Arpaio testified that the loss of 287(g) authority did not affect how the MCSO conducted its immigration related operations, including the saturation patrols. (Tr. at 469:23–470:5.) He has continued to enforce "the immigration laws, human smuggling, employer sanction" as he did previously. (Id. at 473:23–474:1.) The Sheriff maintains the right and intention to conduct such operations in the future. (Id. at 469:20–470:2, 473:5–474:7, 474:20–24.) Sheriff Arpaio testified that the last saturation patrol the MCSO conducted prior to trial occurred during October 2011 in southwest Phoenix. (Id. at 474:8–13.) He testified that although the MCSO had not conducted a saturation patrol in the eight months prior to trial, he has not re-evaluated the propriety of the patrols based on the current litigation or other litigation. (Id. at 474:14–475:1.) Further, the MCSO continues to make immigration arrests. As the Sheriff testified, they arrested about 40 unauthorized persons in Maricopa County in the two weeks prior to trial. They charged those they could with state law violations and they successfully turned the rest over to ICE. (Id. at 503:3–11.) The Sheriff reaffirmed that the MCSO "will continue to do all that we can to reduce the number of illegal aliens making their way into the United States and Maricopa County." (Id. at 336:23–337:8.)

Several officers and deputies likewise affirmed that, essentially, nothing has changed. Chief Sands testified that he does not believe that the revocation of 287(g) authority had any impact on MCSO's ability to conduct saturation patrols or Human Smuggling operations. (Id. at 845:14–22, 837:6–7.) Chief Sands testified that, the MCSO will "continue enforcement of immigration issues." (Id. at 837:6–7.)

Sgt. Madrid also testified that ICE's termination of the MCSO's 287(g) authority does not affect the MCSO's ability to conduct immigration enforcement operations because a person's immigration status is relevant to determining whether there has been a violation of the Arizona state crime of human smuggling, or possibly other state laws related to immigration. (Id. at 1157:17–1158:6.) As discussed above, Sgt. Madrid testified that, in enforcing the state human smuggling statute, MCSO officers continue to consider race as one factor among many "in deciding whether someone is suspected of being an undocumented immigrant in a smuggling load." (Id. at 1164:4–12.) In reviewing a report prepared by an MCSO deputy under his supervision in which the deputy stated that he was suspicious that passengers in a vehicle were unauthorized immigrants *888 based on, among other factors, "[t]he Hispanic decent [sic] of his passengers the pungent body odor and the lack of luggage for traveling," (Ex. 157 at MCSO 024667), Sgt. Madrid stated that he would not conduct any corrective follow up on the officer who submitted it based on the use of race as a factor in forming his original suspicion, (Tr. at 1170:22–1171:3.)

Sgt. Palmer similarly testified that MCSO policy allows officers to "decide to initiate an investigation during a stop based on race or ethnicity, among other factors." (Id. at 717:2–4.) He specifically testified a passenger's race could be used to determine whether the vehicle was a human smuggling load. (Id. at 721:18.) He stood by his sworn deposition testimony that he believed a subject's race was one relevant factor among others that officers could use to develop reasonable suspicion that the subject was unlawfully present in the United States. (Id. at 726:1–15.) Further, when presented with the same report that

Sgt. Madrid had reviewed in which a deputy described the suspect's Mexican descent as a basis, among others, for his belief that the suspect was in the country illegally, Sgt. Palmer stated that "[a]mong the other indicators listed there I don't see a problem with that, no." (Id. at 721:1–2.)

Finally, Deputy Rangel testified that he currently uses the 287(g) factors to determine whether he has reasonable suspicion that someone is unlawfully present. (Id. at 956:25–957:5.)

15. MCSO deputies continue to follow the LEAR policy, which directs them to detain persons whom they cannot arrest on state charges, but whom they believe to be in the country without authorization, pending direction from, or delivery to, ICE.

The MCSO continues to arrest those it believes to be unauthorized aliens, charges those it can on state charges, and turns the rest over to ICE. At trial, Sheriff Arpaio testified that "in the last two weeks we've made over 40 arrests of illegal aliens coming into our county, and a few we did not have the state charge, including some young children, and ICE did accept those people." (Id. at 503:3–6.) He specified that the state charge to which he referred was the Arizona Human Smuggling Act and then noted that when the MCSO arrested unauthorized aliens that could not be charged under the Act, "we haven't had any problem yet turning those that we cannot charge in state court over to ICE." (Id. at 503:10–11.) Although the LEAR policy as written does not require ICE to accept such persons, according to Sheriff Arpaio, there is no problem with ICE doing so. Nevertheless, the Sheriff has apparently stated in press interviews that if he encounters a problem with ICE agreeing to accept the

unauthorized aliens he arrests, the Sheriff will have the MCSO transport such persons back to Mexico. (Ex. 348.)

Similarly, according to Chief Sands under MCSO's current practice "[i]t's the ones that you possibly can't determine there's enough evidence to charge them with the state law, and then you would turn them over to ICE." (Id. at 845:15–17.)

Deputy Rangel similarly testified that MCSO initially "take[s] into custody" and then turns over to ICE "an individual that you suspect is an illegal immigrant but for which you do not have probable cause of a state crime." (Id. at 958:23–959:14.) He repeated that the individual would be "detained by the MCSO until the MCSO ... receives a response from ICE as to whether ICE wants the individual or wants them to be released." (Id.)

Likewise, Lt. Sousa testified at trial that after the Department lost its 287(g) authority, *889 its officers continued to detain people whom they believed to be unlawfully present in the country and "make that phone call to ICE if they didn't have the state charge." (Id. at 1007:9–11.)

Sgt. Madrid also testified that after the MCSO lost its 287(g) authority, MCSO deputies would continue to arrest persons that they believed were present without authorization and turn such people over to ICE. (Id. at 1161:14–19 (testifying that his practice was to detain a suspected illegal immigrant and "make a call to ICE and let them make that determination"), 1226:8–23 (testifying that, after the loss of 287(g) authority, HSU continued to operate in the same way except that they would have to call ICE after detaining a suspected illegal immigrant rather

than arresting that person with their own 287(g) authority).)

Sgt. Palmer testified that MCSO officers who encounter people they believe are unlawfully present in the country "ha[ve] to wait for contact with an ICE agent." (Id. at 698:8–11.) MCSO has drafted, placed in effect, and trained all of its deputies on this policy. (Id. at 1055:14–24, 1056:9–13, 1070:1–10, 1076:11–18.) Deputy DiPietro testified that he received "some online training" on the effect of the loss of 287(g) authority, and that "we were to call ICE, because we didn't have our 287(g) any longer." (Id. at 291:22–23.) Deputy Armendariz stated that it is his current practice to conduct "investigative detentions" of vehicle passengers to determine whether they are in the country legally. (Id. at 1519:13–15; 1544:7–9, 1585:8–1586:9.) He also testified that if the database accessible from his patrol vehicle provided no information on a person with the name and date of birth supplied, he then takes the person into custody until their identity could be ascertained. (Id.)

The Court thus concludes that it is current MCSO policy to detain people on the reasonable suspicion, without more, that they are not legally present in the country while MCSO deputies attempt to or do contact MCSO field officers and/or ICE personnel to investigate the detainee's alienage. (Id. at 1590:1–12, 959:3–14, 503:3–11, 845:7–22, 1161:7–19, 1162:6–22, 1205:10–1206:9, 1226:5–14, 958:23–959:2, 1055:14–24, 1056:9–13, 1070:1–10, 1076:11–18.)

16. In following its LEAR policy, the MCSO continues to use race as an indicator of unauthorized presence. Pursuant to its LEAR policy, MCSO deputies continue to apply the indicators of unlawful presence that were

identified in the 287(g) training their officers received from ICE to determine whether there is reasonable suspicion that someone is in the country without authorization. Lt. Sousa stated that in implementing the LEAR policy, the formerly certified 287(g) officers "still had that training, so they would definitely know the indicators." (Id. at 1007:9–10.) Sgt. Madrid testified that agents continue to look for indications of unauthorized presence during stops and that they are trained to use race as one of those indicators. (Id. at 1162:6–1164:12.) Deputy Rangel testified that he currently uses the 287(g) factors to determine whether he has reasonable suspicion that someone is unlawfully present. (Id. at 957:1–5.) The MCSO therefore continues to pursue the same policies and practices it did before it lost 287(g) authority.

17. The MCSO arrests and/or detains all persons it believes to be unauthorized, and it remains the regular practice of some of MCSO deputies to investigate all the occupants of every vehicle they stop.

The MCSO continues to investigate the identity and immigration status of persons it detains during vehicle stops. (Id. at 503:9–12 (Arpaio), 845:14–22 (Sands), *890 1007:9–11 (Sousa), 1226:8–23 (Madrid), 698:8–11 (Palmer), 958:23–959:7 (Rangel) 1526:1–3, 1546:3–17 (Armendariz), 291:22–23 (DiPietro).) Deputy Armendariz twice confirmed that it is still his practice to go through this process of investigating passengers during all of his stops. (Id. at 1526:1–3, 1546:3–17.)

Sgt. Madrid testified that agents continue to look for indications of unauthorized presence during stops and that they are trained to use race as one of those indicators. (Id.)

Further, once a vehicle has been stopped, MCSO policies allow MCSO deputies to consider the Latino ancestry of a vehicle's occupants, as one factor among others, in deciding whether to inquire into the immigration compliance of persons stopped.

CONCLUSIONS OF LAW

I. PROPRIETY OF INJUNCTIVE RELIEF

In this action, Plaintiffs seek injunctive relief only. To obtain such relief, Plaintiffs have the burden of establishing that, not only have they been wronged, but there is "a sufficient likelihood that [they] will again be wronged in a similar way." City of Los Angeles v. Lyons, 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). To the extent the MCSO has ongoing policies or practices that violate the constitutional protections of the Plaintiff class, such policies or practices constitute a sufficient possibility of ongoing harm to support an injunction. See LaDuke v. Nelson, 762 F.2d 1318, 1326 (9th Cir.1985); Thomas v. Cnty. of L.A., 978 F.2d 504, 508 (9th Cir.1992); Walters v. Reno, 145 F.3d 1032, 1048 (9th Cir.1998). When it had 287(g) enforcement authority, the MCSO implemented operations, policies and practices to take full advantage of its expanded authority to enforce federal administrative immigration regulations and enhance the efficiency of its enforcement operations against unauthorized aliens. Because the federal government has terminated the MCSO's 287(g) authority, and because Plaintiffs seek injunctive relief only, the MCSO's policies, operations, and practices adopted to implement its 287(g) authority would not otherwise be relevant except that, as was made clear by the testimony of the Sheriff and other members of the MCSO command staff at trial, nothing has

changed: the MCSO both uses these same policies, operations and practices, and claims the right to continue to use them in its enforcement of both immigration-related state law and its LEAR policy.

Plaintiffs challenge a number of aspects of the policies, operations and practices that the MCSO has used and continues to use. The MCSO stipulated that Sheriff Arpaio is its ultimate policy maker. A policy, endorsed by an officer who claims he has final decisionmaking authority, combined with statements by officers who are responsible for implementing the policy, provides evidence that the MCSO made "a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Meehan v. Cnty. of Los Angeles, 856 F.2d 102, 107 (9th Cir.1988) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 483, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (emphasis in original)).

Thus, to the extent such practices violate the constitutional rights of the Plaintiff class, Plaintiffs are entitled to injunctive relief. See LaDuke, 762 F.2d at 1326 (holding that plaintiffs "do not have to induce a police encounter before the possibility of injury can occur" because stops *891 are the result of an "unconstitutional pattern of conduct"); Thomas, 978 F.2d at 508 (stating that injunctive relief is appropriate when plaintiffs show that police misconduct "is purposefully aimed at minorities and that such misconduct was condoned and tacitly authorized by department policy makers").

To the extent the MCSO asserts that, despite any potential future harm to the certified class resulting from its policies, Plaintiffs cannot prevail because none of the class representatives

demonstrated at trial that they suffered personal harm, its argument is not well-founded. It is true that to gain class certification, named plaintiffs must "allege and show that they personally have been injured." Warth v. Seldin, 422 U.S. 490, 502, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). However, when the claims of named plaintiffs are not proven at trial, unnamed class members may be awarded relief so long as a "controversy" still exists between the unnamed class members and the defendants. Sosna v. Iowa, 419 U.S. 393, 402, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). ("The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot."); see also Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 753, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (granting relief to class members in multiple subclasses even though the named class representative's claim failed, because "[t]he unnamed members of the class ... have such a personal stake in the outcome of the controversy ... as to assure that concrete adverseness") (internal quotations and citation omitted). The evidence demonstrates that such a controversy exists between Defendants and unnamed class members here.

At any rate, as discussed in greater detail below, Mr. Ortega–Melendres's Fourth and Fourteenth Amendment claims succeed, so he "personally [has] been injured" and is an appropriate class representative. Warth, 422 U.S. at 502, 95 S.Ct. 2197.

II. SPECIFIC CONCLUSIONS

A. The MCSO is enjoined from enforcing its LEAR policy.

[1] [2] [3] Mere unauthorized presence in this country, without more, is not a criminal offense. It is true that use of unauthorized methods of entry into this country generally constitutes at least misdemeanor or petty criminal violations of federal immigration law. See, e.g., 8 U.S.C. § 1325 (2005) (making it a federal misdemeanor to enter or attempt to enter the United States at "any time or place other than as designated by immigration officers."). However, aliens may enter the country legally, but become subject to removal either by staying longer than authorized or otherwise acting in excess of their authorization. Although a number of such aliens are here without or in excess of authorization, they have only committed a civil, as opposed to a criminal, violation of federal law. As the Supreme Court recently explained "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States. If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent." Arizona v. United States, —— U.S. ——, —— –, 132 S.Ct. 2492, 2505, 183 L.Ed.2d 351 (2012) (citing INS v. Lopez–Mendoza, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984)).

