

1 John T. Masterson, Bar #007447
Joseph J. Popolizio, Bar #017434
2 Justin M. Ackerman, Bar #030726
JONES, SKELTON & HOCHULI, P.L.C.
3 40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004
4 Telephone: (602) 263-1700
Fax: (602) 200-7846
5 jmasterson@jshfirm.com
jpopolizio@jshfirm.com
6 jackerman@jshfirm.com

7 Attorneys for Defendant Joseph M. Arpaio in
his official capacity as Sheriff of Maricopa
8 County, AZ

9
10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**

12 Manuel de Jesus Ortega Melendres, et al.,

13 Plaintiff,

14 v.

15 Joseph M. Arpaio, et al.,

16 Defendant.

NO. CV 07-02513-PHX-GMS

**DEFENDANTS RESPONSIVE
MEMORANDUM TO COURT'S
FINDINGS OF FACT (DOC. 1677)**

17 Sheriff Joseph M. Arpaio, Chief Deputy Gerard Sheridan, and Lieutenant
18 Joseph Sousa (“Defendants”) were devastated to read the Court’s Findings of Fact. They
19 desire to do everything in their power to restore the Court’s and community’s confidence
20 in them and the Maricopa County Sheriffs’ Office (“MCSO”). In that spirit, they are
21 committed to working with this Court and the Plaintiffs to fashion remedies that address
22 the Court’s findings of civil contempt.

23 To that end, Defendants propose the following remedies, which are
24 generally described below and are more fully set forth in this responsive memorandum:

- 25
- 26 • Compensation of affected members of the Plaintiff class for violations of the Court’s preliminary injunction.
 - 27 • Sheriff Arpaio and the Chief Deputy, with the Court’s approval, will make a substantial personal contribution to a civil rights organization in Maricopa County committed to
- 28

1 protecting the constitutional and civil rights of the
2 Hispanic Community.

- 3 • The Chief Deputy will accept the original policy violation
4 findings of Donald Vogel that Chief Michael Olson
5 previously sustained, and accept discipline for those
6 findings pursuant to the disciplinary matrix.
- 7 • MCSO will institute new IA investigations as identified by
8 the Court's Findings of Fact.
- 9 • Vest authority over new IA investigations related to the
10 interests of the Plaintiff class in an independent authority.
- 11 • Sheriff Arpaio and the Chief Deputy will publicly
12 acknowledge violations of the Court's Orders.
- 13 • Revise or draft new policies, including policies relevant to
14 grievance procedures.
- 15 • Institute appropriate training and supervision as a result of
16 the deficiencies identified in the Court's Findings of Fact.
- 17 • Plaintiffs may apply for their reasonable attorneys' fees for
18 the contempt proceedings.

19 Defendants have attempted to fashion civil remedies that meaningfully
20 address all of the concerns and issues identified in the Court's Findings of Fact. *See*
21 *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987). However, in the
22 event the Court does not find these suggested remedies to be sufficient, Defendants
23 respectfully request that the Court grant them the opportunity to address the Court's
24 concerns by developing remedies that are responsive.

25 **I. COMPENSATION OF MEMBERS OF THE PLAINTIFF CLASS FOR**
26 **VIOLATIONS OF THE PRELIMINARY INJUNCTION (COUNT I).**

27 Defendants want to compensate members of the Plaintiff class for injuries
28 that may have occurred as a result of the past failures to take reasonable steps to
implement the Court's preliminary injunction. [Doc. 1677 at ¶ 879].

A. Defendants proposed remedies in light of the Court's Findings of Fact
related to Count I.

Defendants propose the following remedies in light of the Court's Findings
of Fact related to Count I.

1 **1. Sheriff Arpaio and the Chief Deputy will contribute a total of**
2 **\$100,000 to a civil rights organization.**

3 Consistent with Sheriff Arpaio and Chief Deputy Sheridan's original
4 commitment prior to the contempt trial, they reiterate that, with the Court's approval, they
5 will personally contribute \$100,000 to a civil rights organization, acceptable to the Court,
6 based in Maricopa County, which is committed to protecting the constitutional and civil
7 rights of the Hispanic community.

