IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TOWN OF COLORADO CITY, ARIZONA; CITY OF HILDALE, UTAH; AND TWIN CITY WATER AUTHORITY, INC.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS APPELLEE

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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17-16472

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TOWN OF COLORADO CITY, ARIZONA; CITY OF HILDALE, UTAH; AND TWIN CITY WATER AUTHORITY, INC.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

The United States brought this civil action under the Violent Crime Control and Law Enforcement Act, 42 U.S.C. 14141 (now 34 U.S.C. 12601), and the Fair Housing Act, 42 U.S.C. 3614. The district court had jurisdiction under 28 U.S.C. 1331 and 1345 and entered a final judgment in favor of the United States on April

18, 2017. E.R.1-54. Defendants filed a timely notice of appeal on July 19, 2017, following a 30-day extension. E.R.1465-1467; Doc.1063; see Fed. R. App. P. 4(a)(1)(B)(i). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

- 1. Whether the district court applied the correct liability standard for violations of 42 U.S.C. 14141.²
- 2. Whether the district court correctly concluded that five arrests were committed without probable cause, findings that underlay in part the court's conclusion that defendants engaged in a pattern or practice of Fourth Amendment violations.
 - 3. Whether the admission of various out-of-court statements was proper.

STATEMENT OF THE CASE

This appeal arises from a lawsuit brought by the United States under the Violent Crime Control and Law Enforcement Act, 42 U.S.C. 14141 (Section 14141), and the Fair Housing Act (FHA), 42 U.S.C. 3614. The defendants, the

¹ "E.R." refers to appellants' Excerpts of Record. "S.E.R." refers to the government's Supplemental Excerpts of Record. "Br." refers to appellants' opening brief. "Doc.__:_" refers to the docket entry and page numbers in the district court record.

² In 2017, Section 14141 was recodified as 34 U.S.C. 12601. Because this case was tried before the recodification, and to be consistent with appellants' brief, we use "Section 14141" here. The full text of Section 14141 is provided in an addendum.

Town of Colorado City, Arizona, and the City of Hildale, Utah (defendants or the Towns), are two adjacent towns straddling the remote Arizona-Utah border that together are known as the Short Creek community.³

The government's basic allegation is that the Towns function as an arm of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS or the Church), a religious sect controlled since 2002 by convicted-felon Warren Jeffs. The government alleged that the Towns conspired with FLDS leaders to use municipal resources—including their joint police department—to advance Church interests and, in doing so, systematically discriminate against and violate the constitutional and fair-housing rights of non-FLDS persons.

After a six-week trial, a jury found defendants liable for violating the FHA and issued an advisory verdict in favor of the government on the Section 14141 claim. The district court subsequently entered a written judgment finding defendants liable under Section 14141 and imposing injunctive relief on both claims.

On appeal, the Towns challenge only the district court's liability finding under Section 14141; they do not challenge either the imposition or scope of injunctive relief, or the jury's verdict on the FHA claim.

³ Although Twin City Water Authority (TCWA) is a party to this appeal, appellants' brief challenges only the Section 14141 liability finding, which does not pertain to TCWA.

1. Background

a. The Short Creek Community And The Rise Of Warren Jeffs

Short Creek was established in the early 1900s as a religious settlement, and FLDS members make up a significant portion of its population. S.E.R.21; Doc.840:194. The FLDS Church, which espouses plural marriage, is led by a Prophet, to whom adherents "defer[] with reverence." Doc.840:194-196.

In 2002, Warren Jeffs became Prophet of the FLDS Church. Doc.840:197-199; S.E.R.4-5. Jeffs began to assert increasing control over members' lives, establishing strict rules enforced through the threat of excommunication. S.E.R.4; Doc.845:437-453; Doc.851:734-735. Excommunication, under Jeffs, meant more than just leaving the Church: Jeffs banished excommunicated men from the community, reassigned their wives and children to other FLDS members, and ordered members not to associate with nonmembers, who are deemed "apostates." E.R.397-400; S.E.R.18-20; Doc.845:440-443; Doc.864:1742-1744. Jeffs has excommunicated numerous town officials and ordered them to resign from their positions, refilling their posts with persons he deems more loyal. E.R.402-403; S.E.R.17-20, 43-48; Doc.864:1741-1745, 1830.

To exert further control over FLDS members, Jeffs established an elite subgroup called the United Order. Those selected for admission were required to cut all ties with non-United Order members and to turn over, or "consecrate," all

their belongings to the Church. S.E.R.86-94; Doc.854:1002-1005; Doc.867:2068-2071; Doc.907:4323. Numerous town officials and police officers were members of the United Order. S.E.R.94-95; Doc.854:1008; Doc.858:1411; Doc.865:1905, 1940; Doc.867:2069; Doc.870:2351-2354.

The Church also controlled its members via a private security force called Church Security. Church Security's functions included protecting FLDS leaders; watching for and alerting Church leaders when outside law enforcement came to town; monitoring United Order members to ensure that they were not associating with non-members; and surveilling non-FLDS persons via both lookout vehicles and city security cameras, which streamed into, and could be operated from, a control room at the Church meeting house. Doc.854:1006-1010; Doc.858:1343-1350, 1412-1421; Doc.865:1948-1961; Doc.867:2078; Doc.870:2315, 2325; Doc.871:2381; Doc.881:2536; Doc.883:2883-2886; Doc.884:2922-2934, 2953. Many town officials and marshals were also Church Security members at some point. S.E.R.79-82; Doc.858:1341-1343, 1420-1421, 1427-1429; Doc.865:1955-1960; Doc.867:2049-2053; Doc.871:2382; Doc.884:3000.

In June 2005, the FBI secured a warrant for Jeffs' arrest on charges connected to sexual misconduct with children. Doc.844:584-585. Jeffs went into hiding, spending over a year as a fugitive before being captured. Doc.844:585-586; Doc.854:1051. In 2011, Jeffs was convicted of two counts of child sexual

assault in Texas. Doc.1:3 n.3; Doc.849:686; Doc.854:1051. Although he remains incarcerated, Jeffs continues to lead the FLDS Church. Doc.840:199-200; Doc.841:310-312; Doc.849:686-706; Doc.864:1831; Doc.904:4288-4289.

b. The United Effort Plan Trust

For religious reasons, the early settlers of Short Creek decided to hold all land in common and created the United Effort Plan Trust (UEP Trust, or Trust) to hold, manage, and distribute real property to its members. S.E.R.21; Doc.840:123. At the time of trial, the UEP Trust owned approximately 90% of the housing in Short Creek. S.E.R.22.

In 1998, the Trust was revised to make the FLDS leader its sole director.

Doc.841:224. Accordingly, Warren Jeffs assumed total control over the Trust when he became Prophet in 2002. S.E.R.22; Doc.845:457. By 2005, however, Jeffs' failure to defend against several lawsuits put the Trust at risk of losing millions of dollars. S.E.R.23; Doc.845:458. Utah intervened to protect the Trust's beneficiaries, asking a state probate court to remove control of the Trust from the FLDS Church and appoint a special fiduciary. S.E.R.23; Doc.840:123; Doc.845:458-459. In 2006, the probate court reformed the Trust to operate on a religiously neutral basis, defining beneficiaries based on their contributions to the Trust, not their religion. Doc.845:460; Doc.862:1605-1606.

The Church strongly opposes non-FLDS management of the Trust and has directed its members not to cooperate with the Trust, its special fiduciary, or the probate court. S.E.R.23-31; Doc.845:465-466; Doc.871:2369. Thus, although FLDS members continue to live in Trust-owned homes, they refuse to execute occupancy agreements—which are akin to leases and are required to occupy Trustowned property—or to pay the \$100 monthly occupancy fee or their share of property taxes. Doc.845:464-465; Doc.861:1585-1586. Instead, the Church moves followers into and out of Trust-owned houses at night without the Trust's knowledge or permission—a practice known as the "midnight shuffle"—to thwart the Trust's management of its properties and prevent non-FLDS persons from moving into them. Doc.845:465-466; Doc.867:2067. Many town officials and police officers are delinquent on their occupancy fees and taxes and have moved into Trust-owned homes without the Trust's permission. Doc.862:1601-1603; Doc.883:2901; Doc.887:3216; Doc.890:3531-3532; Doc.915:4460; Doc.917:4661.

2. United States' Lawsuit

a. Complaint And Proceedings

In June 2012, the United States brought a civil action against the Towns and their municipal utility providers, Twin City Water Authority (TCWA) and Twin City Power, alleging a longstanding pattern or practice of discrimination on the basis of religion. E.R.1468-1486. The complaint raised two main claims:

First, the government alleged that the Towns, through their joint police department, the Colorado City Marshal's Office (Marshal's Office), violated 42 U.S.C. 14141 by engaging in a pattern or practice of constitutional violations. Specifically, it alleged that the Marshal's Office was excessively entangled with the FLDS Church and employed its resources to systematically discriminate against non-FLDS residents, conduct that amounted to a pattern or practice of depriving non-FLDS persons of their rights under the Establishment Clause, Equal Protection Clause, and Fourth Amendment. E.R.1472-1478, 1481-1482.

Second, the complaint alleged that the Towns and their utility companies violated the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, by discriminating against non-FLDS persons in the provision of housing. Among other things, the United States alleged that the Towns enacted a restrictive water policy that functioned to deny water service to non-FLDS individuals, thereby preventing them from occupying UEP Trust-owned homes. E.R.1479-1480, 1482-1483.⁴

The case proceeded to a jury trial in January 2016. Because Section 14141 does not provide a jury right, the parties agreed that the jury would decide the FHA

⁴ The complaint also alleged that the Towns violated 42 U.S.C. 2000b by denying non-FLDS persons equal access to a public zoo and park. E.R.1484. The district court dismissed the Section 2000b claim without prejudice (Doc.38:6), and the government did not reallege it.

claim and serve in an advisory capacity only on the policing claim. See Doc.815:6-8; Doc.934:5079; Fed. R. Civ. P. 39(c)(1).

b. The Evidence At Trial

The government presented extensive evidence supporting its claim that the Towns, through the Marshal's Office, violated Section 14141 by engaging in a pattern or practice of unconstitutional policing in violation of the Establishment Clause, Equal Protection Clause, and Fourth Amendment.⁵

i. There was substantial evidence that Church leaders directed who should occupy town government positions, including who should become marshals.
E.R.385-390, 424-428, 484; Doc.852:848; Doc.854:1000-1001; Doc.857:1310-1311; Doc.858:1373; Doc.867:2015-2023; Doc.870:2355-2359; Doc.871:2367-2369. Church leaders told those selected to become marshals that the appointment was "a mission" or a "calling from the Church," and that their job as a marshal was to protect the Church. S.E.R.41; Doc.867:2016-2017, 2080; see also Doc.857:1322-1323 (marshals given a test to ensure loyalty to Jeffs while he was a fugitive); E.R.528-529 (Jeffs warned marshals, through his Bishop, that "[a]s far as official duties," the "Priesthood has the right to rule").

⁵ Because defendants do not challenge the jury's verdict on the FHA claim, we do not address the evidence supporting that claim.

ii. There was also considerable evidence that marshals, like other town officials, sought and received direction from FLDS leaders about how to perform their jobs to advance the Church's interests. See, *e.g.*, E.R.492-493, 507-508, 512-518; Doc.864:1745-1750; Doc.871:2378-2379. For example, multiple witnesses testified that, for years, town officials and marshals attended regular private meetings with Church leadership at R&W Excavation, an FLDS-affiliated business, where they received orders from the Church on how to handle various issues—including how to thwart the UEP Trust. E.R.375-384; Doc.851:766-784; Doc.858:1376-1378; Doc.867:2065-2067. The R&W meetings were also where city officials received many Church orders on personnel decisions. See E.R.385-390; Doc.851:784-785.

