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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MANUEL de JESUS ORTEGA MELENDRES, JESSICA QUITUGUA RODRIQUEZ, DAVID RODRIQUEZ, VELIA MERAZ, MAUAL NIETO, JR. on behalf of themselves and all others similarly situation, and SOMOS AMERICA,

Plaintiffs,

vs.

JOSEPH M. ARPAIO, in his individual and official capacity as Sheriff of Maricopa County, Arizona; MARICOPA COUNTY, ARIZONA SHERIFF'S OFFICE, and MARICOPA COUNTY, ARIZONA

Defendants.

No. CV 07-02513-PHX-MHM

DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

(Oral Argument Requested)

Pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, defendants Joseph M. Arpaio, Maricopa County, and the Maricopa County Sheriff's Office respectfully move the Court for its Order dismissing Plaintiffs' First Amended Complaint (Doc. # 26) and/or certain claims contained therein for failure to state a claim against these defendants upon which relief can be granted.

This Motion is supported by the following Memorandum of Points and Authorities, the Court's entire file in this matter, and any oral argument that the Court may wish to hear.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit arises from plaintiffs' claim that they were unlawfully stopped and detained by Maricopa County Sheriff's Deputies because of their race and/or national origin. As a result of the foregoing, plaintiffs have filed a four-count proposed class action Amended Complaint against the defendants, alleging violations of their Arizona state and federal constitutional rights.

Plaintiffs' Amended Complaint, however, fails to state claims upon which relief can be granted against these defendants. As such, defendants file this Motion seeking to dismiss as a matter of law plaintiffs' Amended Complaint in its entirety and/or certain claims contained therein.

II. RULE 12(b)(6) STANDARD

A complaint should be dismissed if it appears beyond doubt that a plaintiff can prove no set of facts in support of a claim which would entitle the plaintiff to relief. *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th 2000). In considering a motion to dismiss for failure to state a claim, all factual allegations of the complaint are presumed true and all reasonable inferences are made in favor of the non-moving party. *Rhodes v. Robinson,* 408 F.3d 559, 563 (9th 2005). However, legal conclusions or characterizations in a complaint do not preclude dismissal merely because they are cast in the form of factual allegations as such conclusions or characterizations are not entitled to a presumption of truthfulness. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th 2004).

III. LAW AND ARGUMENT

A. SA/WAA Lacks Standing.

A parties' standing to bring a lawsuit is a fundamental threshold inquiry. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Whether a party has standing is a question of law for the Court to decide. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002). The United States Supreme Court, therefore, directs that "[t]he federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231

(1990) (quoting *Allen v. Wright,* 486 U.S. 737, 750 (1984)), overruled in part, on other grounds, *City of Littlejohn v. Z.J. Giffs D-4, L.L.C.,* 541 U.S. 774 (2004).

Consistent with these principals, federal courts consistently hold that "[s]tanding is an essential component of the case or controversy requirement of Article III, section 2 of the U.S. Constitution." *Caroll v. Nakatani,* 342 F. 3d 934, 940 (9th Cir. 2003). The United States Supreme Court has established three "irreducible standing requirements" for any plaintiff to meet:

> (1) the plaintiff must have suffered an "injury in fact," which is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) the injury must be caused by the defendant; and (3) it must be likely, rather than speculative, that the injury will be redressable by the court.

Id. A party seeking the exercise of federal jurisdiction in its favor bears the burden of alleging sufficient facts demonstrating proper standing. *FW/PBS,* 493 U.S. at 231; *Warth v. Seldin,* 422 U.S. 490, 518 (1975). If any plaintiff fails to assert the necessary factual allegations, that plaintiff has no standing to bring the lawsuit. *FW/PBS,* 493 U.S. at 231.

Our Supreme Court has repeatedly refused to recognize a generalized grievance against allegedly illegal government conduct as sufficient to confer standing. *United States v. Hays*, 515 U.S. 737, 743 (1995). The Court requires that even if a government acts illegally, such as in discriminating based on race, the resulting injury "accords a basis for standing only to those persons who are **personally** denied equal treatment." *Allen v. Wright*, 468 U.S. 737, 755 (1984) (emphasis added). Moreover, the Supreme Court holds that even when a plaintiff has alleged a redressable injury sufficient to satisfy the standing requirements of Article III, federal courts should refrain from "adjudicating abstract questions of wide public significance which amount to generalized grievances." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982).

Only a person who was denied a privilege, benefit, or constitutional right by the conduct of a defendant has "standing to challenge" that conduct. *See*, *e. g., Comfort v. Lynn School Committee*, 418 F.3d 1, 11 (1st Cir. 2005). "Plaintiffs must demonstrate their

standing to sue, which includes, a showing of **actual injury to their** legally protected rights." *Tennison v. Paulus*, 144 F. 3d 1285, 1287 (9th Cir. 1998) (emphasis added). Federal court jurisdiction "can only be invoked when the plaintiff himself has suffered 'some threatened or actual injury resulting from the punitively illegal action.'" *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980) (quoting *Linda R. S. v. Richard D. et al.,* 410 U.S. 614, 617(1973).

