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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America, Plaintiff, v. Maricopa County, Arizona; Maricopa County Sheriff's Office; and Joseph M. Arpaio, in his official capacity as Sheriff of Maricopa County, Arizona, Defendants.	NO. CV10-01878-PHX-GMS **DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** **AND** **CROSS MOTION FOR SUMMARY JUDGMENT** (Oral Argument Requested)

Sheriff Arpaio and the Maricopa County Sheriff's Office ("MCSO") have provided the access to MCSO staff and facilities, as well as to the sources of information, that the United States demands. The document production in response to the United States' request has been overwhelming – and even more is on its way. This cooperation has occurred despite the dispute over the impropriety and unreasonable scope of the United States' Title VI investigation. Questions of fact and law exist and mandate the denial of the United States' Motion for Summary Judgment and the injunctive relief for access to information, facilities, documents and individuals it requests.

Furthermore, summary judgment must enter in favor of the defendants on the United States' First Amended Complaint because: 1) the MCSO and Sheriff Arpaio

have not denied the United States access to the sources of information requested under Title VI; 2) the MCSO and Sheriff Arpaio have not violated any relevant Title VI assurances; and 3) the United States has improperly based its Title VI investigation and this action on language discrimination, despite the fact that language is not a statutory basis for either.

This Response and Cross Motion for Summary Judgment is supported by the following Memorandum of Points and Authorities.

I. FACTS

On March 10, 2009, the United States Department of Justice ("DOJ") initiated an investigation of the MCSO pursuant to the pattern or practice provision of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 ("Title VI") of the Safe Streets Act, 42 U.S.C. §3789d(c). **(DSOF ¶1)** As stated in its opening letter, the DOJ was investigating "alleged patterns and practices of discriminatory police practices and unconstitutional searches and seizures conducted by the MCSO, and on allegations of national origin discrimination, including failure to provide meaningful access to MCSO services for limited English proficient ("LEP") individuals." **(DSOF ¶2)**

On March 25, 2009, Merrily A. Friedlander, Chief of the Coordination and Review Section ("COR") of the Civil Rights Division ("CRD") sent the Maricopa County Attorney's Office ("MCAO") a follow up letter wherein she explained that the COR was the DOJ section which investigated Title VI complaints. **(DSOF ¶3)** In this March 25, 2009 letter, Ms. Friedlander explained that the investigation of MCSO stemmed from a "complaint alleging discrimination on the basis of national origin (Hispanic) by the Maricopa County Sheriff's Office (MCSO) in the operation of its jail facilities." **(DSOF ¶4)** The referenced allegation specifically described the alleged lack of a language assistance policy for LEP inmates and the existence of an alleged English only policy in the jails as the basis for the Title VI investigation. **(DSOF ¶5)** The March 25, 2009 letter

did not mention a Title VI police practices investigation. **(DSOF ¶6)** Instead, it specifically requested a response to information requested in Paragraphs 43-51 of the First Request for Documents and Information which accompanied it. **(DSOF ¶7)** All nine of these requests exclusively addressed LEP issues and were listed under a section entitled "Limited English Proficiency." **(DSOF ¶8)**

On April 30, 2010, representatives of DOJ's Special Litigation Section ("SPL") and COR met with MCAO and MCSO representatives to discuss the investigations and the First Request for Documents and Information. **(DSOF ¶9)** During the meeting, DOJ attorneys stated that one part of the investigation, the police patterns and practices investigation, was being handled by SPL, while the Title VI portion of the investigation was being handled by COR. **(DSOF ¶10)** COR representatives explained that their investigation was focused on national origin discrimination in the jail facilities and consisted of two components: investigation of the allegations of a lack of guidance and access to LEP inmates and allegations that the jail facilities had an English only policy. **(DSOF ¶11)** At no time during the April 30, 2010 meeting did COR suggest that police practices, or any practices outside the jail facilities, were part of its Title VI investigation. **(DSOF ¶12)**