The government also introduced letters to Jeffs from both town officials and marshals expressing their desire to use their positions to do Jeffs' bidding. See, *e.g.*, Doc.844:612-618; Doc.849:638-643, 694-695. In one, written while Jeffs was a fugitive, then-Police Chief Fred Barlow wrote, "I rejoice in the peace that comes over me when I follow the directives that you have sent to me," and advised Jeffs that the other marshals had "all stated to me their desire to follow [your] directives" and "to stand with you in the Priesthood." Doc.844:604-605. In another, marshal Mica Barlow expressed his desire to "be in tune with [Jeffs']

mind and will," to not "offend [Jeffs] or compromise in any way," and to "be an extension of [Jeffs] in the police department." E.R.415-419.

iii. The government identified several specific ways the Marshal's Office used police resources to advance the Church's interests.

First, the Marshal's Office provided assistance and resources to Church Security, the FLDS's private security force. Marshals trained Church Security members in police tactics, including conducting a mock raid on the Church meeting-house to prepare Church Security to help FLDS leaders escape outside law enforcement. S.E.R.68-76; Doc.851:747-762; Doc.865:1961-1962; Doc.867:2078-2080; Doc.871:2382-2384; Doc.884:2935-2939. In one instance, marshals helped FLDS leaders escape when the FBI came to serve subpoenas. Doc.849:650-652; Doc.851:754-757. Marshals also ran license plate checks for vehicles that Church Security deemed suspicious, provided police escorts for FLDS leaders, and guarded the doors at Church Security meetings. S.E.R.76-79; Doc.854:1010-1014; Doc.858:1350-1352, 1422-1423; Doc.861:1548; Doc.867:2080-2082; Doc.870:2315; Doc.916:4499. And the Marshal's Office provided police-issued equipment, such as Tasers and night-vision binoculars, to Church Security. Doc.858:1344-1349.

Second, the Marshal's Office assisted Jeffs while he was a fugitive.

Although the FBI sought the Marshal's Office's assistance in locating Jeffs, town

marshals actively hindered the FBI's efforts. Doc.844:586-589. For example, marshals told the FBI they had no way of reaching Jeffs, although they knew that the Church had established secret courier and telephone networks to communicate with and send resources to him and, indeed, used those networks themselves.

S.E.R.59-66; Doc.851:737-745; Doc.857:1320-1322; Doc.867:2061-2063.

Marshals also provided Jeffs both financial assistance and information on the activities of outside law enforcement. E.R.502-503, 535-537; Doc.854:999; Doc.857:1313-1317; Doc.867:2062.

Third, the Marshal's Office helped Church Security burglarize a former-FLDS member's business to recover evidence of Jeffs' sexual crimes. In 2010, Willie Jessop—owner of R&W Excavation and Jeffs' former bodyguard and spokesman—obtained two audio recordings that changed his view of Jeffs: (1) a recording of Jeffs raping a 12-year-old girl in the presence of other girls, and (2) a recording Jeffs made containing a "very graphic, detailed confession that he had sexually molested" his "sisters and his daughters and some other girls."

Doc.851:806-814. When Jessop started playing the recordings for other FLDS members, Jeffs' brother Lyle ordered Church Security to burglarize Jessop's office to recover the incriminating audio files. Doc.851:816-817. Marshals patrolled outside while both Church Security and town officials removed computers and filing cabinets from Jessop's office. Doc.851:817-818; Doc.865:1964-1965.

Jessop eventually recovered his property, only to have it stolen again by the Church with the support of the Marshal's Office. Doc.851:839; Doc.852:849-856, 864-867.

iv. Finally, the evidence showed that the Marshal's Office treated FLDS members and non-members differently in its provision of police services. Marshals looked the other way when FLDS members broke the law, ignoring widespread crimes like underage marriage, food stamp fraud, and the illegal distribution of prescription drugs. See S.E.R.51-59, 94-105; Doc.851:797; Doc.857:1314-1315; Doc.858:1337-1339; Doc.867:2055-2057; Doc.868:2106-2108; Doc.881:2539-2544. On the other hand, the Marshal's Office failed to provide effective police protection to non-FLDS members. For example, it allowed the repeated harassment of ex-FLDS member and UEP Trust employee Isaac Wyler, refusing to investigate Wyler's reports of crimes against both himself and Trust property. Doc.844:479-487, 505-514. The Marshal's Office also impounded and illegally euthanized a non-FLDS member's \$10,000 horse. Doc.868:2180-2201. And while the Marshal's Office would readily assist County officers to investigate cases involving non-FLDS persons, marshals were evasive and unhelpful when County deputies sought FLDS members. Doc.883:2888-2893.

The Marshal's Office's discriminatory policing was particularly evident in its handling of property disputes, which arose frequently after the state takeover of

the UEP Trust. These disputes followed a basic pattern: The Trust would issue an occupancy agreement for a Trust-owned property to a non-FLDS person. When the person arrived to take possession of the property, an FLDS member would call the Marshal's Office, claiming that he lived on the property and that the non-FLDS individual was trespassing. The marshals would accept the FLDS member's occupancy claim without investigation or proof, no matter how spurious, while refusing to recognize (or often even look at) the non-member's occupancy agreement. If the non-member refused the marshals' orders to leave, marshals would arrest him for criminal trespass. See pp. 38-49, infra; Doc.862:1593-1595; Doc.870:2251; Doc.881:2509-2531; Doc.883:2896-2901. In one incident, the Police Chief admitted that he ordered the non-FLDS persons off the property, despite their having a lease from UEP Trust, because the other person claiming a right to the land was an FLDS member. Doc.862:1594-1595, 1712.

3. Verdict And Judgment

Following 21 days of evidence and argument, the jury returned a verdict finding the Towns and their water utility, the TCWA, liable for violating the FHA.⁶ Doc.932:7-14. The jury also returned an advisory verdict finding that the Towns violated Section 14141. Doc.932:1-6. As to that claim, the advisory jury found

⁶ The district court dismissed the government's FHA claim against Twin City Power before trial. Doc.618:33-37.

that the Towns, through the Marshal's Office, engaged in a pattern or practice of violating all three constitutional provisions on which the government based its Section 14141 claim: the Establishment Clause, the Equal Protection Clause, and the Fourth Amendment.

After a four-day evidentiary hearing on remedy, the district court issued a written judgment finding that the Towns, through the Marshal's Office, violated Section 14141 by engaging in a pattern or practice of unconstitutional policing in violation of the Establishment Clause, the Equal Protection Clause, and the Fourth Amendment. E.R.1-54. Among its extensive findings, the court concluded that the Marshal's Office "fostered excessive government entanglement with religion" that functioned to "endors[e], favor[], or promot[e] the FLDS Church at the expense of non-FLDS residents," conduct that amounted to a "pattern or practice of discriminatory policing in violation of the Establishment Clause." E.R.19. The court also found that the Marshal's Office systematically violated the Equal Protection Clause by "selectively enforcing the law based upon religion," a discriminatory pattern that was particularly evident in its handling of property disputes. E.R.22. As to the Fourth Amendment, the court agreed with the advisory jury that the Marshal's Office unreasonably seized property and made numerous arrests without probable cause. E.R.22-23. Contrary to the advisory jury,

however, the court concluded that the evidence did not support a finding that the Marshal's Office conducted unreasonable detentions short of arrest. E.R.22.

The court ordered injunctive relief on both the FHA and Section 14141 claims. E.R.26-54. Defendants do not challenge the imposition or scope of injunctive relief and are not appealing the jury's verdict on the FHA claim. Rather, they limit their claims on appeal to the Section 14141 liability finding.

SUMMARY OF THE ARGUMENT

Defendants raise three challenges to the district court's finding that they were liable under 42 U.S.C. 14141 for the Marshal's Office's pattern or practice of constitutional violations. None has merit.

1. First, defendants argue that the district court erred in failing to apply the municipal-liability standard of *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), which requires a plaintiff suing a municipality under 42 U.S.C. 1983 to demonstrate that an official policy or custom caused the constitutional violation. This argument fails. Section 14141, by its plain language, makes a municipality liable for a pattern or practice of constitutional violations committed by its lawenforcement officers, whether or not those violations are attributable to an official policy or custom. *Monell's* holding that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory," 436 U.S. at 691, was grounded in

Section 1983's specific language and legislative history and thus has no application to Section 14141, a statute with different language, background, and purpose.

Even if Section 14141 required the government to satisfy *Monell's* customor-policy element, however, the evidence plainly did so here. The record overwhelmingly supports an inference that the Marshal's Office's pattern of discriminatory, religious-based policing was part of an official policy to use the Towns' governments to advance FLDS interests. Indeed, defendants do not argue otherwise.

2. Second, defendants challenge five of the unlawful-arrest findings on which the district court relied, in part, in concluding that defendants, through the Marshal's Office, engaged in a pattern or practice of Fourth Amendment violations. Even if correct, however, defendants' arguments would not undermine the district court's ultimate conclusion that defendants engaged in a pattern or practice of unconstitutional conduct in violation of Section 14141. As an initial matter, the court's finding of a pattern or practice of Fourth Amendment violations was based on more than just these five arrests. But more importantly, the court's Section 14141 ruling was based not just on the Marshal's Office's Fourth Amendment violations; the court also found that the Marshal's Office engaged in a pattern or practice of violating the Establishment Clause and the Equal Protection Clause. Defendants have not preserved any challenges to the Establishment Clause

and Equal Protection findings. These unchallenged findings provide an independent basis for holding defendants liable under Section 14141 that is unaffected by any alleged error in the court's unlawful-arrest findings.

Regardless, the record amply supports the court's conclusion that the Marshal's Office lacked probable cause to make each of the five arrests on which defendants base their challenge. In four of these instances, a marshal arrested a non-FLDS person for criminal trespass—in one case, in his own home—despite the fact that he showed the marshal documentation proving his right to be there. In the fifth, a marshal arrested a non-FLDS person for felony theft of a trailer that an FLDS member left on his property, despite the fact that the arrestee assured the officer that he had no intention of keeping it and, indeed, turned it over. In these circumstances, no reasonable officer could have concluded that these individuals were either on the property in question unlawfully or bore the unlawful intent required to have probable cause to arrest for criminal trespass or theft.

Defendants' efforts to reverse the district court's Section 14141 ruling on procedural grounds also fail. The district court complied with the applicable procedural rule, its judgment sufficiently apprises this Court of the basis for its liability finding, and defendants do not dispute that the record supports the district court's ultimate conclusion that they violated Section 14141.

3. Third, defendants argue that the district court erred in admitting a number of FLDS leaders' out-of-court statements because, in defendants' view, they did not satisfy the requirements for admission as co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E) and were unduly prejudicial under Federal Rule of Evidence 403. Where, as here, the jury was merely advisory, however, such evidentiary arguments carry little weight. This Court reviews cases tried with an advisory jury as though there were no jury. A judge presiding over a nonjury trial has much wider latitude over the admission of evidence, and evidence can rarely if ever be considered unduly prejudicial in nonjury trials, since judges are presumed to base their decisions on proper considerations.

In any event, the district court did not abuse its discretion in admitting any of these statements. Sixteen of the challenged statements—Warren Jeffs' dictations memorializing his activities and communications—were admissible as both coconspirator statements and business records. Several of the challenged statements were not introduced for their truth and were thus admissible as nonhearsay. And the only remaining statement, a recorded conversation between Jeffs and his brother Isaac, was plainly admissible as a co-conspirator statement, as it was one conspirator relaying information to the conspiracy's leader about an important conspiracy activity. The district court did not clearly err in concluding either that a

conspiracy existed between the Towns and the FLDS Church or that the challenged statements were made in furtherance of that conspiracy.

