No. 16-16661

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**IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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MANUEL DE JESUS ORTEGA MELENDRES, *et al*.,
*Plaintiffs-Appellees*,

UNITED STATES OF AMERICA,
*Intervenor-Plaintiff-Appellee*,

v.

MARICOPA COUNTY, ARIZONA,
*Defendant-Appellant*

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*On Appeal from the United States District Court for the District of Arizona*
*No. 2:07-CV-02513-GMS*

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# ANSWERING BRIEF OF PLAINTIFFS-APPELLEES MANUEL DE JESUS ORTEGA MELENDRES, *ET AL*.,

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Cecillia D. Wang
Katrina L. Eiland
ACLU Foundation
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0775

Kathleen E. Brody
Brenda Muñoz Furnish
ACLU Foundation of Arizona
3707 N. 7th Street, Suite 235
Phoenix, AZ 85014
Telephone: (602) 650-1854

Stanley Young
Covington & Burling LLP
333 Twin Dolphin Drive, Suite 700
Redwood Shores, CA 94065
Telephone: (650) 632-4700

Andre I. Segura
ACLU Foundation of Texas
1500 McGowen Street, Suite 250
Houston, TX 77004
Telephone: (713) 942-8146

*Attorneys for Plaintiffs-Appellees (additional attorneys listed on next page)*

*Additional Attorneys for Plaintiffs-Appellees*:

Anne Lai
401 E. Peltason, Suite 3500
Irving, CA 92697
Telephone: (949) 824-9894

Julia Gomez
Mexican American Legal Defense and Educational Fund
634 South Spring Street, 11th Floor
Los Angeles, CA 90014
Telephone: (213) 629-2512

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## INTRODUCTION

Maricopa County appeals from a Second Supplemental Permanent Injunction (the "Second Supplemental Injunction") in a decade-long civil rights litigation that has already made its way to this Court on three previous occasions. The Second Supplemental Injunction—the majority of which the Sheriff consented to—imposes remedies after lengthy civil contempt proceedings and the district court's issuance of voluminous and detailed findings of fact.

Those findings, which are uncontested by the County on this appeal, demonstrated that the Sheriff and other Maricopa County Sherriff's Office ("MCSO") officials were liable on three grounds of civil contempt, including willful violations of the preliminary injunction, pretrial discovery requirements, and an order by the district court remediating those discovery violations. The district court also found that these violations were part of a larger and longstanding pattern of the Sheriff's and other commanders' recalcitrance and outright defiance of the district court; and that they systematically subverted MCSO's internal affairs and discipline process to avoid accountability for their violations of court orders and the constitutional rights of the Plaintiff class. The district court summarized some of its findings as follows:

> [T]he Defendants have engaged in multiple acts of misconduct, dishonesty, and bad faith with respect to the Plaintiff class and the protection of its rights. They have demonstrated a persistent disregard for the orders of this Court, as well as an intention to violate and manipulate the laws and policies

> regulating their conduct as they pertain to their obligations to be fair, 'equitable[,] and impartial' with respect to the interests of the Plaintiff class.

ER 298. The district court also noted that "[t]he facts of this case are particularly egregious and extraordinary." ER 142.

The County's appeal fails fundamentally because the district court exercised its lawful authority in issuing the entirety of the Second Supplemental Injunction. In light of the district court's findings, each provision of the Second Supplemental Injunction is necessary to protect against further violations of the constitutional rights of the Plaintiff class, ER 144-45, to prevent further violations of the district court's orders, ER 147-48, and to modify the court's prior injunctions to account for circumstances revealed through the civil contempt proceeding, ER 146-47. The district court carefully tailored the injunction, noting that its previous orders had proved insufficient to protect the Plaintiff class. ER 147.

Rather than try to meet its burden to show that the injunction is excessive, the County mischaracterizes the district court's orders and ignores the findings that the Sheriff willfully subverted the internal affairs system in order to cover up and evade liability for repeated violations of court orders and Plaintiffs' constitutional rights. The County also attempts to relitigate the claim that it is not a proper defendant—which this Court has already rejected—and argues, without any valid authority, that it should not be held financially liable for the remedies imposed and that the current Sheriff should not have to comply with an injunction to remedy

*systemic* defects that permeate his agency only because it issued before he took office. All of these arguments are meritless.

This Court should affirm the district court's Second Supplemental Injunction in its entirety.

## STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in ordering supplemental injunctive relief that is necessary to safeguard the rights of the Plaintiff class in light of factual findings that Defendants acted in bad faith by repeatedly and deliberately violating the district court's orders protecting the constitutional rights of the Plaintiff class, repeatedly withheld evidence relevant to Plaintiffs' claims and enforcement of the court's orders, and subverted MCSO's internal affairs system in order to hide misconduct and avoid accountability.

2. Whether the County has waived objections to provisions of the Second Supplemental Injunction that were consented to below.

3. Whether, as this Court previously held, injunctive relief based on an ample factual record and for the protection of Plaintiffs' constitutional rights is fully consistent with federalism principles.

4. Whether, as this Court previously held, the County is the proper defendant in lawsuits challenging policies and practices of the Sheriff's Office, and is therefore liable for the cost of compliance with the district court's orders.

# STATEMENT OF THE CASE

## I. Prior Proceedings in This Litigation

This litigation has already reached this Court on three prior occasions. *See Melendres v. Arpaio*, 695 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*). The instant appeal is taken by one of the Defendants,[1] Maricopa County, from the district court's Second Supplemental Injunction, which orders remedies after a lengthy civil contempt proceeding.

Between the issuance of that injunction and the filing of this appeal, Joseph Arpaio was succeeded in office by Paul Penzone. Sheriff Penzone was automatically substituted as defendant-appellant pursuant to Federal Rule of Civil Procedure 25(d) and Federal Rule of Appellate Procedure 43(c)(2). Case No. 16-16663, Doc. No. 25. Sheriff Penzone withdrew the separate appeal filed by his predecessor, Arpaio, and is not party to the County's appeal here. *Id.*, Doc. No. 28-1.

### A. The Nature of the Litigation

Plaintiffs-Appellees ("Plaintiffs") first filed this lawsuit in 2007 against Sheriff Arpaio in his official capacity, MCSO, and Maricopa County. Dist. Ct. Doc. 1, amended by Doc. 26. The amended complaint alleged that those

[1] Throughout this brief, "Defendants" refers to Maricopa County and the Sheriff, except where otherwise specified.

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 of civil immigration violations and without reasonable suspicion of criminal activity. *Id.*

### B. Preliminary Injunction

This case first reached this Court when the Sheriff and MCSO took an interlocutory appeal from the district court's order dated December 23, 2011 (the "preliminary injunction"), which certified the Plaintiff class, granted partial summary judgment to Plaintiffs on their Fourth Amendment claim, and enjoined Defendants from detaining any person based solely on knowledge or reasonable belief that that person was not lawfully present in the United States. *Melendres v. Arpaio*, 836 F. Supp. 2d 959, 992 (D. Ariz. 2011) (Dist. Ct. Doc. 494 at 40). Treating the interlocutory appeal of the partial summary judgment order as an appeal from a preliminary injunction, this Court affirmed the district court. *Melendres I*, 695 F.3d 994.

### C. Post-Trial Rulings

This Court took up this case for the second time when the Sheriff and MCSO appealed from the district court's final judgment. On May 24, 2013, the district court issued its Findings of Fact and Conclusions of Law after a bench trial, finding that the Sheriff and MCSO had unlawful policies targeting Latinos for

traffic operations in violation of both the Fourth and Fourteenth Amendments. SER 99-240 (Dist. Ct. Doc. 579). The court made its preliminary injunction permanent and enjoined the Sheriff and MCSO from continuing other unconstitutional policies. *Id.* at 5.

On October 2, 2013, the district court issued a Supplemental Permanent Injunction/Judgment Order ("Supplemental Injunction") adding remedies necessary to protect the constitutional rights of the Plaintiff class and ensure compliance with the court's prior orders including appointment of an independent monitor (the "Monitor") to assess and report on MCSO's compliance with court orders and other reforms on policies, training, and supervision. ER 487-545.

This Court affirmed the district court's post-trial findings of fact in their entirety and affirmed the Supplemental Injunction almost in its entirety. *Melendres II*, 784 F.3d 1254. This Court reversed the district court on just one narrow ground—the list of "performance-based metrics" subject to monitoring—and remanded for further tailoring of two of the metrics, "disciplinary outcomes for *any* violations of departmental policy" and whether officers were subject to "civil suits or criminal charges . . . for off-duty conduct." *Id.* at 1267 (internal quotation marks omitted). This Court noted that, as drafted, these metrics "create[d] a problem to the extent they were unrelated to the constitutional violations found by the district court." *Id.* The Court explained that if, for example, an officer "face[d]

a charge of driving under the influence of alcohol in another state while on vacation," it could amount to violation of departmental policy and subject the officer to charges, but the record did not reflect a sufficient connection between this type of conduct and the unconstitutional policing at issue in the litigation. *Id.*

On remand, the district court modified the two monitoring metrics as directed. Dist. Ct. Doc. 1270.

