IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Angel Lopez-Valenzuela; Isaac Castro-Armenta, Plaintiffs, vs. Maricopa County; Joseph Arpaio, Maricopa County Sheriff, in his official capacity; William G. Montgomery, Maricopa County Attorney, in his official capacity, Defendants.	No. CV 08-660-PHX-SRB **ORDER**

The Court now considers Plaintiffs Angel Lopez-Valenzuela, Isaac Castro-Armenta, and the certified class's Motion for Summary Judgment ("Pls.' MSJ") (Doc. 203) and Defendants Maricopa County and Joseph Arpaio's Motion for Partial Summary Judgment ("Defs.' MSJ") (Doc. 198), which has been joined by Defendant William Montgomery, in his capacity as Maricopa County Attorney[1]. The Court heard oral argument on these Motions on December 13, 2010. (*See* Doc. 232, Minute Entry.)

[1] Defendants' MSJ was joined by Defendant Richard Romley, who was then the Maricopa County Attorney. (Doc. 204, Joinder at 1-2.) Defendant William Montgomery is the current Maricopa County Attorney. (*See* Doc. 235, Notice of Name Change & Substitution of Maricopa Cnty. Att'y.)

I. BACKGROUND

On November 2, 2006, Arizona voters approved a ballot measure known as Proposition 100, which was referred to the ballot by the Arizona Legislature and amended the Arizona Constitution to provide that no bail may be set "[f]or serious felony offenses as prescribed by the legislature if the person charged entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge." (Pls.' Separate Statement of Facts in Supp. of Pls.' MSJ ("PSOF") ¶ 11 (citing Ariz. Const. art. II, § 22(A)(4)); *see also* Defs.' Statement of Facts in Supp. of Defs.' MSJ ("DSOF") ¶ 1.) [2] Proposition 100 began as House Bill 2389, which was introduced by then-Arizona State Representative Russell Pearce. (PSOF ¶¶ 1-7.) As passed by the voters, Proposition 100 did not contain a definition of "serious felony offense." (*Id.* ¶ 6.) The Legislature had previously passed House Bill 2580, defining "serious felony offense" for purposes of Proposition 100 as any Class 1, 2, 3, or 4 felony. (*Id.* ¶¶ 8, 10.) On April 3, 2007, the Arizona Supreme Court issued an administrative order, stating that, in applying Proposition 100, the standard of proof for a finding that a defendant has entered or remained in the United States unlawfully is probable cause; that standard was later codified by statute. (*Id.* ¶ 59; DSOF ¶ 9.)

The Maricopa County Sheriff's Office ("MCSO") and Maricopa County Attorney's Office ("MCAO") developed policies to implement Proposition 100. (PSOF ¶ 61.) While in custody and without receiving a *Miranda* warning, arrestees are asked to complete a questionnaire, which includes questions about legal status in the United States. (*Id.* ¶¶ 62-63, 65.) MCSO deputies appear and testify at Proposition 100 Initial Appearances ("IAs"), where initial bail determinations are made. (*Id.* ¶¶ 69-71.) At an IA, the judicial officer must ascertain the defendant's name and address, inform the defendant of the charges against him,

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[2] In this Order, the Court cites to the PSOF where the facts contained therein are undisputed for purposes of these Motions or where the Court finds that the reference to evidence in the fact is accurate, is accurately characterized, and supports the factual proposition offered by Plaintiffs. The Court cites to the DSOF where appropriate, but as the DSOF is a less comprehensive document, citations to the PSOF are more frequent.

tell the defendant of his rights to counsel and to remain silent, appoint counsel if the defendant is eligible, and determine whether bail is appropriate. *See Segura v. Cunanan*, 196 P.3d 831, 836 (Ariz. Ct. App. 2008). Although prior to Proposition 100, neither prosecutors nor defense attorneys regularly appeared at IAs, after the passage of Proposition 100, the Maricopa County Attorney's Office ("MCAO") began requiring prosecutors to cover IAs or to be available to appear at IAs to make arguments when appropriate. (PSOF ¶¶ 79-81.) After Proposition 100 took effect, the head of the Maricopa County agency charged with public defender and other indigent defense services opined that appointed defense counsel was now necessary at IAs. (*Id.* ¶ 73.) However, Maricopa County made a policy determination to prohibit the use of county funds to provide appointed counsel for indigent defendants at Proposition 100 IAs and directed the county indigent defense agencies to stop having defense counsel appear at IAs. (*Id.* ¶ 74.)[3]