In the absence of injury to itself, an association may have standing solely as a representative of its members. *Warth v. Seldin*, 422 U.S. 490 (1975). However, an association has such standing only if: (a) its members would have standing to sue in their own right; (b) the interests of the organization sought to be protected are relevant to the organization's purpose; and (c) neither the claim asserted nor the relief sought requires the participation of individual members of the organization in the lawsuit. *International Union, UAW v. Brock*, 477 U.S. 274, 282 (1986).

Here, the proposed plaintiff Somos America/We Are America ("SA/WAA") has failed to allege facts establishing the "irreducible" elements required for legal standing. *Lujan*, 454 U.S. at 472.

1. <u>SA/WAA lacks standing because it has failed to sufficiently allege an actual injury to it, injury to its members, and that the interests it seeks to protect are relevant to its purpose.</u>

The Amended Complaint's tenth paragraph alleges that SA/WAA is "a community-based non-profit membership organization, comprised of grassroots organizations, community and religious leaders, labor unions, students and others, established in March 2006 to mobilize for equal rights for immigrant communities in Arizona and for comprehensive immigration reform." The eleventh paragraph alleges that "[u]pon information and belief, because of their race, color, and/or ethnicity, [SA/WAA] members have been unlawfully targeted, stopped, questioned and or detained" by defendants' alleged policies. Paragraph twelve alleges that SA/WAA "has experienced an increase in various requests for assistance from persons who have been negatively impacted by defendants'

actions… [and] its limited resources have been, and continue to be, diverted and drained" as a result of defendants' alleged action. These allegations are insufficient to confer standing.

There is no *actual* injury alleged to have been suffered by SA/WAA. In fact, SA/WAA does not allege that it has ever been targeted, stopped, questioned, detained, or even negatively impacted by defendants' alleged conduct. It does not allege that it has been denied any constitutional right. It does not allege any specific irreparable injury to it as an entity. It does not allege that it is in danger of some direct injury as a result of defendants' law enforcement policy. Accordingly, the *only* manner in which SA/WAA can have standing is through "association" standing. *Brock*, 477 U.S. at 282.

SA/WAA, however, lacks "association" standing. SA/WAA does not directly and clearly allege in the Amended Complaint that any specific member has been denied any constitutional right by defendants' alleged actions. It does not allege that any of its alleged members -- i.e., the "grassroots organizations, community and religious leaders, labor unions, students and others" which comprise SA/WAA -- would have standing to sue in their own right. Indeed, there is nothing in the record to suggest that any individual member of SA/WAA has standing.

At most, SA/WAA can only ambiguously allege "*upon information and belief*," that unspecified members have had their constitutional rights supposedly violated by defendants' alleged conduct. *See, e.g.,* Amended Complaint at ¶ 11. The barren allegation that "[s]everal individual members have reported to [SA/WAA] that they have been stopped while driving in Maricopa County by MCSO officers without good cause and subjected to mistreatment" is legally inadequate to invoke "association" standing in this case. The "several members" are not identified, not named plaintiffs, and there are no allegations that the unspecified "several members" are, in fact, actual, registered, and *bona fide* members of SA/WAA at the time of the alleged stops when they supposedly suffered a constitutional deprivation. *Legal Aid Society of Hawaii v. Legal Services Corp.*, 145 F.3d 1017, 1030 (9th Cir. 1998). Moreover, SA/WAA has completely failed to allege that any of these members have suffered **an actual injury to their** legally protected rights as required by law.

Tennison, 144 F. 3d at 1287; *City of South Lake Tahoe,* 625 F.2d 231. These failures, alone, are fatal to SA/WAA's alleged standing.

SA/WAA also fails to sufficiently allege that the interests of it, as an association, are relevant to the lawsuit. *Brock*, 477 U.S. at 282. Plaintiffs' Amended Complaint alleges that SA/WAA was established in March 2006 to mobilize for comprehensive immigration reform. There is no allegation attempting to demonstrate how the stated purpose of comprehensive immigration reform is relevant to this action to justify "association" standing.[1]

Other than merely claiming that it voluntarily acts to help those persons of "Latino descent" (Amended Complaint at ¶ 12) who "request assistance… [because they have been] negatively impacted by defendants' actions," SA/WAA makes no allegation of a contractual or other legally recognized relationship that would allow it to bring this lawsuit on its own behalf. *In short, SA/WAA has alleged only a generalized grievance*: it disagrees with the defendants' law enforcement policy in conducting crime suppression sweeps and chooses to spend its money to help those persons it believes are directly affected by that policy.

SA/WAA's sole basis for purported "standing" is precisely the type of "generalized grievances" by a community member that the Supreme Court holds is insufficient to create standing as a matter of law. *See Hays*, 515 U.S. at 737; *Valley Forge Christian College*, 454 U.S. at 474-75; *Allen*, 468 U.S. at 755. Any tangible effect of the defendants' law enforcement policy on SA/WAA is too "remote, fluctuating, and uncertain" to confer standing on it. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). As held by the Supreme Court:

> The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally…. Here the party plaintiffs have no such case.

