No. 15-17558

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

COUNTY OF MARICOPA, ARIZONA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS APPELLEE

GREGORY B. FRIEL
Deputy Assistant Attorney General

THOMAS E. CHANDLER
ALEXANDER B. ARONSON
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - RFK 3730
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-0619

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STATEMENT OF JURISDICTION

The United States brought this action to enforce 42 U.S.C. 14141 (Section 14141) and Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.* The district court had jurisdiction under 28 U.S.C. 1331, 1343, and 1345. The district court granted partial summary judgment for the United States on June

15, 2015, E.R. 165,[1] entered judgment in favor of the United States on September 2, 2015, E.R. 87, entered an amended judgment in favor of the United States on September 3, 2015, E.R. 86, and entered an amended final judgment in favor of the United States on November 6, 2015, E.R. 74-75. Maricopa County (the County) filed a timely notice of appeal on December 30, 2015. E.R. 1-73. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court correctly held that the County is liable under Section 14141 and Title VI for the unconstitutional policies and conduct of Sheriff Arpaio and the Maricopa County Sheriff's Office.

2. Whether the district court correctly held that the County is liable under, and bound by, the district court's findings of unlawful discrimination in private plaintiffs' parallel action, *Melendres* v. *Arpaio*, on the basis of offensive, non-mutual issue preclusion.

STATEMENT OF THE CASE

This case concerns Maricopa County's liability for the unconstitutionally discriminatory conduct of Maricopa County Sheriff Joseph Arpaio (the Sheriff, or

[1] "E.R." refers to appellant's Excerpts of Record. "Br." refers to appellant's opening brief. "Doc. __, at __" refers to the docket entry and relevant page number(s) in *United States* v. *Maricopa County*, No. 2:12-cv-00981-ROS (D. Ariz.).

Arpaio) and the Maricopa County Sheriff's Office (MCSO). The district court, applying Arizona state law, determined that Arpaio "has final policymaking authority with respect to County law enforcement and jails," and therefore that "the County can be held responsible for constitutional violations resulting from these policies." E.R. 138 (quoting *United States* v. *Maricopa Cnty.*, 915 F. Supp. 2d 1073, 1074 (D. Ariz. 2012)). The district court also determined, pursuant to the doctrine of offensive, non-mutual issue preclusion, that the United States had established that Arpaio's discriminatory policing policies violated Section 14141 and Title VI based on the findings of fact and conclusions of law in a parallel action by private plaintiffs, *Melendres* v. *Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013), aff'd in part and vacated in part on other grounds, 784 F.3d 1254 (9th Cir. 2015) (*Melendres II*), cert. denied, 136 S. Ct. 799 (2016). E.R. 149-155. The County has appealed.

1. Private Plaintiffs' Racial Profiling Case: Melendres *v.* Arpaio, et al.

a. In 2007, private plaintiffs brought a class action lawsuit against Sheriff Arpaio, MCSO, and Maricopa County, alleging that they violated federal law by instituting a policy of racially profiling Latino drivers and passengers in making traffic stops under the guise of enforcing federal and state immigration laws. They alleged that the defendants had implemented this policy primarily during so-called "saturation patrols" or "crime suppression sweeps" in which MCSO officers would

stop Latinos without probable cause or reasonable suspicion, looking for immigration law violations. See *Melendres* v. *Arpaio*, 695 F.3d 990, 994-998 (9th Cir. 2012) (*Melendres I*) (addressing standing, jurisdiction, and preliminary injunction rulings). The plaintiffs asserted causes of action under, *inter alia*, the Fourth and Fourteenth Amendments to the United States Constitution, pursuant to 42 U.S.C. 1983 (Section 1983), and Title VI. *Melendres I*, 695 F.3d at 995.

The three *Melendres* defendants were jointly represented by counsel until early 2009, when the County obtained its own representation. Mot. to Substitute Att'y at 1-2, *Melendres*, *supra*, No. 2:07-cv-02513-GMS (D. Ariz. Apr. 20, 2009), ECF No. 84. Subsequently, the district court in *Melendres* granted a joint motion and stipulation to dismiss the County without prejudice. E.R. 443. The parties agreed that dismissal was "in the interests of judicial economy and efficiency" and that "Defendant Maricopa County [was] not a necessary party at [that] juncture for obtaining the complete relief sought." E.R. 446. The parties also agreed that the County's dismissal was "without prejudice to rejoining" the County as a defendant at a later time "if doing so becomes necessary to obtain complete relief." E.R. 446.

Following a 2012 bench trial, the district court issued detailed findings of fact and conclusions of law. *Melendres*, 989 F. Supp. 2d. 822. The court determined that MCSO's "saturation patrols" involved "using traffic stops as a pretext to detect those occupants of automobiles who may be in this country

without authorization." *Id.* at 826. The facts, the court explained, "reveal an institutionalized consideration of race in MCSO operations." *Id.* at 899. The court concluded that "MCSO's use of Hispanic ancestry or race as a factor in forming reasonable suspicion that persons have violated state laws relating to immigration status violates the Equal Protection Clause of the Fourteenth Amendment." *Ibid.* The court enjoined MCSO from "using Hispanic ancestry or race as any factor in making law enforcement decisions pertaining to whether a person is authorized to be in the country." *Id.* at 827. The court later broadened the injunction to enjoin several specific discriminatory MCSO policing tactics and appointed an independent monitor to report on Arpaio's and MCSO's compliance. Supplemental Permanent Inj./Judgment Order, *Melendres*, *supra*, No. 2:07-cv-02513-GMS (D. Ariz. Oct. 2, 2013), ECF No. 606. Defendants appealed, challenging various aspects of the district court's permanent injunction.

b. This Court affirmed the district court's injunction in significant part. This Court also addressed defendants' threshold argument that MCSO was not a proper party before the Court. *Melendres II*, 784 F.3d at 1260. This Court noted that, early in the *Melendres* litigation, "[d]efendants moved the district court to dismiss MCSO on the ground that it was a non-jural entity—that is, it lacked separate legal status from the County and therefore was incapable of suing or being sued in its own name." *Ibid.* But because at that time Arizona law was unsettled

on this issue, the district court had denied the motion. *Ibid.* This Court further noted that, subsequently, in *Braillard* v. *Maricopa County*, "the Arizona Court of Appeals clarified that MCSO is, in fact, a non-jural entity." *Ibid.* (citing *Braillard* v. *Maricopa Cnty.*, 232 P.3d 1263, 1269 (Ariz. Ct. App. 2010), cert. denied, 563 U.S. 1008 (2011)). In light of *Braillard*'s clarification of state law, this Court held that MCSO, as a non-jural entity, was an improper party to the action and substituted the County in its stead. *Ibid.*

Subsequently, the County filed yet another appeal to this Court, "purport[ing] to challenge several of the district court's [earlier] orders." *Melendres* v. *Maricopa Cnty.*, 815 F.3d 645, 648 (9th Cir. 2016) (*Melendres III*). In dismissing the appeal for lack of jurisdiction, this Court rejected the County's principal argument made here, *i.e.*, that it should not be held liable for the unconstitutional conduct of Sheriff Arpaio and MCSO. First, this Court concluded that there was "no unfairness" in holding the County to its earlier stipulation that it would be "rejoined as a Defendant in th[e] lawsuit at a later time if doing so becomes necessary to obtain complete relief." *Id.* at 650 (internal quotation marks omitted). This Court explained that in light of *Braillard*'s intervening clarification of MCSO's non-jural status, it had become necessary to rejoin the County as a defendant. *Ibid.* This Court described the County's claims of unfairness as "illusory" in view of the County's concession that it would have borne the

financial costs of complying with the district court's injunction even absent the substitution. *Ibid.*

Second, this Court explained that under Section 1983, "[i]f the sheriff's actions constitute county 'policy,' then the county is liable for them." *Melendres III*, 815 F.3d at 650 (brackets in original) (quoting *McMillian* v. *Monroe Cnty.*, 520 U.S. 781, 783 (1997)). This Court stated that "Arizona state law makes clear that Sheriff Arpaio's law-enforcement acts constitute Maricopa County policy since he 'has final policymaking authority.'" *Ibid.* (quoting *Flanders* v. *Maricopa Cnty.*, 54 P.3d 837, 847 (Ariz. Ct. App. 2002)). Therefore, the County was directly liable for the Sheriff's unlawful policy of racial discrimination in targeting Latinos for traffic stops. See *id.* at 650-651.

