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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

23 Manuel de Jesus Ortega Melendres, et al.,

24 Plaintiff,

25 v.

26 Joseph M. Arpaio, et al.,

27 Defendant.  
28

NO. CV 07-02513-PHX-GMS

**PARTIES' JOINT  
MEMORANDUM RE: INTERNAL  
INVESTIGATIONS**

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forthcoming.

1 Pursuant to the Court's order during a conference on May 31, 2016, the parties  
2 jointly submit this memorandum stating their respective positions on the internal  
3 investigations that should be conducted by an independent authority and the procedures  
4 that should apply in such investigations. *See* Findings of Fact (Doc. 1677), ¶¶ 902-07.

5 Plaintiffs and the United States note that, after providing Defendants with a draft of  
6 Plaintiffs' and the United States' sections of the memorandum and conducting a  
7 telephonic conference, Defendants provided their sections of this joint memorandum late  
8 on the date of filing and did not advise Plaintiffs that Defendants intended to include  
9 briefing and legal argument. Plaintiffs and the United States note that the Parties have  
10 already had an opportunity to brief these issues in their May 27 memoranda and that  
11 Defendants' submission is beyond the scope of the Court's direction for the instant  
12 memorandum. Plaintiffs and the United States respectfully request leave to file a response  
13 brief if helpful to the Court's consideration of the matters herein. Defendants disagree  
14 with Plaintiffs' characterization of the timing and content of Defendants' portion of the  
15 Joint Memorandum. If the Court allows Plaintiffs to file a responsive brief, as Plaintiffs  
16 request, Defendants request that the Court grant them the opportunity to file a reply to  
17 Plaintiffs' response.

## 18 **PLAINTIFFS' AND THE UNITED STATES' POSITION**

### 19 **I. Procedural Matters and Vesting of Independent Authority**

20 Plaintiffs and the United States maintain that the Court-appointed Monitor should  
21 be authorized to conduct the internal affairs investigations that should be re-opened  
22 pursuant to Paragraph 903 or initiated pursuant to Paragraphs 904 or 905. In the rare case  
23 in which members of the Monitor team have a conflict that cannot be resolved through the  
24 creation or maintaining of an ethical wall (i.e., Defendants' conduct in relation to 1,459  
25 IDs in Sergeant Knapp's possession), Plaintiffs and the United States request that the  
26 Court appoint another independent authority, with no ties to Defendants, to conduct the  
27 investigation.

28

1 Plaintiffs and the United States also maintain that the Monitor, or another  
2 independent authority where one is appointed by the Court, should have ultimate authority  
3 to determine discipline according to the applicable MCSO discipline matrix in cases re-  
4 opened under Paragraph 903 or initiated under Paragraphs 904 and 905. In such cases,  
5 Plaintiffs and the United States propose that if the Monitor (or other independent  
6 authority, if appointed) decides that the appropriate discipline is suspension, demotion, or  
7 termination, the employee should receive a letter notifying him or her of the proposed  
8 discipline. The employee should then be given an opportunity to have a pre-determination  
9 hearing before the Monitor (or independent authority, if appointed). This process will be  
10 adequate to protect the employee's due process rights under *Cleveland Bd. of Educ. v.*  
11 *Loudermill*, 470 U.S. 532 (1985). After the Monitor (or independent authority, if  
12 appointed) imposes final discipline, employees should be afforded the right to appeal the  
13 final decision of the Monitor (or independent authority, if appointed) to the Maricopa  
14 County Law Enforcement Merit Commission ("the County Merit Commission").  
15 Employees have a right to such an appeal under state law, which this Court may supplant  
16 upon a showing that the state law stands as an impediment to the enforcement of federal  
17 court orders or federal law. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 50-53 (1990)  
18 (finding that a district court order imposing a tax increase to fund a desegregation plan  
19 "contravened the principles of comity that must govern the exercise of the District Court's  
20 equitable discretion" because the district court could have ordered the local governmental  
21 authority to raise the necessary revenue itself). The Monitor's (or if applicable, the  
22 independent authority's) findings and disciplinary decision should be presented to the  
23 County Merit Commission. If the County Merit Commission alters or rescinds any  
24 findings or discipline, Defendants should inform the Court and the other parties, and the  
25 Court may then determine whether the Commission's decision stands as an impediment to  
26 the enforcement of the Court's orders or federal law and enter any appropriate orders.

27 Plaintiffs and the United States also submit that the Court should make a finding  
28 that, for investigations to be re-done pursuant to Paragraph 903 of the Findings of Fact

1 (Doc. 1677), the 180-day statute of limitations under A.R.S. § 38-1110 is an impediment  
2 to the enforcement of federal law and the Court's orders. This finding is amply supported  
3 by the Court's previous Findings of Fact and implicit in its order that investigations found  
4 void must be re-done. The Court should also order the County Merit Commission not to  
5 rescind or alter investigatory findings or discipline based on the statute of limitations.

6 Plaintiffs and the United States submit that all findings of fact made by this Court  
7 in the contempt proceeding (Doc. 1677), after a full evidentiary hearing, may be cited as  
8 the basis for findings in internal investigations (i.e., Sustained, Not Sustained, Exonerated,  
9 Unfounded) and for imposition of discipline in matters relating to these proceedings.