[1] Plaintiffs also allege that SA/WAA exists "to mobilize for equal rights for immigrant communities in Arizona." While defendants can assume how this stated purpose is connected to the stated purpose of the lawsuit, plaintiffs surprisingly make no allegation connecting that stated organizational purpose with the purpose of the lawsuit and, therefore, they fail to sufficiently plead "association" standing of SA/WAA.

Id. at 488. The Court, therefore, should dismiss SA/WAA as a plaintiff for the lack of standing.

2. SA/WAA lacks third party standing.

Because SA/WAA has no actual injury and its grounds for "association" standing is tenuous at best, defendants expect that plaintiff may attempt to claim standing for SA/WAA under a theory commonly referred to as "third party" standing. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 419 (1991). That theory, however, still will not give standing to SA/WAA because it makes no allegations justifying third party standing.

In *Powers*, the Supreme Court held that a criminal defendant had standing to assert an equal protection challenge on behalf of jurors that were improperly excluded from his trial. *Id*. The Court allowed a plaintiff (i.e., the criminal defendant) to assert standing on behalf of "third parties" (i.e., the jurors in his trial) condition upon the satisfaction of three criteria. These criteria are: (1) the litigant must have suffered an "injury in fact," thus giving him a "sufficiently concrete interest" in the outcome of the issue in dispute; (2) the litigant must have a close relation to the third party; and (3) some hindrance must exist that prevents the third party's from protecting his own interests." *Id*. at 411. SA/WAA has not alleged in the Amended Complaint any of these three criteria.

First, as discussed earlier in this Motion, SA/WAA is not alleged to have had an "injury in fact." Without an injury in fact to SA/WAA, it does not have a sufficiently concrete interest in the resolution of the legal matter before the Court in this lawsuit. Second, plaintiffs have made no allegation showing that SA/WAA has any "close relationship" with any third party on whose behalf they claim to bring this purported class action lawsuit. SA/WAA is essentially a civil rights group of political activists that wish defendants' law enforcement policy regarding crime suppression sweeps was different, and that it could spend their time and money in other ways. While the wishes of SA/WAA are assumed sincere, the wishes remain inadequate to confer legal standing.

Third, plaintiffs have failed to allege any "hindrance" to any third party's ability to protect their own interests that can only be protected by SA/WAA as a plaintiff. For these reasons, plaintiffs have failed to make sufficient allegations that SA/WAA has "third party"

standing. *Id*. As a consequence, the Court should dismiss SA/WAA as a party plaintiff.

B. Plaintiffs' Constitutional Claims at Counts One (Equal Protection), Two (Federal Unreasonable Search and Seizure) and Three (Arizona Search and Seizure) Fail as a Matter of Law.

Plaintiffs sue the defendants because they were pulled over in traffic stops by Maricopa County Sheriff's Office ("MCSO") deputies during crime suppression sweeps. They claim to subjectively believe they were targeted for the stops by the mere fact of the color of their skin.[2] The fatal problem with the federal and Arizona law based claims of the plaintiffs Amended Complaint are two fold.

First, they do not allege in their Amended Complaint how it is unlawful or a violation of anyone's civil rights under the federal Fourth and Fourteenth Amendment or the Arizona Constitution regarding unreasonable search and seizure, for a peace office to make a traffic stop that is supported by probable cause. Second, they do not sufficiently allege that similarly situated members of non-minority groups were treated differently under the same circumstances.

1. The Law.

To establish a Section 1983 claim under the Fourteenth Amendment for unconstitutional selective enforcement and unreasonable search and seizure[3], the plaintiff must show: (1) the absence of probable cause for the traffic stop as to each of the proposed plaintiffs, *Hartman v. Moore,* 547 U.S. 250, 262, 265 (2006) (in context of absence of probable cause for a criminal prosecution); *Virginia v. Moore*, __ U.S. __, 128 S.Ct. 1598, 1604 (2008) (officers did not violate constitutional rights by arresting motorist whom they had probable cause to believe had violated Virginia law by driving with a suspended license); and (2) that similarly situated members of other, usually majority, groups were treated differently. *United States v. Armstrong*, 517 U.S. 456 (1996); *Farm Labor*

[2] Conclusory allegations of generalized racial bias do not establish discriminatory intent, and a plaintiff must allege more to support a claim that a defendant acted with racial animus. *Jones v. School Dist. of Philadelphia*, 19 F.Supp.2d 414, 421 (E.D. Pa. 1998), *aff'd,* 198 F.3d 403 (3d Cir. 1999) (citing to *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp*., 429 U.S. 252, 264-68 (1977).

[3] Plaintiffs' Amended Complaint at the First Claim for Relief alleges a Fourteenth Amendment violation of the right to equal protection for what appears to be a selective enforcement claim. Plaintiffs' Second Claim for Relief alleges unreasonable search and seizure under the Fourth and Fourteenth Amendments. Plaintiffs' Third Claim for relief alleges essentially unreasonable search and seizure under the Arizona Constitution, Article II, § 8.

Organizing Comm. v. Ohio State Highway Patrol, 308 F.3d 523, 535 n.4 (6th Cir. 2002); *Pyke v. Cuomo*, 258 F.3d 107, 109-110 (2d Cir. 2001); *cf. United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000).

