No. 16-16661

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUEL DE JESUS ORTEGA MELENDRES, *et al.*,

Plaintiffs-Appellees

and

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellee

v.

MARICOPA COUNTY,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 1343. On July 20, 2016, the district court entered its Second Supplemental Permanent Injunction/Judgement Order in favor of plaintiffs and the United States. Doc.

1748.[1] The district court subsequently twice amended this order, making non-substantive corrections, and entered the Second Amended Second Supplemental Permanent Injunction (Second Permanent Injunction) on July 26, 2016 (E.R. 141-207). Maricopa County (the County) filed a timely notice of appeal on September 16, 2016. E.R. 1-3; Fed. R. App. P. 4(a)(1)(B). This court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES[2]

1. Whether, as this Court already has held, the County was correctly held liable for the policies and conduct of its Sheriff and Sheriff's Office.

2. Whether state law bars the County from funding the Second Permanent Injunction.

STATEMENT OF THE CASE

There have been multiple appeals in this case. In a prior appeal, this Court affirmed the district court's preliminary injunction, see *Ortega-Melendres* v. *Arpaio*, 836 F. Supp. 2d 959 (D. Ariz. 2011), aff'd *sub nom.*, *Melendres* v. *Arpaio*,

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[1] "Doc. __" refers to the docket entry in *Melendres* v. *Penzone*, No. 2:07-cv-02513 (D. Ariz.). "E.R." refers to appellant's Excerpts of Record. "Br." refers to appellant's opening brief. "S.E.R." refers to the Supplemental Excerpts of Record submitted with the United States' brief.

[2] The County raises other issues in its opening brief. The United States will continue to abide by the district court's orders and to work collaboratively with the other parties to determine whether any modifications to those orders are appropriate. See pp. 15-16, *infra*.

695 F.3d 990 (9th Cir. 2012) (*Melendres I*), and in a subsequent appeal, the Court largely affirmed the permanent injunction, see *Melendres* v. *Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013), aff'd in part and vacated in part, 784 F.3d 1254 (9th Cir. 2015) (*Melendres II*), cert. denied, 136 S. Ct. 799 (2016). Maricopa County brought another appeal, which the Court dismissed. *Melendres* v. *Maricopa County*, 815 F.3d 645 (9th Cir. 2016) (*Melendres III*).

The County now challenges its liability for the policies and conduct of the Maricopa County Sheriff and the Maricopa County Sheriff's Office (MCSO). The County's arguments that it cannot be held liable are foreclosed by this Court's holdings in the prior appeals and federal and Arizona law. The Court therefore should reject those arguments. The parties are engaged in discussions regarding possible modifications to the injunctions in the district court, and returning this case to that court will help to achieve an appropriate resolution of this case.

1. Factual Background And Prior Appeals: Melendres I, II, *And* III

a. *Melendres I*. In 2007, private plaintiffs filed a class action against the County and MCSO alleging that, among other things, defendants engaged in a custom, policy, and practice of policing activities that violate the Constitution. See *Melendres I*, 695 F.3d at 994-995. The plaintiffs and the County stipulated to dismiss the County from the suit "without prejudice to rejoining Defendant Maricopa County as a Defendant in this lawsuit at a later time if doing so becomes

necessary to obtain complete relief." S.E.R. 160. In December 2011, the district court issued a preliminary injunction against the remaining defendants, see *Ortega-Melendres*, 836 F. Supp. 2d 959, which this Court affirmed, see *Melendres I*, 695 F.3d at 1002.

b. *Melendres II*. In May 2013, following a bench trial, the district court found defendants liable for a number of constitutional violations. See *Melendres*, 989 F. Supp. 2d 892-910. The court entered a permanent injunction, *see id.* at 827, which it later modified (collectively, the First Permanent Injunction), *Melendres II*, 784 F.3d at 1259.