This Court preliminarily enjoined the MCSO on December 23, 2011 from detaining persons based only on a suspicion that they were in this country without authorization *892 in the absence of additional facts. The MCSO appealed the preliminary injunction to the Ninth Circuit. In affirming the preliminary injunction, the Ninth Circuit reiterated these principles:

We have long made clear that, unlike illegal entry, mere unauthorized presence in the United States is not a crime. See Martinez–Medina v. Holder, 673 F.3d 1029, 1036 (9th Cir.2011) ("Nor is there any other federal criminal statute making unlawful presence in

the United States, alone, a federal crime, although an alien's willful failure to register his presence in the United States when required to do so is a crime, and other criminal statutes may be applicable in a particular circumstance.") (citation omitted); Gonzales v. City of Peoria, 722 F.2d 468, 476–77 (9th Cir.1983) (explaining that illegal presence is "only a civil violation"), overruled on other grounds by Hodgers–Durgin [v. de la Vina], 199 F.3d 1037 [(9th Cir.1999)]. The Supreme Court recently affirmed that, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." Arizona v. United States, 132 S.Ct. at 2502.

Ortega Melendres v. Arpaio (Ortega Melendres II), 695 F.3d 990, 1000 (9th Cir.2012).

[4] As demonstrated by the testimony of every MCSO officer at trial, the MCSO's LEAR policy directs its deputies to detain persons believed to be unauthorized aliens but whom they cannot arrest on state charges. The focus of the LEAR policy on detaining any removable alien as opposed to aliens who have committed criminal offenses necessarily means that the MCSO is detaining persons based only on its suspicion that they have committed a civil infraction of federal immigration law. As a local law enforcement agency without 287(g) authority, the MCSO has no statutory, inherent, or constitutional authority to detain people for civil violations of federal immigration law. See Martinez–Medina, 673 F.3d at 1036 ("[U]nlike illegal entry, which is a criminal violation, an alien's illegal presence in the United States is only a civil violation.") (citing Gonzales, 722 F.2d at 476).

As the Supreme Court explained in Arizona, removable aliens are subject to administrative removal proceedings that are civil in nature. 132 S.Ct. at 2499. Thus, "Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances."87 Id. at 2507. After the termination of its 287(g) authority, the MCSO offers no legal authority that would place it, or its LEAR policy, in one of those circumstances. When the MCSO merely suspects a person of being in the country without authorization, it does not, in the absence of additional facts that would make the person guilty of an immigration-related crime, have a basis to arrest or even engage in a brief investigatory detention of such persons.

[5] In affirming this Court's preliminary injunction, not only did the Ninth Circuit establish that the MCSO has no power to arrest such persons under such circumstances, it made clear that the MCSO has no power to detain them to investigate their immigration status. It is the existence of a suspected crime that gives a police officer the right to detain a person for the minimum time necessary to determine whether a crime is in progress. *893 "[P]ossible criminality is key to any Terry investigatory stop or prolonged detention.... Absent suspicion that a 'suspect is engaged in, or is about to engage in, criminal activity,' law enforcement may not stop or detain an individual." Ortega Melendres II, 695 F.3d at 1000 (quoting United States v. Sandoval, 390 F.3d 1077, 1080 (9th Cir.2004)).88

In the absence, then, of any reasonable suspicion of a possible crime, there is no basis on which the MCSO can make an investigative detention—let alone an arrest—based only on the belief that someone

is in the country without authorization. See also Arizona v. Johnson, 555 U.S. 323, 326, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009) (holding that an investigatory stop is justified at its inception only when an officer "reasonably suspects that the person apprehended is committing or has committed a criminal offense").

The MCSO's LEAR policy is not saved by that part of the Supreme Court's decision in Arizona that upheld, as against a preemption challenge, a provision in SB 1070 which provides that, "[f]or any lawful stop, detention or arrest made by a law enforcement official ... a reasonable attempt shall be made, when practicable, to determine the immigration status of the person." A.R.S. § 11–1051(B); see Arizona, 132 S.Ct. at 2515–16. The threshold requirement is a "lawful" stop or detention. As explained above, any stop or detention based only on a reasonable suspicion that a person is in the country without authorization, without more facts, is not lawful. Thus, the LEAR policy does not fall under the ambit of A.R.S. § 11–1051(B).

Further, while 8 U.S.C. § 1357(g)(10) does not require a 287(g) agreement for a local law enforcement agency to report "that a particular alien is not lawfully present in the United States," or to "cooperate in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," such statutory language does not negate constitutional guarantees or authorize local law enforcement agencies to unilaterally arrest such individuals. As the Supreme Court said in discussing this statutory authorization, "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." Arizona, 132 S.Ct. at 2509. Thus, in describing the cooperation anticipated by the statute, the Supreme Court observed:

There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government. The Department of Homeland Security gives examples of what would constitute cooperation under federal law. These include situations where States participate in a joint task force with federal officers, provide operations support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities.... State officials can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody.... But, ... unilateral state action to detain ... *894 goes far beyond these measures, defeating any need for real cooperation.

Id. at 2507.

The LEAR policy requires the arrest of the subject encountered by the MCSO. As Sheriff Arpaio testified, the MCSO continues to arrest all persons that it comes across that it believes to be unauthorized aliens. When the MCSO finds some aliens that it cannot charge with a violation of state law, it turns them over to ICE (and has done so consistently without problem). Of course, his testimony highlights the fact that once such persons come into the custody of the MCSO, they are not free to leave and are hence under arrest. His testimony in this respect is supported by the similar testimony of a number of other MCSO witnesses. Chief Sands, Deputy Rangel, and others testified that such persons are taken into custody first, and only those that cannot be charged on state charges are then turned over to ICE. Such persons are investigated and apprehended upon the

prerogative of the MCSO and not at the direction of ICE. And such apprehensions occur despite the lack of any authority on the part of the MCSO to investigate or arrest for civil immigration violations.

Even if this Court accepted the MCSO's argument that the application of the LEAR policy involves only a detention of the subject pending contact with ICE, it would not make the detention constitutional. In the absence of a reasonable suspicion that a crime has been committed, the MCSO lacks authority to engage in a detention of someone pending such contact. As stated above, a law enforcement officer must suspect that an individual is "engaged in, or is about to engage in, criminal activity," before he or she can stop or detain that individual. Ortega Melendres II, 695 F.3d at 1000. To the extent the MCSO actually follows the written requirements of the LEAR policy, it requires the MCSO deputy to summon an MCSO supervisor to the scene and requires the supervisor to obtain certain information, contact ICE, pass along the information to ICE, await an ICE response, and/or deliver the arrestees to ICE. This inevitably takes time in which the subject is not free to leave regardless of whether the detention is officially termed an arrest. If the cooperation clause in 8 U.S.C. § 1357(g)(10) were to be read broadly enough to countenance such arrests as cooperation, there would be no need for the 287(g) authorization and training which the same statute authorizes. Cf. Christensen v. C.I.R., 523 F.3d 957, 961 (9th Cir.2008) (stating that courts should avoid interpretations "that would render ... subsections redundant").

In the MCSO's operations, there appears to be no practical difference between how it presently implements the LEAR policy and how it performed when it had full 287(g) authority. Even after the

revocation of its 287(g) authority, the MCSO continues to look for indications of unauthorized presence using its 287(g) training, which taught officers that race could be used as an indicator. The MCSO further continues to take credit in the press for unauthorized aliens that it arrested but could not charge and thus turned over to ICE pursuant to its LEAR policy.

The MCSO's LEAR policy is not authorized by Arizona v. United States, 8 U.S.C. § 1357(g)(10), or any other case or statute. The policy is further in excess of the MCSO's constitutional authority because the policy's focus on removable aliens as opposed to aliens who have committed criminal offenses violates the strictures against unreasonable seizures set forth in *895 the Fourth Amendment.89 The Court therefore concludes as a matter of law that when MCSO detains a vehicle's occupant(s) because a deputy believes that the occupants are not legally present in the country, but has no probable cause to detain them for any other reason, the deputy violates the Fourth Amendment rights of the occupants. See Arizona, 132 S.Ct. at 2509 ("Detaining individuals solely to verify their immigration status would raise constitutional concerns.") (citation omitted). The Court further concludes, as a matter of law, that the MCSO has violated the explicit terms of this Court's preliminary injunction set forth in its December 23, 2011 order because the MCSO continues to follow the LEAR policy and the LEAR policy violates the injunction. See Ortega–Melendres v. Arpaio (Ortega–Melendres I), 836 F.Supp.2d 959, 994 (D.Ariz.2011). The MCSO is thus permanently enjoined from enforcing its LEAR policy with respect to Latino occupants of motor vehicles in Maricopa County.

B. The MCSO is enjoined from using Hispanic ancestry or race as any factor in making law enforcement decisions.

The day labor, small-scale, and large-scale saturation patrols either incorporate racial considerations into their operational structure, as is the case with day labor operations, or the MCSO explicitly allows its deputies to consider the race of subjects as one factor among others in forming reasonable suspicion that the subjects are unauthorized aliens. The MCSO presently claims the right to enforce state law with the same operations guided by the same policies that it used to enforce federal immigration law. Sheriff Arpaio and others specifically claim that the Arizona Human Smuggling Act and the Employer Sanctions laws afford the MCSO the right to pursue unauthorized aliens. Because they follow the same policies and procedures as they did previously, the MCSO and its officers continue to consider race as an indicator of illegal presence in enforcing state laws related to immigration, and in enforcing the MCSO's LEAR policy.

There are, however, at least two problems with the methods in which the MCSO pursues these enforcement prerogatives that render those methods unconstitutional.

1. The MCSO's use of Hispanic ancestry or race as a factor in forming reasonable suspicion that persons have violated state laws relating to immigration status violates the Fourth Amendment.

"The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall

short of traditional arrest." United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (citing Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). However, the Fourth Amendment is satisfied if an officer's action is supported by "reasonable suspicion supported by articulable facts that criminal activity may be afoot." United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (citing Terry, 392 U.S. at 30, 88 S.Ct. 1868).

During a so-called "Terry stop," an officer's reasonable suspicion that a person *896 may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. Terry, 392 U.S. at 24, 88 S.Ct. 1868. Under Ninth Circuit law, the race of an individual cannot be considered when determining whether an officer has or had reasonable suspicion in connection with a Terry stop, including for immigration investigation. See, e.g., Montero–Camargo, 208 F.3d 1122 (9th Cir.2000); (Doc. 530 at 23 ¶ c). Nevertheless, analysis under the Fourth Amendment, including that relating to reasonable suspicion, is wholly objective, and "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." See Whren v. United States, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

All parties to this action stipulated as a matter of law that "[r]ace cannot be considered as a factor for reasonable suspicion." (Doc. 530 at 23 ¶ c.) The parties' stipulation comes from the following legal background. In Brignoni–Ponce, 422 U.S. at 881–82, 95 S.Ct. 2574, the Supreme Court held that the Border Patrol had to have reasonable suspicion that a person was in the country without authorization prior to stopping a

vehicle to question its occupants about their immigration status. Even then, absent consent or the development of probable cause, it could only make a brief Terry-like stop to conduct a quick and limited inquiry. In that case, the Court further held that the Hispanic race of the occupants of a vehicle being driven in close proximity to the border did not, without more, provide reasonable suspicion to stop a car at all.

> Even if [the officers] saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican–Americans to ask if they are aliens. Id. at 886–87, 95 S.Ct. 2574. Brignoni–Ponce thus generally stands for the proposition that a person's Mexican ancestry, even when that person is in proximity to the border, does not provide sufficient reasonable suspicion, on its own, to justify even a brief investigative detention. However, the opinion's observation in dicta that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" has been interpreted by ICE to mean that a person's Hispanic appearance can be used as one amongst a number of factors in establishing the requisite quantum of reasonable suspicion to justify a brief investigative detention. The 287(g) training manual for January 2008 that was used by ICE in

training the MCSO cites to Brignoni–Ponce for the proposition that "apparent Mexican ancestry was a relevant factor" that could be used in forming a reasonable suspicion that a person is in the country without authorization but standing alone was insufficient to stop the individuals. (Ex. 68 at 7.)

ICE failed to take into account that its interpretation of the Brignoni–Ponce dicta in this respect was rejected by the en banc Ninth Circuit 13 years ago in United States v. Montero–Camargo, 208 F.3d 1122 (9th Cir.2000) (en banc). In Montero–Camargo, the Ninth Circuit held, at a minimum, that in locations where a significant *897 portion of the legal resident population is of Hispanic ancestry, Hispanic descent was not a permissible factor to consider, either alone or in conjunction with other factors, in forming reasonable suspicion justifying the detention of a suspect based on his or her suspected unauthorized presence. Id. at 1131–33.

In that case, the Border Patrol had stopped the drivers of two vehicles who reversed course and headed back in the direction of Mexico after passing a sign indicating that an upcoming border patrol facility, previously closed, was now open again. Id. at 1126–27. The location where the drivers reversed their direction was 50 miles north of the border, not visible from the border patrol facility, and had been frequently used to exchange illegal immigrants or drugs. Id. Border Patrol agents began following the vehicles after they observed them change their direction. Id. To the agents trailing the vehicles from behind, the occupants of the vehicles appeared to be Hispanic. Id. They thus pulled the vehicles over and asked the occupants about their citizenship. Id. A subsequent search of the cars revealed quantities of marijuana, and the drivers were arrested and convicted for, among other things,

possession with intent to distribute marijuana. Id. Both the district court and the Ninth Circuit panel allowed reliance upon the Hispanic appearance of the vehicle's occupants as one factor among others giving rise to reasonable suspicion to justify the stop. Id. at 1131. While the en banc Ninth Circuit also affirmed the convictions, it emphasized that the defendants' Hispanic appearance was not a proper factor to consider in determining whether the Border Patrol agents had reasonable suspicion to stop the vehicles. Id. In so holding, the Ninth Circuit noted that for reasonable suspicion to exist, the totality of the circumstances "must arouse a reasonable suspicion that the particular person being stopped has committed or is about to commit a crime."90 Id. at 1129 (citing United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) (emphasis in original)). The court went on to note that:

[t]he likelihood that in an area in which the majority—or even a substantial part-of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus. As we have previously held, factors that have such a low probative value that no reasonable officer would have relied on them to make an investigative stop must be disregarded as a matter of law. Id. at 1132; see also Gonzalez–Rivera v. I.N.S., 22 F.3d 1441, 1446 (9th Cir.1994). The court concluded its opinion by noting "at this point in our nation's history, and *898 given the continuing changes in our ethnic and racial composition, Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required." Id. at 1135.