ARGUMENT

Ι

THE DISTRICT COURT CORRECTLY HELD THE TOWNS LIABLE UNDER 42 U.S.C. 14141 FOR THE PATTERN OF CONSTITUTIONAL VIOLATIONS COMMITTED BY THEIR JOINT POLICE DEPARTMENT

A. Standard Of Review

Whether the district court applied the correct liability standard is a legal question reviewed *de novo*. See *Wasnick* v. *Refco*, *Inc.*, 911 F.2d 345, 348 (9th Cir. 1990). Application of an erroneous standard in a civil case is harmless if it is "more probable than not that the same verdict would have been reached" under the correct standard. *Nationwide Life Ins. Co.* v. *Richards*, 541 F.3d 903, 911 (9th Cir. 2008); see *Lambert* v. *Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999) (en banc).

B. Background

In their proposed jury instructions on 42 U.S.C. 14141, defendants requested a municipal-liability instruction akin to the standard mandated by *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), for private actions brought under 42 U.S.C. 1983. E.R.254-255. Specifically, defendants asked the court to instruct that, to find the Towns liable under Section 14141, the advisory jury must find that the Marshal's Office engaged in a pattern or practice of unconstitutional

conduct that resulted from either "an official municipal policy" or "inadequate training" amounting to "deliberate indifference" on defendants' part. E.R.254.

The district court declined to give defendants' proposed instruction, concluding that "Section 1983 concepts" regarding municipal liability do not apply to pattern-or-practice suits brought by the United States under Section 14141.

S.E.R.1-2. Accordingly, the court instructed the advisory jury that a violation of Section 14141 "is established" if the jury finds that the government proved "by a preponderance of the evidence a pattern or practice of conduct by the Marshal's Office which violated" the First, Fourth, or Fourteenth Amendment. E.R.230.

Consistent with that instruction, the court, in its written judgment, found the Towns liable for violating Section 14141 based on the pattern or practice of constitutional violations committed by their marshals, without making a separate finding that an official municipal policy or the Towns' deliberate indifference caused that pattern or practice. E.R.15-25.

C. The District Court Applied The Correct Liability Standard

Defendants argue that the district court erred by holding them vicariously liable under Section 14141 for the misconduct of their marshals, instead of requiring the government to satisfy the municipal-liability standard applicable

under *Monell* to Section 1983 claims. Br.2-7. ⁷ *Monell*, however, does not apply to Section 14141, which by its plain terms imposes liability on municipalities for patterns of constitutional violations their law-enforcement officers commit, without requiring an additional showing that the municipality's policy or custom caused those violations.

1. Section 14141 provides, in relevant part: "It shall be unlawful for *any governmental authority*, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers" that deprives persons of federal statutory or constitutional rights. 42 U.S.C. 14141(a) (emphasis added). Thus, Section 14141's plain language makes clear that Congress intended to make municipalities and other "governmental authorit[ies]" liable for constitutional violations committed by their "law enforcement officers"—even subordinate ones—so long as their unlawful conduct amounts to a "pattern or practice."

Contrary to defendants' repeated suggestion (Br.xvi, 2-7), this is not a "new standard" of liability. Rather, it is the traditional, common-law vicarious liability principle known as *respondeat superior*. See *Meyer* v. *Holley*, 537 U.S. 280, 285

⁷ To the extent defendants challenge the jury instructions (see Br.vii, xvi, 1-2, 9), that argument fails. "[T]here can be no review of supposed errors" in "instructions to [an] advisory jury." *Ashland* v. *Ling-Temco-Vought, Inc.*, 711 F.2d 1431, 1438 (9th Cir. 1983).

(2003). "It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Ibid.*

As both the Supreme Court and this Court have recognized, *respondeat superior* is the default liability rule under federal civil-rights statutes. In affirming that standard for FHA lawsuits, for example, the Supreme Court explained that "[w]here Congress, in other civil rights statutes, has not expressed a contrary intent, the Court has drawn the inference that it intended ordinary [vicarious liability] rules to apply." *Meyer*, 537 U.S. at 287 (alteration in original). This Court has likewise recognized that *respondeat superior* liability is "the general rule regarding actions under civil rights statutes." *Bonner* v. *Lewis*, 857 F.2d 559, 566 (9th Cir. 1988) (holding *respondeat superior* applicable to claims against municipalities under Section 504 of the Rehabilitation Act of 1973).

Therefore, in construing civil-rights statutes such as Section 14141, this Court must apply *respondeat superior* liability absent evidence that Congress intended a different standard. Here, Congress expressed no such intent to jettison the default rule. To the contrary, Congress used language in Section 14141 confirming that *respondeat superior* liability applies.

2. The Supreme Court's holding in *Monell*, which limits municipal liability under 42 U.S.C. 1983 to violations the municipality causes itself through its

"policy or custom," 436 U.S. at 694, is the "exception" to the "general rule" of respondeat superior liability, Bonner, 857 F.2d at 566—an exception not applicable to Section 14141. In Monell, the Court considered whether Congress intended "municipalities and other local government units to be included among those persons to whom § 1983 applies." 436 U.S. at 690. After extensive examination of Section 1983's legislative history, the Court concluded that Congress did so intend, overruling its contrary holding in Monroe v. Pape, 365 U.S. 167, 187 (1961). Monell, 436 U.S. at 664-690. It further concluded, however, that "Congress did not intend municipalities" to be "held liable under § 1983 on a respondeat superior theory." Id. at 691. Rather, the Court held, municipalities are liable under Section 1983 only when an "official municipal policy" or "governmental 'custom'" caused the constitutional deprivation. Ibid.

The Court reached this interpretation based on the specific "language of § 1983, read against the background of the same legislative history" that led it to overrule *Monroe*. *Monell*, 436 U.S. at 691. Specifically, the Court observed that Section 1983, by its terms, imposes liability only on a "person" who, under color of law, "subject[s], or cause[s] to be subjected," any individual to the deprivation of federal rights. *Ibid.* (quoting 42 U.S.C. 1983). This language, the Court concluded, "cannot be easily read to impose liability vicariously on governing bodies," as it "specifically provide[s]" that an employee's tort becomes a

municipality's liability only if the municipality "caused" the employee to commit it. *Id.* at 692. The Court's exhaustive review of the legislative history confirmed that Congress did not intend, in enacting the statute's precursor in 1871, to impose vicarious liability on municipalities under Section 1983. *Id.* at 693-694. Indeed, that legislative history revealed that Congress likely believed at the time—based on precedent in effect in 1871 that has since been overruled, *id.* at 676—that imposing vicarious liability on municipalities would be unconstitutional. *Id.* at 693-694.

Because *Monell's* conclusion that Congress did not intend to make municipalities vicariously liable for their employee's torts under Section 1983 was "gleaned" from the "specific wording of § 1983, as well as the act's legislative history," that reasoning should not extend to other civil-rights statutes, including Section 14141, that have different language and histories. *Bonner*, 857 F.2d at 566 (concluding that *Monell* does not extend to Section 504 of the Rehabilitation Act); accord Duvall v. County of Kitsap, 260 F.3d 1124, 1141 (9th Cir. 2001) (concluding that "the historical justification for exempting municipalities from respondeat superior liability does not apply to" the Americans with Disabilities Act (ADA)). Section 14141 does not limit liability to "person[s]" that "subject, or cause to be subjected" an individual to deprivation of rights "under color of any statute, ordinance, regulation, custom, or usage," as 42 U.S.C. 1983 does. Nor did Congress believe when it enacted Section 14141 that it could not constitutionally

impose vicariously liability on a municipality, as Congress believed when it enacted Section 1983. See *Monell*, 436 U.S. at 676 (noting that the precedent upon which Congress relied in 1871 "has not survived"). Indeed, when Section 14141 became law in 1994, Congress had already enacted a number of civil-rights statutes that impose *respondeat superior* liability against municipalities. See, *e.g.*, *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998) (Title VII of the Civil Rights Act of 1964); *Duvall*, 260 F.3d at 1141 (Title II of the ADA of 1990); *Bonner*, 857 F.2d at 566-567 (Section 504 of the Rehabilitation Act of 1973).8

3. Defendants argue that Congress's use of the term "pattern or practice" in Section 14141 evinces an intent to import Section 1983's liability standard because many courts have used "pattern" and "practice" as shorthand for *Monell*'s "policy or custom" requirement. Br.4-7. The "pattern or practice" language in Section 14141, however, is not a subtle reference to *Monell*. Rather, it is the standard language used in modern civil-rights laws authorizing suits by the Attorney

⁸ Courts have also held that normal *respondeat superior* principles apply to claims brought under the FHA, see *Meyer*, 537 U.S. at 285-287, and the Age Discrimination in Employment Act (ADEA), see *Birbeck* v. *Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994), both of which permit suits against municipalities, see *Keith* v. *Volpe*, 858 F.2d 467, 482 (9th Cir. 1988) (FHA); *EEOC* v. *Los Angeles Cty.*, 706 F.2d 1039, 1041 (9th Cir. 1983) (ADEA).

General.⁹ As the Supreme Court has held, that phrase was "not intended as a term of art." *Teamsters* v. *United States*, 431 U.S. 324, 336 n.16 (1977). Instead, "the words reflect only their usual meaning": namely, that the unlawful conduct must be "more than the mere occurrence of isolated or 'accidental' or sporadic" acts. *Id.* at 336 & n.16. In other words, the term "pattern or practice" in Section 14141, as in other civil-rights statutes, simply functions to limit the government's civil-enforcement authority to cases involving repeated rather than isolated violations.

To be sure, evidence that law-enforcement officers violated the Constitution pursuant to an official policy would suffice to establish a "pattern or practice" under Section 14141. See *United States* v. *Board of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882, 892 (3d Cir. 1990) (the government satisfies Title VII's pattern-or-practice element by proof of an "openly declared" policy to discriminate, even if that policy "was sporadically enforced"); *United States* v. *Gregory*, 871 F.2d 1239, 1246 (4th Cir. 1989) (a sheriff's admitted policy of discriminating against women would prove a pattern-or-practice violation under Title VII). But the government

⁹ See, *e.g.*, 15 U.S.C. 1691e(h) (Equal Credit Opportunity Act); 42 U.S.C. 1997a (Civil Rights of Institutionalized Persons Act); 42 U.S.C. 2000a-5 (Title II of the Civil Rights Act of 1964); 42 U.S.C. 2000e-6 (Title VII); 42 U.S.C. 3614 (FHA); 42 U.S.C. 12188 (Title III of the ADA); 52 U.S.C. 10101 (Voting Rights Act); see also H.R. Rep. No. 102-242, pt. 1, at 137-138 (1991) (committee report to a precursor to Section 14141 explaining that the bill would mirror the Attorney General's "pattern or practice authority under eight [other] civil rights statutes").

is not *required* to prove the additional element of an official policy or custom to establish a municipality's liability under Section 14141.

4. Defendants' reliance on a nonbinding, unpublished, unadopted magistrate judge's Report and Recommendation is unpersuasive. See Br.5-7 (citing *United States* v. *City of Columbus*, No. 2:99-CV-1097, 2000 WL 1133166 (S.D. Ohio Aug. 3, 2000)); E.R.113-114. In construing Section 14141 to import Section 1983's municipal-liability standard, the magistrate in *City of Columbus* relied largely on two isolated passages from a Committee Report to the Police Accountability Act of 1991, the never-enacted predecessor bill to Section 14141. 2000 WL 1133166, at *8 (citing H.R. Rep. No. 102-242, pt. 1, at 137-138 (1991)).

