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17 UNITED STATES DISTRICT COURT
18 DISTRICT OF ARIZONA

19 Manuel de Jesus Ortega Melendres, et
20 al.,

21 Plaintiffs,

22 vs.

23 Joseph M. Arpaio, et al.,

24 Defendants.

25 No. CV 07-02513-PHX-MHM

26 **RESPONSE IN OPPOSITION TO**
27 **DEFENDANTS' RULE 12(b)(6)**
28 **MOTION TO DISMISS**
PLAINTIFFS' FIRST AMENDED
COMPLAINT

(Oral Argument Requested)

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PRELIMINARY STATEMENT

Defendants' illegal racial profiling of Latinos in Maricopa County necessitated the filing of this action, which seeks to enjoin Defendants' unconstitutional policies and practices. Having unsuccessfully opposed Plaintiffs' Motion for Leave to File the First Amended Complaint (FAC), Defendants now seek to dismiss the FAC for failure to state a claim based on the same arguments they previously offered. As shown below, the Motion to Dismiss (Motion) fundamentally misconstrues the law and deliberately ignores several key allegations in Plaintiffs' detailed, well-pled FAC. Even a cursory review of the FAC demonstrates that Defendants' Motion should be denied.

First, the FAC clearly establishes the standing of Plaintiff Somos America/We Are America ("Somos"), an organization created to combat racial discrimination directed at Latinos, and whose members have been subjected to racial profiling and other mistreatment by Maricopa County Sheriff's Office ("MCSO") officers. While Defendants spend several pages describing the law of standing, they ignore specific allegations showing that Somos has both standing to sue on its own behalf (organizational standing) and on behalf of its members (representative standing).

Second, Defendants' assertion that the FAC fails to state claims under the Fourth and Fourteenth Amendments is meritless. Plaintiffs' First Claim for Relief (Equal Protection – Fourteenth Amendment) is amply supported by the FAC, which far exceeds the limited notice requirements of the Federal Rules, and contains detailed allegations illustrating Defendants' comprehensive and regular practice of racially-profiling Latino motorists and passengers. The allegations demonstrate that Defendants have targeted, stopped, interrogated, detained and/or arrested Latino persons based solely on their race, color or ethnicity, and not for any lawful purpose. [*See, e.g.*, FAC ¶ 11 (Somos members have been subjected to Defendants' "policy and practice of profiling and targeting persons" believed to be of Latino descent); FAC ¶ 30 ("Defendants have adopted an unlawful, racially-biased policy of stopping, detaining, questioning and/or searching persons in vehicles in Maricopa County who are or appear to be Latino to interrogate

1 them about their perceived immigration status based on nothing more than their race,
2 color and/or ethnicity”); FAC ¶ 32 (“Caucasian drivers and passengers involved in the
3 same or similar acts or alleged violations are treated differently and their vehicles
4 stopped at much lower rates than similarly situated Latino drivers”); FAC ¶ 40 (“for
5 racially motivated reasons” Latino persons are singled out for investigation “and
6 subjected [] to different treatment”)]

7 Plaintiffs’ Second Claim for Relief (Unreasonable Search and Seizure – Fourth
8 and Fourteenth Amendments) is supported by myriad allegations that Defendants have
9 acted toward the members of the Plaintiff class, including persons named and unnamed,
10 pursuant to a policy that targets Latino drivers and passengers for traffic stops,
11 detentions, searches, questioning and/or arrests, without reasonable suspicion or
12 probable cause. [See, e.g., FAC ¶¶ 3, 11, 29, 30-32, 37-40, 48, 51, 52, 122, 140-41] The
13 FAC alleges that these persons have been and/or will be subject to unlawful extensions
14 of traffic stops solely for the purpose of investigating their immigration status. [See, e.g.,
15 *id.* ¶¶ 30-32, 59-77, 85-97, 110-119, 140]

16 The experiences of the individual named Plaintiffs are the direct product and are
17 emblematic of these unconstitutional policies and practices. For example, the FAC
18 alleges that MCSO officers detained Plaintiff Manuel de Jesus Ortega Melendres for
19 more than nine hours, *without* reasonable suspicion or probable cause to believe that he
20 had committed any crime. He was merely a passenger in a vehicle that was allegedly
21 stopped for speeding during an MCSO immigration “sweep” in Cave Creek. Likewise,
22 MCSO officers unreasonably searched and seized Plaintiffs Velia Meraz and Manuel
23 Nieto, Jr., leaving them alone only after their father rushed out and told the officers that
24 they were all U.S. Citizens. The FAC clearly alleges that Defendants were conducting
25 an immigration “sweep” at that time in that area, and that Ms. Meraz and Mr. Nieto
26 were targeted solely because of their Latino appearance as part of that operation.
27 Similarly, the FAC alleges that Plaintiffs Jessica and David Rodriguez were targeted for
28 differential treatment. As explained below, these allegations must be taken as true for