10 For future investigations undertaken by the Monitor under Paragraph 905,<sup>1</sup>  
11 Plaintiffs and the United States request that the Court order procedures that authorize the  
12 Monitor to conduct such IA investigations and to determine discipline (with the same  
13 appeal procedures outlined above), and as set forth in Plaintiffs' Memorandum on  
14 Remedies for Civil Contempt (Doc. 1684) at 8-9. However, in order to provide MCSO  
15 personnel with training and guidance for sustainable reform, Plaintiffs and the United  
16 States submit that the Court should grant the Monitor the authority to delegate those  
17 responsibilities to MCSO personnel in individual cases, in full or in part, with oversight  
18 and supervision by the Monitor. Consistent with this Court's Order of November 20,  
19 2014 (Doc. 795) at 18, individual members of the Monitor team who become involved in  
20 conducting investigations should be walled off from other members of the Monitor team.<sup>2</sup>

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21  
22 <sup>1</sup> As set forth in Plaintiffs' Memorandum on Remedies for Civil Contempt (Doc.  
23 1684), Plaintiffs and the United States maintain that the Monitor should have this  
24 authority in all IA cases involving policy violations bearing on issues relating to this case,  
25 including all potential policy violations relating to improper detentions, racial bias,  
immigration enforcement, and the seizure and handling of property and evidence. The  
Monitor should have authority in such cases without regard to whether the victims are  
members of the Plaintiff class.

26 <sup>2</sup> If the Court orders that the Monitor will have the authority to conduct  
27 investigations pursuant to paragraph 905 and to delegate those investigations to PSB in  
28 appropriate circumstances, Plaintiffs and the United States recommend that the Court  
order the Monitor to develop protocols, subject to the Court's approval, for walling off the  
members of the Monitor team who will conduct investigations and make delegation  
decisions.

1 Plaintiffs and the United States further submit that any recently initiated IA  
2 investigations based upon the review of newly reviewed “Armendariz-related” video files  
3 (*see, e.g.*, Doc. 1710) should be subject to the procedures ordered by the Court under  
4 Paragraph 905.

## 5 **II. Matters Subject to Immediate Determination of Discipline**

6 Plaintiffs and the United States request that, as to the principals who were charged  
7 as contemnors and therefore had an opportunity to be heard (Chief Deputy Sheridan and  
8 Lieutenant Sousa), the Monitor or the Court immediately determine appropriate discipline  
9 in the IA 14-542 and 14-543 cases relating respectively to commanders’ failures of  
10 supervision of Deputy Charley Armendariz and violations of the Court’s preliminary  
11 injunction. The Court’s contempt findings thoroughly address the facts underlying those  
12 investigations and no further investigation or process is necessary for those individuals.

13 Plaintiffs and the United States also request that the Monitor or the Court  
14 immediately determine appropriate discipline for the making of willful false statements  
15 made to the Court and the Monitor by Chief Deputy Sheridan (Doc. 1677, ¶¶ 87, 229-30,  
16 326, 333-39, 348, 385, 816, 832).

17 Plaintiffs and the United States also submit that all final disciplinary decisions  
18 reached in the internal investigations listed in Defendants’ spreadsheets of “Armendariz-  
19 related” investigations (Doc. 1673-1 and Doc. 1674) should be immediately examined by  
20 the Monitor to determine whether the facts as set forth in the IA files comport with the  
21 discipline imposed and the applicable MCSO discipline matrix. This process, which is  
22 focused on compliance with the discipline matrix in these IA cases, should not preclude  
23 re-investigation of any of the facts underlying these matters as set forth below and in  
24 Paragraph 904 of the Findings of Fact.

## 25 **III. Prioritization of Matters for New Investigations**

26 Plaintiffs and the United States submit that the following matters should be  
27 prioritized for investigation by the Monitor, or another independent authority if appointed:  
28

1           **A. IA Cases 14-542 and 14-543:** As to employees involved in the events  
2 underlying these two investigations other than Chief Deputy Sheridan and Lieutenant  
3 Sousa, these cases should be re-investigated and proper discipline imposed.

4           **B. Policy Violations in Mishandling of Internal Investigations:**  
5 Investigation of Chief Deputy Sheridan, Captain Bailey, Sergeant Tennyson, Detective  
6 Zebro, and any other MCSO personnel for violations of MCSO policy in the handling of  
7 internal investigations relating to this litigation. This should include, at a minimum:

- 8           1) The IA cases found by this Court to have been invalid, void, or deficient,  
9 as listed in the Appendix to the United States' Memorandum in  
10 Response to Findings of Fact (Doc. 1685).<sup>3</sup> Priority should be given to  
11 an investigation of mishandling of the 14-295 and 14-541 cases relating  
12 to thefts and mishandling of civilian property by MCSO personnel, and  
13 to improper practices in IA case 14-221 including the improper grouping  
14 of multiple instances of misconduct and attribution of policy violations  
15 apparently committed by numerous individuals to a deceased deputy.
- 16           2) The Defendants' apparent failure to initiate IA investigations of the  
17 events of May 14, 2014 (Count Three).
- 18           3) The handling of the investigation of the 1,459 IDs in Sergeant Knapp's  
19 possession, including the conduct of Chief Deputy Sheridan and Captain  
20 Bailey, among others.
- 21           4) The failure to investigate clear indications of retaliation against a Latino  
22 MCSO deputy in connection with his internal complaint of racial bias  
23 against fellow deputies in the IA 12-11 case. *See* Ex. 2521; Tr. of Sept.  
24 24, 2015, at 1247-58.
- 25           5) The handling of discipline in IA case 15-22, in which Chief Deputy  
26 Sheridan rescinded written discipline against Deputy Hechavarria on the