## II. Civil Contempt Proceedings

The instant appeal arises from a lengthy civil contempt proceeding, which led to the Second Supplemental Injunction. The Second Supplemental Injunction was based upon the district court's findings that further injunctive relief was needed to protect the Plaintiff class in light of evidence that the Sheriff had repeatedly and intentionally violated several of the court's orders, had withheld evidence relevant to the Plaintiffs' 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 MCSO's internal affairs system in order to permit wrongdoers to escape consequences. The County does not challenge these findings of fact.

These civil contempt proceedings came about as a result of revelations that the Sheriff and MCSO had repeatedly defied two separate district court orders and flouted their pre-trial discovery obligations. In January 2015, Plaintiffs 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. SER 70-98 (Dist. Ct. Doc. 843). On February 12, 2015, the district court issued an order to show cause on three grounds: failures (1) to comply with the district court's December 2011 preliminary injunction by continuing to detain individuals based on suspicion of civil immigration violations alone; (2) to comply with pretrial discovery obligations to preserve and produce responsive documents, and (3) to follow the court's order to preserve late-disclosed traffic stop recordings. ER 460-486.

Over 21 days of testimony, the district court heard the parties' evidence. Although the Sheriff admitted liability for contempt before the evidentiary hearing, he continued to dispute relevant facts, including the events leading to violations of court orders and whether his contempt was deliberate or inadvertent. Plaintiffs 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.

After the evidentiary hearing and closing arguments, the district court issued 162 pages of findings of facts on May 13, 2016. ER 296-457. 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, ER 296-328; failing to disclose thousands of relevant items in

discovery prior to trial, ER 296-98, 328-34, 341-60; and deliberately violating the court's remedial discovery orders, thereby preventing the full recovery of relevant evidence that had been improperly withheld, ER 296-98, 335-41, 347-60. The district court found that the Sheriff and other contemnors had "demonstrated a persistent disregard" for its orders. ER 298.

The district court also found serious systemic deficiencies in MCSO's internal affairs process, which were brought to light during the contempt hearings due to dozens of grossly inadequate misconduct investigations that MCSO conducted in response to newly disclosed violations of the preliminary injunction and MCSO's pretrial discovery obligations. ER 297. 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.*

### A. 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. ER 298-328. Indeed they made *no* changes to MCSO's policies in response to that order, ER 299-300, and MCSO therefore continued to detain individuals based solely on suspected lack of immigration status, and without any suspicion of criminal activity. The district court found that these violations were not isolated or

sporadic; rather, MCSO regularly engaged in these unlawful activities for at least seventeen months after the preliminary injunction, including after this Court affirmed the order. ER 300, 317-18. The court found that these violations caused widespread harm to the Plaintiff class. ER 327-28.

### B. Pretrial Discovery Violations

The district court also held the Sheriff in contempt for violating his pretrial discovery obligations by failing to disclose numerous recordings of traffic stops, some of which depicted conduct that violated the rights of the Plaintiff class. ER 332-35. The existence of such video recordings, and the fact that MCSO deputies routinely recorded traffic stops, were first disclosed to the district court and Plaintiffs in 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. ER 464. The district court found that MCSO deputies frequently took such items as "trophies" of their arrests of members of the Plaintiff class. ER 343 ¶ 276. Although these items were seized during immigration enforcement operations at issue in the trial and were responsive to Plaintiffs' discovery requests, the Sheriff and MCSO had failed to disclose them. ER 343-44.

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

The district court also found that the Sheriff and MCSO commanders violated 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 discovery that an MCSO sergeant improperly had in his possession nearly 1,500 identification documents, a large number of which appeared to belong to members of the Plaintiff class. ER 347, 452. They did so by suspending an internal affairs investigation and deceiving the court-appointed Monitor about the status of the investigation. ER 350-57. This deceit by MCSO officials directly violated a prior court order. ER 351-57.

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 belatedly disclosed the existence of an unknown number of video recordings of traffic stops, the district court ordered the Chief Deputy, in person 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. ER 335, 463-464. The Chief Deputy affirmed that he would personally ensure that the court's order was carried out. ER 336. However, on the same day 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 indeed while still engaged in discussions with the Monitor about how best to carry out the court's order. ER 337-38. In the contempt findings, the district court found that this course of action was a deliberate violation of the court's order and that the Chief Deputy had deliberately misled the Monitor about his actions. ER 337 ¶ 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. ER 338-341.

### D. Systemic Internal Affairs and Supervision Failures Harming the Plaintiff Class

During the contempt hearing, the parties presented evidence on a number of internal affairs proceedings that related to the numerous violations of court orders. Based on that evidence, 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 affairs 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.

But the district court 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," ER 381, and exposed serious flaws in MCSO's internal affairs process.

MCSO also initiated internal investigations into potential employee misconduct relating to the failure to preserve and disclose property belonging to members of the Plaintiff class. ER 335-36, 341. Those investigations, however, were also grossly deficient. ER 399-427.

The district court found that that "the scope of Defendants' constitutional violation is broad" and "permeates the internal affairs investigatory processes." ER 151. Specifically, the court found that MCSO commanders systematically failed to properly investigate and address officer misconduct due to pervasive "structural inadequacies" in the agency's internal affairs policies and practices. ER 441. The court elaborated that MCSO commanders had appointed disciplinary officers who had personal conflicts of interest, ER 297, 369, 373-74, 381, 394, 430, 439-40, 448-49, 454, and strategically delayed investigations to avoid the imposition of discipline, ER 297, 424. The district court also found that high-level commanders subverted the procedures for employees to challenge disciplinary findings (grievances and "pre-determination" and "name-clearing" hearings) to

permit wrongdoers to evade accountability. *See, e.g.*, ER 389-91 ¶¶ 544-48, 449 ¶¶ 870.

The district court also found that MCSO failed to train internal affairs investigators on basic interview techniques, ER 441-43, explicitly applied a different and more lenient disciplinary standard to misconduct relating to this litigation, ER 297, 394 ¶ 571-72, 396-97 ¶ 589-90, 427 ¶ 747, 452 ¶ 888, misapplied disciplinary matrices to improperly reduce consequences, ER 297, 382-85, 388 n.23, 448-49, and failed to hold employees accountable when they lied to internal affairs investigators and to the Monitor, ER 335-38, 405, 418-19, 455 ¶ 904. The district court also identified significant deficiencies in the internal reporting of misconduct, and the intake, categorization, and tracking of citizen complaints. ER 397 ¶ 591, 445-48 ¶¶ 850-67.

The 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." ER 142. 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. ER 297, 381-86. The district court concluded that this evidence

"demonstrate[d] the Defendants' ongoing, unfair, and inequitable treatment of members of the Plaintiff class." ER 451.

The district court's findings also documented 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. ER 161-62 ¶¶ 172-76, 382 ¶¶ 499-500, 393 ¶ 567, 394 ¶ 570, 402 n.28, 443 ¶ 841.

### E. Pattern of Persistent Disregard for the Court's Orders

Notably, the Sheriff's civil contempt, and his 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. ER 360, 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 community meetings and in statements to the press. ER 360 ¶ 367.

Even earlier in the case, MCSO spoliated evidence before trial, leading to a sanctions order. ER 330 ¶ 178, 358 ¶ 352; Dist. Ct. Docs. 261, 493. And during discovery on the civil contempt, MCSO repeatedly failed to disclose documents as required by court order. ER 342-343 ¶¶ 268-75.

### F. Second Supplemental Injunction

After issuing its findings of fact on May 13, 2016, and after hearing from the parties at length on remedies, the district court issued the Second Supplemental Injunction on July 26, 2016.

The Second Supplemental Injunction includes provisions for reform 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 reforms related to supervision and staffing. ER 158-81, 186-88.

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"), ER 189, 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, ER 192-93. The court also ordered the appointment of an independent investigator and disciplinary authority to investigate and decide discipline for certain internal investigations that the court invalidated for inadequacy or where MCSO failed to investigate significant misconduct affecting the Plaintiff class. ER 194-207.

The Sheriff 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 (Dist. Ct. Doc. 1687 at 10-11), and he consented to the vast majority of the measures the court ultimately ordered, SER 1-34, 58-69 (Dist. Ct. Docs. 1732 & 1732-3, 1687); Dist. Ct. Docs. 1715, 1729.

As set forth in more detail below, the 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. ER 148. The district court found that its previous orders had proved to be insufficient to protect the Plaintiff class, in light of Defendants' continued violations. ER 150.

### G. Victim Compensation

The district court also ordered a victim compensation fund for individuals whom MCSO had detained in violation of the preliminary injunction. ER 209-222.

## STANDARD OF REVIEW

A district court's choice of remedies to address constitutional violations and to respond to changed circumstances is reviewed for abuse of discretion. *See Kelly v. Wengler*, 822 F.3d 1085, 1098 (9th Cir. 2016) ("Courts have long had inherent power to modify court orders in changed circumstances."); *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008) ("'The district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong,' and we review the district court's choice of remedies within that scope for abuse of discretion.") (internal citations omitted).