In April 2015, this Court affirmed the First Permanent Injunction in significant part. *Melendres II*, 784 F.3d at 1265-1267. The Court also addressed defendants' argument that MCSO was not a proper party. *Id.* at 1260. The Court observed that, early in this case, "[d]efendants moved the district court to dismiss MCSO on the ground that it was a non-jural entity—that is, it lacked separate legal status from the County and therefore was incapable of suing or being sued in its own name." *Ibid.* Although the district court had denied the motion because Arizona law on this issue was unsettled at that time, the Court noted that, in the interim, "the Arizona Court of Appeals clarified that MCSO is, in fact, a non-jural entity." *Ibid.* (citing *Braillard* v. *Maricopa Cty.*, 232 P.3d 1263, 1269 (Ariz. Ct. App. 2010)). In light of this clarification of state law, the Court ordered, consistent

with the County's 2009 stipulation, that the County be substituted as a defendant for MCSO. *Ibid.*

c. *Melendres III*. After this Court's decision in *Melendres II*, the County filed a notice of appeal challenging its rejoinder as a defendant. *Melendres III*, 815 F.3d at 647-648. The County purported to challenge the "same orders" that MCSO "appealed from previously in *Melendres II*" and sought reversal of the "affirmative mandates" in those orders. *Id.* at 647, 650. The County conceded, however, that "it is required, by Arizona state statute, 'to provide funding for'" MCSO's compliance with the district court's injunctions. *Id.* at 650.

In March 2016, this Court dismissed the appeal as untimely. *Melendres III*, 815 F.3d at 647. The Court explained that there was "no unfairness in holding Maricopa County to its earlier stipulation" and rejoining it as a defendant in the case. *Id.* at 650. The Court further pointed out that the County's "claim of unfairness" was "illusory" because, as the County conceded, "it would have nonetheless had to bear the financial costs associated with complying with the district court's injunction" even if it were not substituted in the place of MCSO. *Ibid.* Finally, in all events, the Court concluded that, as a matter of federal and Arizona law, the County is directly liable for its Sheriff's conduct and policymaking. *Id.* at 650-651 (citing *McMillian* v. *Monroe Cty.*, 520 U.S. 781 (1997), and *Flanders* v. *Maricopa Cty.*, 54 P.3d 837, 847 (Ariz. Ct. App. 2002)).

2. Further Proceedings Below

At a May 14, 2014 hearing in the district court, MCSO revealed that it had discovered potentially relevant evidence that had not previously been disclosed to the plaintiffs. E.R. 462-463. That evidence included personal items such as drivers' licenses, identification cards, and passports, as well as video recordings of traffic stops. E.R. 462-464. After allowing MCSO an opportunity to investigate these matters internally (S.E.R. 104-105), the district court entered an Order to Show Cause as to civil contempt, (E.R. 460-486); see also Doc. 843 (Plaintiffs' Memorandum of Law and Facts re Contempt Proceedings and Request for Order To Show Cause). The court held hearings in 2015 (E.R. 296), and during this time also granted the United States' unopposed motion to intervene (S.E.R. 94-95).

On May 13, 2016, the district court issued findings of fact regarding civil contempt. E.R. 457. The court deferred consideration of appropriate relief, again seeking input from the parties. E.R. 450-456. After considering the positions of all of the parties, the district court entered the Second Permanent Injunction on July 26, 2016. E.R. 141-207.

The County filed a notice of appeal on September 16, 2016. E.R. 1-3. The former Sheriff also appealed. While that appeal was pending, a new Sheriff was elected. After the new Sheriff's substitution as a party, he filed a motion to dismiss the appeal, which this Court granted. See Order, *Melendres* v. *Sheridan*, No. 16-

16663 (9th Cir. Apr. 26, 2017). As neither the Sheriff nor the County has sought a stay of the challenged injunction, MCSO has been implementing it.

STANDARD OF REVIEW

This Court reviews the district court's factual findings for clear error and its legal conclusions de novo. *Del Webb Communities, Inc.* v. *Partington*, 652 F.3d 1145, 1149 (9th Cir. 2011). The Court reviews the "scope and terms of the district court's injunction" for an abuse of discretion. *Melendres II*, 784 F.3d at 1260.

SUMMARY OF THE ARGUMENT

1. The Court should affirm its holdings that the County is a proper party to this case. Those holdings are binding on this panel and properly construe federal and Arizona law. As the Court already has held, rejoining the County as a defendant under the terms of its prior stipulation was proper, and the County is directly liable for MCSO's and the Sheriff's conduct and policymaking under federal and Arizona law in any event. *Melendres II*, 784 F.3d at 1260; *Melendres III*, 815 F.3d at 650 (citing *McMillian* v. *Monroe Cty.*, 520 U.S. 781 (1997)).