27  
28 <sup>3</sup> Two of the IA cases listed in Doc. 1685 were mislabeled. The reference to "IA #2015-541" should be 2014-541. And the case labeled as "IA #2014-021" should be 2015-21.



1 ground that “he was not the only deputy involved in the mishandling of  
2 the property.” Ex. 2062; Tr. of Sept. 24, 2015, at 1208-15.

- 3 6) Examination of the disciplinary findings in IA case 14-114, which  
4 concerned derogatory racist comments about Mexicans made by an  
5 MCSO detention sergeant and directed toward a Latino MCSO detention  
6 officer. The record indicates that the allegations were improperly  
7 categorized under the MCSO discipline matrix. *See* Ex. 2037, 2038; Tr.  
8 of Oct. 27, 2015, at 3584-89.

9 **C. Truthfulness Violations**

- 10 1) Investigation of policy violations in connection with willfully false  
11 statements made to the Court and the Monitor by Chief Trombi and  
12 Captain Bailey. *See* Doc. 1677, ¶¶ 87, 229-30, 326, 333-39, 348, 385,  
13 816, 832.  
14 2) Investigation of any MCSO personnel who have claimed that IDs found  
15 in their possession, or otherwise not properly accounted for, were used  
16 for training purposes, to determine whether such statements were  
17 truthful. *Id.* ¶ 638.

18 **D. Mishandling of the Court’s Orders Relating to Preservation of**  
19 **Documents**

- 20 1) Re-investigation of the 1,459 IDs in Sergeant Knapp’s possession.  
21 2) Investigation of the handling of the 50 hard drives obtained by  
22 Defendants from Dennis Montgomery.

23 **E. Policy Violations During Recorded Stops**

- 24 1) Re-investigation of IA cases 14-544 through 14-548, which involved  
25 traffic stops involving members of the Plaintiff class. The Court found  
26 deficiencies in these investigations. *Id.* ¶¶ 584-91.  
27 2) Re-investigation of IA case 14-785, which involved a complaint of racial  
28 profiling in connection with a traffic stop. The IA case file also



1 suggested that the MCSO investigator did not bother to contact  
2 eyewitnesses (the passengers in the vehicle). Ex. 2784; Tr. of Oct. 28,  
3 2015, at 3845-48.

- 4 3) Re-investigation of IA cases 14-545 (*see* Doc. 1677, ¶¶ 584-91), 14-562,  
5 and 14-563, which involved recorded traffic stops in which the  
6 reviewing MCSO lieutenant believed there was no apparent basis for the  
7 stop. Ex. 2943; Tr. of Oct. 28, 2015, at 3804-05.

8 **F. Theft and Mishandling of Property:** Investigations into all mishandled  
9 items of evidence/property. Priority should be given to:

- 10 1) Re-investigation of the IA 14-295 and IA-541 matters concerning former  
11 Deputy Cisco Perez’s allegations of “pocketing” of items by MCSO  
12 Human Smuggling Unit personnel. (This investigation should  
13 specifically include, among other issues, the role of Officer Raphaelita  
14 Montoya in connection with allegations of theft including IA 15-21 and  
15 IA 15-18, also listed below.)
- 16 2) Re-investigation of IA 15-18 concerning the discovery of CDs,  
17 departmental reports, license plates, IDs, and a passport. The Court  
18 found this investigation to be invalid. Doc. 1677, ¶ 738.
- 19 3) Re-investigation of IA 15-21 (and criminal case CIA 15-18) involving  
20 the possible theft of \$260. The Court found this matter was improperly  
21 investigated. *Id.* ¶¶ 748-51.
- 22 4) Re-investigation of cases IA 14-774 through IA 14-783, relating to IDs  
23 and/or license plates linked to deputies other than Deputy Armendariz.  
24 The Court found that these matters all involved members of the Plaintiff  
25 class and that the investigations were improperly abandoned by Sergeant  
26 Tennyson. *Id.* ¶¶ 641-47.
- 27  
28



1 by a date and time certain as ordered by the Court.

- 2 • After which, the remaining names will be submitted by the  
 3 Parties to the Court without identifying which Party  
 4 nominated the candidate. The Court will then select the  
 Independent Third Party.

5 This procedure is an accelerated one that will permit the parties to provide the Court with  
 6 candidates from each party for the Court's consideration.

7 **B. Disciplinary powers of the Independent Third Party.**

8 The independent third party can impose discipline pursuant to the appropriate  
 9 MCSO disciplinary matrix.<sup>4</sup> In addition, any determination made by the independent third  
 10 party regarding the IA's ordered by the Court should be final, subject to any available  
 11 administrative and/or appellate process provided under Arizona state law.

