No. 18-735

IN THE

Supreme Court of the United States

MARICOPA COUNTY, ARIZONA,

Petitioner,

—v.—

MANUEL DE JESUS ORTEGA MELENDRES, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Stanley Young
COVINGTON & BURLING LLP
3000 El Camino Real
5 Palo Alto Square
Palo Alto, CA 94036

Anne Lai
401 E. Peltason, Suite 3500
Irving, CA 92697

Julia Gomez
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
Los Angeles, CA 90014

Cecillia D. Wang
Counsel of Record
Katrina L. Eiland
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0775
cwang@aclu.org

Kathleen E. Brody
Molly Brizgys
ACLU FOUNDATION OF ARIZONA
3707 N. 7th Street, Suite 235
Phoenix, AZ 85014

Andre I. Segura
ACLU FOUNDATION OF TEXAS
P.O. Box 8306
Houston, TX 77288

Counsel for Respondents Manuel de Jesus Ortega Melendres, et al.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the court of appeals correctly apply the settled § 1983 precedents of this Court and settled Arizona state court precedents in denying Petitioner's repetitive effort to avoid its re-joinder as a defendant in this case?

2. Did Petitioner waive its argument that it was improperly re-joined as a defendant when it stipulated, prior to trial, to its dismissal from the case contingent on its future joinder if necessary for Petitioners to obtain complete relief, and did the court of appeals properly apply law of the case doctrine in holding that it was bound by its prior decisions holding that Petitioner was a proper defendant?

3. Did the court of appeals err in finding that the district court did not abuse its discretion in issuing a remedial injunction after a civil contempt trial, based upon detailed and voluminous factual findings that defendants had repeatedly violated multiple court orders?

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondents make the following disclosures:

1) Respondent Somos America/We Are America Coalition does not have a parent corporation.

2) No publicly held company owns ten percent or more of the stock of Respondent Somos America/We Are America Coalition.

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INTRODUCTION

The petitioner, Maricopa County, Arizona ("the County"), has filed its second petition for certiorari in an 11-year-long class action lawsuit challenging a policy and practice of unconstitutional targeting and detentions of Latinos during traffic stops. The current petition arises from lengthy civil contempt proceedings and seeks review of two of the court of appeals' rulings: rejecting—for the fourth time—the County's objection that it is not a proper defendant, and affirming the district court's second supplemental injunction order.

Although the petition is styled as raising federalism, Tenth Amendment, and Guarantee Clause issues, in fact this case implicates no such thing. First, as to the issue of the County's joinder as a defendant, this Court has already denied a previous petition by Maricopa County making the same arguments in connection with this litigation. *Maricopa County v. Manuel de Jesus Ortega Melendres*, 136 S. Ct. 799 (2016) (No. 15-376). In the decision below, the court of appeals properly applied law of the case doctrine to reject the County's fourth attempt to raise the issue. And in the previous decision, the court of appeals properly applied this Court's precedents and Arizona state law to hold that Arizona sheriff's offices are not jural entities subject to suit, and that the proper defendant under Arizona state law is the County.

The petition should also be denied because the County specifically waived any objection to being joined as a defendant by stipulation in the district court early in this litigation.

The questions concerning the merits of the civil contempt remedy below also do not warrant this Court's review. The court of appeals affirmed a detailed injunction imposing essential remedies to address numerous instances of civil contempt and related failures of the Maricopa County Sheriff's system in investigating officer misconduct. Those failures directly harmed the Plaintiff class. The district court's 67-page injunction followed a 162-page order containing findings of fact and conclusions of law—which the County has never contested—based upon evidence received during a 21-day contempt trial. Under Arizona law, the Sheriff is the final decisionmaker for the County on such matters and the Sheriff and the County are both proper defendants.

The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Nature of the Litigation and Summary of Prior Proceedings.

The decision below is the fourth published decision by the Ninth Circuit in this litigation. *See Melendres v. Arpaio*, 695 F.3d 990, 994 (9th Cir. 2012) (*Melendres I*); *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015) (*Melendres II*); *Melendres v. Maricopa Cty.*, 815 F.3d 645 (9th Cir. 2016) (*Melendres III*); *Melendres v. Maricopa Cty.*, 897 F.3d 1217 (9th Cir. 2018) (*Melendres IV*, *i.e.*, the decision below).[1] As noted above, this is the second petition for certiorari filed by the County in this case.

Plaintiffs-Respondents ("Respondents") first filed this lawsuit in 2007 against three defendants: then-Sheriff Joseph Arpaio in his official capacity, the Maricopa County Sheriff's Office ("MCSO"), and Maricopa County. *See* Dist. Ct. Doc. 1, amended by Dist. Ct. Doc. 26.[2] The operative amended class action complaint alleged that those defendants were systematically violating the Fourth and Fourteenth Amendment rights of Plaintiff class members by targeting them for traffic stops because they are Latino, and detaining them based only on suspicion

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[1] Counsel note that the lead plaintiff in this litigation, Mr. Manuel de Jesus Ortega Melendres, is properly referred to as Mr. Ortega Melendres, and not Mr. Melendres, according to Spanish naming customs. For consistency with captions used by the courts and official reports over years of litigation, however, we will refer to him in case captions by his maternal surname only, "Melendres."