As the United States Supreme Court emphasized in *Armstrong*, this Fourteenth Amendment test imposes a "demanding standard" of pleading as a "significant barrier to the litigation of insubstantial claims." *Armstrong*, 517 U.S. at 463-64. This "rigorous standard," *id*. at 468, is necessary because a selective enforcement claim "asks a court to exercise judicial power over a 'special province' of the Executive." *Id*. at 464 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)). The executive branch of government, therefore, is afforded "broad discretion" in enforcing the law. *Wayte v. United States*, 470 U.S. 598, 607 (1985). Decisions about who should be stopped, arrested, and/or prosecuted are, in general, "not readily susceptible to the kind of analysis the courts are competent to undertake." *Id*.[4]

The Supreme Court has explained that a claimant alleging selective enforcement of a facially neutral criminal law must demonstrate that the challenged law enforcement practice "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte*, 470 U.S. at 608. "To establish discriminatory effect in a race case, the claimant must allege that similarly situated individuals of a different race were not prosecuted." *Armstrong*, 517 U.S. at 465. If probable cause existed for each of the plaintiffs' traffic stops, and there is no allegation of dissimilar treatment, the Section 1983 federal claims for alleged equal protection and unreasonable search and seizure violations of plaintiffs are subject to dismissal as a matter of law.

Probable cause to make a traffic stop exists where the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information would cause a reasonable person to believe that an offense has been or is being committed. *Devenpeck v. Alford*, 543 U.S. 146, 155 (2004) ("Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest."). Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the subject law

[4] "Caution [by the courts] is also required because a selective enforcement claim is easily asserted, and responding to such a charge may be expensive, time consuming, and unduly distracting." *Jones v. Sterling*, 110 P.3d 1271, 1279 (Ariz. 2005) (citing to Armstrong, 517 U.S. at 468.

enforcement officer at the time of the stop. *Id*. An arresting or stopping officer's state of mind is irrelevant to the existence of probable cause. *Id*. at 593.

The test for probable cause does not involve speculation about the outcome of a trial on the merits of a particular charge, but rather upon an assessment of whether the arresting or the officer effecting the stop had knowledge of the facts at the time of the arrest or stop that would lead a prudent person to believe the arrested or detained person had committed or were committing an offense. *United States v. Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971).

2. The Plaintiffs' Federal and Arizona Unreasonable Search and Seizure Claims Fail as a Matter of Law.

In ruling on the Motion to Dismiss as it relates to the Plaintiff's Second and Third Claims for Relief alleging unreasonable search and seizure, the Court must decide as a matter of law whether probable cause existed to stop each of the plaintiffs. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996); *United States v. Brooks*, 367 F.3d 1128, 1134 (9th Cir. 2004); *Criss v. City of Kent*, 867 F.2d 259, 262 (6th Cir. 1988). A plaintiff can "plead himself out of court by pleading facts that undermine the allegations set forth in his complaint." *Henderson v. Sheahan*, 196 F.3d 839, 846 (7th Cir. 1999). Here, the First Amended Complaint's own allegations demonstrate, as a matter of law, that probable cause existed to stop each of the plaintiffs. More pointedly, the allegations in the First Amended Complaint amply show that each of the plaintiffs was stopped based on objective, provable probable cause.

The failure of a motor vehicle driver to follow traffic control signals is a violation of Arizona law. A.R.S. § 28-644; *Johnson v. Maricopa County*, 730 P.2d 862 (Ct. App. 1986) (motorists who approach intersection controlled by traffic signal are required by law to abide by the signal and may proceed in reliance of the signal alone). A peace office may also stop and detain a person as is reasonable necessary to investigate an actual or suspected violation of Arizona law. A.R.S. § 28-1594; *see also Ornelas*, 517 U.S. at 696 (1996) (to justify an investigative stop, officer must have a particularized and objective basis for suspecting the person stopped was or is in engaged in criminal activity.).

The failure of a citizen to willfully fail or refuse to comply with any lawful order or

direction of a police office is a criminal violation of Arizona law. A.R.S. § 28-622. Accordingly, any peace officer that observes violations of the foregoing statutory law has probable cause to stop the person for the legal violation. *Devenpeck*, 543 U.S. at155

As to plaintiff Melendres, he acknowledges in his First Amended Complaint that he and the driver of his vehicle were told that the vehicle was being stopped by MCSO deputies for speeding. *See* Amended Complaint at ¶ 56. Speeding is an objective violation of Arizona law. A.R.S. § 28-644; *Johnson,* 730 P.2d 862. Any peace officer that observes a vehicle that is speeding unquestionably gives the officer probable cause to stop the vehicle driven in violation of law.[5] Indeed, the United States Supreme Court holds that the Fourth Amendment is **not** violated even when a minor traffic violation is pretext rather than the actual motivation for a stop by law enforcement. *Whren v. United States*, 517 U.S. 806 (1996).

