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11 IN THE UNITED STATES DISTRICT COURT FOR THE
 12 DISTRICT OF ARIZONA

13 MANUEL DE JESUS ORTEGA
 14 MELENDRES, on
 15 behalf of himself and all others similarly
 16 situated; *et al.*

16 Plaintiffs,

17 and

18 UNITED STATES OF AMERICA
 19 Plaintiff-Intervenor,

20 v.

21 JOSEPH M. ARPAIO, in his official
 22 capacity as Sheriff of Maricopa County, AZ;
 23 *et al.*

24 Defendants.

No. 2:07-cv-02513-GMS

**UNITED STATES’
 MEMORANDUM IN RESPONSE
 TO FINDINGS OF FACT AND
 ORDER SETTING A HEARING
 FOR MAY 31, 2016**

1
2 Pursuant to the Court’s invitation in its May 13, 2016 Findings of Fact (Doc. 1677
3 at 162), the United States hereby files this responsive memorandum to address five points
4 raised in the Court’s findings: (1) the Court’s sources of authority in ordering additional
5 remedies; (2) policy changes and additional training required at MCSO as a result of the
6 Court’s findings; (3) misconduct investigations to be conducted pursuant to paragraphs
7 903 to 907 of the Court’s findings; (4) structural reforms required at MCSO; and (5) the
8 Court’s proposal regarding expert testimony in paragraphs 899 and 900 of its findings.

9 **I. Sources of Authority for Ordering Remedies**

10 As the Court noted in its findings, the Court has multiple sources of authority for
11 ordering remedies to address the deficiencies it has identified in MCSO’s misconduct
12 investigations. To begin with, it is clear that courts have the authority to modify their
13 injunctions in the event that changed circumstances require it: “We are not doubtful of
14 the power of a court of equity to modify an injunction in adaptation to changed
15 conditions” *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). “The source of
16 the power to modify is of course the fact that an injunction often requires continuing
17 supervision by the issuing court and always a continuing willingness to apply its powers
18 and processes on behalf of the party who obtained that equitable relief.” *Sys. Fed’n No.*
19 *91, Ry. Emp. Dep’t, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961); *see also Anderson v.*
20 *Cent. Point Sch. Dist. No. 6*, 746 F.2d 505, 507 (9th Cir. 1984); 11A Charles A. Wright &
21 Arthur R. Miller, *Federal Practice & Procedure* § 2961 (3d ed.). The Court has now
22 identified additional constitutional violations, including entirely new categories of
23 constitutional violations than those known at trial. The Court has found many more
24 violations of the Fourth Amendment’s prohibition on unlawful detentions and arrests than
25 were known at trial, due to MCSO’s intentional failure to abide by the Court’s 2011
26 preliminary injunction. (Doc. 1677 ¶ 9-10 (noting ongoing violations of the preliminary
27 injunction until May 2013); *id.* ¶ 884 (“Unknown at the time to the Plaintiffs and to this
28 Court, the MCSO had deprived the Plaintiffs of considerable evidence of misconduct

1 towards members of the Plaintiff class.”.) The Court also found widespread
2 misappropriation of personal property, which violates the Fourth Amendment’s
3 prohibition on unlawful seizures. (*Id.* ¶ 885 (“Plaintiffs would have been able to
4 demonstrate that, among other things, the MCSO routinely confiscated the personal
5 property of members of the Plaintiff class without justification.”). Finally, the Court
6 found that MCSO’s internal affairs systems discriminated against members of the
7 Plaintiff class. (*Id.* (describing MCSO’s “internal investigation policies and practices” as
8 “inadequate, bad faith, and discriminatory”).) These constitutional violations remained
9 concealed from the Court due in part to MCSO’s flawed internal affairs systems. (*Id.*
10 (“[Plaintiffs] would have also been able to demonstrate [at trial] the MCSO’s inadequate,
11 bad faith, and discriminatory internal investigation policies and practices as well as
12 additional harms.”).) Had the Court been aware of these issues at trial, it would have
13 entered broader injunctive relief. (*Id.* (“The Court would have been able to timely
14 evaluate that evidence in fashioning the appropriate injunctive relief for the Plaintiffs.”);
15 *id.* ¶ 890 (“Had the . . . withheld evidence and the information to which it led been
16 presented at trial, the Court would have entered injunctive relief much broader in
17 scope.”).) *Hutto v. Finney*, 437 U.S. 678, 687 (1978) (holding that, to remedy
18 constitutional violations, the district court “had ample authority to go beyond earlier
19 orders” and to take “the long and unhappy history of the litigation into account”); *Swann*
20 *v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) (“Once a right and a violation
21 have been shown, the scope of a district court’s equitable powers to remedy past wrongs
22 is broad, for breadth and flexibility are inherent in equitable remedies.”). Now that those
23 constitutional violations have come to light, it is necessary for the Court to order
24 additional injunctive remedies to address them.

