No. 18-498

In the Supreme Court of the United States

MARICOPA COUNTY, ARIZONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Arizona sheriffs are final policymakers for their counties concerning law enforcement in light of Arizona's constitution, statutes, and case law.

2. Whether municipalities can be liable for unlawful actions of their final policymakers under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and 34 U.S.C. 12601 (Supp V. 2017).

3. Whether the courts below correctly applied issue preclusion to bind the petitioner to findings in related litigation regarding the lawfulness of its policing policies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-14) is reported at 889 F.3d 648. The opinion of the district court denying petitioner's motion for summary judgment and granting summary judgment to the United States (Pet. App. 33-102) is reported at 151 F. Supp. 3d 998. The opinion of the district court denying petitioner's motion to dismiss (Pet. App. 15-32) is reported at 915 F. Supp. 2d 1073.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2018. A petition for rehearing was denied on July 16, 2018 (Pet. App. 268-269). The petition for a writ of certiorari was filed on October 15, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2007, private parties brought a class action against petitioner Maricopa County, then-Sheriff Joseph Arpaio, and the Maricopa County Sheriff's Office (MCSO) under 42 U.S.C. 1983, alleging that the defendants had engaged in discriminatory policing against Latinos in violation of the Fourth and Fourteenth Amendments. See *Melendres* v. *Arpaio*, No. 07-cv-2513 (D. Ariz. filed Dec. 12, 2007).

In 2008, the defendants in the *Melendres* action moved to dismiss MCSO from the case on the ground that MCSO did not have a legal existence separate from petitioner. Defs. Mot. to Dismiss Pls. First Am. Compl., 07-cv-2513 D. Ct. Doc. 39, at 19-20 (D. Ariz. Sept. 29, 2008). The district court denied the motion, noting that Arizona law was unsettled on whether county police forces have separate legal existences from the counties that they serve. *Melendres* v. *Arpaio*, 598 F. Supp. 2d 1025, 1039 (D. Ariz. 2009).

In 2009, with petitioner's consent, the *Melendres* plaintiffs filed a joint motion and stipulation to dismiss petitioner from the *Melendres* lawsuit without prejudice. The motion stated that "Defendant Maricopa County [was] not a necessary party at [that] juncture for obtaining the complete relief sought," but that the dismissal was "without prejudice to rejoining" petitioner as a defendant at a later time "if doing so becomes necessary to obtain complete relief." Pet. App. 105.

In 2010, the Arizona Court of Appeals held in *Braillard* v. *Maricopa County*, 232 P.3d 1263, cert. denied, 563 U.S. 1008 (2011), that the MCSO was not a separate legal entity from petitioner and therefore could not be sued in its own right. *Id.* at 1269.

In 2013, after a bench trial, the district court in *Melendres* found MCSO and Arpaio liable for constitutional violations. Pet. App. 111-267. As relevant here, the court found that MCSO had conducted pretextual traffic stops to determine whether vehicle occupants were legally authorized to be in the country, had used Hispanic ancestry or race as part of the evidence to establish reasonable suspicion for suspected state-law immigration violations, and had conducted other discriminatory traffic stops. *Id.* at 114, 221-224, 240-241. The district court entered a permanent injunction directing MCSO to amend various policies and procedures. *Id.* at 265-267.

The court of appeals affirmed the district court's findings and virtually all of the ordered injunctive relief. *Melendres* v. *Arpaio*, 784 F.3d 1254, 1260-1267 (9th Cir. 2015), cert. denied, 136 S. Ct. 799 (2016). However, the court concluded that the MCSO was not in fact a separate legal entity from petitioner in light of the intervening decision in *Braillard*. *Id.* at 1260. The court therefore dismissed MCSO from the case and substituted petitioner in its place. *Ibid.*

Petitioner sought a writ of certiorari. It argued that the court of appeals had erred in substituting petitioner for MCSO in light of *McMillian* v. *Monroe County*, 520 U.S. 781 (1997). It further argued that under *McMillian*, Arizona sheriffs are policymakers for the State, not their respective counties, in the area of law enforcement. See Pet. at 11-19, *Maricopa Cnty.* v. *Melendres*, 136 S. Ct. 799 (2016) (No. 15-376); Pet. Cert. Reply. Br. at 4-9, *Melendres*, *supra* (No. 15-376). This Court denied the petition. *Maricopa Cnty.* v. *Melendres*, 136 S. Ct. 799 (2016) (No. 15-376).

2. a. In 2012, while the *Melendres* case was pending, the United States filed this action against petitioner, then-Sheriff Arpaio, and MCSO, alleging a pattern or practice of unlawful discriminatory police conduct directed at Latinos in Maricopa County. The complaint alleged discriminatory traffic policing in violation of the Fourteenth Amendment and 34 U.S.C. 12601 (Supp. V 2017) (formerly 42 U.S.C. 14141 (2012)) (Count 1); unlawful raids of homes and worksites in violation of the Fourth Amendment and Section 12601 (Count 2); discriminatory policing practices in violation of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.* (Count 3); discriminatory treatment of prisoners with limited English proficiency (LEP) in Maricopa County jails, in violation of Title VI (Count 4); discriminatory practices in violation of the defendants' Title VI contractual assurances (Count 5); and retaliation in violation of the First Amendment and Section 12601 (Count 6). D. Ct. Doc. 1, at 27-30 (May 10, 2012). The conduct underlying Counts 1, 3, and 5 included the same traffic policing practices at issue in the *Melendres* litigation. *Id.* at 5-11.

b. Petitioner and the other defendants moved to dismiss. MCSO argued that it should be dismissed because it was not a legal entity separate from petitioner and was therefore incapable of being sued in its own name. D. Ct. Doc. 35, at 2-4 (June 18, 2012). Petitioner argued that it could not be held liable for Sheriff Arpaio's actions under Section 12601 or Title VI. D. Ct. Doc. 36, at 7-17 (June 21, 2012).