1 purposes of the present Motion, and they support claims for relief under the Fourth and
 2 Fourteenth Amendments. Indeed, these allegations make out a classic case of racial
 3 profiling – of “intrusive law enforcement stop[s] and seizure[s] of innocent persons on
 4 the basis of suspicions rooted principally in the race of the ‘suspects.’” *Washington v.*
 5 *Lambert*, 98 F.3d 1181, 1192 (9th Cir. 1996).

6 Defendants’ other arguments are equally without merit. First, Defendants assert
 7 that Maricopa County cannot be sued, even though it is directly liable for, among other
 8 things, the official policies of Sheriff Joe Arpaio – *the* final decision maker for the
 9 County in the area of law enforcement. [FAC ¶ 13] Second, Defendants invoke qualified
 10 immunity on behalf of Arpaio and the MCSO, forgetting that Plaintiffs do not seek
 11 monetary damages, but rather seek only declaratory and injunctive relief – to which
 12 qualified immunity does *not* apply. Finally, Defendants assert that the MCSO is a “non-
 13 jural” entity, despite its repeated participation as a party in numerous lawsuits, even as a
 14 plaintiff. The MCSO cannot be a “jural entity” only when convenient. Defendants’
 15 Motion should be denied.

16 ARGUMENT

17 **I. DEFENDANTS FAIL TO OVERCOME THE STRONG PRESUMPTION** 18 **AGAINST MOTIONS TO DISMISS.**

19 Rule 8(a) establishes a “powerful presumption against rejecting pleadings for
 20 failure to state a claim.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir.
 21 1997). Indeed, such motions are “viewed with disfavor and [] rarely granted.” *Hall v.*
 22 *City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986), *abrogated on other*
 23 *grounds by Yee v. City of Escondido*, 503 U.S. 519, 525 (1992); *see generally Erickson*
 24 *v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (reiterating that a complaint “need only give the
 25 defendant fair notice of what the claim is and the grounds upon which it rests”) (internal
 26 quotation omitted). This presumption applies with even greater force in civil rights
 27 cases. *Rodriguez v. Calif. Highway Patrol*, 89 F. Supp. 2d 1131, 1135 (N.D. Cal. 2000)
 28 (“[C]ivil rights complaints are to be liberally construed.”) (internal quotation omitted).

1 Taking all well-pleaded factual allegations as true and drawing all reasonable inferences
 2 in Plaintiffs' favor, the FAC satisfies Rule 8(a) – and Defendants should be forced to
 3 defend this vitally important case on the merits as promptly as possible. *Gilligan*, 108
 4 F.3d at 248.

5 **II. THE FAC ESTABLISHES SOMOS' STANDING ON MULTIPLE BASES.**

6 **A. Defendants' Conduct Injures Somos Directly and Gives Somos** 7 **Standing to Sue on Its Own Behalf.**

8 Somos has standing to sue in its own right (“organizational standing”) because it
 9 has suffered an injury-in-fact sufficient to give it “a personal stake in the outcome of the
 10 controversy.” *Smith v. Pac. Prop. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004);
 11 *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) (organizations
 12 have standing if forced to devote resources to address defendant’s misconduct). Somos
 13 may establish injury by showing “(1) frustration of its organizational mission; and (2)
 14 diversion of its resources to combat the particular . . . discrimination in question.” *Smith*,
 15 358 F.3d at 1105 (non-profit disability rights advocacy group had organizational
 16 standing to sue where defendants’ conduct frustrated its mission and caused it to divert
 17 resources to monitor defendants’ activities).

18 Somos’ injury consists of the frustration of its mission *and* the diversion of its
 19 resources to combat Defendants’ alleged misconduct. As the FAC alleges, Somos was
 20 created to advance “equal rights for immigrant communities in Arizona,” and its
 21 “organizational mission includes seeking to combat racial discrimination directed at
 22 Latinos.” [FAC ¶ 10] By violating the rights of Plaintiffs and putative class members,
 23 Defendants’ alleged misconduct frustrates these objectives. *See Smith*, 358 F.3d at 1105.