Pursuant to several decisions of the Arizona Court of Appeals, detainees have a right to request a prompt bond hearing, but they are not routinely informed of this right during their IAs. (*Id.* ¶ 96); *see also Segura*, 196 P.3d at 837-39, 841, 843; *Simpson v. Owens*, 85 P.3d 478, 491-92 (Ariz. Ct. App. 2004) *Simpson/Segura* hearings must be held within seven days of the request. Ariz. R. Crim P. 7.4(b). Judicial officers presiding over IAs do not issue oral or written statements of reasons for holding defendants nonbondable. (PSOF ¶ 98.) Defendants are not permitted to see the evidence the MCSO submits in support of the Proposition 100 nonbondability finding, either at the IA or at a later bond hearing. (*Id.* ¶ 101.) Until the Arizona Supreme Court set the standard for determining whether a person entered or remained in the United States at probable cause, a higher standard was being applied at IAs. (*Id.* ¶ 59; DSOF ¶¶ 8-9.) Before the Arizona Supreme Court's administrative order was issued, Proposition 100 defendants who later had *Simpson/Segura* hearings succeeded in obtaining bond 94% of the time. (PSOF ¶ 104.) Since the probable cause

[3] The vast majority of criminal defendants in Maricopa County, as in many places, are indigent. (*Id.* ¶ 76.)

standard was instituted, the prosecution has virtually a 100% success rate in obtaining and upholding determinations of nonbondability. (*Id.* ¶ 105.)

Plaintiffs' Complaint contains seven claims, six of which remain.[4] Plaintiffs claim that Proposition 100 and its implementing procedures are unconstitutional because they: (A) violate the substantive due process guarantee of the Fourteenth Amendment (Count One); (B) violate the procedural due process guarantee of the Fourteenth Amendment on account of the probable cause standard (Count Two) and the procedures at the IA (Count Three); (C) violate the Fifth Amendment right against self-incrimination (Count Four); (D) violate the Sixth Amendment right to counsel (Count Five); and (E) violate the Excessive Bail Clause of the Eighth Amendment (Count Six). (*See* Compl. ¶¶ 55-77.) Plaintiffs seek declaratory and injunctive relief, as well as attorneys' fees and costs pursuant to 42 U.S.C. § 1988. (*Id.* at 22-23.) Plaintiffs now move for summary judgment on Counts One, Two, Three, and Six, as well as Count Five, in the alternative. (Pls.' MSJ at 1-2.) Plaintiffs reserve Count Four for trial. (*Id.* at 2 n.1.) Defendants Maricopa County and Sheriff Arpaio move for partial summary judgment on Counts One, Two, Three, Five, and Six. (Defs.' MSJ at 1-2.)

II. LEGAL STANDARDS AND ANALYSIS

A. Summary Judgment Standard

The standard for summary judgment is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under Rule 56, summary judgment is properly granted when: (1) no genuine issues of material fact remain; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). A fact is "material" when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" of material fact arises if "the evidence is such that

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[4] The Court previously dismissed Count Seven in an Order signed by the Court on December 8, 2008. (*See* Doc. 47, Dec. 8, 2008, Order at 10-14.)

a reasonable jury could return a verdict for the nonmoving party." *Id*.