2. This Litigation: United States *v.* Maricopa County, et al.

a. In March 2009, while the *Melendres* case was pending, the United States notified Sheriff Arpaio that it was commencing an investigation into MCSO's alleged patterns or practices of discriminatory policing. Doc. 333-3 (Commencement Letter). That investigation focused on a variety of alleged systematic constitutional violations, including "alleged patterns or practices of discriminatory police practices and unconstitutional searches and seizures conducted by the MCSO," and allegations of national origin discrimination, "including failure to provide meaningful access to MCSO services for limited

English proficient (LEP) individuals." Commencement Letter 1. In December 2011, the United States gave notice of its findings to the Maricopa County Attorney and counsel for MCSO. E.R. 421-442 (Findings Letter). The United States explained that it found "reasonable cause to believe that MCSO engage[d] in a pattern or practice of unconstitutional policing" in violation of Section 14141 and Title VI. E.R. 422. Over the following six months, the parties sought to reach an agreement on the issues raised in the Findings Letter. Doc. 333, at 2. These efforts failed.

As a result, on May 10, 2012, the United States filed suit in the United States District Court for the District of Arizona against the County, MCSO, and Arpaio, in his official capacity as sheriff of Maricopa County. The complaint alleged, *inter alia*, that MCSO and Sheriff Arpaio were engaged in a pattern or practice of unlawfully discriminatory police conduct directed at Latinos in Maricopa County, and that the County, responsible for the funding and oversight of MCSO, had failed to ensure that MCSO's activities complied with the requirements of the Constitution and federal law. Doc. 1, at 1-2. The complaint alleged six counts: (1) discriminatory policing practices in violation of Section 14141 and the Fourteenth Amendment; (2) unlawful searches, arrests, and detentions in violation of Section 14141 and the Fourth Amendment; (3) discriminatory policing practices in violation of Title VI; (4) discriminatory treatment of LEP prisoners; (5)

discriminatory practices in violation of the defendants' Title VI contractual assurances; and (6) retaliation in violation of Section 14141 and the First Amendment.[2] Doc. 1, at 27-30.

Arpaio, MCSO, and the County moved to dismiss. As relevant here, the County argued that it cannot be held liable under Section 14141 or Title VI for Arpaio's actions under either *respondeat superior* or the theory that the Sheriff acts as a "policymaker" for the County. Doc. 37, at 7-17. The United States responded, analogizing to case law under Section 1983, that the County, "through its chief policymaker for law enforcement * * * matters [*i.e.*, the Sheriff], has engaged *directly* in the violations of § 14141 and Title VI." Doc. 43, at 6 (emphasis added). MCSO and Arpaio together argued that MCSO should be dismissed as a non-jural entity incapable of being sued, and that the United States had failed to state a claim upon which relief could be granted. Doc. 35.

In December 2012, the district court denied the County's motion, and granted in part and denied in part MCSO's and Arpaio's motion. *United States* v. *Maricopa Cnty.*, 915 F. Supp. 2d at 1084. The district court stated that municipal

[2] The discriminatory policing practices alleged in Counts One, Three, and Five included, but were not limited to, the pretextual immigration enforcement traffic stops and detentions at issue in *Melendres*. The United States also alleged that MCSO's discriminatory policing practices extended to general traffic enforcement, workplace raids, home raids, and "crime suppression" sweeps. Doc. 1, at 5.

liability arises when the "constitutional deprivation is caused by a policy or custom of the municipality," *id.* at 1082, and therefore if the Sheriff has final policymaking authority with respect to County law enforcement, "the County can be held responsible for the constitutional violations resulting from these policies," *id.* at 1084. The court found that, under Arizona law, the Sheriff did have final policymaking authority with respect to County law enforcement. *Ibid*. Further, the district court dismissed MCSO under the 2010 Arizona Court of Appeals decision in *Braillard*, which held that MCSO is a non-jural entity without capacity to sue or be sued. *Id.* at 1077 (citing *Braillard*, 232 P.3d at 1269).

After discovery, Arpaio moved for partial summary judgment, Doc. 345, and the County moved for summary judgment on all claims, Doc. 334. The County again argued that it cannot be liable under Section 14141 or Title VI for the allegedly improper actions of the Sheriff. Doc. 334, at 11-17. The County argued that municipal liability was unavailable because neither Section 14141 nor Title VI authorizes what the County called "imputation liability" and that, in any event, liability was inappropriate here because "the County cannot control the Sheriff's policies and practices relating to law enforcement or jailing." Doc. 334, at 11-17. The County also argued, based on textual differences between the statutes, that Section 1983 principles do not apply to Section 14141 and Title VI. Doc. 334, at 11-16. The United States responded that the County can be liable under Section

14141 and Title VI for the Sheriff's conduct because he has final policymaking authority for the County in law-enforcement matters. Doc. 348, at 14-16. The United States explained that policymaker liability is not a form of vicarious liability (*respondeat superior*) or "imputed" liability, but is *direct* liability. In other words, "because the Sheriff is a County officer with policymaking authority over law-enforcement practices, the Sheriff's actions and policies in that area are the County's own actions and policies." Doc. 348 at 15.

The United States moved for partial summary judgment on its three discriminatory policing claims (Counts One, Three, and Five). Doc. 332, at 4. The government argued that, pursuant to the doctrine of offensive issue preclusion, the County was barred from contesting the legality of the traffic stops held unconstitutional by the district court in *Melendres*, and therefore the County was necessarily liable on the United States' discriminatory policing claims. Doc. 332, at 12-16.

b. The district court denied both defendants' motions and granted partial summary judgment to the United States. E.R. 165. First, citing the law of the case doctrine, the district court reiterated its previous holding that, "[u]nder Arizona law, the Sheriff has final policymaking authority with respect to County law enforcement and jails, and the County can be held responsible for constitutional

violations resulting from these policies."[3] E.R. 128 (citing *United States* v. *Maricopa Cnty.*, 915 F. Supp. 2d at 1084). Accordingly, applying principles of Section 1983 policymaker liability, the district court found the County "directly liable" under Title VI "for violations resulting from its official policy, which includes policy promulgated by Arpaio." E.R. 140. "These policies," the court stated, "constitute intentional acts by Maricopa County." E.R. 140. The district court likewise found that "the logic of policymaker liability * * * render[s] Maricopa County directly, not indirectly, liable" under Section 14141. E.R. 141.