24 The FAC further alleges that Somos has begun to monitor Defendants’ actions
 25 and assist those that have been mistreated by Defendants. [FAC ¶ 12] Somos’ limited
 26 resources have therefore been “diverted and drained as a result of Defendants’ policies
 27 and practices and the harm they cause.” [*Id.*] Remarkably, Defendants’ Motion quotes
 28 these allegations, while arguing that “[t]here is no *actual* injury alleged to have been

suffered by [Somos].” [Mot. at 4-5] Yet Defendants’ alleged activities have depleted Somos’s resources, causing Somos the precise harm that the Supreme Court recognized as conferring standing in *Havens Realty*. See 455 U.S. at 379. Because Somos will continue to be harmed if Defendants’ misconduct is not enjoined, it has properly alleged organizational standing. [FAC ¶¶ 4, 12] See *Smith*, 358 F.3d at 1106 (“[W]e believe these allegations are enough to constitute a showing of a ‘diversion of resources’ and to survive a 12(b)(6) motion.”); *ACORN v. Fowler*, 178 F.3d 350, 357 (5th Cir. 1999) (“general factual allegations of injury resulting from the defendant’s conduct” suffice at the pleading stage to establish organizational standing).

B. Defendants’ Alleged Conduct Injures Somos’ Members, Giving Somos Standing to Sue on Its Members’ Behalf.

Apart from its own injury, Somos has standing to represent its injured members (“representative standing”). *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 342 (1977). An organization has representative standing when: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Id.* at 343; see also *Rodriguez*, 89 F. Supp. 2d at 1135-36 (finding representative standing to challenge racial profiling). The FAC’s allegations satisfy each of these elements.

First, for the reasons that the individual plaintiffs have standing (which Defendants do not challenge), Somos’ members have standing. The FAC states that “Defendants’ agents have pretextually, with racial motivation and without adequate cause stopped vehicles driven or ridden in by Somos America members and have subjected occupants to discriminatory, unreasonable and burdensome questioning and other differential treatment without individualized suspicion or any evidence of criminal activity.” [FAC ¶ 11] Several members have reported such mistreatment to Somos. [*Id.*] Because these members would be entitled to sue Defendants directly, their injuries satisfy the first prong of Somos’ representative standing.

Defendants' assertion that the FAC does not explicitly state that these members were "actual, registered, and *bona fide* members" at the time of the alleged stops is unavailing. [Mot. at 5] Not only does this argument neglect the presumption that general allegations embrace the specific facts needed to support them, *Smith*, 358 F.3d at 1105, but it seeks to create a requirement unsupported by law. Courts have not required represented individuals to be "registered," "bona fide," or even "members" for representational standing. *See Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1110-11 (9th Cir. 2003) ("direct membership linkage" is not required to establish representative standing, and injury to "constituents" of non-profit organization created to protect federal rights suffices to confer standing on organization). Because the FAC alleges that Somos' members have been injured by Defendants' conduct, allegations detailing a "direct membership linkage" at the time of the events are unnecessary. *Id.*¹

Second, the civil rights at stake in this litigation are unquestionably germane to Somos' mission. Somos' purpose is "to combat racial discrimination directed at Latinos." [FAC ¶ 10] Even Defendants "can assume how this stated purpose is connected to the stated purpose of the lawsuit." [Mot. at 6, n.1] Third, Somos' claims and requested relief do not require the participation of individual members. Indeed, the third prong of representative standing is satisfied when a plaintiff seeks only declaratory or injunctive relief, as Somos does here. *See Hunt*, 432 U.S. at 344 (claims for declaratory and injunctive relief do not require individualized proof and are properly resolved in a group context). Accordingly, the FAC meets all three elements of representative standing, and Somos is a proper plaintiff.²

¹ Defendants' reliance on *Legal Aid Soc. of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998), is misplaced. The organizational plaintiffs in *Legal Aid Society* failed to present any evidence on a motion for summary judgment that any of their members had standing in his or her own right. *Id.* at 1030. In contrast, the FAC clearly alleges that Somos' members have been injured by Defendants' conduct [FAC ¶ 11], and at this early stage of litigation, those allegations must be taken as true.

² Moreover, Somos satisfies "third-party standing" – another independent basis for standing. First, Somos has sufficiently alleged that it suffers an injury-in-fact.