District courts "have broad equitable power to order appropriate relief in civil contempt proceedings," and such orders are reviewed for abuse of discretion. *S.E.C. v. Hickey*, 322 F.3d 1123, 1128 (9th Cir.), *amended by* 335 F.3d 834 (9th Cir. 2003). This "deference to the district court's exercise of discretion is heightened where the court has been overseeing a large, public institution for a long period of time." *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992).

In reviewing a district court's underlying factual findings, a clear error standard applies. *In re Dyer*, 322 F.3d 1178, 1190-91 (9th Cir. 2003); *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). This Court "must not reverse as long as the [district court's] findings are plausible in light of the record viewed in its entirety." *United States v. Alexander*, 106 F.3d 874, 877 (9th Cir. 1997). This Court also gives "due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6); *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663, 665 (9th Cir. 1996).

The district court's rulings on purely legal issues are reviewed de novo. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 952 (9th Cir. 2001).

## SUMMARY OF ARGUMENT

The County's appeal is entirely meritless. First of all, the County fails even to specify which provisions of the injunction are excessive, much less explain why. Courts have rightly rejected appellate challenges to injunctions based on such failures.

The County's arguments primarily consist of protests about the cost of compliance with the Second Supplemental Injunction. These arguments carry no weight. Under this Court's settled precedents, the fact that a necessary remedy is costly does not foreclose the remedy.

The County's appeal also fails because the district court crafted its Second Supplemental Injunction based on an extensive record that the Sheriff and other top commanders committed three counts of civil contempt; repeatedly violated numerous other prior orders; repeatedly violated discovery violations, depriving Plaintiffs and the district court of relevant evidence that would have led to additional injunctive remedies in the first Supplemental Injunction; and systemically subverted MCSO's internal affairs processes and misled the court-appointed Monitor in order to hide misconduct and evade accountability, to the detriment of the Plaintiff class. These violations, proved by Plaintiffs during a 21-day contempt hearing, were part of a larger and longstanding pattern of Defendants' discovery violations, recalcitrance, and even defiance of the district court. The County does not challenge these findings of fact.

On this factual record, the district court had three legal bases to issue the Second Supplemental Injunction: (1) to prevent further violations of the rights of the Plaintiff class; (2) to supplement and reinforce prior injunctions based upon newly-revealed circumstances; and (3) as a remedy for civil contempt, in order to prevent further violations of court orders.

In addition, the County has waived its appeal as to provisions of the Second Supplemental Injunction that the Sheriff did not object to and, in fact, consented to below—*i.e.*, virtually all of the reforms to MCSO's internal affairs policies and

procedures, investigation training, and the handling of civilian complaints. Where the County failed to object, and the Sheriff as the County's ultimate decisionmaker on these matters explicitly consented, the appeal should be rejected based on waiver.

The County's argument that it is somehow "unfair" to require the current Sheriff to comply with the Second Supplemental Injunction is meritless. The district court found that Defendants had a policy and systemic pattern of violating Plaintiffs' constitutional rights and the court's orders—a pattern that persisted after the first Supplemental Injunction and that even continued during the pendency of the civil contempt proceedings. These findings ran against the Sheriff in his official capacity. As Sheriff Arpaio's successor in office, Sheriff Penzone is responsible for complying with all of the district court's orders. If Defendants believe that changed circumstances warrant relief from any provision of the Second Supplemental Injunction, they should make their request to the district court, as provided in the injunction itself. Sheriff Penzone's automatic substitution as the proper defendant is no basis for appeal.

The County's argument that the Second Supplemental Injunction violates federalism principles is 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 holds that where, as here, misconduct is attributable to agency policies and a pattern of misconduct by commanders, injunctive relief is entirely appropriate.

The County argues that it is not a proper defendant. But this Court already decided that issue against the County in *Melendres II and III*, and should disregard the County's effort to relitigate that settled question. Contrary to the County's contention, this Court thoroughly and correctly considered the legal standard in *McMillian v. Monroe Cty.*, 520 U.S. 781 (1997), in the prior appeals.

Finally, the County's argument that it cannot be held liable for the intentional misconduct of the Sheriff misapprehends basic § 1983 law. Under Arizona law, the Sheriff is the County's final decisionmaker as to law enforcement matters. *Monell* liability attaches to the County precisely because the Sheriff promulgated unlawful policies.

In summary, the district court properly exercised its discretion to issue the Second Supplemental Injunction and it should be affirmed in its entirety.

# ARGUMENT

## I. The Second Supplemental Injunction Should Be Affirmed In Its Entirety.

### A. The County's Arguments Are Not Properly Raised.

#### 1. The County Makes Only Vague and Conclusory Arguments and Fails To Describe, Much Less Show, Any Abuse of Discretion.

The County asks this Court to strike the Second Supplemental Injunction "in its entirety," Br. 41, but it fails to provide any arguments beyond conclusory statements as to why specific provisions of the district court's order are improper. *See* Br. at 15-22. In fact, the County identifies only a handful of provisions in the court's order as purportedly problematic: granting the Monitor access to all internal affairs investigations (Br. at 19); imposing requirements for the formulation of internal disciplinary policies (Br. at 20); and the "costs associated with the expanded authority of the [M]onitor, the Independent Investigator, the Independent Disciplinary Authority, reformation of the way in which PSB conducts its business, the district court's tinkering with the supervisor/patrol, or relocation of PSB's offices" (*id.*). The County does not even bother to explain why it believes the Court abused its discretion in ordering any of these measures—i.e., why each measure is not sufficiently tailored as a remedy for the violations described in the court's findings. For this reason alone, the County's appeal should be rejected.

In *Thomas v. Bryant*, 614 F.3d 1288, 1323 (11th Cir. 2010), the Eleventh Circuit affirmed an injunction under precisely these circumstances. The defendants appealed from the district court's detailed injunction, making only "conclusory arguments that the injunction extends further than necessary to correct the violation and is overly intrusive." *Id.* The Eleventh Circuit rejected the defendants' appeal because they had failed to "articulate any specific deficiency." *Id.*; *see also United States v. Apple, Inc.*, 791 F.3d 290, 338 n.26 (2d Cir. 2015) (rejecting defendant's appeal of injunction because it made only conclusory arguments that appointment of monitor exceeded district court's authority). This Court should reject the County's equally conclusory arguments here.

**2. Objections Based on the Cost of Compliance Fail Under Ninth Circuit Law.**

The County's objections to the few specific remedies that it does identify are focused primarily on the district court's imposition of the financial burden for such remedies on the County.[2] Br. at 20. For example, the County objects to the relocation of PSB's office in passing and apparently solely based on cost. Br. at 20. But that provision was amply justified on the record. The district court found that civilians who wished to make complaints against MCSO personnel were inhibited from doing so. *See* ER 445-48 ¶¶ 850-67. There was evidence that PSB

[2] Notably, the Sheriff explicitly disagreed with the County's argument that it is not financially liable for the cost of remedies. SER 62-63 (Dist. Ct. Doc. 1687 at 5-6), 295-96 (May 31, 2016 Tr. 15-16).

was infected by conflicts of interest and was too closely tied to the Sheriff and his top commanders, who successfully subverted PSB to prevent accountability. ER 366 ¶ 389, 369 ¶ 407-09, 441, 448-49 ¶¶ 868-69. The order as to PSB's location was necessary to address PSB's physical proximity to the Sheriff's desk and its inaccessibility to the public. SER 302-03 (May 31, 2016 Tr. 159:19-160:17).

Financial considerations, however, cannot create an impediment to remedying constitutional violations or ensuring enforcement of a court's orders. "[F]ederal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights." *Stone*, 968 F.2d at 858; *see also Toussaint v. McCarthy*, 801 F.2d at 1080, 1110 (9th Cir. 1986), *abrogated on other grounds*, *Sandin v. Conner*, 515 U.S. 472 (1995) ("The fact that a remedy is costly does not preclude a district court from ordering the remedy.").

### B. The District Court Properly Applied Settled Precedents on the Scope of Injunctive Relief.

Most fundamentally, the County's appeal must fail because the district court issued the Second Supplemental Injunction to address the repeated bad-faith violations of the court's orders and to supplement and reinforce prior orders that had proved inadequate to protect the rights of the Plaintiff class in light of those violations. The County's characterization of the Second Supplemental Injunction as a "massive usurpation" of the Sheriff's powers simply cannot be squared with the district court's order, which carefully sets out the factual and legal justifications

for all of the remedies. The district court explicitly "account[ed] for and balance[d] the need to respect the prerogatives of state officials" against the protection of the constitutional rights of the Plaintiff class. ER 150; *see also, e.g.*, SER 297-98, 300 (May 31, 2016 Tr. 61:22-62:4, 67:2-7).

As set out in detail above, the district court found that this case is "particularly egregious and extraordinary" and that "MCSO's constitutional violations [were] broad in scope, involve[d] its highest ranking command staff, and flow[ed] into its management of internal affairs." ER 142. The district court found that Defendants had intentionally violated numerous court orders, ER 298-328 ¶¶ 1-164, failed to disclose evidence before and after the original trial, ER 328-35 ¶¶ 165-217, 338-46 ¶¶ 239-94, and failed to disclose internal misconduct impacting the rights of the Plaintiff class, ER 351-57.

