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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

15 Manuel de Jesus Ortega Melendres,
16 et al.,

17 Plaintiffs,

18 vs.

19 Joseph M. Arpaio, et al.,

20 Defendants.

21 No. CV 07-2513-PHX-GMS

22 **REPLY MEMORANDUM IN**
23 **SUPPORT OF PLAINTIFFS'**
24 **MOTION FOR PARTIAL**
25 **SUMMARY JUDGMENT**

26 **ORAL ARGUMENT REQUESTED**

27 The Honorable Judge G. Murray Snow
28

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1 Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment
2 (Dkt. No. 452) ("Defs.' Opp'n") fails to create any genuine dispute of fact precluding
3 summary judgment on Plaintiffs' Fourteenth Amendment claims. The undisputed
4 evidence in Plaintiffs' Motion for Partial Summary Judgment (Dkt. No. 421) ("Pls.'
5 MSJ") shows that Sheriff Arpaio adopted a policy and practice of targeting Hispanics in
6 the MCSO's immigration enforcement operations, and that this policy led to the
7 discriminatory treatment suffered by Plaintiffs. Defendants completely ignore the
8 undisputed, contemporaneous written evidence that specific saturation patrol operations
9 were implemented by the MCSO (e.g., in Queen Creek, Mesa, and Sun City) as a direct
10 result of race-based requests for MCSO action. See Pls.' MSJ at 20-24. This evidence,
11 among much else, shows a pattern of discriminatory conduct that has injured the
12 Plaintiffs.

13 Instead of addressing Plaintiffs' evidence, Defendants rely on their own post hoc,
14 generalized denials of racial animus. Such self-serving denials are insufficient to stave
15 off summary judgment in the face of undisputed written and testimonial evidence
16 establishing the MCSO's discriminatory purpose. See *Villiarimo v. Aloha Island Air,*
17 *Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) ("[T]his court has refused to find a genuine
18 issue where the only evidence presented is uncorroborated and self-serving testimony."
19 (internal quotation and citation omitted)); *Kennedy v. Applause, Inc.*, 90 F.3d 1477,
20 1481 (9th Cir. 1996) (same); see also *Zeigler v. Town of Kent*, 258 F. Supp. 2d 49, 56
21 (D. Conn. 2003) ("It is the rare case, indeed, where a defendant would admit to having
22 acted with racial animus.").

23 Further, Defendants are wrong that the MCSO's statements and actions can be
24 justified by the demographics of illegal immigration in Arizona. The fact that a majority
25 of offenders may be of a particular race does not justify the targeting of an entire racial
26 group. *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (2000) ("[A]t this
27 point in our nation's history . . . Hispanic appearance is . . . of such little probative value
28 that it may not be considered as a relevant [or appropriate] factor" in the enforcement of

1 immigration laws). The balance of Defendants' arguments merely attempt to distract
2 the Court from the undisputed evidence. Plaintiffs' motion should be granted.¹

3 **I. The MCSO's Immigration Enforcement Operations Are Motivated By and**
4 **Planned in Response to Explicit Calls for Targeting of Hispanics**

5 Notwithstanding the denials of defense counsel and MCSO officers in this
6 litigation, the undisputed *contemporaneous* evidence of Sheriff Arpaio's motivations for
7 his policy decisions establish that the MCSO acted with discriminatory intent. This
8 evidence includes the fact that Sheriff Arpaio's initial decision to launch an immigration
9 "crackdown" and saturation patrols was made in direct response to having "heard the
10 people speak" about their hostility towards the Hispanic community. Pls.' MSJ at 16-
11 18. This hostility was reflected in Sheriff Arpaio's own statements. Moreover,
12 Defendants ignore numerous specific and undisputed examples of the MCSO
13 conducting operations in response to explicit calls from Sheriff Arpaio's constituents to
14 target Hispanic individuals. Sheriff Arpaio adopted these racially discriminatory
15 requests for action through his distribution of them to Chief Sands and Sheriff Arpaio's
16 *own annotations* that they were "for our operation." Pls.' MSJ at 20-24. It is this
17 contemporaneous evidence, not the self-serving representations of Defendants, that is
18 decisive for any inquiry about discriminatory intent. *See Vill. of Arlington Heights v.*
19 *Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (listing a non-exhaustive list
20 of factors courts may consider as evidence of discriminatory intent). Defendants thus
21 fail to raise any genuine factual dispute as to their intent.