In considering a motion for summary judgment, the court must regard as true the non-moving party's evidence, if it is supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings; it must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. *Anderson*, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

B. Facial Challenge vs. As-Applied Challenge

Plaintiffs challenge Proposition 100 both on its face and as applied to the members of the certified class.[5] (*See* Pls.' MSJ at 15, 28.) "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Supreme Court later observed, in considering a facial challenge, "[S]ome Members of the Court have criticized the *Salerno* formulation, [but] all agree that a facial challenge must fail where a statute has a 'plainly legitimate sweep.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring in judgments)). In deciding a facial challenge, courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 449-50 (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

C. Substantive Due Process: Count One

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any

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[5] The Court certified a class in this matter defined as follows: "[a]ll persons who have been or will be ineligible for release on bond by an Arizona state court in Maricopa County pursuant to Section 22(A)(4) of the Arizona Constitution and A.R.S. § 13-3961(A)(5)." (Dec. 8, 2008, Order at 19.)

State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To prevail on a claim for a violation of the Due Process Clause, a plaintiff must show (1) that the defendant deliberately abused his power without any reasonable justification, in aid of any government interest or objective, and only to oppress, in a way that shocks the conscience (substantive due process) *or* (2) that the defendant denied the plaintiff a specific right protected by the federal constitution, without procedures ensuring fairness (procedural due process). *Sandin v. Conner* , 515 U.S. 472, 483-484 (1995); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Substantive due process rights are those that are not otherwise constitutionally protected but are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [they] were sacrificed." *Glucksberg*, 521 U.S. at 721 (internal quotation marks and citations omitted).

The Supreme Court established the standard for evaluating substantive due process challenges to bail statutes in *Salerno*. *See* 481 U.S. at 746-47. *Salerno* sets forth two tests to determine whether a bail statute imposes punishment before trial, which is unconstitutional, or, instead, simply serves a regulatory purpose and is intended to ensure the appearance of the person for trial. *Id.*; *see also Bell v. Wolfish* , 441 U.S. 520, 535-37 & n.16 (1979) (explaining the policy behind the due process analysis of conditions or restrictions of pretrial detention). "To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent." *Salerno*, 481 U.S. at 747 (citing *Schall v. Martin*, 467 U.S. 253, 269 (1984)). If the legislature did not have an express intent to punish, then "the punitive/regulatory distinction turns on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]" *Id.* (internal quotation and citation omitted). In other words, where a legislature does not express a punitive intent, a bail regulation can still be unconstitutional if it is excessive in relation to a legitimate alternative purpose, such as flight risk or danger to the community.

1. Intent to Punish

Plaintiffs argue that "the effect and purpose of Proposition 100 is to jail defendants as a punishment for past immigration violations, rather than to ensure their appearance at trial." (Pls.' MSJ at 6.) Plaintiffs contend that the categorical bar to individualized bail determinations reflects an improper legislative intent. (*Id.* at 6-7.) In support of this argument, Plaintiffs have submitted extensive evidence of the pertinent legislative history. (*See* PSOF ¶¶ 12-27.) Although Proposition 100 was passed as a voter referendum, the Court looks to the legislative record, as well as to statements made during the referendum drive and in election materials, in determining legislative intent. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196-97 (2003). Statements of legislators are not given "controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of [the legislature's] intent." *Brock v. Pierce Cnty.*, 476 U.S. 253, 263 (1986) (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984)). Statements made by the sponsor of a piece of legislation "deserve[] to be accorded substantial weight in interpreting [a] statute." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (citations omitted).

Plaintiffs point to numerous portions of the legislative record they claim indicate "Proposition 100's punitive nature." (Pls.' MSJ at 7-10.) During committee hearings on the prospective law, several legislators made statements related to the goal of controlling unauthorized immigration and securing the border. (*See, e.g.*, Doc. 188, Decl. I of Tyler Cook ("Cook Decl. I"), Ex. A; Doc. 186, Decl. I of Sharon Breslin, Ex. A; Doc. 192, Decl. II of Angela Liebl ("Liebl Decl. II"), Ex. A; Doc. 185, Decl. of Jesutine Breidenbach, Ex. A.) Then-Representative Russell Pearce, the sponsor of the bill, made many statements that suggest that his goal in drafting the legislation was to address the "serious problems in this country with violent aliens." (*E.g.*, Liebl Decl. II, Ex. A at 3:22-23.) Mr. Pearce stated during a House Judiciary Committee Meeting, "These people are not in our country legally and have no roots, have committed a serious crime while violating our sovereignty and shouldn't be here in the first place. And yes, I think it rises to a different level than folks who commit crimes . . . ." (Cook Decl. I, Ex. A at 5:7-10.) Plaintiffs assert that the animating purpose

