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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

v.

Maricopa, County of, et al.,

Defendants.

No. CV-12-00981-PHX-ROS
ORDER

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

BACKGROUND

I. The Parties

Plaintiff the United States brought the present action alleging a pattern or practice of discrimination against Latinos in Maricopa County, Arizona by Defendants Joseph M. Arpaio (“Arpaio”) and Maricopa County in violation of the Constitution and federal statutes. Defendant Arpaio is the Sheriff of Maricopa County and heads the Maricopa County Sheriff’s Office (“MCSO”). As MCSO’s chief officer, Arpaio directs law enforcement throughout Maricopa County.¹ He is responsible for MCSO’s policies and operations, which include all facets of policing and prison administration. MCSO is a subdivision of Maricopa County. Maricopa County’s primary governing body is the

¹ MCSO is a non-jural entity, which the Arizona Court of Appeals has determined cannot be sued. *Brailard v. Maricopa County*, 232 P.3d 1263, 1269 (Ariz. Ct. App. 2010).

1 Board of Supervisors (the “Board”). The Board consists of five Supervisors, each of
2 whom is elected from one of Maricopa County’s five districts. Maricopa County
3 determines the budgets and provides the funding for its subdivisions, including municipal
4 courts, public schools, and law enforcement (i.e. MCSO). Maricopa County receives
5 federal financial assistance from the United States, which it distributes to various county
6 subdivisions, including MCSO.

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

8 In 2007, private individual plaintiffs initiated a class action lawsuit against Arpaio,
9 MCSO, and Maricopa County, alleging MCSO officers engaged in racial discrimination
10 against Latinos “under the guise of enforcing immigration law.” *Ortega-Melendres v.*
11 *Arpaio*, 836 F. Supp. 2d 959, 969 (D. Ariz. 2011), *aff’d sub nom. Melendres v. Arpaio*,
12 695 F.3d 990 (9th Cir. 2012) (hereinafter “*Melendres*”). The case focused on “saturation
13 patrols,” which were described as “crime suppression sweeps” in which officers saturate
14 a given area and target persons who appeared to be Latino for investigation of their
15 immigration status. (2:07-CV-02513-GMS, Doc. 26 at 10). Jose de Jesus Ortega-
16 Melendres, the named plaintiff, was stopped in his vehicle by members of the MCSO’s
17 Human Smuggling Unit and detained without probable cause while officers investigated
18 his immigration status, along with those of his passengers. *Melendres v. Arpaio*, 989 F.
19 Supp. 2d 822, 880 (D. Ariz. 2013); (2:07-CV-02513-GMS, Doc. 26 at 17). The certified
20 class of plaintiffs encompassed “[a]ll Latino persons who, since January 2007, have been
21 or will be in the future stopped, detained, questioned or searched by [the defendants’]
22 agents while driving or sitting in a vehicle on a public roadway or parking area in
23 Maricopa County, Arizona.” *Melendres v. Arpaio*, 695 F.3d 990, 995 (9th Cir. 2012). *See*
24 *also Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 994 (D. Ariz. 2011).

25 In May 2009, Maricopa County requested a stay pending the outcome of the
26 United States’ investigation of Arpaio’s practices, which had begun one month earlier.
27 The United States opposed the motion, as did Arpaio, and the court denied the stay due to
28 the timing and uncertainty regarding the outcome of the United States’ investigation.
Melendres v. Maricopa Cnty., No. 07-cv-02513, 2009 WL 2515618, at *4 (D. Ariz. Aug.

1 13, 2009). Over the course of the *Melendres* litigation, the United States requested
2 deposition transcripts and filed motions for protective orders regarding discovery. It also
3 sought to transfer a 2010 Title VI enforcement action to the *Melendres* court.

4 In October 2009, the *Melendres* court granted a joint motion and stipulation to
5 dismiss Maricopa County without prejudice. (2:07-CV-02513-GMS, Doc. 194). The
6 stipulation stated, “Defendant Maricopa County is not a necessary party at this juncture
7 for obtaining the complete relief sought.” (2:07-CV-02513-GMS, Doc. 178).

8 On May 24, 2013, the *Melendres* court issued Findings of Fact and Conclusions of
9 Law. *Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013) (“*Melendres* Order”).
10 The court held MCSO’s “saturation patrols all involved using traffic stops as a pretext to
11 detect those occupants of automobiles who may be in this country without authorization,”
12 *id.* at 826, and “MCSO’s use of Hispanic ancestry or race as a factor in forming
13 reasonable suspicion that persons have violated state laws relating to immigration status
14 violates the Equal Protection Clause of the Fourteenth Amendment.” *Id.* at 899. The court
15 also found MCSO conducted discriminatory traffic stops outside of saturation patrols. *Id.*
16 at 844-845, 889-890. The *Melendres* Order enjoined MCSO from “using Hispanic
17 ancestry or race as [a] factor in making law enforcement decisions pertaining to whether
18 a person is authorized to be in the country, and [] unconstitutionally lengthening [vehicle]
19 stops.” *Id.* at 827.

20 After the ruling, the United States filed a statement of interest concerning potential
21 forms of relief.² On October 2, 2013, the court issued its Supplemental Permanent
22 Injunction/Judgment Order. *Melendres v. Arpaio*, No. CV-07-02513-PHX-GMS, 2013
23 WL 5498218, at *1 (D. Ariz. Oct. 2, 2013) (“Supplemental Order”). The order
24 permanently enjoined Defendants from: 1) “[d]etaining, holding or arresting Latino
25 occupants of vehicles in Maricopa County based on a reasonable belief, without more,

26 ² The statement of interest was made pursuant to 28 U.S.C. § 517, which permits
27 the Attorney General to send officers of the Department of Justice to “any State or district
28 in the United States to attend to the interests of the United States in a suit pending in a
court of the United States, or in a court of a State, or to attend to any other interest of the
United States.” 28 U.S.C. § 517. *See M.R. v. Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2012)
(comparing “statement of interest” under 28 U.S.C. § 517 to an amicus brief).

1 that such persons are in the country without authorization”; 2) “[u]sing race or Latino
2 ancestry as a factor in deciding whether to stop any vehicle” or in deciding whether a
3 vehicle occupant was in the United States without authorization; (3) “[d]etaining Latino
4 occupants of vehicles stopped for traffic violations for a period longer than reasonably
5 necessary to resolve the traffic violation in the absence of reasonable suspicion that any
6 of the vehicle’s occupants have committed or are committing a violation of federal or
7 state criminal law”; (4) “[d]etaining, holding or arresting Latino occupants of a vehicle . .
8 . for violations of the Arizona Human Smuggling Act without a reasonable basis for
9 believing the necessary elements of the crime are present”; and (5) “[d]etaining, arresting
10 or holding persons based on a reasonable suspicion that they are conspiring with their
11 employer to violate the Arizona Employer Sanctions Act.” *Id.* The Supplemental Order
12 also contained numerous provisions regarding the implementation of bias-free policing,
13 including standards for bias-free detention and arrest policies and training, as well as
14 detailed policies and procedures for ensuring and reviewing MCSO’s compliance with
15 the *Melendres* Order. The procedures included the appointment of an independent
16 monitor to report on Arpaio and MCSO’s compliance and collection of traffic stop data.
17 *Id.*

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

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

1 official capacity because ‘an official-capacity suit is, in all respects other than name, to be
2 treated as a suit against the entity.’” *Id.*³ In addition, the court held the *Melendres*
3 injunction was not overbroad because it applied to activities beyond saturation patrols:
4 “Although the evidence largely addressed [the] use of race during saturation patrols, the
5 district court did not clearly err in finding [Arpaio’s] policy applied across-the-board to
6 all law enforcement decisions—not just those made during saturation patrols.”⁴ *Id.*
7 However, the court found the requirements for the independent monitor “to consider the
8 ‘disciplinary outcomes for *any* violations of departmental policy’ and to assess whether
9 Deputies are subject to ‘civil suits or criminal charges . . . for off-duty conduct” were not
10 narrowly tailored and ordered the district court “to tailor [these provisions] to address
11 only the constitutional violations at issue.” *Id.* at 1267.

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

13 On March 10, 2009, the United States Department of Justice (“DOJ”) sent Arpaio
14 a letter notifying him it was commencing an investigation of his office. (Doc. 333-3 at 6).
15 Over a year later, on August 3, 2010, DOJ issued a “Notice of noncompliance with the
16 obligation to cooperate with the Department of Justice investigation pursuant to Title VI
17 of the Civil Rights Act of 1964.” (Doc. 333-3 at 9) (“Notice Letter”). Although the
18 Notice Letter appears to have been mailed only to counsel for MCSO, counsel for
19 Maricopa County responded to it. (Doc. 333-3 at 9). On August 12, 2010, Maricopa
20 County’s private counsel wrote to the United States to express Maricopa County’s
21 “desire[] to cooperate in any way possible with the [United States’] investigation
22 referenced in the Notice Letter,” emphasizing, “[a]s a recipient of Title VI funds,
23 Maricopa County believes it has an obligation to cooperate.” *Id.* Maricopa County
24 offered to use its subpoena power to procure documents in aid of DOJ’s investigation. *Id.*
25 at 10. The letter also stated Maricopa County would “[notify] MCSO that it [could] not

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27 ³ On May 15, 2015, Maricopa County filed a Petition for Rehearing on its
substitution as a party in *Melendres*.

28 ⁴ The reference to “all law enforcement decisions” was referring to decisions made
regarding vehicle stops outside of the context of official saturation patrols.

1 expend any public funds, including on outside counsel, to resist any DOJ Title VI
2 inquiry,” and that “Maricopa County [would] not pay those bills as resisting a Title VI
3 inquiry is outside the scope of the employment of any elected or appointed official.” *Id.*

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

13 On May 9, 2012, DOJ advised Maricopa County:

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

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

20 (1) Intentional discrimination on the basis of race, color or national origin in
21 violation of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §
22 14141 (“Section 14141”) and the Due Process and Equal Protection clauses of the
23 Fourteenth Amendment.

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

26 (3) Disparate impact and intentional discrimination on the basis of race, color or
27 national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§
28 2000d-2000d-7 (“Title VI”).

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

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

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

7 (Doc. 1).