Before the MCSO submitted its LEP position paper pursuant to the First Request for Documents and Information, SPL, COR and counsel for MCSO and the Sheriff, had numerous conversations pertaining to deadlines for Title VI related responses. **(DSOF ¶13)** These conversations, however, addressed only the LEP investigation; at no point during any conversation did COR suggest that they sought information outside of the LEP investigation. **(DSOF ¶14)** Not until August 3, 2010, when Assistant Attorney General Thomas E. Perez sent a letter to counsel regarding the Title VI portion of the investigation, did the DOJ first suggest that police practices were a component of the Title VI investigation. **(DSOF ¶15)**

In his August 3, 2010 letter, Mr. Perez acknowledged that MCSO had responded to the LEP investigation, the only Title VI investigation of which the DOJ had

informed MCSO. **(DSOF ¶16)** MCSO submitted its LEP position paper in response to the LEP investigation as requested. **(DSOF ¶17)** The position paper itself was 54 pages in length, accompanied by 85 exhibits comprising approximately 800 pages of supporting documentation. **(DSOF ¶18)**

Defendants have provided and the United States has otherwise received information and access relevant to its investigation. **(DSOF ¶19)** Defendants have allowed and/or offered access to MCSO staff, as well as the MCSO jail facilities set out in the United States August 25, 2010 letter to MCSO. **(DSOF ¶20)** Defendants have also provided voluminous documentation in response to the United States First Request for Documents and Information, despite a disagreement regarding the proper scope of the United States' investigation and the surreptitious tactics the United States employed to obtain information and documents with the use of another federal agency**,** the Department of Homeland Security ("DHS"). **(DSOF ¶21)**

Defendants' compliance with the Title VI investigation continues. The United States is currently conducting interviews that the MCSO allowed and analyzing documentation that the MCSO has provided. However, the DOJ, understandably, cannot perform all the tasks/interviews it desires simultaneously despite the access, production and cooperation the MCSO and Sheriff Arpaio have and continue to provide.

II. QUESTIONS OF FACT EXIST REGARDING THE REASONABLENESS OF THE SCOPE OF THE UNITED STATES' INVESTIGATION/ COMPLIANCE REVIEW UNDER TITLE VI.

A. Federal Financial Assistance and Related Contractual Assurance Do Not Entitle the United States to Unfettered, Unreasonable Access to MCSO Documents, Staff, and Facilities

While the receipt of federal financial assistance and related signed assurances may subject recipients to access requirements under Title VI regulations, they do not subject recipients to what would constitute an unreasonable search in violation of Fourth Amendment standards. Assurances of compliance with Title VI prohibition against discrimination and acceptance of federal funds constitute consent to *reasonable* searches. *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 99-100 (5th Cir.

1992) (emphasis added) (Hospital's signed assurances and receipt of federal funds under Title VI constituted consent to reasonable searches regarding compliance with Title VI prohibition against discrimination.).

Any consent found in the execution of assurances of compliance is consent only to searches that comport with the constitutional standards of reasonableness. *Harris,* 970 F.2d at 100, citing *Zap v. United States*, 328 U.S. 624, 628, (1946). In *Harris*, the Court rejected the United States' assertion that the Fourth Amendment reasonableness standard does not apply when an administrative search is conducted pursuant to consent. *Id.* Accordingly, the mere signing of assurances does not entitle the United States to *cart blanche* access to MCSO.

To establish the reasonableness of a compliance review, the Court must consider: 1) whether the proposed search is authorized by statute; 2) whether the search is limited in scope; and 3) how the administrative agency designated the target of the search. *Harris,* 970 F.2d at 101 (citing *United States v. Mississippi Power & Light*, 638 F.2d 899, 907 (5th Cir.)).