22
23 ¹ In further support of Plaintiffs' motion, Plaintiffs submit their Responses to
24 Defendants' Separate Statement of Additional Facts ("Pls.' Resp. to Defs.' SSOF") and
25 Plaintiffs' Reply to Defendants' Responses to Plaintiffs' Separate Statement of Facts
26 ("Pls.' Reply to Defs.' Resp. to Pls.' SOF"), filed concurrently herewith. Plaintiffs
27 submit that this submission is necessary because the nearly 200-page objections and
28 evidentiary objections and artificial "disputes" of fact, and over a hundred new facts, that
serve only to confuse the record in this case. Plaintiffs therefore submit these materials
for the benefit of the court, should it wish to consider them, in order to clarify the factual
record. *See BNSF Ry. Co. v. Coconino Land & Cattle LLC*, 2010 WL 4929244 (D. Ariz.
2010) (allowing party to file reply statement of facts in court's "broad discretion").

1 **A. Sheriff Arpaio’s Own Statements Express Racial Animus and**
 2 **Establish His Discriminatory Intent**

3 Defendants fail to dispute that Sheriff Arpaio’s decision to prioritize immigration
 4 enforcement was motivated by hostility towards Hispanics. They do not even address
 5 many of Sheriff Arpaio’s own public statements to that effect. *See* Pls.’ MSJ at 3-4, 18.

6 The only specific remark that Defendants address in any detail is Sheriff Arpaio’s
 7 statement that Mexicans are “all dirty.” De fs.’ Opp’n at 15-16. D efendants argue that
 8 this comment was “likely” taken out of context. *Id.* However, the full context only
 9 serves to demonstrate Sheriff Arpaio’s de humanizing view of M exican immigrants as
 10 vessels for disease. *See* Pls.’ Rep. to Defs. SSOF 43. The original quote reads: “There’s
 11 no control, no health checks or anything. They check fruits and vegetables, how come
 12 they don’t check people? No one talks about that! They’re all dirty.” Pls.’ SOF 19. In
 13 an attempt to justify this stigmatizing remark, Defendants make the sam e gross
 14 characterizations about Mexica n individuals, pointing t o the ICE indicators of
 15 immigration status, such as disheveled dress and punge nt body odor, that have nothi ng
 16 to do with being Mexican or Hispanic. *See, e.g.*, Defs.’ Opp’n at 16.

17 Moreover, Defendants fail to address the great majority of Sheriff Arpaio’s other
 18 derogatory comments, such as his view that Mexican immigrants have failed to
 19 assimilate, his characterization of illegal im migration from Mexico as an “epidemic,”
 20 and his fear that Mexican im migrants are attempting to reconquer United States
 21 territory. Pls.’ SOF 16, 18-20. Contrary to Defendants’ contention, these statements are
 22 comparable to, if not even more stigmatizing than, the statements that have been found
 23 to be expressions of racial bias by other courts. *See* Pls.’ MSJ at 18 (citing cases).

24 **B. Defendants Ignore Undisputed Evidence That Discriminatory**
 25 **Requests for Police Action Motivated MCSO Operations**

26 Defendants admit that Sheriff Arpaio se nt racially-charged letters to his
 27 command staff, and in particular to Chief Sa nds, who decides where, when, and how to
 28 conduct saturation patrols. Defs.’ Opp’ n at 21. Defenda nts do not de ny that these
 letters contain discrim inatory animus. *Id.* Instead, Defenda nts argue that Sheriff

1 Arpaio's distribution and endorsement of these letters lacks significance because they
2 are just "another piece of intelligence" that Sheriff Arpaio wanted Chief Sands to "look
3 at." *Id.* at 21-23. But Defendants ignore the fact that many of these letters contain no
4 evidence of any crime, *see, e.g.*, Pls.' SOF 81, 84, 88, 97; in other words, *there was*
5 *nothing to look into*. Further, Defendants fail to address Sheriff Arpaio's handwritten
6 notes instructing Chief Sands to use these racially-charged citizen complaints "for our
7 operations" (and notations to similar effect). *See* Pls.' SOF 79, 85, 90, 93, 97.²