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

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

16 ANALYSIS

17 I. Legal Standard

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

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

1 nonmoving party bears the burden of proof at trial. *Id.* at 322-23. “Disputes over
2 irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *T.W.*
3 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

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

17 When ruling on a summary judgment motion, the court must view every inference
18 drawn from the underlying facts in the light most favorable to the nonmoving party.
19 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 601 (1986). The court
20 does not make credibility determinations with respect to evidence offered. *See T.W. Elec.*,
21 809 F.2d at 630-631 (citing *Matsushita*, 475 U.S. at 587). Summary judgment is therefore
22 not appropriate “where contradictory inferences may reasonably be drawn from
23 undisputed evidentiary facts.” *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d
24 1324, 1335 (9th Cir. 1980).

25 **II. Justiciability**

26 **A. Justiciability of Claims Against Arpaio**

27 Arpaio argues the United States’ claims involving discriminatory traffic stops in
28

1 Counts One, Two, Three, and Five are moot.⁵ He argues the *Melendres* injunction
2 eliminated all threat of immediate and future discriminatory traffic stops, as well as the
3 ability of this Court to provide redress for those claims.⁶ The United States argues its
4 traffic stop claims are not moot for four reasons: (1) the *Melendres* injunction does not
5 reach all of the conduct challenged in the present suit because it is necessarily tied to and
6 based upon the immigration-related operations at issue in *Melendres*; (2) the federal
7 government has unique interests which warrant providing it with its own enforcement
8 mechanism for the types of reforms and controls in the *Melendres* injunction; (3) Arpaio
9 appealed the scope of the *Melendres* injunction; and (4) the *Melendres* injunction is years
10 away from full implementation.

11 Mootness doctrine prevents courts from ruling “when the issues presented are no
12 longer live and therefor the parties lack a cognizable interest for which the courts can
13 grant a remedy.” *Alaska Ctr. For Env’t v. U.S. Forest Serv.*, 189 F.3d 851, 854 (9th Cir.
14 1999). “The party asserting mootness bears the burden of establishing that there is no
15 effective relief that the court can provide.” *Forest Guardians v. Johanns*, 450 F.3d 455,

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17 ⁵ In the “Introduction” of the complaint, the United States summarizes the basis of
18 the lawsuit as “discriminatory police conduct directed at Latinos.” (Doc. 1 at 1). This
19 conduct includes: 1) stopping, detaining, and arresting Latinos on the basis of race; 2)
20 denying Latino prisoners with limited English language skills constitutional protections;
21 and 3) illegally retaliating against perceived critics through baseless criminal actions,
22 lawsuits, and administrative actions. (Doc. 1 at 1-2). Specifically, Count One alleges
23 violations of 42 U.S.C. § 14141 and the Fourteenth Amendment based on a pattern or
24 practice of law enforcement practices, including traffic stops, workplace raids, home
raids, and jail operations, with the intent to discriminate. Count Two alleges violations of
42 U.S.C. § 14141 and the Fourth Amendment based on a pattern or practice of
unreasonable searches and seizures conducted without probable cause or reasonable
suspicion. Count Three alleges violations of Title VI based on the use of federal financial
assistance by persons alleged to be engaging in discriminatory law enforcement practices.
Count Five alleges violations of Title VI’s contractual assurances.

25 ⁶ Arpaio argues the same facts regarding redressability to claim the action is moot,
26 the Court lacks subject matter jurisdiction, the United States lacks standing, and the
27 action is not ripe. In doing so, he often conflates the standards pertaining to each doctrine.
28 Because standing is measured at the time an action is commenced (in this case, May 10,
2012) and the *Melendres* injunction was not issued until over a year later (May 24, 2013),
it appears the only cognizable justiciability argument Arpaio makes concerns mootness.
See Lujan v. Defenders of Wildlife, 504 U.S. 555, 570, n. 5 (1992) (“[S]tanding is to be
determined as of the commencement of suit”). Therefore, the Court will analyze the
viability of the United States’ claims under mootness doctrine.

1 461 (9th Cir. 2006). And “[t]hat burden is ‘heavy’; a case is not moot where *any* effective
2 relief may be granted.” *Id.* “Partial relief in another proceeding cannot moot an action
3 that legitimately seeks additional relief.” *Flagstaff Med. Ctr., Inc. v. Sullivan*, 962 F.2d
4 879, 885 (9th Cir. 1992).

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

18 *Goodyear Aerospace Corp.* involved a previous suit by an individual private
19 plaintiff. But the court’s analysis relied in part on *Secretary of Labor v. Fitzsimmons*,
20 where the prior suit was a private class action. 805 F.2d 682 (7th Cir. 1986). In
21 *Fitzsimmons*, the Seventh Circuit held the Secretary of Labor was not barred by res
22 judicata from bringing an ERISA enforcement action based on the same facts as a
23 previously settled class action in which the Secretary had intervened. *Fitzsimmons*, 805
24 F.2d at 699. The decision was based in part on the history and structure of ERISA. The
25 court noted ERISA arose out of concern over the “increasingly interstate” “operational
26 scope and economic impact” of employee benefit plans and the direct effect such plans
27 had on the “well-being and security of millions of employees and their dependents.” *Id.* at
28 689 (citing 29 U.S.C. § 1001(a)). Employee benefit plans were also thought to
“substantially affect the revenues of the United States” and therefore to be “affected with

1 a national public interest.” *Id.* The statute provided the Secretary of Labor the right to
2 intervene in any action brought by a participant, beneficiary, or fiduciary. *Id.*

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

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

15 *Id.* at 696.⁷ See also *Herman v. S. Carolina Nat. Bank*, 140 F.3d 1413, 1424 (11th Cir.
16 1998) (same) (citing *Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991)); *Donovan v.*
17 *Cunningham*, 716 F.2d 1455, 1462-63 (5th Cir. 1983)).

18 The Supreme Court has addressed the situation where the government seeks
19 injunctive relief which is potentially duplicative of relief already afforded to a private
20 party. In *United States v. Borden Co.*, the Supreme Court held a private plaintiff’s
21 injunctive relief did not bar the federal government from bringing suit for injunctive
22 relief under the Clayton Act, 15 U.S.C. § 25. 347 U.S. 514, 520 (1954). The district court
23 had held the violations described in the government’s complaint and shown at the trial
24 were, “for the most part, old violations . . . [and] the [private injunction] assure[d], as
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26 ⁷ The court went so far as to conclude “private parties can never be representatives
27 of this clear, specific, and unambiguous *national* interest of the Secretary,” *id.*, and “even
28 if one were to assume that the interests of the Secretary and the class plaintiffs were the
same . . . where the Secretary did not participate in structuring the settlement agreement it
is impossible to conclude that the private plaintiffs had adequately represented the
Secretary’s interests.” *Id.* at 695, n. 16.

1 completely as any decree can assure, that there will be no new violations.” *Id.* at 517-518
2 (internal quotation marks and citation omitted). The Supreme Court reversed, holding
3 that the district court’s reasoning ignored “the prime object of civil decrees secured by
4 the Government—the continuing protection of the public, by means of contempt
5 proceedings, against a recurrence of [] violations.” *Id.* at 519. The Court continued:

6 Should a private decree be violated, the Government would have no right to bring
7 contempt proceedings to enforce compliance; it might succeed in intervening in
8 the private action but only at the court’s discretion. The private plaintiff might find
9 it to his advantage to refrain from seeking enforcement of a violated decree; for
10 example, where the defendant’s violation operated primarily against plaintiff’s
11 competitors. Or the plaintiff might agree to modification of the decree, again
12 looking only to his own interest. In any of these events it is likely that the public
13 interest would not be adequately protected by the mere existence of the private
14 decree. It is also clear that Congress did not intend that the efforts of a private
litigant should supersede the duties of the Department of Justice in policing an
industry. Yet the effect of the decision below is to place on a private litigant the
burden of policing a major part of the milk industry in Chicago, a task beyond its
ability, even assuming it to be consistently so inclined.” *Id.* at 519.

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

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

25 A similar conclusion applies to Title VI, one of the statutes under which the
26 United States’ brings its claims. Title VI is part of the Civil Rights Act of 1964, a
27 sweeping piece of legislation which banned racial discrimination in voting, schools,
28 workplaces, and public accommodations and created mechanisms through which the

1 federal government could enforce each provision. The Act was passed in the context of
2 widespread conflict and unrest regarding racial desegregation, including resistance to
3 desegregation by state and local governments and private individuals. Its purpose was to
4 harness the power of the federal government to eradicate racial discrimination throughout
5 the United States, regardless of local bias. The Supreme Court has held private plaintiffs
6 may bring suit under Title VI for violations caused by intentional discrimination but not
7 disparate impact discrimination. *Alexander v. Sandoval*, 532 U.S. 275 (2001). The federal
8 government, by contrast, may sue for either intentional or disparate impact
9 discrimination. *See infra*, Part III(A). And federal agencies which extend federal financial
10 assistance are both “authorized and *directed* to effectuate [its] provisions.” 42 U.S.C. §
11 2000d (emphasis added). Just as in *Borden Co.*, the statutory scheme of Title VI and the
12 Civil Rights Act of 1964 lends itself to and is enhanced by viewing private enforcement
13 action as supplemental and cumulative to government enforcement action.

14 The other statute under which the United States brings these claims, the Violent
15 Crime Control and Law Enforcement Act of 1994, may be best known for its crime
16 prevention measures, including a federal ban on assault weapons and increased federal
17 funding of local law enforcement. *See Rachel A. Harmon, Federal Programs and the*
18 *Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 883 n. 35-36 (2015). But the Act also
19 contains provisions directed at reforming law enforcement. For instance, under § 14141,
20 the relevant section here, the Attorney General has discretion to bring civil actions to
21 obtain appropriate equitable and declaratory relief to eliminate the pattern or practice of
22 law enforcement that violates constitutional rights and privileges.

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

1 Despite this overlap, the United States possesses a unique interest, which supports
2 the finding of a live controversy as to allegations regarding discriminatory traffic stops.
3 Furthermore, the purposes of Title VI and § 14141 would be served by permitting the
4 United States to bring its own enforcement actions, regardless of previous action taken by
5 private plaintiffs. The United States' interest in this case is distinct from those of private
6 plaintiffs' in *Melendres*. As with the Secretary of Labor in *Fitzsimmons*, the federal
7 government has an interest in the uniform and robust enforcement of federal civil rights
8 legislation nationwide. Its interest in preventing the type of discrimination charged in this
9 case extends beyond the well-being of a defined class of plaintiffs to the safety, security,
10 and just and harmonious coexistence of all citizens. The United States likewise has an
11 interest in ensuring confidence in law enforcement activities which utilize federal funding
12 and may affect interstate commerce. In addition, the findings in Part III(A), *infra*, show
13 congressional intent to permit the federal government to bring an enforcement action. To
14 paraphrase *Fitzsimmons*, to hold mootness doctrine bars the Attorney General from
15 independently pursuing enforcement of Title VI would effectively limit the authority of
16 the Attorney General under the statute—something a court will not do in the absence of
17 an explicit legislative directive. *See Fitzsimmons*, 805 F.2d at 691.