8 **2. Joint proposed compensation scheme designed to address the**
9 **contemnors' violation of the preliminary injunction.**

10 The parties have worked collaboratively during and after the ongoing
11 contempt proceedings to draft a combined proposal for notice and compensation to the
12 Plaintiff class to remedy Sheriff Arpaio's and the other civil contemnors' violation of the
13 Court's preliminary injunction. Attached is the most recent draft dated May 26, 2016.
14 [**Exhibit A**]. The following is a summary of the main provisions of this draft agreement,
15 which includes appointing an agreed upon, third-party, neutral claims administrator
16 (BrownGreer), the procedure for notice to potential participants, a claims adjudication
17 plan, and a compensation scheme:

- 18 • Individuals detained in violation of the Court's Preliminary
19 Injunction will be eligible for compensation. [Ex. A at 2].
- 20 • The appointment of a third-party neutral claims
21 administrator (BrownGreer). [*Id.* at 1].
- 22 • This claims administrator will provide notice to the
23 purported victims of the Contemnors' failure to take
24 reasonable steps to implement the Court's preliminary
25 injunction. [*Id.* at 2-3].
- 26 • Any Claimant who comes forward will be required to
27 complete a basic intake form under oath [*id.* at 4] that will
28 permit the neutral claims administrator to make a
 determination on whether the claimant meets the eligibility
 requirements for participation in the program. [*Id.* at 4-5].
- Eligibility for compensation will be broken into two tracks:
 A or B. [*Id.* at 5].
- Track A individuals are those who are "prequalified" to
 receive compensation based on the information contained
 in the intake form. [*Id.*].

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- Track B individuals are those who do not fit into track A and will be required to establish a prima facie case of a preliminary injunction violation. [*Id.* at 5-7].
- If a claimant meets the prima face case requirements of Track B, MCSO must come forward with competent evidence that casts doubt on one or more of the elements of the claim in a timely fashion. [*Id.* at 7-8].
- Claimants under Track B will also be able to establish eligibility for compensation for additional injuries, such as damages from physical harm and/or severe emotional distress from the detention, lost property, lost wages, and other harms. [*Id.* at 8-10].
- A minimum amount of compensation for detention. [*Id.* at 12].

The parties are continuing to negotiate in good faith the specific parameters of the compensation scheme. The remaining areas to be agreed upon include:

- The applicable time-span for alleged violations that would be eligible;
- Whether remedies apply to traffic stops only as delineated in the Court’s Preliminary Injunction;
- Initial budget regarding notice for the outside vendor BrownGreer;
- Details of the encounter to include a precise date or a limited range;
- What evidence constitutes proof that the encounter was with MCSO;
- The time-frame by which MCSO must rebut the claim;
- The cap on “additional damages” including emotional distress, lost wages, lost property, and other costs;
- The rate of damages for length of detention, and whether the detention includes that by ICE/CBP or MCSO;
- The need for a social security number and/or tax documents as it relates to compensation for medical expenses and other compensable damages;
- The minimum compensation rate for detention;
- Whether the claim documents are public record; and
- Whether returned claims that are incomplete or otherwise contained deficiencies can be cured.

- Whether Plaintiffs are entitled to attorneys' fees for this process.

Sheriff Arpaio and the other civil contemnors reiterate that they are committed to ensuring that the violations of the Court's preliminary injunction found in Count I of the Court's Findings of Fact are remedied and adequate compensation is paid to the individuals who come forward.¹

B. Maricopa County is taking the position that it might not be liable for remedies based on "willful" or "intentional" behavior.

On May 20, 2016, Maricopa County informed Sheriff Arpaio and the other civil contemnors that to the extent this Court "imposes measures in this action designed to remedy willful and/or intentional violations of the court's orders," the County may "take the position that it cannot be found liable for the financial consequences for such remedies." [5/20/16 Maricopa County Letter, attached as **Exhibit B**]. This appears to be an about-face from the County's previous position to Plaintiffs that it would indemnify the Sheriff, regardless of any willful contemptuous conduct found by this Court, for any remedies ordered by the Court "designed to compensate individuals whose rights were violated as a result of detentions incident to traffic stops conducted in violation of the court's preliminary injunction." [6/2/15 Maricopa County Letter, attached as **Exhibit C**]. While the County has not made a final determination on whether it will indemnify Sheriff Arpaio and the other civil contemnors, Sheriff Arpaio brings this issue to the Court's attention because it may affect any potential relief (financial or injunctive) the Court might order.