12 **II. NEW AND RE-OPENED IA INVESTIGATIONS.**

13 **A. New and re-opened IA Investigations to be conducted.**

14 **1. Sheriff Arpaio's concerns regarding use of the Court's Monitor  
 to conduct IA investigations and impose discipline.**

15 While the Court has inherent power to "invoke the weight of the judicial authority  
 16 if state and local authorities, who have the primary responsibility for curing constitutional  
 17 violations, fail in their affirmative obligations" to correct constitutional violations,  
 18 *Milliken v. Bradley*, 433 U.S. 267, 281 (1977), there are limits to the Court's inherent  
 19 power to do so. Under Article III, the judicial power granted to federal courts "is not an  
 20 unconditioned authority to determine the constitutionality of legislative or executive acts."  
 21 *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1037 (D. Neb.  
 22 2010). Injunctive relief must be tailored to the actual harm proven at trial. *See Lewis v.*  
 23 *Casey*, 518 U.S. 343, 358 (1996). Moreover, a court's exercise of its contempt authority  
 24 must be constrained by the principle that only the "least possible power adequate to  
 25 achieve the end proposed should be used in contempt cases." *Young v. U.S. ex rel.*  
 26 *Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987) (internal quotation marks omitted).

27 \_\_\_\_\_  
 28 <sup>4</sup> As stated in Section IV(A) below, Chief Deputy Sheridan is not subject to  
 MCSO's disciplinary matrix.

1           *Rizzo v. Goode*, 423 U.S. 362 (1976), is instructive on this issue. At issue in *Rizzo*  
2 were allegations that the Mayor, Police Commissioner of Philadelphia, and others  
3 permitted a pervasive pattern of illegal and unconstitutional mistreatment of Philadelphia  
4 minority citizens and other residents. *Id.* at 366. The district court imposed a  
5 comprehensive program for addressing such complaints. *Id.* at 362-63. The Supreme  
6 Court struck down the district court’s injunction, holding that the district court had  
7 overstepped its constitutional bounds. “[T]he principles of federalism . . . play such an  
8 important part in governing the relationship between federal courts and state governments  
9 . . . [w]hen it injected itself by injunctive decree into the internal disciplinary affairs of  
10 this state agency, the District Court departed from these precepts.” *Id.* at 380 (emphasis  
11 added). The Supreme Court continued:

12                         Where, as here, the exercise of authority by state officials is  
13                         attacked, federal courts must be constantly mindful of the  
14                         special delicacy of the adjustment to be preserved between  
                              federal equitable power and State administration of its own  
                              law.

15 *Id.* at 378 (citations and quotations omitted).<sup>5</sup> This delicate balance requires government  
16 to have the widest latitude in the “dispatch of its own internal affairs.” *Id.* at 378-79, citing  
17 *Cafeteria and Restaurant Workers Union Local 473 A.F.L.-C.I.O. v. McElroy*, 367 U.S.  
18 886, 896 (1961).

19           The failure to protect these sovereign choices is a failure to abide by the Guarantee  
20 Clause in Article IV, § 4, the Tenth Amendment of the United States Constitution, and  
21 ignores the federal judiciary’s duty to preserve the “healthy balance of power between the  
22 States and the Federal Government [designed to] reduce the risk of tyranny and abuse  
23 from either front.” *Gregory v. Ashcroft*, 501 U.S. 452, 458, 463 (1991) (citations omitted)

24                         <sup>5</sup> See also *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)  
25 (“It is difficult to think of a greater intrusion on state sovereignty than when a federal  
26 court instructs state officials on how to conform their conduct to state law.”); *City of Los*  
27 *Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (jurisprudential concerns of “equity, comity  
28 and federalism” sharply constrict federal judicial oversight of “state law enforcement  
authorities.”); *id.* at 113 (comity counsels in favor of permitting state judiciary systems to  
oversee state law enforcement practices); *O’Shea v. Littleton*, 414 U.S. 488, 499 (1974)  
(same).

1 (quoting U.S. Const. art. IV, § 4).<sup>6</sup> The overarching concern is particularly manifest here,  
2 given that Arizona county sheriffs derive their powers directly from the Arizona  
3 Constitution. AZ. CONST., art. XII, §§ 3, 4 (A county sheriff occupies a constitutionally-  
4 created, independently-elected county office with “powers . . . as prescribed by law.”).

5 Vesting final decision making authority over IA investigations in an extra-agency  
6 authority is counter to the “well-established rule that [a local government] has  
7 traditionally been granted the widest latitude in the dispatch of its own internal affairs.”  
8 *Rizzo*, 423 U.S. at 378-79 (internal quotations and citations omitted); *see also Missouri v.*  
9 *Jenkins*, 495 U.S. 33, 52 (1990) (“local officials should at least have the opportunity to  
10 devise their own solutions to [their own] problems” before intervention by a federal  
11 district court). Nevertheless, in a good faith effort to reconcile the Court’s view of  
12 remedial efforts required to restore the Court’s and the community’s confidence in MCSO  
13 processes and the required latitude afforded to MCSO in handling its internal affairs,  
14 Sheriff Arpaio agrees to vest such authority in an **independent objective third party**.