18 In addition, the *Melendres* injunction does not moot the portions of the United
19 States' claims which overlap with *Melendres* because continued violations by Arpaio and
20 MCSO following the issuance of the injunction demonstrate a real and immediate threat
21 of future harm, as well as the importance of granting the United States authority to
22 enforce injunctive relief addressing MCSO's discriminatory traffic stops. *See Borden*
23 *Co.*, 347 U.S. at 519; (2:07-CV-2513-GMS, Doc. 948) (Arpaio's stipulation to violations
24 of the *Melendres* injunction by Arpaio and MCSO); (2:07-CV-2513-GMS, Doc. 0127 at
25 118-125). In addition, in the context of the United States' broader claims, its claims
26 regarding traffic stops may lead to different injunctive measures than those put forth in
27 *Melendres*, where the allegations of discriminatory traffic stops were brought in isolation.
28 In other words, the *Melendres* injunction may afford some, but only partial relief for the
United States' claims. *See Flagstaff Med. Ctr., Inc.*, 962 F.2d at 885.

1 In sum, it is premature for the Court to conclude the United States’ allegations
2 would lead to a replica of the *Melendres* injunction. And, even if portions of the order
3 were replicated, the United States’ unique interest in enforcing those provisions and the
4 continuing threat of future harm it faces render the claims justiciable.

5 **B. Justiciability of Claims Against Maricopa County**

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

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

16 In a previous order, the Court held, “Under Arizona law, the Sheriff has final
17 policymaking authority with respect to County law enforcement and jails, and the County
18 can be held responsible for constitutional violations resulting from these policies,” (Doc.
19 56 at 13), and denied Maricopa County’s motion to dismiss, including the allegation of
20 lack of standing.⁸

21 “Law of the case” doctrine “preclude[s a court] from reexamining an issue
22 previously decided by the same court, or a higher court, in the same case.” *United States*
23 *v. Jingles*, 702 F.3d 494, 499 (9th Cir. 2012) (citation omitted). The doctrine applies
24 where an issue was “decided explicitly or by necessary implication in [the] previous
25 disposition.” *Id.* (internal quotation marks and citation omitted).

26 In finding Maricopa County could be held responsible for Arpaio’s constitutional
27 violations, the Court ruled, by necessary implication, the County was capable of

28 ⁸ The Court reaffirmed this decision in denying Maricopa County’s motion for reconsideration. (Doc. 73).

1 redressing those violations. Nonetheless, Maricopa County now claims the Court's
2 previous analysis was flawed because it relied on precedents from § 1983 cases involving
3 claims for monetary, rather than injunctive relief. Maricopa County acknowledges A.R.S.
4 § 11-201 gives it the power to determine MCSO's budget, but maintains that authority is
5 insufficient to influence or control how MCSO is run. Maricopa County also claims: 1)
6 the County cannot "cure the alleged violations here" (Doc. 356 at 10); 2) the United
7 States has failed to show Arpaio and MCSO engage in "assessing, collecting,
8 safekeeping, managing or disbursing the public revenues" such that they would fall under
9 Maricopa County's supervisory authority pursuant to A.R.S. § 11-251(1); and 3) A.R.S. §
10 11-444 severely limits its authority to withhold funding.

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

16 As will be discussed at greater length in Part III(B)(i), *infra*, the logic of
17 "policymaker" liability under § 1983 applies to produce institutional liability under Title
18 VI and its sister statute, Title IX, as well. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S.
19 256, 279 (1979) (holding that a successful showing of a Title VI violation rests on the
20 actions of a decisionmaker). The Court's previous order relied on numerous state court
21 decisions identifying the sheriff as a policymaker for Maricopa County, *United States v.*
22 *Maricopa Cnty., Ariz.*, 915 F. Supp. 2d 1073, 1082-84 (D. Ariz. 2012), (Doc. 56), and
23 that determination is the law of this case. *See United States v. Jingles*, 702 F.3d 494, 499
24 (9th Cir. 2012).

25 Regarding Maricopa County's argument that its inability to "cure the alleged
26 violations" destroys the United States' standing, the United States is correct that it need
27 only show the potential for partial redress. *See Meese v. Keene*, 481 U.S. 465, 476
28

1 (1987).⁹

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

6 However, A.R.S. § 11-251(1) provides:

7 The board of supervisors, under such limitations and restrictions as are prescribed
8 by law, may: . . . Supervise the official conduct of all county officers and officers
9 of all districts and other subdivisions of the county charged with assessing,
10 collecting, safekeeping, managing or disbursing the public revenues, see that such
11 officers faithfully perform their duties and direct prosecutions for delinquencies.

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

16 The Board’s authority over the sheriff’s budget is somewhat constrained by A.R.S.
17 § 11-444(A), which states: “The sheriff shall be allowed actual and necessary expenses
18 incurred by the sheriff in pursuit of criminals, for transacting all civil or criminal
19 business.” But the statute also provides that the Board meet monthly to allocate funds to
20 the sheriff for the payment of such expenses and that the sheriff “render a full and true
21 account of such expenses” every month to the Board. A.R.S. § 11-444(B)-(C).

22 In 1965, the Arizona Attorney General’s Office issued an opinion interpreting
23 A.R.S. § 11-444,¹⁰ which stated:

24 [T]he board of supervisors, being the agency of the county vested with

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

¹⁰ The relevant language of A.R.S. § 11-444 in 1965 was substantially similar to
its present form.

1 responsibility for allowing claims, must be satisfied in each instance when
2 examining the claims of sheriffs . . . that the expenses claimed are for a public
3 purpose and are the actual and necessary expenses thereof.

4 Op. Atty. Gen. No. 65-18. This reading harmonizes the funding requirements of A.R.S. §
5 11-444 with the Board's duty under A.R.S. § 11-251(1) to "see that such officers
6 faithfully perform their duties and direct prosecutions for delinquencies." A.R.S. § 11-
7 251(1). *Cf. Pinal Cnty. v. Nicholas*, 179 P. 650, 651-52 (Ariz. 1919) (holding, in
8 executing its duty to pay "necessary expenses" of the County Attorney, "the board of
9 supervisors is charged with the duty of supervising all expenditures incurred by him, and
10 rejecting payment of those which are illegal or unwarranted"). Therefore, the Board can
11 refuse to fund inappropriate activities, which is exactly what the United States wants
12 Maricopa County to do.

13 Maricopa County's argument centers on its purported inability to initiate any
14 authorized action to affect Arpaio's compliance with the law or a court order, given the
15 sheriff's statutory duties and electoral independence and the Board's statutory obligation
16 to fund his activities. But Maricopa County admits it has the ability and duty "to facilitate
17 compliance of the Sheriff and other constitutional officers with judicial orders." (Doc.
18 334 at 9, n. 2). And the United States identified numerous ways in which Maricopa
19 County could, within its authority, exercise oversight and influence over Arpaio. For
20 instance, Maricopa County could put the sheriff on a line-item budget and use its power
21 to withhold approval for capital expenditures, salary increases and the like to encourage
22 compliance with court orders. (Docs. 348 at 10-12; 349 at ¶13-26). The United States
23 also discussed actions Maricopa County has already taken to oversee and control
24 MCSO's fiscal management to ensure its compliance with county policy. (Docs. 348 at
25 13; 349 at ¶13). In the name of sound fiscal management, and at least partially in
26 response to constituent complaints, the Board has, in the past, ordered audits and
27 "operational efficiency reviews" of MCSO's vehicle use, extradition and travel policy,
28 and staffing practices and ordered "oversight functions" be performed by the County
Office of Management and Budget. (Docs. 349-2, 349-3). In fact, Maricopa County's

1 own initial response to DOJ’s investigation stated the County could deny MCSO
2 reimbursement for funds expended in an effort to resist the investigation, as such
3 resistance was “outside the scope of the employment of any elected or appointed
4 official.” (Doc. 333-3 at 10). This evidence and the Arizona Attorney General’s
5 interpretation of the relevant statutes, show Maricopa County has the ability to afford at
6 least partial redress for violations committed by Arpaio, MCSO, and Maricopa County.

7 In addition, another district court recently upheld taxpayers’ standing to sue
8 Maricopa County in challenging the expenditure of municipal funds for MCSO’s
9 enforcement of an allegedly discriminatory statute. *Puente Arizona v. Arpaio*, No. CV-
10 14-01356-PHX-DGC, 2015 WL 58671 at *11 (D. Ariz. Jan. 5, 2015) (“[A] favorable
11 decision would . . . prevent[] further expenditures for enforcement of the identity theft
12 laws.”) (citing *Hinrichs v. Bosma*, 440 F.3d 393, 397–98 (7th Cir. 2006) (“Such an injury
13 is redressed not by giving the tax money back . . . but by ending the unconstitutional
14 spending practice.”)).¹¹ See also *We Are Am./Somos Am., Coal. of Arizona v. Maricopa*
15 *Cnty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1104 (D. Ariz. 2011) (finding plaintiffs
16 had alleged injury sufficient to confer standing to sue county/Board of Supervisors, the
17 sheriff, and others in action seeking suspension of the use of municipal funds for MCSO
18 enforcement of discriminatory policy). In *Puente*, as here, Maricopa County argued its
19 inability to control the County’s criminal law enforcement meant that allowing Maricopa
20 County to remain a party “could result in it being ‘bound by an injunction that is not
21 within its authority to comply with under Arizona law.’” 2015 WL 58671 at *25. The
22 court held “[t]his fact might limit [Maricopa County’s] exposure to contempt or other
23 remedies if an injunction is disregarded, but it does not alter the fact that the County is a
24 proper defendant.” *Id.*

25 Even assuming Maricopa County’s control over MCSO’s operations is limited to
26 control over funding, as opposed to direct and complete oversight and control of
27 enforcement operations, that control establishes Maricopa County could contribute to the

28 ¹¹ Arpaio and Maricopa County’s arguments against standing in that case focused
on injury, not redressability.

