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28 UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al.,

Plaintiffs,

and

United States of America

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Civil Case No.: 2:07-cv-2513-PHX-GMS

**PLAINTIFFS' AND UNITED STATES'  
JOINT MOTION FOR AN ORDER TO  
SHOW CAUSE**

1 v.

2 Paul Penzone, Sheriff, et al.,

3 Defendants.  
4

5  
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1 Plaintiffs and the United States respectfully submit the following motion in support of the  
2 initiation of civil contempt proceedings against Defendants Maricopa County, the Maricopa  
3 County Sheriffs' Office ("MCSO"), and Sheriff Paul Penzone, for MCSO's failure to comply  
4 with the Second Order by administering an internal investigation system that fails to conduct fair  
5 investigations in a timely fashion.

### 6 BACKGROUND

7 In 2016, this Court found Defendants to be in civil contempt because they had, among  
8 other things, "manipulated all aspects of the internal affairs process to minimize or entirely  
9 avoid imposing discipline on MCSO deputies and command staff whose actions violated the  
10 rights of the Plaintiff class." Dkt. 1765, Second Amended Second Supplemental Injunction  
11 Order ("Second Order"), at 2 (July 26, 2016). Moreover, Defendants had "delayed  
12 investigations so as to justify the imposition of lesser or no discipline" and thus "escape  
13 accountability for their own misconduct, and the misconduct of those who had implemented  
14 their decisions." Dkt. 1677, Findings of Fact, at 2 (May 13, 2016). "Defendants' unfair, partial,  
15 and inequitable application of discipline disproportionately damaged members of the Plaintiff  
16 class." *Id.*

17 To remedy those problems, the Court issued another injunction, the Second Order,  
18 requiring Defendants to make specific reforms to MCSO's internal investigation procedures.  
19 Dkt. 1765. The Ninth Circuit upheld the Second Order in full in 2018. *Melendres v. Maricopa*  
20 *Cty.*, 897 F.3d 1217, 1221 (9th Cir. 2018). The Monitor's quarterly reports establish that MCSO  
21 has failed to meet its obligations under the Second Order, allowing the backlog of open  
22 misconduct cases to grow exponentially over the last five years. *See, e.g.*, Dkt. 2569, Twenty-  
23 Fifth Quarterly Report (Nov. 16, 2020). Those quarterly reports provide ample evidence of  
24 Defendants' contempt. This Court should therefore initiate civil contempt proceedings to ensure  
25 compliance with the Second Order.

### 26 ARGUMENT

27 This Court's authority to enforce the Second Order through civil contempt is well-settled.  
28 *See Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992). As set forth in

1 detail below, the Monitor’s most recent quarterly report sets out conclusions that MCSO is  
2 grossly out of compliance with this Court’s requirement that internal investigations be timely  
3 completed. Dkt. 2569, Twenty-Fifth Quarterly Report, at 203-04 (citing Dkt. 1765, Second  
4 Order, ¶ 204). As also set forth below, Defendants’ violations of the Second Order have harmed  
5 the Plaintiff Class and put Plaintiffs at risk of biased policing. Because the Monitor’s report  
6 indicates that Defendants have committed civil contempt of court, Plaintiffs and the United  
7 States request that the Court issue an order requiring Defendants to show cause why they should  
8 not be held in contempt, set an expedited discovery schedule, and schedule a contempt hearing.  
9 *See United States v. Ayres*, 166 F.3d 991, 995-96 (9th Cir. 1999) (quoting *Int’l Union, United*  
10 *Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994)) (“[C]ivil contempt ‘may be  
11 imposed in an ordinary civil proceeding upon notice and an opportunity to be heard.’”); *SEC v.*  
12 *Hyatt*, 621 F.3d 687, 696 (7th Cir. 2010) (quoting 5 Wright & Miller, *Federal Practice and*  
13 *Procedure* § 1195 (3d ed. 2004)) (“A request for an order to show cause is ordinarily entertained  
14 and treated as a motion, if doing so will not prejudice the opposing parties.”).

15 **I. Defendants Committed Contempt by Violating the Court’s July 26, 2016 Injunction.**

16 The Second Order requires Defendants to implement specific reforms to MCSO’s  
17 internal investigation policies and practices, “aimed at eliminating a condition that flows from  
18 the MCSO’s violation of” the Plaintiffs’ “constitutional rights at issue—namely, the tacit  
19 authorization and condonation that the MCSO conveys to its deputies when police misconduct  
20 related to members of the Plaintiff class is exempted from the normal internal affairs system and  
21 is treated with special leniency or is entirely swept under the rug.” Dkt. 1765 at 5. In particular,  
22 the Second Order requires the Sheriff to “ensure that all allegations of employee misconduct,  
23 whether internally discovered or based on a civilian complaint, are fully, fairly, and efficiently  
24 investigated.” *Id.* ¶ 163; *see also id.* ¶ 170 (“The Sheriff shall investigate all complaints and  
25 allegations of misconduct.”). Those investigations must be “objective, comprehensive, and  
26 *timely.*” *Id.* ¶ 183 (emphasis added). Further, “[i]nternal affairs investigators will complete  
27 their administrative investigations within 85 calendar days of the initiation of the investigation”;  
28

1 “if within a Division,” the time frame is 60 calendar days. *Id.* ¶ 204. Only “[r]easonable  
2 requests for extensions of time may be granted.” *Id.*

3 MCSO has resoundingly failed to implement each of these requirements in the Court’s  
4 Order. As of the Monitor’s January 2021 site visit, MCSO had a backlog of over 2,000  
5 misconduct cases, with the average length of completion for a case being over 500 days, far in  
6 excess of both the Second Supplemental Injunction’s time limit and the state statutory timeline  
7 of 180 days. *See* Ariz. Rev. Stat. § 38-1110(a); *see also* Dkt. 2569, Twenty-Fifth Quarterly  
8 Report, at 4, 189-95, 203-04. Statistics relating to MCSO’s administrative (i.e., non-criminal)  
9 internal investigations have grown increasingly dire in recent years. In 2018 (the second year  
10 after issuance of the Second Order), MCSO’s average time to close a case was 204 days; by  
11 2019, the average time was 499 days; in 2020, it was 552 days. *Id.* at 192-93.