8 Defendants' attempts to argue that other factors informed the MCSO's decision
9 to conduct saturation patrols, Defs.' Opp'n at 22, do not raise a triable fact issue. *See*
10 Pls.' Resp. to Defs.' SSOF 67-68. As Sheriff Arpaio has publicly stated, "I always have
11 an official reason, so I can win the lawsuits, and then I have my reason." Pls.' Resp. to
12 Defs.' SSOF 44. The fact that the MCSO may have considered other factors does not
13 preclude a finding that MCSO's saturation patrols operations were racially motivated.
14 *See Arlington Heights*, 429 U.S. at 265 (race need only be one "motivating factor" not
15 "sole" factor in decision). Defendants' evidence is simply insufficient to rebut the
16 undisputed evidence—established through the MCSO's own planning documents and
17 news releases—that MCSO saturation patrol operations were improperly initiated in
18 response to race-based requests for action, Pls.' MSJ at 21-24, and that facially-neutral
19 traffic laws were discriminatorily applied during such operations, Pls.' MSJ at 24-34.

20 Finally, Defendants overlook Plaintiffs' undisputed evidence of a direct causal
21 connection between such complaints and particular MCSO saturation patrols. *See* Pls.'
22

23 ² Although Defendants seek to downplay their significance, Sheriff Arpaio's "thank
24 you notes" in response to these letters are also highly probative of Arpaio's intent.
25 These were not "pro forma" responses sent in response to any letter received by Sheriff
26 Arpaio. To the contrary, many of these notes were highly personalized, expressing
27 agreement with specific remarks and in some cases *affirmatively expressing an intent to*
28 *take action* on the basis of the complaints. *See, e.g.*, Pls.' SOF 32, 40, 84, 93; Pls.'
Reply to Defs.' Resp. to Pls.' SOF 40. For example, in response to a letter affirming that
he had the right to "investigate people based on the color of their skin, or their accent or
the way they look," Sheriff Arpaio thanked the writer for her support of his illegal
immigration policies and told her how much he enjoyed reading her story about her
Italian mother and the mother's own endorsement of racial profiling. Pls.' SOF 40.

1 MSJ at 20-24. Specifically, Defendants fail to refute that: (1) the saturation patrol
2 occurring in Sun City on August 13-14, 2008 was conducted in response to a request
3 that the MCSO “check out Sun City” because people were speaking Spanish at a local
4 McDonald’s, which Sheriff Arpaio forwarded to Chief Sands with the notation “for our
5 operation”; (2) two saturation patrols in Mesa during the summer of 2008 were a direct
6 result of letters sent by Sheriff Arpaio to Chief Sands as “intelligence” stating that “the
7 head of Mesa’s police union is a Hispanic” and suggesting that the MCSO should
8 “determine whether these day laborers are here [legally]”, to which Sheriff Arpaio
9 responded, “I will be going into Mesa”; and (3) the saturation patrol occurring on
10 October 3, 2007 in Queen Creek was conducted in response to “emails from the town
11 council in reference to day laborers,” including one complaining of Hispanic men
12 “being silly” and making people in the town feel “uncomfortable,” a race-based
13 complaint that Sheriff Arpaio thought should be “look[ed] in to.” Pls.’ MSJ at 22-23.
14 Even the MCSO’s own News Release confirmed that the Queen Creek saturation patrol
15 was based on the very same “citizen complaints regarding day laborers.” Pls.’ SOF 53
16 (citing Hickey Dec. Ex. 10).³

17 As Deputy Chief Sands has explained, the MCSO views it as politically
18 beneficial for the MCSO to respond to citizen complaints by carrying out immigration
19 operations. *See* Pls.’ SOF 100 (citing Sands Dep. II 122:21-123:18). The uncontested
20 written evidence makes clear that the MCSO did precisely that. This reliance on
21

22 ³ Notably, the MCSO News Release for the Queen Creek saturation patrol that
23 describes the operation as being responsive to email complaints *also* refers to the Cave
24 Creek saturation patrol (during which Mr. Ortega Melendres was stopped) as part of the
25 same effort. *See* Pls.’ SOF 53 (citing Hickey Dec. Ex. 10) (“The Queen Creek operation
26 comes on the heels of Sheriff Arpaio’s enforcement efforts in . . . Cave Creek where day
27 laborers sought sanctuary at the Good Shepherd of Hills church.”) These same racial
28 considerations thus underlie the Cave Creek operation as well. *See* Defs.’ Resp. to Pls.’
SOF 176 (noting that the operation was based on citizen complaints about day laborers).
Contrary to Defendants’ claim, Defs.’ Opp’n at 24-25, the MCSO did *not* reserve official
action for instances when its own investigation confirmed that there was criminal
activity. The MCSO’s follow-up undercover investigation in Cave Creek revealed *no*
information pertaining to human smuggling, drop houses, or even illegal immigration,
Pls.’ SOF 173, and yet it went ahead with the operation anyway.