The district court granted MCSO's motion to dismiss but denied petitioner's motion. Pet. App. 15-32. It granted MCSO's motion because it concluded based on *Braillard* that MCSO was a non-jural entity that could

not be sued in its own name. *Id.* at 17. It denied petitioner's motion because it concluded that petitioner could be held liable for constitutional violations resulting from its own policies. *Id.* at 27, 31. The court further held that the sheriff was a final policymaker for petitioner with respect to law enforcement under Arizona law. *Id.* at 31-32.

c. After the parties filed cross-motions for summary judgment, the district court granted the United States' motion for summary judgment on Counts 1, 3, and 5, to the extent that they were predicated on the same policing policies found unlawful in *Melendres,* and denied petitioner's cross-motion. Pet. App. 33-102. As relevant here, the court held that municipalities can be liable under Title VI and Section 12601 for the actions of their policymakers. *Id.* at 52-58, 63-70. And the court concluded that the United States was entitled to summary judgment on Counts 1, 3, and 5, to the extent that they were predicated on the policing policies at issue in *Melendres*, because petitioner was bound by the *Melendres* court's findings regarding those policies. In particular, the court concluded that offensive, non-mutual issue preclusion applied because petitioner had a "pre-existing 'substantive legal relationship'" with MCSO, which was bound by the *Melendres* judgment, and because petitioner's interests were "adequately represented by" MCSO in the *Melendres* litigation. *Id.* at 81 (citation omitted); see *id.* at 80-84. It further held that the *Melendres* findings established violations of Section 12601 and Title VI. *Id.* at 85-89.

d. The United States elected not to further pursue Counts 1, 3, and 5, to the extent that they were based on conduct other than that deemed unconstitutional in

Melendres. The district court then dismissed with prejudice all "portions of Counts One, Three, and Five not based on the unconstitutional discrimination found" in *Melendres*. Pet. App. 274-275.

The United States subsequently intervened in the *Melendres* litigation and agreed to pursue all relief relating to Counts 1, 3, and 5 of this case—addressing the conduct at issue in *Melendres*—through the *Melendres* case. See 07-cv-2513 D. Ct. Doc. 1239 (D. Ariz. Aug. 13, 2015); D. Ct. Doc. 407, at 7 (Sept. 2, 2015). Accordingly, the district court ordered the clerk of court to enter final judgment in this case in favor of the United States on Counts 1, 3, and 5, and to terminate the case, stating that "[p]ursuant to the United States' representations, all injunctive relief on Claims One, Three, and Five will be pursued in *Melendres*." D. Ct. Doc. 407, at 7.

e. The parties entered into settlement agreements resolving all the other counts. In the settlement agreement to resolve Count 4, the government agreed to dismiss the count, and petitioner agreed to modifications of its procedures regarding LEP inmates in MCSO's jails. D. Ct. Doc. 391-2, Attachment A (July 17, 2015). After an oversight period of two years, the government agreed that petitioner had fulfilled all of its obligations under that settlement.[*] The parties entered into a separate agreement resolving Counts 2 and 6. Pet. App.

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[*] See App., *infra*, 5a ("We have determined that MCSO and Maricopa County have met the terms of the jails agreement and, accordingly, that it is appropriate for DOJ to conclude its enforcement and oversight of the agreement."); see also Yihyun Jeong, *Maricopa County Sheriff's Office meets federal language-access requirements in jails*, azcentral.com, Aug. 10, 2017, https://www.azcentral.com/story/news/local/phoenix/2017/08/10/sheriffs-office-meets-federal-language-access-requirements-jails/554638001/.

276-285. The district court entered that agreement as an order and retained jurisdiction over its enforcement. *Id.* at 275.

3. Petitioner appealed the judgment in this case, and the court of appeals affirmed. Pet. App. 4-14.

The court of appeals held that a county can be liable under Title VI and Section 12601 for the acts of its final policymakers. Pet. App. 9-13. It noted that this Court has determined that local governments can be liable for deprivations of constitutional or federal rights under 42 U.S.C. 1983 "if a local government's own official policy or custom caused the deprivation of federal rights." Pet. App. 10. This Court, the court of appeals noted, had explained that requirement as ensuring "that a municipality's liability 'is limited to acts that are, properly speaking, acts "of the municipality"—that is, acts which the municipality has officially sanctioned or ordered.'" *Ibid.* (quoting *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480 (1986)). The court of appeals noted that this Court has held that only certain officials can "establish official policy on the government's behalf": those who "exercise 'final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.'" *Ibid.* (quoting *McMillian*, 520 U.S. at 785).

