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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' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

The Maricopa County Sheriff's Office and Sheriff Joseph M. Arpaio (collectively "MCSO") are entitled to summary judgment in this matter. The United States' claims and request for injunctive and declaratory relief are now moot in light of MCSO's continued cooperation with the Department of Justice ("DOJ") during its Title VI investigation, and the DOJ's virtually unfettered access to MCSO facilities, staff, and documents. Alternatively, MCSO is entitled to summary judgment because the DOJ's Title VI investigation is improperly based on alleged language discrimination, and not race, color, or national origin.

I. THE CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF ARE MOOT

"A claim is moot if it has lost its character as a present, live controversy." *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997). Although the burden of demonstrating mootness is a heavy one, "[t]hat does not mean that the burden cannot be borne." *Smith v. University of Washington*, 233 F.3d 1188, 1194 (9th Cir. 2001). "The voluntary cessation exception is not absolute." *United States v. Brandau*, 578 F.3d 1064, 1068 (9th Cir. 2009). "[E]ven when a cessation is voluntary, mootness can follow." *Smith*, 233 F.3d at 1194. "[T]he voluntariness of the cessation is a factor, rather than a clincher." *Id*. The primary question is whether subsequent events have made it absolutely clear that the allegedly wrongful behavior – denying access to MCSO staff, facilities, and documents in connection with the United States' pending Title VI investigation – could not reasonably be expected to recur. *Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs., Inc.*, 528 U.S. 167, 189 (2000). This can be established by showing that it is "extremely unlikely that [the United States] will file another complaint." *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009).

The United States does not dispute the virtually unfettered access that MCSO provided in October and November 2010. (DSOF 74–97.) This included tours of six MCSO facilities and informal discussions with MCSO personnel during those tours, and the production of all requested MCSO policies (1101 pages), documents disclosed in the *Melendres* matter (approximately 12,850 pages), 808 pages of documents in support of its LEP position paper, 11 documents associated with grievance and visitation processes, and 931 gigabytes of documentation responsive to the United States' First Request. (*Id*.) Since MCSO filed its Motion for Cross-Summary Judgment on December 10, 2010, this cooperation has continued to the present, and will continue in the future until the investigation has ended.

A. The DOJ Conducted The 230 Interviews It Requested

The scheduling of inmate and MCSO staff interviews was not particularly

an easy task. **(DSSOF ¶1)**[1] It required reconciling the schedules of MCSO and DOJ lawyers, as well as MCSO personnel. **(DSSOF ¶2)** At all times, MCSO personnel, attorneys, and paralegals facilitated as seamless an interview process as possible under the circumstances – something for which the DOJ personnel openly expressed appreciation. **(DSSOF ¶3)** Most importantly, the interviews that the DOJ requested all occurred.

1. One Hundred Forty-Five (145) Inmate Interviews Have Occurred

As the Title VI investigation moved forward in January 2011, DOJ attorneys and jail consultants continued to interview inmates in the Maricopa County Jail system. **(DSSOF ¶4)** To facilitate the DOJ's inmate interview process, MCSO provided the DOJ with inmate rosters from which the DOJ selected interviewees. **(DSSOF ¶5)** MCSO also reserved legal visitation rooms for the DOJ to conduct these interviews. **(DSSOF ¶6)** MCSO did not limit the length or the number of these inmate interviews, nor did it limit the availability of any inmate for interview.[2] **(DSSOF ¶7)**

The interview process continued according to DOJ requests and agreed upon guidelines with a few understandable limitations stemming from the necessary and expected security measures of the jails. **(DSSOF ¶11)** The DOJ conducted inmate interviews outside the presence of MCSO personnel and attorneys as the DOJ requested, on dates and times that the DOJ requested. **(DSSOF ¶12)**

The DOJ conducted 59 inmate interviews in January 2011 alone. **(DSSOF ¶13)** Thus, to date, the DOJ has conducted a total of **145 inmate interviews** in furtherance of their Title VI investigation, and all occurred with the assistance and

[1] "DSSOF" refers to MCSO's Supplemental Statement of Facts in Support of Cross-Motion for Summary Judgment.