1 racially-biased citizen complaints violated the Fourteenth Amendment. *Smith v. Town*
 2 *of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982); *United States v. Yonkers Bd. of Educ.*,
 3 837 F.2d 1181, 1224 -25 (2d Cir. 1987); *Cnty. Hous. Trust v. Dep't of Consumer &*
 4 *Regulatory Affairs*, 257 F. S upp. 2d 208, 227 (D.D.C. 2003) (decision “tainted with
 5 discriminatory intent” due to reliance on discriminatory citizen complaints).

6 It is neither surprising nor informative that Sheriff Arpaio and Deputy Chief
 7 Sands would, in testimony provided in this litigation, deny that they considered race in
 8 the planning and execution of saturation patrols. *See Smith*, 682 F. 2d at 1064
 9 (“Municipal officials acting in their official capacities seldom, if ever, announce on the
 10 record that they are pursuing a particular course of action because of their desire to
 11 discriminate against a racial minority.”). What matters is what Sheriff Arpaio and other
 12 MCSO personnel wrote and intended at the time of the saturation patrols. The written
 13 record indicates, without dispute, that the MCSO endorsed and acted on the remarks
 14 from Sheriff Arpaio’s constituents, and used them in the MCSO’s operations. On this
 15 point, it is more revealing that Sheriff Arpaio admitted that he would not personally be
 16 “bothered” if he were racially profiled. Pls.’ SOF 166.

17 **II. The Defendants’ Policy of Targeting Hispanics in Immigration Enforcement** 18 **Operations, Including Saturation Patrols, Directly Harmed the Plaintiffs⁴**

19 Instead of pointing to any dispute of fact, Defendants respond to Plaintiffs’
 20 evidence of discrimination by disparaging it as occurring at an “amorphous macro
 21 level.” Defs.’ Opp’n at 3-5. In fact, Plaintiffs have demonstrated that they have been
 22 directly harmed by the MCSO’s specific policies and practices. If MCSO leadership
 23 institutes a policy and practice of intentionally discriminating in the enforcement of
 24 immigration law, and Plaintiffs are subject to selective enforcement pursuant to this
 25 policy and practice, then Plaintiffs have suffered a constitutional injury. *See, e.g., Doe*

26 ⁴ For all the reasons stated in Plaintiffs’ opposition, Plaintiffs have standing. Pls.’
 27 Opp’n at 5-11. Defendants contention that the declaration of Aldolfo Maldonado should
 28 be stricken is without merit. Defs.’ Reply at 5 n.1 [Dkt. No. 465]. Plaintiff Somos
 America’s representative, Lydia Guzman, identified Mr. Maldonado as a member that
 had been stopped by the MCSO in her deposition. *See* Pls.’ Resp. to Defs.’ SOF 152.

1 *v. Vill. of Mamar oneck*, 462 F. Supp. 2d 520, 546- 49 (S.D.N.Y. 2006) (finding that
2 discriminatory intent as to plaintiffs established by statements and policies of political
3 leadership and the police department).