Plaintiff Melendres, therefore, is unable as a matter of law to allege a fundamental element required for Section 1983 liability for unreasonable search and seizure because his own allegations acknowledge the basis for the traffic stop that provided law enforcement probable cause for the same. The fact that plaintiff Melendres now denies any probable cause is immaterial to the Court's analysis. *Rodriquez v. California Highway Patrol*, 89 F.Supp.2d 1131, 1139 (N.D. Ca. 2000) (an "individual plaintiffs' allegations that they were stopped for pretextual reasons, with more, would not state a claim under the Fourth Amendment."); *see also Ornelas*, 517 U.S. at 696; *Brooks*, 367 F.3d at 1134; *Criss*, 867 F.2d at 262. Plaintiff Melendres' § 1983 search and seizure claims are ripe for dismissal as a matter of law. *Hartman,* 547 U.S. 250; *see also Caldeira v. County of Kauai*, 866 F.2d 1175, 1181 (9th Cir. 1989); *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999).

As to the Rodriguez plaintiffs, the plaintiffs affirmatively acknowledge in their Amended Complaint that the road that they were admittedly driving their motor vehicle on

[5] In their Reply in support of their Motion to Amend Complaint (Doc# 20 at p. 8, lns. 18-20), Plaintiffs urge that they have viable search and seizure claims because they merely allege the racial animus or intent of the MCSO deputies when making a traffic stop. That argument is immaterial to avoiding dismissal. The Supreme Court recognizes that whether defendants were motivated by race in making the traffic stops is immaterial in deciding whether a section 1983 claim is subject to dismissal. *Whren v. United States*, 517 U.S. 806, 813 (1996) (The Supreme Court unanimously rejected the argument "that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.").

was closed with a visible "Road Closed" sign. *See* Amended Complaint at ¶¶ 83, 89, and 96. This is an objective violation of Arizona law. A.R.S. § 28-644; *Johnson,* 730 P.2d 862. Any peace officer that observes the Rodriguez plaintiffs driving on the admittedly closed road in violation of A.R.S. § 28-644 unquestionable gives the officer probable cause to stop the vehicle driven in violation of law. How then can the Rodriguez plaintiffs establish a Section 1983 for unreasonable search and seizure when they make allegations essentially admitting in their First Amended Complaint to having broken the law and giving law enforcement probable cause for a traffic stop and search and seizure? They cannot. The plaintiffs' conclusory allegation that probable cause did not exist is immaterial to the Court's analysis under the law. *Cholla Ready Mix, Inc.,* 382 F.3d at 973.

The Rodriguez plaintiffs § 1983 claim under the Fourth and Fourteenth Amendments, and their Arizona law based claim, are subject to dismissal as a matter of law based on their own allegations. *Hartman,* 547 U.S. 250; *see also Caldeira,* 866 F.2d at 1181; *Askew*, 191 F.3d at 957.

As to the Meraz and Nieto plaintiffs, the allegations in the Amended Complaint -- and the reasonable inferences drawn from those allegations -- also show that they failed to obey the instructions of a peace officer, then belatedly fled the scene, failed to stop for pursuing law enforcement vehicles apparently signaling for them to immediately pull over, and were generally non-compliant with the instructions of the peace officers. *See* Amended Complaint at ¶¶ 98-119. This conduct is an objective violation of Arizona law. A.R.S. § 28-622; *see also United States v. Jacobs*, 715 F.2d 1343, 1345-46 (9th Cir. 1983) (addressing whether the law enforcement officer had sufficient basis to fear for his safety to warrant actions taken). Meraz and Nieto, therefore, cannot establish §1983 liability for unreasonable search and seizure when they make allegations essentially admitting to objective violations of law thereby giving law enforcement probable cause to stop and search. Their § 1983 claim as to their Second Cause of Action (unreasonable search and seizure), and their Third Cause of Action (Arizona law based claim) are subject to dismissal as a matter of law.

In summary, the plaintiffs' allegations in their own First Amended Complaint defeat their federal and state law based claims for alleged unreasonable search and seizure. The

Court, therefore, should dismiss each of those claims.

3. The Plaintiffs' Equal Protection Claim Fails as a Matter of Law.

To maintain a valid equal protection claim during a lawful traffic stop, plaintiffs must next allege in their Amended Complaint facts demonstrating that similarly situated members of other, usually majority, groups were treated differently. *Armstrong*, 517 U.S. 456; *Farm Labor Organizing Comm.,* 308 F.3d at 535 n.4; *Pyke,* 258 F.3d at 109-110; *Montero-Camargo*, 208 F.3d at 1135. Plaintiffs, however, have failed to meet this burden.

As to the Rodriguez plaintiffs, for example, the plaintiffs affirmatively acknowledge in the Amended Complaint that MCSO Deputies pulled over all other vehicles driving on the closed road. *See* Amended Complaint at ¶¶ 85-86.[6] Plaintiffs make no allegation that similarly situated persons from *non-minority groups* were not pulled over. *Id*. at ¶ 91. Plaintiffs also make no allegation that similarly situated persons from *non-minority groups* were given only warnings or treated more quickly. *Id*. at ¶¶ 85, 86, and 91. At most, plaintiffs only allege that it subjectively appeared to the Rodriquez plaintiffs that the other drivers, *without any allegation regarding the race of those other drivers*, that were pulled over were let go in "short order, without visibly exchanging any documentation." *Id*. at ¶ 86.[7] This type of allegation is legally inadequate to allege a valid equal protection selective enforcement cause of action. *Armstrong*, 517 U.S. at 465 (plaintiffs "must show that similarly situated individuals of a different race were not prosecuted."); *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) (Plaintiff must plead the existence of a similarly situated non-minority group being treated differently when challenging a law or policy that does not contain an express racial classification).