[2] In the infrequent event that an inmate whom the DOJ randomly selected was unavailable, the unavailability was due to circumstances such as a previously scheduled medical visit or work shift of the particular inmate. **(DSSOF ¶8)** On one occasion, on the morning of January 25, 2011, an inmate at Durango jail appeared for an interview, but needed a Spanish interpreter. **(DSSOF ¶9)** As the DOJ did not have an interpreter present as it had for other interviews, the inmate's interview was postponed until that afternoon when an interpreter could be present. **(DSSOF ¶10)**

cooperation of MCSO personnel and attorneys. **(DSSOF ¶14)**

2. Eighty-Five (85) MCSO Staff Interviews Have Occurred

In January and February 2011, MCSO coordinated the interviews of both detention and patrol staff from an array of duty assignments. **(DSSOF ¶15)** Like the inmate interviews, the DOJ selected those staff members to interview, and MCSO made them available. **(DSSOF ¶16)** In all, the DOJ requested and conducted **85 staff member interviews**, including interviews of 53 command staff (i.e., personnel holding the rank of Sergeant and above). **(DSSOF ¶17)** The 53 command staff included 5 administrative, 31 detention, and 17 patrol staff members. **(DSSOF ¶18)** On the detention side, the DOJ interviewed 4 Chiefs, 6 Captains, 18 Lieutenants, 1 Sergeant, and 18 Detention Officers; the DOJ also interviewed 2 civilian supervisors and 1 civilian employee. **(DSSOF ¶19)** On the law enforcement side, the DOJ interviewed 5 Chiefs, 8 Captains, 2 Lieutenants, 2 Sergeants, 2 Volunteer Posse Members, and 11 Deputies. **(DSSOF ¶20)**

The DOJ has also interviewed **Sheriff Joseph M. Arpaio**. **(DSSOF ¶21)** Although this interview was originally scheduled for January 28, 2011, the DOJ cancelled that interview because of inclement weather in Washington, D.C., and rescheduled it for February 11, 2011. **(DSSOF ¶22)** The DOJ did not complete Sheriff Arpaio's interview on February 11, 2011, however, but, with Sheriff Arpaio's accommodation, it resumed and concluded on February 17, 2011. **(DSSOF ¶23)** His two interviews exceeded previously agreed upon time limits. **(DSSOF ¶24)**

B. <u>Document Production Has Continued</u>

MCSO's response to the United State's First Request for Production of Documents and Information is overwhelming. **(DSSOF ¶25)** And this response occurred before and after the filing of this action. In addition to the 13,669 pages of documentation and a terabyte hard drive containing 931 gigabytes, the MCSO also made available 116 boxes of documents produced in response to the First Request. **(DSSOF ¶26)** DOJ attorneys have reviewed the documents contained in those boxes on **four occasions** at the offices of MCSO's lawyers: December 17, 2010 and January 3, 4, 5, 2011. **(DSSOF ¶27)**

On many occasions, MCSO lawyers have made clear that DOJ is welcome to resume its review of these documents upon reasonable notice and within normal business hours. **(DSSOF ¶28)**

To assist the DOJ in its evaluation of the voluminous documentation and information that MCSO has produced, MCSO attorneys have repeatedly offered to provide the DOJ assistance to evaluate the boxed and electronic information previously provided in response to the DOJ's First Request for Documents and Information. **(DSSOF ¶29)** MCSO's cooperation and allowed access to information has occurred and will continue to occur. **(DSSOF ¶30)** As the DOJ nears the conclusion of this Title VI investigation, MCSO's pledge of cooperation, among other things, most likely will appear in an agreement between the parties intended to conclude this investigation and litigation. **(DSSOF ¶31)**

C. The United States And MCSO Are Negotiating A "Go Forward" Agreement Intended To Conclude The Title VI Investigation And This Action In The Very Near Future

Since Jones, Skelton & Hochuli, P.L.C. became counsel of record on October 2, 2010, the United States has received nothing short of complete cooperation in its investigation, including total access to MCSO staff, facilities, and documents, which is precisely the injunctive and declaratory relief the United States seeks in this lawsuit. **(DSSOF ¶32)** In fact, in the Stipulation filed with this Court to extend the deadline for filing this Reply, the United States acknowledged that MCSO has made "great strides" in its production, so much so that *it* was "confident" that MCSO's summary judgment motion would eventually be mooted by MCSO's efforts, and contemplated reaching an agreement with MCSO for future information requests. (Dkt. # 52.)

As an acknowledgement of the MCSO's continued cooperation, the DOJ proposed entering into an agreement that would identify the few items that the DOJ deems left to accomplish in this Title VI investigation. **(DSSOF ¶33)** Although discussions regarding a contemplated agreement date back at least to the beginning of February 2011, and were formally acknowledged in the Stipulation filed on February 25, 2011, the

United States delivered a draft of this proposed "go forward" agreement on April 13, 2011. **(DSSOF ¶34)** The draft agreement outlines the tasks that the DOJ believes it has left to accomplish, including limited follow-up interviews and review of certain documents. **(DSSOF ¶35)** The proposed agreement also includes a reasonable time period in which to finalize the DOJ's investigation, followed by a dismissal of this case. **(DSSOF ¶36)** The MCSO is confident that it will enter into an agreement which will lead to the conclusion of the Title VI investigation and this action shortly. **(DSSOF ¶37)**