2. Contrary to the County's arguments, state law does not bar the County from funding MCSO's compliance with the injunction. In the first place, the County already has conceded to this Court that it is responsible for funding compliance with the district court's injunctions. Moreover, state-law restrictions

regarding local governments' self-insurance funds do not preclude all liability for unlawful acts, as the County claims.

ARGUMENT

I

THIS COURT HAS ALREADY HELD THAT THE COUNTY IS A PROPER PARTY IN THIS CASE

The County's argument that it is not a proper party in this case, see Br. 26-31, is foreclosed by this Court's binding prior opinions. In *Melendres II*, this Court held that the County is the appropriate defendant in this case because MCSO "lacked separate legal status from the County." 784 F.3d at 1260. Therefore, consistent with the County's earlier stipulation, the Court ordered that the "County be substituted as a party" for MCSO. *Ibid*.

The Court elaborated on the County's liability for the policies and conduct of its Sheriff and MCSO in *Melendres III*. 815 F.3d at 650-651. There, the Court pointed out that the County had stipulated that "it would be rejoined 'as a Defendant in this lawsuit at a later time if doing so becomes necessary to obtain complete relief.'" *Id.* at 650. As the Court explained, rejoining the County had become necessary to provide complete relief because Arizona courts had clarified that MCSO is a non-jural entity and, thus, was not a proper defendant. *Ibid.*

Moreover, the Court explained that the County's "claim of unfairness" in being held to its stipulation was "illusory." *Melendres III*, 815 F.3d at 650.

Indeed, the County conceded that if it had never been substituted "in place of MCSO, it would have nonetheless had to bear the financial costs associated with complying with the district court's injunction" as a matter of Arizona law. *Ibid.* "Given that concession, there is no argument that our substitution of [the County] into the case in *Melendres II* saddled it with obligations that it would not otherwise have had." *Ibid.*

The Court further held that rejoinder of the County would be proper even in the absence of the County's stipulation and concession. *See Melendres III*, 815 F.3d at 650-651. As the Court explained, under *McMillian* v. *Monroe County*, 520 U.S. 781 (1997), the County is directly liable for the actions of its Sheriff and MCSO if they constitute county "policy." *Melendres II*, 784 F.3d at 650. Thus, because "Arizona state law makes clear" that a sheriff's "law-enforcement acts" constitute county policy as an exercise of the sheriff's "final policymaking authority," the Court held that rejoining the County as a defendant was proper in any event. *Ibid.* (quoting *Flanders* v. *Maricopa Cty.*, 54 P.3d 837, 847 (Ariz. Ct. App. 2002)).

Under the law of the circuit doctrine, this Court's published decision in *Melendres II* is binding authority in this appeal—authority that this Court reaffirmed in *Melendres III*. "[A] published decision of this court constitutes binding authority which must be followed unless and until overruled by a body

competent to do so." *Gonzalez* v. *Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (citation and internal quotation marks omitted), aff'd *sub nom. Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).[3]

At any rate, this Court's decisions in *Melendres II* and *III* are correct. The County argues, for example, that its alleged lack of control over the Sheriff and MCSO is essentially the dispositive factor in negating its liability under *McMillian*. See Br. 26-27. This Court, however, correctly rejected the County's flawed reading of *McMillian*, concluding that the County was directly liable despite the County's contention that it lacked control over the Sheriff. See *Melendres III*, 815 F.3d at 650-651. Moreover, contrary to the County's claim, the County Board of Supervisors exercises meaningful supervisory authority over the Sheriff and MCSO's law-enforcement functions because the Sheriff is a county officer under state law. See Ariz. Rev. Stat. Ann. § 11-401(A)(1) (2017); see, *e.g.*, Ariz. Rev. Stat. Ann. § 11-251(1) (2017) (authorizing county boards to "[s]upervise the official conduct of" county officers); *id.* § 11-201(A)(6) (2017) (authorizing county