[2] Citations herein denoted "Dist. Ct. Doc." are to the docket in the district court case, No. 07-cv-02513-PHX-GMS (D. Ariz.).

of civil immigration violations and without reasonable suspicion of criminal activity. *See* Dist. Ct. Doc. 26.

The 11-year history of this litigation includes the following district and circuit court orders:

- A preliminary injunction in 2011, ordering that the defendants stop their policy of detaining motorists and passengers solely based on suspected violations of civil immigration laws, which was affirmed by the court of appeals in *Melendres I*;
- Findings of fact and conclusions of law in 2013 following a bench trial on the merits of Respondents' claims, concluding that defendants' policies and practices violated the Fourth and Fourteenth Amendment rights of the Plaintiff class members;
- A supplemental permanent injunction in 2013, which was affirmed by the court of appeals in *Melendres II*. The County's petition for certiorari seeking review of *Melendres II* was denied by this Court, *Maricopa Cty. v. Melendres*, 136 S. Ct. 799 (2016) (No. 15-376);
- A court of appeals decision in 2016 dismissing the County's untimely-filed appeal from four district court orders including the supplemental permanent injunction in *Melendres III*; and
- Findings of fact and then a second supplemental permanent injunction in 2017 after a bench trial on civil contempt charges,

affirmed by the court of appeals in the decision below, *Melendres IV*.

The County's co-defendant, current Maricopa County Sheriff Paul Penzone, took office shortly after his predecessor and the County filed separate appeals from the second supplemental permanent injunction. After being substituted for the former sheriff under Federal Rule of Civil Procedure 25(d), Sheriff Penzone withdrew his appeal and he has been implementing the second supplemental injunction. The Sheriff is not a party to the instant Petition.

B. Facts Relating to the County's Joinder as a Defendant.

Respondents, as Plaintiffs below, named the Petitioner, Maricopa County, as a defendant in their amended class action complaint filed in 2007, along with then-Sheriff Arpaio and the MCSO.

In September 2009, all parties to this litigation filed a stipulation requesting that Maricopa County be dismissed because the parties agreed the County was not a necessary party for Plaintiffs to obtain complete relief. Dist. Ct. Doc. 178. That stipulation expressly provided that the County would be rejoined "as a Defendant in this lawsuit at a later time if doing so becomes necessary to obtain complete relief." *Id.* The district court ordered the County's dismissal pursuant to the stipulation. Dist. Ct. Doc. 194.

Following the trial ruling and (first) supplemental permanent injunction order, then-defendants Sheriff Arpaio and the MCSO filed an appeal to the Ninth Circuit. In its decision on that

appeal, *Melendres II*, the court of appeals restored Maricopa County as a defendant, applying an Arizona state court decision—which post-dated the County's conditional stipulated dismissal by the district court—to hold that the MCSO is not a jural entity under Arizona state law and cannot be sued. *Melendres II*, 784 F.3d at 1260 (citing *Braillard v. Maricopa Cty.*, 224 Ariz. 481, 232 P.3d 1263, 1269 (Ariz. Ct. App. 2010)). The court substituted the County for the MCSO because, under Arizona state law, the Sheriff exercises final decisionmaking authority for the County and, unlike the MCSO, the County is subject to suit. *Id.* (citing Fed. R. Civ. P. 21).

The County then filed a petition for certiorari to this Court, raising the same issue about its re-joinder as a defendant as in the instant petition. This Court denied certiorari in that case, No. 15-376.

The County also filed an untimely appeal from four district court orders that had issued between December 2011 and April 2014. Because the County filed its appeal more than a year after the last of those district court orders, the court of appeals dismissed the appeals as untimely and for lack of appellate jurisdiction. *Melendres III*, 815 F.3d 645.

The County then filed its appeal from the second supplemental injunction order, which issued after the civil contempt trial. The court of appeals affirmed the injunction in *Melendres IV*, 897 F.3d 1217.

In the opinion below, the court of appeals held that the district court did not abuse its discretion in issuing the second supplemental injunction (as

further detailed below) and also rejected the County's repeated argument that it was not properly re-joined as a defendant. On the latter issue, the court of appeals noted that it had "already—thrice—rejected this argument." *Melendres IV,* 897 F.3d at 1223. It reiterated that "under the Supreme Court's decisions interpreting 42 U.S.C. § 1983, 'if the sheriff's actions constitute county policy, then the county is liable for them.'" *Id.* (quoting *Melendres II*, 815 F.3d at 650 and *McMillian v. Monroe Cty.*, 520 U.S. 781, 783 (1997)). The court of appeals further noted that it had recently reaffirmed its holding in another appeal brought by Maricopa County in separate litigation brought by the federal government. *Id.* (citing *United States v. Cty. of Maricopa*, 889 F.3d 648, 651 (9th Cir. 2018)). Finally, it concluded that its prior decisions finding that the County was a proper defendant in this case were binding on the court under the law of the case doctrine. *Id.* (citing *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc)).