15 **2. Sheriff Arpaio’s concerns regarding constitutional due process**  
16 **issues and the Arizona’s Police Officer’s Bill of Rights.**

17 Sheriff Arpaio also reiterates to the Court his constitutional due process concerns  
18 regarding re-opening closed IA investigations and potential issues involving future IAs.  
19 “A threshold requirement to a substantive or procedural due process claim is the plaintiff’s  
20 showing of a liberty or property interest protected by the Constitution.” *Wedges/Ledges of*  
21 *California, Inc. v. City of Phoenix*, Ariz., 24 F.3d 56, 62 (9th Cir. 1994); *see also Board of*  
22 *Regents v. Roth*, 408 U.S. 564, 569 (1972); *Kraft v. Jacka*, 872 F.2d 862, 866 (9th Cir.  
23 1989). A protected property interest is present where an individual has a reasonable

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24 <sup>6</sup> Arizona Courts have also refused to permit independent agencies to supervise and  
25 impose discipline on County officers. In *Hounshell v. White*, 202 P.3d 466 (Ariz. App.  
26 2008), the Court of Appeals of Arizona considered whether an Arizona Board of  
27 Supervisors has “power to supervise and impose discipline” on “employees of other  
28 county officers,” concluding it does not: “The Arizona legislature knows how to expressly  
grant a board of supervisors the power to supervise and impose discipline when it wishes  
to do so. It has not done so with respect to deputies and employees of other county  
officers, and we can only conclude that its choice in this regard was intentional.” *Id.* at  
471.

1 expectation of entitlement deriving from “existing rules or understandings that stem from  
2 an independent source such as state law.” *Roth*, 408 U.S. at 577. “A reasonable  
3 expectation of entitlement is determined largely by the language of the statute and the  
4 extent to which the entitlement is couched in mandatory terms.” *Association of Orange*  
5 *Co. Deputy Sheriffs v. Gates*, 716 F.2d 733, 734 (9th Cir. 1983), cert. denied, 466 U.S.  
6 937, 104 S. Ct. 1909, 80 L.Ed.2d 458 (1984). Although procedural requirements  
7 ordinarily do not transform a unilateral expectation into a protected property interest, such  
8 an interest is created “if the procedural requirements are intended to be a ‘significant  
9 substantive restriction’ on ... decision making.” *Goodisman v. Lytle*, 724 F.2d 818, 820  
10 (9th Cir.1984) (citations omitted).

11 The Ninth Circuit has found that various state statutes and city codes create  
12 constitutionally protected due process rights. *See Wedges*, 24 F.3d at 63 (property interest  
13 is created by the Phoenix City Code requiring the city to issue an operating license if a  
14 coin-operated machine satisfies the regulatory definition of a “game of skill”); *Sanchez v.*  
15 *City of Santa Ana*, 915 F.2d 424, 429 (9th Cir. 1990) (finding constitutionally protected  
16 property interest in merit pay where city grievance procedure “implicitly restricted the  
17 City's authority to demote an employee”).<sup>7</sup>

18 Similarly, Defendant Arpaio reiterates that the Arizona Police Officer’s Bill of  
19 Rights creates *federally* protected constitutional rights. Arizona has codified a  
20 comprehensive police officer’s “bill of rights.” A.R.S. §§ 38-1101-1115. The purpose of  
21 this statutory scheme is to provide special protections for law enforcement officers,  
22 including those at MCSO, who are subject to an internal affairs investigation and/or  
23 disciplinary action. *See* A.R.S. § 38-1101(8)(c) (“Law enforcement officer” means “[a]

24  
25 <sup>7</sup> *Accord Parks v. Watson*, 716 F.2d 646, 657 (9th Cir.1983) (Court held that the  
26 criteria for vacating plotted city streets created a property interest); *see also T.T. v.*  
27 *Bellevue Sch. Dist.*, 376 Fed. Appx. 769, 771 (9th Cir. 2010) (remanding to trial court to  
28 determine “whether the Washington Administrative Code (“the Code”) gave T.T. a  
reasonable expectation of a protected entitlement because the mandatory nature of the  
Code sections created a significant substantive restriction on the school district's decision  
making.”).

1 nonprobationary regularly appointed and paid deputy sheriff of a county.”). This statutory  
2 scheme, in part, ensures that officers receive adequate notice of an internal investigation  
3 (A.R.S. § 38-1104(A)), the names of all individuals associated with the investigation  
4 (A.R.S. § 38-1106(A)(1)), notice of similar discipline ordered against other officers  
5 (A.R.S. § 38-1104(E)), “just cause” for termination (A.R.S. § 1101(7)), specific time limits  
6 for conducting an IA investigation (A.R.S. § 38-1110), and specific appellate rights from  
7 a disciplinary decision (A.R.S. §§ 38-1106, -1107). These statutes create constitutionally  
8 protected due process rights because they stem from state law and contain “particularized  
9 standards or criteria” to create a property interest. *Allen v. City of Beverly Hills*, 911 F.3d  
10 367, 370 (9th Cir. 1990); *see also Roth*, 408 U.S. at 577; *Gates*, 716 F.2d at 734.