How then can the Rodriguez plaintiffs establish a Section 1983 claim for violation of equal protection by claiming racial profiling when essentially admitting to having broken the law, albeit unknowingly, in their Amended Complaint, and admitting to all others persons similarly situated on the road also having been pulled over? They cannot as a matter of law.

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[6] This allegation alone renders the Rodriguez plaintiffs' equal protection claim fatally defective. They have failed to allege that similarly situated members of non-minority groups were treated differently.

[7] The only time the Rodriquez plaintiff identify the race of other drivers is *after* they received a citation and stopped to observe future stops. Amended Complaint at ¶ 96. They make no allegations concerning the race of the other drivers stopped at or before the time they were stopped.

As such, their § 1983 equal protection claim is subject to dismissal.

As to plaintiffs Melendres, Meraz, and Nieto, plaintiffs make no allegation whatsoever that they were treated any differently under the circumstances than any non-minority groups. The burden is on these plaintiffs to allege in their Amended Complaint that they were treated differently than similarly situated non-minorities. They have failed to make such allegations, and as such, their § 1983 equal protection claim at Count One is subject to dismissal as a matter of law.

In summary, each of the acts and failures of the plaintiffs, as *alleged* in their own Amended Complaint and from the reasonable inferences drawn from the same, unquestionably gave enforcement officers probable cause to stop the vehicles occupied by them. As a matter of law, therefore, there can be no unreasonable search and seizure claim under the Fourth and Fourteenth Amendments. Moreover, plaintiffs make no specific allegation that the plaintiffs were treated differently than any other non-minority group. As a matter of law, therefore, there can be no equal protection violation under the Fourteenth Amendment and the Court should dismiss their First Claim for Relief (equal protection).[8]

C. Plaintiffs' Municipal Liability Claims Against Maricopa County Fail as a Matter Of Law.

Plaintiffs' Amended Complaint seeks to hold Maricopa County derivatively liable for the actions of defendant Arpaio. That is not permissible under the law and, therefore, plaintiffs' Amended Complaint, as to Maricopa County, is subject to dismissal.

A municipality, such as defendant Maricopa County, may be held liable under a § 1983 claim only when the municipality **itself** causes the constitutional violation at issue, and not under a *respondeat superior* theory. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691-95 (1978); *Hanson v. Black*, 885 F.2d 42, 645-46 (9th Cir. 1989); *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992); *Van Ort v Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996).

[8] Plaintiffs' Fourth Claim for Relief (Race Discrimination in Federally Funded Programs) is a claim legally duplicative of their First Claim for Relief (i.e., Fourteenth Amendment, equal protection claim.). *Guardians Ass'n v. Civil Service Comm. of New York*, 463 U.S. 582 (1982); *United States v. Fordice*, 505 U.S. 717 (1992); *Alexander v. Sandoval*, 532 U.S. 275 (2001). As such, this claim fails for the same reasons Plaintiffs' First Claim for Relief must fail.

> [T]he language of §1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable **solely** because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory.

Id. at 691 (Emphasis in original).

Municipal liability under §1983 "attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. Cincinnati,* 475 U.S. 469, 483 (1986). "Municipal liability depends on its own wrongdoing." *Greenwalt v. Sun City West Fire Dist.*, 250 F.Supp.2d 1200, 1215 (D. Ariz. 2003). To avoid futility of their § 1983 claims against Maricopa County, therefore, plaintiffs must properly plead the existence of a municipal policy; i.e., that the enforcement of that policy caused a deprivation of a federal right; and that **the municipality** itself committed "deliberate action" that constitutes a "moving force" behind the plaintiffs' deprivation of federal rights. *Id*. A policy is established by pleading: (1) a "policy statement, ordinance, regulation or decision officially adopted and promulgated" *by the municipality's lawmaking body*; (2) a single edict or act by a municipal officer with final policy making authority; or (3) "a widespread custom or practice." *Id*. at 1215-16.

Taking the plaintiffs' allegations in their Amended Complaint as true, plaintiffs have failed to properly allege the existence of any particular policy statement, ordinance, regulation, or decision of the lawmaking body **of defendant Maricopa County** that led to the alleged deprivation of plaintiffs' federal rights. Plaintiffs have not properly alleged anywhere in their Amended Complaint an edict or act by the Maricopa County Board of Supervisors -- the actual lawmaking body of Maricopa County -- that led to the alleged deprivation of plaintiffs' federal rights. They have not properly alleged a "widespread custom or practice" encouraged or allowed by the County's Board of Supervisors that led to the alleged deprivation of plaintiffs' federal rights. Nowhere in Plaintiffs' Amended Complaint do they even cite a policy, ordinance, regulation, decision, edict or act **of**

defendant Maricopa County that was a "deliberate action" that constituted a "moving force" behind plaintiffs' alleged deprivation of rights. All of the plaintiffs' allegations center on the conduct and/or actions of defendant Arpaio.