behind Proposition 100 was to punish people who are in the country without authorization for their *previous* crime of unlawfully entering or remaining in the United States, rather than an appropriate bail consideration such as flight risk or dangerousness. (Pls.' MSJ at 7.)

The Arizona Legislature made no formal findings regarding the purpose of Proposition 100. The legislative history suggests that Proposition 100 may have been motivated by a desire to punish for past crimes, but there is also evidence that legislators considered the issue of flight risk. For instance, immediately after making the statement quoted above, Mr. Pearce said, "We already have pretty good bail requirements, but again, one of them is . . . flight risk[,] and this goes directly toward that flight risk, the issue relevant to bondability." (Cook Decl. I, Ex. A at 5:10-12; *see also id.* at 3:16-18 (Mr. Pearce: "[I]f you are in this country illegally and commit a serious crime, . . . you are a flight risk, you've got no roots, you can go home any day . . . .").) During the same hearing, another legislator asked Mr. Pearce, "[D]o you have any evidence to show that foreign nationals . . . pose more of a flight risk than U.S. citizens?" (*Id.* at 4:7-9.) No one came forward at the time with evidence to support his claim that people who are unlawfully present in the United States are categorically more of a flight risk than people who are not unlawfully present, nor have Defendants in this matter presented evidence to that effect. (*See* PSOF ¶¶ 32-40.) However, the Court agrees with Defendants that the Arizona Legislature–unlike the United States Congress–comprises "citizen legislators" who do not have access to the type of resources, both in terms of money and staff, that federal legislators do. (*See* Mot. Hr'g Tr. 25:2-4, Dec. 13, 2010 ("Hr'g Tr.").)

Defendants point to Mr. Pearce's deposition testimony in this case as evidence of his proper purpose in drafting and sponsoring Proposition 100. (Defs.' Resp. to Pls.' MSJ at 8.) Mr. Pearce's statements during his deposition regarding flight risk are contradicted by other portions of the same deposition. In addition, the Court assigns significantly greater weight to evidence from the legislative history that demonstrates the legislature's purpose at the time Proposition 100 was debated and referred to the voters than to the post hoc deposition testimony of the law's sponsor. (*See* Docs. 180-82, Decl. of Andre I. Segura & Attach.

("Segura Decl."), Ex. E, Pearce Dep., vol. 1, 49:11-50:13; Segura Decl., Ex. F, Pearce Dep., vol. 2, 12:1-14, 25:12-22, 43:20-44:4, 86:3-12, 115:20-116:3.); *cf. Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 579 (1995) ("Material not available to the lawmakers is not considered, in the normal course, to be legislative history. After-the-fact statements . . . are not a reliable indicator of what Congress intended when it passed the law . . . ."); *Wash. Cnty. v. Gunther*, 452 U.S. 161, 176 n.16 (1981) (observing that the Supreme Court is "normally hesitant to attach much weight to comments made [by legislators] after the passage of the legislation," and, because the statements at issue were contradictory, "giv[ing] them no weight at all" (citation omitted)); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977) (assigning "little if any weight" to after-the-fact statements of legislators).