Notably, the district court also found that after the Sheriff's misconduct came to light, he and other MCSO officials "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." ER 142. MCSO conducted flawed investigations, even after insisting that it be afforded an opportunity to address the misconduct and knowing that those investigations would be subject to the court's scrutiny. ER 452.

The district court also emphasized the egregious nature of the Sheriff's discovery violations and their impact on the Plaintiff class. The contempt hearing revealed new Fourth Amendment violations, including widespread improper seizures of property from the Plaintiff class. ER 343-346. If that evidence had been timely disclosed, Plaintiffs would have been able to demonstrate at trial the "inadequate, bad faith, and discriminatory" nature of MCSO's internal affairs process, ER 451 ¶ 885, and the court would have ordered broader injunctive relief in the first Supplemental Injunction in October 2013—relief that Plaintiffs sought at the time and were denied. But because of Defendants' violations, Plaintiffs were deprived of that evidence. ER 143, 147.

The County fails to address the district court's lengthy findings. Stunningly, the County argues that the district court should have issued only "a simple order prohibiting such machinations." Br. at 19. This disregards the mountainous record of MCSO's repeated bad-faith violations of the rights of the Plaintiff class and the history of MCSO's failure to abide by, and open hostility to, the district court's orders. Fortunately, "federal courts are not reduced to issuing injunctions against state officers and hoping for compliance." *Plata v. Schwarzenegger*, 2005 WL 2932253, at *24 (N.D. Cal. Oct. 3, 2005) (quoting *Hutto v. Finney*, 437 U.S. 678, 690 (1979)).

Indeed, the Second Supplemental Injunction rests on three legal bases: the court's "broad and flexible equitable powers to remedy past wrongs," its "equitable authority to modify its injunctions in light of changed circumstances," and its "authority to impose remedial sanctions for civil contempt." ER 143 (citations omitted). The district court properly exercised its discretion on all three grounds.

*First*, the district court exercised its "broad power to fashion a remedy" based on abundant findings that its previous orders were violated. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971); *see also Brown v. Plata*, 563 U.S. 493, 542-43 (2011); *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977). As this Court noted in *Melendres II*, "the enjoined party's 'history of noncompliance with prior orders can justify greater court involvement than is ordinarily permitted.'" *Melendres II*, 784 F.3d at 1265 (quoting *Sharp*, 233 F.3d 1166 at 1173); *see also Armstrong v. Brown*, 768 F.3d 975, 986 (9th Cir. 2014); *Morales Feliciano v. Rullan*, 378 F.3d 42, 55 (1st Cir. 2004).

*Second*, in light of the voluminous evidence presented at the contempt hearing, the district court properly exercised its discretion to "to modify an injunction in adaptation to changed conditions." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). When it became clear that Defendants had engaged in a course of conduct that continued to violate the rights of the Plaintiff class and the court's orders, the district court was well within its authority to exercise

"continuing supervision . . . [and] its powers and process on behalf of the party who obtained the equitable relief." *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961).

As the district court correctly explained, modification of the first Supplemental Injunction was necessary given the implications of "new facts" on the court's ability to "effectuate . . . the basic purpose of the original" injunction. ER 146 (quoting *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942)). At the time of the first Supplemental Injunction, "[n]either Plaintiffs nor the Court knew that 'the MCSO had deprived the Plaintiffs of considerable evidence of misconduct towards members of the Plaintiff class.'" ER 146. The court found that the improperly withheld evidence would have demonstrated that MCSO maintained "inadequate, bad faith, and discriminatory internal investigation policies and practices" that permitted MCSO to continue violating the rights of the Plaintiff class, notwithstanding the preliminary injunction and other court orders. ER 451 ¶ 885.

*Third*, the court's internal affairs remedies were an appropriate exercise of its authority to issue remedies for civil contempt that are "designed to compel future compliance" with its orders. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994). The court explained that in light of its findings that Defendants had subverted MCSO's internal affairs system to hide violations of

Plaintiffs' rights, discovery violations, and violations of the court's orders, it was necessary to take steps to "[e]nsur[e] that the MCSO has a functional system of investigating officer misconduct and imposing discipline," ER 147-48. Absent the ability to impose effective discipline, the court explained, officers will "feel at liberty to disregard MCSO's policies" and the court's orders. ER 148.

The record demonstrates that the district court had ample grounds to order reforms of MCSO's internal affairs systems for the protection of the Plaintiff class. The district court identified problems in nearly every aspect of MCSO's internal affairs policies and procedures that had harmed the Plaintiff class, including: conflicts of interest and the appearance of bias in internal investigations (ER 159-60 ¶¶ 167(a)-(b), 369-70 ¶¶ 407-12, 373-77 ¶¶ 437-55, 380-81 ¶¶ 484-89, 410-12 ¶¶ 660-68, 419-20 ¶¶ 707-11, 428-30 ¶¶ 756-68, 431-42 ¶¶ 771-75, 439-40 ¶¶ 814-25, 449 ¶ 869, 452 ¶ 889); truthfulness and failures to report misconduct internally (ER 160 ¶¶ 167(c)-(f), 368 ¶¶ 398, 385 n.21); uneven handling of district-based internal investigations (ER 160 ¶¶ 167(g), 165-66 ¶¶ 190-92, 172-73 ¶¶ 213-15, 366 ¶ 392, 398 ¶ 595, 442-43 ¶¶ 834-37, 448-49 ¶ 868); problems with receipt and tracking of civilian complaints (ER 160-61 ¶¶ 168-71, 178-81 ¶¶ 237-50, 184-86 ¶¶ 254-60, 446-484); insufficient supervision requirements, and problematic rules related to promotions and transfers (ER 161-62 ¶¶ 172-76, 382 ¶ 499-500, 389-91 ¶¶ 544-48, 393 ¶ 567, 394 ¶ 570, 402 n.28); inadequate investigation training for

internal affairs and patrol district personnel (ER 163-73, 396 ¶ 586-88, 405 ¶¶ 637-38, 412 ¶ 667, 421-22 ¶¶ 718-24, 426 ¶ 746, 428-29 ¶¶ 756-57, 441-43 ¶¶ 826-37); fairness and consistency of discipline outcomes (ER 173-75 ¶¶ 219-22, 373 ¶ 438, 382-85 ¶¶ 501-15, 387-88 ¶¶ 532-37, 391-92 ¶¶ 553-55, 394-97 ¶¶ 574-889, 408-09 ¶¶ 648-53, 414 ¶ 678, 417-21 ¶¶ 702-17, 435-36 ¶ 797); problematic grievance pre-determination hearing procedures (ER 162 ¶¶ 177, 175-76 ¶¶ 223-28, 376 ¶ 451, 378 ¶¶465-66, 390 ¶ 546, 428-29 ¶ 755-59, 449 ¶ 870-71); and inadequacy of internal criminal investigations (ER 176-78 ¶¶ 229-36, 399-417 ¶¶ 602-92, 427 ¶ 750).

In analogous circumstances, other federal courts have recognized that "a meaningful disciplinary system" is essential to ensure that lawful "policies and procedures [do not] become a dead letter."[3] *Madrid v. Gomez*, 889 F. Supp. 1146, 1181 (N.D. Cal. 1995) (internal quotation marks omitted); *see also Madrid v.*

[3] While failing to respond to the district court's careful reasoning based on the actual contempt record, the County attempts to rely on inapposite language from this Court's prior opinion in *Melendres II* remanding an internal affairs-related provision in the *first* Supplemental Injunction for further tailoring. Br. at 18-19 (quoting *Melendres II*, 784 F.3d at 1267). This argument is meritless. As noted above at 27, the district court here explicitly found that it previously had denied Plaintiffs' request for more robust injunctive relief relating to internal affairs after the original 2012 trial, and that in light of the contempt record showing Defendants' discovery violations, the court would have granted Plaintiffs' request in the first place if it had had the withheld evidence. ER 142. In short, any rulings by either the district court or this Court as to the cited provision in the first Supplemental Injunction were based on an entirely different factual record—indeed, one that was unlawfully manipulated by Defendants.

*Woodford*, 2004 WL 2623924, at *8 (N.D. Cal. Nov. 17, 2004) ("[T]he ability to effectively investigate and discipline officers . . . is essential to correcting the underlying constitutional violations."). *Cf. Gwynn v. City of Philadelphia*, 719 F.3d 295, 303 (3d Cir. 2013) (explaining that "[t]he need for oversight and corrective action" of police misconduct "is particularly acute. . . . because officers exercise the most awesome and dangerous power . . . to use lawful force to arrest and detain") (internal quotation marks omitted). In these circumstances, the court must "be assured that [MCSO] will be able to police itself without Court and government supervision." *United States v. Dist. Council of N.Y.C. & Vicinity of the United Bhd. Of Carpenters & Joiners of Am.*, 571 F. Supp. 2d 555, 568 (S.D.N.Y. 2008). Without these remedies, an inadequate internal affairs process would stay in place and "reinforce an already clear message to" officers that constitutional violations "will be tolerated, if not actively encouraged." *Gomez*, 889 F. Supp. at 1192.