On the merits, the district court ruled that the County was precluded, through offensive, non-mutual issue preclusion, from contesting the issues decided in *Melendres* as to MCSO's unlawful enforcement of immigration laws through pretextual traffic stops. E.R. 152-153. The court explained that offensive, non-mutual issue preclusion was appropriate both because the County had a "pre-existing 'substantive legal relationship'" with a party bound by the *Melendres* judgment, *i.e.*, MCSO, and because the County was "adequately represented by someone with the same interests who [wa]s a party" to the *Melendres* case, *i.e.*,

[3] The district court made some of its determinations as to the Sheriff's policymaking authority for County law enforcement in the context of the County's standing argument, *i.e.*, that the United States lacked standing to sue the County because it failed to show that the harms alleged are likely to be redressed by a favorable judgment against the County. E.R. 128-133. The court incorporated and relied upon these determinations in its rulings on the County's liability. See, *e.g.*, E.R. 141-142, 153 n.28.

MCSO. E.R. 149-150 (brackets in original) (quoting *Taylor* v. *Sturgell*, 553 U.S. 880, 894 (2008)). Determining that the *Melendres* findings established violations of Section 14141 and Title VI, the court therefore granted summary judgment to the United States on Counts One, Three, and Five to the extent they addressed the pattern of discriminatory traffic stops deemed unconstitutional in *Melendres*. E.R. 152-155, 165.

The parties entered into a settlement agreement in July 2015, resolving the United States' claims concerning unreasonable searches and detentions in violation of Section 14141 and the Fourth Amendment (Count Two), and retaliation in violation of Section 14141 and the First Amendment (Count Six). E.R. 88-95. Separately, the parties settled the final claim (Count Four), concerning discrimination against LEP prisoners in violation of Title VI. E.R. 97-113 (collectively, the Settlement Agreements). Pursuant to the Settlement Agreements, the County and Arpaio committed to a series of policy and protocol changes designed to prevent further violations.

In September 2015, the district court entered judgment in favor of the United States on its claims relating to MCSO's discriminatory policing. E.R. 87; E.R. 86. The County filed a motion seeking to alter, amend, or correct that judgment. Doc. 410. In its order amending the judgment, the district court stated that "[a]t its core, the motion argues Maricopa County cannot be held liable for the illegal

actions of Maricopa County Sheriff Joseph Arpaio. Throughout this case, Maricopa County has repeatedly made some variant of this argument. The argument was rejected in the past and will be rejected again." E.R. 76. The district court clarified the scope of the judgment, however, explaining that the judgment was confined to the portions of the United States' discriminatory policing claims (Counts One, Three, and Five) "based on the unconstitutional discrimination found in *Melendres v. Arpaio*," *i.e.*, intentional discrimination against Hispanic persons during traffic stops conducted in connection with immigration-related law-enforcement actions. E.R. 77.

On December 30, 2015, the County filed a timely notice of appeal. E.R. 1-2. On appeal, the County challenges the district court's rulings as to both its liability for Sheriff Arpaio's and MCSO's policies and conduct, and whether it is precluded from relitigating the *Melendres* findings.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Leever* v. *City of Carson*, 360 F.3d 1014, 1017 (9th Cir. 2004). "Viewing the evidence in the light most favorable to the nonmoving party," this Court "must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Ibid.*

SUMMARY OF THE ARGUMENT

In seeking once again to avoid liability for the unconstitutional conduct of its sheriff, the County retreads well-worn ground, disregarding Arizona state law and the decisions of this Court. The County's appeal raises two basic questions, both of which the district court decided correctly.

1. First, the district court correctly held, analogizing to case law under Section 1983, that because the Maricopa County sheriff has final policymaking authority over Maricopa County law enforcement, the County is *directly* liable under Section 14141 and Title VI for the Sheriff's unconstitutional conduct. In so holding, the court faithfully applied Arizona state law and Supreme Court precedent governing municipal liability.

The County argues that municipal policymaker liability is not cognizable under Section 14141 or Title VI, but points to no authority refuting the district court's contrary conclusion. Although Section 14141, unlike Section 1983, contemplates municipal liability for "patterns or practices" of unconstitutional conduct by subordinate law-enforcement officers under agency principles, unlawful policies that give rise to policymaker liability under Section 1983 principles will also do so under Section 14141. In this case, the United States below and the district court permissibly rested the County's liability on the principle of policymaker liability borrowed from Section 1983 under *Monell* v.

Department of Social Services, 436 U.S. 658 (1978). On this theory, the County's liability under Section 14141 stems *directly* from the unlawful conduct of the County's official policymaker, Sheriff Arpaio. Likewise, the County is directly liable under Title VI for the Sheriff's unconstitutional conduct and policies, which constitute official Maricopa County policy.

The County's efforts to distance itself from Sheriff Arpaio and MCSO also fail. This Court has expressly recognized that "Arizona state law makes clear that Sheriff Arpaio's law-enforcement acts constitute Maricopa County policy." *Melendres III*, 815 F.3d 645, 650 (2016). Against this backdrop, the County's theory that the Sheriff acts as final policymaker "only on behalf of his own office," Br. 11-16, or, in the alternative, on behalf of the State, Br. 13 n.7, is not correct. Likewise, the County's claim that it has "no authority to control how a sheriff carries out his law enforcement duties" is also wrong. Br. 15. Indeed, the County entered into the Settlement Agreements specifically committing to certain conduct and policy changes by its sheriff's office, belying its disclaimer of authority over MCSO. That disclaimer is also squarely at odds with settled principles of Arizona state law.

2. Second, the district court properly applied the doctrine of offensive, non-mutual issue preclusion to hold that the County was barred from relitigating issues that were actually litigated and decided in the private plaintiffs' *Melendres*

litigation, *i.e.*, Arpaio's and MCSO's pattern or practice of unconstitutional traffic stops. The County's opening brief fails entirely to address the district court's primary basis for that holding: the County—through participation in *Melendres* by its self-described "political subdivision" MCSO—satisfies the "substantive legal relationship" exception to the bar against nonparty issue preclusion. E.R. 151. Issue preclusion is also appropriate, as the district court explained, because the County was adequately represented in *Melendres* by MCSO, with whom its interests are squarely aligned. E.R. 151-152. This Court's decision to substitute the County for MCSO in *Melendres II*—post-trial and after the *Melendres* district court's issuance of an injunctive order—only underscores the correctness of the district court's conclusion. Accordingly, the judgment of the district court should be affirmed.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY HELD THAT THE COUNTY IS LIABLE UNDER SECTION 14141 AND TITLE VI FOR THE UNCONSTITUTIONAL POLICIES AND CONDUCT OF SHERIFF ARPAIO AND THE MARICOPA COUNTY SHERIFF'S OFFICE

The United States brought this action against the County under Section 14141 and Title VI. Under both of these statutes, a municipality is directly liable for constitutional violations stemming from its official policies. Because in Arizona sheriffs are official policymakers for their counties in the area of law

enforcement, including traffic stops, the County is directly liable for Sheriff Arpaio's unlawful law-enforcement policies and conduct.