1. <u>The Scope of the United States' Review is Unreasonable.</u>

Although the statutory authority for the United States to conduct a *reasonable* compliance review exists, the scope of the instant review is unreasonable. Here, the United States has not provided evidence of actual national origin discrimination by the MCSO. Rather, the United States initiated an investigation alleging that MCSO discriminates on the basis of national origin (Hispanic) in the operation of its jail facilities, specifically alleging that the MCSO lacks a language assistance policy for limited English proficient (LEP) inmates. **(DSOF ¶22)** The United States defined, but defies, the scope of its own Title VI investigation and requisite constitutional standards of reasonableness.

Despite a mention of discriminatory police practices in its initial correspondence to Sheriff Arpaio on March 9, 2009, the DOJ sent a longer, more detailed correspondence on March 25, 2009 in which it limited the scope of its investigation of alleged national origin discrimination by the MCSO to alleged discrimination against LEP

inmates in the Maricopa County jails. **(DSOF ¶23)** The March 25, 2009 letter defined the DOJ's investigation into alleged MCSO Title VI non-compliance by referring only to a complaint regarding language discrimination against Hispanics in the operation of its jails; in that letter, however, the DOJ did not reveal that it intended to expand its investigation beyond the MCSO's operation of jail facilities and, specifically, the LEP program to MCSO's police function. It did not do so until August 2010. **(DSOF ¶24)** As a result, the scope of the United States' compliance review/investigation and its First Request went far beyond what is reasonable with regard to the Title VI compliance review/investigation it defined. **(DSOF ¶25)**

Accordingly, Sheriff Arpaio and previous counsel expressed concern with a federal government investigation of MCSO that went well beyond language efficiency programs in the Maricopa County Jail System and, instead, delved into the venue of MCSO law enforcement/police function—regardless of the investigation that the United States itself defined. **(DSOF ¶26)** The Sheriff and counsel were entitled to question and did question the apparent unreasonableness of the government's probe. **(DSOF ¶27)** With the United States' own communication defining the scope of its investigation, the unreasonableness of the scope of the United States' request for information and investigation is clear. **(DSOF ¶28)**

2. <u>The Means that the United States Employed to Investigate MCSO were Unreasonable.</u>

The MCSO questioned the propriety of the United States' investigation and the unreasonable scope of its first request. **(DSOF ¶29)** As a result, the United States covertly investigated the MCSO by using the Department of Homeland Security (DHS) to obtain information and documentation that the DOJ desired, but to which it was not entitled, in this investigation. **(DSOF ¶30)**

The DOJ surreptitiously entered into a document sharing arrangement and deceptive scheme with the DHS to obtain interviews of MCSO employees without the consent and outside the presence of counsel. **(DSOF ¶31)** The DOJ admittedly devised a

plan whereby DHS would collect MCSO documents and witness statements as a part of its routine audit of MCSO, with the understanding that the DOJ would do the same with information gathered in its investigation. **(DSOF ¶32)** Yet pursuant to MCSO counsel's inquiry, the DOJ made repeated assurances that DHS did not have any role in DOJ's investigation. **(DSOF ¶33)** At no time did the DOJ bring their information sharing agreement with DHS to the attention of MCSO counsel's attention. **(DSOF ¶34)** Interviews of represented MCSO individuals occurred despite the fact that the DOJ attorneys knew that the individuals interviewed were represented by counsel and that the DOJ had not received the consent of counsel to conduct interviews, in violation of Rule 4.2(a), Arizona Rules of Professional Conduct, 4.2(a) of the District of Columbia Rules of Professional Conduct. **(DSOF ¶35)** Moreover, the Ethical Standards for Attorneys for the Government clearly provide that the if an attorney does not have the authority or the right to engage in an activity, the Government cannot delegate or direct an agent to do so either. *See* 28 C.F.R. §77.4(f). Yet the DOJ did just that.