There are two reasons that plaintiffs' allegations in their Amended Complaint as to defendant Arpaio's "policies, practices, philosophies, and directives" are legally insufficient to support a municipal liability claim under §1983 against defendant Maricopa County. First, "[t]he fact that a particular official -- even a policy making official -- has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur,* 475 U.S. 482-83. Second, the "official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable." *Id*. at 483. "[F]inal policy making authority is a question of state law." *Id*. Under Arizona law, only the elected members of the Maricopa County Board of Supervisors, not defendant Arpaio, are responsible for establishing the final government policy **for Maricopa County**. *See* A.R.S. §11-251(30) and (31). While defendant Arpaio is responsible for establishing the final policy for the MCSO, he is not responsible for establishing the final policy of Maricopa County.

In summary, plaintiffs' Amended Complaint alleges no set of factual allegations that supports *Monell* municipality liability against defendant Maricopa County itself under Section 1983. On this ground alone, therefore, the Court should dismiss Maricopa County as a named defendant.

D. Defendants Arpaio And The MCSO Have Qualified Immunity for All of Plaintiffs' Liability Claims.

The defense of "qualified immunity" requires courts to enter judgment in favor of a government and its employees unless the employees' conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The defense is designed to protect "all but the plainly incompetent or those who knowingly violated the law." *Malley v. Briggs*, 477 U.S. 335, 341 (1986); *see also Alexander v. County of Los Angeles*, 64 F.3d 1315, 1319 (9th Cir. 1995). Here, the Amended Complaint lacks facts showing that Sheriff Arpaio or the MCSO

were "plainly incompetent" or acted in "knowing violation of the law." Qualified immunity applies.

The qualified immunity standard requires a two-pronged inquiry: first, was the right claimed to have been violated clearly established at the time the defendants acted; and second, if so, could a reasonable peace officer in defendants' position nonetheless believe that defendants' conduct was lawful given the circumstances.

1. One Reasonable Peace Officer Could Believe that Defendants' Conduct was Lawful.

Assuming that the right to be free from racially motivated traffic stops is clearly established under the law, the inquiry is whether one reasonable peace officer out of the world of reasonable peace officers could have believed that Sheriff Arpaio's conduct, or the conduct of his deputies in the MCSO, as alleged in the Amended Complaint, was lawful. The qualified immunity analysis asks whether "***all*** reasonable officials in the defendant's circumstances would have then known that the defendant's conduct was violated the plaintiff's asserted constitutional or federal statutory right." *Cozzo v. Tangipahoa Parish Council President Gov't*, 279 F.3d 273, 284 (5th Cir. 2002) (emphasis added); *Thompson v. Upshur County*, 245 F.3d 447, 457 (5th Cir. 2001). In other words, qualified immunity applies if **one** reasonable peace officer out of the world of reasonable officers **could** disagree on whether the defendants' conduct was permissible. *Reynolds v. County of San Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996), *overruled on other grounds, Acri v. Varian Assoc's Inc*., 114 F.3d 999 (1997). **"[I]f officers of reasonable competence could disagree, immunity should be recognized."** *Malley*, 475 U.S. at 341.[9]

Based on the allegations of the Amended Complaint, as a matter of law, one reasonable sheriff out of the world of reasonable sheriffs could believe Sheriff's Arpaio's conduct to be appropriate and lawful.

[9] The inquiry of whether a reasonable sheriff could believe that defendant's conduct was lawful is an *objective* inquiry by the Court. *Harlow*, 457 U.S. at 819; *see also Mazuz v. Maryland*, 442 F.3d 217, 232 (4th Cir. 2006) (Kelly, J., concurring) ("Whether an officer's conduct was objectively reasonable, and hence protected by qualified immunity, is a question of law solely for the court.").

A. Plaintiff Melendres.

A reasonable sheriff could certainly believe that pulling over a vehicle for speeding in violation of Arizona state law was appropriate and lawful. A reasonable sheriff could also believe it reasonable to ask questions of the vehicle's driver and occupants, especially in light of Sheriff Arpaio having a Memorandum of Understanding with federal authorities which authorized MCSO personnel to perform certain immigration enforcement. Indeed, according to plaintiffs' own allegations, defendant Arpaio has a Memorandum of Understanding with the U.S. Immigration and Customs Enforcement ("ICE") which authorized personnel of the MCSO to perform certain immigration enforcement functions. *See* Amended Complaint at ¶¶ 20-29. These immigration enforcement functions by the MCSO could be performed, among other things, pursuant to routine or spontaneous law enforcement decisions. *Id*. As to Plaintiff Melendres, as a passenger in a vehicle stopped for speeding, he provided the MCSO officers with identification and other papers which established that he was a foreign national. *See* Amended Complaint at ¶ 58. The officers, for whatever reason, did not trust the veracity or legitimacy of the visa and permit provided to them by the Plaintiff and detained him for transportation to ICE. *Id.* at ¶ 72. ICE officials questioned the Plaintiff, and eventually released him. *Id.* at ¶ 75. A reasonable officer could certainly believe it lawful to question and/or detain a person whose legal status in the United States was uncertain to that officer.