11 With respect to ¶¶ 903-905 of the Court’s Findings of Fact (Doc. 1677), A.R.S. §  
12 38-1110 provides that an “employer shall make a good faith effort to complete any  
13 investigation of employee misconduct within one hundred eighty calendar days after the  
14 employer receives notice of the allegation by a person authorized by the employer to  
15 initiate an investigation of the misconduct.” Failure to conduct an investigation within  
16 one hundred eighty calendar days may result in the appeal board dismissing any discipline  
17 ordered if it is determined that the employer did not make a good faith effort to complete  
18 the investigation within one hundred eighty calendar days. A.R.S. § 38-1110(C). In  
19 addition, if an officer is successful in reversing a termination on appeal, he may be  
20 awarded monetary damages and attorneys’ fees. *See* A.R.S. § 38-1106(J); § 38-1107(C)-  
21 (E). Invalidating previous IA investigations, disciplinary decisions, and/or grievance  
22 decisions by MCSO and instituting new ones in their place might violate the timeliness  
23 provisions of the statutory scheme. Likewise, the new investigations outlined in ¶ 904  
24 might violate the 180-day deadline where MCSO received notice of an allegation by a  
25 person authorized by the employer to initiate an investigation of the misconduct. *See*  
26 A.R.S. § 38-1104(A), § 38-1110.

27 Finally, to the extent an individual exercises his or her right to appeal discipline  
28 imposed as a result of an IA ordered by this Court to the Maricopa County Law



1 Enforcement Merit System Counsel<sup>8</sup> or an Arizona court, and such discipline is reversed,  
 2 it is questionable whether this Court can lawfully invalidate that decision.<sup>9</sup> *See In re*  
 3 *Gruntz*, 202 F.3d 1074, 1078 (9th Cir. 2000) (“Thus, it follows that federal district courts  
 4 have no authority to review the final determinations of a state court in judicial  
 5 proceedings.”) (citation omitted).<sup>10</sup>

6 **3. The Court’s Findings of Fact should not be included in any IA**  
 7 **investigation ordered by the Court.**

8 In order to accommodate the due process rights stated in the sections above, any IA  
 9 investigations ordered by this Court should be wholly separate, and independent from the  
 10 Court’s Findings of Fact (Doc. 1677). Sheriff Arpaio, Chief Deputy Sheridan, Joseph  
 11 Sousa, and the other unnamed parties in this action were never on notice that the purpose  
 12 of the contempt proceedings was to conduct a fact finding investigation into the adequacy  
 13 of MCSO’s internal affairs investigations, or the adequacy of discipline imposed as a  
 14 result of those investigations. [See Doc. 880 (setting forth the issues to be decided in the  
 15 contempt proceeding as follows: (1) failing to implement and comply with the Court’s

16 <sup>8</sup> The Law Enforcement Merit System Counsel operates independently of Maricopa  
 17 County.

18 <sup>9</sup> Pursuant to A.R.S. §§ 38-1106, -1107, it is an individual’s right to appeal  
 19 discipline imposed as a result of any IA ordered by this Court to the Arizona Superior  
 20 Court. *See also* A.R.S. § 38-1107(A) (“If a law enforcement officer is demoted or  
 21 terminated as the result of an employer ... reversing the decision or recommendation of a  
 22 hearing officer, administrative law judge or appeals board ... the law enforcement officer  
 23 may bring an action in superior court for a hearing de novo on the demotion or  
 24 termination.”). If the Court orders new IAs and MCSO agrees to this process, Sheriff  
 25 Arpaio believes that any new IA resulting in a demotion or termination of an MCSO  
 26 employee would implicate this statutory provision. Moreover, because the Court and all  
 27 the parties agree that MCSO’s disciplinary matrix will be applied to any findings resulting  
 28 from the new and re-opened IA investigations, Sheriff Arpaio asserts that the Arizona’s  
 Police Officer’s Bill of Rights applies to any investigations ordered by the Court.

<sup>10</sup> *Accord Dubinka v. Judges of Superior Court of State of Cal. for County of Los Angeles*, 23 F.3d 218, 221 (9th Cir. 1994) (“Federal district courts ... may not exercise appellate jurisdiction over state court decisions.”); *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) (federal bankruptcy courts should not invalidate the results of state criminal proceedings); *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) (federal statutory jurisdiction over direct appeals from state courts lies exclusively in the Supreme Court and is beyond the original jurisdiction of federal courts); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (the *Rooker* jurisdictional bar extends to particular claims that are “inextricably intertwined” with those a state court has already decided).

1 preliminary injunction; (2) violating discovery obligations; and (3) acting in derogation of  
2 the Court's May 14, 2014 Order)].<sup>11</sup>

3 As such, the civil contemnors and others did not have a full and fair opportunity to  
4 address the full gamut of the issues involved in the IA investigations invalidated by this  
5 Court and future ones that the Court has contemplated in its Findings of Fact.  
6 Specifically, the Court's Findings of Fact invalidated previous IA investigations and  
7 suggested additional investigations on the basis that "[a]n effective and honest internal  
8 affairs policy is a necessary element of the MCSO's self-regulation" and that the IA's  
9 litigated for the court were "relevant to assessing relief" in the contempt proceedings.  
10 [Doc. 1677 at ¶ 889]. Therefore, given that the Court's Findings of Fact regarding IA  
11 investigations went to the remedy the Court would order as part of the three clearly  
12 defined topics in the Court's Order to Show Cause, and were not intended to be a final  
13 evaluation of the investigations themselves or the discipline to be imposed, additional and  
14 independent fact finding and investigation should occur during *any* new IA ordered by the  
15 Court.