[6] The MCSO stipulated that Ninth Circuit law prohibits its officers from using race or Hispanic appearance in determining "whether an officer has or had reasonable suspicion in connection with a Terry stop, including for immigration investigation." (Doc. 530 at 23 ¶ c.) To the extent the Court finds that the MCSO nevertheless uses and has used race or Hispanic appearance as a factor in forming reasonable suspicion, the MCSO urges the Court to "determine whether the actions taken were justified based upon other factors constituting the totality of the circumstances." (Doc. 562 at 30 n. 29.) It suggests that "[t]o do otherwise, would be contrary to the holding in Montero–Camargo" in which the Ninth Circuit, while rejecting the use of race as any criteria in arriving at reasonable suspicion, nevertheless recognized that there were sufficient facts independent of race to provide reasonable suspicion justifying the stop. (Id.)

To the extent that there was a legitimate, pretextual traffic basis for the original stop that does not involve race, it does not matter to Fourth Amendment analysis that the officer's underlying decision to make the stop may have subjectively been based on considerations of race. See Whren, 517 U.S. at 813, 116 S.Ct. 1769. Further, to the extent that other factors in combination, and excluding race as a consideration, were sufficient to justify reasonable suspicion for the stops, there is no Fourth Amendment violation. See United States v. Manzo–Jurado, 457 F.3d 928, 934–36 (9th Cir.2006). As discussed below, however, such motivations do make a difference to the equal protection analysis.

As to the investigation and arrests of vehicle occupants for unauthorized presence, with few exceptions, the arrest reports contain insufficient facts on which this Court could determine that, even absent

their consideration of race, MCSO deputies could have formed reasonable suspicion that an occupant of the vehicle was in the country without authorization. That is true for most of the MCSO's operations at issue in this trial.91 See, e.g., Manzo–Jurado, 457 F.3d at 932 (holding that an "individual['s] appearance as a member of a Hispanic work crew, [his] inability to speak English, [his] proximity to the border, and unsuspicious behavior," cannot together provide law enforcement with reasonable suspicion to investigate his immigration status).

The problem with the MCSO's policies and procedures is that they institutionalize the systematic consideration of race as one factor among others in forming reasonable suspicion or probable cause in making law enforcement decisions. To the extent that officers do consider the race of a person in *899 making law enforcement decisions that result in his or her seizure, they necessarily consider race as a factor in forming the reasonable suspicion or probable cause that led to their arrest. It is true that in any given factual setting there may be other facts independent of race sufficient to justify reasonable suspicion that a state statute related to immigration has been violated. But, that possibility does not justify the MCSO's systematic policy in using race as a factor in forming reasonable suspicion. Further, it is apparent that allowing the MCSO to consider race as one factor among others in forming reasonable suspicion will produce irreparable injury to the Plaintiff class. The MCSO is thus enjoined from promulgating, implementing, continuing, or following any such policy or practice.

2. The MCSO's use of Hispanic ancestry or race as a factor in forming reasonable suspicion that persons

have violated state laws relating to immigration status violates the Equal Protection Clause of the Fourteenth Amendment.

The MCSO's consideration of race or ethnicity as a factor in developing probable cause or reasonable suspicion also gives rise to equal protection issues. The Equal Protection Clause provides that no state shall "deny any person within its jurisdiction the equal protection of the law." U.S. Const. Amend. XIV, § 1. The Clause is "a direction that all persons similarly situated should be treated alike."92 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

The Equal Protection Clause is violated by governmental action undertaken with intent to discriminate against a particular individual or class of individuals. See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 271–72, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). Discriminatory intent may be demonstrated by statutory language, or by governmental action that creates a disparate impact on the individual or class and there is direct or circumstantial evidence of a discriminatory purpose. Id. at 272–74, 99 S.Ct. 2282; Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

The MCSO's policies and practices, some of which it apparently received from ICE, expressly permitted officers to make racial classifications. Such racial classifications are subject to strict scrutiny, and the policies here fail to withstand that scrutiny, for the reasons described below. See Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). Nevertheless, the MCSO, consistent with its argument that the Plaintiff class has been unable to demonstrate that the representatives of the class suffered any harm,

argues that there is no evidence that Deputies DiPietro or Rangel had any racial motivation for stopping the vehicle in which Mr. Ortega–Melendres was a passenger. That argument, however, fails to address the most relevant facts. Those facts reveal an institutionalized consideration of race in MCSO operations.

According to the news release issued by the MCSO after the first Cave Creek operation at which Mr. Ortega–Melendres was arrested, the genesis for that operation was "tips received on [Sheriff Arpaio's] newly implemented illegal immigration *900 hotline" about a local church providing assistance to day laborers." (Ex. 307.) As has been discussed above, the MCSO had solicited such complaints from citizens because it sought to enforce federal immigration laws against Hispanic day laborers. Other courts have found an equal protection violation when "plaintiffs' status as day laborers was inextricably intertwined with race in the minds of ... law enforcement officials." Doe v. Vill. of Mamaroneck, 462 F.Supp.2d 520, 552 (S.D.N.Y.2006).

On September 19 and 22, 2007, several days previous to the September 27 operation, Latino HSU officers went undercover to the church, signed up for work, and verified the presence of day laborers inside the church parking lot. They then held their operation there, in part, based on the racial makeup of the day laborers who were present. Thus, the location for the operation was selected, at least in part, based on racial makeup of the day laborers that were present there. When locations are selected, in whole or in part, because they will enhance enforcement of the law against a specific racial component of the community, that selection involves racial classification and must meet the requirements of strict scrutiny. As an MCSO

witness acknowledged, it would be "racial profiling for deputies to aggressively enforce traffic laws in predominantly Latino neighborhoods because of an assumption that illegal immigrants live or work there." (Tr. at 1152:20–24.)

As is also explained above in some detail, Deputy DiPietro received his instruction to stop the vehicle from the undercover officers based in part on their observation that Mr. Ortega–Melendres and those who entered the truck with him were Latino. Therefore, regardless of whether Deputy DiPietro or even Deputy Rangel were able to observe the racial makeup of the occupants of the vehicle, the direction to develop a basis to stop the vehicle in which Mr. Ortega–Melendres was a passenger was based, in part, on his race.

Similarly, in day labor and small-scale operations, MCSO undercover officers routinely directed that vehicles that picked up Hispanic day laborers be targeted for pretextual traffic enforcement. And, pursuant to MCSO policy and practice in other operations, MCSO deputies, in determining which vehicles they will stop for traffic enforcement purposes, emphasize those vehicles that have Hispanic occupants. As the supervising sergeants noted, according to their understanding, it would be impossible for a deputy to commit racial profiling if he has a legitimate reason to pull over a vehicle. This is clearly a limited and incorrect understanding.

Further, having pulled over a vehicle with Hispanic occupants, MCSO deputies are further authorized by policy, operation plans, and continuing practice to consider the race of the occupants in deciding which ones they will investigate for immigration-related violations of state law. The fact that Mr. Ortega–Melendres's vehicle was stopped and

his identity investigated, based at least in part on racial considerations, makes Mr. Ortega–Melendres an adequate representative for persons in the class that were subjected to similar policies or practices.

[7] [8] [9] Any government policy or practice that discriminates based upon race is subject to strict judicial scrutiny. In such cases, the racial distinction must be narrowly tailored to serve a compelling governmental interest. See Parents Involved, 551 U.S. at 720, 127 S.Ct. 2738 (holding that "when the government distributes burdens ... on the basis of individual racial classifications that action is reviewed under strict scrutiny."); Gratz v. Bollinger, *901 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (holding that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."); Grutter v. Bollinger, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (same). Government decisions are further subject to equal protection review when race is merely one factor that motivates action, even if it is not the predominant factor. A government policy is presumed to be racially discriminatory when it is "based in part on reports that referred to explicit racial characteristics." Flores v. Pierce, 617 F.2d 1386, 1389 (9th Cir.1980) (emphasis added) (Kennedy, J.). In Grutter, the Supreme Court applied strict scrutiny to a policy which involved race as one factor among many even though plaintiff's expert conceded that "race is not the predominant factor" in the policy. 539 U.S. at 320, 123 S.Ct. 2325; see also Arlington Heights, 429 U.S. at 263, 97 S.Ct. 555 (subjecting government action to equal protection review on "proof that a discriminatory purpose has been a motivating factor in the decision").

[10] The enforcement of immigration-related civil or criminal offenses amounts to a compelling governmental interest. Yet Defendants have not argued that this policy is narrowly tailored to meet that interest. Given the facts surrounding the presence of Hispanics in Maricopa County, the MCSO could not successfully do so. The great majority of Hispanic persons in the county are citizens, legal residents of the United States, or are otherwise authorized to be here. Thus the fact that a person is Hispanic and is in Maricopa County is not a narrowly-tailored basis on which one could conclude that the person is an unauthorized alien, even if a great majority of the unauthorized persons in Maricopa County are Hispanic. Further, as has been explained above, in the Ninth Circuit, race cannot be used under the Fourth Amendment to form probable cause or reasonable suspicion that a crime has been committed. Thus, there is no legitimate basis for considering a person's race in forming a belief that he or she is more likely to engage in a criminal violation, and the requisite "exact connection between justification and classification," Gratz, 539 U.S. at 270, 123 S.Ct. 2411, in focusing on Hispanic persons in immigration enforcement is lacking.93

Despite the presence of express racial classifications in the policies, practices, and procedures followed by the MCSO, it argues that a plaintiff challenging law enforcement policies on equal protection grounds must show "both that the ... system had a discriminatory effect and that it was motivated by a discriminatory purpose." Wayte v. U.S., 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (citation omitted); see also Arlington Heights, 429 U.S. 252, 265, 97 S.Ct. 555 (1977) ("Proof of racially discriminatory intent or purpose is required to show a

violation of the Equal Protection Clause.").94 But the discriminatory intent *902 requirement arises when law enforcement operations that are race-neutral nevertheless produce racially disparate results. Feeney, 442 U.S. at 272, 99 S.Ct. 2282. In those circumstances, the Supreme Court has determined that such policies are not violations of the Fourteenth Amendment if there is no discriminatory intent. Id. at 280–81, 99 S.Ct. 2282. As discussed above, however, the operations in this case are not race-neutral. They expressly incorporate racial bias. The MCSO's policies at issue here make overt racial classifications because they permit the consideration of race as one factor among others in making law enforcement decisions. In such circumstances, according to Wayte, "[a] showing of discriminatory intent is not necessary." 470 U.S. at 609 n. 10, 105 S.Ct. 1524.

[11] In light of the facts found above, the Plaintiffs have sufficiently established a basis for injunction on equal protection grounds without the need for additional analysis. Nevertheless, even if Plaintiffs were required to show additional indicia of discriminatory intent, they have sufficiently done so. A "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," Arlington Heights, 429 U.S. at 266, 97 S.Ct. 555, demonstrates that the MCSO discrimination against Hispanics was intentional, even if it was done to be responsive to some elements of the electorate.

The Court finds direct evidence of discriminatory intent based on the MCSO's policies, operations plans and procedures. Although such discrimination must be intentional in a disparate impact case, it need not be based on ill-will. That is, although the MCSO permits its officers to make overt racial classifications in making law enforcement

decisions, it does not necessarily follow that such policies and practices are based on overt antipathy towards Hispanics. The policies, at least originally, may have been based on a desire to produce the most efficient immigration enforcement.95 Yet, to the extent the MCSO intended and does discriminate based on race, through its policies, the lack of racial antipathy as a motivation makes no difference in the constitutional analysis. The Supreme Court has noted that their "cases clearly reject the argument that motives affect the strict scrutiny analysis." Parents Involved, 551 U.S. at 741, 127 S.Ct. 2738 (2007) (collecting cases). According to the Supreme Court, "all governmental action based on race—a group classification long recognized as 'in most circumstances irrelevant and therefore prohibited'—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (quoting Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943) (emphasis in original)).

In addition to the explicit policies and practices of the MCSO discussed above, there is circumstantial evidence of discriminatory intent. The MCSO further made changes in its policies and instructions to present the appearance of racially-neutral operations without actually implementing such operations. One such measure was the so-called "zero tolerance policy." No officer could provide a consistent definition of that policy as instituted by the MCSO for large-scale saturation patrols. At best, it did not limit in any way a deputy's discretion as to whom to pull over for *903 traffic violations during an operation. By Lt. Sousa's own admission, the zero tolerance policy was

specifically designed to "avoid the perception of racial profiling." (Tr. at 998:5–17.). Lt. Sousa expressly conceded that one of the reasons he included language prohibiting racial profiling in operations plans and directives was so that he could testify to it in any subsequent litigation. Chief Sands himself referred to this policy as "rhetoric." (Id. at 830:23–831:1.)

Further, Lt. Sousa periodically instructed deputies at pre-operational briefings that they should not racially profile. At the same time, however, Lt. Sousa told them he was sure that they were not racially profiling. Coincident with these self-assuring instructions and assurances, the MCSO continued to implement policies and operations plans regarding saturation patrols that instructed officers that while race could not be the only basis on which to base law enforcement action, it was a legitimate factor, among others, on which they could base decisions pertaining to immigration enforcement. The MCSO did so in spite of criticisms from the media and other sources that its officers were engaging in racial profiling.

In addition to its policies that permitted the consideration of race as a factor in making law enforcement decisions, the MCSO did no monitoring to determine whether operations as a whole, or individual officers participating in operations, demonstrated patterns of racial bias. Based on the Court's review of the arrest statistics and shift summaries, the Court concludes that a cursory review of the shift summaries after the HSU operations would have demonstrated high disparities of Hispanic surnames among those arrested during saturation patrols, even for non-immigration related offenses. It would further have revealed a high incidence of Hispanic surnames among passengers arrested, even for non-immigration related offenses.