The Court considers the materials and media to which voters were exposed to be neutral on the question of punitive intent. The voter materials contained some official statements reflecting a punitive purpose, but ultimately the message was mixed.[6] The official voter information guide provided voters with four statements in favor of Proposition 100 and one against. Mr. Pearce's statement said, "Illegal aliens that commit a crime [sic] are an extremely difficult challenge for law enforcement and growing threat to our citizens. Large, well-organized gangs of illegal aliens have flooded many neighborhoods with violence to the point that Arizona now has the highest crime rate in the nation." (Doc. 183, Decl. of Anne Lai, Ex. EE at 1.) A candidate for governor submitted a statement in favor of Proposition 100, saying, "This Ballot Measure addresses one area that needs to be resolved in this fight to secure our borders and reduce the level of crime in our neighborhoods." (*Id.* at 2.) The voter pamphlet also discussed flight risk, though: "Illegal immigrants accused of committing serious felonies in Arizona should not be allowed to make bail and flee the country before standing trial for their crimes." (*Id.* at 1.) Plaintiffs have submitted news articles from the pertinent time period, one of which describes Proposition 100 as one of "a foursome of ballot

[6] In considering a voter referendum such as this one, it is appropriate for courts to look to voter materials as a means of assessing motive. *See, e.g.*, *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696-98 (9th Cir. 1997).

measures aimed at curbing illegal immigration." (Segura Decl., Ex. A at 1.)[7] But other news coverage addressed flight risk. (*See id.*, Ex. B at 1 ("An illegal immigrant is, without a doubt, a high [flight] risk because of the ability to come in and go out of the country when they please."); *id.*, Ex. D at 4 (Andrew Thomas: "Arizona has a tremendous problem with illegal immigrants coming into the state, committing serious crimes, and then absconding and not facing trial for their crimes, either because they jump bail after they are let out, or because, when they are let out on bail, the federal government deports them.").) The Court finds that the voter materials and media coverage do not establish that Proposition 100 has a punitive purpose.

Having reviewed the voluminous evidence submitted in this case, the Court finds that the record as a whole does not support a finding that Proposition 100 was motivated by an improper punitive purpose. While some statements by legislators relate to controlling illegal immigration, other pieces of evidence show that Proposition 100's purpose is regulatory. Moreover, Proposition 100 was ultimately approved by Arizona voters, so that reduces somewhat the importance of the legislative record. Proposition 100 does not violate *Salerno*'s first test.

2. Excessive in Relation to Legitimate Interest

The Court further concludes that Proposition 100 is not excessive in relation to the government's legitimate interest in controlling flight risk of people accused of certain felonies. The Arizona legislature and Arizona voters made the logical assumption that a person who is unlawfully present in the United States may not appear for trial. (*See, e.g.*, Cook Decl. I, Ex. A at 5:10-12; *see also id.* at 3:16-18 (Mr. Pearce: "[I] f you are in this country illegally and commit a serious crime, . . . you are a flight risk, you've got no roots, you can go home any day . . . .").)

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[7] It is also proper for courts to look to contemporaneous media coverage when considering the constitutionality of a voter referendum. *See, e.g.*, *City of L.A. v. Cnty. of Kern*, 509 F. Supp. 2d 865, 876-80 (C.D. Cal. 2007), *rev'd on other grounds*, 581 F.3d 841 (9th Cir. 2009).

In *Salerno*, the Supreme Court upheld the federal Bail Reform Act (the "Act") against a substantive due process challenge, noting that the Act "limits the circumstances under which detention may be sought to the most serious of crimes." 481 U.S. at 747 (analyzing 18 U.S.C. § 3142(f), which makes available a detention hearing if the case involves "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders"). However, the Act focused on a different rationale for holding a person nonbondable, namely "that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'" *Id.* at 741 (quoting 18 U.S.C. § 3142(e)(1)). The parties agree that Proposition 100 is aimed only at flight risk, not dangerousness. (*See* Hr'g Tr. 6:5-9.)

Therefore, the analysis in *Salerno* concerning the scope of the Act's reach is not analogous to the instant matter. *See* 481 U.S. at 747-51. Proposition 100 reaches a larger number of crimes than the Act, but, given the goal of targeting flight risk, not dangerousness, it is not excessive. The government has the burden of proof under the Act to demonstrate a person's dangerousness by clear and convincing evidence, but Proposition 100 is not concerned with dangerousness, so a less stringent standard is also not excessive. *Compare* A.R.S. § 13-3961(A)(5), *with* 18 U.S.C. § 3142(f)(2). Ultimately, the Supreme Court in *Salerno* concluded that the Act appropriately balanced the individual's right to liberty with the government's compelling interest. 481 U.S. at 750-51. Likewise, the Court finds that Arizona's Proposition 100, like the Act, "focuses on a particularly acute problem in which the [g]overnment interests are overwhelming." *Id.* at 750.