3. The United States improperly combined its Title VI investigation with its 42 U.S.C. §14141 investigation.

The scope of the United States' Title VI investigation is also unreasonable because the United States improperly incorporated its investigation under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §14141, in its Title VI investigation. Title VI and Section 14141 are distinct statutes with different purposes and law enforcement mechanisms. Title VI is a funding statute that prohibits intentional race, color and national origin discrimination. As the United States has specifically defined it, the instant Title VI investigation focuses on alleged national origin discrimination in the Maricopa County Jails. **(DSOF ¶36)** Under Section 14141, the United States does not have subpoena power.[1] Nevertheless, the United States has taken the position, that its

[1] *See Daniels v. City of New York*, 200 F.R.D. 205, 207 & n.3 (S.D.N.Y. 2001) (holding that the Government has no statutory authority to compel city, under investigation for violation of 42 U.S.C. 14141, to provide it with any information prior to instituting an action, and that only after initiating a civil action does the Government have "discovery devices available to any civil litigant including subpoena power and party discovery"); *id*. at 209 & n.8 (holding that the Government "has no 'awesome powers' to

police practices investigation under Section 14141 falls under the umbrella of its Title VI investigation and that it had the power to compel the MCSO, Sheriff Arpaio and Maricopa County to provide it with information under Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §14141and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3789d. **(DSOF ¶37)** Defendants disagreed with this proposition and questioned the United States' fusing of its Title VI national origin-jail investigation, with its Section 14141 investigation into MCSO's police practices. **(DSOF ¶38)** Again, the Title VI investigation is directed only toward the alleged national origin discrimination in the jails. **(DSOF ¶39)** The Section 14141 investigation presents police practices issues that do not implicate national origin (e.g., use of force and firearms training, canine policies, overtime policies and searches and seizure) and do not fall under the umbrella of the subject Title VI investigation with which Sheriff Arpaio and the MCSO have complied. **(DSOF ¶40)**

Sheriff Arpaio and the MCSO identified a genuine disagreement regarding the unreasonableness of the scope of a police practices and national origin investigations under Title VI before the filing of this action and the instant Motion. **(DSOF ¶41)** The Sheriff and MCSO had every right to question the United States' approach to these investigations and offered to resolve this disagreement cooperatively through negotiations. **(DSOF ¶42)** The Sheriff and the MCSO explained their disagreement with the scope of the United States' Title VI investigation in this regard, yet the United States filed this action and this Motion complaining that the Sheriff and the MCSO have failed to cooperate—despite the facts.

The United States has taken the position that the its authority in a Title VI investigation is unlimited. **(DSOF ¶43)** In an August 24, 2010 meeting between DOJ and MCSO counsel, the DOJ would not acknowledge that any issue was beyond the scope

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compel pre-action, investigatory discovery" during investigation for violation of 42 U.S.C. 14141 because statute "does not provide for investigatory tools such as administrative subpoenas or civil investigative demands").

of the Title VI investigation (including issues of use of force, discipline of deputies, uniform and dress policies). **(DSOF ¶44)** Accordingly, the United States contended that every document typically requested in a police practices investigation, is also relevant to a Title VI investigation limited to alleged national origin discrimination in the Maricopa County Jails. **(DSOF ¶45)**

4. <u>How the United States designated the MCSO as a target is suspect and unreasonable.</u>

The investigation of Sheriff Arpaio and MCSO came immediately after the change in Administration in 2009 and appears to be politically motivated. The MCSO became the subject of three independent investigations in a matter of weeks after the change in Administration in Washington, D.C.: 1) the Civil Rights Division Special Litigation Section's investigation into alleged pattern and practices of constitutional or legal violations; 2) the Coordination and Review Section's investigation into allegations of discrimination against LEP individuals, and; 3) the Department of Homeland Security's investigation into the MCSO's 287(g) program (notwithstanding the complete absence of any previous complaints or concern from ICE or DHS under the Memorandum of Agreement.) **(DSOF ¶46)** Politics clearly play a role in the United States' investigation of MCSO.