[3] In *Gonzalez*, this Court sitting en banc explained that, when this Court publishes a prior decision, it becomes binding authority as the law of the circuit, which supersedes the prudential law-of-the-case rule. 677 F.3d at 389 n.4. Under the law of the case doctrine, a prior appellate decision in the same case generally precludes reconsideration of a decided issue unless the decision is clearly erroneous and results in a manifest injustice, or reconsideration is appropriate for other limited reasons. See *United States* v. *Jingles*, 702 F.3d 494, 502-503 (9th Cir. 2012). But "the exceptions to the law of the case doctrine are not exceptions to [the] general 'law of the circuit' rule." *Gonzalez*, 677 F.3d at 389 n.4.

boards to determine county officers' budgets); *id.* § 11-253(A) (2017) (authorizing county boards to require county officers to produce certain reports and post a bond, if necessary, and to remove and replace them for failing to comply); see also *Hounshell* v. *White*, 199 P.3d 636, 639, 646 (Ariz. Ct. App. 2008) (concluding that Section 11-253 authorized the county to require the sheriff to post a bond to cover costs relating to criminal corruption charges against him).

The County also asserts that most courts have found that liability cannot be imputed to an Arizona county for a sheriff's tortious acts in carrying out law enforcement functions because counties lack control over these functions. See Br. 29-30. But this Court also properly rejected that argument, explaining that the County's case law is inapposite because it addresses respondeat superior liability, while under *McMillian*, the County's direct liability flows from the fact that "the agent's status cloaks him with the governmental body's authority." *Melendres III*, 815 F.3d at 651 (quoting *Flanders*, 54 P.3d at 847).

In short, the Court's decisions in *Melendres II* and *Melendres III* are correct, and this panel should adhere to this binding circuit precedent.

II

STATE LAW CANNOT AND DOES NOT REQUIRE THIS COURT TO VACATE THE INJUNCTION

The County's argument that it lacks the legal authority under Arizona law to fund compliance with the injunction, see Br. 22-26, fares no better. As explained,

the County already has *conceded* that, under Arizona law, it must "bear the financial costs associated with complying with the district court's "injunction[s]." *Melendres III*, 815 F.3d at 650 (quoting Ariz. Rev. Stat. § 11-444). Indeed, Arizona courts have observed that "Maricopa County pays its own debts, and it funds the Sheriff[']s official functions. Whether the County or the Sheriff is liable is of no practical consequence. One or both paths must be good, and they both lead to the same money." *Braillard* v. *Maricopa Cty.*, 232 P.3d 1263, 1269 n.2 (Ariz. Ct. App. 2010) (quoting *Payne* v. *Arpaio*, No. 09-cv-1195, 2009 WL 3756679, at *6 (D. Ariz. Nov. 4, 2009)); see also Br. 25 n.10 (suggesting certain expenses "be charged to the Sheriff, not the County"). And, as this Court has already observed, the County agreed to become a party in this case if it became necessary, and there is "no unfairness" in holding it to its agreement. *Melendres* II, 815 F.3d at 645.[4]

The County thus falls back on an argument that it lacks authority to fund compliance with an injunction that arises out of willful misconduct, see Br. 22-26, but that argument is incorrect, as a matter of both federal law and state law. In the first place, federal law is clear that a state law "cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme." *Hook* v.

[4] The County presents neither an estimate of the projected cost nor any budget figures to show that the County cannot afford to fund MCSO's compliance with the injunction.

Arizona Dep't of Corr., 107 F.3d 1397, 1402 (9th Cir. 1997) (citation omitted); see also *Stone* v. *City & Cty. of S.F.*, 968 F.2d. 850, 862 (9th Cir. 1992), as amended on denial of reh'g (Aug. 25, 1992). In *Hook*, for example, this Court considered an argument that another Arizona statute prohibiting payment for certain court-ordered remedies barred federal injunctive relief. The Court rejected that argument, holding that States cannot legislatively preempt compliance with federal-court orders in this manner but, instead, that federal law "preclude[s] the application" of state laws "to defeat" valid federal remedies. *Hook*, 107 F.3d at 1400 (quoting Ariz. Rev. Stat. § 35-152).