1 requested relief, which is all the law requires to create standing. Therefore, summary
2 judgment on this issue will be denied.¹²

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

4 Maricopa County advances several arguments for granting summary judgment in
5 its favor with respect to the United States' claims under Title VI (Counts Three, Four,
6 and Five) and § 14141 (Counts One, Two, and Six). First, Maricopa County claims Title
7 VI does not authorize the United States to file suit to enforce its provisions. Next,
8 Maricopa County claims neither Title VI nor § 14141 authorize imputation of liability
9 from Arpaio and MCSO to Maricopa County. Alternatively, Maricopa County argues
10 even if the statutes authorize imputation, the County would not be liable for the alleged
11 violations. Finally, Maricopa County claims the United States failed to comply with the
12 notice requirements of Title VI.¹³

13 **A. Authorization to File Suit Under Title VI**

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

24 Under Title VI, compliance may be effected "by termination of or refusal to grant

25 ¹² The Ninth Circuit's recent decision in substituting Maricopa County for MCSO
26 in *Melendres*, although it does not discuss Maricopa County's capability of redressing the
27 wrongs found in that case or implementing the *Melendres* injunction, supports a finding
of standing against Maricopa County in this case. *Melendres v. Arpaio*, 784 F.3d 1254
(9th Cir. 2015).

28 ¹³ The standing argument raised by Maricopa County was addressed in the
previous section. *See* Part II(B), *supra*.

1 or to continue assistance” or “by any other means authorized by law.” 42 U.S.C. § 2000d-
2 1. The parties focus on the interpretation of the phrase “any other means authorized by
3 law.” The United States relies on *National Black Police Association, Inc. v. Velde*, 712
4 F.2d 569, 575 (D.C. Cir. 1983) and *United States v. Baylor University Medical Center*,
5 736 F.2d 1039, 1050 (5th Cir. 1984), each of which recognizes “any other means
6 authorized by law” as including enforcement options beyond administrative action. *See*
7 *also Guardians Ass’n v. Civil Serv. Comm’n of City of New York*, 463 U.S. 582, 630
8 (1983) (J. Marshall, dissenting) (“[I]n extending grants the United States has always
9 retained an inherent right to sue for enforcement of the recipient’s obligation.”).
10 Maricopa County claims *Velde* and *Baylor University Medical Center* do not represent
11 the current approach to statutory interpretation which was abandoned by the Supreme
12 Court in *Alexander v. Sandoval*. 532 U.S. 275 (2001).

13 In *Sandoval*, the Supreme Court condemned lower courts’ liberal implication of
14 private rights of action “to provide remedies as are necessary to make effective []
15 congressional purpose” and established a stricter standard requiring more explicit
16 findings of congressional intent to support such causes of action. 532 U.S. 275, 287
17 (2001). In determining the congressional intent behind § 602 of Title VI the Court
18 endeavored to discern the “focus” of the provision. *Sandoval*, 532 U.S. at 288-289.¹⁴ The
19 Court held: “Statutes that focus on the person regulated rather than the individuals
20 protected create ‘no implication of an intent to confer rights on a particular class of
21 persons.’” *Id.* at 289. It found § 602 focused neither on persons regulated nor individuals
22 protected, but instead exclusively on federal agency enforcement. *Id.* (“[Section] 602 is
23 ‘phrased as a directive to federal agencies engaged in the distribution of public funds,’ . .
24 . . . When this is true, ‘[t]here [is] far less reason to infer a private remedy in favor of
25 individual persons.’”). The implication, then, is that where a statutory provision focuses

26
27 ¹⁴ DOJ promulgated regulations under § 602 prohibiting disparate impact racial
28 discrimination in federally-funded programs. 28 CFR § 42.104(b)(2) (2000). *Sandoval*
did not affect previous decisions establishing a private right of action to enforce § 601,
Id. at 281.

1 on a particular party, it is more likely Congress intended to confer a right of action on that
2 party to enforce the provision. The logic of *Sandoval*, therefore, supports finding a right
3 of action for federal agency enforcement under § 602 of Title VI.

4 The Sixth Circuit appears to be the only federal court of appeals to have addressed
5 the meaning of “any other means authorized by law” as it applies to means of
6 government enforcement following *Sandoval*. The Sixth Circuit acknowledged the pre-
7 *Sandoval* understanding of the phrase and found it authorized the government to bring
8 suit to enforce a statutory provision.¹⁵ *United States v. Miami Univ.*, 294 F.3d 797, 808
9 (6th Cir. 2002) (“We believe that the fourth alternative [‘take any other action authorized
10 by law with respect to the recipient’] expressly permits the [agency] to bring suit to
11 enforce the [statutory] conditions in lieu of its administrative remedies.”) (citing *Baylor*
12 *Univ. Med. Ctr.*, 736 F.2d at 1050; *Nat’l Black Police Ass’n*, 712 F. 2d at 575). *Cf. United*
13 *States v. Marion Cnty. Sch. Dist.*, 625 F.2d 607, 611 (5th Cir. 1980) (“[T]he
14 government’s right to sue to enforce its contracts exists as a matter of federal common
15 law, without necessity of a statute . . . Congress may nullify the right, but, as the Supreme
16 Court has repeatedly emphasized, courts are entitled to conclude that Congress has done
17 so only if the evidence of Congress’ intent is extremely, even unmistakably, clear.”).

18 Maricopa County claims Congress rejected an amendment to Title VI explicitly
19 authorizing public judicial enforcement of Title VI. The rejected amendment provided
20 that a recipient of federal funds “assume[d] a legally enforceable [sic] undertaking . . . [and
21 the] United States district courts [would] have jurisdiction [over] civil actions brought in
22 connection with such undertakings by either the United States or by any recipient
23 aggrieved by action take under any such undertaking.” 110 Cong. Rec. 2493-94 (1964).
24 The author of the proposed amendment, Congressman Meader, envisioned such disputes
25 being governed by the law of contracts. 110 Cong. Rec. 2493 (1964). But the amendment
26 was rejected in favor of the broader provision for enforcement of contractual obligations
27 not only through the courts, but by “any . . . means authorized by law.” In the words of

28 ¹⁵ The phrase, as interpreted, appeared in the Family Educational Rights and
Privacy Act (“FERPA”).

1 Congressman Celler, the Meader Amendment would have “den[ie]d] much needed
2 flexibility to the Federal agencies to effectuate their nondiscrimination policy . . . [in
3 contrast to the version using ‘any other means authorized by law’ which] seeks to
4 preserve [] the maximum [] existing procedures . . . including any judicial review.” 110
5 Cong. Rec. 2494 (1964). The record of the congressional debate surrounding this
6 amendment clearly shows Congress’s intent that the provisions of Title VI be enforceable
7 through lawsuits to allow enforcement by judicial review.

8 Furthermore, to the extent the phrase “any other means authorized by law” may be
9 ambiguous as it appears in Title VI, the Court must defer to DOJ’s interpretation. *See*
10 *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (citing *Chevron U.S.A.*
11 *Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). DOJ regulations
12 interpret the phrase “any other means authorized by law” in Title VI to include
13 “[a]ppropriate proceedings brought by the Department to enforce any rights of the United
14 States under any law of the United States (including other titles of the Act), or any
15 assurance or other contractual undertaking.” 28 C.F.R. § 42.108(a)(1).

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

18 **B. Imputation of Liability**

19 Maricopa County claims neither Title VI nor § 14141 authorize imputation of
20 liability from Arpaio and MCSO to Maricopa County. It contrasts these statutes with 42
21 U.S.C. § 1983, which explicitly creates liability for entities which cause others to commit
22 constitutional violations. The United States claims the Court already decided Maricopa
23 County can be held liable for Arpaio’s violations in its order on the early motion to
24 dismiss. It also contends Arpaio’s actions constitute the actions of Maricopa County for
25 purposes of liability under § 14141 and Title VI.¹⁶

26
27 ¹⁶ In its recent *Melendres* decision, the Ninth Circuit held, on remand, the district
28 court could consider whether dismissal of Sheriff Arpaio in his official capacity was
warranted because, typically, a suit against a person in his official capacity is, “in all
respects other than name, [] treated as a suit against the entity.” *Melendres v. Arpaio*, 784
F.3d 1254, 1260 (9th Cir. 2015). Because the court did not specify whether Arpaio is or is

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

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

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

20 “To hold a local government liable for an official’s conduct [under § 1983], a
21 plaintiff must first establish that the official (1) had final policymaking authority
22 ‘concerning the action alleged to have caused the particular constitutional or statutory
23 violation at issue’ and (2) was the policymaker for the local governing body for the
24 purposes of the particular act.” *Weiner v. San Diego Cnty.*, 210 F.3d 1025, 1028 (9th Cir.
25 2000) (citing *McMillian v. Monroe County Alabama*, 520 U.S. 781, 785 (1997)). In
26 analyzing the second question—whether a policymaker may be associated with a

27 not an appropriate party and because no party has argued this point, the Court will not
28 decide it. The Ninth Circuit’s statement does, however, bolster the Court’s assessment of
the relationship between Maricopa County and Arpaio and the potential for Maricopa
County’s liability.

1 particular government entity for purposes of liability—the amount of control the
2 government entity, i.e. the county board of supervisors, possesses over the official is but
3 one factor. *Goldstein v. City of Long Beach*, 715 F.3d 750, 755 (9th Cir. 2013) *cert.*
4 *denied sub nom. Cnty. of Los Angeles, Cal. v. Goldstein*, 134 S. Ct. 906, 187 L. Ed. 2d
5 778 (2014). Other factors include the county’s obligation to defend or indemnify the
6 official, the scope of the official’s duties, and the official’s definition in the state
7 constitution. *Goldstein*, 715 F.3d at 755-762. The Court’s previous order held Arpaio
8 “has final policymaking authority with respect to County law enforcement and jails, and
9 [based on that,] the County can be held responsible for constitutional violations resulting
10 from these policies.” *United States v. Maricopa Cnty., Ariz.*, 915 F. Supp. 2d 1073, 1082-
11 84 (D. Ariz. 2012); (Doc. 56).