4 The MCSO's discriminatory practices injured each named Plaintiff. Mr. Ortega
5 Melendres was stopped, questioned, searched, and arrested during a saturation patrol at
6 a Cave Creek church that focused on day laborers. Pls.' MSJ 8-9. That operation was
7 conducted despite a prior written finding that there was "no information discovered
8 pertaining to forced labor, human smuggling or possible 'drop-houses.'" *See* Pls.' SOF
9 173. The operation was initiated based on citizen complaints, many of which are
10 racially charged,⁵ and explicitly involved pretextual traffic stops of vehicles carrying
11 Hispanic men who appeared to be day laborers. Pls.' MSJ at 8-9, 26. Likewise, Mr.
12 Rodriguez was asked for his Social Security information—even though similarly
13 situated non-Hispanic drivers were not—pursuant to the MCSO's practice of making
14 unreasonable requests for documentation based on race. Pls.' MSJ at 9, 27; Pls.' Resp.
15 to Defs.' SOF 134. Finally, Mr. Nieto and Ms. Meraz were detained at gunpoint during
16 a saturation patrol in order to check Mr. Nieto's identification and confirm that he and
17 Ms. Meraz were U.S. citizens. *See* Pls.' MSJ 9, 27; Pls.' SS OF 267. Thus, the MCSO
18 injured each Plaintiff pursuant to the MCSO's discriminatory efforts to enforce the
19 immigration laws. *See* Pls.' MSJ at 5-6, 26-27 (describing the practice of initiating
20 pretextual traffic stops for minor traffic violations to screen motorists for immigration
21 violations and ask passengers for identification); Pls.' MSJ at 15- 24 (the MCSO's
22 immigration enforcement operations initiated and conducted based on race).

23 Moreover, the evidence shows that the individual deputies who stopped Plaintiffs
24 acted with discriminatory intent. Pls.' Op p'n at 28- 34. The race of Plaintiffs was
25 visually apparent (at some point during the interaction) to the MCSO officers who

26 _____
27 ⁵ Although the Cave Creek operation was based on citizen complaints, *see* Defs.'
28 Resp. to Pls.' SOF 176, no written complaints have been produced to Plaintiffs regarding
this operation. If written complaints did exist, they were likely destroyed by Defendants.
See Pls.' Renewed Mot. for Sanctions 7-10.

1 interacted with the named Plaintiffs and made the decisions to extend those interactions:
 2 Deputies DiPietro, Rangel, Ratcliffe, Armendariz, Kikes and Beeks. Pls.' Resp. to
 3 Defs.' SSOF at 3-4, 10, 16-19. The record also shows that some of the HSU supervisors
 4 and officers involved in Plaintiffs' stops circulated extremely inappropriate racially
 5 charged emails making fun of Mexicans. Pls.' SOF 147-49 (discussing racially-charged
 6 jokes distributed by MCSO officers, including "Mexican 300" video circulated by
 7 Deputy Rangel and "Mexican Yoga" email circulated by Sergeant Palmer).⁶ This is
 8 further evidence of their intent.

9 **III. Reliable Statistical Evidence Demonstrates the Discriminatory Impact of the** 10 **MCSO's Policies on Plaintiffs and other Hispanics in Maricopa County**

11 Defendants attack the relevance and reliability of the detailed statistical analysis
 12 of MCSO traffic stop patterns as laid out by Plaintiffs' expert Dr. Ralph Taylor.
 13 Defendants largely fail to identify any specific issues with Dr. Taylor's report, and
 14 instead quote technical statistical terms out of context. Defs.' Opp'n at 32-33. These
 15 attempts to diminish Dr. Taylor's study are misleading. See Pls.' Opp'n at 27-28 n.14.
 16 As Plaintiffs have already explained, Dr. Taylor's analysis demonstrates discriminatory
 17 effect and is also probative of discriminatory intent. Pls.' MSJ at 31 -34. As such, it is
 18 directly relevant to Plaintiffs' claims. See Pls.' Opp'n at 23-27.⁷

19 ⁶ The circulation of these emails for years while this lawsuit was ongoing is a very
 20 serious matter and demonstrates MCSO's tolerance of these attitudes within its agency.
 21 Pls.' MSJ 8, 30-31. Defendants' decision to address it only in a brief footnote is further
 22 evidence of their cavalier approach to officer oversight. Contrary to Defendants'
 23 contention, such incidents were far from "isolated"; Plaintiffs presented dozens of
 24 examples in their statements of fact. See, e.g., Pls.' SOF 145-151. In response,
 25 Defendants countered with only a single instance of HSU Lieutenant Sousa objecting to
 26 such email from *posse members*, not MCSO officers. See Pls.' Resp. to Defs.' SSOF 95.