A. A Municipality Is Directly Liable Under Section 14141 And Title VI For The Unlawful Policies And Conduct Of Its Final Policymakers

A municipality is directly liable under Section 14141 and Title VI for its own official, unlawful policies, and for the unlawful conduct of its final policymakers. While the district court correctly found the County liable on this basis, Section 14141 extends even further, providing for municipal liability under agency principles for the unconstitutional conduct of even subordinate "law enforcement officers" (*i.e.*, non-policymakers) where that conduct rises to the level of a "pattern or practice." 42 U.S.C. 14141. Although this Court can affirm the County's liability under Section 14141 based on the district court's application of policymaker liability principles akin to those under Section 1983, both standards are satisfied here, as policymaker liability suffices to establish a "pattern or practice." Cf. *United States* v. *Gregory*, 871 F.2d 1239, 1246 (4th Cir. 1989) (determining that a sheriff's admitted policy of discriminating against women would prove a "pattern or practice" violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*), cert. denied, 493 U.S. 1020 (1990).

1. Municipal policymaker liability under Section 1983 is well established. Section 1983 imposes liability on any "person" who, under color of law, deprives another, or "causes" another to be deprived of, a federally protected right. The

Supreme Court has construed the term "person" to include municipalities. See *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 690 (1978). Municipal liability arises where "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," caused the particular constitutional violation at issue. *Id.* at 694; accord *Streit* v. *County of L.A.*, 236 F.3d 552, 559 (9th Cir.) (quoting *Monell*, 436 U.S. at 694), cert. denied, 534 U.S. 823 (2001). Section 1983, *Monell* explained, "imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." 436 U.S. at 692. *Monell* rejected *respondeat superior* liability for local governments, however, explaining that "the touchstone of the § 1983 action against a government body is an allegation that official *policy* is responsible for a deprivation." *Id.* at 690-691 (emphasis added). In other words, "a municipality can be held *directly* liable for a violation of the Constitution or a federal law under § 1983 if its own 'policy or custom . . . inflicts the injury.'" *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1157 n.13 (9th Cir. 2009) (quoting *Monell*, 436 U.S. at 694), cert. denied, 560 U.S. 924 (2010).

Contrary to the County's understanding, Br. 17-18, there is no "imputation" of Section 1983 municipal liability under *Monell*; the municipality's liability is direct. The County's opening brief characterizes various forms of municipal liability, including "direct," "policymaker," "vicarious," and so-called "imputed"

liability. Br. 16-18. The district court did not resolve the case based on "vicarious" liability, also known as *respondeat superior*, so that principle of liability is not at issue in this case. "Policymaker" liability, as articulated in the context of Section 1983 by *Monell*, is simply a form of "direct" liability; the policymaker's status cloaks him with the governmental body's authority such that the municipality is *directly* liable for his unlawful policy. See *Melendres III*, 815 F.3d 645, 651 (9th Cir. 2016); *Ileto*, 565 F.3d at 1157 n.13. Accordingly, the County is wrong that "imputation of liability" from the policymaker to the municipality "is central to the 'policymaker' liability paradigm discussed in *Monell*."[4] Br. 16. Indeed, *Monell* makes no mention of "imputation."

2. Under Section 14141, a municipality may be held liable under at least two different theories. First, the statute imposes liability on "any governmental authority" that "engage[s] in a pattern or practice of conduct by law enforcement officers" that deprives persons of federally protected rights. 42 U.S.C. 14141(a). Section 14141, therefore, unlike Section 1983, imposes liability on agency principles—the municipality (or other government entity) is responsible for the

[4] The district court understood as much, rejecting the County's argument that neither Section 14141 nor Title VI "authorize[s] imputation of liability," E.R. 136, and explaining that pursuant to policymaker liability, the "County is directly liable for violations resulting from its official policy, which includes policy promulgated by Arpaio," E.R. 140. As the district court explained, "[t]hese policies constitute intentional acts by Maricopa County for which no imputation is required." E.R. 140.

conduct of its subordinate law enforcement officers when their conduct amounts to a pattern or practice of unlawful action. See Doc. 43, at 6 n.2 (United States noting below that Section 14141 "may provide for a local government's vicarious liability"). Under this theory, the government need not show that the law enforcement officers were policymakers with respect to their actions at issue. See Doc. 355, at 5 (United States noting below that Section 14141 premises liability for a governmental authority on patterns or practices of unconstitutional conduct by its law enforcement officers); see also Order on Municipal Liability Instruction at 2, *United States* v. *Town of Colo. City*, No. 3:12-cv-8123-HRH (D. Ariz., Feb. 12, 2016), ECF No. 891 (Section 14141 creates municipal liability "where a municipality has been shown to have engaged in a pattern or practice of conduct violating the United States Constitution").

Consistent with this reading, the United States has brought suits under Section 14141 against various governments for violations committed by law enforcement officers, successfully securing settlements. For example, in *United States* v. *New Jersey*, the United States brought and settled Section 14141 claims against the State of New Jersey for a pattern or practice of racially discriminatory traffic stops by New Jersey State Police troopers. Consent Decree, No. 3:99-cv-05970-MLC-JJH (D.N.J. Dec. 29, 1999). Likewise, in *United States* v. *City of New Orleans*, the United States brought and settled Section 14141 claims against

the City of New Orleans for a pattern or practice of excessive force and unlawfully discriminatory policing practices by New Orleans Police Department officers. 731 F.3d 434 (5th Cir. 2013); see also, *e.g.*, Agreement, *United States* v. *Town of E. Haven*, No. 3:12-cv-01652-AWT (D. Conn. Dec. 21, 2012) (Section 14141 claims against the Town of East Haven for a pattern or practice of discrimination against Latinos by East Haven Police Department officers).

As the district court found here, a municipality may also be liable under Section 14141 based on principles of policymaker liability analogous to those found under Section 1983. Under this theory, the municipality can be held liable if the plaintiff can show that the municipality "itself" was at fault, *e.g.*, through an official policy. *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989). Therefore, just as a municipality may "cause" a Section 1983 violation through an unlawful policy or custom promulgated by its policymaker, 42 U.S.C. 1983, the municipality may violate Section 14141 by "engag[ing]" in a pattern or practice of unconstitutional conduct through that policy or custom, 42 U.S.C. 14141(a). See *United States* v. *City of Columbus*, No. 2:99-cv-1097, 2000 WL 1133166, at *8 (S.D. Ohio Aug. 3, 2000) (Section 14141 "is properly construed to similar effect" as Section 1983.).

The County asserts that principles of policymaker liability do not apply to Section 14141 because Section 14141 uses the term "engage" (rather than Section

1983's "causes to be subjected"), and therefore municipal liability under Section 14141 must be premised on direct misconduct by the municipality itself, rather than by its policymaking official. Br. 18-21. This argument rests on the mistaken notion that policymaker liability, as articulated in the context of Section 1983, involves some "imputation" of liability to the municipality that Section 14141 does not permit. See Br. 18-21. As the district court correctly explained, however, "[b]ecause a 'policymaker' is not acting individually, but on behalf of the institution/entity, and his policies are the policies of the entity, no imputation takes place in charging the entity with violations stemming from those policies." E.R. 140. Simply put, under this theory of liability, a municipality is *directly* liable under Section 14141 when, through its official policy or custom, it engages in a pattern or practice of unlawful law-enforcement conduct.[5]