1 **III. THE FAC AMPLY SUPPORTS PLAINTIFFS' FOURTH AND** **2 FOURTEENTH AMENDMENT CLAIMS.**

3 In a section of their Motion called "The Law," Defendants confuse the standards
 4 that apply to Plaintiffs' *separate* claims under the Fourth Amendment (unreasonable
 5 search and seizure) and the Fourteenth Amendment (equal protection). [Mot. at 8,
 6 Section B.1, "The Law"] First, and contrary to Defendants' assertions, to establish a
 7 Fourth Amendment claim, Plaintiffs need *only* allege facts capable of showing that they
 8 were searched or seized without reasonable suspicion or probable cause. They do not also
 9 need to show that similarly-situated members of other, non-minority groups were treated
 10 differently. [*Cf.* Mot. at 8]

11 Second, to state a claim under the Fourteenth Amendment's Equal Protection
 12 Clause, Plaintiffs need only allege facts showing that Defendants acted with "racially
 13 discriminatory intent or purpose." *Vill. of Arlington Heights v. Metro. Housing Dev.*
 14 *Corp.*, 429 U.S. 252, 266 (1977). Plaintiffs are not required to show that similarly
 15 situated members of other, non-minority groups were treated differently if there is other
 16 evidence of discriminatory motive. The FAC abundantly satisfies these standards.

17 **A. Defendants Violated the Fourth Amendment by Initiating or** **Extending Searches and Seizures Without Reasonable Suspicion.**

18 The FAC states valid claims under the Fourth Amendment and the Arizona
 19 Constitution for unreasonable searches and seizures because it alleges that Defendants
 20 unreasonably stopped, searched and/or arrested, or otherwise extended the stops of,
 21 plaintiffs and putative class members, without reasonable suspicion or probable cause.
 22 [*E.g.*, FAC ¶¶ 3, 11, 29, 30-32, 37-40, 48, 51, 122, 140-41] Indeed, the FAC alleges a

23 (continued from page 6) Second, it has a close relation to its members, whose civil rights
 24 are affected by the complained-of pattern and practice. Third, its members are deterred
 25 from bringing suit due to fear of publicity and retaliation from a Defendant that has
 26 shown that he will not hesitate to bring pressure to bear on those who take issue with his
 27 tactics. [*E.g.*, FAC ¶¶ 40, 44]; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 683 (1977)
 28 (vendor had third-party standing to challenge a law prohibiting distribution of
 contraceptives to minors, because the desire to avoid publicity would deter potential
 purchasers from defending their own rights).

1 pattern and practice of using race as a surrogate for individualized suspicion of violation
2 of immigration laws, and this pattern and practice has led to the unreasonable seizures of
3 persons *lawfully present* in Maricopa County. [*E.g., id.* ¶¶ 30-32, 52] The FAC alleges
4 that this pattern and practice is directed to all members of the class, and that Defendants’
5 behavior toward the named Plaintiffs “starkly illustrates” these unlawful policies,
6 practices and conduct. [*Id.* ¶ 52]

7 For example, the FAC alleges that MSCO officers arrested and detained Mr.
8 Ortega without reasonable suspicion or probable cause to believe that he committed any
9 crime. Mr. Ortega was merely a passenger in a car that was allegedly stopped for
10 speeding during an MSCO “crime suppression sweep” in Cave Creek. [*Cf.* FAC ¶¶ 30,
11 35-38, 41-48 (describing MCSO’s use of so-called “crime suppression sweeps” as part
12 of a campaign to target Latinos for stops, detention, investigation and arrests)] After he
13 presented a *valid* U.S. visa and permit, the officers inexplicably handcuffed, searched
14 and detained him. He was not cited for any traffic violation, not charged with any crime
15 and not given any explanation for this treatment. [*Id.* ¶¶ 66-71]

16 Defendants’ assertion that Mr. Ortega cannot state a Fourth Amendment claim is
17 baseless. [Mot. at 11] Defendants assert that, because an officer had probable cause to
18 believe the *driver* of the vehicle in which Mr. Ortega was a passenger was speeding, the
19 officer had reasonable suspicion or probable cause to search, arrest and detain Mr.
20 Ortega *for nine hours*. [FAC ¶ 56; Mot. at 11] This absolutely contradicts the Fourth
21 Amendment requirement that suspicion be particularized, and that an investigatory stop
22 be reasonably related to the circumstances that justified it. Even if a traffic stop might
23 have been initially justified, the Fourth Amendment does not give officers a blank check
24 to run roughshod over the constitutional rights of everyone involved. Rather, traffic
25 stops must be supported by at least reasonable suspicion – *i.e.*, “specific, articulable
26 facts which, when considered with objective and reasonable inferences, form a basis for
27 *particularized* suspicion” of criminal activity. *U.S. v. Montero-Camargo*, 208 F.3d
28 1122, 1129 (9th Cir. 2002) (holding that race and ethnicity are of such little probative

1 value that they may *not* be considered in the reasonable-suspicion analysis, including for
2 immigration enforcement purposes). The stop must be justified at its inception and be
3 reasonably related in scope to the circumstances that justified it. *Terry v. Ohio*, 392 U.S.
4 1, 19-20 (1968). It must last no longer than is necessary. *U.S. v. Urrieta*, 520 F.3d 569,
5 578-79 (6th Cir. 2008); *U.S. v. Valadez*, 267 F.3d 395, 397 (5th Cir. 2001).