16 **4. Investigations involving MCSO command staff, invalidated by**  
17 **the Court's Findings of Fact, and those that involve the interests**  
18 **of the plaintiff class should be conducted by the independent**  
**third party.**

19 Any investigation or re-investigation of MCSO command staff suggested by the  
20 Court's Findings of Fact should be conducted by the appointed independent third party  
21 authority. In order to have a truly independent investigation into matters identified in the  
22 Findings of Fact, the person conducting the investigation should not be the Monitor, who  
23 is an agent of the Court. An inherent conflict exists if the Monitor reaches a different  
24 conclusion in its investigation than the Court reached in its Findings of Fact. Accordingly,

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25 <sup>11</sup> Although the Court's Findings of Fact indicates that the Court fully advised  
26 Defendants and several non-party contemnors that the adequacy and good faith of their  
27 investigations would be subject to the evaluation by the Parties and the Court, this topic  
28 was not addressed in the Court's Order to Show Cause, which is the critical pleading  
providing Defendants notice and opportunity to be meaningfully heard on the issues to be  
litigated during these contempt proceedings.

1 in light of the due process concerns expressed in the preceding sections, any future  
 2 investigations should be entirely new investigations, based on an objective and fresh  
 3 review of the facts, and carried out by an independent authority that has absolutely no  
 4 prior involvement in the events at issue.

5 Sheriff Arpaio reiterates that during the May 31, 2016 hearing, the Court plainly  
 6 stated that it will carefully consider Sheriff Arpaio's proposals on this issue and that to the  
 7 extent the Court and the Sheriff can arrive at an agreement, that the Court and the Sheriff  
 8 ought to make that effort. [5/31/16 RT at 75-76]. In light of the concerns raised by the  
 9 Sheriff regarding the independence of the Court's Monitor, Sheriff Arpaio believes that a  
 10 reasonable middle ground for the IA's that the Court is going to order as a result of its  
 11 Findings of Fact is that they should be performed by the independent third party.<sup>12</sup>

12 **5. Investigations involving other MCSO personnel should be**  
 13 **performed by MCSO with the Monitor's supervision.**

14 Any investigation or re-investigation not involving MCSO command staff or the  
 15 interests of the plaintiffs' class should be performed by MCSO's Professional Standards  
 16 Bureau ("PSB"), and be completely transparent to the Court's Monitor to ensure that the  
 17 IA function is being carried out in a responsible manner. Pursuant to the Court's  
 18 recommendations, the following is Sheriff Arpaio's proposed procedure for this process:

- 19 • PSB will conduct the initial investigation, which will be  
 presented to Captain Stephanie Molina for findings.
- 20 • Upon completion of the findings, the packet will be sent to  
 the legal liaison for Compliance to complete its quality  
 21 control check. If there is an identifiable issue that needs  
 22 PSB attention, the packet will be resubmitted to PSB.
- 23 • Once approval from Compliance is obtained, the packet  
 will then be presented to the Appointed Authority. If the  
 24 packet relates to a sworn officer, the Appointed Authority  
 will be Chief Kenneth Holmes. If the packet relates to a  
 25 detention officer, the Appointed Authority will be Chief  
 Donald Marchand.
- 26 • The PSB packet will be reviewed by the Appointed

27 \_\_\_\_\_  
 28 <sup>12</sup> Of course, as stated above, this does not divest that individual of their appellate  
 rights under the Arizona Police Officer's Bill of Rights.

1 Authority regardless of whether PSB makes a sustained or  
2 non-sustained finding.

- 3 • The Chief Deputy will make a final review of the  
4 Appointed Authority's findings.<sup>13</sup>
- 5 • All findings and discipline imposed by the Appointed  
6 Authority and Chief Deputy will be reported to the  
7 Monitor and the Court.

8 If the investigation is at the District level, the following procedure should be  
9 followed:

- 10 • The assigned district investigator (a MCSO command level  
11 deputy) will perform the investigation.
- 12 • Once completed, PSB will perform the quality control of  
13 all district investigations. Additional sworn personnel  
14 have been added to PSB to assist with the increased  
15 caseload and quality control with district cases.
- 16 • If the district investigation is not satisfactory, it will be  
17 returned to the district for completion.
- 18 • Chief Kenneth Holmes will review the district  
19 investigation and make a final determination.
- 20 • All findings and discipline imposed by Chief Kenneth  
21 Holmes will be reported to the Monitor.

22 **B. Use of the Court's Findings of Fact during new and re-opened IA**  
23 **investigations.**

24 As stated above, Sheriff Arpaio's position on this issue is that the new IAs  
25 conducted by either the independent third party or MCSO cannot rely on the Court's  
26 Findings of Fact, especially when direct application of the Court's Findings of Fact may  
27 implicate termination under MCSO's disciplinary matrix. Discharge of an employee  
28 assumes a constitutional dimension when the employee has a property interest in  
continued employment and, therefore, he may not be terminated without due process.