Neither passage cited by the magistrate in *City of Columbus* suggests an intent to import *Monell's* "policy or custom" requirement. The report's statement that the "standards of conduct under the Act are the same as those under the Constitution, presently enforced in damage actions under [S]ection 1983," meant only that the proposed statute would enforce direct violations of the Constitution and thus not "impose any new standards of conduct on police officers." H.R. Rep. No. 102-242, at 138. And the report's reference to changing "the policy of a police department," read in context, was simply highlighting the Attorney General's lack of authority, before Section 14141's enactment, to seek systemic reforms in the area of police misconduct. See H.R. Rep. No. 102-242, at 137. The reference did

not purport to define the extent of municipal liability. Indeed, the full passage makes clear that Congress contemplated that, as in other civil-rights statutes, the statute would encompass not just official policies but more informal conduct that rises to the level of a pattern or practice. See *ibid*.

5. Finally, defendants contend, wrongly, that interpreting Section 14141 to permit vicarious liability would violate Section 5 of the Fourteenth Amendment. Br.7-9.

Although defendants' legal theory is unclear, they appear to assert that, if Section 14141 authorizes *respondeat superior* liability, then it would not be "congruent and proportional" under *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997), but instead an impermissible congressional attempt to redefine the substance of the Fourteenth Amendment. See Br.8 (citing a portion of *City of Columbus* that, in turn, relied on *Boerne*). That argument fundamentally misunderstands the law. "[T]he congruence and proportionality requirement applies only to prophylactic legislation; it doesn't apply to a direct remedy for unconstitutional conduct." *Alaska* v. *EEOC*, 564 F.3d 1062, 1068 (9th Cir. 2009); see also *United States* v. *Georgia*, 546 U.S. 151, 158 (2006) (distinguishing between "prophylactic" laws, which are subject to *Boerne*, and laws that target "*actual* violations" of the Constitution, which are not). As applied here, Section

14141 is not prophylactic legislation; the court found defendants liable under the statute for actual violations of the Constitution.

To the extent defendants are making a more general "federalism" argument based on City of Canton v. Harris, 489 U.S. 378 (1989) (see Br.8-9), that argument also fails. The *Harris* Court held that a Section 1983 plaintiff suing a municipality for police misconduct on a failure-to-train theory must prove that the inadequate training amounted to deliberate indifference. *Id.* at 388-389. In so holding, the Court observed that a "lesser standard" would not only "result in de facto respondeat superior liability" in contravention of Monell, but could also "engage the federal courts in an endless exercise of second-guessing municipal employeetraining programs," which would "implicate serious questions of federalism." *Id.* at 392. This passage, which defendants take out of context (Br.9), plainly does not stand for the broad proposition that any federal statute permitting vicarious liability against municipalities is unconstitutional. Indeed, if that were true, then the Supreme Court's decision in Faragher and this Court's decisions in Bonner and Duvall—each of which applied respondeat superior liability to municipalities under federal civil-rights statutes—could not have come out as they did.

Moreover, defendants' reliance on *Harris* ignores two safeguards in Section 14141 that avoid the federalism concerns to which a broad reading of Section 1983 might give rise. First, Section 14141 requires a showing of a "pattern or practice"

of federal constitutional or statutory violations. Section 1983, by contrast, allows suit against an individual officer who, under color of law, commits a single constitutional or federal statutory violation. See *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991). One key policy reason for limiting municipal liability under Section 1983 is to ensure that municipalities are not constantly held liable for the isolated conduct of a single bad actor. Indeed, the Court emphasized that very concern in *Harris*, noting that "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." 489 U.S. at 391-392.

Second, Section 14141 "only provides for civil actions brought by the United States Attorney General." *Gustafson* v. *City of West Richland*, 559 F. App'x 644, 645 (9th Cir. 2014). That requirement ensures that the volume of litigation against municipalities under Section 14141 will be miniscule compared to the potential flood of Section 1983 actions by private individuals. In combination, these two limitations inherent in Section 14141 significantly reduce the risk that municipalities will be unduly burdened in a way they might if Section 1983 provided for broader municipal liability than the Court has allowed.

D. Even Under Monell The Towns Would Be Liable Because The Evidence Demonstrated That The Marshal's Office's Pattern Of Constitutional Violations Amounted To An Official Municipal Policy

Even if Section 14141 required the government to prove that an official custom or policy caused law-enforcement officers' constitutional violations—which it does not, as outlined above—the evidence satisfied that element here. The record strongly supports a conclusion that the Marshal's Office's pattern of discriminatory, religious-based policing was a "longstanding practice or custom" constituting the "standard operating procedure of" the Towns, thereby satisfying *Monell. Trevino* v. *Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (citation omitted).

Indeed, on this record, the inference is overwhelming that it was the Towns' "permanent and well-settled" policy to use the Marshal's Office to advance FLDS interests at the expense of non-members' constitutional rights. *Trevino*, 99 F.3d at 918. The Marshal's Office's entanglement with the FLDS Church was longstanding and pervasive, its violations of non-members' rights were widespread, and the intertwining with the Church pervaded not only the entire Marshal's Office but the Towns' governments generally. See pp. 4-7, 9-14, *supra*. There was substantial evidence, for example, that town officials, like their marshals, sought and received directives from the Church on how to handle matters such as personnel decisions and opposing the UEP Trust.

Accordingly, even if Section 14141 required the government to satisfy *Monell's* policy-or-custom requirement, the district court's failure to make a formal policy-or-custom finding would be harmless, as it is "more probable than not" that the court would have reached the same verdict had the statute required that element. *Nationwide*, 541 F.3d at 911. Defendants do not contend otherwise.

II

THE DISTRICT COURT COMMITTED NO ERROR, MUCH LESS REVERSIBLE ERROR, IN CONCLUDING THAT THE TOWNS' JOINT POLICE DEPARTMENT REPEATEDLY ARRESTED NON-FLDS RESIDENTS WITHOUT PROBABLE CAUSE

A. Standard Of Review

A district court's factual findings "must not be set aside unless clearly erroneous," and this Court "must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6); see *Anderson* v. *City of Bessemer*, 470 U.S. 564, 572-573 (1985). This Court "may affirm a judgment on the basis of any evidence in the record that supports it." *Louie* v. *United States*, 776 F.2d 819, 823 (9th Cir. 1985).

Whether an arrest was supported by probable cause is a mixed question of law and fact: the ultimate legal conclusion is reviewed *de novo*, while the factual findings underlying that conclusion are reviewed for clear error. *United States* v. *Ortiz-Hernandez*, 427 F.3d 567, 573 (9th Cir. 2005). Whether a seizure constitutes

a de facto arrest necessitating probable cause is reviewed *de novo*. *United States* v. *Miles*, 247 F.3d 1009, 1012 (9th Cir. 2001).

B. The District Court's Findings Were Procedurally Proper
 Defendants raise three procedural objections to the district court's Section
 14141 findings. Br.10-13. None has merit.

First, defendants contend that the district court violated Rule 52(a)'s requirement that the court "find the facts specially and state its conclusions of law separately," Fed. R. Civ. P. 52(a), because it included within its factual findings a legal conclusion that various arrests were made without probable cause. Br.10-11. That argument fails. The district court's written judgment explicitly separates its factual findings from its legal conclusions, as Rule 52(a) requires. Compare E.R.17-24, with E.R.24-26. That the court may have "intermingled some of its findings of fact with its conclusions of law" is "of no significance," as this Court "look[s] at a finding or a conclusion in its true light, regardless of the label that the district court may have placed on it." *United States* v. *1.377 Acres of Land*, 352 F.3d 1259, 1270 (9th Cir. 2003) (citation omitted).

Second, defendants argue that the district court "improperly adopted the United States' proposed findings of fact" rather than making "its own findings based upon an independent evaluation of the evidence." Br.11-12. As defendants acknowledge, however, the district court "did not restate the United States'

findings verbatim" (Br.11), nor did it adopt them "[w]holesale." *Photo Elecs*. *Corp.* v. *England*, 581 F.2d 772, 776 (9th Cir. 1978); see, *e.g.*, *In re T.H. Richards Processing Co.*, 910 F.2d 639, 643 n.2 (9th Cir. 1990) (finding it "regrettable" that the court "merely crossed out the word 'proposed' in entering the challenged findings"). Rather, the court issued its own findings, identifying in footnotes the paragraphs from the government's proposed findings that it specifically adopted. E.R.17-24.

In doing so, the court did not "uncritically accept[]" the government's proposed findings. *Bessemer*, 470 U.S. at 572. Indeed, it expressly rejected the government's proposed finding that Steven Bateman's detention was unjustified (E.R.22, 704-705), and declined to adopt others, such as those relating to the Marshal's Office's handling of a fatal forklift incident and failure to investigate a hit-and-run of a non-FLDS teenager (E.R.21-22, 654-656). These substantive deviations from the government's proposed findings "indicate[] that the district court did not 'uncritically accept'" them. *L.K. Comstock & Co. v. United Eng'rs & Constr., Inc.*, 880 F.2d 219, 222 (9th Cir. 1989) (citation omitted); see also *Clady* v. *Los Angeles Cty.*, 770 F.2d 1421, 1427 (9th Cir. 1985).¹⁰

¹⁰ Even if the court had adopted the government's proposed findings "[w]holesale" or "substantially verbatim," that would "not, by itself, warrant reversal." *Photo Elecs.*, 581 F.2d at 776-777; see *Bessemer*, 470 U.S. at 572. (continued...)

Third, defendants argue that it was "improper" for the district court to make "summary findings." Br.12-13. But the court's "summary findings" in its written judgment are not the sum total of its factual findings. Rather, the court incorporated a number of the government's more detailed proposed findings, which in turn cite to specific record evidence. See E.R.17-24. Defendants do not and cannot argue that these detailed findings, which constitute the findings of the court, Bessemer, 470 U.S. at 572, are insufficient to apprise this Court of the basis for the district court's decision.

In any event, the district court "is not required to base its findings on each and every fact presented at trial," Simeonoff v. Hiner, 249 F.3d 883, 891 (9th Cir. 2001) (citation omitted), and this Court "may affirm a judgment on the basis of any evidence in the record that supports it," Louie, 776 F.2d at 823. Thus, even "[c]onclusory and unhelpful findings" do not require remand or reversal "if the record supports the district court's ultimate conclusion." Simeonoff, 249 F.3d at 891. Defendants do not dispute that the record supports the district court's ultimate conclusion that the Marshal's Office engaged in a pattern or practice of constitutional violations, challenging only a few subsidiary findings underlying one portion of that conclusion.

(continued...)

Rather, this Court would simply apply "more careful scrutiny" in assessing whether adopted findings are clearly erroneous. *Photo Elecs.*, 581 F.2d at 777.

C. Defendants' Limited Challenge To Five Subsidiary Findings, Even If Meritorious, Would Not Undermine The District Court's Ultimate Conclusion That The Marshal's Office Engaged In A Pattern Or Practice Of Constitutional Violations

The district court based its ultimate Section 14141 ruling on findings that the Marshal's Office engaged in a pattern or practice of violating three constitutional provisions: the Establishment Clause, the Equal Protection Clause, and the Fourth Amendment. E.R.25. As the court correctly recognized, a finding "of a pattern or practice of violating any one of the three constitutional amendments in question would entitle [the United States] to relief." E.R.17; see 42 U.S.C. 14141.

Yet, defendants' challenge to the district court's findings pertains only to the Fourth Amendment, not the other two constitutional provisions. Defendants attack five subsidiary findings on which the court relied, in part, in finding a pattern or practice of Fourth Amendment violations—specifically, its findings that five arrests of non-FLDS persons were "effected without probable cause." E.R.23. Defendants have not preserved for appeal any challenge to the district court's separate findings that the Marshal's Office engaged in a pattern or practice of violating both the Establishment Clause and Equal Protection Clause. ¹¹ Moreover, even the court's

In a footnote, defendants argue that the district court clearly erred in finding that, in addition to lacking probable cause, the five arrests challenged were motivated by religion in violation of the Equal Protection Clause. See E.R.21-22. Defendants claim that "the evidence shows" that the marshals arrested these non-FLDS individuals for legitimate reasons and not based on their religion. Br.17 n.4. (continued...)