6 Here, Defendants lacked *any basis* to search and arrest Mr. Ortega, let alone
7 detain him for nine hours. [FAC ¶¶ 53-81] Defendants' assertion that the Memorandum
8 of Understanding ("MOU") with ICE permitted the officer to stop Mr. Ortega to inquire
9 into his immigration status is fundamentally flawed, and it touches on a key issue this
10 case. [Mot. at 18] Defendants may *not* rely on the MOU to justify law-enforcement
11 activities that violate the constitutional rights of Plaintiffs and putative class members.
12 Indeed, the Fourth Amendment limits federal statutes and immigration enforcement
13 authority such that agents may *not* question any individual as to his right to be in the
14 United States without reasonable suspicion, involving more than mere ethnic
15 appearance, that the individual is an alien. *See, e.g., Murillo v. Musegades*, 809 F. Supp.
16 487, 498 (W.D. Tex. 1992). Moreover, to forestall concerns about racial profiling, ICE
17 itself has declared that under an MOU, "Police cannot randomly ask for a person's
18 immigration status . . . [and] may only use their authority when dealing with someone
19 who is suspected of a state crime that is *more than a traffic offense*." [FAC ¶ 23
20 (emphasis altered)] At best, the officer had probable cause to believe that someone *other*
21 *than Mr. Ortega* had committed a traffic offense. This falls far short of justifying an
22 investigation, let alone an arrest, of Mr. Ortega.

23 The FAC also alleges that Defendants had neither reasonable suspicion nor
24 probable cause to justify their search and seizure of Ms. Meraz and Mr. Nieto. Like Mr.
25 Ortega, Ms. Meraz and Mr. Nieto were not cited for any traffic violation or charged with
26 any crime. Upon pulling into a gas station parking lot, they were greeted with an
27 officer's unexplained demand that they leave. They complied, yet other officers were
28 called to follow them. [FAC ¶¶ 101-05] When signaled to pull over, Mr. Nieto did so.

1 [Id. ¶¶ 107-09] The officers then descended on Mr. Nieto and Ms. Meraz in front of
2 their family business and, with weapons raised, forcefully pulled Mr. Nieto from the car
3 and handcuffed him, demanding identification. [Id. ¶¶ 110, 112] Yet the officers ceased
4 their pursuit, investigation and detention when Ms. Meraz's and Mr. Nieto's father told
5 the officers that his children were U.S. Citizens. [Id. ¶¶ 116-17] Indeed, the officers then
6 left, without issuing any citations or giving any explanation for their actions. The FAC
7 alleges that this search and seizure was part of Defendants' immigration sweep going on
8 at that time, and was motivated solely by Ms. Meraz's and Mr. Nieto's Latino
9 appearance – rather than any reasonable suspicion or probable cause. [Id. ¶ 119] These
10 allegations state a Fourth Amendment claim.

11 Defendants' assertion that Ms. Meraz and Mr. Nieto violated A.R.S. § 28-622, a
12 statute concerning an officer's authority to "direct, control or regulate traffic," is
13 unsupported by the FAC and is entirely inappropriate at the motion to dismiss stage.
14 [Mot. at 12, 19] Neither Ms. Meraz nor Mr. Nieto received a citation or warning for
15 violating this statute. Nowhere does the FAC suggest that the officers were directing
16 traffic at the time of the stop – or had any legitimate justification for their seizure of
17 these Plaintiffs, or for the scope and duration of that seizure. On a Rule 12(b)(6) motion,
18 Defendants cannot construct their own unsubstantiated factual narrative. Rather,
19 Plaintiffs' well-pled allegations must be taken as true and construed in their favor.
20 *Gilligan*, 108 F.3d at 248-49.

21 The FAC also states a clear violation of Plaintiffs Jessica and David Rodriguezes'
22 Fourth Amendment rights. It alleges that the Rodriguezes, as members of the putative
23 class, were stopped without justification under the Fourth Amendment. [FAC ¶¶ 31-32,
24 52] While the Rodriguezes were ostensibly stopped for driving on a closed road, the
25 FAC makes clear that Mr. Rodriguez did not see any "Road Damaged" sign until after
26 the encounter, when he traveled on another part of the road. Nowhere does the FAC
27 state that he failed "to follow traffic control signals." [Id. ¶¶ 83-84; Mot. at 10, 12]
28 Further, the Rodriguezes' complaint extends beyond the propriety of the initial stop to