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[5] If anything, Congress's use of the term "engage" indicates that liability under Section 14141 may be conditioned on *less* direct involvement in the unlawful practice than that required by Section 1983. Under Section 1983, liability attaches only when a person, under color of law, "subjects, or causes to be subjected," any person to a deprivation of federally protected rights. 42 U.S.C. 1983. But under Section 14141, a governmental authority may be liable for merely "engag[ing]" in, or taking part in, such a deprivation. 42 U.S.C. 14141; cf. *Louis-Charles* v. *Sun-Sentinel Co.*, 595 F. Supp. 2d 1304, 1307 (S.D. Fla. 2008) (interpreting the term "engaged in" as used in the Fair Labor Standards Act to require only "a minimal amount of participation" (citing, *inter alia*, *Engage Definition*, Merriam-Webster, http://www.merriam-webster.com/dictionary/engage (last visited Sept. 16, 2016))). In any event, it certainly does not require *more* evidence of direct causation than would satisfy the requirements of Section 1983. See *City of Columbus*, 2000 WL 1133166, at *8 (concluding that

(continued…)

3. Title VI also applies to Maricopa County here. Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. The purpose of Title VI is to ensure that public funds are not spent in a manner that encourages, subsidizes, or results in racial discrimination.[6] To this end, a recipient is *directly* liable under Title VI for its own discriminatory policies. *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (Title IX case; indicating that in cases involving an "official policy of the recipient entity," *Gebser*'s actual knowledge and deliberate indifference standards for damages claims are not necessary);[7] see also *Mansourian* v. *Regents of Univ. of Cal.*, 602 F.3d 957, 967-969 (9th Cir. 2010) (same). In other words, a funding recipient can be said to have directly acted in violation of Title VI "when the violation is caused by official policy." *Simpson* v. *University of Colo. Boulder*,

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(…continued)
liability under Section 14141 can be established by evidence that would establish liability under Section 1983).

[6] The County does not contest that it is a recipient of federal funding covered by Title VI.

[7] The Supreme Court, recognizing that Title IX was "patterned after" Title VI, has interpreted and applied the statutes in the same fashion. *Cannon* v. *University of Chi.*, 441 U.S. 677, 694-696 (1979).

500 F.3d 1170, 1176-1178 (10th Cir. 2007) (agreeing with *Gebser* that official policies of the recipient are intentional acts requiring no imputation). As the district court correctly explained, in these circumstances, as with policymaker liability under Section 1983 and Section 14141, "no imputation takes place" in charging the recipient with Title VI violations "stemming from those policies—they are the policies of the entity." E.R. 140. Therefore, "Maricopa County is *directly* liable for violations resulting from its official policy, which includes policy promulgated by Arpaio. These policies constitute intentional acts *by Maricopa County* for which no imputation is required." E.R. 140 (emphases added; internal citation omitted).

In sum, a municipality is directly liable under Section 14141 and Title VI for the unlawful policies and conduct of its official policymakers. Because, as set forth below, Sheriff Arpaio is the County's official law-enforcement policymaker, the County is directly liable for his unconstitutional policies and conduct.

B. Under Arizona Law, The Maricopa County Sheriff Has Final Policymaking Authority For Maricopa County Law Enforcement, And The County Is Therefore Liable For The Sheriff's Unlawful Law-Enforcement Policies And Conduct

The district court correctly held that the County is liable under Section 14141 and Title VI for the unconstitutional law-enforcement policies and conduct of Sheriff Arpaio and MCSO. E.R. 140-141; see also *United States* v. *Maricopa Cnty.*, 915 F. Supp. 2d 1073, 1082-1084 (D. Ariz. 2012). In reaching that

conclusion, the district court correctly determined that "[u]nder Arizona law, the Sheriff has final policymaking authority with respect to County law enforcement and jails, and the County can be held responsible for constitutional violations resulting from these policies." *United States* v. *Maricopa Cnty.*, 915 F. Supp. 2d at 1084. Throughout this case, the district court repeatedly rejected the County's arguments to the contrary. E.R. 76. Subsequently, in *Melendres III*, this Court reached the same conclusion: "Arizona state law makes clear that Sheriff Arpaio's law-enforcement acts constitute Maricopa County policy." 815 F.3d at 650. Although this Court made that observation in the context of a Section 1983 action, the conclusion applies equally here.

1. Even if this Court were writing on a clean slate, it is clear that, under Arizona law, the Sheriff acts as an official Maricopa County policymaker in the area of law enforcement. As this Court has recognized, under *Monell*'s policymaker liability framework, a municipality is liable for the actions of "those whose edicts or acts may fairly be said to represent official policy." *Cortez* v. *County of L.A.*, 294 F.3d 1186, 1188-1189 (9th Cir. 2002) (quoting *Monell*, 436 U.S. at 694) (Section 1983 action). If a sheriff's actions "constitute county 'policy,' then the county is liable for them." *McMillian* v. *Monroe Cnty.*, 520 U.S. 781, 783 (1997) (citation omitted). To hold a local government liable for an official's conduct under the policymaker standard, a plaintiff must establish that

the official has "final policymaking authority" for the local government "concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Id.* at 785 (citation omitted). To determine whether a particular official has final policymaking authority for a particular government entity, the court must look to state law. *Id.* at 786 (citing cases).

In *McMillian*, a Section 1983 action, the Supreme Court addressed whether, in Alabama, sheriffs are law-enforcement policymakers for the State or their respective counties. In concluding that Alabama sheriffs are law-enforcement policymakers for the State, the court looked to the Alabama Constitution, the Alabama Code, and relevant Alabama case law. 520 U.S. at 786-793. First, the Court observed that Alabama had taken specific steps in its constitution to increase state control over sheriffs, including, for example, by changing Alabama law to explicitly add sheriffs to the list of state "executive department" members. *Id.* at 787. The *McMillian* Court also deferred to the Alabama Supreme Court's "unequivocal" position "that sheriffs are state officers" under the state constitution. *Id.* at 789. Likewise, the Court viewed the State's responsibility for judgments against sheriffs as "strong evidence in favor of the * * * conclusion that sheriffs act on behalf of the State." *Ibid.* (citing Alabama Supreme Court); see also *Goldstein* v. *City of Long Beach*, 715 F.3d 750, 758 (9th Cir. 2013) (addressing this *McMillian* consideration), cert. denied, 134 S. Ct. 906 (2014). Further, citing

the Alabama Code, the *McMillian* Court emphasized that Alabama sheriffs were "given complete authority to enforce the state criminal law in their counties," and that the "'powers and duties' of the counties themselves * * * [did] not include any provision in the area of law enforcement." 520 U.S. at 790. The Court concluded that "Alabama Sheriffs, when executing their law-enforcement duties, represent the State of Alabama, not their counties." *Id.* at 793.

Following *McMillian*, this Court has similarly looked to state law in Section 1983 actions to determine whether a government policymaker acts on behalf of the state or local government when acting in a particular area or on a particular issue. See generally *Weiner* v. *San Diego Cnty.*, 210 F.3d 1025, 1029 (9th Cir. 2000) (noting that a court must "examine [the State's] constitution, statutes, and case law" when determining a county's liability under *McMillian*). For example, in *Goldstein*, this Court applied California state law to determine that California district attorneys act as county, not state, policymakers when instituting procedures related to the use of jailhouse informants. 715 F.3d at 755. Distinguishing *McMillian*, this Court contrasted the steps Alabama had taken to increase state control over sheriffs with "the contrary California trend to categorize district attorneys as county officials." *Id.* at 759. This Court also emphasized that, in California, the county board of supervisors "shall supervise the official conduct of all county officers," and that California counties "must defend and indemnify" the

district attorney in an action for damages. *Ibid*. (citation omitted). This Court relied on similar factors in *Streit* to determine that California sheriffs act on behalf of their counties when overseeing and managing local jails. 236 F.3d at 561; see also *Cortez*, 294 F.3d at 1189 (same); *Brewster* v. *Shasta Cnty.*, 275 F.3d 803, 805 (9th Cir. 2001) (same, when the sheriff investigates crime in the county), cert. denied, 537 U.S. 814 (2002). These cases, each of which turned on interpretation of state law, reflect *McMillian*'s rejection of "a uniform, national characterization for all sheriffs," and reflect the notion that "the States have wide authority to set up their state and local governments as they wish." *McMillian*, 520 U.S. at 795.