In any event, Defendants believe that the County has no legal authority to deny liability, even if the Court's remedies are tied to "intentional" findings. The Ninth Circuit opinion in this case establishes that because Sheriff Arpaio is a defendant *only* in

¹ In the spirit of ensuring adequate compensation to the Plaintiff class, Defendants also point out to the Court that there might be an issue with providing compensatory financial relief under Count I because the Plaintiff class has been certified only for injunctive relief under Fed. R. Civ. P. 23(b)(2). To the extent any modification of the class is necessary to accomplish compensation, Defendants will assist with any procedure this Court deems necessary.

1 his official capacity, the County is the proper party to this action, and therefore, liable for
 2 the remedies ordered by this Court. *See Melendres v. Arpaio*, 784 F.3d 1254, 1260 (9th
 3 Cir. 2015), *cert. denied sub nom. Maricopa County, Ariz. v. Melendres*, 136 S. Ct. 799,
 4 193 L. Ed. 2d 711 (2016) (ordering that Maricopa County be substituted as a party in lieu
 5 of MCSO because “an official capacity suit is, in all respects other than name, to be
 6 treated as a suit against the entity.”); *United States v. Maricopa, County of*, CV-12-00981-
 7 PHX-ROS, 2015 WL 9266969, at *16 (D. Ariz. June 15, 2015) (“Maricopa County is
 8 directly liable for violations resulting from its official policy, which includes policy
 9 promulgated by Arpaio.”); *see also Braillard v. Maricopa Cnty.*, 224 Ariz. 481, 232 P.3d
 10 1263, 1269 (App. 2010) (holding that MCSO is a non-jural entity). Furthermore, the
 11 existence of the County’s insurance or self-insurance does not control the legal issue of
 12 whether the County is the true defendant here; neither does it divest the County of its
 13 underlying liability for the Sheriff’s and MCSO’s actions.

14 **II. PROPOSED REMEDIES RELATED TO MCSO’S INTERNAL AFFAIRS**
 15 **INVESTIGATIONS AND DISCIPLINE (COUNTS 2/3).**

16 **A. Chief Deputy Sheridan will accept the previous policy violation**
 17 **findings.**

18 The Chief Deputy will accept the original policy violation findings of
 19 Donald Vogel that Chief Michael Olson previously sustained (but then overturned
 20 following Chief Sheridan’s name clearing hearing), as outlined in the Court’s Findings of
 21 Fact at paragraph 435. Chief Deputy Sheridan will accept discipline for these findings
 22 pursuant to MCSO’s disciplinary matrix.

23 **B. The Court’s invalidation of previous IA investigations, disciplinary**
 24 **decisions, and/or grievance decisions.**

25 The Court’s Findings of Fact found the following disciplinary and/or
 26 grievance decisions to be insufficient, invalid or void, and suggested that new
 27 investigations and/or discipline for some or all of these subjects should occur:

- 28 • Vogel Investigation – IA 2014-543. [Doc. 1677 at ¶¶
 405-423; 424-490].

- 1 • Olson Investigation – IA 2014-542. [*Id.* at ¶¶ 405-423;
491-573]
- 2 • Cisco Perez Investigation – IA 2014-295. [*Id.* at ¶¶
3 603-692]
- 4 • Cisco Perez Follow Up Investigation - IA 2015-541.
5 [*Id.* at ¶¶ 693-717]
- 6 • IA 2015-018. [*Id.* at ¶¶ 738-747]
- 7 • IA 2014-021. [*Id.* at ¶¶ 748-751]
- 8 • IA 2015-022. [*Id.* at ¶¶ 752-764]
- 9 • Mackiewicz investigation.² [*Id.* at ¶¶ 766-825]

10 The Court also suggested that additional investigations should be conducted into new or
11 previously uninvestigated violations or alleged violations. [*Id.* at ¶ 904].³ The Sheriff and
12 the Chief Deputy struggle to provide the Court with a remedy related to the Court’s
13 invalidation of previous IA investigations because of concerns that opening investigations
14 that have already been completed might violate Arizona state law.⁴ However, they are

15 ² Defendants question the relevance of the Mackiewicz investigation to the interest
16 of the Plaintiff class and the injunctive relief ordered by this Court.