The court of appeals concluded that the concept of policymaker liability could also be used in assessing municipal liability under Title VI and Section 12601. The court found that decisions of this Court indicate that Title VI makes entities liable for their own misconduct, and further establish that an entity's misconduct includes wrongdoing undertaken pursuant to official policies. Pet. App. 11 (discussing *Davis ex. rel LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640

(1999); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998)).

The court of appeals reasoned that Section 12601 also permits municipalities to be held liable for the actions of their final policymakers. Pet. App. 11. It described Section 12601 as sharing the same basic purpose as Section 1983. *Id.* at 12. Further, the court observed, the text of Section 12601 makes clear that it "imposes liability on local governments." *Ibid.* "Indeed," the court reasoned, "the language of § 12601 goes even further than § 1983, making it unlawful for 'any governmental authority or any agent thereof, or any person acting on behalf of a governmental authority' to engage in the prohibited conduct." *Ibid.* (citation omitted). The court stated that it need not decide whether this broad language means local governments can be held liable "on the basis of general agency principles." *Ibid.* Instead, the court observed, "[i]t is enough for us to conclude, as we do, that § 12601 at least imposes liability on a governmental authority whose own official policy causes it to engage in 'a pattern or practice of conduct by law enforcement officers' that deprives persons of federally protected rights." *Ibid.* (citation omitted).

The court of appeals also rejected petitioner's contention that petitioner could not be liable for Sheriff Arpaio's actions because Sheriff Arpaio was not a final policymaker on its behalf. Pet. App. 7-9. Applying the framework in *McMillian*, the court assessed the sheriff's status as policymaker by examining "Arizona's Constitution and statutes, and the court decisions interpreting them." *Id.* at 7. The court concluded that those authorities demonstrated that Arizona sheriffs were policymakers for their counties concerning law enforcement. The court noted that the Arizona Constitution

designates the office of the sheriff as one "created *in and for each organized county of the state*," Pet. App. 8 (quoting Ariz. Const. Art. 12, § 3), and that Arizona law "explicitly states that sheriffs are 'officers of the county,'" *ibid.* (quoting Ariz. Rev. Stat. Ann. § 11-401(A)(1) (2012)). It also observed that Arizona law empowers each county board of supervisors to "'supervise the official conduct of all county officers,' including the sheriff, to ensure that 'the officers faithfully perform their duties.'" *Ibid.* (brackets omitted) (quoting Ariz. Rev. Stat. Ann. § 11-251(1) (Supp. 2017)). Further, the court noted, county boards may "'require [a sheriff] to make reports under oath on any matter connected with the duties of his office,' and may remove an officer who neglects or refuses to do so." *Ibid.* (quoting Ariz. Rev. Stat. Ann. § 11-253(A) (2012)). The court also relied on the fact that state law requires Arizona counties to pay their sheriffs' expenses, *ibid.* (citing Ariz. Rev. Stat. Ann. § 11-444(A) (2012)), including expenses incurred in complying with injunctive relief ordered against the sheriff and sheriff's office, *ibid.* In addition, the court determined that the most relevant state court decision "confirm[ed] that sheriffs act as policymakers for their respective counties." *Ibid.*; see *id.* at 8-9 (discussing *Flanders* v. *Maricopa Cnty.*, 54 P.3d 837 (Ariz. Ct. App. 2002)). While the court acknowledged that "sheriffs in Arizona are independently elected and that a county board of supervisors does not exercise complete control over a sheriff's actions," it concluded that "'the weight of the evidence' strongly supports the conclusion that sheriffs in Arizona act as final policymakers for their respective counties on law-enforcement matters." *Id.* at 9 (quoting *McMillian*, 520 U.S. at 793).

Finally, the court of appeals affirmed the district court's application of issue preclusion to prevent petitioner from re-litigating the lawfulness of the traffic policing practices that were held unlawful in *Melendres*. Pet. App. 13-14. The court observed that petitioner had been "originally named as a defendant in the *Melendres* action," and was dismissed by joint stipulation "without prejudice to [petitioner's] being rejoined as a defendant later in the litigation if that became necessary to afford the plaintiffs full relief." *Id.* at 13. The court further observed that petitioner had effectively "agreed to delegate responsibility for defense of the action to Arpaio and MCSO, knowing that it could be bound by the judgment later despite its formal absence as a party." *Ibid.* Accordingly, the court explained, when the intervening state-law decision in *Braillard* made clear that MCSO was a nonjural entity that could not be sued in its own name, it had re-joined petitioner as a defendant in the *Melendres* action. *Id.* at 13-14. The court noted that petitioner had challenged that determination in this Court, and this Court had denied certiorari. *Id.* at 14.

The court of appeals concluded that under those circumstances, "[e]ach of the elements of offensive nonmutual issue preclusion is satisfied." Pet. App. 14. In particular, "[t]here was a full and fair opportunity to litigate the identical issues in the prior action; the issues were actually litigated in the prior action; the issues were decided in a final judgment; and [petitioner] was a party to the prior action." *Ibid.* The court noted that petitioner "contests only the last element, arguing that it was not in fact a party to *Melendres*." *Ibid.* But it determined that petitioner's challenge "[wa]s not accurate as a factual matter, because [petitioner] was originally named as a defendant in *Melendres* and is now one

of the parties bound by the judgment in that action." *Ibid.* "Moreover," petitioner "effectively agreed to be bound by the judgment in that action," and "[s]uch an agreement is one of the recognized exceptions to non-party preclusion." *Ibid.* (citing *Taylor* v. *Sturgell*, 553 U.S. 880, 893 (2008)).