For reasons discussed more fully below, the Court also concludes that the procedural protections afforded to defendants subject to Proposition 100 keep it from being excessive in relation to the goal of assuring appearance at trial. A defendant may move for a hearing pursuant to *Segura*, 196 P.3d at 837-39, 841, 843, and *Simpson*, 85 P.3d at 491-92, and the hearing must be conducted within seven days of the motion. *See* Ariz. R. Crim P. 7.4(b). The Arizona Court of Appeals has held that these hearings satisfy substantive due process standards, and this Court agrees. *See Segura*, 196 P.3d at 843-44; *Hernandez v. Lynch*, 167

P.3d 1264, 1270-75 (Ariz. Ct. App. 2008); *Simpson*, 85 P.3d at 482-95. Like the Arizona Court of Appeals, this Court finds "that Proposition 100 is a legitimate regulatory provision ensuring that [unlawfully present aliens] accused of certain serious felonies appear to stand trial and that it does not cast an unreasonably wide net." *Hernandez*, 167 P.3d at 1270 (citing *Simpson*, 85 P.3d at 486). [8] Therefore, no triable issues of fact remain. The Court grants Defendants summary judgment on Count One of the Complaint.

D. Procedural Due Process: Counts Two and Three

Plaintiffs also move for summary judgment on their procedural due process claims, Counts Two and Three. (Pls.' MSJ at 17-19.) "When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process." *Salerno*, 481 U.S. at 746 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The Court finds that Proposition 100 does not deprive Plaintiffs of their procedural due process rights.

In *Salerno*, the Supreme Court emphasized the significant "procedural safeguards" in place that permitted judges applying the Act to make an individualized determination in each case. *See id.* at 742-43. The Act requires a prompt, adversarial detention hearing, wherein the detainee has the right to counsel, may testify on his own behalf, may "present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing." *Id.* at 751; *see also* 18 U.S.C. § 3142(f)-(g). The judicial officer making the detention determination under the Act "is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community."

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[8] Moreover, the Arizona Rules of Criminal Procedure give criminal trials priority over civil trials in terms of timing and establish that defendants in custody are entitled to be tried within 150 days of arraignment. *See* Ariz. R. Crim. P. 8.1(a), 8.2(a)(1). While this time limit is subject to certain exceptions and exclusions, those extensions are largely within the control of the defendant. *E.g.*, Ariz. R. Crim. P. 8.2(a)(3); 8.2(d); 8.4; 8.5. Therefore, pretrial detention is, by its nature, relatively brief.

Salerno, 481 U.S. at 751-52 (citing 18 U.S.C. § 3142(g)). The judicial officer must issue written findings of fact and a written statement of reasons if he or she decides to detain the individual. *Id.* at 752 (citing 18 U.S.C. § 3142(i)). The government must prove that a defendant is a danger to the community by clear and convincing evidence, pursuant to the Act. *Id.* (citing 18 U.S.C. § 3142(f)). A determination of detention under the Act is immediately appealable. 18 U.S.C. § 3142(c).

In *Simpson*, the Arizona Court of Appeals held that "at least most of the procedural protections enunciated in *Salerno*" are necessary for a state bail provision to comply with procedural due process. 85 P.3d at 492. The issue here is whether defendants subject to Proposition 100 must be afforded those protections at the IA or whether the right to move for a *Simpson*/*Segura* hearing is sufficient to assure adequate procedural due process. The Court finds that *Simpson*/*Segura* hearings provide enough process to protect the rights of people subject to Proposition 100. An IA is, by its nature, brief, but a defendant who moves for a full bail hearing has the right to counsel, may testify on his own behalf, may present other evidence, and may cross-examine witnesses for the government. *See Segura*, 196 P.3d at 240.