In light of *this* "litigation history" – MCSO's cooperation and provision of access from August 2010 to the present, the United States' acknowledgement of this cooperation and access since October 2010 and confidence that it will continue, the pending "go forward" agreement between the parties, and the fact that the Title VI investigation is nearly finished – MCSO has met its burden of showing that it is absolutely clear that the alleged conduct that was the basis for this lawsuit (MCSO's denial of access and information) is not reasonably be expected to recur. *Friends of the Earth, Inc.*, 528 U.S. at 189. The United States' claim that they have "good reason to believe MCSO's misconduct will return" is unsupportable. *See Anderson v. City of Boston*, 375 F.3d 71, 93 (1st Cir. 2004) ("Mere skepticism about the defendants' future intentions cannot justify the type of judicial intervention that plaintiffs seek."). The United States' claims for injunctive and declaratory relief are moot.

II. LANGUAGE IS NOT A PROPER STATUTORY BASIS FOR THE UNDERLYING TITLE VI INVESTIGATION

Although the First Amended Complaint broadly alleges that the United States launched an investigation of "alleged national origin discrimination" (Dkt. # 17 at 2, ¶ 3), the United States has made clear that its investigation is targeting only an alleged "failure to provide meaningful access to MCSO services for limited English proficient (LEP) individuals." (Dkt. # 19–30 at 2.) The United States has also made clear that this investigation was initiated because of a private complaint. (Dkt. # 19–33 at 2.) *See* 28 C.F.R. § 42.107(b) ("Any person who believes himself or any specific class of individuals

to be subjected to discrimination prohibited by this subpart may by himself or by a representative file with the responsible Department official or his designee a written complaint."); 28 C.F.R. § 42.107(c) ("The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, *complaint*, or any other information indicates a possible failure to comply with this subpart.") (Emphasis added).

In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the United States Supreme Court rejected the Title VI interpretation in *Lau v. Nichols*, 414 U.S. 563 (1974), upon which the United States relies, and held that § 601 prohibits only intentional discrimination, and that private individuals do not have a right of action to enforce disparate-impact regulations promulgated under § 602, such as 28 C.F.R. § 42.104(b)(2), the regulation invoked in this case.[3] 532 U.S. at 280, 285, 293. Because the underlying investigation was initiated by a private individual's complaint, and private individuals can only bring an action under § 601, proof of intentional discrimination is required. The United States does not dispute that language is *not* a valid basis for intentional discrimination under § 601. *See*, *e.g.*, *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 795 (8th Cir. 2010) ("While Title VI prohibits discrimination on the basis of national origin, language and national origin are not interchangeable.").[4] Thus, even assuming that

[3] Section 601 provides that no person 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" covered by Title VI. 42 U.S.C. § 2000d. Section 602 authorizes federal agencies "to effectuate the provisions of [§ 601] … by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. Under the authority of § 602, the DOJ promulgated 28 C.F.R. § 42.104(b)(2), which forbids funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."

[4] *Alexander* reversed the holding in *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), which the United States cites in support of its position. 532 U.S. at 293. Moreover, *Yniguez v. Arizonans for Official English*, 119 F.3d 795 (9th Cir. 1997) and *Asian Am. Bus. Group v. City of Pomona*, 716 F.Supp. 1328 (C.D. Cal. 1989) involved First Amendment claims, and *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) and *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595 (9th Cir. 1993) involved Title VII claims. "It is well-settled that Title VII is concerned not only with intentional discrimination, but also with employment practices and policies that lead to disparities in the treatment of classes of workers." *Garcia*, 998 F.2d at 1484. The United States' investigative authority derives

the United States' distinction between intentional discrimination and disparate impact is correct, its investigation still falls outside the scope of Title VI.

CONCLUSION

Summary judgment in favor of MCSO and Sheriff Arpaio is appropriate on the United States' First Amended Complaint because language is not a proper basis for the underlying Title VI investigation; language and national origin are not interchangeable. In addition, MCSO has been doing everything asked of it in this investigation. And it is prepared to formalize an agreement for its continued cooperation and access for the remainder of the United States' investigation. This is precisely the relief sought by the United States when it filed this lawsuit. There is no reason for this Court to enter an order requiring MCSO to do what it has voluntarily done, what it has voluntarily been doing, and what it will voluntarily agree to do in the future. The Cross-Motion for Summary Judgment must be granted, and this case dismissed.

DATED this 26th day of April, 2011.

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from Title VI. *See* 28 C.F.R. § 42.107(c). Only cases interpreting that Title are applicable.

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