4. In May 2018, the United States contacted counsel for petitioner to propose that the parties jointly move the district court to terminate the settlement agreement regarding Counts 2 and 6, because MCSO had complied with all terms of the agreement. See App., *infra*, 1a-2a. Petitioner did not respond.

ARGUMENT

Petitioner seeks this Court's review of whether Arizona sheriffs are final policymakers for their counties on matters of law enforcement (Pet. 16-27), whether counties can be liable under Title VI and Section 12601 for actions of their policymakers (Pet. 27-31), and whether the courts below correctly applied principles of collateral estoppel in this case (Pet. 31-36). The petition should be denied. The questions presented appear to lack ongoing significance for petitioner in this case. And in any event, the court of appeals correctly rejected petitioner's arguments in determinations that do not conflict with any decision of this Court or any other court of appeals.

1. As an initial matter, the petition should be denied because the questions presented appear to lack ongoing practical significance for petitioner in this case. Three of the six counts in the United States' complaint (Counts 2, 4, and 6) have been settled. Petitioner fulfilled the terms of the settlement agreement with respect to Count 4. And the United States has also proposed terminating the settlement agreement regarding Counts 2

and 6—the only settlement agreement for which the district court retains jurisdiction—because it believes that petitioner has complied with all terms of that agreement. If that agreement is terminated, then the issue of petitioner's liability with respect to the settled counts will be moot. See *Arata* v. *Nu Skin Int'l, Inc.*, 96 F.3d 1265, 1269 (9th Cir. 1996) (relinquishing jurisdiction where the terms of a settlement agreement were "completed to the satisfaction of the Court in a manner that [wa]s fair, adequate and reasonable").

The United States has agreed to pursue all relief pertaining to the remaining counts (Counts 1, 3, and 5) in the separate *Melendres* litigation. D. Ct. Doc. 407, at 7. Citing that agreement, the district court ordered this case terminated, and the United States therefore cannot pursue any relief relating to Counts 1, 3, or 5 in this case. *Ibid.* It thus does not appear that the Court's resolution of the questions presented here would have any legal or practical significance for petitioner in this case. See *Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 12 (1992) (when it is "impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed.") (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)).

Insofar as any of the questions presented has continuing relevance for petitioner in *Melendres*, the appropriate course was to seek this Court's review of those questions in *Melendres*—the case whose disposition would potentially be affected by the determination of the questions presented. See Pet., *Maricopa Cnty.* v. *Melendres*, No. 18-735 (filed Dec. 6, 2018) (seeking review of whether sheriffs are final policymakers for their counties on law-enforcement matters under Arizona law); see also *Maricopa Cnty.* v. *Melendres*, 136 S. Ct.

799 (2016) (No. 15-376) (denying review of whether the court of appeals erred by substituting petitioner for MCSO and whether the court erred in its analysis of sheriffs' status as county policymakers in Arizona).

2. In any event, none of the claims in the petition warrants this Court's review.

a. Certiorari is not warranted to review the court of appeals' conclusion that Arizona sheriffs are policymakers for their counties concerning law enforcement. This Court recently denied review of that state-law-specific issue, *Melendres*, 136 S. Ct. 799, and the same result is warranted in this case.

i. The court of appeals' determination of the policymaker status of Arizona sheriffs reflects a correct application of *McMillian* v. *Monroe County*, 520 U.S. 781 (1997). In *McMillian*, a Section 1983 case, the Court assessed whether Alabama sheriffs were policymakers for the State or for their respective counties in the area of law enforcement by examining the Alabama Constitution, the Alabama Code, and relevant case law. In concluding that sheriffs were officers of the State, the Court found "especially important" the designation of sheriffs as state officers under Alabama's Constitution. *Id.* at 787. The Court also relied in part on the Alabama Supreme Court's conclusion "that sheriffs are state officers, and that tort claims brought against sheriffs based on their official acts therefore constitute suits against the State." *Id.* at 789. In addition, the Court viewed the State's responsibility for judgments against sheriffs as "strong evidence in favor of the * * * conclusion that sheriffs act on behalf of the State." *Ibid.* Because Alabama was under the jurisdiction of the

Eleventh Circuit, the Court also "defer[red] considerably to" the court of appeals' "expertise in interpreting Alabama law." *Id.* at 786.