the deputy's conduct after they were stopped. [FAC ¶¶ 87-88] During the stop, the investigating officer must use the "least intrusive means" reasonably available, *Valadez*, 267 F.3d at 398, and the stop must be "carefully tailored" to its underlying justification. *Carrasca v. Pomeroy*, 313 F.3d 828, 836 (3d Cir. 2002). As the FAC alleges, the officer failed to tailor the stop to determining whether Mr. Rodriguez in fact drove on a closed road, nor did the officer use the least intrusive means. Rather, he extended its scope and duration by requesting Mr. Rodriguez's social security card. [FAC ¶ 87] This was not "standard procedure" for a traffic offense [*id.* ¶ 88], because none of the other drivers was asked to produce their social security cards. [*Id.* ¶ 96] The officer went beyond any legitimate purpose of the stop, and any extension to investigate immigration status was unlawful for the same reason as in Mr. Ortega's case. [*Id.* ¶¶ 87-88, 96] In sum, the FAC states a claim for violation of the Rodriguezes' Fourth Amendment rights.

B. Defendants' Discriminatory Treatment of Plaintiffs and Class Members Violates the Equal Protection Clause.

Plaintiffs' Equal Protection claim is entirely *independent* of their Fourth Amendment claim. [*Cf.* Mot. at 13] Plaintiffs may state an Equal Protection claim by showing "that they were subjected to unequal treatment based upon their race or ethnicity during the course of an *otherwise lawful* traffic stop." *Farm Labor Organizing Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533 (6th Cir. 2002) (emphasis added). *See also Whren v. U.S.*, 517 U.S. 806, 813 (1996) (a stop supported by objective probable cause may nonetheless violate the Equal Protection Clause because the "Constitution prohibits selective enforcement of the law based on considerations such as race").

The FAC states a claim under the Fourteenth Amendment's Equal Protection Clause by alleging that Defendants have intentionally discriminated against Plaintiffs and putative class members on the basis of race and ethnicity. *See, e.g., Rodriguez*, 89 F. Supp. 2d at 1140; [*e.g.*, FAC ¶¶ 2-3, 11, 17, 27, 30-34, 39, 49-51, 122] The numerous allegations in the FAC describing Defendants' policy and practice of racial targeting of

1 Latinos applies to all class members, including the named Plaintiffs. Paragraph 52
 2 specifically states that the experiences of the named Plaintiffs illustrate the illegal acts
 3 described earlier in the FAC.

4 Where, as here, a discriminatory *purpose* is manifest, Plaintiffs do not need to
 5 also show that similarly situated members of other, non-minority groups were treated
 6 differently. *See Vill. of Arlington Heights*, 429 U.S. at 266; *Pyke v. Cuomo*, 258 F.3d
 7 107, 108-09 (2d Cir. 2001) (holding that plaintiffs could plead a “theory of
 8 discriminatory motivation underlying a facially neutral policy . . . [without] show[ing]
 9 the disparate treatment of other similarly situated individuals”). The FAC specifically
 10 alleges facts showing Defendants’ discriminatory purpose, including admissions and
 11 public statements of intent. [*E.g.*, FAC ¶ 33 (“Arpaio has claimed that physical
 12 appearance alone is sufficient to question an individual regarding their immigration
 13 status.”); *id.* ¶ 34 (Arpaio has described his operations “as a ‘pure program’”); *id.* ¶ 49-
 14 51 (discussing additional indicia of racial bias)] Because “a government that sets out to
 15 discriminate intentionally in its enforcement of some neutral law or policy will rarely if
 16 ever fail to achieve its purpose,” such allegations are sufficient to state a claim under the
 17 Equal Protection Clause. *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 543
 18 (S.D.N.Y. 2006).

19 While not required to do so, the FAC affirmatively alleges that Defendants’
 20 policies and practices have treated others differently. Specifically, it alleges that
 21 similarly-situated Caucasian motorists are not subjected to similar mistreatment. [FAC ¶
 22 32 (“Caucasian drivers and passengers . . . are treated differently and their vehicles
 23 stopped at much lower rates than similarly situated Latino drivers and passengers.”)]
 24 Moreover, the FAC alleges that the individual Plaintiffs were treated differently than
 25 members of non-minority groups and describes the underlying circumstances. For
 26 example, the FAC’s allegations concerning the Rodriguezes identifies similarly-situated
 27 non-Latino motorists who were *not* asked for similar documents and *not* cited. [*Id.* ¶ 96
 28 (“Mr. Rodriguez was able to stop and speak with several drivers he had seen pulled over