As to the few provisions singled out by the County as problematic, the district court properly exercised its discretion on the facts and the law:

### 1. Monitor's Authority To Review Internal Affairs Investigations.

To ensure that the agency is complying with its orders and not manipulating internal affairs investigations, the district court provided the Monitor with the authority to oversee and direct internal affairs investigations relating to the Plaintiff

class or "CRMs." ER 189 ¶ 274 (providing authority to the Monitor "[i]n light of the Court's finding that the MCSO . . . willfully and systematically manipulated, misapplied, and subverted MCSO's employee disciplinary policies and internal affairs processes to avoid imposing appropriate discipline on MCSO deputies and command staff for their violations of MCSO policies with respect to members of the Plaintiff class"); *see also* ER 189-93 ¶¶ 275-293. The district court also provided that the Monitor should "inquire and report" on non-CRMs as well as CRMs. Br. at 19 (citing ER 193 ¶ 292).

The County's objection to the Monitor's review of non-CRMs is meritless. The district court explained that in light of the systemic abuse of internal affairs processes that harmed the Plaintiff class, including different and more lenient disciplinary standards for investigations relating to this litigation, there was a need for "assurance that the MCSO *uniformly* investigates misconduct and applies appropriate, uniform, and fair discipline at all levels of command, whether or not the alleged misconduct directly relates to members of the Plaintiff class." ER 193 ¶ 290 (emphasis added). In other words, the district court must be able to ensure that internal affairs investigations relating to the Plaintiff class are not being treated differently or more leniently, and are not being manipulated in a way that causes harm to the Plaintiff class. Inquiry into all internal affairs investigations is necessary to determine whether MCSO has eliminated disparities between those

investigations involving the Plaintiff class and others, so that the Monitor's authority over internal affairs relating to the Plaintiff class may at that point cease. *See* ER 192 ¶ 288-89.

### 2. Appointment of Independent Authority over Certain Investigations

The County also objects to the appointment of an independent authority to conduct certain investigations invalidated by the district court (ER 194-207 ¶¶ 294-337). Yet the Sheriff himself proposed this remedy because he preferred a new appointee over the existing Monitor, *see, e.g.*, SER 44-45 (Dist. Ct. Doc. 1715 at 8-9), even though he knew that it could be a more costly alternative. This obliterates the County's suggestion that the appointment is unduly burdensome.

Moreover, this provision is justified on the record demonstrating that when MCSO was permitted to carry out these investigations, it abused the internal affairs process to avoid accountability. The re-investigations are limited to those declared invalid by the district court and those that MCSO never initiated at all because of manipulations designed to avoid responsibility for actions of its employees. ER 194-95 ¶¶ 294-98; 366-430 ¶¶ 387-765, 455 ¶¶ 903-04. The district court has the inherent power to invoke the weight of the judicial authority if state and local authorities, who have "the primary responsibility" for curing constitutional violations, "fail in their affirmative obligations." *See Milliken*, 433 U.S. at 281 (citation omitted). "Federal courts possess whatever powers are necessary to

remedy constitutional violations because they are charged with protecting . . . rights," *Stone*, 968 F.2d at 861, which includes the transfer of decision-making control to an independent authority, *Plata*, 563 U.S. at 511. The court's inherent equitable authority includes the power even to "displace local enforcement . . . if necessary to remedy the violations of federal law found by the court." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695-96, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979). The district court did not abuse its discretion in appointing an independent authority to conduct a limited number of internal investigations that it found invalid.

Indeed, based on similar records of noncompliance, courts have transferred even more decisionmaking authority to independent entities in order to ensure compliance with orders. *See, e.g.*, *Plata v. Schwarzenegger*, No. C01-1351, Order Appointing Receiver, at 4-8 (N.D. Cal. Feb. 14, 2006) (SER 269-77) (giving Compliance Director power over, among other things, all personnel decisions—including promotions, demotions, and disciplinary actions—to remedy agency's lack of progress on injunction); *Campbell v. McGruder*, No. 1462-71 (WBB), Findings and Order Appointing Receiver, at 7-10 (D.D.C. July 11, 1995) (SER 278-87) (endowing receiver with broad power to create system and procedures to ensure compliance with injunction); *United States v. Jefferson Cty.*, No. CV-75-S-666-S, Order Appointing Receiver, at 1-10 (N.D. Ala. Oct. 25, 2013) (SER 245-

68) (appointing receiver with power over county personnel board defendant county found in civil contempt of injunction); *Wayne Cty. Jail Inmates v. Wayne Cty. Chief Exec. Officer*, 444 N.W.2d 549, 555-56 (1989) (upholding lower court's transfer to receiver of "all authority with respect to the operation of the jail that formerly resided in the Sheriff of Wayne County" after lack of progress on injunction).

Here, the members of the Plaintiff class were "the overwhelming majority of the victims of the multiple acts of misconduct that were the subjects of virtually all the flawed investigations." ER 452 ¶ 888. Even though the Sheriff and MCSO were "fully advised and aware that the adequacy and good faith of their investigations would be subject to evaluation by the Parties and the Court," ER 451 ¶ 886, they continued "manipulating the operation of their disciplinary processes to minimize or altogether avoid imposing fair and equitable internal discipline for misconduct committed against members of the Plaintiff class." ER 452 ¶ 889. And the court found that they would "continue to attempt to conceal additional past mistreatment of the Plaintiff class as it comes to light in order to avoid responsibility for it." *Id*. Further, the district court found that Defendants' actions rose to the level of bad faith. ER 298 ("Defendants have engaged in multiple acts of misconduct, dishonesty, and bad faith with respect to the Plaintiff class and the protection of its rights."). On this record demonstrating that MCSO was incapable

of properly handling these investigations on its own, appointment of independent authorities over a limited number of re-opened investigations was necessary to correct the harm that those inadequate investigations perpetuated.

The County makes no attempt to argue that the appointment of the independent authority was not called for on this record. Instead, the County asserts in a conclusory fashion that the appointments constitute "punishment" because it is "readily apparently that the district court has stacked the deck in such a way as to ensure that some sort of disciplinary action will be imposed in most, if not all, of the[se] cases." Br. at 21. The opposite is in fact true. The district court ordered the creation of policies and procedures to ensure that investigations are done fairly. And in appointing independent authorities, the district court expressly chose not to dictate the outcome of any investigation; rather, it gave complete, unfettered discretion over these investigations to these independent authorities. *See* ER 201 ¶ 310 (explaining that the Independent Investigator "is independently responsible for [his] respective jurisdiction set forth in this Order, and . . . should make independent decisions within his own delegated responsibility"); ER 201 ¶ 313 (explaining that "the Independent Investigator has the sole authority to determine whether reinvestigations or new charges arising from the Findings of Fact should or should not be pursued" and "the authority to reopen investigations, pursue new investigations, make preliminary findings of fact, bring charges against an

employee, and recommend to the Independent Disciplinary Authority that a particular level of discipline be imposed"); ER 203 ¶ 322 ("The Independent Disciplinary Authority will be the final arbiter of the facts and will decide which acts of misconduct, if any, the sustained facts establish. If the facts establish misconduct, it is the duty of the Independent Disciplinary Authority to determine the level of discipline to be imposed on the employee."); ER 205 ¶ 334 ("The Decisions reached by the Independent Disciplinary Authority shall be final."). The district court did not mandate any particular outcome, only that such investigations be conducted fairly and adequately. The purpose of these re-investigations is to root out misconduct affecting the Plaintiff class, in order to create conditions within the MCSO no longer violative of the Plaintiff class's constitutional rights—in other words, to ensure compliance with the district court's orders and the Constitution.

### 3. Uniform Internal Affairs Policies

The County does not make specific objections to any of the individual policy requirements ordered in the Second Supplemental Injunction—rather, it apparently objects that the internal affairs policies are uniformly applicable to all investigations rather than only to those relating to members of the Plaintiff class. This argument is nonsensical, as it would have the court order necessary reforms only to apply to some internal investigations, while leaving others subject to abuse

and manipulation. The necessity of uniform changes to policies relating to certain key aspects of MCSO's internal affairs system is well supported by the record. And in any event, this argument has been waived, as the Sheriff agreed to the vast majority of the across-the-board revisions to its policies. SER 1-34 (Dist. Ct. Doc. 1732 & 1732-3). *See infra*, at 42-46.

As the district court found, an "effective and honest internal affairs policy is a necessary element of the MCSO's self-regulation." ER 452 ¶ 889. However, the district court found that MCSO's internal affairs policies failed to address numerous issues that arose in the investigations the court reviewed. ER 448-49 ¶¶ 868-75. For example, as discussed above, the district court found inadequate conflicts of interest rules, grievance and "pre-determination" or "name-clearing" procedures that permitted high-ranking commanders to improperly rescind discipline that was warranted under MCSO policy, and a lack of policies to ensure that complaints were properly received, tracked, and assigned. *See supra*, at 13-14. Moreover, the district court found that MCSO "promulgated special inequitable disciplinary policies pertaining only to *Melendres*-related internal investigations" that resulted in officers avoiding appropriate discipline for misconduct harming the Plaintiff class. ER 297, 384-85 ¶¶ 510-15, 394 ¶ 572, 425-27 ¶¶ 738-47, 448 ¶ 865, 452 ¶ 888. Further, the district court found that "[e]ach division [conducting

internal affairs investigations] had different interpretations of policies and procedures governing internal affairs investigations." ER 398 ¶ 596.