C. Facts Relating to the Civil Contempt Proceedings.

This petition arises from a lengthy civil contempt proceeding. After that proceeding, the district court issued the second supplemental injunction order finding that additional remedies were necessary to protect the Plaintiff class in light of evidence that Sheriff Arpaio had repeatedly and intentionally violated several of the court's orders, had withheld evidence relevant to Respondents' claims in the original trial on the merits, continued to withhold evidence and mislead the court-appointed monitor during the contempt proceeding,

and had subverted and exploited defects in MCSO's internal affairs system in order to permit wrongdoers to escape consequences.

The County did not challenge these findings of fact in the court of appeals and does not do so here.

In January 2015, Respondents moved for an order to show cause as to why MCSO, the Sheriff, his Chief Deputy, and other MCSO commanders should not be held in civil contempt for repeatedly defying two separate district court orders and flouting their pre-trial discovery obligations. SER 70-98.[3] On February 12, 2015, the district court issued an order to show cause on three grounds: (1) violation of the district court's December 2011 preliminary injunction by continuing to detain individuals based on suspicion of civil immigration violations alone; (2) failure to comply with pretrial discovery obligations to preserve and produce responsive documents, and (3) violation of the court's order directing action to preserve late-disclosed traffic stop recordings. ER 460-486.[4]

The district court held 21 days of evidentiary hearings. Although Sheriff Arpaio had admitted liability for contempt before the evidentiary hearing, he continued to dispute relevant facts, Dist. Ct. Doc. 1003, including the events leading to violations of court orders and whether his contempt was

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[3] "SER" refers to Appellees' Supplemental Excerpts of Record filed in the appeal below, *Melendres v. Maricopa Cty.*, No. 16-6661 (9th Cir. Aug. 29, 2017), Doc. No 34.

[4] "ER" refers to Appellants' Excerpts of Record filed in the appeal below, *Melendres v. Maricopa Cty.*, No. 16-16661 (9th Cir. Mar. 31, 2017), Doc. Nos. 15-1 to 15-4.

deliberate. Respondents argued, and the district court agreed, that such facts were relevant to determining the proper remedy for the Sheriff's admitted contempt. Dist. Ct. Docs. 1004, 1007.

On May 13, 2016, the district court issued 162 pages of findings of facts. *See* Pet. App. "D," 20-236. The court found the Sheriff and other top MCSO commanders liable on three grounds of civil contempt: intentionally failing to implement the district court's preliminary injunction, *id.* at 20-64; failing to disclose thousands of relevant items in discovery prior to trial, *id.* at 20-23, 64-73, 82-107; and deliberately violating the court's remedial discovery orders, thereby preventing the full recovery of relevant evidence that had been improperly withheld, *id.* at 20-23, 73-82, 89-107. The district court specifically found that the Sheriff and other contemnors had "demonstrated a persistent disregard" for its orders. *Id.* at 22.

The district court also found serious systemic deficiencies in MCSO's internal affairs process that were brought to light during the contempt hearings. MCSO conducted dozens of grossly inadequate misconduct investigations in response to newly disclosed violations of the preliminary injunction and MCSO's pretrial discovery obligations. *Id.* at 21-22, 114-225. The district court concluded that the Sheriff and other commanders had manipulated the internal affairs process in bad faith to "escape accountability" for violations of the rights of the Plaintiff class and the court's orders. *Id* at 21.

1. Violations of the Preliminary Injunction.

The district court found that the Sheriff and other MCSO commanders intentionally failed to implement the district court's preliminary injunction. Pet. App. "D" at 23-64. They made no changes to MCSO's policies in response to that order, and MCSO therefore continued to illegally detain individuals based solely on suspected lack of immigration status and without any suspicion of criminal activity. *Id.* at 25. The district court found that these violations were not isolated or sporadic, but that MCSO regularly engaged in these unlawful activities for at least seventeen months after the preliminary injunction, including after the court of appeals affirmed the order. *Id.* at 25-49. The court found that these violations caused widespread harm to the Plaintiff class. *Id.* at 62-64.

2. Pretrial Discovery Violations.

The district court also held Sheriff Arpaio in contempt for violating his pretrial discovery obligations by failing to disclose documentation and numerous recordings of traffic stops, some of which concerned conduct that violated the rights of the Plaintiff class. Pet. App. "D" at 64-73. As a result of the discovery violation, Respondents and the district court did not learn of the existence of relevant video recordings until May 2014, a year after the district court's post-trial findings of fact. ER 462-63.

The district court also found that the Sheriff and other MCSO commanders had violated their discovery obligations by failing to disclose countless items of personal property, many of which appeared

to have been seized from members of the Plaintiff class. Pet. App. "D" at 85-89. The district court found that MCSO deputies frequently took such items as "trophies" of their arrests of members of the Plaintiff class. *Id.* at 85 ¶ 276.