Such a review would have suggested to the MCSO the possibility that such stops and arrests were being effectuated in a manner that was not race-neutral.

Chief Click, the MCSO's standard of care expert at trial, testified that any supervisor who wanted to minimize racial profiling would have to take active steps to combat it by reviewing records, investigating unusual findings, and retraining officers as needed. He testified that "anything that would raise the specter of racial profiling needs to be investigated and looked at further." (Id. at 1765:12–14.) Despite the presence of arrest reports, stat sheet summaries, and other records that raised the specter of racial profiling, Sgts. Madrid and Palmer, Lt. Sousa and Chief Sands took no action to investigate racially biased policing during the saturation patrols.

Chief Click testified that to determine whether or not officers are improperly using race during a saturation patrol, a department would not merely look to see if there was probable cause for a particular stop, but "look at the bigger picture, how many people did either the individual deputy stop or how many were stopped, how many total people were stopped during the patrol?" (Id. at 1764:23–1765:1.) Yet both supervising sergeants testified that as long as there was probable cause to stop a particular vehicle, they would have no suspicion of racially-biased policing in an operation.

When asked about a policy to prevent racial profiling, Chief Click stated that, "I think if it was solely, 'I trust them, so I therefore don't have to monitor them,' that would fall below the standard of care." (Id. at 1754:11–13.) Sgt. Palmer testified that he simply trusted his deputies not to *904 engage in racial profiling, even as he exchanged e-mails that denigrated people of Mexican ancestry and Spanish-

speakers with those very deputies. Although he claimed to have been subject to unspecified discipline for such e-mails, he was not removed from his position. Sgt. Palmer's e-mails to his deputies would have led those deputies to believe that racial insensitivity towards Hispanics was practiced and endorsed within the HSU. See DeWalt v. Carter, 224 F.3d 607, 612 n. 3 (7th Cir.2000) (holding that the use of racially offensive language does not constitute a per se constitutional violation, but it "is strong evidence of racial animus").

Further, the MCSO did not have its deputies make a record of all their stops during saturation patrols, even though, as testified to by Chief Click, it is a standard reasonable practice for a law enforcement officer to document any law-enforcement related stop he or she has with any person. (Tr. at 1778:4–13.) Thus, the MCSO's failure to monitor its deputies' actions for patterns of racial profiling was exacerbated by its inadequate recordkeeping, which made it more difficult to conduct such monitoring.

During the time that the MCSO was aware that ICE was contemplating terminating its 287(g) certification, it relied, in significant part, on the internet research of Sgt. Palmer to determine whether it could continue to enforce federal immigration law without 287(g) authority. The sergeant supplied to his command staff a non-existent federal law obtained from the internet, by which the MCSO erroneously concluded that it had legal authority to continue to enforce federal immigration law. After MCSO's 287(g) authority was revoked, Sheriff Arpaio, on national television, professed MCSO's erroneous position that it could continue to enforce federal immigration law absent federal authorization based on this non-existent statute as justification. In relying on Sgt.

Palmer's unverified internet research, the MCSO did not make any competent effort to ensure that its legal positions were in compliance with controlling authority, and therefore made no real effort to ensure that its deputies were following the law pertaining to the rights of minorities during such operations.96

Further, Sheriff Arpaio's public statements about the HSU operations and the saturation patrols signaled to MCSO deputies that the purpose of those operations and patrols was to arrest people who were not legally present in the United States. As the chief policymaker within the MCSO, Sheriff Arpaio's public comments may have created the impression both in and out of the MCSO that considering a person's race when evaluating whether that person was legally present in the United States was appropriate and endorsed by the MCSO.

At trial, Sheriff Arpaio testified that he did not agree with his statements on CNN or the Glenn Beck show. (Id. at 363:17; 365:17.) Yet later on in his testimony he inconsistently explained that when he made these comments he only meant that such appearance could be a factor for an MCSO officer to consider in determining whether further investigation of immigration status was appropriate once a vehicle had already been stopped. (Id. 498:22–503:6.) Whether or not he believed at the time or believes now the statements that he made during these nationally-televised *905 interviews is not relevant to the question of whether the interviews would have led MCSO officers to believe that the sentiments were the policy of the MCSO. Defendants stipulated that Sheriff Arpaio "has final authority over all the agency's decisions," and "sets the overall direction and policy for the MCSO." (Doc. 513 at 8.) Sheriff Arpaio's statements and the attendant news releases shed light

not only on "[t]he historical background of the decision," but also provide "contemporary statements by members of the decisionmaking body." Arlington Heights, 429 U.S. at 267–68, 97 S.Ct. 555.

Finally, after December 2011, when this Court entered its preliminary injunction prohibiting the MCSO from detaining persons based solely on a belief that the person was in the country without authorization, the MCSO continued to conduct its LEAR policy in violation of the explicit terms of that injunction. Its officers continued to race as a factor in doing so.

The MCSO asserts that it had no discriminatory purpose in promulgating its policies because they were based on training received by ICE. Even assuming this is true, the MCSO cannot suggest that it can continue system-wide policies applying racial classifications, because even though they are legally erroneous and facially discriminatory, the MCSO believed in good faith that they were permissible at the time of their adoption. Such reliance does not prevent the Equal Protection Clause from barring the future use of such facially discriminatory systemic classifications, even assuming they were implemented in good faith.

Defendants cite numerous cases holding that advice of counsel is a defense to an equal protection claim. They do not cite any evidence that the ICE officers conducting the training were attorneys providing legal advice to the MCSO.97 And again, even assuming that counsel wrongfully advised the MCSO that it could promulgate system-wide policies in enforcing state laws related to immigration, the MCSO has a constitutional responsibility to refrain from wrongfully using race in law enforcement decisions independent of any advice provided by

another law enforcement agency, even ICE. U.S. Const. amend. XIV, § 1

Based on the factors set forth in Arlington Heights and discussed above, Plaintiffs have established that the MCSO had sufficient intent to discriminate against Latino occupants of motor vehicles. Further, the Court concludes that the MCSO had and continues to have a facially discriminatory policy of considering Hispanic appearance probative of whether a person is legally present in the country in violation of the Equal Protection Clause. The MCSO is thus permanently enjoined from using race, or allowing its deputies and other agents to use race as a criteria in making law enforcement decisions with respect to Latino occupants of vehicles in Maricopa County.

C. The MCSO is enjoined from unconstitutionally lengthening stops unless during the legitimate course of the stop it develops reasonable suspicion, based on permissible factors, that a state crime is being committed.

In appropriate circumstances, it is acceptable for law enforcement to engage in *906 pre-textual traffic stops to investigate other potential criminal acts. See Whren, 517 U.S. at 810–813, 116 S.Ct. 1769. Analysis under the Fourth Amendment is wholly objective, and "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Id. at 813, 116 S.Ct. 1769. However, "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." Illinois v. Caballes, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005);

Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (holding that the scope of the stop "must be carefully tailored to its underlying justification"); United States v. Turvin, 517 F.3d 1097, 1099, 1104 (9th Cir.2008) (same).

When the driver of their vehicle is stopped, passengers are legally seized for the same time it takes the officer to resolve the basis for the stop with the driver. Brendlin v. California, 551 U.S. 249, 257–58, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). Yet, stopping a driver for a traffic violation provides no "reason to stop or detain the passengers." Maryland v. Wilson, 519 U.S. 408, 413, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). The deputy cannot prolong the stop to investigate a passenger unless the deputy through his or her observations obtains particularized reasonable suspicion that the passenger is committing a violation that the deputy is authorized to enforce. See United States v. Cortez, 449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). In such cases, the deputy is only allowed to prolong the stop for the brief time sufficient to investigate the existence of the crime. Arizona, 132 S.Ct. at 2528. When the MCSO deputies were 287(g) authorized, that authority presumably extended to include administrative and hence non-criminal violations of federal immigration law. Such authority, however, no longer exists.

Even in the absence of reasonable suspicion, however, an officer may make inquiries of the driver and passengers concerning "matters unrelated to the justification for the traffic stop." But again, such inquiries may not "measurably extend the duration of the stop." Johnson, 555 U.S. at 323, 129 S.Ct. 781 (emphasis added). See also Muehler v. Mena, 544 U.S. 93, 101, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) ("Mere police questioning does not constitute a seizure" unless

it prolongs the detention of the individual) Even if a simple request for passenger identification is thus within the scope of a traffic stop for a minor infraction to the extent it does not extend the stop, see United States v. Soriano–Jarquin, 492 F.3d 495, 500 (4th Cir.2007), detaining passengers to investigate their immigration status once they have either provided or not provided identification runs into the Fourth Amendment. Detaining a passenger while running his or her identification through an MCSO database is not "reasonably related in scope" to the traffic infraction and therefore requires independent reasonable suspicion. Caballes, 543 U.S. at 407, 125 S.Ct. 834; Terry, 392 U.S. at 20, 88 S.Ct. 1868. "Detaining individuals solely to verify their immigration status" raises "constitutional concerns." Arizona, 132 S.Ct. at 2509.

[12] The evidence demonstrates that during many saturation patrol stops, officers investigated the identities of and arrested multiple passengers on immigration violations, while also being responsible for issuing a citation to the driver. In such circumstances, based on the amount of time it took to resolve the stop of Mr. Ortega–Melendres, together with the process testified to by Deputies Armendariz and Rangel, the Court concludes that the investigation of the passengers would have *907 frequently taken significantly more time than it generally took to issue a traffic citation to a driver.98

As the facts summarized above indicate, at least some MCSO deputies claim that they investigate the identities of all of the passengers of the vehicles they stop as a matter of course. The arrest reports do not generally support this proposition. Nevertheless, to the extent that MCSO officers investigate the identity of all vehicle occupants as a matter of course, they do

so without determining whether there is reasonable suspicion with respect to the individual occupants that would justify their extension of the stop. The same is also true to the extent that: (1) Sheriff Arpaio claimed the right for the MCSO to investigate all the passengers in a vehicle when the driver was pulled over, and (2) during day labor operations, during which participating deputies were instructed to investigate the immigration status of all of the occupants of a vehicle.

Even if some officers participating during saturation patrols extended the duration of the stop only upon obtaining reasonable suspicion as they saw it that some or all of the vehicle's occupants were unauthorized, they had been erroneously instructed that in doing so they could use race as one factor among others in forming that reasonable suspicion. Montero–Camargo, 208 F.3d at 1135 (holding that Hispanic appearance, for example, is "of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required"). Thus, to the extent that officers considered race as a necessary factor in forming the reasonable suspicion on which they prolonged the stop, they had insufficient basis for both the reasonable suspicion and the prolonged stop.

As a result of its enforcement of state law related to immigration and its LEAR policy, MCSO deputies continue to screen the occupants of vehicles they stop for immigration compliance despite the revocation of their 287(g) authority. In doing so, they are either prolonging a stop to investigate a civil violation of federal law which they have no authority to enforce, or, as demonstrated by their past activities, present a substantial likelihood that they will prolong the stop beyond the time reasonably necessary to

resolve the traffic stop. The MCSO, in so operating and claiming a right to so operate, presents a likelihood that it will violate the Fourth Amendment rights of the Plaintiff class, and is thus prohibited from prolonging stops in the absence of reasonable suspicion, formed on a permissible basis, that a separate crime is or is about to be committed.

D. The MCSO is enjoined from using reasonable suspicion of unauthorized presence, without more, as probable cause or reasonable suspicion that the Human Smuggling Act or Employer Sanctions Law has been violated sufficient to justify an investigatory detention or arrest.

[13] As is stated above, the MCSO has no probable cause to arrest or even hold a person that it only believes has committed *908 a civil infraction of state or federal laws.99 At trial, Sheriff Arpaio testified to two specific state statutes that he claims give the MCSO authority to continue to engage in ongoing enforcement operations—the Arizona Employers Sanction Law and the Arizona Human Smuggling Statute.

The Arizona Employer Sanctions Law, A.R.S. § 23–211 (2010) et seq., explicitly authorizes the "county sheriff or any other local law enforcement agency to assist in investigating a complaint" filed pursuant to that law. A.R.S. §§ 23–212, 23–212.01. But the law contains only civil, and not criminal, sanctions against employers. It imposes no criminal sanction against unauthorized aliens. The law thus provides no basis for the MCSO to criminally cite, arrest, or engage in investigatory detentions of persons whom it believes to be in the country without authorization based upon a reasonable suspicion that they have violated the

Employer Sanctions Law or are conspiring with others to do so. As the Ninth Circuit has already noted, "possible criminality is key to any Terry investigatory stop or prolonged detention.... Absent suspicion that a 'suspect is engaged in, or is about to engage in, criminal activity,' law enforcement may not stop or detain an individual." Ortega Melendres II, 695 F.3d at 1000 (quoting United States v. Sandoval, 390 F.3d 1077, 1080 (9th Cir.2004)). The Arizona Employer Sanctions Law, a noncriminal law, thus provides the MCSO with no basis to stop or detain any person that it believes to be in the country without authorization.

By contrast, the Arizona Human Smuggling Act provides criminal sanctions against those who smuggle unauthorized persons. The Act specifies that "[i]t is unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose." A.R.S. § 13–2319. As defined by the Act, "smuggling of human beings" means:

[1] the transportation, procurement of transportation or use of property or real property

[2] by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are

[a] not United States citizens, permanent resident aliens or persons otherwise lawfully in this state or

[b] have attempted to enter, entered or remained in the United States in violation of law.

A.R.S. § 13–2319(F)(3).

There is nothing in the Act that criminalizes unauthorized presence. The Act criminalizes smuggling an unauthorized alien. Even to the extent that an unauthorized alien could be charged for committing the crime of conspiracy to violate the Arizona Human Smuggling Act with his or her

smuggler, an MCSO officer could only have reasonable suspicion sufficient to detain the unauthorized alien on conspiracy charges if he had reasonable suspicion under the "totality of the circumstances" that both the crime of human smuggling is being committed and the unauthorized alien conspired in its commission. Montero–Camargo, 208 F.3d at 1129.