In fact, the DOJ's 100 day Progress Report released in April 2009, treated the mere decision to open an investigation of the MCSO as an accomplishment in and of itself, despite the fact that the merits and/or actual facts being investigated had yet to be determined. **(DSOF ¶47)** Moreover, the Civil Rights Division Deputy acknowledged that media reports provided the basis of the investigations, and that the DOJ was not yet in possession of the facts that would establish a constitutional violation. **(DSOF ¶48)** Furthermore, in February 2009, four Democratic members of the House Judiciary Committee publicly called for an investigation of Sheriff Arpaio, despite acknowledging the absence of any federal investigation establishing any misconduct of Sheriff Arpaio or MCSO. **(DSOF ¶49)**

The timing of United States' investigations of MCSO and the politicians' use of unfounded, inflammatory allegations demonstrate the politicization of the federal investigations of MCSO and Sheriff Arpaio. The DOJ commenced investigations of the MCSO and Sheriff Arpaio without specific evidence of an existing violation. Its designation of the MCSO and Sheriff Arpaio as targets of investigations constitutes a politically motivated, fishing expedition without evidentiary foundation and demonstrates the unreasonableness of the subject investigation of this lawsuit.

III. LANGUAGE IS NOT A STATUTORY BASIS FOR A TITLE VI INVESTIGATION

42 U.S.C. § 2000d provides that no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance "on the ground of race, color, or national origin." The corresponding implementing regulations similarly prohibit discrimination on the basis of "race, color, or national origin." 28 C.F.R. § 42.104(b)(2). Neither include language as a basis for Title VI enforcement. The congressional history is also silent on the question of language, further indicating Congress' intent not to include language within the purview of the protections of Title VI. *See 1964 U.S.C.C.A.N. 2391, H. Rep. No. 914, 88th Cong., 2nd Sess. (1964) and S. Rep. No. 872, 88th Cong., 2nd Sess. (1964)*. Yet, language is the alleged discriminatory basis for the United States' Title VI investigation against Defendants.

Courts addressing this issue have consistently held that language does not equate to national origin for Title VI purposes: "While Title VI prohibits discrimination on the basis of national origin, language and national origin are not interchangeable." *Mumid v. Abraham Lincoln High Sch.,* 618 F.3d 789, 795 (8th Cir. 2010) (citing *Hannoon v. Fawn Eng'g Corp.*, 324 F.3d 1041, 1048 (8th Cir. 2003); *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2nd Cir. 1983); *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980)); see also *Castaneda v. Pickard*, 648 F.2d 989, 1007 (5th Cir. 1981) (holding that "we do not think it can seriously be asserted that [a] program [of allegedly inadequate bilingual education

in a Texas public school] was intended or designed to discriminate against Mexican-American students" in violation of Title VI.).

This distinction has also been upheld in a Title VI jail case. In *Franklin v. District of Columbia*, 960 F. Supp. 394, 398 (D.C.D.C. 1997), rev'd in part on other grounds, 163 F.3d 625 (D.C. Cir. 1998), a class of Hispanic prisoners raised a Title VI claim, alleging that the District of Columbia violated their rights by failing to offer religious, vocational, and education programs in the Spanish language. The court held that the inmates were not entitled to Title VI relief because they were "not being barred from participation in prison programs because of their race, color or national origin. While the programs are open to all inmates, limited-English proficient inmates' participation is limited only by their English fluency." Id. at 432. A similar result must occur here.

The plain language of Title VI and its implementing regulations, expressly state that prohibitions are on the basis of race, color, or national origin only – not language. Congressional intent and case law are not to the contrary. Language is not a proxy for national origin and, as such, any enforcement of Title VI on the basis of language is beyond the scope of Title VI and not properly the subject of any action before this Court. Accordingly, this Court must enter summary judgment in favor of defendants on the First Amended Complaint.