12 Title VI does not explicitly provide liability for entities which cause others to
13 violate the statute. Title VI provides: “No person in the United States shall, on the ground
14 of race, color, or national origin, be excluded from participation in, be denied the benefits
15 of, or be subjected to discrimination under any program or activity receiving Federal
16 financial assistance.” 42 U.S.C. § 2000d. The section is enforceable through termination
17 or refusal of federal funding or “by any other means authorized by law.” 42 U.S.C. §
18 2000d-1. Termination or refusal of funding is “limited to the particular political entity, or
19 part thereof, or other recipient as to whom [an express finding on the record . . . of a
20 failure to comply] has been made and, shall be limited in its effect to the particular
21 program, or part thereof, in which such noncompliance has been so found.” 42 U.S.C. §
22 2000d-1.

23 No court has directly confronted the question of whether “policymaker” liability
24 applies under Title VI. But case law on Title IX, which parallels Title VI,¹⁷ is instructive.

25
26 ¹⁷ See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 684 (1979) (stating Title IX was
27 patterned on Title VI). Title IX prohibits discrimination in federally funded educational
28 programs on the basis of gender instead of race. 20 U.S.C. § 1681. Like Title VI, Title IX
authorizes termination or refusal of funding for “the particular political entity, or part
thereof, or other recipient as to whom [an express finding on the record . . . of a failure to
comply] has been made and, shall be limited in its effect to the particular program, or part
thereof, in which such noncompliance has been so found,” as well as enforcement

1 Like Title VI, Title IX does not explicitly provide liability for causing others to violate
2 the statute, nor for classic respondeat superior liability. In *Gebser v. Lago Vista*
3 *Independent School District*, the Supreme Court held “Congress did not intend to allow
4 recovery [under Title IX] where liability rests solely on principles of vicarious liability or
5 constructive notice.” 524 U.S. 274, 288 (1998). *See also Davis Next Friend LaShonda D.*
6 *v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999) (“[A] recipient of federal funds
7 may be liable in damages under Title IX only for its own misconduct.”). Instead, a
8 principal can be held liable for “employees’ independent actions” only if, after actual
9 notice to an “appropriate person,”¹⁸ the principal fails to adequately respond to the
10 employees’ violations, thus demonstrating “deliberate indifference” to the alleged
11 violation. *Gebser*, 524 U.S. at 289-291 (“It would be unsound, we think, for a statute’s
12 *express* system of enforcement to require notice to the recipient and an opportunity to
13 come into voluntary compliance while a judicially *implied* system of enforcement permits
14 substantial liability without regard to the recipient’s knowledge or its corrective actions
15 upon receiving notice.”) (emphasis in original). This sort of “deliberate indifference” is a
16 form of intentional discrimination by the employer/principal directly, not a form of
17 vicarious liability. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005).

18 An institution is also directly liable for its “own official decision[s].” *Gebser*, 524

19 _____
20 through “any other means authorized by law.” 20 U.S.C. § 1682.

21 ¹⁸ An “appropriate person,” under Title IX is, “at a minimum, an official of the
22 recipient entity with authority to take corrective action to end the discrimination.” *Id.* at
23 290. In the context of schools (the primary entities governed by Title IX), “appropriate
24 person” can refer to teachers, principals, or school boards, depending on the authority of
25 those actors within a particular educational system. *See Smith v. Metro. Sch. Dist. Perry*
Twp., 128 F.3d 1014, 1020-21 (7th Cir. 1997) (“While a principal has some authority
26 over the activities within his school, the [state] statutes place institutional control over
27 ‘program or activities’ with the school district and school board . . . [and] does not give
28 assistant principals administrative control over educational programs or activities. . . .
Thus neither a principal nor an assistant principal can be considered a grant recipient.”).

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

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

11 This logic parallels the reasoning that undergirds the law establishing
12 “policymaker” liability under § 1983 and applies with equal force to Title VI. Maricopa
13 County is directly liable for violations resulting from its official policy, which includes
14 policy promulgated by Arpaio. *See United States v. Maricopa Cnty., Ariz.*, 915 F. Supp.
15 2d 1073, 1082-84 (D. Ariz. 2012). These policies constitute intentional acts by Maricopa
16 County for which no imputation is required. Therefore, summary judgment on the
17 grounds of impermissible imputation (i.e. vicarious liability) under Title VI will be
18 denied.

19 **ii. 42 U.S.C. § 14141**

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

22 The Violent Crime Control and Law Enforcement Act of which § 14141 is a part
23 provides, among other things, grants for state and local law enforcement agencies to
24 improve police training and practices and help prevent crime. Pub. L. 103-322, 42 U.S.C.
25 Ch. 136, §§ 13701-14223. Section 1414, specifically, provides:

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

1
2 42 U.S.C. § 14141 (emphasis added).

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

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

17 Maricopa County argues it is entitled to summary judgment regarding its liability
18 under Title VI and § 14141, even if imputation is permitted because “the County cannot
19 control the Sheriff’s policies and practices relating to law enforcement or jailing.” (Doc.
20 334 at 18). This argument was addressed in Part II(B), *supra*. Maricopa County has
21 sufficient authority to provide some redress for violations committed by Arpaio and
22 MCSO. Therefore, the argument is without merit.

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

28 The United States has the power to sue to enforce its contracts. *See Cotton v.*
United States, 52 U.S. 229, 231, 13 L. Ed. 675 (1850); *Rex Trailer Co. v. United States*,

1 350 U.S. 148, 151 (1956). And “[f]ederal law governs the interpretation of contracts
2 entered pursuant to federal law where the federal government is a party.” *Chickaloon-
3 Moose Creek Native Ass’n., Inc. v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004).

4 Neither party offered authority addressing how courts treat the enforcement of an
5 *ultra vires* contract between a county and the federal government. But the Court rejected
6 the contention that Maricopa County lacked *any* authority to enforce the
7 nondiscrimination mandate that attaches to federal funds under Title VI. *See* Part II(B),
8 *supra*; (Doc. 56). Even if “persons dealing with public officers are bound, at their peril, to
9 know the extent and limits of their power,” the United States is, at the very least, entitled
10 to hold Maricopa County accountable for failing to take action it was authorized to take
11 under Arizona law with respect to Arpaio and MCSO, which could have helped prevent
12 violations of Maricopa County’s contractual obligations under Title VI. *See Pinal Cnty.
13 v. Pomeroy*, 60 Ariz. 448, 455 (1943). Therefore, summary judgment will be denied on
14 the issues of Maricopa County’s liability for its contractual assurances and violations
15 under § 14141.

16 **D. Notice of Maricopa County’s Violations**

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

21 Title VI provides: “no [] action shall be taken until the department or agency
22 concerned has advised the appropriate person or persons of the failure to comply with the
23 requirement and has determined that compliance cannot be secured by voluntary means.”
24 42 U.S.C.A. § 2000d-1. The regulations state notification of “failure to comply and action
25 to be taken to effect compliance” must be given to the “[funding] recipient or other
26 person.” 28 C.F.R. § 42.108(d)(3). The Supreme Court has interpreted “appropriate
27 person” under Title IX, a parallel statute, to mean “at a minimum, an official of the
28 recipient entity with authority to take corrective action to end the discrimination.” *Gebser
v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). The notice provision in Title

1 IX, which requires actual, not constructive notice, however, only applies “when the
2 alleged Title IX violation consists of an institution’s deliberate indifference to acts that
3 ‘do not involve official policy of the recipient entity.’” *Mansourian v. Regents of Univ. of*
4 *California*, 602 F.3d 957, 967 (9th Cir. 2010) (citing *Gebser*, 524 U.S. at 290). Again, the
5 Court interprets the provisions of Title VI in parallel with those of its sister statute, Title
6 IX. *See n. 19, supra*.

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

18 It has not always been clear who represents the [MCSO] with respect to different
19 matters, so we felt it made sense to provide notice to both you and the attorneys
20 who represented MCSO with respect to our [a previous] lawsuit. *Since our current*
21 *investigation potentially affects Maricopa County as the conduit of federal*
financial assistance to MCSO, we will continue to carbon copy you on significant
correspondence between us and [Jones Skelton].

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

23 DOJ continued to copy Montgomery and Maricopa County on its correspondence
24 with Jones Skelton, which revealed the United States’ position that Jones Skelton and
25 MCSO were not engaging in good faith negotiations with the federal government. (Doc.
26 333-3 at 15-20). On May 9, 2012, the United States wrote to Jones Skelton and
27 Montgomery separately to advise each of its plans to file suit. In its letter to Montgomery,
28 the United States stated MCSO’s counsel had chosen to “cancel negotiations” and that

1 the United States had “determined the [MCSO’s] compliance . . . [could not] be secured
2 through voluntary means.” (Doc. 333-3 at 25). Finally, the letter stated:

3 Based on the foregoing, please be advised that in accordance with the notice
4 requirements set forth in DOJ’s Title VI regulations, 42 C.F.R. § 108(d)(3) [sic], it
5 is the intention of the Department of Justice to file a civil action against Maricopa
6 County, [MCSO], and [Arpaio] in order to remedy the serious Constitutional and
7 federal law violations . . . noted in our December 15, 2012 [sic] Findings Letter.

8 (Doc. 333-3 at 25-26).

9 Maricopa County argues that because the Findings Letter refers only to Title VI
10 violations by MCSO, not Maricopa County, the letter cannot constitute proper notice to
11 Maricopa County under the statute. The United States argues the notice provided to
12 Maricopa County via the January 17, 2012 letter, “numerous communications” between
13 attorneys for the United States and Maricopa County, and meetings between DOJ and “at
14 least two county commissioners” was sufficient to place Maricopa County on notice of its
15 liability and provide it with an opportunity to respond.¹⁹ The United States also argues
16 that because MCSO is not a jural entity separate, for legal purposes, from Maricopa
17 County, its communications with MCSO count towards notice to Maricopa County.²⁰

18 To the extent Maricopa County attempts to defeat claims based on official policies
19 which allegedly violated Title VI, its argument fails. The Supreme Court has held notice

20 ¹⁹ DOJ’s meeting with county supervisors highlights an issue which has yet to be
21 resolved by the facts presented, but which is not necessary to the issue of notice.
22 Maricopa County points out that DOJ’s meeting with the supervisors took place without
23 Montgomery or any representative from the Maricopa County Attorney’s Office
24 (“MCAO”) and that this could mean one of two things: either (1) the United States did
25 not believe the Board of Supervisors (in other words, Maricopa County) was represented
26 by MCAO, or (2) the United States did believe the Board of Supervisors was represented
27 by MCAO and committed an ethical violation by meeting with the Board without
28 MCAO’s presence, notification, or consent. If the first option is true, communications
with Montgomery would be irrelevant to the question of notice. If the second is true,
communications with Montgomery would be relevant, but the United States would have
also committed an ethical violation. Maricopa County’s motion does not clarify one way
or another whether MCAO was representing Maricopa County at the time of the United
States’ communications or whether the United States believed it to be.