Having reasonable suspicion that the Arizona state crime of human smuggling is being violated requires considerably more facts than merely having reasonable suspicion that a person is in the country without authorization. There must be, at the least, a reasonable suspicion under all of the circumstances of the conjunction of the elements necessary for the crime to be *909 present. Aside from the other elements, an MCSO officer would have to have reasonable suspicion that the person who was transporting the unauthorized alien "knew or had reason to know that the [unauthorized alien was] not [a] United States Citizen[ ], permanent resident alien[ ], or person[ ] otherwise lawfully in this state." A.R.S. § 13–2319(F)(3).

One does not have reason to know that an alien is unauthorized merely because he or she is unauthorized. To offer an example from the facts of the present case, Deputy DiPietro set forth no legitimate basis on which he could have formed a reasonable suspicion that the driver of the vehicle in which Ortega–Melendres was a passenger knew or had reason to know that the persons he was transporting were not lawfully in this state. When Deputy DiPietro himself was asked how he came to the opinion that the day laborers were likely to be unauthorized, he testified that he did not form that belief until after participating in the operation during which he arrested Ortega–Melendres.

When a 287(g)-trained MCSO deputy participating in an HSU operation did not purport to have the experience to form a reasonable suspicion that day laborers in general were unauthorized aliens until after the operation in which he made the arrest that is subject to question, it is not clear how he could successfully attribute to the driver of the vehicle he stopped during the operation "reason to know" that day laborers were likely to be "unauthorized aliens." Even if he had this experience, the idea that day laborers are usually unauthorized aliens is unsupported by any statistics presented at trial, and, as discussed above, is typically compounded with an unconstitutional association between work status and race, at least within the MCSO.100

Further, the MCSO acknowledges that, at the time of his arrest, Ortega–Melendres was in possession of a visa that was validly issued and, on its face, authorized his presence on the day of his arrest. Thus, even assuming that he did not have his I–94 document in his possession and/or was otherwise "out-of-status" with the federal immigration requirements of his visa, the status violation was a violation of federal civil immigration regulations, and did not constitute a violation of the Arizona Human Smuggling Act. Pursuant to his existing and validly issued visa, Ortega–Melendres was lawfully in this state. To the extent that he was lawfully in this state, but out of compliance with federal immigration regulations, that is an issue presented by the federal immigration regulations, and not state law, and thus not within the jurisdiction of MCSO officers after the revocation of their 287(g) authority.

Additionally, the MCSO cannot use Ortega–Melendres's Hispanic origin as any basis for arguing that the driver of his vehicle had reason to know that he was in the country without authorization. If an *910 MCSO officer cannot use Hispanic ancestry as a reason on which to base reasonable suspicion that a crime is being committed, then he or she cannot use it to establish that a human smuggler had reason to know that he was transporting an unauthorized alien.101

Thus, a reasonable suspicion that someone is in the country without authorization does not alone constitute sufficient reasonable suspicion to detain someone on the basis that the Arizona Human Smuggling Act is being violated. The preliminary injunction entered by this Court on September 23, 2011 is made permanent. Further, suspected violations of the Arizona Employer Sanctions Law provides the MCSO with no basis to conduct investigatory detentions of persons that it believes to be in the country without authorization. The MCSO is thus enjoined from detaining persons on the belief that they are involved with a violation of, or have otherwise conspired to violate, the Arizona Employer Sanctions Law. The MCSO is further permanently enjoined from detaining persons based only on the belief that they are in the country without authorization, for the reasons set forth in this Court's order of December 23, 2011.

CONCLUSION

Injunctive relief in a class action must be properly tailored to the actual harm proven at trial. See Lewis v. Casey, 518 U.S. 343, 358, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("It is the role of courts to provide

relief to claimants, in individual or class actions, who have suffered, or will immediately suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and Constitution."). Plaintiffs are entitled to injunctive relief necessary to remedy the Fourth and Fourteenth Amendment violations caused by MCSO's past and continuing operations. The MCSO is thus permanently enjoined from: (1) detaining, holding or arresting Latino occupants of vehicles in Maricopa County based on a reasonable belief, without more, that such persons are in the country without authorization, (2) following or enforcing its LEAR policy against any Latino occupant of a vehicle in Maricopa County; (3) using race or Latino ancestry as a factor in determining to stop any vehicle in Maricopa County with a Latino occupant; (4) using race or Latino ancestry as a factor in making law enforcement decisions with respect to whether any Latino occupant of a vehicle in Maricopa County may be in the country without authorization; (5) detaining Latino occupants of vehicles stopped for traffic violations for a period longer than reasonably necessary to resolve the traffic violation in the absence of reasonable suspicion that any of them have committed or are committing a violation of federal or state criminal law; (6) detaining, holding or arresting Latino occupants of a vehicle in Maricopa County for violations of the Arizona Human Smuggling Act without a reasonable basis for believing that, under all the circumstances, the necessary elements of the crime are present; (7) detaining, arresting or holding persons based on a reasonable suspicion that they are conspiring with their employer to violate the Arizona Employer Sanctions Act.

The permanent injunctive relief ordered above is immediately effective. But, as *911 the Court previously discussed with the parties at the end of trial, it will confer with them before ordering any further relief that the evidence demonstrates to be necessary to effectuate this relief. In considering the necessity and extent of such additional relief, and in addition to the other matters discussed at length during this order, the Court has determined that the MCSO is aggressively responsive to the wishes of a significant portion of the Maricopa County electorate that desires vigorous law enforcement operations against unauthorized residents by state and local law enforcement authorities. The MCSO continues to engage in law enforcement efforts against unauthorized aliens, and continues to aggressively assert its authority to do so. In doing so, the MCSO erroneously trained its patrol deputies that, despite the revocation of its 287(g) authority, the MCSO nevertheless had authority to enforce federal immigration law. It further violated and continues to violate the terms of this court's preliminary injunction entered on December 23, 2011 by enforcing its LEAR policy.

To the extent that the MCSO implemented faulty instruction from ICE through the racially-biased policies and practices governing its enforcement operations, its own implementation of those operations was also significantly flawed by its failure to observe normal standards of police conduct as defined by its own practices expert. Among other things the MCSO implemented a "zero tolerance" policy without meaningful effect to mollify those concerned about the racial disparity caused by MCSO operations, and thus failed to have a clear policy that

required execution of the saturation patrols and other enforcement efforts in a race neutral manner; made no efforts to determine whether its officers were engaging in racially-biased enforcement during its saturation patrols, and failed to comply with standard police practices concerning record-keeping maintained by other law enforcement authorities engaged in such operations.

The Court will entertain any proposals that are mutually acceptable to the parties in implementing steps to ensure compliance with its above orders, but in the absence of such proposals will proceed to enter such orders as are necessary to effectuate the above relief. In determining what authority may be necessary to provide such relief, the Court is particularly interested in the views of the parties concerning the following questions: (1) To what extent, if any, should any law enforcement operations of the MCSO that have the potential to involve members of the Plaintiff class be subject to the direct oversight and pre-approval? (2) To what extent, if any, should the MCSO be required to provide training to all of its personnel including posse members concerning the inappropriate use of race as an indicator of legal violations? (3) To what extent, if any, should the MCSO be required to provide training to all of its personnel concerning the elements of the Arizona Human Smuggling Statute and the requirements necessary to have reasonable suspicion that the statute is being violated? (4) To what extent, if any, does the MCSO still hold itself out to the general public as enforcing laws against illegal aliens or as currently engaged in immigration enforcement? (5) To what extent should the MCSO be required to keep publicly available records of all persons with whom it has law enforcement contact in vehicles so long as it is

engaged in the enforcement of state laws that have immigration-related elements such as the state Human Smuggling Act? (6) To what extent should those records be required to contain the purpose of any law enforcement *912 stops, the names of persons contacted, and the resulting length of the stop?

As further guidance for the proceeding, the Court asks the parties to consider the following stipulations of settlement in place in other jurisdictions:

1) Daniels v. New York, No. 99 Civ. 1695 (S.D.N.Y. Sept. 24, 2003), available at http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_ 0.pdf

2) United States v. Los Angeles, No. 00–11769 GAF (C.D.Cal. June 15, 2001), available at http://www.lapdonline.org/assets/pdf/final_consent_decree.pdf

3) United States v. State of New Jersey, Civil No. 99–5970 (D.N.J. Dec. 30, 1999), available at http://www.nj.gov/oag/jointapp.htm.

IT IS THEREFORE ORDERED that Plaintiffs are entitled to injunctive relief necessary to remedy the Fourth and Fourteenth Amendment violations caused by MCSO's past and continuing operations. The MCSO is thus permanently enjoined from:

1. Detaining, holding or arresting Latino occupants of vehicles in Maricopa County based on a reasonable belief, without more, that such persons are in the country without authorization.

2. Following or enforcing its LEAR policy against any Latino occupant of a vehicle in Maricopa County.

3. Using race or Latino ancestry as a factor in determining to stop any vehicle in Maricopa County with a Latino occupant.

4. Using race or Latino ancestry as a factor in making law enforcement decisions with respect to whether any Latino occupant of a vehicle in Maricopa County may be in the country without authorization.

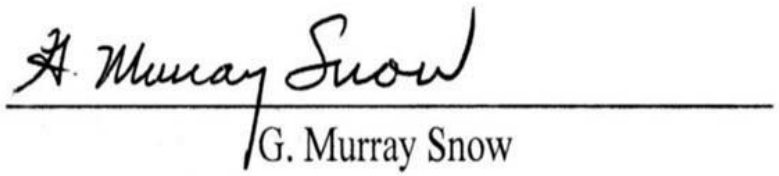
5. Detaining Latino occupants of vehicles stopped for traffic violations for a period longer than reasonably necessary to resolve the traffic violation in the absence of reasonable suspicion that any of them have committed or are committing a violation of federal or state criminal law.

1. Detaining, holding or arresting Latino occupants of a vehicle in Maricopa County for violations of the Arizona Human Smuggling Act without a reasonable basis for believing that, under all the circumstances, the necessary elements of the crime are present.

2. Detaining, arresting or holding persons based on a reasonable suspicion that they are conspiring with their employer to violate the Arizona Employer Sanctions Act.

IT IS FURTHER ORDERED setting a hearing at which the above matters will be discussed for Friday, June 14, 2013 at 9:30 a.m. in Courtroom 602, Sandra Day O'Connor U.S. Federal Courthouse, 401 W. Washington St., Phoenix, Arizona 85003–2151.

Dated this 24th day of May, 2013.



G. Murray Snow
United States District Judge

APPENDIX G

FILED
JULY 16, 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 15-17558
D.C. No. 2:12-cv-00981-ROS
District of Arizona, Phoenix

United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA
Plaintiffs - Appellee,
v.
COUNTY OF MARICOPA, Arizona
Defendants – Appellant,

and

PAUL PENZONE, in his official capacity
As Sheriff of Maricopa County, Arizona,
Defendant.

ORDER

Before: GOULD, TALLMAN, and WATFORD, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing.

Judges Gould and Watford vote to deny the petition for rehearing en banc, and Judge Tallman so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel hearing and rehearing en banc, filed June 21, 2018, is DENIED.

APPENDIX H

FILED
JULY 26, 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 15-17558
D.C. No. 2:12-cv-00981-ROS
District of Arizona, Phoenix

United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA
Plaintiffs - Appellee,
v.
COUNTY OF MARICOPA, Arizona
Defendants – Appellant,

and

PAUL PENZONE, in his official capacity
As Sheriff of Maricopa County, Arizona,
Defendant.

ORDER

Before: GOULD, TALLMAN, and WATERFORD, Circuit Judges.

Appellant's motion to stay the mandate is GRANTED. The mandate is stayed for a period of ninety days from the date of this order. If Appellant files a petition for

writ of certiorari in the United States Supreme Court during the period of the stay, the stay shall continue until final disposition by the Supreme Court. *See* Fed. R. App. P. 41.

APPENDIX I

In the United States District Court
For the District of Arizona

United States of America,
Plaintiff,
v.
Maricopa, County of, et al.,
Defendants.

No. CV-12-00981-PHX-ROS

JUDGEMENT IN A CIVIL CASE

Decision by the Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed September 2, 2015, the Clerk of Court shall dismiss the United States on Claims One, Three, and Five, and enter into final judgment in favor of the United States on Claims One, Three, and Five, and terminate the case.

Brian D. Karth
District Court Executive
Clerk of Court

September 2, 2015

By: s/Kenneth Miller
Deputy Clerk

APPENDIX J

In the United States District Court
For the District of Arizona

United States of America,
Plaintiff,
v.
Maricopa, County of, et al.,
Defendants.

No. CV-12-00981-PHX-ROS

AMENDED JUDGEMENT IN A CIVIL CASE

Decision by the Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed September 2, 2015, judgment is entered in favor of Plaintiff Untied States on Claims One, Three, and Five. This action is hereby terminated.

Brian D. Karth
District Court Executive
Clerk of Court

September 3, 2015

By: s/Kenneth Miller
Deputy Clerk

APPENDIX K

In the United States District Court
For the District of Arizona

United States of America,
Plaintiff,
v.
Maricopa, County of, et al.,
Defendants.

No. CV-12-00981-PHX-ROS

ORDER AMENDING JUDGEMENT

The Clerk of the Court entered final judgment in favor of the United Sates on September 3, 2015. Almost one month later, Maricopa County filed a motion seeking to alter, amend, or correct the judgement. (Doc.410). At its core, the motion argues Maricopa County cannot be held liable for the illegal actions of Maricopa County Sheriff Joseph Arpaio. Throughout this case, Maricopa County has repeatedly made some variant of this argument. The argument was rejected in the past and will be rejected again. However, the United States explicitly abandoned portions of certain counts. Therefore, the judgment will be amended to reflect the United Sates' partial victory and its decision to abandon all other portions of the remaining counts. The Court will also grant the United States' request to enter a signed copy of the settlement agreement on the docket.