Fourth Amendment finding was based on more than just the five arrests that defendants challenge: the court also found that marshals unlawfully arrested a sixth former-FLDS member, William E. Jessop, and engaged in the unreasonable seizure of property. E.R.22-23. Defendants do not challenge these findings. Therefore, even if the court had erred in concluding that the marshals lacked probable cause to make any of the five challenged arrests—and it did not—such error would not undermine its ultimate conclusion that the Marshal's Office engaged in a pattern or practice of "depriv[ing] persons of rights * * * secured or protected by the Constitution." 42 U.S.C. 14141(a).

- D. The Evidence Amply Supports The District Court's Conclusion That The Five Arrests Defendants Challenge Were Effected Without Probable Cause The district court did not err in concluding that the Marshal's Office lacked probable cause for any of the five arrests defendants challenge.
- 1. Isaac Wyler. Isaac Wyler, a former-FLDS member, has managed properties for the UEP Trust since 2005. S.E.R.118-119; Doc.845:456. He testified that, in December 2015, he went with a locksmith to take possession of a

(continued...)

This Court should deem that argument waived, as it occurs "in a lone footnote" without "any authority in support." United States v. Alameda Gateway, Ltd., 213 F.3d 1161, 1168 (9th Cir. 2000). Regardless, the court could reasonably infer that these arrests were motivated by the arrestees' non-FLDS status, and its Equal Protection finding was based on much more than these five arrests anyway. E.R.19-23.

Trust-owned property in Hildale for which the Trust had secured a restitution order. ¹² E.R.1070-1071. The house appeared vacant, and nobody answered Wyler's knock. E.R.1070-1073. Wyler testified that a woman drove up, confirmed that the house was empty, and asked his permission to take "a pile of stuff" she had left on the back lawn. E.R.1073. Shortly thereafter, however, Marshal Hyrum Roundy arrived, followed by a different woman who claimed to live in the home. E.R.1073-1074. Wyler attempted to speak with her, but before he could show her the restitution order, Roundy arrested Wyler for trespassing. E.R.1075-1076. Wyler testified that when Roundy was shown the restitution order, Roundy "said the judge's signature and the court paperwork looked fake to him." E.R.1076. Wyler was never charged with trespassing. Doc.844:504; Doc.917:4674.

Defendants' argument that Roundy had probable cause to arrest Wyler for criminal trespass (Br.16-17) is meritless. The Hildale property—like almost all property in Short Creek—was owned by Wyler's employer, the UEP Trust, and Wyler had a court order permitting him to take possession of it. Given this, no reasonable officer could have believed that Wyler either was on the property

The restitution order permitted Wyler to change the locks if the home was vacant. If someone was occupying it and refused to leave, Wyler was supposed to call law enforcement to have them physically remove the occupant. E.R.1071, 1080; Doc.917:4673.

unlawfully or bore the unlawful intent required for criminal trespass in Utah. See Utah Code Ann. § 76-6-206(2) (West 2017); *Blankenhorn* v. *City of Orange*, 485 F.3d 463, 471-472 (9th Cir. 2007) (defining probable cause standard).

Defendants argue that Roundy had probable cause to believe that Wyler was trespassing because a woman "claimed to live there." Br.17. But this conclusory statement alone, "without further investigation by the police," was "insufficient to support probable cause." *Hopkins* v. *Bonvicino*, 573 F.3d 752, 767 (9th Cir. 2009). Roundy did nothing to investigate the woman's claim before arresting Wyler: He did not interview either her or Wyler, who would have shown him the restitution order, nor did he ascertain whether the house was vacant. And even if the woman could somehow prove that she lived there, that would not have made Wyler's presence or intent unlawful, since the property owner, the UEP Trust, had authorized him to be there.

2. Patrick Pipkin And Andrew Chatwin. Patrick Pipkin is a former-FLDS member who acquired a lease for the FMJ Zoo, a commercial property in Colorado City, from the UEP Trust in October 2015. E.R.1087-1089. While in the process of taking possession of the zoo with County sheriffs' assistance, Pipkin learned

Although Police Chief Jerry Darger testified that Roundy told him over the phone that Wyler refused to show him "any paperwork," E.R.1079, the district court was entitled to credit Wyler's version over Darger's second-hand account. See *Bessemer*, 470 U.S. at 575. The defense did not call Roundy.

that an FLDS man named Chad Johnson claimed to be living in a tack shed on the property. E.R.1092-1093. When Pipkin reached Johnson on the phone, Johnson said he was the property's caretaker and asked if he and his daughters could stay in the tack shed. E.R.1096-1097. Pipkin agreed to permit them to use the tack shed temporarily but stated that he would continue taking possession of the rest of the property. E.R.1097-1098. Police Chief Jerry Darger and another marshal were present for this conversation and saw Pipkin's lease. E.R.1092-1098.

A few hours later, however, when Pipkin called the Marshal's Office to report vandalism and theft on the property, another marshal arrived and told Pipkin that he was trespassing. E.R.1099-1100. Pipkin showed the marshal his lease and relayed his earlier conversation with Johnson. E.R.1100-1102. When Pipkin and the marshal called Johnson, however, Johnson now claimed "that he had learned his rights" and that he was "in charge of the entire property." E.R.1102-1103.

Soon thereafter, Chief Darger returned and said that the Marshal's Office's "legal counsel told them that it was a residential property," that Pipkin had not followed the correct eviction procedures for residential property, and that he was therefore "trespassing on Chad Johnson." E.R.1104. Although both the County sheriff and a UEP Trust representative informed Darger that the property was commercial, and although Johnson did not produce any evidence that he lived there, Darger insisted that the tack shed was residential and that Pipkin was

trespassing. E.R.1105; see also E.R.1120; Doc.917:4682-4683. When Pipkin showed Darger his lease and refused Darger's order to leave, Darger arrested him and Andrew Chatwin, whom Pipkin had brought to help with the eviction.

E.R.1106, 1138. Pipkin and Chatwin spent the night in jail, then were released by a judge the next morning. E.R.1107-1108. They were not told they could not return to the property. E.R.1108.

Four days later, Pipkin called the County sheriffs when he found dozens of FLDS members vandalizing the property. E.R.1113-1114. Both the County sheriffs and town marshals arrived. A marshal asserted that "there was no commercial property" in Short Creek "except for the airport," and thus that the "entire town was residential," a false claim that both the County sheriff and UEP representative again rebutted. E.R.1115; see also E.R.1173. Chief Darger told Pipkin again that he was trespassing on Chad Johnson's property, although Pipkin had not gone near the tack shed and Johnson was not present. E.R.1116-1118. When Pipkin refused the marshals' orders to leave, they arrested him and Chatwin again. E.R.1117-1118. The city prosecutor eventually dropped the charges. E.R.1121-1122.

The district court did not err in concluding that the marshals lacked probable cause to arrest Pipkin and Chatwin for trespass on either occasion. ¹⁴ The arresting marshal knew that Pipkin had a lease for the property; indeed, County sheriffs were present to help him take possession of it. Thus, no reasonable officer could think Pipkin or Chatwin were on the property unlawfully. See Ariz. Rev. Stat. §§ 13-1502–1504 (2018). Chad Johnson's unverified claim that he lived in the tack shed was insufficient to create probable cause that Pipkin and Chatwin were on the property unlawfully, and the marshals did not investigate much less confirm Johnson's claim. See *Hopkins*, 573 F.3d at 767. Nor did it matter that Pipkin "had not completed a residential eviction of Johnson." Br.22. Both the County sheriffs and UEP representative repeatedly told the marshals that the zoo was commercial property and thus did not require a residential eviction. The marshals' insistence that the zoo was residential rather than commercial because an FLDS member claimed to be squatting in a tack shed on the property was not reasonable.

3. Richard Holm. Richard Holm is a former-FLDS member who purchased 350 acres of land in Hildale from the UEP Trust. Doc.864:1741-1743; E.R.1232-1233. Holm testified that, after he bought the latest parcel, an FLDS member—

Contrary to defendants' claim that the court did not specify which arrest formed the basis of its finding (Br.17-18), the court in fact found that both arrests were unlawful (E.R.22). The court's use of the singular "arrest" in a subsequent paragraph (E.R.23) was likely just a typographical error.

who had previously told Holm he considered the land "stolen from the Trust"—left a trailer on Holm's property. E.R.1235-1236. When Holm had consulted the County sheriff about an earlier trailer left there, the sheriff told him that, instead of towing it, Holm could move it into his warehouse until its owner came to retrieve it. E.R.1237-1238. Following that advice, Holm did the same with this trailer, deeming it the "friendl[ier]" approach. E.R.1238-1239.

A few days later, however, Marshal Hyrum Roundy called Holm, accused him of stealing the trailer, and ordered him to meet Roundy at the warehouse. E.R.1240. Holm acknowledged that the trailer was in his warehouse and told Roundy that he did not intend to keep it but just wanted it off his property until the owner retrieved it. E.R.1240. When Holm arrived at the warehouse, Roundy was there with Sergeant Sam Johnson and a third man, and Roundy ordered Holm to open the building. E.R.1241-1242. Holm did so, and the other man removed the trailer. E.R.1242-1243.

Roundy then announced that he was arresting Holm for felony theft.

E.R.1243. Roundy handcuffed Holm and took him to the county jail. E.R.12441245. On the drive there, Roundy asked Holm whether he had a deed to the
property; when Holm confirmed that he did, Roundy remarked that, in his view,
the probate judge who had approved the sale had "been bought off." E.R.1244.

The County Attorney declined to prosecute Holm. E.R.1246.

Defendants argue that Roundy had probable cause to arrest Holm for theft or receiving stolen property (RSP) "because a trailer was reported missing," and "they observed that the trailer was inside of Holm's building." Br.26. But under Utah law, both theft and RSP require proof that the person possessing the property "intend[s] to deprive the owner of it." Utah Code Ann. § 76-6-408(1) (West 2017) (RSP); see *id.* § 76-6-404 (theft); see also *id.* § 76-6-401(3) (defining "purpose to deprive"). "[W]hen specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred." *Blankenhorn*, 485 F.3d at 472 (citation omitted). Here, Holm told Roundy specifically that he did not intend to keep the trailer and, indeed, turned it over. E.R.1240-1243. Given this, the court did not err in concluding that Roundy lacked probable cause to arrest Holm for theft or RSP.

Defendants argue that the district court clearly erred in finding that Roundy's purported reason for arresting Holm was not "credible," urging that the court's finding was "based on hindsight" and "Holm's self-serving testimony" that he owned the property. Br.26. But no hindsight was necessary: Holm testified that he told Roundy *before Roundy arrested him* that he did not intend to keep the trailer. E.R.1240-1243. That testimony was uncontradicted—the defense did not

¹⁵ RSP also requires knowledge or belief that the property has been stolen, Utah Code Ann. § 76-6-408(1) (West 2017), which there was no suggestion of here.

call Roundy, and Sergeant Johnson testified that he "wasn't privy to" the conversation between Roundy and Holm. E.R.4535-4536. That neither Darger nor Johnson confirmed that Holm owned the land (Br.26) is irrelevant. The trial court was entitled to credit Holm's testimony that he owned it, particularly when the defense presented no evidence to the contrary. See *Bessemer*, 470 U.S. at 575.

4. Guy Timpson. Guy Timpson is a former-FLDS member who voluntarily left the Church in 2011. E.R.1270. He testified that, in 2014, the UEP Trust gave him an occupancy agreement for a home that was then occupied by Jeffs' relatives. E.R.1272-1273. Timpson went to the property to post a notice-to-vacate and the occupancy agreement. E.R.1272-1273, 1281.