17 ³ Defendants would like to raise an issue with the Court about its Findings of Fact.
18 Defendants wish the Court’s injunctive relief to be constitutionally valid. As such, to the
19 extent the Court orders injunctive relief tied to the subjects contained in its Findings of
20 Fact, such relief must be limited to the constitutional violations it has found in this case
21 and the interests of the Plaintiff class. *See Melendres v. Arpaio*, 784 F.3d 1254, 1267 (9th
22 Cir. 2015), cert. denied sub nom. *Maricopa County, Ariz. v. Melendres*, 136 S. Ct. 799
23 (2016) (finding injunctive relief that “broadly requires the Monitor to consider the
24 ‘disciplinary outcomes for any violations of departmental policy’ and to assess whether
25 Deputies are subject to ‘civil suits or criminal charges ... for off-duty conduct’ was not
26 narrowly tailored to addressing the relevant violations of federal law at issue in this
27 action”). Paragraph 904 of the Court’s Findings of Fact, among others, appears to suggest
28 broad remedies that may or may not be narrowly tailored to the interest of the Plaintiff
29 class.

30 ⁴ Defendants would like to bring to the Court’s attention their concerns about the
31 Arizona Police Officer’s Bill of Rights. *See* A.R.S. §§ 38-1101-1115. This statutory
32 scheme, in part, ensures that officers receive adequate notice of an internal investigation
33 (A.R.S. § 38-1104(A)), “just cause” for termination (A.R.S. § 1101(7)), a requirement that
34 an IA investigation is conducted within 180 days (A.R.S. § 38-1110), and specific
35 appellate rights from a disciplinary decision (A.R.S. §§ 38-1106, -1107).

36 Defendants are unsure whether invalidating previous IA investigations, disciplinary
37 decisions, and/or grievance decisions by MCSO and instituting new ones in their place
38 would violate the timeliness provisions of A.R.S. § 38-1110(C). *Id.* (“Failure to conduct
39 an investigation within one hundred eighty calendar days may result in the appeal board
40 dismissing any discipline ordered if it is determined that the employer did not make a

1 committed to working with the Court and Plaintiffs to satisfactorily resolve their concerns
2 so the identified investigations may be addressed to the Court's satisfaction.

3 **C. Defendants' proposed reorganization of IA investigations and final**
4 **decision making authority over MCSO discipline. [¶¶ 903-907].**

5 To address the Court's concerns regarding the integrity of the Professional
6 Standards Bureau ("PSB"), Sheriff Arpaio and the Chief Deputy are committed to
7 ensuring the following re-organization of IA investigations at MCSO:

- 8 • All PSB investigators have been IA certified, interview
9 trained, and detective certified. All Complaints will be
10 provided directly to PSB, who will then assign an
11 investigator.
- 12 • Upon completion of the investigation of sworn deputies
13 and the identified civilian counterparts, the investigation
14 will be presented to the Captain over PSB, currently
15 Captain Molina, for findings.
- 16 • Upon completion of the findings, the packet will be sent to
17 Compliance to complete their quality control check. If
18 there is an identifiable issue that needs PSB attention, the
19 packet will be resubmitted to PSB.
- 20 • Once approval from Compliance is completed, the packet
21 will then be presented to the Appointed Authority, which
22 will be Chief Holmes.
- 23 • The Chief Deputy will no longer be involved in the

24 good faith effort to complete the investigation within one hundred eighty calendar days.
25 A.R.S. § 38-1110(C)."). Likewise, the new investigations outlined in ¶ 904 might run
26 against the 180-day deadline to initiate an investigation of misconduct to the extent
27 MCSO was put on notice that an investigation should occur. *See also* A.R.S. § 38-
28 1104(A).