27 ⁷ Defendants citation to *Lacy v. Villeneuve*, 2005 U.S. Dist. LEXIS 31638 (W.D.
 28 Wash. 2005) and *Giron v. City of Alexandria*, 693 F. Supp. 2d 904 (E.D. Ark. 2010)
 undermines their own argument as these courts *accepted* statistical evidence as proof of
 discriminatory effect. Similarly, although the court in *United States v. Hernandez-*
Bustos, 2005 U.S. Dist. LEXIS 16311 (D. Kan. 2005) did exclude a racial profiling g
 study as unreliable, it did so for a number of reasons inapplicable to this case (e.g., the
 study looked at stops in a *different county* than the one at issue). *Id.* at *19. Indeed,
 Defendants make no effort to explain why any of the concerns in *Hernandez-Bustos*
 actually apply to Dr. Taylor's study. Statistical evidence such as Dr. Taylor's study is
 widely accepted as relevant and admissible evidence tending to show a pattern of
 discrimination. See, e.g., *Obrey v. Johnson*, 400 F.3d 691, 696-97 (9th Cir. 2005).

1 Defendants raise four specific concerns about Dr. Taylor's study, none of which
2 have any merit. Defs.' Opp'n at 32-33. First, Defendants claim that Dr. Taylor should
3 have ignored traffic stops with "a human smuggling interdiction component."
4 Defendants do not explain why Dr. Taylor should have excluded such incidents, nor
5 why such an exclusion would make any sense in a case concerned with the MCSO's
6 discriminatory enforcement of immigration laws. In any event, human smuggling
7 arrests were a small part of saturation patrols. See Pls.' SOF 61-73. Second, contrary to
8 Defendants' claim, Dr. Taylor did not "fail[] to exclude duplicate records"; in fact, Dr.
9 Taylor specifically excluded duplicate records. See Taylor Rebuttal Report at 4-5, 11-13
10 (Dkt. No. 424, Ex. C). Third, Dr. Taylor properly excluded MCSO incidents that were
11 not described as "traffic stops" or "traffic violations" because these incidents (e.g., "tow
12 truck request," "vehicle accident w/injuries," "injured/sick person" "reckless boat
13 driving") involve non-discretionary police calls unrelated to the types of routine traffic
14 stops at issue in this case. See Taylor Rebuttal Report at 10-11. Fourth, Defendants
15 fault Dr. Taylor for not including socioeconomic variables in his model, failing to
16 mention that (1) Defendants' own expert did not include such variables and (2) the
17 existing data shows that socioeconomic variables would not have affected Dr. Taylor's
18 findings about the relative stop rates of Hispanics. See Taylor Rebuttal Report at 36-37.

19 **IV. The MCSO's Immigration Enforcement Operations Are Not Race-Neutral**

20 Finally, Defendants spend much of their opposition insisting that their statements
21 and actions can be explained by the demographic realities of illegal immigration. Defs.'
22 Opp'n at 9-16. While it indeed is possible to have an immigration enforcement program
23 that is racially neutral, and many law enforcement agencies do, that is not the case here.
24 As discussed at length, the undisputed written evidence shows that Defendants'
25 decision-making on immigration enforcement was improperly motivated by
26 considerations of race and ethnicity.

27 Defense counsel contends that the MCSO's disproportionate targeting of
28

1 Hispanics in the agency's immigration enforcement efforts is justified by the fact that a
 2 majority of illegal immigrants in Arizona are Hispanic. Defs.' Opp'n at 12-15.
 3 However, Plaintiffs have established that Defendants are not stopping a disproportionate
 4 number of Hispanics based on race-neutral indicators of unlawful immigration status,
 5 such as observing them at border crossings⁸ or finding immigrants in a human
 6 smuggling load.⁹ See Pls.' MSJ at 20 (immigration status not usually observable), 33
 7 (explaining how many Hispanics seized on saturation patrols were *not* illegal
 8 immigrants). The only explanation for the high number of Hispanics stopped on
 9 saturation patrols that is supported by the record is that Hispanics are purposefully
 10 targeted for stops and investigations based on "what they look like." Pls.' SOF 11.