²⁰ All of the communications the United States claims constituted notice occurred
after the Arizona Court of Appeals ruling in *Braillard v. Maricopa County*, 224 Ariz.
481, 487 (Ct. App. 2010) (establishing MCSO as a non-jural entity).

1 requirements like the one contained in Title VI only apply where the violation stems from
2 the practices of individual actors or staff, not institutional decisions such as those
3 embodied by official policy. *See Gebser*, 524 U.S. at 290 (holding notice required in case
4 not involving official policy of recipient entity); *Mansourian*, 602 F.3d at 967-969
5 (“[T]he Supreme Court has made clear that no notice requirement is applicable to Title
6 IX claims that rest on an affirmative institutional decision [such as the promulgation of
7 institutional policies]”).

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

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

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

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

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

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

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

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

19 Ordinary issue preclusion requires a party show: “(1) the issue sought to be
 20 litigated is sufficiently similar to the issue presented in an earlier proceeding and
 21 sufficiently material in both actions to justify invoking the doctrine, (2) the issue was
 22 actually litigated in the first case, and (3) the issue was necessarily decided in the first
 23 case.” *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 775 (9th Cir. 2003).²¹ A

24 ²¹ An “identity of issues” exists where:

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

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

(3) Pretrial preparation and discovery related to the matter presented in the first

1 plaintiff seeking non-mutual, offensive issue preclusion, however, must also show its
2 application would not be unfair. *See Parklane Hosiery Co.*, 439 U.S. 322, 330-331
3 (1979). A number of circumstances may render offensive issue preclusion unfair and
4 therefore impermissible. For instance, where a defendant “may have little incentive to
5 defend vigorously, particularly if future suits are not foreseeable . . . [or] if the judgment
6 relied upon as a basis for the estoppel is itself inconsistent with one or more previous
7 judgments . . . [or] where the second action affords the defendant procedural
8 opportunities unavailable in the first action that could readily cause a different result.” *Id.*
9 at 330-331.

10 Arpaio does not contest the identity of issues between *Melendres* and certain
11 aspects of the United States’ complaint. Nor does he argue these issues were not actually
12 litigated or necessarily decided. Instead, Arpaio focuses entirely on the question of
13 fairness. He first argues the United States adopted a “wait and see” strategy in the
14 *Melendres* litigation and that it deliberately withheld suit until the *Melendres* decision so
15 that it could use the findings from that case in this suit. “Wait and see” was explicitly
16 denounced by the Supreme Court as contrary to judicial economy and a factor
17 disfavoring application of non-mutual, offensive issue preclusion. *Id.* at 329. As proof of
18 this strategy, Arpaio offers Maricopa County’s motion to stay *Melendres* pending the
19 outcome of DOJ’s investigation. But Arpaio himself opposed the stay, as did the
20 *Melendres* plaintiffs, and ultimately, the court denied the motion. The *Melendres* court
21 reasoned: “[I]t is doubtful that the DOJ investigation will necessarily overlap with the
22 issues of this case sufficient to prove markedly beneficial. Even if they did, the length of
23 the stay proposed by the County undercuts any such utility.” *Melendres v. Maricopa*
24 *Cnty.*, No. 07-CV-02513-PHX-GMS, 2009 WL 2515618, at *2 (D. Ariz. Aug. 13, 2009).

25
26 action can reasonably be expected to have embraced the matter sought to be presented in
the second,

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

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

1 At the time of the court’s ruling, discovery in *Melendres* was closed and the dispositive
2 motion deadline had passed. It was unclear when DOJ’s investigation, which had begun a
3 few months prior, would be complete. Not only was the *Melendres* court’s denial of the
4 stay reasonable, it is not a basis for attributing a “wait and see” strategy to the United
5 States now. In addition, despite being aware of DOJ’s ongoing investigation, neither
6 Arpaio nor any other party moved to join the United States as a party in *Melendres*.

7 The evidence also does not support Arpaio’s argument that the United States was
8 “heavily involved in the *Melendres* litigation” in such a way as would render application
9 of non-mutual, offensive issue preclusion unfair. (Doc. 346 at 8). Arpaio attempts to
10 characterize the United States as seeking influence and control in *Melendres*, but the
11 United States more accurately describes its actions as “routine efforts to stay apprised of
12 related litigation.” (Doc. 354 at 6). The United States requested and was denied the
13 opportunity to attend depositions. *Melendres v. Arpaio*, No. CV-07-02513-PHX-GMS,
14 2009 WL 3489402, at *1 (D. Ariz. Oct. 28, 2009). It ordered transcripts, requested a
15 protective order for documents the parties sought in discovery, attended status
16 conferences relevant to its document production, and requested a related case be
17 transferred to the judge who was handling *Melendres*. The United States’ statement of
18 interest, filed after the *Melendres* court published its decision, offered the services and
19 suggestions of the federal government regarding addressing constitutional violations in
20 law enforcement agencies. The statement even discussed the possibility of a “global
21 settlement encompassing the United States’ claims,” an option the *Melendres* litigants,
22 including Arpaio, failed to pursue. (2:07-CV-02513-GMS, Doc. 580).

23 Finally, contrary to the few non-controlling and distinguishable cases Arpaio cites,
24 this is not a case in which the United States could have easily joined the prior litigation.
25 *Cf. Charles J. Arndt, Inc. v. City of Birmingham*, 748 F.2d 1486, 1494 (11th Cir. 1984)
26 (individual plaintiff was aware of and testified in the earlier suit); *In re Air Crash*
27 *Disaster at Stapleton Int’l Airport, Denver, Colo., on Nov. 15, 1987*, 720 F. Supp. 1505,
28 1523 (D. Colo. 1989) *rev’d on other grounds by Johnson v. Cont’l Airlines Corp.*, 964
F.2d 1059 (10th Cir. 1992) (plaintiffs were aware of, testified in, and were represented by

1 the same counsel as plaintiffs in earlier suit). The timing issues discussed above, as well
2 as the differences between the federal government joining litigation versus an individual
3 plaintiff doing so, indicate the difficulty that would have been involved in consolidating
4 these two cases.

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

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

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

22 “A person who was not a party to a suit generally has not had a ‘full and fair
23 opportunity to litigate’ the claims and issues settled in that suit.” *Taylor v. Sturgell*, 553
24 U.S. 880, 892 (2008). But the Supreme Court has recognized six categories of exceptions
25 to this general principle. A nonparty may be precluded from relitigating an issue from a
26 prior case when: (1) the nonparty agreed to be bound by the determinations of the prior
27 case; (2) the nonparty had a “pre-existing ‘substantive legal relationship’” with a party
28

1 bound by the judgment;²² (3) the nonparty was “adequately represented by someone with
2 the same interests who [wa]s a party”;²³ (4) the nonparty “‘assume[d] control’ over the
3 litigation in which [the] judgment was rendered;” (5) a party to the previous litigation
4 was a “designated representative” or proxy of the nonparty; and (6) a special statutory
5 scheme “expressly foreclose[s] successive litigation by nonlitigants.”²⁴ *Sturgell*, 553
6 U.S. at 893-895. The third exception, adequate representation, requires: (1) the interests
7 of the nonparty and the party to the prior litigation were aligned in the litigation; (2) the
8 party to the prior litigation either understood itself to be acting in a representative
9 capacity *or* the original court took care to protect the interests of the nonparty; and, in
10 certain circumstances, (3) the nonparty had notice of the original suit. *Id.* at 900.²⁵

11 The *Sturgell* decision represented a retreat from what the Supreme Court
12 characterized as lower courts’ expansive readings of “privity” doctrine as it applied to
13 issue preclusion. The phrase “substantive legal relationship” was deliberately substituted
14 for “privity” in an attempt to narrow the scope of the exception. *See id.* at 894, n. 8.
15 Previously, the Supreme Court had held issue preclusion could be applied to a nonparty
16 of the previous case when the nonparty was in privity with a party to the prior litigation.
17 *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-403 (1940). In *Adkins*, the
18 Supreme Court held a suit involving the National Bituminous Coal Commission, a
19 federal entity, was binding on the entire federal government. *Adkins*, 310 U.S. at 402
20 (“There is privity between officers of the same government.”). “The crucial point,” the
21 Court stated, “[was] whether or not in the earlier litigation [the party] had authority to
22 represent [the nonparty’s] interests in a final adjudication of the issue in controversy.” *Id.*
23 at 403. The Ninth Circuit and other courts subsequently went further, holding that when

24 ²² “Qualifying relationships include, but are not limited to, preceding and
25 succeeding owners of property, bailee and bailor, and assignee and assignor.” *Id.* at 894.

26 ²³ E.g. Class actions.

27 ²⁴ I.e. Bankruptcy proceedings.

28 ²⁵ *Sturgell* does not make clear whether the three additional factors articulated as
the requirements of “adequate representation” apply to all of the categories for proper
nonparty issue preclusion or just the one for “adequate representation.”

1 interests are sufficiently aligned, there may even be privity between “governmental
2 authorities as public enforcers of ordinances and private parties suing for enforcement as
3 private attorneys general.” *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997). In
4 *Sturgell*, the Supreme Court reframed its precedent as “endeavor[ing] to delineate
5 discrete exceptions [to the bar against nonparty preclusion] that apply in ‘limited
6 circumstances.’” *Sturgell*, 553 U.S. at 888.²⁶

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

20 Even if the requirements for the “adequate representation” exception also apply,
21 Maricopa County qualifies for nonparty issue preclusion. Maricopa County argues its
22 interests were not aligned with MCSO because “the County contested its responsibility
23 for the Sheriff’s actions.” But MCSO *also* contested its liability for the Sheriff’s actions
24 and Maricopa County and MCSO together submitted a joint answer and joint motion to

25 ²⁶ The Supreme Court rejected the concept of “virtual representation,” which it
26 described as a more “expansive” basis for nonparty preclusion. “Virtual representation”
27 had various definitions in the lower courts. The D.C. Circuit’s version held a nonparty
28 was virtually represented for purposes of preclusion where the nonparty: (1) shared an
identity of interests with a party to the litigation, (2) was adequately represented in the
prior litigation, and (3) had either a close relationship with the putative representative,
substantially participated in the prior case, or was tactically maneuvering to avoid
preclusion. *Sturgell*, 553 U.S. at 889-890.