12 Moreover, there has been no upside gain in the quality of internal investigations as a  
13 result of these delays. To the contrary, MCSO still struggles to improve the quality of its  
14 internal investigations. *See, e.g.,* Arellano Decl. Ex. 1, Chief Warshaw Letter to Sheriff Penzone  
15 at 2 (July 10, 2020) (noting consistent decrease in quality of District/Division internal  
16 investigations). And the United States and Plaintiffs have raised concerns regarding substantial  
17 deficiencies in recently closed investigations related to, among other misconduct, the improper  
18 seizure and retention of driver’s licenses from persons with Hispanic last names. *See* Arellano  
19 Decl. Ex. 2, N. Glass Email to Chief Warshaw et al. (Feb. 3, 2021).

20 MCSO has proposed addressing the huge backlog of cases by removing many of the  
21 important safeguards that this Court imposed to ensure the legitimacy of investigations and the  
22 consistent application of discipline. For example, MCSO has recommended increasing its  
23 discretion to remove certain complaints from the queue of internal affairs cases not yet  
24 investigated; MCSO likewise wishes to allow district supervisors to handle such complaints  
25 directly, *i.e.,* bypassing the internal investigations and discipline system. *See* Arellano Decl. Ex.  
26 3, K. Friday Email to M. Johnston et al. (Nov. 25, 2020). Plaintiffs and the United States  
27 rejected this proposal, because allowing cases to bypass MCSO’s formal accountability  
28 measures would be inconsistent with the Court’s goal of ensuring that MCSO’s internal

1 investigations are free from the manipulations and abuses documented during the earlier  
2 contempt trial. *See* Arellano Decl. Ex. 4, C. Wang Email to K. Friday et al. (Dec. 2, 2020); Ex.  
3 5, M. Johnston Letter to K. Friday et al. (Nov. 16, 2020); and Ex. 6, N. Glass Email to C. Wang  
4 et al. (Dec. 4, 2020).

## 5 **II. Defendants’ Failure to Timely Investigate Misconduct Harms the Plaintiff Class.**

6 The failure to investigate and discipline deputies engaging in misconduct results in  
7 concrete harms to the Plaintiff Class. While misconduct complaints are pending, the deputies  
8 awaiting investigation continue to be on the street interacting with the Plaintiff Class. As the  
9 Monitor has noted, MCSO’s delay has allowed complaints against problematic deputies to pile  
10 up and that a timely, compliant investigation process could have prevented “further bad  
11 behavior.” Arellano Decl. Ex. 1, Chief Warshaw Letter to Sheriff Penzone at 1 (July 10, 2020).  
12 In addition, the over 500-day wait for most investigations to be completed results in lost  
13 evidence, including diminished memories, making it more likely that misconduct will ultimately  
14 go unaddressed. Finally, community members who know that their complaints will not be  
15 investigated in a timely manner may be dissuaded from even making a well-founded complaint  
16 in the first place. Indeed, the Community Advisory Board (“CAB”) has noted it is “questionable  
17 whether [CAB should] encourage the community to file a complaint when the process is so  
18 flawed and non functional.” Arellano Decl. Ex. 7, Email from CAB to Sheriff Penzone (Oct. 1,  
19 2020). In short, when the internal investigation and discipline system at MCSO remains in a  
20 dysfunctional state by quantitative and qualitative measures, the Plaintiff Class cannot be  
21 assured that there will be accountability for misconduct that affects them.

## 22 **III. The Court Should Therefore Issue an Order to Show Cause Why Defendants** 23 **Should Not Be Held in Civil Contempt and Permit Limited Discovery.**

24 The Monitoring Team’s most recent quarterly report indicates that MCSO has violated  
25 the Second Order. Dkt. 2569 at 203-04. Plaintiffs and the United States therefore request that  
26 the Court issue an order to show cause why Defendants should not be held in civil contempt and  
27 schedule a hearing on the same. *See Ayres*, 166 F.3d at 995-96 (“[C]ivil contempt ‘may be  
28 imposed in an ordinary civil proceeding upon notice and an opportunity to be heard.’”); *Hyatt*,

1 621 F.3d at 696 (courts ordinarily entertain and treat a request for show cause order as a  
2 motion).

3 Plaintiffs also request that the Court permit expedited discovery prior to any contempt  
4 hearing, so that Plaintiffs may test any purported justifications Defendants intend to offer for  
5 their noncompliance. *See FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (after  
6 the movant shows the contemnors violated the court’s order, “[t]he burden then shifts to the  
7 contemnors to demonstrate why they were unable to comply”); *Cal. Dep’t of Soc. Servs. v.*  
8 *Leavitt*, 523 F.3d 1025, 1033-34 (9th Cir. 2008) (district court had authority to grant request for  
9 discovery to determine whether party had complied with court’s order).

10 **CONCLUSION**

11 For the foregoing reasons, the Court should issue an order to show cause why Defendants  
12 should not be held in civil contempt, schedule a hearing regarding the same, and permit  
13 expedited discovery into these matters.

14  
15 DATED: March 10, 2021

Respectfully submitted,

16 COVINGTON & BURLING LLP

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2021, the foregoing document was filed through the Court's CM/ECF system which will serve a true and correct copy of the filing on all counsel of record.

/s/ Hannah M. Chartoff

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