The court concluded that the only way to ensure that misconduct related to the Plaintiff class was investigated properly and appropriate discipline imposed was to require uniform policy reforms that addressed the numerous deficiencies the district court identified.

For the same reasons that the district court vested the Monitor with authority to review all investigations, the district court found that it was necessary to ensure that MCSO has adequate *and uniform* policies in place to prevent future harm to the Plaintiff class. ER 158-59 ¶¶165-66. The court properly exercised its discretion to ensure that future investigations pertaining to the Plaintiff class are not treated differently or adversely and that reformed policies must apply across all investigations. It would simply be illogical and impractical, and would lead to inequitable results harming the Plaintiff class, if there were different internal affairs policies for different cases depending on who the victims of misconduct are. And MCSO's history of downgrading offense levels to avoid punishment, e.g., ER 387-88, 447-48, justifies the district court's concern that MCSO cannot be counted on to appropriately categorize misconduct for purposes of deciding which rules to apply.

#### 4. Supervisor-to-Employee Ratio and Additional Supervisor Training

The district court also properly imposed remedial measures to address deficiencies in supervision, including a modification to a provision in the first Supplemental Injunction capping the number of deputies that may be overseen by one supervisor. *See* ER 186-88 ¶¶ 263-268.

The contempt findings demonstrated a systematic failure of supervision within MCSO that resulted in harm to the Plaintiff class. ER 393-94 ¶¶ 568-70, 443-45 ¶¶ 838-49. Specifically, the district court found that "[u]ltimately, many key supervisory personnel have no training in supervising, which . . . resulted in damage to class members." ER 444 ¶ 844. Thus, to ensure proper supervision, the district court also ordered that all supervisors be trained in the best practices set forth in the Second Supplemental Injunction. ER 162-64 ¶¶ 178-82.

Further, the district court found that "in light of the increased workload on sergeants necessary to engage in appropriate supervision," the supervisor-to-employee ratio of one-to-twelve that the court previously imposed in the Supplemental Injunction was too permissive to ensure protection of the Plaintiff class. ER 445 ¶ 849. On this basis, the district court had good reason to order a modification to its prior order, given changed circumstances. Moreover, while the district court's order permits MCSO to seek a different supervision ratio upon explanation, the agency has not done so to date. ER 187 ¶ 266.

In summary, the County has made no real attempt to challenge any of the specific remedies imposed by the district court, and it would have no grounds to do so: the district court's Second Supplemental Injunction is "narrowly tailored to prevent repetition of proved constitutional violations" and does "not intrude unnecessarily on state functions." *Toussaint*, 801 F.2d at 1087 (citing *Ruiz v. Estelle*, 679 F.2d 1115, 1156 (5th Cir. 1982)).

### C. Any Appeal as to Remedies Consented to by the Sheriff Has Been Waived.

The County's appeal also should be rejected to the extent it challenges provisions in the Second Supplemental Injunction that were expressly consented to. Although the County now seeks reversal of the entire injunction, the Sheriff generally conceded that the district court's findings demonstrated a need for revisions to MCSO's policies and procedures, including in the areas of internal affairs investigations and MCSO disciplinary policies. *See* SER 67 (Dist. Ct. Doc. Doc. 1687 at 10), 299-301 (May 31, 2016 Tr. 66:15-68:4). Specifically, the Sheriff consented to provisions for:[4]

- Reform of policies and procedures related to the internal affairs process;
- Training on the internal affairs process;

[4] The Sheriff suggested modifications to Plaintiffs' proposed language and disagreed with certain details in the parties' joint submission. SER 1-34 (Dist. Ct. Doc. 1732 & 1732-3). But he consented in principle to the following measures and stated no arguments against them.

- Training on the handling of civilian complaints;
- Improved documentation of civilian complaints, internal affairs investigations, and disciplinary matters; and
- Measures to prevent further violations of document preservation and production requirements.[5]

SER 1-34 (Dist. Ct. Docs. 1732 & 1732-3).

The County did not take a contrary position as to the remedies that the Sheriff agreed to; 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 infra* at 51-52 (citing *Flanders v. Maricopa Cty.*, 54 P.3d 837, 847 (Ariz. Ct. App. 2002)).

Because the County, through its final policymaker, the Sheriff, consented to the majority of the remedies in the Second Supplemental Injunction, any appeal as

[5] Defendants arguably also waived objections to appointment of an outside authority to conduct internal affairs investigations relating to Class Remedial Matters and to the Monitor's review of internal affairs investigations, including non-Class Remedial Matters. *See* SER 35-69 (Dist. Ct. Docs. 1687, 1715); Dist. Ct. Doc. 1729. Although the Sheriff preferred that a new independent authority conduct CRM investigations going forward, he did not contest the propriety of third-party oversight. *See, e.g.*, SER 51-52 (Dist. Ct. Doc. 1715 at 15-16); Dist. Ct. Doc. 1729 at 9. Likewise, the Sheriff failed to mount a clear objection to the Monitor's review of non-CRM investigations. *See* SER 35-69 (Dist. Ct. Docs. 1687, 1715); Dist. Ct. Doc. 1729. The fact that it is challenging to ascertain the Sheriff's position from the record demonstrates why it is unfair for the County's appeal to be heard now, under this Court's rule that objections are preserved only if the district court had a fair opportunity to rule on them. *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012).

to those remedies has been waived and must be rejected. The district court gave Defendants every opportunity to be heard on the provisions of the remedial order—with joint submission of the parties indicating areas of agreement and dispute, Dist. Ct. Docs. 1715, 1732, 1736-2, a round of separate briefs on the remedies, Dist. Ct. Docs. 1684, 1685, 1687, 1688, 1720, 1721, 1729, 1730, and at least two hearings before the district court, Dist. Ct. Docs. 1694, 1736. In affording the parties a full and fair process, the district court did not issue the Second Supplemental Injunction until more than two months after issuing its Findings of Fact. Throughout this process, Defendants never attempted to argue against the foregoing provisions, listed at 42-43.

Thus, as to these remedies the Sheriff explicitly consented to, the district court had no opportunity to rule on any objections, and this Court should not consider any challenge to those remedies now.[6] *See, e.g.*, *W. Watersheds Project v. U.S. Dep't of the Interior*, 677 F.3d 922, 925 (9th Cir. 2012); *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998-99 (9th Cir. 2012); *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009).

In addition to being bound by the Sheriff's explicit consent, the County is also bound by its failure to make objection to any of these specific aspects of the

[6] Moreover, as set forth above, the County even now on appeal has failed to articulate any specific argument to challenge these remedial provisions, and its appeal should be rejected for that independent reason. *See supra*, at 23-24.

relief. *See Gluth v. Kangas*, 951 F.2d 1504, 1511 (9th Cir. 1991) (defendant waived appeal by failing to object to a proposed order during district court proceedings); *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 449 Fed. App'x 923, 933-34 (Fed. Cir. 2011). The County did lodge a general argument (repeated here on appeal and addressed below at 56-59) that it should not be responsible for funding remedies arising from willful or intentional contempt of court, but it made specific objections only relating to the victim compensation provisions, Dist. Ct. Doc. 1688. The County did not express any disagreement with the Sheriff on the foregoing consented-to internal affairs reform provisions, or raise any arguments against their inclusion in the court's order. *Id.*

In its briefing to the district court on the remedial measures, the County included a footnote stating that "the County's omission of matters not raised [in the brief]" should not be understood as an implied waiver. Dist Ct. Doc. 1688 at 1-2 n.1. But such a vague statement does not negate the waiver, as the test for whether a waiver has occurred is whether an appellant has "raised [the issue] sufficiently for the trial court to rule on it." *Ruiz*, 667 F.3d at 1322 (quotation marks omitted). In light of the Sheriff's explicit consent to these provisions and the County's complete silence, no issues were ever raised for the district court's consideration, and the County must be deemed to have waived any argument as to those provisions.

In *Armstrong*, 768 F.3d 975, this Court confronted an analogous situation when the district court modified and expanded the scope of its previous injunction in light of the plaintiff's allegation of noncompliance. The defendant made a legal argument on appeal to this Court that it had not raised below. This Court held that the defendant had waived the argument, even though the defendant had made a generalized protestation that "there was neither a factual nor legal basis for the proposed expansion." *Id.* at 981. *Armstrong* mandates a finding that the County may not now challenge provisions of the Second Supplemental Injunction that it did not specifically object to below—especially when the Sheriff consented to them.[7]

## II. The Election of a New Sheriff Does Not Affect the Propriety of the Remedial Measures.

The County contests the Second Supplemental Injunction not because it is unwarranted based on the developed record, but because Arpaio is no longer the Sheriff. The County argues that the slate should be simply wiped clean and Sheriff

[7] This Court's prior ruling on a different waiver argument made by Plaintiffs in *Melendres II* is inapposite. In considering Defendants' consent to large portions of the first Supplemental Injunction, this Court found that Defendants had not waived any arguments where (1) Defendants initially raised objections to the provisions, (2) the district court had assured Defendants that the submission of a joint proposed order would not affect Defendants' right to appeal the remedies to which they had initially objected, and (3) Defendants expressed their intent to appeal and preserved their appeal rights in the text of the joint proposed order. *See* 784 F.3d at 1264. These circumstances are not present with the Second Supplemental Injunction at issue here, and *Armstrong* dictates a finding of waiver.