3. Violations of Court Orders Relating to Discovery and Internal Affairs Investigations.

The district court also found that the Sheriff and MCSO commanders violated several other court orders. First, the district court found that while the contempt proceeding was ongoing, MCSO officials, including the commander of the internal affairs department, attempted to conceal the fact that an MCSO sergeant improperly had in his possession nearly 1,500 identification documents, many which appeared to belong to members of the Plaintiff class. Pet. App. "D" at 89-102, 228-29. They attempted to conceal this information by suspending an internal affairs investigation and deceiving the court-appointed monitor about the status of the investigation. This deceit was in direct violation of a prior court order. *Id.* at 89-102.

Second, the district court found the Sheriff and his Chief Deputy in contempt for deliberately violating a direct order of the court remediating a specific prior discovery violation. In May 2014, when defense counsel disclosed the existence of an unknown number of video recordings of traffic stops that should have been produced in pretrial discovery, the district court directly ordered the Chief Deputy, who was physically present during a status conference, to formulate and obtain the monitor's approval of a plan to quietly gather and preserve

traffic stop recordings, in a manner calculated to prevent the destruction or hiding of such evidence by MCSO deputies. *Id.* at 73-74; *see also* ER 463-64. The Chief Deputy affirmed that he would personally ensure that the court's order was carried out. Pet. App. "D" at 74. However, on the same day that the court issued its oral order, the Chief Deputy directed another commander to send out an email to a large number of personnel requesting the video recordings, without disclosing that action to the monitor and while still engaged in discussions with the monitor about how best to carry out the court's order. *Id.* at 75-78. In the contempt findings, the district court found that this course of action was a willful violation of the court's order and that the Chief Deputy had deliberately misled the monitor about his actions. *Id.* at 76 ¶ 229. The district court found that many recordings were likely destroyed or lost as a result of MCSO officials' bad-faith violation of the court's explicit order. *Id.* at 78-82.

4. Systemic Internal Affairs and Supervision Failures Harming the Plaintiff Class.

The district court found that the Sheriff and his top commanders—including the commander of the internal affairs department (known as the Professional Standards Bureau or "PSB")—had subverted MCSO's internal investigation and discipline systems in order to cover up misconduct and permit personnel to escape discipline for their violations of court orders and the constitutional rights of the Plaintiff class.

By the time of the contempt hearing, MCSO had initiated an internal affairs investigation into

MCSO command staff's violations of the preliminary injunction. The district court ultimately found that this investigation was entirely inadequate, resulted in the imposition of "no discipline on anyone for the MCSO's 17 month violation of this Court's orders," Pet. App. "D" at 134, and exemplified serious flaws in MCSO's internal affairs process.

MCSO also conducted grossly deficient internal investigations of potential employee misconduct relating to the failure to preserve and disclose property belonging to members of the Plaintiff class. *Id.* at 73-74, 81-82, 158-198.

The district court found that that "the scope of Defendants' constitutional violation is broad" and "permeates the internal affairs investigatory processes." Pet. App. "E" at 249. The court found that MCSO commanders systematically failed to properly investigate and address officer misconduct because of pervasive "structural inadequacies" in the agency's internal affairs policies and practices. Pet. App. "D" at 214. MCSO commanders appointed disciplinary officers who had personal conflicts of interest, *id.* at 21, 118-19, 124-26, 134-35, 198-201, 211-13, 222-25, 231-32, and strategically delayed investigations to avoid the imposition of discipline, *id.* at 21, 152-54, 189-90. High-level commanders subverted the procedures for employees to challenge disciplinary findings to permit wrongdoers to evade accountability. *See, e.g.*, *id.* at 145-147 ¶¶ 544-48, 449 ¶ 870.

The district court also found that the Defendants failed to train internal affairs investigators on basic interview techniques, *see id.* at 214-15, explicitly applied a different and more

lenient disciplinary standard to misconduct relating to this litigation, *id.* at 21, 139 ¶ 512, 152 ¶¶ 571-72, 155-56 ¶¶ 589-91, 194 ¶ 747, 228-29 ¶ 888, misapplied disciplinary matrices to reduce penalties, *id.* at 21, 135-40, 222-23; *see also* ER 388 n.23,[5] and failed to hold employees accountable when they lied to internal affairs investigators and to the court-appointed monitor, Pet. App. "D" at 73-78, 165-67, 182-84, 233 ¶ 904. The district court also identified significant deficiencies in the internal reporting of misconduct, and the intake, categorization, and tracking of citizen complaints. *Id.* at 148 ¶ 551, 156 ¶ 591, 220-23.

The district court concluded that the Sheriff and other MCSO commanders "manipulated all aspects of the internal affairs process to minimize or entirely avoid imposing discipline on MCSO deputies and command staff whose actions violated the rights of the Plaintiff class." Pet. App. "E" at 238. In fact, out of numerous investigations presented during the contempt hearing, only a single commander received any significant discipline—a one-week suspension for serious supervisory failures that harmed the Plaintiff class—and he nonetheless received a raise and promotion. Pet. App. "D" at 22, 134-41, 152 ¶ 570. The district court concluded that this evidence "demonstrate[d] the Defendants' ongoing, unfair, and inequitable treatment of members of the Plaintiff class." *Id.* at 228.