In reaching its conclusion with respect to Alabama sheriffs, this Court emphasized that it was not setting forth a uniform rule for all sheriffs. See *McMillian*, 520 U.S. at 795. It explained that while such approach "might [make it] easier to decide cases," it "would ignore a crucial axiom of our government: the States have wide authority to set up their state and local governments as they wish." *Ibid.* Given States' authority over their own governments, the Court concluded, it was "entirely natural that both the role of sheriffs and the importance of counties vary from State to State, [and] there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another." *Ibid.*

The court of appeals correctly applied *McMillian* to determine that Arizona sheriffs are policymakers for their counties, not for the State. It relied on the Arizona Constitution, which designates the office of the sheriff as "created in and for each organized county of the state," and provisions of Arizona law "explicitly stat[ing] that sheriffs are 'officers of the county.'" Pet. App. 8 (citations and emphasis omitted). It also properly took into account provisions of Arizona law authorizing the county board of supervisors to supervise sheriffs' performance of their duties and requiring each county to pay its sheriff's expenses, including expenses incurred in complying with injunctive relief against the sheriff and his office. *Ibid.* Finally, it properly determined that the most pertinent state court decision also signaled that sheriffs are county policymakers with re-

spect to law enforcement. *Id.* at 8-9 (discussing *Flanders* v. *Maricopa Cnty.*, 54 P.3d 837 (Ariz. Ct. App. 2002)).

ii. The court of appeals' conclusion regarding the status of Arizona sheriffs does not present any conflict warranting this Court's intervention. As this Court explained in *McMillian*, the classification of officials as policymakers for the State or the county "is dependent on an analysis of state law." 520 U.S. at 786. Because no other court of appeals appears to have considered whether Arizona sheriffs are county or state officials on matters of law enforcement policy, the application of *McMillian* to Arizona sheriffs implicates no conflict.

Petitioner is mistaken in asserting (Pet. 23-25) a conflict between the decision below and decisions that considered the status of sheriffs under distinct state-law schemes. *Grech* v. *Clayton County*, 335 F.3d 1326 (11th Cir. 2003) (en banc), held that a Georgia sheriff was not acting on behalf of the county when he maintained a policy permitting invalid arrest warrants to remain in a state database. Six judges concluded that Georgia sheriffs are final policymakers for the State in the area of law enforcement, *id.* at 1330-1348 (plurality opinion), but six other judges disagreed, *id.* at 1349-1364. Accordingly, the court did not adopt any categorical holding on the status of Georgia sheriffs. *Id.* at 1347 n.46 (plurality opinion). In any event, the plurality's conclusion that Georgia sheriffs were state policymakers rested on provisions of Georgia law that differ from the corresponding provisions of Arizona law. For example, whereas Georgia courts had held that county commissions cannot influence how sheriffs spend their funds, *id.* at 1339 (plurality opinion), Arizona law provides for counties to "supervise the official conduct of"

all county officers, including the sheriff, to ensure that they "faithfully perform their duties and direct prosecutions for delinquencies," Ariz. Rev. Stat. Ann. § 11-251(1) (Supp. 2017).

Similarly, the decision below does not conflict with the Eleventh Circuit's decision in *Turquitt* v. *Jefferson County*, 137 F.3d 1285 (en banc), cert. denied, 525 U.S. 874 (1998). *Turquitt* determined that Alabama sheriffs acted on behalf of the State, rather than the county, when operating county jails. *Id.* at 1288. Its analysis "turn[ed] on state law, including state and local positive law, as well as custom and usage having the force of law." *Ibid.*; see *id.* at 1288-1291 (discussing the Alabama Constitution, Alabama Code, and Alabama case law). Although petitioner asserts (Pet. 23) a conflict because the court in *Turquitt* stated that local governments cannot be liable under Section 1983 "for the acts of those whom the local government has no authority to control," 137 F.3d at 1292, the court below did not adopt a contrary rule. Rather, the court stressed that Arizona laws do "empower counties to supervise * * * their respective sheriffs," even though the county "does not exercise *complete* control" over its sheriff's activities. Pet. App. 8-9 (emphasis added).

The decision below likewise does not conflict with *Franklin* v. *Zaruba*, 150 F.3d 682 (7th Cir. 1998), cert. denied, 525 U.S. 1141 (1999), or *Knight* v. *C.D. Vernon*, 214 F.3d 544 (4th Cir. 2000). *Franklin*, a sovereign immunity case, held that sheriffs in Illinois were not state officials for purposes of the Eleventh Amendment. 150 F.3d at 684-685. In doing so, the court relied in part on *Scott* v. *O'Grady*, 975 F.2d 366 (7th Cir. 1992), cert. denied, 508 U.S. 942 (1993), in which the court had held that sheriffs generally act on behalf of Illinois counties

when executing law enforcement duties. *Ibid.* *O'Grady*, in turn, rested on an examination of Illinois law. *Id.* at 370-372. *Knight* similarly held that North Carolina sheriffs were not policymakers for their counties when making sheriff's office personnel decisions, based on an analysis of North Carolina law. 214 F.3d at 552-553. Those state-specific rulings do not conflict with the Ninth Circuit's analysis of the status of sheriffs under Arizona law.

b. The court of appeals' determination that Title VI and Section 12601 impose liability on municipalities for the unlawful actions of their final policymakers also does not warrant further review.

i. The court of appeals' interpretation of Title VI and Section 12601 was correct. This Court has held that a locality may be liable for the unlawful acts of its policymakers under Section 1983, which imposes liability on any "person" who, under color of law, deprives another, or "causes" another to be deprived, of a federally protected right, 42 U.S.C. 1983. See *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 690 (1978). *Monell* held, in particular, that a locality may be liable under Section 1983 for the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694.