> The competing interests at stake are a defendant's liberty and the government's need to ensure his presence for trial. On balance each of these interests is protected by allowing a defendant to be held after an [IA] for a reasonable period of time while both parties are given the opportunity to prepare for a full hearing on the no-bail determination.

Id. (citing *Hernandez*, 167 P.3d at 1272-75)). The Arizona Rules of Criminal Procedure require that any *Simpson*/*Segura* hearing be held "not later than seven days after filing of the motion," so any detention between an IA and a full hearing will be brief. *See* Ariz. R. Crim. P. 7.4(b). Like in *Salerno*, "these extensive safeguards suffice to repel a facial challenge." 481 U.S. at 752.

The Court also finds that the use of the probable cause standard does not violate procedural due process. As discussed above, the Act applies the clear and convincing standard only to determinations of dangerousness; a preponderance of the evidence standard is applied to flight risk. *See* 18 U.S.C. § 3142(f)(2); *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991) ("On a motion for pretrial detention, the government bears the burden

of showing by a preponderance of the evidence that the defendant poses a flight risk, and by clear and convincing evidence that the defendant poses a danger to the community."(citing *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985))). Clear and convincing is a significantly higher standard than either probable cause or preponderance of the evidence. The Court finds that the difference between a preponderance of the evidence standard and a probable cause standard does not amount to a procedural due process violation.

No genuine issue of material fact remains as to whether Proposition 100 is implemented in a fair manner. *See Salerno*, 481 U.S. at 746 (citing *Mathews*, 424 U.S. at 335). Accordingly, Defendants are entitled to summary judgment on Counts Two and Three of Plaintiffs' Complaint.

E. Eighth Amendment: Count Six

The Eighth Amendment provides, "Excessive bail shall not be required." U.S. Const. amend. VIII, cl. 1. "This Clause, of course, says nothing about whether bail shall be available at all." *Salerno*, 481 U.S. 752. The *Salerno* court observed that "'the very language of the [Eighth] Amendment fails to say that all arrests must be bailable.'" *Id.* at 754 (quoting *Carlson v. Landon*, 342 U.S. 524, 545-46).

> The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release not be 'excessive' in light of the perceived evil. . . . [T]o determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response.

Id. The Court has already concluded that Proposition 100 is not excessive in relation to the goal of ensuring that criminal defendants appear for trial. The reasoning related to substantive due process, *supra*, applies equally in the Eighth Amendment context. *Cf. United States v. Portes*, 786 F.2d 758, 766 (7th Cir. 1985) (holding that the Eighth Amendment does not create a constitutional right to bail and that Congress and the states may regulate bail determinations); *United States v. Moore*, 607 F. Supp. 489, 493 (N.D. Cal. 1985) (observing that, while "legislative determinations regarding the right to bail cannot be arbitrary," the Eighth Amendment does not prevent legislatures from making certain offenses nonbailable). Therefore, Proposition 100 does not violate the Eighth Amendment, and Defendants are

entitled to summary judgment on Count Six of the Complaint.

F. Sixth Amendment: Count Five

In the alternative, Plaintiffs move for summary judgment on their Sixth Amendment challenge to Maricopa County's policy of not permitting appointed defense counsel at Proposition 100 IAs. (Pls.' MSJ at 20.) Plaintiffs argue that "Proposition 100 fundamentally changed the nature of [IAs], making them more complex and triggering the need for counsel." (*Id.*) The Supreme Court "has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 194 (2008) (citing *Brewer v. Williams*, 430 U.S. 387, 398-399 (1977); *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986)). The right to counsel attaches when "a prosecution is commenced," which can be marked by a "formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 198 (internal quotations and citations omitted). Once the right to counsel attaches, "counsel must be appointed within a reasonable amount of time," and the defendant "is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." *Id.* at 212. "[C]ritical stages [are] proceedings between an individual and agents of the State (whether formal or informal, in court or out) that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary." *Id.* at 212 n.16 (internal quotations and citations omitted).