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[5] This reference is also to the district court's findings of facts following the contempt trial. However, because Petitioner's Appendix "D" omits all the footnotes from that order, Respondents have provided the citation to the same document in the court of appeals' ER.

The district court also found persistent inadequacies in officer supervision, promotions, and transfers, which contributed to the supervisory failures that damaged the Plaintiff class and allowed individuals who had committed serious misconduct to be promoted. *Id.* at 136 ¶¶ 499-500, 151-152, 217-18; *see also* ER 402 n.28.[6]

5. Pattern of Persistent Disregard for the Court's Orders.

The Sheriff's civil contempt and subversion of the internal affairs system were part of a larger and longstanding pattern of recalcitrance and defiance by the Sheriff and other MCSO commanders. For example, in October 2013, senior MCSO commanders mischaracterized and disparaged the district court's post-trial orders during a briefing for deputies about to engage in a large-scale patrol. In the presence of the Sheriff, the Chief Deputy referred to the court's orders as "ludicrous" and "crap" and falsely stated that only a small group of deputies were found to have used race as a factor in traffic stops. Pet. App. "D" at 107 (internal quotation marks omitted); *see also* ER 462. The Chief Deputy directed deputies not to take seriously the district court's order requiring documentation of the race/ethnicity of individuals who are stopped. ER 462. The court found that "[t]hese misstatements served as the genesis for additional misstatements" other MCSO commanders later made to the public about the court's order at

[6] As above at note 5, Respondents have provided the citation to the document in the Excerpts of Record because Petitioner's Appendix "D" omits the footnotes.

community meetings and in statements to the press. Pet. App. "D" at 107 ¶ 367.

Even earlier in the case, MCSO spoliated evidence before trial, leading to a sanctions order. *Id.* at 67 ¶ 178, 104 ¶ 352; *see also* Dist. Ct. Docs. 261, 493. And during discovery on the civil contempt, MCSO repeatedly failed to disclose documents as required by court order. Pet. App. "D" at 83-85 ¶¶ 268-75.

D. The Second Supplemental Injunction.

After issuing its findings of fact on the civil contempt trial, and after hearing from the parties at length on remedies, the district court issued the second supplemental injunction on July 26, 2016. Pet. App. "E," 237-318.

The second supplemental injunction orders several reforms of the internal affairs system, including: amendments to MCSO's disciplinary matrix and internal affairs policies, including rules on conflicts of interest and prevention of retaliation against whistleblowers; proper training for internal affairs staff; revisions to pre-determination hearing procedures; improvements to complaint intake, public communication, and tracking; and supervision and staffing reforms. *Id.* at 258-87, 294-96.

The second supplemental injunction also vests the monitor with authority to supervise and direct internal investigations relating to the Plaintiff class ("Class Remedial Matters" or "CRMs"), *id.* at 297-98, and to inquire and report on other MCSO internal affairs investigations ("non-CRMs") to ensure that investigations are properly categorized, and that MCSO uniformly and fairly investigates and imposes

discipline, *id.* at 301-02. The court also ordered the appointment of an independent investigator and disciplinary authority to investigate and decide discipline for certain internal investigations already undertaken by MCSO that the court found to be deficient. *Id.* at 302-318.

Then-Sheriff Arpaio recognized the need for the court's remedies to include reform of the agency's internal affairs policies and procedures, *see, e.g.*, SER 67-68, and consented to the vast majority of the measures the court ultimately ordered, *id.* at 1-34, 58-69.

As set forth in more detail below, the district court explained that these remedies were necessary to ensure that MCSO has "in place an effective means of imposing discipline upon its own officers in order to ensure that officers do not feel at liberty to disregard" the constitutional rights of the Plaintiff class and the court's orders intended to safeguard them. Pet. App. "E" at 245. The district court found that its previous orders had proved to be insufficient to protect the Plaintiff class, in light of the Defendants' continued violations. *Id.* at 248-49.

E. The Victim Compensation Plan.

The district court also ordered a victim compensation fund for individuals MCSO had detained in violation of the preliminary injunction. Pet. App. "F," 319-336.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS CORRECTLY APPLIED SETTLED ARIZONA STATE LAW IN DECIDING THE ISSUE OF THE COUNTY'S RE-JOINDER AS A DEFENDANT.

Despite the County's effort to reframe the decision below as one implicating weighty issues of federalism, the Tenth Amendment, and the Guarantee Clause, what the court of appeals actually did was simple and correct: It applied Arizona state decisions to conclude that one of the defendants originally named by the Respondents, the MCSO, was not a jural entity subject to suit, and then substituted the County, which is the proper jural entity subject to suit under state law. This issue of settled state law does not merit this Court's review.