In all events, even if state law could preclude enforcement of a federal judicial remedy, the Arizona statutory provision that the County invokes does not do so here. In particular, the County invokes Ariz. Rev. Stat. § 11-981, which allows counties to establish self-insurance trust funds to pay benefits and claims. See Ariz. Rev. Stat. § 11-981(A) (2017). The County then posits that because MCSO officers take an oath to support the Constitution (as well as state and federal law), when they violate the Constitution they are acting "outside the scope of their employment or authority." Br. 22. Thus, according to the County, because employees must be "acting within the scope of employment" to be covered by the County's self-insurance trust funds, it follows that the County cannot fund compliance with the injunction. Br. 22.

This argument has no merit. Acting within "the scope of employment" does not necessarily mean acting lawfully; it means acting as an agent of the employer. "This rule is not based on the ground that the agent had authority, express or implied, to commit" a wrongful act; it is based on the ground that "the agent represents the principal." *Ohio Farmers Ins. Co.* v. *Norman*, 594 P.2d 1026, 1028 (Ariz. Ct. App. 1979). Accordingly, "an employer may be accountable for the wrongful act of an employee * * * even though the employer has expressly forbidden the conduct." *Reisch* v. *M & D Terminals, Inc.*, 884 P.2d 242, 245 (Ariz. Ct. App. 1994). For example, the State can be liable where its probation officer "acted contrary to the court's directive." *State* v. *Pima Cty. Adult Prob. Dep't*, 708 P.2d 1337, 1340 (Ariz. Ct. App. 1985). This interpretation makes sense. If noncompliance with the law relieves the County from all liabilities, as the County's theory suggests, then the County would have *no* liability for court judgments against its employees, agents, and officers, including in matters as routine as a traffic accident when an officer runs a red light.[5]

The County also asserts that restrictions on use of County funds to influence elections bar it from funding the injunction. Br. 23 (citing Ariz. Rev. Stat. § 11-

[5] The County's peculiar argument suggests, at most, that the County may not be able to use insurance or a self-insurance trust fund (if the County maintains one) towards some of the injunction expenses. Br. 22 (citing Ariz. Rev. Stat. § 11-981(A)(2)). The County does not explain how this would preclude other funding, including the funding it normally provides for MCSO's operations.

410). The County's theory is that if a former official sought to boost his re-election chances through contumacious conduct, then any payments to help implement the injunction would constitute the impermissible "use of county resources 'for the purpose of influencing the outcomes of elections.'" Br. 23 (quoting Ariz. Rev. Stat. § 11-410). But compliance with the injunction—the actual "use of county resources" at issue here—is not an attempt to win an election but implementation of a remedy entered by the district court. Such a strained reading of state law might hinder funding of any government work, as most elected state officials arguably go about their daily tasks "motivated in part" by a desire to win re-election (Br. 23). The County cites no authority suggesting that its puzzling reading of state law has ever been adopted, and the Court should reject it here.

* * *

As for the scope of the injunction, none of the foregoing precludes the parties, including the County, from working collaboratively to achieve an appropriate resolution of this case. "[S]ound judicial discretion may call for * * * modification" of injunctions in changed circumstances. *System Federation* v. *Wright*, 364 U.S. 642, 647 (1961). Moreover, any party may request that the district court modify any of its orders if the party believes that change is warranted. *Horne* v. *Flores*, 557 U.S. 433, 447 (2009); *Rufo* v. *Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992). The district court has offered to modify its prior orders,

where appropriate, to accommodate changed circumstances, see S.E.R. 24-25, and already has granted some requests to amend the First Permanent Injunction, see S.E.R. 1-8, 18-21.

The County points out that it now has a new Sheriff and other new personnel at MCSO. Br. 13, 15-16, 39-40. As a general matter, these personnel changes may warrant modification of the district court's injunctions, including the Second Permanent Injunction. The new Sheriff has dismissed the appeal filed on his behalf and no longer is a party before the Court. Instead, the private plaintiffs, the new Sheriff, and the United States have begun preliminary discussions regarding possible modifications to the injunctions in the district court in light of the changed circumstances at MCSO. The district court, which has overseen this litigation for several years, is best suited to assess, in the first instance, any such modifications that the parties may agree to seek.

CONCLUSION

The Court should affirm its holding that the County is a proper party to this case.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The government states, pursuant to Ninth Circuit Rule 28-2.6, that it is aware of no other cases pending in this Court related to this appeal beyond the three appeals identified by appellant.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because this brief contains 3680 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: August 29, 2017

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR-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/ Thomas E. Chandler
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