Against that backdrop, the text and history of Section 12601 support the court of appeals' conclusion that a municipality may also be held liable under Section 12601 for edicts or acts of their final policymakers. Section 12601 is even more explicit than Section 1983 in making municipalities liable for actions of their policymakers, because Section 12601 directly states that it is "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 rights, privileges, or immunities secured or protected by" federal law. 34 U.S.C. 12601 (Supp. V 2017) (emphasis added). In addition, as the court of appeals observed, Section 1983 and Section 12601 "share[] important similarities," in that both were created to address violations of federal civil rights and impose liability on municipal governments. Pet. App. 12.

The court of appeals was likewise correct that a municipality can be liable under Title VI for the actions of its policymakers. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. This Court has held that an analogous statute, Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, renders municipalities liable for discrimination resulting from their official policies. See *Davis ex rel. LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640-642 (1999); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). And this Court "has interpreted Title IX consistently with Title VI." *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002). Because *Monell* establishes that an entity's "official policy" includes "polic[ies] or custom[s] * * * made by * * * those whose edicts or acts may fairly be said to represent official policy," 436 U.S. at 694, these precedents establish that municipalities may be liable under Title VI for actions of their policymakers.

Petitioner is mistaken in contending (Pet. 30) that municipal liability is inappropriate under Title VI and Section 12601 because the language of those provisions "suggests Congress intended only to impose liability on those who are themselves involved in the proscribed activity." Policymaker liability is a form of direct liability, because the edicts or actions of the policymaker "may fairly be said to represent official policy" of the local government. *Monell*, 436 U.S. at 694; see *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480 (1986) (stating that limiting municipal liability to acts of policymakers ensures that a municipality's liability is "limited to acts that are, properly speaking, acts of the municipality") (internal quotation marks omitted). Petitioner also notes (Pet. 29-30) that Title VI and Section 12601 have distinct histories, but it points to no evidence in the history of Title VI or Section 12601 indicating that Congress intended narrower policymaker liability under those provisions than under Section 1983. Finally, petitioner seeks (Pet. 31) to distinguish the statutes here from Section 1983 on the ground that Title VI and Section 12601 do not include Section 1983's phrase, "causes to be subjected." But neither *Monell* nor any other decision of this Court suggests that it is the phrase "causes to be subjected" that gives rise to policymaker liability in Section 1983, or, conversely, that the absence of this language means that policymaker liability would not apply.

ii. The question whether a county government may be held liable for the actions of its policymakers under Title VI and Section 12601 does not warrant this Court's intervention. That question does not implicate any disagreement among the courts of appeals. To the con-

trary, as the court below noted, Pet. App. 9, and petitioner acknowledges, Pet. 28, no other court of appeals appears to have addressed whether municipalities can be liable for the actions of their policymakers under these provisions. Petitioner identifies no sound reason for this Court to grant certiorari here on an issue of first impression.

c. Finally, contrary to petitioner's suggestion (Pet. 31-36) no further review is warranted of the court of appeals' application of principles of issue preclusion to the facts of this case.

i. The courts below correctly determined that issue preclusion barred petitioner from relitigating the lawfulness of its traffic policing policies. Issue preclusion bars "'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). Issue preclusion generally applies against a party to the prior judgment, so long as the party had a full and fair opportunity to litigate the determination in question. See 1 Restatement (Second) of Judgments § 29 (1982). Issue preclusion can also be applied against a non-party that "agree[d] to be bound by the determination of issues in an action between others." *Sturgell*, 553 U.S. at 893 (quoting 1 Restatement (Second) of Judgments § 40 (1982)). Here, as the court of appeals determined, petitioner was a party to the *Melendres* judgment. Pet. App. 13-14. Moreover, as the court of appeals also held, even if petitioner were not properly described as a party in *Melendres*, petitioner fell within "one of the recognized exceptions to non-party preclusion" because it

"effectively agreed to be bound by the judgment in that action." *Id.* at 14 (citing *Sturgell*, 553 U.S. at 893).

Petitioner disputes (Pet. 32-36) whether this case satisfies the requirements for non-party preclusion. But the court of appeals properly concluded that petitioner was subject to issue preclusion as a *party* in *Melendres*, before addressing non-party preclusion in the alternative. Pet. App. 13-14. Although petitioner filed a petition for a writ of certiorari challenging the court of appeals' decision in *Melendres* to join petitioner as a party, this Court declined review of that determination. 136 S. Ct. 799 (2016) (No. 15-376). And petitioner develops no argument that it was entitled to relitigate the legality of Sheriff Arpaio's policing policies under the principles governing preclusion of *parties*.

In any event, as to non-party preclusion, petitioner is mistaken in contending (Pet. 35) that issue preclusion principles do not apply because petitioner did not "agree[] to be bound by" the determination of issues in *Melendres*. When petitioner agreed in *Melendres* to be dismissed from the suit "without prejudice to rejoining" petitioner "at a later time if doing so be[came] necessary to obtain complete relief," Pet. App. 105, petitioner agreed that it could be added to the litigation as a party that would be bound by the judgment if necessary to afford relief against MCSO. And as the court of appeals concluded in *Melendres*, petitioner's rejoinder did become necessary once *Braillard* established that MCSO did not have a legal existence separate from petitioner.