29 Finally, Defendants are unsure whether this Court can invalidate discipline that was
30 imposed on an individual where an appeal was taken, and a final decision was rendered by
31 an Arizona court. *See In re Gruntz*, 202 F.3d 1074, 1078 (9th Cir. 2000) ("Thus, it
32 follows that federal district courts have no authority to review the final determinations of a
33 state court in judicial proceedings.") (citation omitted); *Dubinka v. Judges of Superior*
34 *Court of State of Cal. for County of Los Angeles*, 23 F.3d 218, 221 (9th Cir. 1994)
35 ("Federal district courts ... may not exercise appellate jurisdiction over state court
36 decisions."); *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) (federal bankruptcy courts should
37 not invalidate the results of state criminal proceedings); *see also Rooker v. Fidelity Trust*
38 *Co.*, 263 U.S. 413 (1923) (federal statutory jurisdiction over direct appeals from state
39 courts lies exclusively in the Supreme Court and is beyond the original jurisdiction of
40 federal courts); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)
41 (the *Rooker* jurisdictional bar extends to particular claims that are "inextricably
42 intertwined" with those a state court has already decided).

1 preliminary findings or the final findings.

- 2
- 3 • The PSB packet will be reviewed by the Appointed Authority regardless of whether PSB makes a sustained or non-sustained finding.
 - 4 • Regarding district investigations, the assigned district investigator will perform the investigation. Once completed, PSB will perform the quality control of all district investigations. Additional sworn personnel have been added to PSB to assist with the increased caseload and quality control with district cases. If the district investigation is not satisfactory, it will be returned to the district for completion.
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 - 8 • Further, under previous policies, only the Chief Deputy could initiate a truthfulness investigation/findings. This exclusive authority is eliminated. A truthfulness investigation/findings can be initiated by PSB.
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 - 11 • As a final step to the re-organization, a detention Captain and Lieutenant will be added to PSB to deal exclusively with complaints involving detention officers and their identified civilian counter-parts.
 - 12
 - 13
 - 14 • To accomplish this re-organization, the following policies will be updated: CP-8, CP-3, CP-5 and GH-2.

15 In the event an internal investigation relates to the interests of the Plaintiff
 16 class pursuant to paragraphs 905-906 of the Court's Findings of Fact *or* if the principal of
 17 the internal investigation is ranked above the appropriate MCSO decision maker, Sheriff
 18 Arpaio suggests the following additional steps:

- 19
- 20 • The appropriate MCSO decision maker will forward his/her determination to an official in an outside agency or qualified individual for an independent review and final determination of discipline. However, termination of any MCSO personnel will remain the sole province of the Sheriff or his MCSO designee.
 - 21
 - 22 • The outside official's final determination and any associated discipline will be reported to the Monitor and the Court.
 - 23
 - 24 • This will occur regardless of whether the IA investigation is sustained or not-sustained.
 - 25

26 Finally, pursuant to paragraph 907 of the Court's Findings of Fact, Sheriff
 27 Arpaio proposes that all investigative and disciplinary authority should be returned to
 28 Sheriff Arpaio and/or his designee after the Court finds MCSO in full compliance with the

1 injunctive relief it has ordered.⁵

2 **III. ACCEPTING RESPONSIBILITY IN A PUBLIC FORUM.**

3 Sheriff Arpaio and the Chief Deputy will appear in a public forum to
4 acknowledge violations of the Court's orders. The statement would be videotaped and
5 disseminated for viewing by members of the public who are unable to attend the forum.

6 **IV. SUGGESTED REVISIONS TO MCSO'S POLICIES AND TRAINING**
7 **(COUNTS 2/3).**

8 The Court recommended remedies designed to ensure that disclosure
9 violations would not occur in the future. Sheriff Arpaio agrees with the Court that there
10 should be a revision or creation of policies and practices in the areas of personnel
11 supervision, supervisory structure, staffing and training, IA investigations, MCSO
12 disciplinary policies, MCSO policies related to complaint intake, tracking, and
13 accountability, and any necessary training and staffing measures designed to implement
14 these corrective measures. [Doc. 1677 at ¶ 895]. Moreover, Sheriff Arpaio agrees with
15 the Court that there should be a revision or creation of new IA policies and practices that
16 address conflicts, bias and appearance of impropriety, hearing procedures that are fair to
17 the principal and the MCSO, the requirement of an explanation when overturning initial or