Penzone should be unencumbered by any court orders. This argument is meritless and procedurally confused.

The district court has repeatedly found that constitutional violations and failures to comply with court orders permeate the agency—and were not solely personal failures specific to Arpaio or other MCSO officials. ER 149 ("Defendants were systematically violating the Fourth and Fourteenth Amendment rights of the Plaintiff class in several different respects including the adoption of unconstitutional policies."); ER 150 ("The MCSO continued to adhere to these policies after the Court ruled in 2011 that they violated Plaintiffs' constitutional rights."). As set forth by the district court, "[t]his case has a long history before May 13, 2016, [and] the remedies . . . are responsive to that history of Defendants' evasion, manipulation, and violation of their obligations under the Court's orders." ER 151 n.4; s*ee also* ER 151 ("Here, the scope of Defendants' constitutional violation is broad; the violation permeates the internal affairs investigatory processes."). In these circumstances, the injunction properly runs against the officeholder. *See Hoptowit v. Spellman*, 753 F.2d 779, 782 (9th Cir. 1985) (affirming district court's injunction against successors to public office where "various findings of fact concerning institutional practices" had been made "from which the continuation of the dispute is a reasonable inference," and were "not merely idiosyncratic abuses of the particular members of the outgoing

administration") (internal quotation marks omitted); *Puente Arizona v. Arpaio*, No. CV-14-01356, 2017 WL 1133012, at *5 (D. Ariz. Mar. 27, 2017) (issuing permanent injunction against Sheriff Penzone even in light of changed administration given finding of an "established institutional policy" of violations).

Sheriff Penzone is Sheriff Arpaio's successor in office and he was automatically substituted as a defendant under Federal Rule of Civil Procedure 25(d). As the officeholder, he became responsible for complying with all of the district court's orders. The County argues that imposition of these remedies on a new sheriff would be "unfair," but it cites no authority for this novel proposition.

The district court's first Supplemental Injunction, which is incorporated by reference in the Second Supplemental Injunction, ER 156, provides the mechanism for the Sheriff to seek relief from any provision in either injunction based upon changed circumstances or a claim of full compliance, ER 496 ¶ 8. If Defendants wish to be released from any provision in the Second Supplemental Injunction, the proper mechanism is to apply to the district court, and not through a legally and factually unfounded claim of "unfairness" on this appeal.

## III. The Supplemental Remedies Are Consistent with Federalism and Comity Principles.

This Court has previously rejected the County's arguments that injunctive relief in this case violates federalism principles. The County relies again on *Rizzo*, 423 U.S. 362. Br. 31-35. As the district court noted, "[t]he facts of *Rizzo* . . . are []

diametrically opposed to the facts of" this case. ER 149. In *Rizzo*, the Supreme Court reversed an injunction going to an agency on the ground that the record only indicated that the misconduct was attributable to a few individual officers. In contrast, on the instant appeal, as in *Melendres II*, the injunctive relief is imposed because of a record of *policies* and a *pattern* of misconduct by the Sheriff and other top commanders. 784 F.3d at 1265 ("The district court's finding that Defendants' unconstitutional policy extended office-wide throughout the MCSO was supported by evidence in the record."). *Rizzo* specifically held that under the instant circumstances, injunctive relief is appropriate. 423 U.S. at 375 (noting that injunctions were appropriate in cases involving a "deliberate plan" or an "intentional, concerted . . . effort" to violate plaintiffs' rights). "Where federal constitutional rights have been traduced . . . principles of restraint, including comity, separation of powers and pragmatic caution dissolve . . . ." *Stone*, 968 F.2d at 860 (alteration and internal quotation marks omitted).

In addition, the record of MCSO's willful defiance of the court's authority and failure of the court's previous remedies to eradicate unconstitutional conditions in MCSO further justifies the need for the Second Supplemental Injunction, notwithstanding whatever greater measure of restraint that federalism principles might otherwise warrant. Where, as here, a government agency has "resisted complying with its federal obligations at every turn[,]" comprehensive

relief is warranted, including "prescribing more specific mechanisms of compliance" than previously ordered. *Armstrong*, 768 F.3d at 986 (alteration and internal quotations omitted).

## IV. The County Is a Proper Party in This Case.

The County again argues, Br. at 26-31, that it should not be a party in this case. This argument is meritless for several reasons.

### A. *Melendres II* and *III* Are Law of the Case and Preclude the County's Appeal.

The County, through a stipulation, long ago waived any objection to being made a party in this case. SER 241-44 (Dist. Ct. Doc. 178). In September 2009, all parties filed a stipulation requesting that the County, which had been named as a defendant in the original complaint, be dismissed because the parties agreed the County was not a necessary party for Plaintiffs to obtain complete relief. *Id*. The district court ordered the County's dismissal pursuant to the stipulation. Dist. Ct. Doc. 194.

In *Melendres II*, this Court restored the County as a defendant in this case, applying an Arizona state court decision (which post-dated the County's dismissal by the district court) to hold that MCSO is not a jural entity and cannot be sued. 784 F.3d at 1260 (citing *Braillard v. Maricopa Cnty.*, 224 Ariz. 481, 232 P.3d 1263, 1269 (App. 2010)). This Court substituted the County for the MCSO in the

exercise of its broad authority to "add or drop a party" "at any time, on just terms." *Id.* (quoting Fed. R. Civ. P. 21) (internal quotation marks omitted).

In *Melendres III*, 815 F.3d 645, this Court rejected the County's objection to being substituted for the MCSO as a defendant in this case. The Court noted that the County had waived that objection when it stipulated that it could be "rejoined 'as a Defendant in this lawsuit at a later time if doing so becomes necessary to obtain complete relief.'" *Id.* at 650. When the County's re-joinder became necessary because of the state court's *Braillard* decision, it could not cry foul.

In *Melendres III*, this Court also held that, based on Arizona law, the Sheriff acted on the County's behalf and that the County therefore could not mount its own separate and untimely appeal to the district court's liability findings after the Sheriff's appeal had been rejected by this Court. This Court noted that under *McMillian v. Monroe Cty.*, 520 U.S. 781, 783 (1997), if a sheriff's actions constitute county policy, then the county is liable for them. *Melendres III*, 815 F.3d at 650. And, this Court held, under Arizona state law, sheriffs have "final policymaking authority" for the county on matters relating to their office. *Id.* (citing *Flanders*, 54 P.3d at 847; A.R.S. § 11- 441(A)).

*Melendres III* also rejected the County's argument that it does not control the Sheriff and therefore cannot be held liable under the doctrine of *respondeat*

*superior*. Br. at 29-30. The County rehashes the same arguments here, *see* Case No. 15-15996, Doc. 32, at 15-16, but this Court has already rejected them.

> Maricopa County attempts to sidestep [*Flanders*] by arguing that Sheriff Arpaio's acts cannot create respondeat superior liability. But under section 1983, ''[l]iability is imposed, not on the grounds of *respondeat superior*, but because the agent's status cloaks him with the governmental body's authority.'' *Flanders*, 54 P.3d at 847 (citing *City of Phoenix v. Yarnell*, 909 P.2d 377, 384-85 (1995)). Accordingly, the case law Maricopa County cites holding that it is not liable for the Sheriff's acts under respondeat superior is inapposite here.

815 F.3d at 651. This Court held that the County is liable under § 1983 not on a *respondeat superior* theory, but because the Sheriff acts for the County. *Id*.[8]

The County concedes that this Court's earlier rulings on the issue of the County's § 1983 liability apply equally to the question of the County's responsibility for remedying the Sheriff's contempt. Br. at 26 n. 11. This Court's previous ruling is therefore law of the case, and the County cannot challenge it in its present appeal. "[T]he decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Herrington v. Cty. of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) (internal quotation marks omitted); *see also Melendres III*, 815 F.3d at 651 (quoting *Browder v. Dir., Dep't of Corr.*, 434

[8] *Melendres III* notes that "the County could rely on the degree to which it can control [the Sheriff's] behavior to potentially avoid any adverse consequences" from a contempt proceeding against the Sheriff and the County. 815 F.3d at 651. This passage merely points out that the County could present defenses if charged with contempt based on the Sheriff's actions; it does not speak to any limitation on the County's liability to pay for remedies ordered to address the Sheriff's contempt, and the County does not make that argument.

U.S. 257, 264 (1978)). The County's failure to follow *Melendres III* has unnecessarily multiplied the burden on this Court and the parties.