ii. The application of issue preclusion principles in the circumstances of this case does not warrant this Court's review. Petitioner alleges no conflict among the courts of appeals regarding the application of preclusion principles. Nor does petitioner dispute that under

this Court's precedents, a non-party may be bound by the judgment in a suit based on its agreement. Instead, petitioner asserts (Pet. 34-35) that the record did not adequately establish agreement on the facts of petitioner's case. That fact-bound claim—*i.e.*, that the courts below misapplied preclusion principles to the particular record in this case—does not warrant further review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General
ERIC S. DREIBAND
Assistant Attorney General
THOMAS E. CHANDLER
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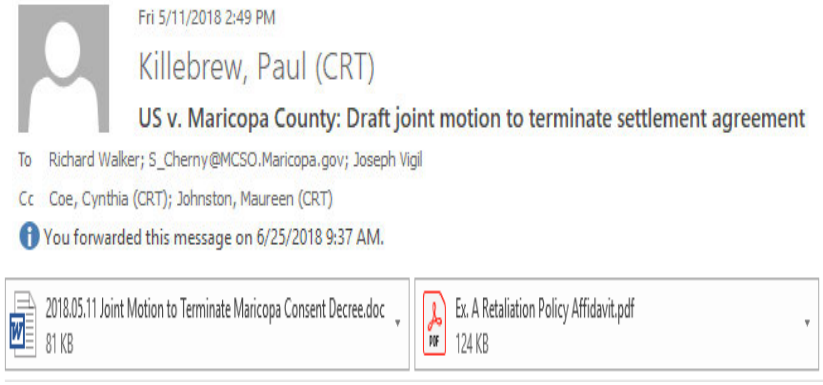
FEBRUARY 2019

APPENDIX A



Rick, Stephanie, and Joe,

I hope you're all well. As I've discussed with Rick, it is now appropriate to terminate the settlement agreement in *US v. Maricopa County* that covers worksite operations and First Amendment retaliation. MCSO has complied with the settlement agreement. The agency has not carried out a worksite operation in several years, and its policy on First Amendment retaliation has been in effect for some time. We've drafted a joint motion to terminate the settlement agreement, and it's attached for your review, along with an exhibit to the pleading.

Joe, I know you haven't been involved in these discussions, but I've included you because you've entered an appearance in *US v. Maricopa County* on behalf of the Sheriff.

I also wanted to briefly address the email preservation discussion. It's my understanding that I'm waiting for the County to send me a list of all County employees whose emails are being preserved, including the suc-

cessors to those previously sent litigation hold notices. While that list is necessary for reaching resolution on the County's email preservation, I can go ahead and give you my response regarding MCSO's email preservation efforts.

In the May 1, 2018 letter, Rick characterized a proposal that I made regarding MCSO's email preservation efforts on an April 13, 2018 conference call. Rick correctly stated that I proposed to preserve the emails of (1) all employees in BIO and PSB up through their Chain of Command to the Sheriff; and (2) all Captains and above including the Sheriff on the Patrol side. But there was one more category in my proposal, which is: (3) all email communications that indicate bias. As I said on the April 13th call, I do not anticipate that this third category would require any additional preservation efforts beyond what is already required in the *Melendres v. Penzone* litigation; I include this category because such communications are central to the United States' claims in *US v. Maricopa County*, and I cannot make a preservation agreement that leaves such communications out. But again, I would not expect MCSO to do anything in addition to what is already required by *Melendres* to preserve email communications that fall into the third category. If these three categories are acceptable to MCSO and the County, I think we have an agreement on email preservation as to MCSO.

Please do not hesitate to contact me if I can provide any additional information or answer any questions.

Have a great weekend!

Paul

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APPENDIX B

U.S. Department of Justice
Civil Rights Division

SHR:PK:JLM:td
DJ 207-8-8

Special Litigation Section - PHB
950 Pennsylvania Ave, NW - RFK
Washington, DC 20530

Aug. 3, 2017

Stephanie Cherny
Chief of Staff & Special Counsel
Maricopa County Sheriff's Office
550 West Jackson Street
Phoenix, AZ 85003

Re: Settlement Agreement Regarding Language Access in the Maricopa County Sheriff's Office Jails

Dear Ms. Cherny:

This concerns the settlement agreement between the United States, the Maricopa County Sheriff's Office (MCSO), and Maricopa County, concerning language access for limited English proficient (LEP) inmates in the MCSO jails (the "jails agreement"), which became effective on November 6, 2015, upon its approval by the court in the *United States v. Maricopa County* (D. Ariz.).[1]

[1] *United States v. Maricopa County, et al.*, raised claims relating to four distinct but interrelated patterns of unconstitutional discriminatory police practices targeting Latinos in Maricopa County, one of which involved discrimination against LEP Latino inmates in MCSO jails. The United States resolved the remaining claims

We have determined that MCSO and Maricopa County have met the terms of the jails agreement and, accordingly, that it is appropriate for DOJ to conclude its enforcement and oversight of the agreement. Implementing the reforms set forth in the jails agreement is a significant accomplishment and we extend our congratulations to MCSO and the County. We recognize the hard work and dedication that went into development and implementation of these reforms, and appreciate the cooperation of MCSO, and, in particular, the MCSO jails' command staff and personnel. As a result of their efforts, we believe that there has been a significant shift in MCSO jail personnel's attitudes toward and treatment of Latinos in MCSO jails. This shift, together with the reforms implemented in connection with the jails agreement, has contributed to a safer and more equitable environment for Latinos in MCSO jails.