18 ⁵ In the hope that the Court fashions a constitutionally adequate civil remedy for
19 the violations it has found in its findings, specifically in ¶¶ 905-907 of its Findings of
20 Fact, Defendants wish to note that a court's exercise of its contempt authority should be
21 tempered by the principle that the least possible power adequate to achieve the end
22 proposed should be used in contempt cases. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481
23 U.S. 787, 801 (1987); *see also Rizzo v. Goode*, 423 U.S. 362 (1976) (noting federalism
24 concerns of federal district courts issuing injunctive relief on state government agencies);
25 *see also Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("It is
26 difficult to think of a greater intrusion on state sovereignty than when a federal court
27 instructs state officials on how to conform their conduct to state law."); *City of Los*
28 *Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (jurisprudential concerns of "equity, comity
and federalism" sharply constrict federal judicial oversight of "state law enforcement
authorities."); *id.* at 113 (comity counsels in favor of permitting state judiciary systems to
oversee state law enforcement practices); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)
(same); *Coleman v. Espy*, 986 F.2d 1184, 1190-91 (8th Cir. 1993) (sovereign immunity
precludes injunctive relief ordered by federal district court for failure to obey a court
order). The overarching federalism concern is particularly manifest here, given that
Arizona county sheriffs derive their powers directly from the Arizona Constitution. AZ.
CONST., art. XII, §§ 3, 4 (A county sheriff occupies a constitutionally-created,
independently-elected county office with "powers . . . as prescribed by law."); A.R.S. §

1 final sustained discipline, and specification of the extent of grievance authority. [*Id.* at ¶
2 896]. Finally, Sheriff Arpaio agrees with the promulgation of grievance policies designed
3 to address conflicts of interest and the ability of PSB to address evidence first presented
4 by a principal at a name-clearing hearing. [*Id.* at ¶ 898].

5 As per the Court's suggestion, Sheriff Arpaio looks forward to receiving
6 Plaintiffs' expert's suggestions regarding what specific training and policy changes are
7 required in light of the deficiencies discussed in the Court's Order. [*Id.* at ¶ 900]. Sheriff
8 Arpaio looks forward to discussing these training and policy issues with Plaintiffs, and
9 plans to avoid further litigation on these issues.

10 **V. ATTORNEYS' FEES.**

11 As the Supreme Court recognized in *Chambers v. NASCO, Inc.*, 501 U.S.
12 32, 45 (1991), a court may assess attorneys' fees as a sanction for the "willful
13 disobedience of a court order." *Id.* at 258 (quoting *Fleischmann Distilling Corp. v. Maier*
14 *Brewing Co.*, 386 U.S. 714, 71 (1967)). Should the Court order attorneys' fees to
15 Plaintiffs, Defendants reserve the right to challenge the reasonableness of the amount of
16 fees and costs Plaintiffs request.

17 **VI. CONCLUSION.**

18 Defendants have earnestly attempted to provide the Court with remedial
19 measures that fully address the Court's findings and concerns, so that this matter can be
20 concluded. However, Defendants reiterate that, in the event the Court does not find
21 Defendants' suggested remedies to be sufficient to fully address the issues identified in its
22 Findings of Fact, they ask that the Court grant Defendants the opportunity to develop
23 additional remedies that address the Court's concerns.⁶

24
25 ⁶ While Defendants are committed to doing everything in their power to assist the
26 Court and Plaintiffs in resolving this case to everyone's satisfaction, they do, however,
27 object to the Court's Order precluding them from challenging the Court's Findings of
28 Fact. [Doc. 1680]. Defendants are well aware of Fed.R.Civ.P. 52(a)(5) ("A party may
later question the sufficiency of the evidence supporting the findings, whether or not the
party requested findings, objected to them, moved to amend them, or moved for partial
findings."). However, because Defendants do not know what the final outcome of this
case will be, and do not know whether the final outcome will require a previous challenge

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DATED this 27th day of May, 2016.

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

By /s/John T. Masterson
John T. Masterson
Joseph J. Popolizio
Justin M. Ackerman
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004
Attorneys for Defendant Joseph M. Arpaio
and the Maricopa County Sheriff's Office

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2016, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing; and served on counsel of record via the Court's CM/ECF system.

/s/Karen Gawel

to the findings, Defendants believe that due process entitles them to the opportunity and time to raise all such challenges now, as might be necessary to preserve any appellate rights they might later need to assert.