Accordingly,

IT IS ORDERED the Motion to Amend (Doc 410) is **GRANTED IN PART.**

IT IS FURTHER ORDERED THE JUDGMENT (Doc 409) is **AMENDED** to state as follows.

IT IS ORDERED AND ADJUDGED judgment is entered in favor of Plaintiff United States on the portions of Counts One, Three, and Five based on the unconstitutional discrimination found in *Melendres v. Arpaio,* CV-07-2513-PHX-GMS (D. Ariz). The portions of Counts One, Three , and Five not based on the unconstitutional discrimination found *Melendres v. Arpaio,* CV-07-2513-PHX-GMS (D. Ariz) are **DISMISSED WITH PREJUDICE.** Counts Two and Six are **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED the Motion to Amend (Doc 415) is **GRANTED.** The Court will sign and docket the parties' settlement agreement attached herewith, and the Clerk shall enter an amended judgment accordingly.

Dated this 6th day of November, 2015.

Honorable Roslyn O. Silver
Senior United States District Judge

In the United States District Court
For the District of Arizona

United States of America,
Plaintiff,
v.
Maricopa County, Arizona; and
Joseph M. Arpaio, in his official capacity
As Sheriff of Maricopa County, Arizona,
Defendants.

No. CV-12-00981-PHX-ROS

SETTLEMENT AGREEMENT

The parties to this Agreement, the United States of America, Joseph M. Arpaio, Sheriff of Maricopa County, and Maricopa County (collectively the "Parties"), enter into this Settlement Agreement ("Agreement") to resolve all claims related to worksite identity theft operations ("Worksite Operations") and claims relating to alleged retaliation ("Retaliation Claims") as set forth in, *inter alia*, the Second and Sixth Claims of the United States' Complaint in this action. The parties have reached a separate agreement that resolves the United States' Fourth Claim and that portion of any other claim addressing discrimination in MCSO jails. *See* Attachment A.

The Parties agree that this Agreement is in the best interests of the people of Maricopa County and the United States.

I. DEFINITIONS

The following terms and definitions shall apply to this Agreement:

1. "Agreement" means this Agreement.

2. "Business," as used in Paragraph 9, below, means any business, organization, or other enterprise that employs people, is engaged in business activities or charitable services, and is involved in the provision of goods or services, or both.

3. "Complaint" means the Complaint filed in United States v. Maricopa County and Joseph M. Arpaio, in his official capacity as Sheriff of Maricopa County, Arizona, No. 2:12-cv-00981-ROS.

4. "Defendants" means Joseph M. Arpaio, Sheriff of Maricopa County, named in his official capacity; and Maricopa County.

5. "Effective Date of this Agreement" means the date on which this Agreement becomes effective pursuant to Paragraph 23, below.

6. "Identity theft," as used in Paragraph 9, below, means the crime of "taking identity of another person," as defined currently or prospectively by Arizona law, and as currently defined:

> A person commits taking the identity of another person or entity if the person knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information or entity identifying information of another person or entity, including a real or fictitious person or entity, without the consent of that other person or entity, with the intent to obtain or use the other person's or entity's identity for any unlawful purpose or to cause loss to a person or entity whether or not the person or entity actually suffers any economic loss as a result of the offense, or with the intent to obtain or continue employment.

Ariz. Rev. Stat. § 13-2008(A).

7. "MCSO" means the Maricopa County Sheriff's Office.

8. "United States" means the United States of America as represented by the United States Department of Justice's Civil Rights Division and its agents, employees, and consultants.

9. "Worksite Identity Theft Operation" means any pre-planned MCSO law enforcement operation at a place of business to execute a search warrant for evidence of, or for persons suspected of committing, identity theft or crimes incident thereto, such as forgery.

II. SECOND CLAIM OF THE UNITED STATES' COMPLAINT AND ALLEGATIONS RE: WORKSITE OPERATIONS

10. On December 18, 2014, the MCSO announced that it would no longer enforce State identity theft laws relating to obtaining or continuing employment, namely A.R.S. sections 13-2008(A) (employment provision) and 13-2009(A)(3), and that it would disband its Criminal Employment Unit.

11. On January 5, 2015, in the case of Puente Arizona v. Arpaio, No. 14-cv-01356 (D. Ariz.), the United States District Court for the District of Arizona entered a preliminary injunction enjoining the Maricopa County Sheriff from enforcing those statutory provisions that address actions committed with the intent to obtain or continue employment.

12. On January 19, 2015, the MCSO disbanded its Criminal Employment Unit, which was responsible for investigating cases of identity theft relating to obtaining or continuing employment, and for planning and carrying out Worksite Identity Theft Operations.

13. MCSO is not now engaged, currently planning to engage, or currently intending to engage in any Worksite Identity Theft Operations.

14. Before any Worksite Identity Theft Operation targeting three or more suspects may occur after the Effective Date of this Agreement:

a. Defendant Arpaio shall cause the MCSO to first establish a set of written policies or protocols to ensure that subsequent Worksite Identity Theft Operations are conducted in compliance with all applicable laws and the United States Constitution; and

b. Defendant Arpaio will provide Plaintiff United States with draft policies and protocols regarding Worksite Identity Theft Operations, as described above, before MCSO finalizes them, and MCSO will consider in good faith any comments, suggestions, objections, and recommendations from the United States regarding those policies and protocols. Once MCSO finalizes policies and protocols regarding Worksite Identity Theft Operations, as described above, the MCSO shall ensure that all personnel participating in any subsequent Worksite Identity Theft Operations are advised of the applicable policies and protocols and MCSO will take reasonable measures designed to ensure that all MCSO personnel comply with such policies, and

protocols in carrying out any Worksite Identity Theft Operations.

15. If a Worksite Identity Theft Operation occurs after the Effective Date of this Agreement, it must comply with all applicable laws, and the United States Constitution.

16. If a Worksite Identity Theft Operation occurs after the Effective Date of this Settlement Agreement, MCSO shall timely grant reasonable requests by the United States for information related to any such operation so that the United States may determine whether such operation was conducted consistent with Federal law and the United States Constitution. Such information shall include documents, data, and records, including any investigative reports and supplemental reports and any video or audio recordings relating to such operation.

17. The United States may bring a new civil action within two (2) years of the Effective Date of this Agreement seeking relief for alleged violations of federal law relating to any Worksite Identity Theft Operations that occurred prior to the Effective Date of this Agreement, but the United States may bring such a civil action only if: (a) a Worksite Identity Theft Operation, as defined in Paragraph 9 of this Agreement, occurs after the Effective Date of this Agreement; (b) the United States first notifies the Defendants that the information it has obtained indicates that the Worksite Identity Theft Operation involves Fourth and Fourteenth Amendment violations that are consistent with the pattern or practice of Fourth or Fourteenth Amendment violations alleged in this case; (c) the United States attempts to confer with the Defendants to seek an agreement on specific actions MCSO can take to guard

against constitutional violations in any future Worksite Identity Theft Operations; and (d) the Parties are unable, within 60 days of the United States' notification, to agree on such action or a Defendant fails to implement any such actions it has agreed to take. The United States may not bring such a civil action—an action seeking relief for alleged violations of Federal law relating to Worksite Identity Theft Operations that occurred prior to the Effective Date of this Agreement—after two (2) years of the Effective Date of this Agreement.

18. This Settlement Agreement does not affect the United States' authority to bring a civil action seeking relief for violations of federal law relating to Worksite Identity Theft Operations that occur after the Effective Date of this Agreement.

III. SIXTH CLAIM OF THE UNITED STATES' COMPLAINT AND ALLEGATIONS RE: RETALIATION

19. Within 30 days after the effective date of this Agreement, the Maricopa County Sheriff's Office (MCSO) will establish an official policy prohibiting retaliation against any individual for any individual's lawful expression of ideas in the exercise of the First Amendment right to the freedom of speech.

20. The Parties have agreed that the policy will read as follows:

> It is the policy of the Maricopa County Sheriff's Office to respect the First Amendment rights of all individuals. MCSO personnel will not take action against any

individual in retaliation for any individual's lawful expression of opinions in the exercise of the First Amendment right to the freedom of speech.

21. MCSO will notify all MSCO personnel of this policy through the issuance of a briefing board and in any other way MCSO determines to be appropriate. MCSO will take reasonable steps to ensure all future MCSO personnel are advised of this policy, consistent with MCSO practices to advise new personnel of existing MCSO policies.

22. Through counsel, within 45 days after the Effective Date of this Agreement, Defendant Arpaio will provide the United States with an affidavit or sworn declaration by an MCSO employee with authority to speak on behalf of MCSO and Sheriff Arpaio confirming that MCSO has issued the policy and briefing board, and will provide copies of same to the United States.

IV. EFFECTIVE DATE AND JURISDICTION

23. This Agreement shall become effective upon the signing of this Agreement by duly authorized representatives of Plaintiff United States, Defendant Sheriff Joseph Arpaio, Defendant Maricopa County, and by the Court. The Court will retain jurisdiction over this action for the purpose of enforcing compliance with the terms of this Agreement.

V. SCOPE, IMPLEMENTATION AND ENFORCEMENT

24. The United States shall notify Defendants if it determines that a Defendant is not in compliance with the Agreement in any respect. The

Parties shall first attempt to resolve any dispute informally by notification and conferral. If the Parties are unable to agree on a resolution of the dispute concerning the Defendant's compliance within 60 days after initial conferral, the United States may, without further notice to Defendants, seek enforcement of this Agreement with the United States District Court for the District of Arizona (the "Court"), through any appropriate form of relief. Any motion to enforce this Agreement shall be brought within one year of the occurrence of any alleged violations.

25. The Parties shall notify each other of any court or administrative challenge to this Agreement. In the event any provision of this Agreement is challenged in any local or state court, removal to a federal court shall be sought by the Parties and transfer of venue to the United States District Court for the District of Arizona will be sought.

26. In response to requests for documents or data as provided herein, either Defendant may withhold from the United States any documents or data protected by the attorney-client privilege or the work product doctrine. Should a Defendant decline to provide the United States access to such documents or data based on attorney-client privilege and/or the work product doctrine, the Defendant shall inform the United States that it is withholding documents or data on this basis and shall provide the United States with a log describing the documents or data.

27. The Parties may make use of protective orders or agreements to ensure the confidentiality of any non-public information as appropriate and necessary. Other than as expressly provided herein, this Agreement shall not be deemed a waiver of any privilege or right a Defendant may assert, including the attorney-client communication privilege, attorney

work product protections, and any other privilege, right, or protection recognized at common law or created by statute, rule or regulation, against any other person or entity with respect to the disclosure of any document.

VI. ENTIRE AGREEMENT, SEVERABILITY, COSTS

28. This Agreement constitutes the entire agreement between the Parties with regard to the Second and Sixth Claims, and any portions of other claims arising out of or relating to Worksite Operations or Retaliation Claims of the Complaint in this action, and it supersedes any and all prior representations and agreements, whether oral or written, between the Parties with regard to those claims. No such prior representations or agreements may be offered or considered to vary the terms of this Agreement, or to determine the meaning of any of its provisions.

29. In the event that any provision in this Agreement is declared invalid for any reason by a court of competent jurisdiction, said finding shall not affect the remaining provisions of this Agreement.

30. Each party shall bear its own costs, fees, and expenses associated with the litigation concerning this action, United States v. Maricopa County, et al., No. 2:12-cv-981 (D. Ariz).

SIGNATURES OF THE PARTIES:

Steve Chucri

Steve Chucri
Chairman, Maricopa County
Board of Supervisors

Joseph M. Arpaio
Joseph M. Arpaio
Maricopa County Sheriff

C. Copeland
Attest:
Clerk of the Board – Deputy

Mark C. Faull
Chief Deputy County Attorney

Mark J. Kappelhoff
Mark Kappelhoff, Deputy Assistant Attorney General
U.S. Department of Justice, Civil Rights Division

SO ORDERED this 6th day of November 2015.

Honorable Roslyn O. Silver
Senior United States District Judge

APPENDIX L

In the United States District Court
For the District of Arizona

United States of America,
Plaintiff,
v.
Maricopa, County of, et al.,
Defendants.

No. CV-12-00981-PHX-ROS

AMENDED JUDGEMENT IN A CIVIL CASE

Decision by the Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed November 6, 2015, amended judgment is entered is entered as follows:

IT IS ORDERED AND ADJUDGED judgment is entered in favor of plaintiff United Sates on the portions of Counts One, Three and Five based on the unconstitutional discrimination found in *Melendres v. Arpaio*, CV-07-2513-PHX-GMS (D. Ariz.) are DIMISSED WITH PREJUDICE.

Counts Two and Six are DIMISSED WITH PREJUDICE.

Brian D. Karth
District Court Executive
Clerk of Court

November 6, 2015

By: s/ Leann Dixon

APPENDIX M

U.S. Constitution, Article 4 Section 4 Republican Government

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Constitution, 10th Amendment Reserved Powers to States

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

34 U.S.C. 12601 Cause of Action

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1)[1] has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain

appropriate equitable and declaratory relief to eliminate the pattern or practice.

42 U.S.C. §1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC 2000 (d) Title VI of Civil Rights Act 1964

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Constitution of the State of Arizona, Article 4 Section 19

Local or special laws

No local or special laws shall be enacted in any of the following cases, that is to say:

1. Granting divorces.

2. Locating or changing county seats.

3. Changing rules of evidence.

4. Changing the law of descent or succession.

5. Regulating the practice of courts of justice.

6. Limitation of civil actions or giving effect to informal or invalid deeds.

7. Punishment of crimes and misdemeanors.

8. Laying out, opening, altering, or vacating roads, plats, streets, alleys, and public squares.

9. Assessment and collection of taxes.

10. Regulating the rate of interest on money.

11. The conduct of elections.

12. Affecting the estates of deceased persons or of minors.

13. Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises.