Plaintiffs' Amended Complaint, therefore, should be dismissed for failure to state a claim upon which relief may be granted on the basis of qualified immunity for the Melendres traffic stop.

B. Rodriguez plaintiffs.

As to the Rodriguez plaintiffs, the plaintiffs acknowledge in their Amended Complaint that the road that they were admittedly driving their motor vehicle on *was closed* with a visible "Road Closed" sign. *See* Amended Complaint at ¶¶ 83, 89, and 96. This is an objective violation of Arizona law. A.R.S. § 28-644; *Johnson,* 730 P.2d 862. A reasonable peach officer could believe that he was well within his authority provided to him under law to make the stop and question the driver of the vehicle and pursuant to

agreement with the federal government. *See* Amended Complaint at ¶ 21 (granting MCSO deputies the authority "to perform certain immigration enforcement functions.") Taking the Plaintiffs' allegations as true, a reasonable law enforcement officer could have believed his conduct in stop and questioning these plaintiffs was proper and not a violation of any clearly established statutory or constitutional rights, including making an inquiry regarding Mr. Rodriguez' social security card.

Plaintiffs' Amended Complaint as to unequal treatment, therefore, should be dismissed for failure to state a claim upon which relief may be granted on the basis of qualified immunity for the Rodriguez traffic stop.

C. Meraz and Nieto plaintiffs.

As to the Meraz and Nieto plaintiffs, the allegations in their Amended Complaint show that they failed to obey the instructions of a peace officer, then belatedly fled the scene, failed to stop for pursuing law enforcement vehicles apparently signaling for them to immediately pull over, and were generally non-compliant with the instructions of the peace officers. *See* Amended Complaint at ¶¶ 98-119. This is an objective violation of Arizona law. A.R.S. § 28-622; *see also United States v. Jacobs*, 715 F.2d 1343, 1345-46 (9th Cir. 1983). Again, the MCSO officer(s) questioned these plaintiffs and did so within the authority provided to them under law and pursuant to agreement with the federal government. *See* Amended Complaint at ¶ 21. Taking the Plaintiffs' allegations as true, a reasonable law enforcement officer could have believed his conduct in stopping and questioning the plaintiff was proper and not a violation of any clearly established statutory or constitutional rights.

Plaintiffs' Amended Complaint, therefore, should be dismissed for failure to state a claim upon which relief may be granted on the basis of qualified immunity for the Meraz and Nieto traffic stop.

E. The Amended Complaint Improperly Adds Non-Jural Entity MCSO as a Named Defendant.

Plaintiffs' Amended Complaint adds the MCSO as a named defendant. The MCSO, however, is a non-jural entity not capable of suing, or being sued, in its own name.

In order for a plaintiff to sue a county department, such as the MCSO, the department must "enjoy a separate legal existence." *Darby v. Pasadena Police Dept.*, 939 F.2d 311, 313 (5th Cir. 1991) (holding that a plaintiff may not bring a civil rights action against a servient political agency or department unless such agency or department enjoys a separate and distinct legal existence); *Mayes v. Elrod*, 470 F. Supp. 1188, 1192 (N.D. Ill. 1979) (same); *Jacobs v. Port Neches Police Dep't*, 915 F.Supp.2d 842, 844 (E.D. Tex. 1996) (sheriff's department not a proper party to suit).

A political subdivision cannot sue or be sued in its own name unless it is "a separate and distinct corporate entity." *Kirby Lumbar Corp. v. State of La. Through Anacoco-Prairie State Fame and Fish Comm'n*, 293 F.2d 82, 83 (5th Cir. 1961); *Darby*, 939 F.2d at 313. "[U]nless the true political entity has taken explicit steps to grant the servient agency with jural authority, the agency cannot engage in any litigation except in concert with the government itself." *Darby*, 939 F.2d at 313 *citing to Taylor v. Administrator of the SBA*, 722 F.2d 105, 110-11 (5th Cir. 1983); *J.C. Driskill, Inc. v. Abdnor*, 901 F.2d 383, 386 (4th Cir. 1990); *see also Avery v. Burke County*, 660 F.2d 111, 114 (4th Cir. 1981). Plaintiff makes no allegation that the MCSO is a corporate entity separate and apart from Maricopa County. As a consequence, the Court should dismiss the MCSO from this litigation because it is a non-jural entity.

IV. CONCLUSION.

Based on the foregoing, defendants respectfully request that the Court dismiss Plaintiffs' Amended Complaint as against them for the reasons stated above, or dismiss those individual claims that fail to set forth a viable cause of action against them under the law.

DATED this 24th day of September, 2008.

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ORIGINAL of this document electronically filed with the Clerk's Office using the CM/ECF System this 24th day of September, 2008

COPY of this document electronically mailed this 24th day of September to the following:

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