As part of our oversight of the jails agreement, we conducted two site visits to the MCSO jails. During the more recent of these visits, in January 2017, we were encouraged to hear MCSO command staff and counsel express a commitment to sustaining and continuing the improvements to the provision of language access services and the treatment of LEP inmates in MCSO jails. To assist in these efforts, we briefly describe below our recommendations for MCSO's sustained and continuing

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through a court-enforceable settlement agreement with MCSO and Maricopa County, entered into simultaneously with the jails agreement, and through intervention in a parallel, private lawsuit, *Melendres v. Arpaio*. The United States' enforcement work relating to that settlement agreement and the *Melendres* court orders proceed separately from the enforcement of the jails agreement and are not addressed in this letter.

improvement of its provision of language access in its jails.

First, implementation of the jails agreement required MCSO to develop, implement, and improve procedures for accurately identifying inmates who need language assistance. Early identification of LEP inmates is a critically important step in the provision of language access in jails, and it is an area in which MCSO has made enormous improvements. For example, we were favorably impressed with the expanded and more formally defined role of the "information officers" involved in greeting and orienting individuals being admitted to MCSO jails, and note that this has improved the efficacy and accuracy of early identification of LEP inmates in the jails. Similarly, the increase in the number of Spanish-speaking bilingual staff working in "classification" of inmates—the stage where newly admitted inmates are interviewed and assigned to housing units—appears to have helped improve the accuracy of identification of LEP inmates. We urge MCSO to institutionalize these changes and to continue to assess their efficacy and consider and implement any necessary improvements to the procedures for identifying LEP inmates. Related to this, we recommend that MCSO continue to explore ways to safely and effectively ensure that detention officers are aware of which inmates under their supervision are LEP.

Second, implementation of the jails agreement required effective and appropriate use of bilingual jail personnel to communicate with LEP inmates or facilitate communication between LEP inmates and English-speaking, monolingual jail personnel. This is another area where we observed significant progress. For ex-

ample, although not required by the jails agreement, MCSO offered a salary increase to employees with foreign language skills, to serve as an incentive for employees to self-identify as foreign language speakers. The bilingual jail personnel we met were proud of their qualifications and eager to use their foreign language skills. Moreover, in our interviews with Latino LEP inmates, we heard very few accounts of Spanish-speaking officers refusing to speak with or act as interpreters for Latino LEP inmates.

Nonetheless, particularly given how fundamental effective communication between detention officers and inmates is for maintaining safety within the jails, we encourage MCSO to continue to take steps to hire and retain bilingual personnel—given the substantial Latino LEP population in MCSO's jails—and to improve the manner and frequency of the communication between bilingual detention officers and inmates. For example, once MCSO has identified inmates as LEP, MCSO should not rely solely on inmates to assert that they do not understand or to specifically request language assistance. Similarly, detention officers should intervene in cases in which inmates are acting as interpreters for one another, particularly when it seems possible that the inmate may need or want to discuss matters that are private or that could compromise the inmate's safety in the housing unit. To address these situations, we recommend that detention officers be trained about when and why it would be inappropriate to allow inmates to act as interpreters for one another, about how to handle situations in which inmates are interpreting for other inmates or for jail personnel, and about how to identify situations in which it may present

a particular safety threat for inmates to be offering to act as interpreters for other inmates.

Third, one of the significant measures of the success of the jails agreement is the extent to which critical information, such as the jails' rules and regulations, is effectively communicated to LEP inmates. This is an area in which we observed marked and continuing improvement, even as between the two site visits we conducted to assess MCSO's implementation of the jails agreement. For example, we observed that signs were posted in English and Spanish throughout the MCSO jails and that announcements about important information, such as when medical staff is entering a housing unit or when a housing unit is being put on a disciplinary "lock down," were broadcast in English and Spanish.

We encourage MCSO to continue to explore effective ways to communicate critical information to its LEP Latino population, with particular attention to the fact that a significant proportion of the population has limited education and literacy. For example, MCSO could develop a brief handout for inmates with a summary of the MCSO jails' rules and regulations, available in English and Spanish, and a summary of the most important points of the language access policies and procedures, ideally distributed both in paper copy at intake and through the video kiosks located in the housing units. We have been impressed with MCSO's use of televisions and interactive video kiosks to communicate information with inmates both in the intake area and in the housing units, and we would encourage MCSO to continue to explore how these video monitors can be used to effectively communicate information to

inmates who are both LEP and have limited literacy. Finally, we encourage MCSO to continue to improve access to classes and programs for Spanish-speaking inmates, by exploring more effective way to make Latino LEP inmates aware of the programs that are currently available, by housing Spanish-speaking LEP inmates in housing units that have Spanish-language classes, and by increasing the number of classes offered in Spanish throughout the jail facilities.

Again, we congratulate MCSO and Maricopa County for fully implementing the reforms in the jails agreement, and look forward to hearing of your sustained and continuing dedication to protecting and improving safe and equitable conditions of Latino LEP inmates in MCSO jails.

Sincerely,

/s/ STEVEN H. ROSENBAUM
STEVEN H. ROSENBAUM
Chief
Special Litigation Section

cc: Bill Montgomery
Maricopa County Attorney

Richard K. Walker
Counsel for Maricopa County