25 The Court also has inherent authority to alter and amend its permanent injunction
26 in light of frauds committed on the Court. Fed. R. Civ. P. 60(d)(3); *see Chambers v.*
27 *NASCO, Inc.*, 501 U.S. 32, 44 (1991); *United States v. Estate of Stonehill*, 660 F.3d 415,
28 444 (9th Cir. 2011); 11 Charles A. Wright & Arthur R. Miller, *Federal Practice &*

1 Procedure § 2870 (3d. ed.). Here, MCSO has committed fraud not only against the
2 Plaintiff class, but also against the integrity of this Court. MCSO attempted, through
3 purposefully inadequate internal affairs investigations, to deceive the Court and Monitor
4 about the seriousness and extent of its employees' misconduct—misconduct that violated
5 the constitutional rights of the Plaintiff class. Furthermore, as the Court noted in its
6 findings (Doc. 1677 ¶ 891), the Court has inherent authority to enter remedies that
7 prevent the abuse of the judicial process. *Chambers*, 501 U.S. at 44. MCSO's history of
8 abuses of the judicial process in this case alone stretches from at least discovery all the
9 way through to when MCSO personnel made bad faith, deliberate misstatements of fact
10 while testifying under oath during the contempt hearing. It is thus appropriate for the
11 Court to issue remedies aimed at preventing the recurrence of these widespread, systemic
12 abuses.

13 The Court also has authority to issue remedies for civil contempt that are
14 “designed to compel future compliance with a court order.” *Int'l Union, United Mine*
15 *Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994). Internal affairs systems normally
16 ensure that law enforcement personnel abide by legal standards (Doc. 1677 ¶ 889 (“An
17 effective and honest internal affairs policy is a necessary element of the MCSO's self-
18 regulation.”).) As this Court has stated in its findings, however, MCSO's existing internal
19 affairs system has both condoned and encouraged repeated violations of this Court's
20 orders. In light of this precedent, it is necessary for the Court to exert its authority to
21 mandate reforms of MCSO's internal affairs systems as a means of compelling MCSO's
22 compliance not only with the Court's permanent injunction (Doc. 606) and its previous
23 order regarding internal affairs investigations (Doc. 795), but also with orders that the
24 Court may enter in the future.

25 **II. Policy Changes, Additional Training, and Other Remedies**

26 Throughout the contempt findings, the Court identified numerous ways in which
27 deficiencies in MCSO's policies and training regarding misconduct investigations,
28 complaint intake, and supervision caused violations of the rights of the Plaintiff class.

1 Part of an adequate remedy for these violations should include orders to require MCSO to
2 reform its systems for investigating misconduct.

3 **A. Changes to Internal Affairs and Discipline Policies**

4 In a Notice of Authorities filed after the contempt hearing (Doc. 1590), the United
5 States provided the Court with four consent decrees that included provisions related to
6 internal affairs systems. Those consent decrees include provisions related to conflicts of
7 interest; subversion of the discipline process by presenting new evidence at pre-discipline
8 hearings; the appropriate handling of incomplete investigations; consequences for
9 investigators who perform inadequate investigations; documentation of decisions by
10 those reviewing decisions; qualifications and training requirements for those conducting
11 investigations; the use of leading questions during internal affairs interviews; the
12 consideration of promotional candidates' disciplinary history and status; and prohibitions
13 on retaliation for participation in a misconduct investigation. (*Id.* at 3-4.) The imposition
14 of such remedies is amply supported by the record and is certainly appropriate here.
15 (Doc. 1677 ¶¶ 410-12, 437-49, 707-11, 771-75, 869 (conflicts of interest); ¶¶ 451, 546,
16 870 (new evidence presented at predetermination and name-clearing hearings); ¶¶ 718-24
17 (incomplete investigations); ¶¶ 648-53, 712 (inadequate investigations); ¶¶ 678, 746,
18 756-57, 797, 871 (documentation of decisions); ¶¶ 826-37 (qualifications and training of
19 investigators); ¶¶ 588, 637, 639, 667, 833 (leading questions); ¶¶ 698, 702, 704-07, 859
20 (mis-categorization of misconduct); ¶¶ 465-66, 499, 509-12, 535-37, 574-83, 589, 717,
21 755-59 (discipline and promotions); ¶¶ 798-808, 824 (retaliation).)