2. In contrast to the Alabama law addressed in *McMillian*, and as this Court has previously recognized, Arizona's constitution, statutes, and case law "make[] clear" that Arizona sheriffs are the final policymaking authority for their counties on law-enforcement matters, including the traffic stops at issue here. *Melendres III*, 815 F.3d at 650. First, the Arizona Constitution and Arizona statutes establish Arizona sheriffs' policymaking authority for county law enforcement. Unlike the Alabama Constitution, the Arizona Constitution does not list sheriffs as part of "the state 'executive department.'" *McMillian*, 520 U.S. at 787 (finding this designation "especially important" for determining liability); accord *Streit*, 236 F.3d at 561 (emphasizing the California Constitution's designation of sheriffs as county officers). Rather, the Arizona Constitution and Arizona statutes explicitly

identify the sheriff as a *county* officer. See Ariz. Const. Art. XII, § 3 ("There are hereby created in and for each organized county of the state the following officers who shall be elected by the qualified electors thereof: a sheriff" and other officers.); Ariz. Rev. Stat. Ann. § 11-401(A) (2016) ("The officers of the county are * * * [the] Sheriff" and other officers.); see also *Cortez*, 294 F.3d at 1190 (Section 1983 action; "In reaching our conclusion [that the sheriff is a county officer], we found particularly salient California's constitutional designation of sheriffs as county officers.").

Arizona statutes also make clear that a sheriff has authority over its county's general law-enforcement functions, which encompass traffic stops. The Arizona Revised Statutes set forth the laws governing "county officers" and enumerate the powers and duties of a sheriff, including to "[p]reserve the peace," "[a]rrest * * * all persons who attempt to commit or who have committed a public offense," and "[p]revent and suppress all affrays, breaches of the peace, riots and insurrections which may come to the knowledge of the sheriff." Ariz. Rev. Stat. Ann. § 11-441(A) (2016); see *Melendres III*, 815 F.3d at 650 (citing Section 11-441(A)); cf. Br. 11-16 & n.7 (County asserts that the Sheriff is a final law-enforcement policymaker for MCSO, and, alternatively, the State, but not for the County).

Further, under Arizona statutes, the County bears the cost of the Sheriff's misconduct in official law-enforcement matters, which is "strong evidence in favor of the * * * conclusion" that Arizona sheriffs act on behalf of their respective counties. *McMillian*, 520 U.S. at 789; accord *Goldstein*, 715 F.3d at 758; *Streit*, 236 F.3d at 562. Arizona law makes clear that the expenses of the sheriff "shall be a county charge," Ariz. Rev. Stat. Ann. § 11-444(A) (2016), and the County acknowledged in *Melendres* that it would "bear the financial costs" of MCSO's compliance with the district court's injunction, *Melendres III*, 815 F.3d at 650; see also *Braillard* v. *Maricopa Cnty.*, 232 P.3d 1263, 1269 n.2 (Ariz. Ct. App. 2010) ("Maricopa County pays its own debts, and it funds the Sheriffs [sic] official functions. Whether the County or the Sheriff is liable is of no practical consequence. * * * [T]hey both lead to the same money." (citation omitted)), cert. denied, 563 U.S. 1008 (2011). This factor strongly supports a finding that the Sheriff acts on behalf of the County, rather than on behalf of the State. *Streit*, 236 F.3d at 562 (describing this as a "crucial factor").

In addition, Arizona state court decisions, as well as federal district courts applying Arizona state law, make clear that the Sheriff is the County's final law-enforcement policymaker. For example, in *Flanders* v. *Maricopa County*, the Arizona Court of Appeals concluded that Arpaio is a final policymaker for the County for purposes of Section 1983 liability, and that the County was responsible

for the Sheriff's jail policies. 54 P.3d 837, 847 (2002). Similarly, in *Guillory* v. *Greenlee County*, the court determined that, pursuant to Arizona statute, the sheriff is "the designated and final policymaker for [his c]ounty regarding the needs of its officers for the prompt and orderly administration of criminal justice," and that "[a]s a matter of law, the [c]ounty is liable for policies made by [its s]heriff." No. CV 05-352 TUC DCB, 2006 WL 2816600, at *4 (D. Ariz. Sept. 28, 2006) (citing Ariz. Rev. Stat. Ann. §§ 11-401(A)(1), 11-441, 11-444). Finally, in *Braillard*, 232 P.3d at 1275, a case involving a claim for wrongful death alleged to have been caused by inadequate training of MCSO personnel, the court stated: "[B]ased on the training issues identified in our discussion of Arpaio's liability," plaintiff's *Monell* claim can "be made properly against the County" rather than against MCSO.

3. It is therefore clear that, under Arizona law, the Sheriff acts on behalf of the County when executing his law-enforcement functions. The County's various arguments to the contrary are not correct.

a. The County asserts that the Sheriff "acts as final policymaker only on behalf of his own office," Br. 11, arguing that *Flanders* and *Braillard* are inapposite because they concern the Sheriff's policymaking status for the County in the specific contexts of jail policy and officer training, not traffic stops, Br. 31 n.15. But the County has failed to explain how it has responsibility for the

Sheriff's jail-management and officer-training decisions, but not his law-enforcement decisions more broadly. See *Puente Ariz.* v. *Arpaio*, 76 F. Supp. 3d 833, 868 (D. Ariz. 2015) ("[T]he County has not explained, nor can the Court discern, how the County has more control over the Sheriff's jail-management decisions than over his law-enforcement decisions."), rev'd in part on other grounds and vacated in part, 821 F.3d 1098 (9th Cir. 2016).

Indeed, following clear state law guidance, every federal district court to address this issue has held that Arizona counties are liable for the law-enforcement conduct of county sheriffs. For example, in *Puente Arizona*, the district court stated that "*Flanders* compels the conclusion that Sheriff Arpaio is the final policymaker for the County on law-enforcement matters." 76 F. Supp. 3d at 868. Likewise, in *Guillory*, the court held that "[a]s a matter of law, the County is liable for policies made by the Sheriff, pursuant to his designated powers and duties as provided for by statute," which include general law-enforcement functions. 2006 WL 2816600, at *4 (citing Ariz. Rev. Stat. Ann. § 11-441). And in *Ortega Melendres* v. *Arpaio*, the district court denied Maricopa County's motion to dismiss, holding that the County may be held liable for the "discretionary acts of its Sheriff in the context of jail management and law enforcement policy." 598 F. Supp. 2d 1025, 1038 (D. Ariz. 2009). Finally, in *Lovejoy* v. *Arpaio*, the district court held that "Sheriff Arpaio is a final policymaker for Maricopa County in the

context of criminal law enforcement." No. CV 09-1912-PHX-NVW, 2010 WL 466010, at *12-13 (D. Ariz. Feb. 10, 2010).[8]

b. The County next argues that municipal liability is inappropriate here because the County allegedly lacks "any meaningful control over the law enforcement activities of [its] sheriff," Br. 14, citing cases declining to hold municipalities *vicariously* liable on that basis, Br. 33-35. As this Court explained in *Melendres III*, however, the County's "[l]iability is imposed, not on the grounds of *respondeat superior*, but because the [Sheriff's] status cloaks him with the governmental body's authority." 815 F.3d at 651 (first brackets in original) (quoting *Flanders*, 54 P.3d at 847). And as discussed above, *McMillian* instructs courts to consider a variety of factors aside from the municipality's "control" over an official, including "how state law defines the official's office, the scope of the official's duties, the source of the official's salary and equipment, [and] whether the municipality indemnifies the official." *Puente Ariz.* v. *Arpaio*, No. CV-14-