The court of appeals first decided this issue in *Melendres II*, in 2015. It noted that at the time the district court initially addressed whether MCSO was properly named as a defendant, Arizona law was unsettled, but that, in the intervening period, the Arizona Court of Appeals clarified that MCSO is a non-jural entity under Arizona state law and therefore cannot be sued. *Melendres II*, 784 F.3d at 1260 (citing *Braillard*, 232 P.3d at 1269). The court of appeals therefore substituted the County as a defendant. *Id.*

The County repeats the argument it made in its prior unsuccessful petition for certiorari: namely, that it—and specifically, the Maricopa County Board of Supervisors—lacks control over the Sheriff, and therefore the County is not a proper defendant.

Compare Pet. for Writ of Certiorari, *Maricopa Cty. v. Melendres* (15-376) *with* Pet. 18-27. But, as the court of appeals properly concluded, the County's argument is wrong under Arizona law, and also misses the point. Under Arizona law, the Sheriff is the final decisionmaker for the County on matters of law enforcement; in other words, the Sheriff *is* the County for these purposes and his acts are the County's acts. *See Flanders v. Maricopa Cty.,* 54 P.3d 837, 847 (Ariz. Ct. App. 2002). The County and the Sheriff are subject to suit and are both liable for the violations of law the district court found.

Moreover, the County Board of Supervisors does effectively control the Sheriff under Arizona law. The Board has the power to require reports from county officers, including the Sheriff, and to remove and replace them. A.R.S. § 11-253(A); *see also Fridena v. Maricopa Cty.*, 504 P.2d 58, 61 (Ariz. Ct. App. 1972) ("Inasmuch as the Sheriff is a county officer under A.R.S. § 11-401 subsec. A, par. 1. the County exercises supervision of the official conduct of the Sheriff."); A.R.S. § 11-251(1) (the County, through the Board of Supervisors, may "[s]upervise the official conduct of all county officers"); A.R.S. § 11-201(A)(6) (the county determines the budget of the Sheriff); A.R.S. § 11-444(B)-(C) (the Board meets monthly to allocate funds to the sheriff for the payment of expenses and "the sheriff shall render a full and true account of such expenses" every month to the Board).

The County Board of Supervisors' ability to supervise, direct, fund and, if needed, remove the Sheriff establishes that the Sheriff acts for the County under Arizona law. These statutory

provisions give the County Board of Supervisors "the ability and duty to facilitate compliance of the Sheriff and other constitutional officers with judicial orders. . . . 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 court orders." *United States v. Maricopa Cty.*, 151 F. Supp. 3d 998, 1015 (D. Ariz. 2015) (internal quotation marks omitted), *aff'd*, 889 F.3d 648 (9th Cir. 2018). The County is therefore properly responsible for remedying the Sheriff's contempt.

Petitioner cites no Arizona authorities to the contrary. It instead cites Arizona state court decisions holding that Arizona counties are not liable on a theory of *respondeat superior* for torts committed by law enforcement officers. *See* Pet. 21 (citing *Kloberdanz v. Arpaio*, No. 13-cv-02182, 2014 WL 309078, at *4-5 (D. Ariz. 2014); *Ochser v. Maricopa Cty.*, No. 05-cv-2060, 2007 WL 1577910, at *2 (D. Ariz. 2007); *Fridena*, 504 P.2d at 61. Those citations are inapposite, however, because the court below found the County is directly liable for the actions of its ultimate decisionmaker on law enforcement matters, not on a theory of *respondeat superior*.

Petitioner also argues that "[n]ot only is there no statutory grant of authority to Arizona counties over law enforcement matters, but it is the sheriffs who have the sole authority to supervise and impose disciplinary measures for misconduct by officers working under their command." Pet. 22 (citing *Hounshell v. White*, 202 P.3d 466 (Ariz. Ct. App. 2008)). But this entirely defeats the County's

argument. The County is liable precisely *because* the Sheriff exercises this authority as the County's ultimate decisionmaker for law enforcement matters.

The court of appeals properly applied Arizona state law and, in any event, the resolution of questions of Arizona state law does not merit this Court's review.

II. THE COURT OF APPEALS CORRECTLY APPLIED *McMILLIAN* TO DETERMINE THAT THE SHERIFF IS AN OFFICER OF THE COUNTY.

The County also argues, once again, that the court of appeals failed to follow *McMillian v. Monroe County*, 520 U.S. 781 (1997). Pet. 23-27. In *McMillian*, this Court examined the Alabama state constitution to determine that a defendant sheriff was an agent of the state, not the county, and that the county therefore was not liable under § 1983. 520 U.S. at 787. But Petitioner misunderstands *McMillian*. The County seeks the same *outcome* as in *McMillian*, but as the court of appeals has repeatedly explained, the *rule* in *McMillian*—which requires analysis of state law to determine whether a defendant official is an officer of the county or the state—dictates a different outcome here: namely that the County is liable under § 1983. As set forth above, and as the court of appeals correctly held, under *Arizona* law, the Sheriff is an officer of the County and not the state. Ariz. Const. art. 12, § 3. The County is therefore liable under § 1983.