When Timpson returned later, Sergeant Sam Johnson arrived and confronted him. E.R.1273-1274. Timpson explained that he had posted the notice-to-vacate and occupancy agreement on the property's gate, but Johnson "didn't want to go see" them. E.R.1273-1274. Timpson started walking toward the gate, at which point Police Chief Darger arrived and yelled at Timpson to stop. E.R.1274. When Timpson again urged Johnson to look at his paperwork, Darger grabbed Timpson's arm, twisted it behind his back, and pushed him against a police car. E.R.1274, 1285. Timpson was not yelling or physically threatening anyone before Darger grabbed him. E.R.1274-1275. Johnson acknowledged that Timpson was "detained" and would not "have felt free to leave." E.R.1300. The Marshal's

Office charged Timpson with criminal trespass, but the city prosecutor dropped the charges. E.R.1284, 1290.

Defendants do not dispute that Darger lacked probable cause to arrest Timpson. Their sole contention is that he was *not* arrested because the witnesses did not characterize the encounter as an arrest. Br.28. While it is true that Timpson was "never arrested" in the sense of being handcuffed and taken to the police station (E.R.1283, 1296), a seizure need not be a formal arrest to require probable cause under the Fourth Amendment. Rather, a seizure can become a "de facto arrest" requiring probable cause when it exceeds the permissible limits of an investigatory stop. *United States* v. *Ricardo D.*, 912 F.2d 337, 339 (9th Cir. 1990).

Here, Darger's act of grabbing Timpson's arm, twisting it behind his back, and pushing him against a police car converted an otherwise permissible stop into a de facto arrest. Although the use of force "does not convert [a] stop into an arrest *if it occurs under circumstances justifying fears for personal safety*," *United States* v. *Buffington*, 815 F.2d 1292, 1300 (9th Cir. 1987) (emphasis added), defendants do not claim that Darger feared for his safety. Indeed, both marshals testified that Darger grabbed Timpson because he had "turned around and walked off" while Johnson was talking to him. E.R.1299, 1302. Although both marshals denied at trial that Darger twisted Timpson's arm or shoved him against his car (E.R.1295, 1303), the district court was entitled to credit Timpson's version over the marshals'

self-serving account. See *Bessemer*, 470 U.S. at 572-573. Twisting Timpson's arm behind his back and pushing him against a police car was a disproportionately intrusive and violent show of force that escalated the stop into a de facto arrest. See *Washington* v. *Lambert*, 98 F.3d 1181, 1185 (9th Cir. 1996) (whether a stop has transformed into an arrest turns on "whether the methods used were reasonable *given the specific circumstances*").

5. Jerold Williams. Jerold Williams is a former-FLDS member who was arrested for trespassing in his own home in Colorado City shortly after being excommunicated. Williams testified that, after being cast out, he learned the truth about "inappropriate conduct of the Church leadership" and decided to return home to inform his family and "protect [his] children." E.R.1313. Before doing so, he obtained an occupancy agreement for the home to prevent the Marshal's Office from arresting him. E.R.1313, 1358-1359.

When Williams arrived with his wife, who had also left the Church, family members who were still FLDS members ran inside and locked the door. E.R.1314, 1358. Because Williams did not bring his key, he entered through an open basement window, then opened the front door for his wife. E.R.1314, 1358. Williams told his family he wanted to talk to them, but within minutes marshal Curtis Cooke and a Church Security member arrived. E.R.1315, 1382. Williams told Cooke he had built the home and lived there for decades, and gave Cooke the

occupancy agreement. E.R.1315, 1384-1385. Williams refused Cooke's repeated orders to leave the home. When Cooke threatened to arrest him, Williams asked to make a phone call and called the County sheriff's office. E.R.1316-1317. When Williams then asked Cooke to wait for the County sheriff to arrive, Cooke became "agitated and upset" and arrested Williams for criminal trespass. E.R.1317-1320, 1385-1386. The city prosecutor later dropped the charges. E.R.1320.

The district court did not err in concluding that Cooke lacked probable cause to arrest Williams for criminal trespass. ¹⁶ Cooke knew that Williams had lived in the house for decades and had an occupancy agreement for it. Thus, no reasonable officer in Cooke's position could have believed that Williams was on the property unlawfully. See Ariz. Rev. Stat. §§ 13-1502–1504 (2018). Although the testimony that family members in the house were crying and screaming (Br.32), if credited, may have given the marshals reasonable grounds to investigate, it did not create probable cause to arrest Williams for trespassing, particularly when he had paperwork establishing his right to be there.

¹⁶ Contrary to defendants' claim (Br.32-33), the court did not rely solely on the three facts mentioned in paragraph 483 of the government's proposed findings but expressly adopted 24 paragraphs of underlying findings regarding Williams' arrest. See E.R.21 n.42, 23 n.48. Regardless, this Court may affirm based on "any evidence in the record that supports" the judgment, whether or not the district court cited it. *Louie*, 776 F.2d at 823.

E. Defendants' Prejudice Assertions Are Meritless

Although defendants contend that they have suffered prejudice relating to three of the court's unlawful-arrest findings—those pertaining to Wyler, Pipkin and Chatwin, and Holm (Br.15, 17-18, 24)—defendants have failed to show any prejudice, much less reversible error.

First, defendants claim that, because the three arrests occurred after the close of discovery, they did not have the opportunity to investigate them. Br.15, 17-18, 24. Defendants do not, however, challenge the admission of these incidents on discovery grounds and, indeed, raised a discovery objection below to only the Pipkin and Chatwin incident, after the government had already introduced, without objection, evidence of the Wyler and Holm arrests. See Doc.871:2407-2410. In any event, defendants do not explain why they could not have investigated these arrests, when they employ the marshals involved, they had the relevant police reports in their possession, and the incidents occurred up to six months before trial. Nor do defendants identify any evidence that they have discovered in the over two years since these arrests that would have undercut the district court's no-probablecause conclusion. Indeed, defendants elected not to present testimony from Hyrum Roundy, the arresting marshal in two of these incidents.

Second, defendants assert that the court's findings on these three arrests prejudiced their defense against constitutional claims "in other pending cases

against the Towns." Br.34. Defendants do not identify what "other pending cases" they mean. Regardless, defendants cite no authority for the unusual proposition that an appellate court can reverse a judgment for allegedly erroneous findings that are concededly harmless to the outcome of *this* trial because they might impact a party's defense in *other* litigation. Cf. *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993) (observing that the harmless-error inquiry asks whether the verdict "rendered in *this* trial was surely attributable to the error").

III

THE DISTRICT COURT COMMITTED NO ERROR, MUCH LESS REVERSIBLE ERROR, IN ADMITTING FLDS LEADERS' VARIOUS OUT-OF-COURT STATEMENTS

A. Standard Of Review

District courts have "broad discretion in admitting evidence, and their rulings are reviewed only for an abuse of discretion." *United States* v. *Barragan*, 871 F.3d 689, 705 (9th Cir. 2017). When evidence is admitted as a co-conspirator statement under Federal Rule of Evidence 801(d)(2)(E), the court's "underlying factual determination[s] that a conspiracy existed and that the statements were made in furtherance of that conspiracy" are reviewed for clear error. *United States* v. *Gil*, 58 F.3d 1414, 1419 (9th Cir. 1995) (citation omitted). Whether the district court correctly construed a hearsay rule is reviewed *de novo*. *United States* v. *Alvarez*, 358 F.3d 1194, 1214 (9th Cir. 2004). The erroneous admission of

evidence in a civil case is harmless if it is "more probable that not" that the same verdict would have occurred absent the evidence. *Nationwide Life Ins. Co.* v. *Richards*, 541 F.3d 903, 911 (9th Cir. 2008).

Where, as here, the case was tried with an advisory jury, the court's discretion over evidentiary matters is even broader. ¹⁷ This Court reviews the district court's rulings in such cases "as if there had been no" jury. Ashland v. Ling-Temco-Vought, Inc., 711 F.2d 1431, 1438 (9th Cir. 1983); see also Frostie Co. v. Dr. Pepper Co., 361 F.2d 124, 126 (5th Cir. 1966). A court sitting without a jury "has discretion to receive evidence that might be inadmissible in a jury trial." Hollinger v. United States, 651 F.2d 636, 640 (9th Cir. 1981). Indeed, although a district court "can commit reversible error by excluding evidence" in nonjury cases, "it is almost impossible for it to do so by admitting evidence." 11 Fed. Prac. & Proc. Civ. § 2885 (3d ed. 2018). And Federal Rule of Evidence 403 is largely inapplicable in nonjury trials, since "the risk that a verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial." EEOC v. Farmer Bros. Co., 31 F.3d 891, 898 (9th Cir. 1994).

Defendants seek reversal only of the district court's Section 14141 liability finding; they do not argue that their claimed evidentiary errors require reversal and retrial of the jury's verdict on the FHA claim. See Br.45, 51, 56.

B. Background

Before trial, the government filed a motion *in limine* to admit various FLDS leaders' out-of-court statements under Rule 801(d)(2)(E). E.R.151-162. Under that rule, a statement offered against an opposing party that otherwise meets the definition of hearsay is admissible as nonhearsay if it "was made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). The proponent must show both that a conspiracy existed between the declarant and the opposing party and that the statement was made in furtherance of that conspiracy. *United States* v. *Bowman*, 215 F.3d 951, 960-961 (9th Cir. 2000).

The government argued that the evidence submitted at the summary judgment stage was "more than sufficient" for the court to "make the requisite foundational finding" that a conspiracy existed between defendants and FLDS leaders "with the common purpose to use the Cities' governments to further the directives and goals of the FLDS Church." E.R.154. The government also noted that some statements would be admissible on other grounds as well (E.R.152 n.1), and that FLDS leaders' directives "are not hearsay because they are not offered for the truth of the matter asserted" (E.R.155 n.3).

The district court held the government's motion in abeyance pending establishment of the requisite foundation at trial. E.R.108. The court observed,

however, that prior proceedings suggested that the government would "succeed in producing evidence of" a conspiracy between the Towns and FLDS Church, and thus that the court was prepared to admit out-of-court statements made in furtherance of that conspiracy "[s]ubject to the United States proving up its concerted action contention." E.R.108. On the same day, the court denied defendants' motion *in limine* to preclude Jeffs' "dictations, sermons, and correspondence" under Federal Rules of Evidence 401 and 403 (see E.R.222-225), finding Jeffs' statements "relevant and not unfairly prejudicial." E.R.105-106.

At trial, the government's first witness—Dowayne Barlow, a former assistant to the FLDS Bishop—testified about the Church's increasing control over town officials after Jeffs became Prophet. S.E.R.4-20. Barlow also testified that, from 2004 through 2011, he regularly attended meetings between Church leadership and town officials at R&W Excavation to coordinate on legal issues, including the subdivision of UEP Trust land. E.R.374-384.

When the government asked Barlow specifically what FLDS leaders said, Hildale's lawyer objected on hearsay grounds. E.R.384. The court permitted the question, ruling that the government had "[t]entatively" established the foundation for Rule 801(d)(2)(E). E.R.384. Barlow testified that Lyle Jeffs said, "They can subdivide all they want, but we own the water" (E.R.385), a statement relevant to the government's FHA claim.

The court confirmed the next day, after additional testimony detailing the Towns' entanglement with the Church, that the government had established the existence of a conspiracy for purposes of Rule 801(d)(2)(E). E.R.404-406. Accordingly, the court admitted a number of FLDS leaders' out-of-court statements under this rule throughout the government's case-in-chief.

C. The District Court Did Not Abuse Its Discretion In Admitting The Challenged Out-Of-Court Statements

Defendants seek reversal of the district court's Section 14141 liability finding on the grounds that the court (1) clearly erred in finding that a conspiracy existed between the Towns and FLDS Church (Br.40-45); (2) misconstrued Rule 801(d)(2)(E) to eliminate the requirement that the statements be made in furtherance of the conspiracy (Br.47); (3) clearly erred in finding that 23 admitted statements were made in furtherance of the conspiracy (Br.47-51); and (4) abused its discretion in admitting statements that were unduly prejudicial under Federal Rule of Evidence 403 (Br.51-55). These arguments are meritless.