IV. THE UNITED STATES HAS RECEIVED ACCESS TO THE MCSO JAIL FACILITIES, STAFF, INMATES, AND DOCUMENTATION AS REQUESTED

The United States argues that "[t]ransparent administration of MCSO's police practices and jail operations is critical to the United States obligation to ensure that public funds are not being used to finance illegal racial discrimination." **(DSOF ¶50)** It also cites to an internet article regarding Sheriff Arpaio's unwillingness to cooperate with the Department of Justice (DOJ). **(DSOF ¶51)** But transparency does not require the "free access to the entire office" (MCSO) that the DOJ insists upon. **(DSOF ¶52)** Certainly, Robert Driscoll, Esq. and Sheriff Arpaio were both critical of the ethical questionability of the DOJ's investigation of MCSO, including the political nature of the

investigation; yet the DOJ inappropriately insisted on unfettered access to the MCSO, and the unreasonable scope of the investigation. **(DSOF ¶53)** Nevertheless**,** the United States has actually been the beneficiary of the transparency and access it desires to conduct its compliance review under Title VI, despite objections and hyperbole. **(DSOF ¶54)**

Despite the unreasonableness and improprieties of the United States' investigation, Sheriff Arpaio has granted the United States access to MCSO staff and facilities as the United States requested in its August 25, 2010 letter, contrary to the United States' contention. **(DSOF ¶55)** DOJ attorneys have enjoyed the transparency and access that the United States seeks. Accordingly, the United States' Motion for Summary Judgment fails and summary judgment must enter in defendants' favor on the First Amended Complaint.

A. <u>DOJ Attorneys have toured all of the Jail Facilities</u>

Within twelve (12) days of their appearance, the undersigned counsel met with five Assistant U.S. Attorneys in Phoenix to discuss the United States' First Request and its investigation of MCSO, generally. **(DSOF ¶56)** On November 2, 2010, five Assistant U.S. Attorneys met with MCSO Chiefs Jerry Sheridan and Jack MacIntyre, as well as defense counsel, William R. Jones, John T. Masterson and Joseph J. Popolizio at the offices of Jones, Skelton & Hochuli, P.L.C. **(DSOF ¶57)** As a result of that meeting, Chiefs Sheridan and MacIntyre pledged that the United States would receive access to MCSO facilities, staff, and inmates as requested. **(DSOF ¶58)** And the Chiefs immediately delivered.

During the November 2, 2010 meeting, Chief Sheridan offered to commence the requested tours of the MCSO facilities that very afternoon. **(DSOF ¶59)** The United States declined that offer and, instead, elected to return the following week to tour the MCSO facilities. **(DSOF ¶60)** One week later, on the morning of November 9, 2010, a team of DOJ Attorneys from Washington, D.C. met with MCSO command staff and counsel at the 4th Avenue Jail. **(DSOF ¶61)** During that meeting, MCSO command staff, once again, pledged to cooperate with the DOJ's investigation. **(DSOF ¶62)** At the

conclusion of that meeting, a the DOJ attorney team began a day-long tour of the Maricopa County Jails. **(DSOF ¶63)**

Accompanied by MCSO tour guides Sergeant James Seibert and Lieutenant Ernest Alcala, as well as officers assigned to a given facility selected at random, the DOJ team toured Fourth Avenue (including Central Intake), Durango, Estrella, Towers, Lower Buckeye, and In Tents jail facilities—i.e., all of the Maricopa County jail facilities that the United States requested to tour. **(DSOF ¶64)** Defense attorneys Popolizio and Masterson also attended the tours. **(DSOF ¶65)** MCSO personnel and counsel complied with the DOJ team's every request. **(DSOF ¶66)** Thus, the United states received the access to facilities pursuant to its request despite the allegations in its First Amended Complaint and the arguments set forth in its Motion. Accordingly, the United States' Motion for Summary Judgment fails and summary judgment must enter in defendants' favor on the First Amended Complaint.