Contrary to Petitioner's assertion, Pet. 27, there is no split of authority among the circuits on the issue of county liability. In *Grech v. Clayton*

County, 335 F.3d 1326, 1330-48 (11th Cir. 2003) (en banc), and *Turquitt v. Jefferson County*, 137 F.3d 1285, 1289 (11th Cir. 1998), the Eleventh Circuit applied the *McMillian* test and held that under Georgia and Alabama law, respectively, sheriffs are officers of the state and not the county, and that sheriffs therefore are not county policymakers on relevant subjects. *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), is a *respondeat superior* case in which the Seventh Circuit pointed out that "sheriffs occupy a somewhat unique position under Illinois law" in that sheriff's offices are independent legal entities distinct from counties, *id.* at 685-86—precisely the opposite of what Arizona law provides, as set forth above. Similarly, in *Knight v. Vernon*, 214 F.3d 544, 552 (4th Cir. 2000), the Fourth Circuit applied *McMillian* and looked to North Carolina state decisions that specifically held that the county was not liable for the wrongful termination of the sheriff's employee.

In short, the court of appeals properly applied *McMillian* and analyzed settled Arizona state law to conclude that the County is a proper defendant because the Sheriff exercises final decisionmaking authority *for the County* on the matters at issue in this litigation, and that the County therefore is liable under § 1983. There is no split of authority and there is no issue warranting the Court's review. *See* S. Ct. R. 10.

III. THE COURT OF APPEALS CORRECTLY APPLIED SETTLED LAW IN AFFIRMING THE DISTRICT COURT'S SECOND SUPPLEMENTAL INJUNCTION AND VICTIM COMPENSATION ORDERS.

As the court of appeals noted, *Melendres IV*, 897 F.3d at 1219-21, and as detailed in Respondents' answering brief below, 9th Cir. Doc. No. 33,[7] the district court's finding that the second supplemental injunction order was necessary to protect the Plaintiff class's constitutional rights was supported by voluminous findings of fact based on the lengthy contempt trial record. The court of appeals concluded, based on long-settled precedents setting the standard for injunctive relief, that the injunction was narrowly tailored and the district court did not abuse its discretion. *Melendres IV*, 897 F.3d at 1221-22 (citing *Melendres II*, 784 F.3d at 1265; *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991); *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)).

Petitioner complains that the court of appeals' affirmance of the second supplemental injunction disregards purported Arizona state laws about certain funding limitations on the County and therefore violates state sovereignty and principles of federalism. Pet. 28-32. But Petitioner fails to cite any Arizona state authority providing that the County cannot be held responsible for the cost of compliance

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[7] Docket citations herein denoted "9th Cir. Doc." are to the docket in the appeal below, *Melendres v. Maricopa Cty.*, No. 16-16661 (9th Cir.).

with the second supplemental injunction. *See Melendres IV*, 897 F.3d at 1223 (analyzing A.R.S. § 11-981(A)(2) and noting Petitioner's concession on an earlier appeal that it has a duty under Arizona law to fund the cost of compliance with the district court's injunctions). Nor has Petitioner cited a single authority by an Arizona or federal court standing for the principle that a state or municipality can avoid liability under § 1983 simply by enacting a state law forbidding such liability. In fact, federal precedents are to the contrary. *See, e.g.*, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695, *as modified*, 444 U.S. 816 (1979) ("State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution."); *N. Carolina State Bd. of Ed. v. Swann*, 402 U.S. 43, 45 (U.S. 1971) (holding state law that would "obstruct the remedies granted by the District Court" invalid because state "policy must give way when it operates to hinder vindication of federal constitutional guarantees"); *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1402 (9th Cir. 1997), *as amended* (Apr. 22, 1997) (explaining that state law "cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme" (internal quotation marks omitted)).

In any event, like the issue of its joinder as a defendant, the County's argument that it lacks authority to fund certain remedies depends on Arizona state law, the proper interpretation of which does not merit this Court's review.

The County's other federalism arguments are also meritless. *Rizzo v. Goode*, 423 U.S. 362 (1976), the case on which the County relies, reversed injunctive relief against a municipal agency where the misconduct was attributable to the actions of a few individual officers. *Rizzo* itself explains that where, as here, misconduct is attributable to agency policies and a pattern of misconduct by commanders, injunctive relief is appropriate. 423 U.S. at 375. In the context of a civil contempt remedy where repeated and willful violations of numerous prior district court orders were proved, there was more than an adequate basis for the second supplemental injunction.

The decision below is also consistent with *Lewis v. Casey*, which held in a prison conditions context that the district court's injunction order "was developed through a process that failed to give adequate consideration to the views of state prison authorities." 518 U.S. 343, 362 (1996). Even setting aside that the Court grants particular deference to prison officials, *id.* at 387 n.9 (citing *Turner v. Safley*, 482 U.S. 78, 84–85 (1987)), and that this case does not involve such deference, *Lewis* is distinguishable because this case concerns an injunction entered after the Defendants committed repeated willful acts of contempt, and the district court afforded all parties a chance to be heard fully on the issue of remedy. The court requested a joint submission from the parties indicating areas of agreement and dispute, Dist. Ct. Docs. 1715, 1732, 1736-2, and another round of separate briefs on the remedies, Dist. Ct. Docs. 1684, 1685, 1687, 1688, 1720, 1721, 1729, 1730, and it held at least two hearings before issuing the injunction, Dist. Ct. Docs. 1694, 1736.