1. The District Court Did Not Clearly Err In Finding That A Conspiracy Existed Between The Towns And The FLDS Church

Defendants first argue that the district court clearly erred in finding that a conspiracy existed between the Towns and Church for purposes of Rule 801(d)(2)(E). Br.40-45. Defendants do not dispute that the government's evidence *overall* established a conspiracy to use the Towns' governments to further

the Church's objectives. Rather, they contend that, when the district court "tentatively" ruled during the first witness's testimony, the evidence of conspiracy was not yet sufficient. See Br.42-45.

Defendants' argument fails. Even in a jury trial, a judge considering the admissibility of statements under Rule 801(d)(2)(E) "may admit the challenged statements conditionally, subject to a later motion to strike if the [proponent] fails to establish the required foundation." *United States* v. *Watkins*, 600 F.2d 201, 204 (9th Cir. 1979). "It is not controlling, therefore, whether sufficient independent evidence" of a conspiracy "existed at the time the trial judge made his first ruling under Rule 801(d)(2)(E)." *Id.* at 204-205. Rather, "[i]n ascertaining whether the foundation has been established," this Court can "consider all the evidence" supporting the existence of a conspiracy, "regardless of the order of proof." *United States* v. *Miranda-Uriarte*, 649 F.2d 1345, 1349 (9th Cir. 1981).

Here, the district court, having previewed the evidence during pretrial proceedings, anticipated that the government would succeed in establishing the existence of a conspiracy at trial. E.R.108. Thus, the court ruled Lyle Jeffs' statement "[t]entatively" admissible based on Dowayne Barlow's testimony regarding the conspiracy. E.R.384. Whether sufficient evidence of a conspiracy existed at that point is irrelevant—what matters is whether the government established a conspiracy by the end of trial. Defendants did not move to strike

Lyle Jeffs' statement on foundation grounds, nor do they argue on appeal that the evidence overall failed to establish a conspiracy.

In any event, even when the district court "[t]entatively" ruled, there was sufficient evidence to conclude that defendants were engaged in a conspiracy with the FLDS Church. E.R.384. Barlow had already testified that town officials and marshals attended regular meetings at which FLDS leaders instructed them on how to handle various legal issues to advance the Church's interests. E.R.374-384. Barlow had also testified about the power Jeffs wielded over town officials via the threat of excommunication and family separation, and how that power compelled officials to follow Jeffs' orders. See S.E.R.4-31. These facts supported a conclusion that defendants were more likely than not engaged in a joint venture with the Church to use their governments to advance FLDS objectives.

By the time the court finalized its ruling the next morning, the evidence establishing a conspiracy was even stronger. The court had heard testimony that: FLDS leaders dictated who would fill government positions, including town council members, mayors, and marshals (S.E.R.38-47, 110-117); FLDS leaders called becoming a marshal a religious "mission" (S.E.R.41); the Marshal's Office turned a blind eye to illegal activities by FLDS members (S.E.R.49-62, 93-105); marshals assisted Jeffs while he was a fugitive (S.E.R.58-66); numerous town officials served on Church Security (S.E.R.79-82); and the Marshal's Office

trained Church Security on how to evade outside law enforcement and helped them surveil the community (S.E.R.68-79). On this record, the district court did not clearly err in concluding that the government had established the existence of a conspiracy.

2. The District Court Understood Rule 801(d)(2)(E)'s Foundational Requirements

Defendants next argue that the district court relied on an "erroneous interpretation of the law," improperly admitting co-conspirator statements "based solely on the existence of a conspiracy" without also finding that they were made "in furtherance of" the conspiracy. Br.47. Not so.

The record leaves no doubt that the district court understood that a statement must be made in furtherance of the conspiracy to be admissible under Rule 801(d)(2)(E): The court acknowledged the "in furtherance of" requirement in its pretrial order. E.R.108. It sustained objections to multiple statements on the ground that they were not made in furtherance of the conspiracy. See E.R.351-352; S.E.R.107-108, 152-153. And it explicitly instructed the advisory jury that it had found that the statements it admitted were made "during and in furtherance of" the conspiracy between the Towns and FLDS Church. E.R.228.

Defendants' reliance on an isolated remark—"If the fundamentals of the conspiracy or joint undertaking is established, [the statement] becomes nonhearsay" (E.R.99)—is unavailing. The court was not suggesting that co-

conspirator statements are admissible "based solely on the existence of a conspiracy" (Br.47) but simply explaining that if the Rule's foundational requirements are met, the out-of-court statement "becomes nonhearsay." E.R.99. That was a correct articulation of Rule 801(d)(2)(E).

3. The District Court Did Not Abuse Its Discretion In Admitting The Challenged Statements

Defendants challenge the admission of 23 statements on the ground that they were not made in furtherance of the conspiracy. The district court did not abuse its discretion in admitting any of these statements.

a. Statements Not Admitted For Their Truth Are Not Hearsay

Several of the statements defendants challenge are not hearsay at all because they were not introduced to prove the truth of the matter asserted. See Fed. R. Evid. 801(c)(2). Accordingly, this Court need not reach defendants' argument that these statements did not satisfy Rule 801(d)(2)(E). See, *e.g.*, *United States* v. *Sayetsitty*, 107 F.3d 1405, 1414-1415 (9th Cir. 1997).

For example, defendants point to several instructions or directives given by FLDS leaders. See Br.47-48 (citing Jeffs' instructions not to associate with apostates and excommunication of FLDS members); Br.50-51 (citing FLDS leaders' directives not to associate with non-United Order members and to consecrate all one's belongings to the Church). But "[i]nstructions to an individual to do something" are not hearsay "because they are not declarations of fact and

therefore are not capable of being true or false." *United States* v. *Chung*, 659 F.3d 815, 833 (9th Cir. 2011) (citation omitted).

Likewise, Isaac Wyler's testimony that Warren Jeffs "prayed for the states of Arizona and Utah" and their Attorney Generals to "be destroyed" (E.R.401, cited at Br.48) is not hearsay because it was not introduced for its truth but for its effect on Wyler. See Los Angeles News Serv. v. CBS Broad., Inc., 305 F.3d 924, 935 (9th Cir. 2002) ("Out-of-court declarations introduced to show the effect on the listener are not hearsay."). The government asked Wyler, "Did there come a time when you began to question your participation in the religion?" E.R.400. Wyler responded that witnessing Jeffs pray publicly for the destruction of the States, the execution of their Attorneys General, and the execution of an ousted Church member "shook [him] up really bad," explaining that "at that point" he "didn't feel like [he] had signed up for any kind of religion like this." E.R.402. Because this statement was introduced not for its truth—i.e., that Jeffs really desired the destruction of the States and their Attorneys General—but to show why Wyler began distancing himself from the FLDS, it was admissible as nonhearsay. 18

The statement was also admissible under Rule 801(d)(2)(E). Coconspirators could reasonably interpret a statement by Jeffs conveying antagonism toward the state Attorneys General, who had begun cracking down on the Church's practice of underage marriage, as an encouragement to resist those efforts. See E.R.401. "[S]tatements made to prompt further action on the part of conspirators" (continued...)

The same goes for Wyler's testimony relating a meeting in which an FLDS leader compared the town governments, utility companies, UEP Trust, and FLDSrun businesses to a "fleet of vehicles" driven by the Prophet. E.R.392 (cited at Br.50). Wyler had testified that, in his understanding, the Church "ran the city government," and the government "was a part of the [C]hurch." S.E.R.120. When asked how he knew that, Wyler responded that a Church leader had "explained it to us quite clearly" by describing the Towns as one of the various "vehicles" in the Prophet's "fleet." S.E.R.121. Because this statement was introduced for its "[e]ffect on the listener" (S.E.R.121)—i.e., to explain the basis for Wyler's understanding—and not for its truth, it was admissible nonhearsay. 19

Jeffs' Dictations Were Admissible As Co-Conspirator Statements And b. As Business Records

Defendants' challenge to the admission of sixteen of Jeffs' "dictations" (Br.48-49) also fails, as those statements were admissible both as co-conspirator statements and as business records.

(continued...)

are "in furtherance of" the conspiracy under Rule 801(d)(2)(E). United States v. Yarbrough, 852 F.2d 1522, 1535 (9th Cir. 1988).

¹⁹ Even if the "vehicles" remark were considered for its truth, it was admissible under Rule 801(d)(2)(E). The statement was designed to help Jeffs maintain control over the town governments by justifying and normalizing that control to FLDS followers, thereby furthering the conspiracy's objectives.

- *i. Background.* Fifteen of the challenged statements are transcriptions of audiorecorded dictations Jeffs made between 2003 and 2006; one is a transcription of Jeffs speaking on a recorded telephone meeting with other FLDS leaders. In the dictations, Jeffs documents in great detail "the day-to-day goings-on of the FLDS community" (S.E.R.139), memorializing events directly relevant to allegations in this case. These events include:
 - Jeffs' appointment and removal of government officials, including the mayors and various town councilmen (E.R.484, 515-517, 1008);
 - Jeffs' communications with both Towns' mayors, directly and through his bishops, giving them orders and exerting pressure on them via threats of excommunication (E.R.492-493, 507, 513-514, 558);
 - Jeffs' receipt of communications—many while he was a fugitive—from town officials, including the mayors and marshals, updating him on events such as the activities of and resistance to the UEP Trust and outside law enforcement (E.R.487, 502-503, 508, 531-540, 542);
 - Jeffs' directives to FLDS members to halt new construction on UEP land (E.R.468), and to "answer them nothing" if questioned by outside law enforcement (E.R.464), which corroborated other witnesses' accounts (see S.E.R.23-26; Doc.854:1019; Doc.857:1313; Doc.864:1835; Doc.870:2316).

The government introduced the transcriptions of Jeffs' dictations through John Hanna, the Texas Ranger who recovered them while executing a search warrant on Jeffs' YFZ Ranch in 2008. S.E.R.123-135. Hanna testified that the transcriptions were among thousands of pages of archival documents and "priesthood records" seized from two secure vaults within YFZ Ranch's temple and temple annex. S.E.R.136-137. A "priesthood record," Hanna explained, is "a daily accounting created by Warren Jeffs" that provides "a road map into the operations" of the Church, such as the "construction of buildings, [the] location and removal of individuals from within the church and within different families," and Jeffs' "locations," "travels," and "activities while a fugitive." S.E.R.138-139. These records covered a three-year span. S.E.R.139.

Hanna testified that, through their investigation, his team determined that Jeffs did not type his own records but dictated them onto audiotapes, which one of his wives would then transcribe. S.E.R.142-143. Hanna was able to verify the accuracy of each transcription by comparing it to the audiotape bearing the same date. S.E.R.140-141. He also evaluated the accuracy of the records' contents by comparing "details within" them with "known facts," such as "events," "weather," and the known "day-to-day movements of the FLDS individuals." S.E.R.141-142. Through this process, Hanna was "able to determine with a very high degree of certainty that these records were accurate and true." S.E.R.142. Hanna estimated

that he spent thousands of hours over a four-year period reviewing these records.

S.E.R.143.

When the government sought to introduce the first of these records through Hanna, defense counsel objected on hearsay grounds. E.R.458. The government responded that the document was admissible as a business record in light of Hanna's testimony that "these records detail[] regularly conducted activity of the [C]hurch" and "document the [Church's] day-to-day activities." E.R.459. The government also argued that the document was admissible as a co-conspirator statement. E.R.459. The district court ruled the document admissible on the ground that it was "sufficiently connected to" the conspiracy. E.R.460. The court did not address whether it also satisfied the business-records exception.