### B. This Court's Prior Rulings as to the County's Liability Were Correct on the Merits.

If this Court were to countenance the County's effort to relitigate the issue of its liability for the Sheriff's actions, it should come to the same conclusion as before. First, as noted above, the County's claim that "a proper analysis of Arizona state law [has not been] performed in this case applying the principles enunciated in *McMillian*," Br. at 26, is simply incorrect.

The County here seeks the same *outcome* as in *McMillian*, but as this Court noted, the *rule* in *McMillian* dictates the result that the County is liable. In *McMillian*, the Supreme Court held that the county was not a proper defendant principally because the Alabama Constitution provides that sheriffs are officers of the state, not the county. *McMillian*, 520 U.S. at 787. But as noted above, under Arizona law, the Sheriff is an officer of the county and not the state. Ariz. Const. art. 12, § 3. The County points to a dispersion of power in Arizona's counties, Br. at 28, but that does not mean that the Sheriff is not a county official; it simply means that the Sheriff is one of a number of county officials.[9]

[9] Moreover, "[m]erely because a county official exercises certain functions independently of other political entities within the county does not mean that he does not act for the county." *Goldstein v. City of Long Beach*, 715 F.3d 750, 757

The County argues once again that it "lacks control over the Sheriff," Br. at 28, but this misses the point. Under Arizona law, the Sheriff *is* the County for purposes of exercising law enforcement authority. *Flanders*, 54 P.3d at 847. Moreover, the County's Board of Supervisors retains the power to require reports from county officers, including the Sheriff, and to remove and replace them for failure to perform that duty. A.R.S. § 11-253; *see also Fridena v Maricopa Cty.*, 504 P.2d 58, 61 (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"); 11-201(A)(6) (the county determines the budget of the Sheriff); 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 indicates that the Sheriff acts for the County under Arizona law. These statutory provisions taken together give the Board of Supervisors "the ability and duty to facilitate compliance of the Sheriff and other constitutional officers with judicial orders. . . . For instance, Maricopa County

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(9th Cir. 2013) (quoting *Brewster v. Shasta Cty.*, 275 F.3d 803, 810 (9th Cir. 2001) (internal quotation marks omitted)).

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). The County is therefore liable to remedy the Sheriff's contempt.

The County relies on *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003) (en banc), which is distinguishable for precisely the same reason as *McMillian*. State law in both cases provided that sheriffs are officers of the state and not the county. Moreover, the only thing that all three opinions in *Grech* agreed on was that the challenged actions by the sheriff specifically related to a function of the state and not the county. *Id*. at 1350-51 & n.2. *Grech*'s holding that the Georgia county was not liable for acts of the sheriff is therefore inapposite.

The County's citation to *Hounshell v. White*, 202 P.3d 466 (Ariz. Ct. App. 2008), is also misplaced. *Hounshell* holds that a county Board of Supervisors may not discipline employees who report to a sheriff; it concerns only the allocation of powers within the county government. *Hounshell* implies nothing about the rights of an outside party who is suing the county. To the contrary, the state court explicitly recognized that the county would be liable to outside parties if the sheriff violated their rights. *See id.* at 471 ("Finally, we recognize that a complaining

party can argue that a county may incur liability in the event that a county officer declines to discipline an employee engaged in misconduct.").

The County's argument that it is not liable for the acts of the Sheriff should be rejected, once again.

## V. The County Is Liable for the Cost of Remedial Measures Including Victim Compensation.

As noted above, the Sheriff acts as the arm of the County on matters relating to law enforcement and the County is jointly liable with the Sheriff under the district court's orders. The County now argues that it should not be responsible for the cost of compliance with the district court's remedial measures because the Sheriff's misconduct was intentional.

This argument should be rejected in the first instance because it has been waived. The County has previously admitted its responsibility to remedy harm from the Sheriff's intentional conduct in its previous appeal. This Court noted in *Melendres III* that the County

> concedes that it is required, by Arizona state statute, "to provide funding for the massive changes the district court has imposed." *See* Ariz. Rev. Stat. § 11-444. Thus, the County has conceded that even if we had never substituted it in place of MCSO, it would have nonetheless had to bear the financial costs associated with complying with the district court's [2013] injunction.

815 F.3d at 650.[10] The post-trial Supplemental Injunction rested on the district court's finding, among other things, that "the MCSO discrimination against Hispanics was intentional." SER 223 (Dist. Ct. Doc. 579 at 125).

Moreover, the County's argument fails on the merits. The County is liable under 42 U.S.C. § 1983 and *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) precisely when "'a *deliberate* choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986) (plurality opinion)) (emphasis added). There should be municipal liability where the Sheriff "made the *conscious* choice to . . . do nothing" to comply with the preliminary injunction. *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992) (emphasis added). "[A] municipality will be liable for all of its injurious conduct, whether committed in good faith or not." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

Indeed, the Supreme Court has observed that municipalities can be liable under § 1983 for compensatory damages—such as those provided by the district court's order that the County compensate persons detained in violation of the

[10] A.R.S. § 11-444(A) provides that, "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 . . . ."

preliminary injunction—in cases where officials have committed intentional misconduct that, under a different law, could have resulted in *punitive* damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (holding that § 1983 does not allow a municipality to be liable for punitive damages, which are meant to "punish the tortfeasor whose wrongful action was intentional or malicious," but noting that the municipality is liable for compensatory damages); *id.* at 269 ("[T]he compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office."). The victim of a county official's wrongful practice or policy should be able to obtain a compensatory remedy from the county, whether the wrong was intentional or not. Such a remedy is what the district court issued here.

The County raises several state law-based arguments that are wrong on their own merits, and also fly in the face of federal law. The County relies on A.R.S. § 11-981(A), Br. 22-23, which authorizes the County to purchase insurance or provide self-insurance. But state laws governing the County's purchase of liability insurance do not limit the circumstances in which the County can be held liable under *Monell* and § 1983. A state certainly could not insulate its counties from liability for federal civil rights violations by prohibiting the counties' purchase of insurance for such liabilities.

The County also nonsensically cites A.R.S. § 11-410, which bars the use of County funds "for the purpose of influencing the outcomes of elections." The County points to the district court's finding that some of Sheriff Arpaio's contemptuous misconduct was motivated by his belief that it would help him to win re-election. Br. at 23. But the fact that the Sheriff's misconduct was motivated by a desire to win votes can hardly be a reason to absolve the County of liability for the remedies for his contempt. Paying compensation to the victims of those constitutional violations has nothing to do with " the purpose of influencing the outcomes of elections" under any reasonable reading of the state statute.

As to its state statutory arguments, the County errs fundamentally when it argues that "any unconstitutional or unlawful actions, including any willful and intentional violations of lawful court orders, are perforce not within the scope of [its officials'] authority or employment" and therefore do not lead to County liability. Br. at 23. In fact, the basis for *Melendres III* is that Sheriff Arpaio was acting in the course of his duties as the County's chief law enforcement policymaker when he committed the wrongful acts in this case. *See Melendres III*, 815 F.3d at 650 (citing *McMillian*, *Monell* and *Flanders*); 42 U.S.C. § 1983 (liability for those "who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia . . . cause[] . . . the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws"). *Monell* mandates the County's liability under § 1983 for exactly those official policies and practices that do violate the Constitution and laws.[11]

## CONCLUSION

The Second Supplemental Injunction should be affirmed in its entirety.

Respectfully submitted,

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/s/ Katrina L. Eiland
Cecillia D. Wang
Katrina L. Eiland
ACLU Foundation
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0775
keiland@aclu.org
cwang@aclu.org

Stanley Young
Covington & Burling LLP
333 Twin Dolphin Drive, Suite 700
Redwood Shores, CA 94065
Telephone: (650) 632-4700
syoung@cov.com

Kathleen E. Brody
Brenda Muñoz Furnish
ACLU Foundation of Arizona
3707 N. 7th Street, Suite 235
Phoenix, AZ 85014
Telephone: (602) 650-1854
kbrody@acluaz.org

[11] In footnote 10 of its brief, the County argues that the remedial costs should be charged to the Sheriff and not the County. The Court should decline this request that it insert itself into a political dispute among components of the County about what parts of the County budget should be used to pay for a compensatory remedy that the County as a whole is liable to provide.

bmfurnish@acluaz.org

Andre I. Segura
ACLU Foundation of Texas
1500 McGowen Street, Suite 250
Houston, TX 77004
Telephone: (713) 942-8146
asegura@aclutx.org

Anne Lai
401 E. Peltason, Suite 3500
Irving, CA 92697
Telephone: (949) 824-9894
alai@law.uci.edu

Julia Gomez
Mexican American Legal Defense
and Educational Fund
634 South Spring Street, 11th Floor
Los Angeles, CA 90014
Telephone: (213) 629-2512
jgomez@maldef.org

Counsel for *Plaintiffs-Appellees*

## CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,998 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Katrina L. Eiland
Katrina L. Eiland

## CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2017, I electronically filed the Answering Brief of Plaintiffs-Appellees Manuel De Jesus Ortega Melendres, *et al*. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Katrina L. Eiland
Katrina L. Eiland