14. Remitting fines, penalties, and forfeitures.

15. Changing names of persons or places.

16. Regulating the jurisdiction and duties of justices of the peace.

17. Incorporation of cities, towns, or villages, or amending their charters.

18. Relinquishing any indebtedness, liability, or obligation to this State.

19. Summoning and empaneling of juries.

20. When a general law can be made applicable.

Constitution of the State of Arizona, Article 12 Section 3

County officers; election; term of office

There are hereby created in and for each organized county of the state the following officers who shall be elected by the qualified electors thereof: a sheriff, a county attorney, a recorder, a treasurer, an assessor, a superintendent of schools and at least three supervisors, each of whom shall be elected and hold his office for a term of four (4) years beginning on the first of January next after his election, which number of supervisors is subject to increase by law. The supervisors shall be nominated and elected from districts as provided by law.

The candidates for these offices elected in the general election of November 3, 1964 shall take office on the first day of January, 1965 and shall serve until the first day of January, 1969.

Constitution of the State of Arizona, Article 12 Section 4

County officers; duties, powers, and qualifications; salaries

The duties, powers, and qualifications of such officers shall be as prescribed by law. The board of supervisors of each county is hereby empowered to fix salaries for all county and precinct officers within such county for whom no compensation is provided by law, and the salaries so fixed shall remain in full force and effect until changed by general law.

Constitution of the State of Arizona, Article 22, Section 17

Compensation of public officers

All State and county officers (except notaries public) and all justices of the peace and constables, whose precinct includes a city or town or part thereof, shall

be paid fixed and definite salaries, and they shall receive no fees for their own use.

A.R.S. 1-201 Adoption of common law; exceptions

The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.

A.R.S.11-201. Powers of county

A. The powers of a county shall be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law. It has the power to:

1. Sue and be sued.

2. Purchase and hold lands within its limits.

3. Make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers.

4. Make such orders for the disposition or use of its property as the interests of the inhabitants of the county require.

5. Levy and collect taxes for purposes under its exclusive jurisdiction as are authorized by law.

6. Determine the budgets of all elected and appointed county officers enumerated under section 11-401 by action of the board of supervisors.

B. Except for the purposes of acting as an intermediary in a license transfer or sale, a county shall not own a

commercial cable television system or any other pay television system.

C. Section 11-251.05, subsection A, paragraph 1 does not authorize a county to levy and collect taxes for any purposes beyond those otherwise specifically authorized by statute.

A.R.S 11-251. Powers of board

The board of supervisors, under such limitations and restrictions as are prescribed by law, may:

1. Supervise the official conduct of all county officers and officers of all districts and other subdivisions of the county charged with assessing, collecting, safekeeping, managing or disbursing the public revenues, see that such officers faithfully perform their duties and direct prosecutions for delinquencies, and, when necessary, require the officers to renew their official bonds, make reports and present their books and accounts for inspection.

2. Divide the counties into such districts or precincts as required by law, change them and create others as convenience requires.

3. Establish, abolish and change election precincts, appoint inspectors and judges of elections, canvass election returns, declare the result and issue certificates thereof.

4. Lay out, maintain, control and manage public roads, ferries and bridges within the county and levy such tax for that purpose as may be authorized by law.

5. Provide for the care and maintenance of the sick of the county, erect and maintain hospitals for that purpose and, in its discretion, provide a farm in connection with the county hospital and adopt ordinances for working the farm.

6. Provide suitable rooms for county purposes.

7. Purchase, receive by donation or lease real or personal property necessary for the use of the county prison and take care of, manage and control the property, but no purchase of real property shall be made unless the value has been previously estimated by three disinterested citizens of the county, appointed by the board for that purpose, and no more than the appraised value shall be paid for the property.

8. Cause to be erected and furnished a courthouse, jail and hospital and such other buildings as necessary, and construct and establish a branch jail, when necessary, at a point distant from the county seat.

9. Sell at public auction, after thirty days' previous notice given by publication in a newspaper of the county, stating the time and place of the auction, and convey to the highest bidder, for cash or contract of purchase extending not more than ten years from the date of sale and on such terms and for such consideration as the board shall prescribe, any property belonging to the county that the board deems advantageous for the county to sell, or that the board deems unnecessary for use by the county, and shall pay the proceeds thereof into the county treasury for use of the county, except that personal property need not be sold but may be used as a trade-in on the purchase of personal property when the board deems this disposition of the personal property to be in the best interests of the county. When the property for sale is real property, the board shall have such property appraised by a qualified independent fee appraiser who has an office located in this state. The appraiser shall establish a minimum price, which shall not be less than ninety per cent of the appraised value. The notice regarding the sale of real property shall be published in the county where the property is situated and may be published in one or more other counties,

and shall contain, among other things, the appraised value, the minimum acceptable sale price, and the common and legal description of the real property. Notwithstanding the requirement for a sale at public auction prescribed in this paragraph, a county, with unanimous consent of the board and without a public auction, may sell or lease any county property to any other duly constituted governmental entity, including the state, cities, towns and other counties. A county, with unanimous consent of the board and without public auction, may grant an easement on county property for public purposes to a utility as defined in section 40-491. A county, with unanimous consent of the board and without public auction, may sell or lease any county property for a specific use to any solely charitable, social or benevolent nonprofit organization incorporated or operating in this state. A county may dispose of surplus equipment and materials that have little or no value or that are unauctionable in any manner authorized by the board.

10. Examine and exhibit the accounts and performance of all officers having the care, management, collection or disbursement of monies belonging to the county or appropriated by law or otherwise for the use and benefit of the county. The working papers and other audit files in an examination and audit of the accounts and performance of a county officer are not public records and are exempt from title 39, chapter 1. The information contained in the working papers and audit files prepared pursuant to a specific examination or audit is not subject to disclosure, except to the county attorney and the attorney general in connection with an investigation or action taken in the course of their official duties.

11. Examine, settle and allow all accounts legally chargeable against the county, order warrants to be drawn on the county treasurer for that purpose and provide for issuing the warrants.

12. Levy such tax annually on the taxable property of the county as may be necessary to defray the general current expenses thereof, including salaries otherwise unprovided for, and levy such other taxes as are required to be levied by law.

13. Equalize assessments.

14. Direct and control the prosecution and defense of all actions to which the county is a party, and compromise them.

15. Insure the county buildings in the name of and for the benefit of the county.

16. Fill by appointment all vacancies occurring in county or precinct offices.

17. Adopt provisions necessary to preserve the health of the county, and provide for the expenses thereof.

18. With the approval of the department of health services, contract with any qualified person to provide all or part of the health services, funded through the department of health services with federal or state monies, that the board in its discretion extends to residents of the county.

19. Contract for county printing and advertising, and provide books and stationery for county officers.

20. Provide for rebinding county records, or, if necessary, the transcribing of county records.

21. Make and enforce necessary rules and regulations for the government of its body, the preservation of order and the transaction of business.

22. Adopt a seal for the board, a description and impression of which shall be filed by the clerk in the office of the county recorder and the secretary of state.

23. Establish, maintain and conduct or aid in establishing, maintaining and conducting public aviation fields, purchase, receive by donation or lease any property necessary for that purpose, lease, at a nominal rental if desired, sell such aviation fields or property to the United States or any department, or sell or lease such aviation fields to a city, exchange lands acquired pursuant to this section for other lands, or act in conjunction with the United States in maintaining, managing and conducting all such property. If any such property or part of that property is not needed for these purposes, it shall be sold by the board and the proceeds shall be paid into the general fund of the county.

24. Acquire and hold property for the use of county fairs, and conduct, take care of and manage them.

25. Authorize the sheriff to offer a reward, not exceeding ten thousand dollars in one case, for information leading to the arrest and conviction of persons charged with crime.

26. Contract for the transportation of insane persons to the state hospital or direct the sheriff to transport such persons. The county is responsible for such expense to the extent the expense is not covered by any third party payor.

27. Provide for the reasonable expenses of burial for deceased indigents as provided in section 36-831 and maintain a permanent register of deceased indigents, including name, age and date of death, and when burial occurs, the board shall mark the grave with a permanent marker giving the name, age, and date of birth, if known.

28. Sell or grant to the United States the title or interest of the county in any toll road or toll train in or partly within a national park, on such terms as may

be agreed on by the board and the secretary of the interior of the United States.

29. Enter into agreements for acquiring rights-of-way, construction, reconstruction or maintenance of highways in their respective counties, including highways that pass through Indian reservations, with the government of the United States, acting through its duly authorized officers or agents pursuant to any act of Congress, except that the governing body of any Indian tribe whose lands are affected must consent to the use of its land, and any such agreements entered into before June 26, 1952 are validated and confirmed.

30. Do and perform all other acts and things necessary to the full discharge of its duties as the legislative authority of the county government, including receiving and accepting payment of monies by credit card or debit card, or both. Any fees or costs incurred by the use of the credit or debit card shall be paid by the person tendering payment unless the charging entity determines that the financial benefits of accepting credit cards or debit cards exceeds the additional processing fees.

31. Make and enforce all local, police, sanitary and other regulations not in conflict with general law.

32. Budget for funds for foster home care during the school week for children with intellectual disabilities and children with other disabilities who reside within the county and attend a school for students with disabilities in a city or town within such county.

33. Do and perform all acts necessary to enable the county to participate in the economic opportunity act of 1964 (P.L. 88-452; 78 Stat. 508), as amended.

34. Provide a plan or plans for its employees that provide tax deferred annuity and deferred compensation plans as authorized pursuant to title 26,

United States Code. Such plans shall allow voluntary participation by all employees of the county. Participating employees shall authorize the board to make reductions in their remuneration as provided in an executed deferred compensation agreement.

35. Adopt and enforce standards for shielding and filtration of commercial or public outdoor portable or permanent light fixtures in proximity to astronomical or meteorological laboratories.

36. Subject to the prohibitions, restrictions and limitations as set forth in section 11-812, adopt and enforce standards for excavation, landfill and grading to prevent unnecessary loss from erosion, flooding and landslides.

37. Make and enforce necessary ordinances for the operation and licensing of any establishment not in the limits of an incorporated city or town in which is carried on the business of providing baths, showers or other forms of hydrotherapy or any service of manual massage of the human body.

38. Provide pecuniary compensation as salary or wages for overtime work performed by county employees, including those employees covered by title 23, chapter 2, article 9. In so providing, the board may establish salary and wage plans incorporating classifications and conditions prescribed by the federal fair labor standards act.

39. Establish, maintain and operate facilities that provide for physical evaluation, diagnosis and treatment of patients and that do not keep patients overnight as bed patients or treat patients under general anesthesia.

40. Enact ordinances under its police authority prescribing reasonable curfews in the entire unincorporated area or any area less than the entire

unincorporated area of the county for minors and fines not to exceed the fine for a petty offense for violation of such ordinances. Nothing in this paragraph shall be construed to require a request from an association or a majority of the residents of an area before the board may enact an ordinance applicable to the entire or any portion of the unincorporated area. An ordinance enacted pursuant to this paragraph shall provide that a minor is not violating a curfew if the minor is accompanied by a parent, a guardian or an adult having supervisorial custody, is on an emergency errand or has been specifically directed to the location on reasonable, legitimate business or some other activity by the parent, guardian or adult having supervisorial custody. If no curfew ordinance is applicable to a particular unincorporated area of the county, the board may adopt a curfew ordinance on the request or petition of either:

(a) A homeowners' association that represents a majority of the homeowners in the area covered by the association and to which the curfew would apply.

(b) A majority of the residents of the area to which the curfew would apply.

41. Lease or sublease personal property owned by the county to other political subdivisions of this state to be used for a public purpose.

42. In addition to the agreements authorized by section 11-651, enter into long-term agreements for the purchase of personal property, provided that the board may cancel any such agreement at the end of a fiscal year, at which time the seller may repossess the property and the agreement shall be deemed terminated.

43. Make and enforce necessary ordinances not in conflict with the laws of this state to regulate off-road

recreational motor vehicles that are operated within the county on public lands without lawful authority or on private lands without the consent of the lawful owner or that generate air pollution. For the purposes of this paragraph, "off-road recreational motor vehicle" means three and four wheel vehicles manufactured for recreational nonhighway all terrain travel.

44. Acquire land for roads, drainage ways and other public purposes by exchange without public auction, except that notice shall be published thirty days before the exchange, listing the property ownership and descriptions.

45. Purchase real property for public purposes, provided that final payment shall be made not later than five years after the date of purchase.

46. Lease-purchase real property and improvements for real property for public purposes, provided that final payment shall be made not later than twenty-five years after the date of purchase. Any increase in the final payment date from fifteen years up to the maximum of twenty-five years shall be made only on unanimous approval by the board of supervisors.

47. Make and enforce ordinances for the protection and disposition of domestic animals subject to inhumane, unhealthful or dangerous conditions or circumstances provided that nothing in this paragraph limits or restricts the authority granted to incorporated cities and towns or counties pursuant to section 13-2910. An ordinance enacted pursuant to this paragraph shall not restrict or limit the authority of the game and fish commission to regulate the taking of wildlife. For the purposes of this paragraph, "domestic animal" means an animal kept as a pet and not primarily for economic purposes.

48. If a part of a parcel of land is to be taken for roads, drainage, flood control or other public purposes and the board and the affected property owner determine that the remainder will be left in such a condition as to give rise to a claim or litigation concerning severance or other damage, acquire the whole parcel by purchase, donation, dedication, exchange, condemnation or other lawful means, and the remainder may be sold or exchanged for other properties needed for any public purpose.

49. Make and enforce necessary rules providing for the reimbursement of travel and subsistence expenses of members of county boards, commissions and advisory committees when acting in the performance of their duties, if the board, commission or advisory committee is authorized or required by federal or state law or county ordinance, and the members serve without compensation.

50. Provide a plan or plans for county employee benefits that allow for participation in a cafeteria plan that meets the requirements of the United States internal revenue code of 1986.

51. Provide for fringe benefits for county employees, including sick leave, personal leave, vacation and holiday pay and jury duty pay.

52. Make and enforce ordinances that are more restrictive than state requirements to reduce or encourage the reduction of carbon monoxide and ozone levels, provided an ordinance does not establish a standard for vehicular emissions, including ordinances to reduce or encourage the reduction of the commuter use of motor vehicles by employees of the county and employees whose place of employment is in unincorporated areas of the county.