22 **B. Changes to Civilian Complaint Policies**

23 The Court reached several findings related to civilian complaints, including a
24 finding that “complaints were not properly transmitted, processed, or investigated.” (Doc.
25 1677 ¶ 852.) The Court noted that MCSO has no systems in place to ensure that
26 complaints are appropriately categorized, and miscategorization can lead to serious
27 misconduct going unaddressed. (*Id.* ¶¶ 859-864.) MCSO also does not have a policy for
28

1 when a civilian complains directly to a deputy about that deputy's own misconduct. (*Id.* ¶
2 866.)

3 The United States urges the Court to order remedies to correct these deficiencies.
4 When a civilian at the scene of an incident indicates to a deputy that he or she would like
5 to make a misconduct complaint or requests a complaint form for alleged misconduct,
6 MCSO policy should provide that the deputy should immediately inform his or her
7 supervisor, who will respond to the scene to assist the individual in providing and
8 accepting appropriate forms. (If the Court orders this change to policy, the United States
9 suggests that this increased supervisory responsibility be taken into account with any
10 changes the Court may order regarding the appropriate ratio of sergeants to deputies. (*Id.*
11 ¶ 849.)) The supervisor should then immediately notify the Professional Standards
12 Bureau, who should be given sole authority for conducting investigations into civilian
13 complaints. This will ensure consistent and appropriate categorization and investigation
14 of complaints across the agency.

15 The Court noted that MCSO does not employ “testers”—individuals who pose as
16 civilians making complaints—to ensure that employees respond to and process
17 complaints appropriately. The United States urges the Court to order MCSO to initiate a
18 civilian complaint testing program focused on complaint intake, including testing of
19 complaints made in person at MCSO facilities, complaints made telephonically, and
20 complaints made electronically over email or through MCSO's website. The testing
21 program should include the following elements:

- 22 • Sufficient random and targeted testing to assess the complaint intake
23 process, utilizing surreptitious video and/or audio recording of testers'
24 interactions with MCSO personnel to assess the appropriateness of
25 responses and information provided;
- 26 • An assessment of whether personnel enter testers' complaints into IA Pro
27 and include accurate and complete information; and
- 28 • Public reports on the outcome of the testing program.

1 In its contempt findings, the Court also notes that MCSO’s history of
2 misappropriating and destroying personal property “gives rise to a reasonable inference
3 that at least some of the owners of such property would have registered complaints with
4 the MCSO.” (Doc. 1677 ¶ 852.) The United States submits that this history—in
5 conjunction with MCSO’s record of constitutional violations against Latinos—gives rise
6 to another reasonable inference: that victims of MCSO employees’ misconduct are likely
7 to have been reluctant to make complaints directly to MCSO, the agency that violated
8 their rights. To address this problem, the Court should permit the Monitor, in close
9 consultation with the parties and the Community Advisory Board, to launch an
10 information campaign designed to inform the public about the civilian complaint process,
11 including information about how to contact the Monitor or the Community Advisory
12 Board as an alternative to registering complaints directly with MCSO. As is their current
13 practice, the Monitor and Board would then forward any complaints they receive to
14 MCSO. The United States notes that MCSO would ideally undertake such a campaign
15 itself, but, given its track record in and issues it has raised about community engagement
16 (Doc. 1677 ¶ 368, p. 66 n. 13), the community would likely be better served if the
17 Monitor fulfilled this role.