[8] The County relies upon the plurality opinion of the Eleventh Circuit in *Grech* v. *Clayton County*, 335 F.3d 1326 (2003) (en banc). That opinion—which focused on the relative degree of control over the sheriff exercised by the State and county, respectively—simply analyzed applicable Georgia law to argue that, as in Alabama under *McMillian*, Georgia sheriffs are final law-enforcement policymakers for the State rather than the county. *Id.* at 1332-1344 (opinion of Hull, J.). As discussed above, that is just not the case under Arizona law. Moreover, as Judge Barkett noted in her controlling concurrence, the *Grech* plurality's reasoning advances a "misstatement of *McMillian.*" See *id.* at 1351 (Barkett, J., concurring in the judgment).

01356-PHX-DGC, 2015 WL 1432674, at *2 (D. Ariz. Mar. 27, 2015) (citing, *inter alia*, *McMillian*, 520 U.S. at 787-793). Indeed, "[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*, 715 F.3d at 757 (quoting *Brewster*, 275 F.3d at 810); see also *Puente Ariz.*, 2015 WL 1432674, at *2 ("Contrary to the County's argument, a county's lack of control over a sheriff is not dispositive of its liability for his law-enforcement decisions under § 1983.").

In any event, the County and its Board of Supervisors (the Board) do exercise meaningful supervisory authority over Arpaio's and MCSO's law-enforcement functions. Arizona Revised Statutes Section 11-251(1) provides:

> The board of supervisors, under such limitations and restrictions as are prescribed by law, may: * * * [s]upervise the official conduct of all county officers and officers of all districts and other subdivisions of the county charged with assessing, collecting, safekeeping, managing or disbursing the public revenues, [and] see that such officers faithfully perform their duties and direct prosecutions for delinquencies.

Ariz. Rev. Stat. Ann. § 11-251(1) (2016). As the Arizona Court of Appeals has held, even if this statute does not give the County "control" over every aspect of the Sheriff's statutorily mandated law-enforcement duties, because the Sheriff is a county officer under state law, "the County exercises supervision of the official

conduct of the Sheriff" pursuant to Section 11-251(1).[9] *Fridena* v. *Maricopa Cnty.*, 504 P.2d 58, 61 (Ariz. Ct. App. 1972) (citing Ariz. Rev. Stat. Ann. §§ 11-251(1), 11-401(A)(1)). The County's Board of Supervisors also wields the power to require reports from county officers, including the Sheriff, "on any matter connected with the duties of his office," and to remove and replace county officers for failure to perform that duty. Ariz. Rev. Stat. Ann. § 11-253(A) (2016). The County determines the budget of its sheriff, *id.* § 11-201(A)(6) (2016), and the Sheriff must "render a full and true account of [his] expenses" to the Board every month, *id.* § 11-444(C). Cf. *Goldstein*, 715 F.3d at 755-758 (relying on similar factors). Moreover, in this very case, the Settlement Agreements require that the County ensure certain conduct and policy changes by MCSO, E.R. 88-95, 97-113, p. 13, *supra*, flatly contradicting its insistence that it has "no authority to control how [its] sheriff carries out his law enforcement duties." Br. 15.[10]

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[9] The County suggests that its supervisory authority under Section 11-251(1) is limited to matters concerning public revenues. Br. 33-34. Although the statute refers to public revenues in determining *which* officers the County may supervise, the statute's plain language extends the County's supervisory authority to all "official conduct" of such officers, without qualification. See Ariz. Rev. Stat. Ann. § 11-251(1).

[10] The County also argues that the district court "imposed its notions of how power and responsibility are allocated among the institutions of county government," and in doing so "usurp[ed]" the prerogatives reserved to the State. Br. 37. To the contrary, the district court carefully considered and deferred to governing state law.

In short, under the *McMillian* framework, Arizona state law establishes that sheriffs in Arizona are final policymakers for their counties in the context of law enforcement. *United States* v. *Maricopa Cnty.*, 915 F. Supp. 2d at 1082-1084. Accordingly, as the district court correctly held, the County is directly liable for the adoption and enforcement of the Sheriff's law-enforcement policies.

II

THE COUNTY IS LIABLE UNDER, AND BOUND BY, THE FINDINGS OF UNLAWFUL DISCRIMINATION IN *MELENDRES*

The district court in *Melendres* concluded that "MCSO's use of Hispanic ancestry or race as a factor in forming reasonable suspicion that persons have violated state laws relating to immigration status violates the Equal Protection Clause of the Fourteenth Amendment." *Melendres* v. *Arpaio*, 989 F. Supp. 2d. 822, 899 (D. Ariz. 2013), aff'd in part and vacated in part on other grounds, 784 F.3d 1254 (9th Cir. 2015), cert. denied, 136 S. Ct. 799 (2016). Here, the United States sought to preclude the County from re-contesting these issues, arguing that the *Melendres* findings entitled the United States to summary judgment on portions of its discriminatory policing claims in Counts One, Three, and Five. The district court agreed. It concluded that offensive, non-mutual issue preclusion was appropriate both because the County had a "pre-existing 'substantive legal relationship'" with MCSO, a party bound by the *Melendres* judgment, and because the County was "adequately represented" by MCSO in that case. E.R. 149-150

(quoting *Taylor* v. *Sturgell*, 553 U.S. 880, 894 (2008)). The district court further concluded—and the County does not dispute—that the *Melendres* findings amounted to a "pattern or practice" of unconstitutional discrimination by the Sheriff and MCSO. E.R. 153-155; accord E.R. 77. The court therefore granted partial summary judgment to the United States on portions of Counts One, Three, and Five of the Complaint.

This Court, through its decision in *Melendres II* to re-join the County as a party post-judgment, has already done precisely what the district court did here—this Court gave the findings of fact and conclusions of law in *Melendres* preclusive effect against the County despite the County's technical absence from the case at the time of the *Melendres* judgment. See *Melendres II*, 784 F.3d 1254, 1260 (9th Cir. 2015), cert. denied, 136 S. Ct. 799 (2016). This Court should affirm the district court's decision to do the same here.

A. Issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire* v. *Maine*, 532 U.S. 742, 748-749 (2001). By "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate," the doctrine protects against "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*

v. *United States*, 440 U.S. 147, 153-154 (1979). As this Court has recognized, offensive, non-mutual issue preclusion is appropriate where (1) there was a full and fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually litigated and necessary to support the prior judgment; (3) the issue was decided in a final judgment; and (4) the party against whom issue preclusion is asserted was a party to, or in privity with a party to, the prior action. See, *e.g.*, *Resolution Trust Corp.* v. *Keating*, 186 F.3d 1110, 1114 (9th Cir. 1999). Each of these requirements for offensive, non-mutual issue preclusion is met.