The Ninth Circuit Court of Appeals identified three factors "useful in determining whether an event" is a critical stage:

> First, if failure to pursue strategies or remedies results in a loss of significant rights, then Sixth Amendment protections attach. Second, where skilled counsel would be useful in helping the accused understand the legal confrontation, we find that a critical stage exists. Third, the right to counsel applies if the proceeding tests the merits of the accused's case.

United States v. Bohn, 890 F.2d 1079, 1080-81 (9th Cir. 1989) (quoting *Menefield v. Borg*, 881 F.2d 696, 698-99 (9th Cir. 1989)). The Arizona Supreme Court has held that, "[i]n Arizona, an initial appearance is a proceeding at which a person is advised of his right to

counsel and steps are taken toward obtaining counsel for subsequent proceedings. Hence, no right to an attorney exists at the initial appearance on the day of the arrest." *State v. Cook*, 724 P.2d 556, 561 (1986).

The Court finds that Proposition 100 IAs are not critical stages of the prosecution. In Arizona, an IA–even a Proposition 100 IA–is not a preliminary hearing. An IA must take place within 24 hours of an arrest. Ariz. R. Crim. P. 4.1(a). If the person was arrested without a warrant, a complaint must be filed within 48 hours of the IA. Ariz. R. Crim. P. 4.1(b).

> At the person's [IA] the magistrate must do certain prescribed things, including: ascertaining the defendant's true name and address, informing the defendant of the charges, informing the defendant of the right to counsel and the right to remain silent, determining whether probable cause exists for the purpose of release from custody, appointing counsel if the defendant is eligible, and determining the release conditions, if any.

Segura, 196 P.3d at 836. No plea is entered at the IA. *Cf. White v. Maryland*, 373 U.S. 59, 60 (1963). If a complaint is filed after the IA, a preliminary hearing to determine probable cause is held no later than 10 days after the IA if the defendant is in custody, unless the defendant waives the hearing. Ariz. R. Crim. P. 5.3(a).

Thus, IAs are brief, administrative proceedings at which the defendants' "failure to pursue strategies or remedies" does not "result[] in a loss of significant rights." *Bohn*, 890 F.2d at 1080. Moreover, the Court finds that "skilled counsel" is unnecessary to help "the accused understand the legal confrontation" because the matters at issue are largely ministerial and, in fact, include the appointment of counsel if appropriate. *See id.* at 1081. Finally, IAs do not "test[] the merits of the accused's case." *Id.* No genuine issue of material fact remains as to Plaintiffs' Sixth Amendment claim; Defendants are entitled to summary judgment on Count 5 of the Complaint.

III. CONCLUSION

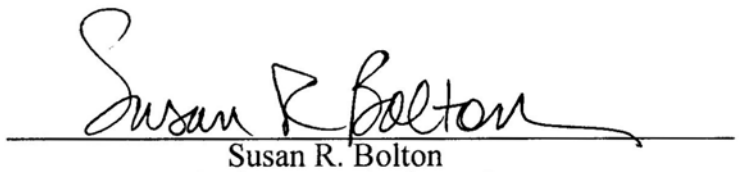
For the reasons stated above, the Court finds that no triable issues of fact remain as to Counts One, Two, Three, Five, and Six of Plaintiffs' Complaint and grants Defendants summary judgment on those five claims.

IT IS ORDERED denying Plaintiffs Angel Lopez-Valenzuela, Isaac Castro-Armenta,

and the certified class's Motion for Summary Judgment (Doc. 203).

IT IS FURTHER ORDERED granting Defendants Maricopa County and Joseph Arpaio's Motion for Partial Summary Judgment (Doc. 198). The Clerk is directed to enter judgment in this matter in favor of Defendantswith respect to Counts One, Two, Three, Five, and Six of the Complaint.

DATED this 29th day of March, 2011.



Susan R. Bolton
United States District Judge