18 **C. Additional Training**

19 The United States urges the Court to order additional training at MCSO on at least
20 the following topics: the contempt proceedings and resulting remedies; accepting
21 complaints from civilians; identifying and reporting misconduct; and conducting and
22 reviewing misconduct investigations. Training on the contempt proceedings, accepting
23 complaints from civilians, and identifying and reporting misconduct should be required
24 for all personnel. Training on conducting and reviewing misconduct investigations should
25 be required for anyone in a supervisory position—sergeants and above. If the Court
26 orders supervisors to have a more active role in accepting civilian complaints (see
27 subsection II.B, above), supervisors should also be required to have specialized training
28 on accepting complaints from civilians. As the Court has done with previous training

1 required under the permanent injunction, the Court should ensure that counsel for the
2 Plaintiff class and Plaintiff-Intervenor are afforded an opportunity to review any training
3 materials and provide comments and recommendations before the training is delivered.
4 (Doc. 606 ¶¶ 15, 46.)

5 **D. Auditing and Continuous Improvement Systems**

6 The Court should not only ensure that MCSO conducts thorough and impartial
7 misconduct investigations, but also that it develops systems to identify and correct its
8 own deficiencies in those investigations. The United States thus urges the Court to order
9 that MCSO develop an auditing system that is designed to periodically review at least
10 stratified random samples of MCSO's completed misconduct investigations and identify
11 any procedural irregularities. Such an auditing system for internal affairs is currently in
12 use at the Seattle Police Department. *See* Seattle Police Department, Office of
13 Professional Accountability, <http://www.seattle.gov/opa/opa-reports>. If MCSO's audits
14 identify any irregularities, the Court should require MCSO to address them by either
15 correcting them or documenting why they were necessary.

16 **III. Independent Entity to Conduct Misconduct Investigations**

17 In its findings, the Court has described a set of remedies tailored to address the
18 unique types of misconduct and resulting harms that it has identified: in addition to
19 implementing new or revised policies and training for MCSO's internal affairs systems,
20 the Court has suggested that an appropriate remedy for the bias, incompetence, and bad
21 faith running throughout MCSO's internal systems of accountability is to empower an
22 independent authority to conduct certain internal affairs investigations and to impose
23 discipline. (Doc. 1677 ¶¶ 903-07.) The investigations would be limited to those declared
24 void or invalid by the Court, those that MCSO never initiated at all due to indifference or
25 manipulation of command staff, those that directly relate to misconduct or untruthfulness
26 that occurred during the contempt proceedings, and those that involve future harms to the
27 Plaintiff class. (*See id.* ¶¶ 903-06.) These remedies are well within the Court's power, as

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1 the misconduct found by the Court justifies an even broader remedy: the imposition of a
2 receivership.

3 **A. Legal Standard for Appointing an Independent Entity**

4 The Court's authority to appoint an independent entity flows from the Court's
5 broad equitable authority to ensure compliance with its orders and federal law, including
6 the power to "displace local enforcement . . . if necessary to remedy the violations of
7 federal law" and to assume "direct supervision" of state property "if state recalcitrance or
8 state-law barriers should be continued." *Washington v. Washington State Commercial*
9 *Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 695-96 (1979); *see also Plata v.*
10 *Schwarzenegger*, 603 F.3d 1088, 1093-98 (9th Cir. 2010), *aff'd sub nom, Brown v. Plata*,
11 563 U.S. 493 (2011). In cases such as this one, "[w]here more traditional remedies, such
12 as contempt proceedings or injunctions, are inadequate under the circumstances, a court
13 acting with its equitable powers is justified, particularly in aid of an outstanding
14 injunction, in implementing less common remedies, such as a receivership, so as to
15 achieve compliance with a constitutional mandate." *Shaw v. Allen*, 771 F. Supp. 760, 762
16 (S.D. W. Va. 1990) (receiver for McDowell County Jail). The Court "has the discretion—
17 indeed, the duty—to take immediate action in a manner coextensive with the degree of
18 ongoing and persistent harm." *Plata v. Schwarzenegger*, No. 01-1351, 2005 WL 2932243
19 at *8 (N.D. Cal. May 10, 2005).