11 Defense counsel presents theories about his clients' motivations, but fails to offer
 12 proof that these were in fact their motivations. For example, counsel argues that Sheriff
 13 Arpaio's selection of immigration enforcement as a priority for the agency was based on
 14 "escalating drug and human trafficking crime, and serious public safety concerns."
 15 Unlike Plaintiffs, who cite record evidence that the MCSO was motivated by racial
 16 animus and stereotypes, defense counsel cites no contemporaneous evidence to support
 17 the notion that Defendants were motivated by public safety concerns. Defs.' Opp'n at 9-
 18 10 (citing to the brief of an entirely different government official in a different lawsuit).
 19 In addition, if the MCSO's immigration enforcement activities were in fact motivated by

20
 21 ⁸ Defendants' discussion about unlawful *entry* into the United States being a
 22 criminal offense, Defs.' Opp'n at 11, is irrelevant as MCSO does not even purport to be
 23 enforcing the federal criminal illegal entry law, but rather the *civil* violation of being
 24 present in the United States without authorization. The Supreme Court has *never* held
 25 that local law enforcement officers have authority, in the absence of a 287(g) agreement,
 26 to enforce the *civil* violations of the immigration law. Defendants miscite *Muehler v.*
 27 *Mena*, 544 U.S. 93, 96, 101 (2005), which involved questioning during a joint operation
 28 by local police and federal immigration authorities. As Defendants acknowledge, local
 law enforcement officers decidedly do not have such authority in the Ninth Circuit.
United States v. Arizona, __ F.3d __, 2011 WL 1346945, at *17 (9th Cir. Apr. 11, 2011).

⁹ While Defendants make liberal reference to the interdiction of human smuggling
 on saturation patrols, the reality is that the operations netted almost no arrests under the
 state human smuggling statute and were not designed to do so. See Pls.' SOF 61-73.
 This is not surprising. MCSO saturation patrols took place in urban areas of Maricopa
 County, such as downtown Phoenix or Mesa, rather than on known smuggling corridors.

1 public safety concerns, one would expect the MCSO's program to be closely tailored to
2 the detection of illegal immigrants who are committing violent crimes or other criminal
3 acts. Instead, the vast majority of those stopped and arrested on saturation patrols are
4 not involved in any kind of smuggling activity or violent criminal activity whatsoever.
5 *See* Pls.' MSJ at 24-28 (describing the unusual design of MCSO's saturation patrol
6 operations); Pls.' SOF 61-73 (detailing arrests on saturation patrols). Indeed, the MCSO
7 distinguishes its program from that of other Arizona law enforcement agencies, in that
8 the MCSO "go[es] after illegals, not the crime first." Pls.' SOF 8.

9 Defendants also argue that they only target Hispanics for immigration
10 investigations after a stop is initiated. Defs.' Opp'n at 15-16. First, the evidence shows
11 that Defendants are disproportionately *stopping* Hispanics. *See* Pls.' MSJ at 31-34.
12 Second, contrary to Defendants' contention, racial profiling that only commences *after* a
13 stop is made is no more permissible than making an initial stop based on race.
14 Notwithstanding how ICE may train its agents, racial profiling in immigration
15 enforcement is unlawful in the Ninth Circuit. *Montero-Camargo*, 208 F.3d at 1134-
16 36.¹⁰ While it may be the case that a majority of illegal immigrants in Maricopa County
17 are Hispanic, it does not follow that a majority of Hispanics are illegal immigrants. (In
18 fact, this is not the case. *See* Pls.' Resp. to Defs.' SSOF 30.) Sheriff Arpaio's insistence
19 on equating Hispanic-appearing individuals to illegal immigrants only demonstrates the
20 race-conscious nature of his agency's program.

21 Plaintiffs fully agree that one can oppose illegal immigration without have racial
22 or ethnic animus. Defs.' Opp'n at 15. However, the Constitution prohibits generalized
23 law enforcement activity based on race, and that is what the MCSO is engaging in here.

24 _____
25 ¹⁰ Defendants' citation to an unpublished 5th Circuit opinion for the contrary
26 proposition is telling. Regardless of whether race may be considered as a factor in "the
27 poultry-producing region of Scott County, Mississippi," *see United States v. Vandyck-*
28 *Aleman*, 2006 U.S. App. LEXIS 24245 at *9 (5th Cir. 2006), the Ninth Circuit law is
clear that race may *not* be considered in areas, like Maricopa County, where a substantial
part of the resident population is both Hispanic and legally present. *Montero-Camargo*,
208 F.3d at 1134-36. It is not clear why Defendants would even cite to *Vandyck-Aleman*
unless the MCSO is, in fact, relying on Hispanic appearance.

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RESPECTFULLY SUBMITTED this 23rd day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2011 I caused the attached document to be electronically transmitted to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

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