1 by Sheriff's deputies. Not one of them had been asked for a social security card, and not
 2 one of them had been given a citation. *The other drivers were all Caucasian.*")
 3 (emphasis added)]³ The allegations regarding Mr. Ortega likewise demonstrate that he
 4 was treated much differently than the Caucasian driver of the vehicle – who was not
 5 detained. [FAC ¶ 56]

6 Similarly, the FAC alleges that Ms. Meraz and Mr. Nieto were left alone once the
 7 officers heard their father identify them as U.S. Citizens. [*Id.* ¶ 116-119] Further, the
 8 FAC alleges that these two plaintiffs were targeted because of their Latino appearance
 9 during one of Defendants' so-called "crime suppression sweeps," and that each
 10 Plaintiffs' experience was the product of Defendants' pattern and practice of racial
 11 profiling. [FAC ¶¶ 30-32, 42, 48, 52, 119] In these circumstances, Plaintiffs have
 12 sufficiently alleged discriminatory effect.

13 Defendants' assertion that Plaintiffs must satisfy the requirements in selective
 14 *prosecution* cases, or otherwise face a "demanding standard of pleading" and
 15 "significant barrier" to litigation, is simply wrong. [Mot. at 9] This argument conflates
 16 "selective prosecution" and "selective enforcement" by improperly relying on selective
 17 prosecution cases when arguing the similarly-situated requirement. [Mot. at 9 (citing
 18 *Wayte v. United States*, 470 U.S. 598 (1985); *United States v. Armstrong*, 517 U.S. 456
 19 (1996))] The MSCO is a police agency, not a prosecutor's office, and selective
 20 prosecution cases – which arise in the context of criminal prosecutions – involve very
 21 different considerations than civil cases. *See Awaboly v. City of Adelanto*, 368 F.3d

22
 23
 24 ³ Defendants assert that Mr. Rodriguez did not identify the race of the other
 25 drivers until *after* he was cited. [Mot. at 13, n.7] This is irrelevant, because the other
 26 Caucasian drivers were pulled over by the same officers, for the same alleged traffic
 27 violation, at the same place and at roughly the same time, and these drivers admitted to
 28 Mr. Rodriguez that the officers had not requested their social security cards nor cited
 them. [FAC ¶ 96] Defendants provide no authority for the proposition that similarly
 situated non-minorities must be identified at the instant the constitutional violation
 occurs.

1 1062, 1071 (9th Cir. 2004) (*Armstrong* did not apply to a malicious prosecution case
2 where the plaintiff was not challenging any decision by the prosecutor).

3 Indeed, courts have found selective prosecution cases inapplicable to selective
4 enforcement or racial profiling cases for several reasons. First, selective prosecution
5 claims implicate constitutional concerns by interfering with the prosecutorial function –
6 something not directly at issue in a civil claim of racial profiling. *See Awaboly*, 368 F.3d
7 at 1071; *Rodriguez*, 89 F. Supp. 2d at 1141. Second, absent clear evidence to the
8 contrary, courts presume that prosecutors have properly discharged their duties.
9 *Armstrong*, 517 U.S. at 464. “Law enforcement officers, in contrast, never have been
10 afforded the same presumption of regularity.” *Rodriguez*, 89 F. Supp. 2d at 1141.

11 Third, courts have recognized that requiring the identification of a similarly-
12 situated class that was treated differently might well be “impossible” outside the
13 selective prosecution context, due to the difficulty of identifying individuals who were
14 not issued citations or arrested, or *not* even stopped. *Rodriguez*, 89 F. Supp. 2d at 1141.
15 Requiring that Plaintiffs prove such a negative where Defendants have failed to gather
16 relevant data about individuals stopped without further incident, or not stopped at all,
17 would effectively eliminate the Court’s ability to enjoin unconstitutional acts. *See Farm*
18 *Labor Organizing Comm.*, 308 F.3d at 534 n. 4; *Pyke*, 258 F.3d at 108-09; *Doe*, 462 F.
19 Supp. 2d at 545 (noting that this would be a result that “*Armstrong* does not sanction”).

20 While evidence of a similarly-situated class of individuals who were treated
21 differently than Plaintiffs may be utilized as part of a lawsuit seeking to enjoin a racially
22 discriminatory policy, it is not the only – or necessarily best – way to prove an Equal
23 Protection violation. *See, e.g., Vill. of Arlington Heights*, 429 U.S. at 266 (court may
24 inquire into “such circumstantial and direct evidence of intent as may be available”).
25 Here, Plaintiffs have alleged and will present significant direct and circumstantial
26 evidence of the discriminatory motivations behind, and discriminatory impact of,
27 Defendants’ conduct and policies. Against this backdrop, the FAC more than adequately
28 states a claim under the Equal Protection Clause.