53. Make and enforce ordinances to provide for the reimbursement of up to one hundred per cent of the cost to county employees of public bus or van pool transportation to and from their place of employment.

54. Lease for public purposes any real property, improvements for real property and personal property under the same terms and conditions, to the extent applicable, as are specified in sections 11-651 and 11-653 for lease-purchases.

55. Enact ordinances prescribing regulation of alarm systems and providing for civil penalties to reduce the incidence of false alarms at business and residential structures relating to burglary, robbery, fire and other emergencies not within the limits of an incorporated city or town.

56. In addition to paragraph 9 of this section, and notwithstanding section 23-504, sell or dispose of, at no less than fair market value, county personal property that the board deems no longer useful or necessary through a retail outlet or to another government entity if the personal property has a fair market value of no more than one thousand dollars, or by retail sale or private bid, if the personal property has a fair market value of no more than fifteen thousand dollars. Notice of sales in excess of one thousand dollars shall include a description and sale price of each item and shall be published in a newspaper of general circulation in the county, and for thirty days after notice other bids may be submitted that exceed the sale price by at least five per cent. The county shall select the highest bid received at the end of the thirty day period.

57. Sell services, souvenirs, sundry items or informational publications that are uniquely prepared for use by the public and by employees and license and

sell information systems and intellectual property developed from county resources that the county is not obligated to provide as a public record.

58. On unanimous consent of the board of supervisors, license, lease or sell any county property pursuant to paragraphs 56 and 57 of this section at less than fair market value to any other governmental entity, including this state, cities, towns, public improvement districts or other counties within or outside of this state, or for a specific purpose to any charitable, social or benevolent nonprofit organization incorporated or operating in this state.

59. On unanimous consent of the board of supervisors, provide technical assistance and related services to a fire district pursuant to an intergovernmental agreement.

60. Adopt contracting procedures for the operation of a county health system pursuant to section 11-291. Before the adoption of contracting procedures the board shall hold a public hearing. The board shall publish one notification in a newspaper of general circulation in the county seat at least fifteen days before the hearing.

61. Enter into an intergovernmental agreement pursuant to chapter 7, article 3 of this title for a city or town to provide emergency fire or emergency medical services pursuant to section 9-500.23 to a county island as defined in section 11-251.12. The board may charge the owners of record in the county island a fee to cover the cost of an intergovernmental agreement that provides fire and emergency medical services.

62. In counties that employ or have designated an animal control county enforcement agent pursuant to section 11-1005, enter into agreements with foundations or charitable organizations to solicit

donations, property or services, excluding enforcement or inspection services, for use by the county enforcement agent solely to perform nonmandated services and to fund capital improvements for county animal control, subject to annual financial and performance audits by an independent party as designated by the county board of supervisors. For the purposes of this paragraph, nonmandated services are limited to low cost spay and neuter services, public education and outreach efforts, pet adoption efforts, care for pets that are victims of cruelty or neglect and support for volunteer programs.

63. Adopt and provide for the enforcement of ordinances prohibiting open fires and campfires on designated lands in the unincorporated areas of the county when a determination of emergency is issued by the county emergency management officer and the board deems it necessary to protect public health and safety on those lands.

64. Fix the amount of license fees to be paid by any person, firm, corporation or association for carrying on any game or amusement business in unincorporated areas of the county and prescribe the method of collection or payment of those fees, for a stated period in advance, and fix penalties for failure to comply by fine. Nothing in this article shall be construed as authorizing any county to require an occupational license or fee for any activity if state law precludes requiring such a license or fee.

65. Adopt and enforce ordinances for the prevention, abatement and removal of graffiti, providing that any restrictions on the retail display of potential graffiti tools be limited to any of the following, as determined by the retail business:

(a) In a place that is in the line of sight of a cashier or in the line of sight from a work station normally continuously occupied during business hours.

(b) In a manner that makes the product accessible to a patron of the business establishment only with the assistance of an employee of the establishment.

(c) In an area electronically protected, or viewed by surveillance equipment that is monitored, during business hours.

66. Adopt ordinances and fees related to the implementation of a local stormwater quality program pursuant to title 49, chapter 2, article 11.

A.R.S 11-251.02. <u>Additional powers of the board</u>

The board of supervisors may:

1. Authorize the use of county personnel, facilities, equipment, supplies and other resources in search or rescue operations involving the life or health of any person.

2. Contract for the acquisition, rental or hire of equipment, services, services supervision, supplies and other resources for use in such search or rescue operations.

3. Contract with an ambulance service provider that has a certificate of necessity issued pursuant to title 36, chapter 21.1, article 2 to provide ambulance service in the rural or wilderness service areas in counties with a population of less than five hundred thousand persons.

4. Contract with a government agency to provide the services of the constable at fees that are less than those established by section 11-445, except for those services that are specifically authorized by law to be performed by the sheriff.

A.R.S 11-401 Enumeration of officers

A. The officers of the county are:

1. Sheriff.
2. Recorder.
3. Treasurer.
4. School superintendent.
5. County attorney.
6. Assessor.
7. Supervisors.
8. Clerk of the board of supervisors.
9. Tax collector.

B. The county treasurer shall be ex officio tax collector

A.R.S. 11-409 Deputies and employees; appointment

The county officers enumerated in § 11-401, by and with the consent of, and at salaries fixed by the board, may appoint deputies, stenographers, clerks and assistants necessary to conduct the affairs of their respective offices. The appointments shall be in writing.

A.R.S. 11-441 Powers and duties

A. The sheriff shall:

1. Preserve the peace.

2. Arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense.

3. Prevent and suppress all affrays, breaches of the peace, riots and insurrections which may come to the knowledge of the sheriff.

4. Attend all courts, except justice and municipal courts, when an element of danger is anticipated and

attendance is requested by the presiding judge, and obey lawful orders and directions issued by the judge.

5. Take charge of and keep the county jail, including a county jail under the jurisdiction of a county jail district, and the prisoners in the county jail.

6. Endorse upon all process and notices the year, month, day, hour and minute of reception, and issue to the person delivering it, on payment of fees, a certificate showing the names of the parties, title of paper and time of reception.

7. Serve process and notices in the manner prescribed by law and certify under the sheriff's hand upon the process or notices the manner and time of service, or if the sheriff fails to make service, the reasons for failure, and return them without delay. When returnable to another county, the sheriff may enclose such process or notices in an envelope, addressed to the officer from whom received, and deposit it postage prepaid in the post office. The return of the sheriff is prima facie evidence of the facts stated in the return.

8. Secure, as soon as possible, the home of a deceased person located outside the boundaries of an incorporated city or town if the sheriff is unable to determine or locate the heirs or executor of the deceased person.

B. The sheriff may in the execution of the duties prescribed in subsection A, paragraphs 1 through 4 command the aid of as many inhabitants of the county as the sheriff deems necessary.

C. The sheriff shall conduct or coordinate within the county search or rescue operations involving the life or health of any person, or may assist in such operations in another county at the request of that county's sheriff, and may request assistance from any persons or

agencies in the fulfillment of duties under this subsection.

D. The sheriff, in the execution of the duties prescribed in this section, may request the aid of volunteer posse and reserve organizations located in the county.

E. The sheriff may assist in the execution of the duties prescribed in this section in another county at the request of that county's sheriff.

F. The sheriff may require any prisoner who is on work release to reimburse the county for reasonable expenses incurred in connection with the release.

G. The board of supervisors of a county bordering the Republic of Mexico may adopt an ordinance pursuant to chapter 2 of this title allowing the sheriff to prevent the entry from this state into the Republic of Mexico at the border by any resident of this state who is under eighteen years of age if the minor is unaccompanied by a parent or guardian or does not have written consent for entry from a parent or guardian. The authority of the sheriff is only to prevent entry and not to otherwise detain the minor. This subsection shall not be construed to limit the authority of the sheriff pursuant to any other law. A county is not civilly or criminally liable for not adopting an ordinance pursuant to this subsection.

H. Notwithstanding § 13-3112, the sheriff may authorize members of the sheriff's volunteer posse who have received and passed firearms training that is approved by the Arizona peace officer standards and training board to carry a deadly weapon without a permit while on duty.

A.R.S. 11-444 Expenses of sheriff as county charge; expense fund

A. The 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, except that the allowable expenses of service of process in civil actions shall be as provided in § 11-445.

B. The board shall, at the first regular meeting in each month, set apart from the expense fund of the county a sum sufficient to pay the estimated traveling and other expenses of the sheriff during the month, which shall be not less than the amount paid for the expenses for the preceding month. The sum so set apart shall thereupon be paid over to the sheriff for the payment of such expenses.

C. At the end of each month the sheriff shall render a full and true account of such expenses, and any balance remaining unexpended shall be paid by the sheriff into the county treasury. If the sum so paid over is insufficient to pay the expenses incurred during the month, the excess shall be allowed and paid as other claims against the county.

A.R.S. 41-1821 Arizona peace officer standards and training board; membership; appointment; term; vacancies; meetings; compensation; acceptance of grants

A. The Arizona peace officer standards and training board is established and consists of thirteen members appointed by the governor. The membership shall include:

1. Two sheriffs, one appointed from a county having a population of two hundred thousand or more persons

and the remaining sheriff appointed from a county having a population of less than two hundred thousand persons.

2. Two chiefs of city police, one appointed from a city having a population of sixty thousand or more persons and the remaining chief appointed from a city having a population of less than sixty thousand persons.

3. A college faculty member in public administration or a related field.

4. The attorney general.

5. The director of the department of public safety.

6. The director of the state department of corrections.

7. One member who is employed in administering county or municipal correctional facilities.

8. Two certified law enforcement officers who have knowledge of and experience in representing peace officers in disciplinary cases. One of the certified law enforcement officers must have a rank of officer and the other must have a rank of deputy. One of the appointed officers must be from a county with a population of less than five hundred thousand persons.

9. Two public members.

B. Before appointment by the governor, a prospective member of the board shall submit a full set of fingerprints to the governor for the purpose of obtaining a state and federal criminal records check pursuant to § 41-1750 and Public Law 92-544. The department of public safety may exchange this fingerprint data with the federal bureau of investigation.

C. The governor shall appoint a chairman from among the members at its first meeting and every year thereafter, except that an ex officio member shall not be appointed chairman. The governor shall not appoint more than one member from the same law

enforcement agency. No board member who was qualified when appointed becomes disqualified unless the member ceases to hold the office that qualified the member for appointment.

D. Meetings shall be held at least quarterly or on the call of the chairman or by the written request of five members of the board or by the governor. A vacancy on the board shall occur when a member except an ex officio member is absent without the permission of the chairman from three consecutive meetings. The governor may remove a member except an ex officio member for cause.

E. The term of each regular member is three years unless a member vacates the public office that qualified the member for this appointment.

F. The board members are not eligible to receive per diem but are eligible to receive reimbursement for travel expenses pursuant to title 38, chapter 4, article 2.[1]

G. On behalf of the board, the executive director may seek and accept contributions, grants, gifts, donations, services or other financial assistance from any individual, association, corporation or other organization having an interest in police training, and from the United States of America and any of its agencies or instrumentalities, corporate or otherwise. Only the executive director of the board may seek monies pursuant to this subsection. Such monies shall be deposited in the fund created by § 41-1825.

H. Membership on the board shall not constitute the holding of an office, and members of the board shall not be required to take and file oaths of office before serving on the board. No member of the board shall be disqualified from holding any public office or employment nor shall such member forfeit any such

office or employment by reason of such member's appointment, notwithstanding the provisions of any general, special or local law, ordinance or city charter.

A.R.S. 41-1822 Powers and duties of board; definition

A. With respect to peace officer training and certification, the board shall:

1. Establish rules for the government and conduct of the board, including meeting times and places and matters to be placed on the agenda of each meeting.

2. Make recommendations, consistent with this article, to the governor, the speaker of the house of representatives and the president of the senate on all matters relating to law enforcement and public safety.

3. Prescribe reasonable minimum qualifications for officers to be appointed to enforce the laws of this state and the political subdivisions of this state and certify officers in compliance with these qualifications. Notwithstanding any other law, the qualifications shall require United States citizenship, shall relate to physical, mental and moral fitness and shall govern the recruitment, appointment and retention of all agents, peace officers and police officers of every political subdivision of this state. The board shall constantly review the qualifications established by this section and may amend the qualifications at any time, subject to the requirements of § 41-1823.

4. Prescribe minimum courses of training and minimum standards for training facilities for law enforcement officers. Only this state and political subdivisions of this state may conduct basic peace officer training. Basic peace officer academies may admit individuals who are not peace officer cadets only if a cadet meets the minimum qualifications

established by paragraph 3 of this subsection. Training shall include:

(a) Courses in responding to and reporting all criminal offenses that are motivated by race, color, religion, national origin, sexual orientation, gender or disability.

(b) Training certified by the director of the department of health services with assistance from a representative of the board on the nature of unexplained infant death and the handling of cases involving the unexplained death of an infant.

(c) Medical information on unexplained infant death for first responders, including awareness and sensitivity in dealing with families and child care providers, and the importance of forensically competent death scene investigations.

(d) Information on the protocol of investigation in cases of an unexplained infant death, including the importance of a consistent policy of thorough death scene investigation.

(e) The use of the infant death investigation checklist pursuant to § 36-3506.

(f) If an unexplained infant death occurs, the value of timely communication between the medical examiner's office, the department of health services and appropriate social service agencies that address the issue of infant death and bereavement, to achieve a better understanding of these deaths and to connect families to various community and public health support systems to enhance recovery from grief.

5. Recommend curricula for advanced courses and seminars in law enforcement and intelligence training in universities, colleges and community colleges, in conjunction with the governing body of the educational institution.

6. Make inquiries to determine whether this state or political subdivisions of this state are adhering to the standards for recruitment, appointment, retention and training established pursuant to this article. The failure of this state or any political subdivision to adhere to the standards shall be reported at the next regularly scheduled meeting of the board for action deemed appropriate by that body.

7. Employ an executive director and other staff as are necessary to fulfill the powers and duties of the board in accordance with the requirements of the law enforcement merit system council