The court admitted 23 additional documents through Hanna, all but one over defendants' hearsay objection. Defendants argue that the district court erred in admitting 16 of these documents because, in defendants' view, they were not made in furtherance of the conspiracy as required by Rule 801(d)(2)(E).

ii. Jeffs' Dictations Were Admissible As Co-Conspirator Statements. The district court did not clearly err in concluding that Jeffs' dictations were "in furtherance of" the conspiracy between the Towns and FLDS Church. The dictations were in furtherance of the conspiracy because they constituted "a record

of information relevant to the activities of the common enterprise." *United States* v. *Schmit*, 881 F.2d 608, 613 (9th Cir. 1989).

In *Schmit*, the defendants in a drug conspiracy case appealed the admission under Rule 801(d)(2)(E) of a tape-recorded dictation made by "the leader of the criminal enterprise." 881 F.2d at 612. In the "lengthy and somewhat rambling" dictation, the leader weighed the pros and cons of a new potential criminal endeavor, discussed co-conspirators' trustworthiness, and speculated about law enforcement's investigations. *Id.* at 611. Defendants argued that the recorded statement "cannot be regarded as made 'in furtherance of the conspiracy" because it consisted of mere "idle chatter" and "casual admissions of culpability," and there was no evidence it was "played for others" or "used in any other way" to advance the conspiracy's objectives. *Id.* at 612 (citations omitted).

This Court disagreed. "Ledgers, books of record, and notes containing information relevant to the conspiracy," this Court explained, may be admissible as statements "in furtherance of the conspiracy without evidence that they were in fact consulted or otherwise communicated." *Schmit*, 881 F.2d at 613. And "[a] microcassette tape, like a note or a ledger, is an accepted place to record information." *Ibid*. Observing that the statement was "dictated at a critical juncture" by the conspiracy's leader, "catalogued and analyzed factors relevant" to an important decision, and "was preserved with other records of the planning and

execution of the enterprise's activities," this Court concluded that the district court could reasonably find that the recording was made to further the conspiracy's objectives. *Id.* at 612.

So too here. Jeffs' dictations chronicle decisions he made regarding who should occupy government positions, communications he sent to and received from town officials, and directives he issued regarding how to carry out the Church's objectives. They document "a critical juncture in" the Church's increasing control over the Towns—including the period when Jeffs was a fugitive—and were "preserved with other records" of the FLDS community's activities. *Schmit*, 881 F.2d at 612. And as *Schmit* makes clear, whether Jeffs intended to share the dictations with the Towns (see Br.49) is irrelevant to their role, as records, in furthering the conspiracy. *Id.* at 613; see also *United States* v. *SKW Metals & Alloys, Inc.*, 195 F.3d 83, 89 (2d Cir. 1999) (handwritten notes memorializing conversations with co-conspirators were made "in furtherance of" the conspiracy).

iii. Jeffs' Dictations Were Also Admissible As Business Records. Jeffs' dictations were also admissible as "Records of a Regularly Conducted Activity" under Federal Rule of Evidence 803(6). Although the district court did not address the government's business-records argument, this Court "may affirm on any basis supported by the record, whether or not relied upon by the district court." Hall v. North Am. Van Lines, Inc., 476 F.3d 683, 686 (9th Cir. 2007).

Rule 803(6) provides an exception to the hearsay rule for any "record of an act, event, condition, opinion, or diagnosis" when the following conditions are met: (A) the record "was made at or near the time by—or from information transmitted by—someone with knowledge"; (B) the record was "kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit"; (C) making the record was "a regular practice of that activity"; (D) these conditions are "shown by the testimony of the custodian or another qualified witness"; and (E) "the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6). Church records are admissible under this exception provided that a proper foundation is laid. *Hall* v. *CIR*, 729 F.2d 632, 634 (9th Cir. 1984). Jeffs' dictations satisfy Rule 803(6)'s conditions.

First, the records were made "at or near the time" of the events they describe by "someone with knowledge." Fed. R. Evid. 803(6)(A). They are Jeffs' dictations memorializing his own activities and communications made shortly after they occurred.

Second, the records were "kept in the course of a regularly conducted activity" of the FLDS Church, and making such records was "a regular practice of that activity." Fed. R. Evid. 803(6)(B)-(C). Ranger Hanna laid an extensive foundation on this point, testifying that he uncovered thousands of pages of

priesthood records spanning a three-year period, that the records detailed the day-to-day operations of the FLDS organization, and that they were kept in secure vaults within a secured FLDS compound. Beyond Hanna's testimony, the records on their face bear indicia of regularity. Each record, for example, states the date, time, and location where Jeffs made the dictation. Some are explicitly labeled, "Record of President Warren Jeffs." E.R.970-977. And Jeffs references the keeping of records within the dictations themselves. See, *e.g.*, E.R.965-966, 1025. In short, these records were plainly not "generated in anticipation of litigation," *Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 980 (9th Cir. 2009), or for any other "suspect" motive, *Keogh* v. *CIR*, 713 F.2d 496, 500 (9th Cir. 1983); see also *United States* v. *Kaiser*, 609 F.3d 556, 574-576 (2d Cir. 2010) (handwritten notes documenting phone conversations were business records).

Third, the foregoing conditions were established through the testimony of a "qualified witness." Fed. R. Evid. 803(6)(D). "A witness does not have to be the custodian of documents offered into evidence to establish Rule 803(6)'s foundational requirements." *United States* v. *Childs*, 5 F.3d 1328, 1334 (9th Cir. 1993). Rather, the phrase "other qualified witness" is "broadly interpreted to require only that the witness understand the record-keeping system." *Ibid.* (citation omitted). As such, courts have recognized that "a government agent" may provide

a foundation "where the agent is familiar with the record-keeping system." *United States* v. *Pelullo*, 964 F.2d 193, 201 (3d Cir. 1992).

Here, Ranger Hanna was intimately familiar with the Church's record-keeping system, having spent four years analyzing thousands of pages of recovered FLDS documents. Given that familiarity, he understood, and testified to, the process by which those records were generated. He also verified not only that the transcriptions accurately reflected Jeffs' audiorecorded dictations but also that the details they described "were accurate and true." S.E.R.142. Thus, Hanna was a "qualified witness" for purposes of Rule 803(6)(D).

Finally, defendants cannot show that "the source of information" or "the method or circumstances of preparation" indicate "a lack of trustworthiness." Fed. R. Evid. 803(6)(E). Jeffs made the dictations contemporaneously to memorialize his activities and communications. They were stored in secure vaults on a secure compound along with family records and other archival documents. Given that their apparent purpose was to serve as a historical record of FLDS operations, and not for, say, litigation, Jeffs would have had "no incentive to misrepresent the facts recorded on the documents." *United States* v. *Bachsian*, 4 F.3d 796, 798 (9th Cir. 1993). Indeed, Hanna testified that he was able to verify the accuracy of details in the records by cross-referencing them with known facts in the world. S.E.R.140-142. Thus, the records satisfy Rule 803(6)'s final condition.

c. The Remaining Statement Was Admissible Under Rule 801(d)(2)(E)

The only other statement defendants challenge that is not covered above was a conversation between Jeffs and his brother, Isaac, that was surreptitiously recorded while Isaac visited Jeffs in prison. Br.50. In this conversation, Isaac updated Jeffs about the Church's efforts—with the Marshal's Office's assistance—to recover from Willie Jessop the incriminating audio recordings of Jeffs' ritual child-rape and confession to molesting female family members. See pp. 12-13, *supra*. Specifically, Isaac informed Jeffs that they "did get the stuff that Willie had back," and that they had "locked it up in a trailer" until Jeffs advised them "what [he] wanted done with that." S.E.R.155; see E.R.449-452.

This statement was admissible under Rule 801(d)(2)(E). Far from a "mere conversation" between brothers (Br.50), this was a conspirator relaying crucial information to the conspiracy's leader regarding an important event carried out by co-conspirators. "[S]tatements made to keep coconspirators abreast of an ongoing conspiracy's activities satisfy the 'in furtherance of' requirement." *United States* v. *Tamman*, 782 F.3d 543, 553 (9th Cir. 2015) (citation omitted).

4. The Court Did Not Abuse Its Broad Discretion Under Rule 403

Finally, defendants' argument that the district court should have excluded

Jeffs' statements under Rule 403 (Br.51-55) is meritless. The jury was merely
advisory as to the Section 14141 claim. Given that the court, not the jury, would

be responsible for deciding defendants' liability, there was little risk that the Section 14141 verdict would be unfairly affected by any prejudicial content in Jeffs' statements, as judges are presumed to rely only on proper considerations when making decisions. See *Farmer Brothers*, 31 F.3d at 898; cf. *Harris* v. *Rivera*, 454 U.S. 339, 346 (1981) (per curiam) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.").

In any event, even in a jury trial, the court would not have abused its discretion in concluding that Jeffs' "dictations, sermons, and correspondence"—the only statements defendants challenged under Rule 403 (see E.R.222-224)—were not unduly prejudicial. Defendants wrongly claim that the district court failed to conduct a Rule 403 balancing. Br.54. The court expressly found Jeffs' statements "relevant and not unfairly prejudicial." E.R.105. Moreover, when defendants reasserted their Rule 403 objection to one of Jeffs' dictations, the court excluded the inflammatory portions of the dictation, limiting admission to the portion referencing Jeffs' directives to the mayor. E.R.490-492. Thus, it is clear that the court "considered Rule 403's requirements." *United States* v. *Ono*, 918 F.2d 1462, 1465 (9th Cir. 1990). It did not need to "mechanically recite" them each time it admitted one of Jeffs' dictations. *Ibid.* (citation omitted).

Defendants have not met their heavy burden to overcome the deference afforded the district court's Rule 403 rulings. See *United States* v. *Layton*, 767 F.2d 549, 553-554 (9th Cir. 1985). Jeffs' dictations were plainly relevant to the government's claims, as they demonstrated the control Jeffs wielded over town officials and marshals. And defendants do not identify any specific content that they claim was prejudicial, much less unfairly so, relying entirely on Jeffs' status as a "polarizing figure" and general assertions that his statements were "inflammatory." Br.54. The district court did not abuse its wide discretion in concluding that these statements' probative value was not "substantially outweighed" by any prejudicial effect. Fed. R. Evid. 403.

D. Any Error In Admitting The Challenged Statements Was Harmless

Finally, defendants do not and cannot argue that any error in admitting the challenged statements affected the district court's ultimate Section 14141 ruling.

Even removing these statements, the government presented abundant evidence that the Marshal's Office was excessively entangled with the FLDS Church and routinely discriminated against non-FLDS persons in violation of the Establishment Clause, Equal Protection Clause, and Fourth Amendment. See E.R.608-707; pp. 4-14, supra. Thus, it is "more probable than not" that the court would have still found the Towns liable under Section 14141 had any or all of these challenged statements been excluded. Nationwide, 541 F.3d at 911.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The government states, pursuant to Ninth Circuit Rule 28-2.6(c), that it is aware of one case pending before this Court that is related to this case insofar as it raises a similar issue regarding the correct municipal-liability standard under 42 U.S.C. 14141 (now 34 U.S.C. 12601): *United States* v. *Maricopa County*, No. 15-17558 (9th Cir.), argued Sept. 15, 2017 (pending decision).

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-16472

Note: This form must be signed by the attorney or unrepresented litigant and attached to the end of the brief. I certify that (check appropriate option):
This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1. The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) □ separately represented parties; (2) □ a party or parties filing a single brief in response to multiple briefs; or (3) □ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
This brief complies with the longer length limit authorized by court order dated The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is 15.999 words or pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).
This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
Signature of Attorney or Unrepresented Litigant s/ Christine A. Monta
("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney

Addendum

Text of 42 U.S.C. 14141 (recodified at 34 U.S.C. 12601)

Full text of 42 U.S.C. 14141 (now 34 U.S.C. 12601):

§ 14141. Cause of action

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.