IV. MARICOPA COUNTY MAY BE HELD LIABLE FOR ITS OWN ACTION OR INACTION, AND IS A PROPER DEFENDANT.

The FAC contains a number of allegations that strongly support holding Maricopa County directly liable under 42 U.S.C. § 1983. First, the FAC specifically alleges that Sheriff Arpaio “is the final decisionmaker for Maricopa County in the area of law enforcement.” [FAC ¶ 13] As such, Arpaio’s “decision to adopt a particular course of action” constitutes County policy, even without official action of the Maricopa County Board of Supervisors. *Harper v. City of Los Angeles*, 533 F.3d 1010, 1024-25 (imposing municipal liability under § 1983 where City’s Police Chief was “an authorized policymaker on police matters”); *see also Flanders v. Maricopa County*, 203 Ariz. 368, 378, 54 P.3d 837, 847 (Ct. App. 2002) (holding Maricopa County liable under § 1983 for Sheriff Arpaio’s jail policies); *Guillory v. Greenlee County*, CV-05-352-TUC-DCB, 2006 WL 2816600, *5 (D. Ariz. Sept. 28, 2006) (holding County liable for Sheriff’s policies regarding officer training that applied to all officers over an extended period of time).

Second, Maricopa County may be held directly liable for acquiescing in and effectively sanctioning Arpaio’s law-enforcement policies, practices and custom. *See Monell v. Dep’t of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 691 (1978) (local governments are responsible for practices and custom, although such “custom has not received formal approval through the body’s official decisionmaking channels”); *Harper*, 533 F.3d at 1024 (a policy may be “tacitly authorized”); *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1308 (11th Cir. 2001) (finding § 1983 municipal liability because “sexual harassment was the on-going, accepted practice at the City and that the City Commission, Mayor, and other high ranking City officials knew of, ignored, and tolerated the harassment”). The FAC alleges that the County has tolerated, acquiesced in, or otherwise tacitly authorized the Sheriff’s illegal customs and practices. [*E.g.*, FAC ¶ 19 (“[T]he Chair of Maricopa County Board of Supervisors has praised as good law enforcement these policies and practices of Defendant Arpaio in the face of large-scale

criticism that they specifically target Latinos.”)] By any measure, the FAC properly alleges the County’s liability. *See Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002) (a § 1983 claim against a municipality may be stated with “nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice”).

V. DEFENDANTS ARPAIO AND THE MCSO HAVE NO IMMUNITY AGAINST DECLARATORY AND INJUNCTION RELIEF.

Defendants inexplicably seek qualified immunity here. “[Q]ualified immunity is only an immunity from a suit for damages, and does not provide immunity from suit for declaratory or injunctive relief.” *Hydrick v. Hunter*, 500 F.3d 978, 988 (9th Cir. 2007). Because the FAC seeks only declaratory and injunctive relief, Arpaio and the MCSO are not entitled to immunity. *Id.*

VI. MCSO IS A PROPER DEFENDANT.

Defendants cite no authority holding that MCSO is a “non-jural entity not capable of suing, or being sued, in its own name.” [Mot. at 19] Moreover, Defendants ignore the numerous Arizona cases in which MCSO has acted as a “jural entity.” *See, e.g., Maricopa County Sheriff’s Office v. Maricopa County Employee Merit Sys. Comm’n*, 211 Ariz. 219, 119 P.3d 1022 (2005) (MCSO as plaintiff-appellant); *W. Valley View, Inc. v. Maricopa County Sheriff’s Office*, 216 Ariz. 225, 165 P.3d 203 (Ct. App. 2007) (MCSO as defendant-appellant); *Patterson v. Maricopa County Sheriff’s Office*, 177 Ariz. 153, 865 P.2d 814 (Ct. App. 1993) (same).

Furthermore, MCSO is amendable to suit as a “program or activity” under Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000d-4a(1)(A) (defining “program or activity” to include “a department, agency, special purpose district, or other instrumentality of a State or of a local government”). Even under Defendants’ definition of MCSO as a “county department,” MCSO constitutes a “program or activity” that, as Plaintiffs have alleged, receives federal funds. [Mot. at 20; FAC ¶ 18] MCSO may therefore be sued as a “program or activity” to enjoin its illegal use of those funds.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiffs' First Amended Complaint.

RESPECTFULLY SUBMITTED this 14th day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2008, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrant:

Timothy James Casey
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I further certify that I caused a copy of the attached document to be mailed on the 14th day of October, 2008 to:

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/s/ Monica Medlin
Legal Secretary

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