In sum, the court of appeals correctly applied settled precedents on the scope of injunctions and the factbound application of those precedents does not warrant this Court's review. *See* S. Ct. R. 10.

IV. THIS CASE IS A POOR VEHICLE FOR REVIEW OF ANY LEGAL ISSUES BECAUSE OF PROBLEMS OF WAIVER AND LAW OF THE CASE.

The petition should also be denied because the County specifically waived its arguments both as to county liability and the merits of the second supplemental injunction, and the court of appeals properly ruled that it was bound by law of the case doctrine on the issue of the County's liability and joinder.

A. Waiver by Stipulation.

As set forth above, early in this litigation, the County stipulated to and the district court approved its dismissal from the case on the express condition that the dismissal was "without prejudice to rejoining [the County] as a Defendant at a later time in this lawsuit if doing so becomes necessary to obtain complete relief." Dist. Ct. Docs. 178, 194. The County is bound by its agreement, which was approved by the court. *See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) ("absent some affirmative indication that the agreement was entered into unknowingly or involuntarily," waiver agreement was valid and enforceable); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013) ("Stipulations must be binding."); *Christian Legal Soc. Chapter of the Univ. of Calif., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 677 (2010) ("This

Court has accordingly refused to consider a party's argument that contradicted a joint stipulation [entered] at the outset of th[e] litigation.") (internal citation and quotation marks omitted).

B. Law of the Case.

Petitioner's arguments about the County's liability do not warrant the Court's review because the court of appeals concluded that its prior decisions finding the County to be a proper defendant in this case were binding as law of the case. *See Melendres IV*, 897 F.3d at 1223 (citing *Gonzalez*, 677 F.3d at 389 n.4). Indeed, the court of appeals had already decided the issue three times over—twice in this case and once in another appeal brought by Maricopa County in separate litigation. *See id.* Before filing the instant petition, the County unsuccessfully sought review of the question of its liability with this Court, *see Maricopa Cty. v. Melendres*, 136 S. Ct. 799 (2016) (No. 15-376).

The court of appeals was bound by its previous rulings under the law of the case doctrine. *See Agostini v. Felton*, 521 U.S. 203, 236 (1997) ("Under [the law of the case] doctrine a court should not reopen issues decided in earlier stages of the same litigation.") (citing *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)); *Herrington v. Cty. of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) ("[T]he decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." (internal quotation marks omitted)). The court of appeals therefore correctly rejected Petitioner's argument.

In sum, the only properly presented question is whether the court of appeals correctly applied law of the case principles in the decision below. That question does not merit this court's attention.

C. Waiver on Merits of Second Supplemental Injunction.

Petitioner also waived objections to the bulk of the second supplemental injunction.[8] Although the County seeks reversal of the entire injunction, the Sheriff generally conceded that the district court's findings demonstrated a need for revisions to MCSO policies and procedures, including with respect to internal affairs investigations and disciplinary policies. *See* SER 67-68.

The County did not take a contrary position regarding the remedies to which the Sheriff agreed; nor could it have, since Arizona state law provides that a county's sheriff is the final policymaker for the county on such matters. *See supra* pp. 17-21. In affording the parties a full and fair opportunity to be heard, *see supra* pp. 24-25, the district court did not issue the second supplemental injunction until more than two months after issuing its findings of fact. Throughout that period, the County failed to raise specific objections to the vast majority of provisions in the second supplemental injunction. At a minimum, the County's waiver makes this case a poor vehicle for consideration of any substantive legal issue.

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[8] The court of appeals rejected Respondents' waiver argument, *Melendres IV*, 897 F.3d at 1221 n.1; however, at a minimum Petitioner's failure to make clear objections makes this case a poor vehicle for this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
15 15th Street NW
Washington, DC 20005

Stanley Young
COVINGTON & BURLING LLP
3000 El Camino Real,
5 Palo Alto Square,
10th Floor
Palo Alto, CA 94036

Andre I. Segura
ACLU FOUNDATION OF TEXAS
P.O. Box 8306
Houston, TX 77288

Anne Lai
401 E. Peltason,
Suite 3500
Irving, CA 92697

Cecillia D. Wang
Counsel of Record
Katrina L. Eiland
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0775
cwang@aclu.org

Kathleen E. Brody
Molly Brizgys
ACLU FOUNDATION OF ARIZONA
3707 N. 7th Street,
Suite 235
Phoenix, AZ 85014

Julia Gomez
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
Los Angeles, CA 90014

Date: March 11, 2019

Counsel for Respondents
Manuel de Jesus Ortega Melendres, et al.