*Gini v. Las Vegas Metro. Police Dept.*, 40 F.3d 1041, 1044 (9th Cir. 1994) (citing *Board*

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26 <sup>13</sup> Although Sheriff Arpaio initially suggested the complete removal of the Chief  
27 Deputy from any involvement in the IA process, pursuant to this Court's encouragement  
28 that the Chief Deputy continues to be involved in the IA process, Sheriff Arpaio has  
modified his proposal out of respect for the Court's recommendation. [See 5/31/16 RT at  
101, 103].

1 *of Regents v. Roth*, 408 U.S. 564 (1972)).

2 Application of the Court's Findings of Fact, particularly those that involve its  
3 findings of truthfulness, to any future IA investigation would preclude any independent  
4 investigation of facts and determination of discipline by the independent authority and  
5 simply move straight to imposing discipline. This is not the kind of due process that the  
6 Supreme Court and the Ninth Circuit has held is required for such a significant  
7 deprivation of a deputy's property interest in continued employment at MCSO. *See*  
8 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("the root requirement"  
9 of the Due Process Clause is "that an individual be given an opportunity for a hearing  
10 *before* he is deprived of any significant property interest.").

### 11 **III. NEW IA'S LISTED BY PLAINTIFFS.**

12 Plaintiffs have listed various IA investigations in Section III of their proposal that  
13 this Court should order to be investigated. Without waiving any rights to challenge the  
14 Court's authority to invalidate or institute new IA investigations, Sheriff Arpaio does not  
15 contest the institution of any IA ordered by this Court pursuant to its Findings of Fact,  
16 with the exception outlined below regarding the Chief Deputy.<sup>14</sup> **However, Sheriff**  
17 **Arpaio cannot waive a principal's right to challenge the re-opening or institution of**  
18 **new IAs ordered by this Court based on any applicable state or federal law.**

### 19 **IV. IA INVESTIGATIONS TO BE CONDUCTED INVOLVING CHIEF** 20 **DEPUTY SHERIDAN.**

#### 21 **1. The Chief Deputy is not subject to MCSO's disciplinary matrix.**

22 The Maricopa County Attorneys' Office ("MCAO") recently issued a published  
23 opinion stating that the Chief Deputy of MCSO is not subject to the MCSO disciplinary

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24  
25 <sup>14</sup> Sheriff Arpaio reiterates that any investigations ordered by the Court involving  
26 MCSO command staff or the interests of the plaintiff class should be done by an  
27 Independent Third Party Authority. Any investigations unrelated to the interests of the  
28 Plaintiff class should be done by MSCO with reporting to the Court's monitor.

**In addition, Sheriff Arpaio believes that this is one area that expert opinion on  
whether the IA investigations suggested by the Plaintiff class are necessary because  
they were improperly conducted.**

1 matrices because he is an unclassified employee and that only the Sheriff can discipline  
2 the Chief Deputy. [See MCAO Opinion No. 2016-001, attached as **Exhibit A**].  
3 Accordingly, pursuant to the authority stated in MCAO Op. No. 2016-001, the Chief  
4 Deputy will not agree to be subject to discipline pursuant to MCSO's disciplinary matrix  
5 for any new or re-opened IA ordered by the Court.

6 **2. The Chief Deputy agrees to application of the disciplinary matrix**  
7 **for IA 543.**

8 Although not required, the Chief Deputy will accept the original policy violation  
9 findings of Donald Vogel that Chief Michael Olson previously sustained, a suspension of  
10 40 hours, (but then overturned following Chief Sheridan's name clearing hearing), as  
11 outlined in the Court's Findings of Fact at paragraph 435. As a gesture of goodwill, in  
12 light of the Court's Findings of Fact, Chief Deputy Sheridan will accept the discipline  
13 previously imposed (a suspension of 40 hours) for these findings pursuant to MCSO's  
14 disciplinary matrix.<sup>15</sup>

15 \* \* \*

16 DATED this 14th day of June, 2016.

17  
18 By: /s/ Cecillia D. Wang  
19 Cecillia D. Wang (*Pro Hac Vice*)  
20 Andre I. Segura (*Pro Hac Vice*)  
21 Nida Vidutis\*  
22 ACLU Foundation  
23 Immigrants' Rights Project

24 <sup>15</sup> While Defendants are committed to doing everything in their power to assist the  
25 Court and Plaintiffs in resolving this case to everyone's satisfaction, they note that the  
26 Court's Findings of Fact remain unchallenged. Defendants are well aware of  
27 Fed.R.Civ.P. 52(a)(5) ("A party may later question the sufficiency of the evidence  
28 supporting the findings, whether or not the party requested findings, objected to them,  
moved to amend them, or moved for partial findings."), and reserve the right to challenge  
the Court's Findings of Fact in this Court or on appeal, notwithstanding any consent to, or  
agreement with, the Court re-opening of old IA investigations pursuant to its Findings of  
Fact, instituting new IA investigations involving members of MCSO, or involving an  
independent third party to oversee these IA investigations and impose discipline.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of June, 2016, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing; and served on counsel of record via the Court’s CM/ECF system.

/s/ Cecillia D. Wang