1 dismiss the complaint. Maricopa County argues MCSO could not have “‘understood
2 itself to be acting in a representative capacity’ for the County.” Again, Maricopa County
3 and MCSO’s joint representation by counsel in *Melendres* and their joint submissions,
4 defenses, and arguments for dismissal demonstrate both the alignment of their interests
5 and their understanding of themselves as indistinguishable legal entities for purposes of
6 defending the suit. In fact, the Ninth Circuit recently ordered the *Melendres* court—post-
7 trial and after the issuance of an injunctive order—to substitute Maricopa County for
8 MCSO due to MCSO’s status as a non-jural entity. *Melendres v. Arpaio*, 784 F.3d 1254
9 (9th Cir. 2015). Without discussing the issue, the Ninth Circuit appears to have assumed
10 Maricopa County was adequately represented in the preceding *Melendres* litigation such
11 that adding it as a party for purposes of injunctive relief was fair and reasonable.

12 Therefore, summary judgment on this issue will be granted. The same non-mutual,
13 offensive issue preclusion that applies to Arpaio in this case as a result of *Melendres* will
14 also apply to Maricopa County.²⁷

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

16 Application of non-mutual, offensive issue preclusion here means the United
17 States will not have to relitigate facts and issues decided in *Melendres* which also
18 underlie parts of the United States’ current claims. Instead, those issues will be given
19 “conclusive effect” here. *See* Restatement (Second) of Judgments § 13 (1982). The issues
20 include MCSO’s performance of traffic stops in connection with purported immigration
21 and human smuggling law enforcement, including “crime suppression operations” and
22 “saturation patrols,” during which the officers unlawfully relied on race, color, or
23 national origin, as well as MCSO’s use of Hispanic ancestry or race as a factor in forming
24 reasonable suspicion that persons violated state laws relating to immigration status in
25 violation of the Equal Protection Clause of the Fourteenth Amendment. *See Melendres v.*
26 *Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013). In sum, in deciding the merits of the United
27 States’ claims, the Court will treat the *Melendres* findings relating to discriminatory

28 ²⁷ Neither party attempts to argue Maricopa County lacked notice of the previous case.

1 enforcement of immigration laws through vehicle stops as findings of fact in this case.

2 The United States argues these findings from *Melendres* entitle it to summary
3 judgment on its discriminatory policing claims contained in Counts One, Three, and
4 Five.²⁸

5 **i. Count One**

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

9 Section 14141 provides: “It shall be unlawful for any governmental authority, or
10 any agent thereof, or any person acting on behalf of a governmental authority, to engage
11 in a pattern or practice of conduct by law enforcement officers . . . that deprives persons
12 of rights, privileges, or immunities secured or protected by the Constitution or laws of the
13 United States.” 42 U.S.C. § 14141. A “pattern or practice” is “more than the mere
14 occurrence of isolated or ‘accidental’ or sporadic discriminatory acts.” *Int’l Bhd. of*
15 *Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977). *See also Obrey v. Johnson*,
16 400 F.3d 691, 694 (9th Cir. 2005). In order to show a “pattern or practice,” one must
17 prove the conduct “was the [defendant’s] standard operating procedure the regular rather
18 than the unusual practice.” *Teamsters*, 431 U.S. at 336.

19 There is no dispute that Arpaio is a “governmental authority” under the statute,
20 and the *Melendres* court found Arpaio and MCSO violated the Constitution, specifically
21 the Equal Protection Clause of the Fourteenth Amendment. *See Melendres v. Arpaio*, 989
22 F. Supp. 2d 822 (D. Ariz. 2013). Furthermore, the findings of *Melendres* amount to a
23 “pattern or practice” under the statute. The *Melendres* court found Arpaio and MCSO at
24 one time promulgated official policies which “expressly permitted officers to make racial
25 classifications.” *Melendres*, 989 F. Supp. 2d at 899. The court also found that even once

26 ²⁸ The following analysis focuses on the *Melendres* court’s findings as to Arpaio,
27 but applies equally to Maricopa County because, as discussed in Part III(B), *supra*,
28 Maricopa County is directly liable for the actions of Arpaio as its official policymaker on
law enforcement matters and for MCSO, a non-jural subdivision of the County.

1 these explicit policies were discontinued for facially race-neutral ones, intentional
2 discrimination on the basis of race continued to influence MCSO's operations. *Id.* at 902-
3 904 (finding MCSO continued to instruct officers that although race could not be the only
4 basis for law enforcement action, it was a legitimate factor, among others, on which they
5 could base decisions pertaining to immigration enforcement). Overall, the court
6 concluded Arpaio and MCSO's policies and procedures "institutionalize[d] the
7 systematic consideration of race as one factor among others in forming reasonable
8 suspicion or probable cause in making law enforcement decisions." *Id.* at 898. These
9 findings clearly show a "pattern or practice." The discrimination found by the *Melendres*
10 court was not of an isolated or accidental nature, but rather of standard operating
11 procedure throughout MCSO.

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

23 **ii. Count Three**

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

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

1 “program or activity” is defined as: “(i) A department, agency, . . . or other
2 instrumentality of a State or of a local government; or (ii) The entity of such State or
3 local government that distributes such assistance and each such department or agency
4 (and each other State or local government entity) to which the assistance is extended, in
5 the case of assistance to a State or local government” 28 C.F.R. § 42.102(d).

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

14 **iii. Count Five**

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

17 DOJ regulations under Title VI require each recipient of federal financial
18 assistance to include an assurance that the recipient and subrecipients will comply with
19 Title VI and its implementing regulations. *See* 28 CFR § 42.105(a), (b). Violations of
20 Title VI, therefore, automatically violate these contractual assurances. Based on the
21 foregoing, summary judgment on a portion of Count Five will be granted. Again, the
22 relief granted will be based on the facts found in *Melendres* and any further facts and
23 violations the United States may prove at trial.²⁹

24 **V. Claims Related to LEP Inmates**

25 Arpaio argues he is entitled to summary judgment on the allegations of intentional
26 discrimination or disparate treatment regarding limited English proficient (“LEP”)

27 ²⁹ In addition to liability based on the actions of Arpaio and MCSO, Maricopa
28 County is also liable for this claim based on the contractual assurances given by its Board
of Supervisors, the entity which distributes federal funds to various County departments,
including Arpaio and MCSO.

1 inmates in Counts Four and Five. In reply, he also argues he is entitled to summary
2 judgment on allegations of disparate impact on LEP inmates. The United States claims it
3 has submitted ample evidence that Arpaio has and continues to intentionally discriminate
4 against LEP inmates in violation of Title VI. It also argues Arpaio did not initially move
5 for summary judgment on the disparate impact claims.

6 Whether or not Arpaio raised it in his initial motion, his argument that Title VI
7 applies only to intentional discrimination is not accurate. In *Alexander v. Sandoval*, the
8 Supreme Court held § 601 of Title VI created a private cause of action only for
9 intentional discrimination. 532 U.S. 275 (2001). But the Court chose to defer to
10 regulations promulgated by DOJ under § 602 of the law, which prohibited activities
11 having a disparate impact on the basis of race. *Sandoval*, 532 U.S. at 281-282. It
12 assumed without deciding that these regulations were reasonable and, therefore, valid. *Id.*
13 The focus in *Sandoval* was whether a private right of action existed to enforce the
14 disparate impact regulations DOJ had created. The Court held it did not, but declined to
15 address whether a disparate impact cause of action under Title VI existed. *Id.* As
16 discussed in Part III(A), *supra*, the Supreme Court’s analysis implies a cause of action for
17 disparate impact discrimination does lie. Therefore, summary judgment on the claim for
18 disparate impact discrimination will not be granted.

19 Regarding Arpaio’s motion with respect to intentional discrimination, Title VI
20 provides: “No person in the United States shall, on the ground of race, color, or national
21 origin, be excluded from participation in, be denied the benefits of, or be subjected to
22 discrimination under any program or activity receiving Federal financial assistance.” 42
23 U.S.C. § 2000d. DOJ’s implementing regulations specifically prohibit “[restricting] an
24 individual in any way in the enjoyment of any advantage or privilege enjoyed by others
25 receiving any disposition, service, financial aid, or benefit under the program,” 28 C.F.R.
26 § 42.104(b)(1)(iv), or “[utilizing] criteria or methods of administration which have the
27 *effect* of subjecting individuals to discrimination . . . [or] defeating or substantially
28 impairing accomplishment of the objectives of the program as respects individuals of a
particular race, color, or national origin.” 28 C.F.R. § 42.104(b)(2) (emphasis added).

1 DOJ guidance provides, a federal funding recipient must “take reasonable steps to
2 ensure ‘meaningful’ access to the information and services they provide [to LEP
3 inmates].” Department of Justice, *Enforcement of Title VI of the Civil Rights Act of*
4 *1964—National Origin Discrimination Against Persons With Limited English*
5 *Proficiency; Policy Guidance*, 65 FR 50123-01, 50124 (Aug. 16, 2000); Department of
6 Justice, *Guidance to Federal Financial Assistance Recipients Regarding Title VI*
7 *Prohibition Against National Origin Discrimination Affecting Limited English Proficient*
8 *Persons*, 67 Fed. Reg. 41455, 41469-70 (Jun 18, 2002).

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

16 Arpaio argues he has made reasonable efforts to provide LEP inmates with
17 meaningful access to information and services, thus defeating the United States’ claim.
18 He cites his DI-6 Policy, which states LEP inmates are to have “the same rights and
19 protections mandated by federal, state, and local laws.” (Doc. 345 at 10). The United
20 States attacks these assertions on three grounds: (1) the DI-6 Policy on which Arpaio
21 relies was not enacted until October 2013—eighteen months after the U.S. brought suit;
22 (2) the pre-DI-6 Policy actions Arpaio took to address LEP discrimination were
23 insufficient to meet the “reasonable steps” requirement; and (3) notwithstanding the
24 enactment of the DI-6 Policy, evidence shows disparate treatment of a significant level of
25 continuing harm to LEP inmates. The DI-6 Policy was, indeed, enacted in 2013. But
26 Arpaio claims the policy memorialized “MCSO’s long standing, reasonable efforts to
27 ensure LEP inmates have meaningful access.” (Doc. 358 at 6). He contests the claim that
28 the United States’ evidence proves “a *significant number* of LEP beneficiaries” are being
deprived of access. *Id.* at 7 (emphasis in original). The arguments are fact-based, and the

1 facts are in dispute, namely how Arpaio and MCSO were treating LEP inmates prior and
2 subsequent to the October 2013 enactment of the DI-6 Policy and the effects of that
3 treatment. (*See* Doc. 353 beginning at ¶ 65). Therefore, this issue is not appropriate for
4 summary judgment.