B. <u>During the Jail Tours DOJ Attorneys spoke freely with MCSO and CHS Personnel</u>

During the jail tours, the DOJ team spoke directly to MCSO detention officers, all of whom were allowed to speak freely with the DOJ Attorneys. **(DSOF ¶67)** As the tours occurred, MCSO detention officers answered the DOJ Attorney team's questions regarding the particular jails, including pods within the jails, jail programs, the provision of medical care, as well as inmate (including LEP inmate) access to programs and medical care. **(DSOF ¶68)** Neither defense counsel nor present command staff curtailed the open dialogue between the MCSO officers and the members of the DOJ team. **(DSOF ¶69)**

In addition, during the facility tours, DOJ Attorney team members also spoke with Correctional Health Services (CHS) personnel, the medical professionals who provide medical care to inmates in the Maricopa County Jail system. **(DSOF ¶70)** During the tours, members of the DOJ Attorney team requested medical and grievance forms available at each facility, also. **(DSOF ¶71)** Each request was granted without

hesitation. **(DSOF ¶72)** Furthermore, MCSO Sergeant James Seibert provided the DOJ Attorneys with MCSO duty rosters as requested and pledged to provide inmate rosters the next morning when the DOJ Attorneys were scheduled to commence inmate and command staff interviews. **(DSOF ¶73)** Thus, the United States received access to staff and individuals as requested during its facility tours. Accordingly, the United States' Motion for Summary Judgment fails and summary judgment must enter in defendants' favor on the First Amended Complaint.

C. The DOJ has and will continue to conduct Inmate and MCSO Command Staff and Employee Interviews

As initially agreed, inmate and MCSO command staff interviews were scheduled to commence on November 10, 2010. **(DSOF ¶74)** The United States, however, postponed their commencement. **(DSOF ¶75)** Instead, the DOJ Attorneys elected to commence inmate interviews on November 16, 2010 and to postpone command staff interviews indefinitely. **(DSOF ¶76)** As with the inmate interviews, MCSO has pledged cooperation regarding the DOJ interviews of MCSO staff which will occur in the future. **(DSOF ¶77)** The MCSO is patiently awaiting word from the DOJ regarding when it would like to commence MCSO staff interviews. **(DSOF ¶78)** The DOJ has already received interviews of MCSO officials, however. Pursuant to an agreement with MCSO, the DOJ has received videotapes and transcripts of interviews with 21 top MCSO officials in connection with *Melendres v. Arpaio, et al,* No. CV-07-2513-PHX-GMS, a case involving allegations of racial profiling by the MCSO. **(DSOF ¶79)**

In addition, pursuant to the United States' request, inmate interviews were scheduled to occur November 16, 17, 18, 19, 22, 23, 24, and 30, as well as December 2 and 3, 2010; these interviews have proceeded as requested, unless the teams of Assistant United States Attorneys and their interpreters altered their requested schedule. **(DSOF ¶80)** The MCSO/Sheriff Arpaio has accommodated every request by a DOJ interview team to alter the inmate interview schedule. **(DSOF ¶81)**

Moreover, MCSO staff accommodated the United States by accepting the

United States requested inmate interview schedule, by providing it with legal rooms to conduct ex parte interviews at each facility and by accommodating several teams consisting of Assistant United States Attorneys and interpreters to conduct interviews simultaneously. **(DSOF ¶82)** All of this occurred in addition to the previously scheduled and unrelated tours and visits of other organizations. **(DSOF ¶83)**

The United States' requested inmate interview schedule was as follows: November 16, 2010 (two teams--one full day/one just in the afternoon); November 17 and 18, 2010 (two teams all day); November 19, 2010 (one team all day); November 22 and 23, 2010 (two teams all day); November 24, 2010 (one team all day); November 30, December 2, and December 3, 2010 (two teams all day). **(DSOF ¶84)** Through December 3, 2010, the DOJ teams, pursuant to their requests, conducted approximately 54 hours of interviews of 86 inmates selected from inmate rosters at Estrella, Durango, Tents, and Lower Buckeye jails. **(DSOF ¶85)** And more interviews will occur in the future. **(DSOF ¶86)**

The United States has received and will continue to receive cooperation and access regarding the interviews of staff and inmates that it requested. Accordingly, the United States' Motion for Summary Judgment fails and summary judgment must enter in defendants' favor on the First Amended Complaint.