B. Elements two and three are not in dispute. The County does not contest that the identical issue—the constitutionality of the Sheriff's policy of discriminatory traffic stops—was actually litigated, decided, and necessary to the final judgment against the Sheriff and MCSO in *Melendres*. See Br. 43-45; Doc. 351, at 2-3. Rather, the County argues that it was not a party to the prior action, and therefore that the "claims *against the County* were not 'actually litigated and necessary' to the *Melendres I* judgment," and that no claims were "'decided *against*' *the County* in that judgment." Br. 44 (emphases added). This, of course, is beside the point. Non-mutual issue preclusion inherently involves issues decided against a different party.

C. The County makes two arguments, directed at elements one and four: (1) that it was not afforded a "full and fair opportunity" to litigate the issue in

Melendres "because Plaintiffs in that case dropped their claims against the County well before trial," and, relatedly, (2) that it was not "in privity" with "the Sheriff and/or MCSO." Br. 44. Both fail.

1. As a general matter, "a person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." *Sturgell*, 553 U.S. at 892. But the Supreme Court has clarified that "the rule against nonparty preclusion is subject to exceptions." *Id.* at 893. As the district court correctly held, two of those exceptions apply here.

First, nonparty preclusion "may be justified based on a variety of pre-existing 'substantive legal relationship[s]' between the person to be bound and a party to the judgment." *Sturgell*, 553 U.S. at 894 (brackets in original). In this case, the County enjoyed a full and fair opportunity to litigate the *Melendres* case through its pre-existing substantive legal relationship with MCSO. As the Arizona Court of Appeals made clear in *Braillard* v. *Maricopa County*, MCSO is not a separate legal entity from the County. 232 P.3d 1263, 1269 (Ariz. Ct. App. 2010) ("Although [Ariz. Rev. Stat. Ann.] § 11-201(A)(1) provides that counties have the power to sue and be sued through their boards of supervisors, no Arizona statute confers such power on MCSO as a separate legal entity."); see also *Ekweani* v. *Maricopa Cnty. Sheriff's Office*, No. 2:08-cv-1551, 2009 WL 976520, at *2 (D. Ariz. Apr. 9, 2009) ("[T]he office[] of the county sheriff * * * [is] simply [an]

administrative subdivision[] of the county."). Even in this appeal, the County does not squarely deny its substantive legal relationship with MCSO. See Br. 43-45. Nor could it. In its motion to dismiss in *Melendres*, the County itself described MCSO as its "political subdivision" and "county department," and denied that MCSO "enjoy[s] a separate legal existence" from the County. Doc. 355-1, at 20 (citation omitted) (County seeking to dismiss MCSO from *Melendres* "because it is a non-jural entity").[11] Accordingly, as the district court correctly concluded, there is little doubt Maricopa County qualifies "for the 'substantive legal relationship' exception to the bar against nonparty issue preclusion." E.R. 151.

Second, a nonparty may be bound by a judgment because it was "'adequately represented by someone with the same interests who [wa]s a party' to the suit." *Sturgell*, 553 U.S. at 894 (citation omitted; brackets in original). A party's representation of a nonparty is "adequate" for preclusion purposes if "(1)

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[11] The County asserts that it lacked a full and fair opportunity to litigate *Melendres* because the *Melendres* plaintiffs dropped their claims against the County before trial. But the fact that the parties jointly moved to dismiss the County from *Melendres* because the County was "not a necessary party" only underscores the substantive legal relationship between MCSO and the County. Doc. 351, at 2 (County's response). The County was unnecessary because it was a separate party in name only; as far as the claims in *Melendres* were concerned, it was represented through its "county department," MCSO. Doc. 355-1, at 20; see also *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402 (1940) ("Identity of parties is not a mere matter of form, but of substance. * * * [P]arties nominally different may be, in legal effect, the same." (citation omitted)).

[t]he interests of the nonparty and [the] representative are aligned; and (2) either the party understood [it]self to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id.* at 900 (internal citation omitted). Each of those requirements is met.

The County enjoyed a full and fair opportunity to litigate the issues in *Melendres* because it was "adequately represented" in that case by MCSO, with whom its interests were squarely aligned. As the district court noted, both the County and MCSO contested their liability for the Sheriff's actions, and "Maricopa County and MCSO together submitted a joint answer and joint motion to dismiss the complaint." E.R. 151-152. Indeed, as the district court explained, "Maricopa County and MCSO's joint representation by counsel in *Melendres* and their joint submissions, defenses, and arguments for dismissal demonstrate both the alignment of their interests and their understanding of themselves as indistinguishable legal entities for purposes of defending the suit." E.R. 152; see also Doc. 355-1, at 20 (defendants jointly arguing in *Melendres* that MCSO is a non-jural entity that does not "enjoy a separate legal existence" from Maricopa County).

Moreover, MCSO understood that as a "county department" and "political subdivision" of the County, it was representing the County's interests as to the claims in *Melendres*. Doc. 355-1, at 20. Indeed, this Court recognized as much in

its decision, after trial and the issuance of the injunctive order in *Melendres*, to substitute the County for MCSO in light of *Braillard*'s clarification of MCSO's non-jural status. *Melendres II*, 784 F.3d at 1260; E.R. 152 ("Without discussing the issue, the Ninth Circuit appears to have assumed Maricopa County was adequately represented in the preceding *Melendres* litigation such that adding it as a party for purposes of injunctive relief was fair and reasonable.").

2. The final element necessary for the application of offensive, non-mutual issue preclusion is also met here—the County was in "privity" with a party to *Melendres*, *i.e.*, MCSO. As established above, pp. 40-41, *supra*, the County has a substantive legal relationship with MCSO, which satisfies the privity requirement as well. See *Sturgell*, 553 U.S. at 894 n.8 (explaining that "the substantive legal relationships justifying preclusion are sometimes collectively referred to as 'privity'").

Accordingly, the district court correctly held that the requirements of offensive, non-mutual issue preclusion were met. Therefore, the court also correctly held that the County is liable for violations of Section 14141 and Title VI in Counts One, Three, and Five based on the unconstitutional discrimination found in *Melendres*.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

GREGORY B. FRIEL
Deputy Assistant Attorney General

s/ Alexander B. Aronson
THOMAS E. CHANDLER
ALEXANDER B. ARONSON
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - RFK 3730
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-0619

STATEMENT OF RELATED CASES

The government states, pursuant to Ninth Circuit Rule 28-2.6, that, in addition to the pending cases identified by appellant, it is aware of three cases related to this appeal insofar as they involve transactions or events that underlie issues in this appeal: *Melendres* v. *Arpaio*, No. 2:07-cv-02513-GMS (notice of appeal filed by Joseph M. Arpaio on Sept. 15, 2016); *Melendres* v. *Arpaio*, No. 2:07-cv-02513-GMS (notice of appeal filed by Maricopa County, Arizona on Sept. 16, 2016); and *Melendres* v. *Arpaio*, No. 2:07-cv-02513-GMS (notice of appeal filed by Brian Sands on Sept. 16, 2016). Court of Appeals docket numbers are not yet available for these cases.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d) because this brief contains 10,216 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

s/ Alexander B. Aronson
ALEXANDER B. ARONSON
Attorney

Date: September 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE 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 this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Alexander B. Aronson
ALEXANDER B. ARONSON
Attorney