5 **VI. Retaliation Claims**

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

13 **A. Bar Complaints**

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

18 Arizona courts have established “an absolute privilege extended to anyone who
19 files a complaint with the State Bar alleging unethical conduct by an attorney.”
20 *Drummond v. Stahl*, 127 Ariz. 122, 126 (Ct. App. 1980) (“[P]ublic policy demands the
21 free reporting of unethical conduct”). However, the Supreme Court and the Ninth Circuit
22 have held that “state law cannot provide immunity from suit for federal civil rights
23 violations.” *Wallis v. Spencer*, 202 F.3d 1126, 1144 (9th Cir. 2000); *Martinez v. State of*
24 *Cal.*, 444 U.S. 277, 285, n. 8 (1980) (“A construction of the federal statute which
25 permitted a state immunity defense to have controlling effect would transmute a basic
26 guarantee into an illusory promise; and the supremacy clause of the Constitution insures
27 that the proper construction may be enforced”). For example, in *Imbler v. Pachtman*, the
28 Court held common law prosecutorial immunity applies to cases under § 1983. 424 U.S.

1 409 (1976).³⁰ But the Fifth Circuit refused to extend prosecutorial immunity to decisions
2 to bring complaints before state ethics commissions, even where a state law also provides
3 absolute privilege for those complaints. *Lampton v. Diaz*, 639 F.3d 223, 229 (5th Cir.
4 2011) (“Lampton likely enjoys immunity from the state law claims under Mississippi
5 law. . . . [H]owever, federal law does not provide immunity to complainants before state
6 ethics committees In the absence of congressional action, we should not create that
7 immunity merely because it may be desirable for some policy reason.”).

8 Arpaio cites *Donahoe v. Arpaio* in support of his position. 869 F. Supp. 2d 1020
9 (D. Ariz. 2012) *aff’d sub nom. Stapley v. Pestalozzi*, 733 F.3d 804 (9th Cir. 2013). In
10 *Donahoe*, Arpaio had filed suit against various Maricopa County officials—including
11 members of the Board of Supervisors and judges—under the federal Racketeer
12 Influenced and Corrupt Organization Act (“RICO”). He claimed the officials were
13 improperly using their power to obstruct a criminal investigation. Arpaio’s allegations
14 spanned a variety of conduct and included his adversaries’ filing of bar complaints
15 against the County Attorney. *Id.* The officials sued Arpaio for retaliation for the exercise
16 of their First Amendment rights. *Id.* The district court held Arpaio’s alleged injuries were
17 not actionable under RICO, nor was the conduct on which the claim was based, including
18 bar complaints. *Id.* at 1053.

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

27 _____
28 ³⁰ The Court also held the scope of that immunity was fixed at what it was in 1871,
the year § 1983 was enacted.

1 **B. Probable Cause**

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

6 To prove a claim for retaliation in violation of the First Amendment, a plaintiff
7 must show: (1) the defendant “took action that ‘would chill or silence a person of
8 ordinary firmness from future First Amendment activities’” and (2) the defendant’s
9 “desire to cause the chilling effect was a but-for cause of the defendant’s action.” *Skoog*
10 *v. Cnty. of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006) (citing *Mendocino Env’tl. Ctr.*
11 *v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir.1999); *Hartman v. Moore*, 547 U.S.
12 250 (2006)).

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

28 The United States’ claim against Arpaio includes ordinary retaliation, as well as
retaliatory prosecution. It alleges, with retaliatory motive, Arpaio complained to the

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

15 As the Ninth Circuit’s analysis in *Ford v. City of Yakima* shows, the question of
16 the substance of a constitutional right is distinct from the question of whether that right
17 was clearly established for purposes of qualified immunity. 706 F.3d 1188 (9th Cir.
18 2013). The Supreme Court has held *Hartman*’s impact on the requirements for a claim of
19 retaliatory arrest was “far from clear” at the time it was decided. Thus, an officer accused
20 of retaliatory arrest could assert the defense of qualified immunity because *Hartman*’s
21 rule regarding probable cause did not necessarily extend to the area of retaliatory arrests.
22 *Reichle v. Howards*, 132 S. Ct. 2088, 2095-96 (2012). But the Court specially noted,
23 unlike in a claim for retaliatory prosecution, “in many retaliatory arrest cases, it is the
24 officer bearing the alleged animus who makes the injurious arrest.” *Id.* at 2096.
25 Nevertheless, the Court stopped short of providing a definitive answer as to whether
26 proving lack of probable cause was necessary to succeed on a claim for retaliatory arrest.
27 Instead, the Court simply stated, “*Hartman* injected uncertainty into the law governing
28 retaliatory arrests.” *Id.* Since *Hartman* and *Reichle*, the Ninth Circuit has continued to
hold “an individual has a right ‘to be free from police action motivated by retaliatory

1 animus but for which there was probable cause.” *Ford*, 706 F.3d at 1193 (citing *Skoog*,
2 469 F.3d at 1235).

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

11 **C. Justiciability: Standing and Mootness**

12 Arpaio denies he retaliated against his critics for voicing their disapproval of his
13 practices. He also claims the United States lacks standing to bring a retaliation claim
14 because the alleged conduct represents a past wrong with no real or immediate threat of
15 future retaliation. The United States argues standing does not require the immediate
16 threat of unlawful *conduct*, but rather *injury*, and that the harm caused by Arpaio’s past
17 retaliation persists. It also claims the “voluntary cessation” exception to mootness
18 doctrine applies, maintaining this claim’s justiciability.

19 In order for a case to be justiciable, “[t]he plaintiff must show that he ‘has
20 sustained or is immediately in danger of sustaining some direct injury’ as the result of the
21 challenged official conduct and the injury or threat of injury must be both ‘real and
22 immediate,’ not ‘conjectural’ or ‘hypothetical.’” *City of Los Angeles v. Lyons*, 461 U.S.
23 95, 101-02 (1983) (citations omitted).

24 “It is well settled that ‘a defendant’s voluntary cessation of a challenged practice
25 does not deprive a federal court of its power to determine the legality of the practice.’”
26 *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)
27 (citation omitted). A case only becomes moot in the context of a voluntary cessation “if
28 subsequent events [make] it *absolutely clear* that the allegedly wrongful behavior could
not reasonably be expected to recur.” *Id.* (citing *United States v. Concentrated Phosphate*

1 *Export Ass'n.*, 393 U.S. 199, 203 (1968)) (emphasis added). “[A] voluntary governmental
2 cessation of possibly wrongful conduct [may be treated] with some solicitude.” *Sossamon*
3 *v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009). But courts warn the
4 solicitude should only be applied where the “self-correction . . . appears genuine.”
5 *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988).

6 Arpaio does not contest that he and MCSO filed the lawsuits, submitted bar
7 complaints, and performed the arrests the United States alleges. What Arpaio contests is
8 the allegation that these actions were performed in retaliation for criticism he and his
9 office received. In other words, that they were done with retaliatory animus. But the
10 United States’ facts are sufficient to raise a reasonable inference that Arpaio’s actions
11 were performed out of retaliatory animus. Arpaio’s conclusory denials do not defeat this
12 evidence. Therefore, summary judgment will not be granted on these grounds.

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

21 **VII. Obey the Law Injunction**

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

27 Under the federal rules, “[e]very order granting an injunction and every restraining
28 order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C)
describe in reasonable detail—and not by referring to the complaint or other document—

1 the act or acts restrained or required.” Fed. R. Civ. P. 65(d). As such, “blanket injunctions
2 to obey the law are disfavored.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,
3 518 F. Supp. 2d 1197, 1226 (C.D. Cal. 2007) (quoting *Mulcahy v. Cheetah Learning*
4 *LLC*, 386 F.3d 849, 852 n. 1 (8th Cir. 2004)) (internal quotation marks omitted). But
5 district courts have broad discretion to shape equitable remedies. *See Monsanto Co. v.*
6 *Geertson Seed Farms*, 561 U.S. 139, 175 (2010). When an appellate court finds a trial
7 court abused its discretion by issuing an overly broad order, it may strike those provisions
8 “dissociated from those [acts] which a defendant has committed.” *N.L.R.B. v. Express*
9 *Pub. Co.*, 312 U.S. 426, 435 (1941). *See, e.g., S.E.C. v. Smyth*, 420 F.3d 1225, 1233 (11th
10 Cir. 2005) (holding general “obey-the-law” injunctions unenforceable).

11 The purpose of Rule 65(d) is to ensure defendants have fair notice of what conduct
12 is prohibited and to avoid undue restraint. The Ninth Circuit has “not adopted a rule
13 against ‘obey the law’ injunctions per se.” *F.T.C. v. EDebitPay, LLC*, 695 F.3d 938, 944
14 (9th Cir. 2012). Instead the court recognizes, in certain circumstances, “injunction[s] . . .
15 framed in language almost identical to the statutory mandate . . . [are not] vague” because
16 they “adequately describe the impermissible conduct.” *United States v. Miller*, 588 F.2d
17 1256, 1261 (9th Cir. 1978). *See also E.E.O.C. v. AutoZone, Inc.*, 707 F.3d 824, 842 (7th
18 Cir. 2013) (holding “obey-the-law” injunctions *may* be an “appropriate” form of
19 equitable relief where evidence suggests the proven illegal conduct may continue or be
20 resumed, for example, when those responsible for workplace discrimination remain with
21 the same employer or some other factor “convinces the court that voluntary compliance
22 with the law will not be forthcoming”).

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

1 be decided. Summary judgment on these grounds will not be granted.

2 Accordingly,


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

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

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

13 Dated this 15th day of June, 2015.

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Honorable Roslyn O. Silver
Senior United States District Judge