D. <u>The DOJ has also received the documentation it requested.</u>

As the DOJ attorneys stated, the postponement of the command staff interviews was, in part, due to the voluminous MCSO documentation that the United States had received on November 5, 2010 via overnight delivery in response to the First Request and pursuant to the pledge of MCSO Chiefs at the aforementioned November 2, 2010 meeting. **(DSOF ¶87)** The documentation consisted of all of the MCSO policies (1101 pages) that the United States requested within the First Request. **(DSOF ¶88)** This, however, is not the only documentation that the United States has received from the MCSO--despite the unreasonable scope of its Title VI investigation and corresponding First Request. The documents that the MCSO produced go beyond DOJ's requests

associated with LEP and into the realm of police function, despite the dispute between the parties regarding the proper scope of the Title VI investigation. **(DSOF ¶89)**

The MCSO has provided other documentation in response to the DOJ's First Request and before the filing of this action and Motion. **(DSOF ¶90)** Moreover, the DOJ has presumably received documentation and interview information pursuant to its "deal" with the DHS. **(DSOF ¶91)** In addition, the MCSO has designated documents disclosed in *Melendres v. Arpaio, et al,* No. CV-07-2513-PHX-GMS**,** (approximately 12,850 pages) as responsive to the DOJ's First Request, as requested in the August 25, 2010 letter. **(DSOF ¶92)** It did so on August 27, 2010. **(DSOF ¶93)** Further, the MCSO has also provided 11 documents associated with grievance and visitation processes, as well as 808 pages of documents in support of its LEP position paper. **(DSOF ¶94)** But the production does not stop there. **(DSOF ¶95)**

On December 10, 2010, the MCSO and Sheriff Arpaio sent via Federal Express a hard drive containing *931 gigabytes of documentation* responsive to the First Request, also. **(DSOF ¶96)** As discussed with the DOJ, even more is yet to come.

As the DOJ is also aware, undersigned counsel has received *116 boxes* of documents in response to the First Request, which must be either placed in electronic format or perhaps made available to DOJ counsel for review, to avoid the exorbitant cost of reproducing hundreds of thousands of pages. **(DSOF ¶97)**

Production of and access to documentation has occurred pursuant to the United States' request, despite the impropriety of the United States' Title VI investigation. Accordingly, the United States' Motion for Summary Judgment fails and summary judgment must enter in defendants' favor on the First Amended Complaint.

V. CONCLUSION

The MCSO and Sheriff Arpaio have permitted access to "such sources of information, and its facilities, as may be pertinent to ascertain compliance with the law. 28 C.F.R.§42.106(c). The United States is enjoying substantial latitude in scrutinizing the policies and practices of the MCSO. *See United States v. El Camino Cmty. Coll. Dist.,*

600 F.2d 1258, 159-60 (9th Cir. 1979). But substantial latitude does not equal unfettered access. Pursuant to Title VI regulations, the MCSO and Sheriff Arpaio have provided and the United States has received and continues to receive "[a]ccess to sources of information" to ensure that all non-discrimination requirements are being met, *as may be pertinent* to ascertain Title VI compliance and its implementing regulations. 28 C.F.R. §42.1069(c).

The facts clearly demonstrate that MCSO and Sheriff Arpaio are cooperating with the United States' Title VI investigation. As the United States is well aware, Defendants have pledged cooperation, cooperated, and continue to cooperate with the United States' investigation. MCSO and Sheriff Arpaio have provided more than reasonable access to information, documentation, facilities and individuals pursuant to Title VI assurances.

In addition, the basis for the United States' Title VI investigation is improper: language is *not* a proxy for national origin.

Accordingly, denial of the United States' Motion for Summary Judgment and entry of summary judgment in favor of defendants on the First Amended Complaint is mandated.

RESPECTFULLY SUBMITTED this 10th day of December, 2010.

JONES, SKELTON & HOCHULI, P.L.C.

By /s/Joseph J. Popolizio

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