20 A seven-part standard guides a court's discretion in appointing a receiver:

21 (1) Whether there is a grave and immediate threat or actuality of harm to
22 plaintiffs; (2) whether the use of less extreme measures of remediation has
23 been exhausted or proven futile; (3) whether continued insistence that
24 compliance with the Court's order would lead only to confrontation and
25 delay; (4) whether there is a lack of leadership to turn the tide within a
26 reasonable period of time; (5) whether there is bad faith; (6) what resources
27 are being wasted; and (7) whether a receiver is likely to provide a relatively
28 quick and efficient remedy.

1 *Plata*, 2005 WL 2932243, at *7; *see also Plata*, 603 F.3d at 1093-98; *Dixon v. Barry*, 967
2 F.Supp. 535, 550 (D.D.C. 1997); *Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir.
3 1976).

4 A receivership typically involves the wholesale transfer of institutional authority,
5 but courts have also imposed more limited receiverships. In the *Plata* case cited above,
6 for example, the court appointed a receiver to remedy only “the undisputed constitutional
7 deficiencies in prisoners’ health care” in the California Department of Corrections, and
8 not to take over management of the entire corrections system. *Plata*, 603 F.3d at 1097.

9 **B. The Standard for Appointing an Independent Entity Is Met Here**

10 In this case, empowering an “independent authority” to conduct certain internal
11 affairs investigations would represent a more limited remedy than a traditional
12 receivership. The transfer of the Sheriff’s authority over specific categories of
13 misconduct investigations would be tailored to harms that the Court has identified and
14 designed to achieve a narrow outcome that cannot be reached any other way: impartial
15 and thorough internal affairs investigations free from the undue influence of MCSO
16 command staff.

17 This remedy is clearly supported by the seven-part receivership test cited above.
18 First, there is a “grave and immediate threat or actuality of harm to plaintiffs.” The Court
19 found that MCSO intentionally conducted deficient investigations into misconduct that
20 harmed members of the Plaintiff class, including unjustified detentions and arrests of
21 Latino individuals and misappropriations of Latinos’ property. Latinos constituted “the
22 overwhelming majority of the victims of the multiple acts of misconduct that were
23 subjects of virtually all of the flawed investigations.” (Doc. 1677 ¶ 888.) MCSO
24 intentionally minimized misconduct that impacted the Plaintiff class through
25 misclassification or failure to follow up. (*Id.* ¶¶ 509-15 (MCSO instituted a
26 discriminatory policy to aggregate misconduct that harmed Latinos and to thus minimize
27 the discipline imposed); *see also id.* ¶¶ 278, 290, 292, 608, 645 (describing investigations
28 never initiated).) In sum, MCSO has repeatedly and consistently failed to hold its own

1 employees accountable for violating the rights of Latinos, and this has resulted, and
2 continues to result, in grave and immediate harm to Latinos.

3 Second, “the use of less extreme measures of remediation has been exhausted or
4 proven futile.” MCSO has now had multiple opportunities to conduct professional and
5 impartial investigations into misconduct that impacts the rights of Latinos. It has
6 repeatedly failed to do so. MCSO was aware that its investigations would be monitored
7 and assessed. This was made clear by the Court’s 2014 Order that expanded the
8 Monitor’s role regarding misconduct investigations related to violations of the Court’s
9 orders or to matters concerning Deputies Armendariz or Perez. (Nov. 20, 2014 Order,
10 Doc. 795 at 17-21.) The defendants were “fully advised and aware that the adequacy and
11 good faith of their investigations would be subject to evaluation by the Parties and the
12 Court.” (Doc. 1677 ¶ 886.) But they were unable and unwilling to conduct investigations
13 in a fair and impartial manner (*see, e.g., id.* ¶¶ 218-38 (finding that after being ordered by
14 the Court and the Monitor to quietly search for additional recordings of traffic stops made
15 by MCSO deputies, the MCSO violated the Court’s orders that same day, resulting in a
16 significant loss of evidence that likely would have showed harm to the plaintiff class)),
17 and, as noted in the attached Appendix, the Court was forced to declare a number of
18 MCSO’s internal investigations void.

19 Third, permitting MCSO to continue carrying out its own misconduct
20 investigations will only lead to “confrontation and delay.” The Court repeatedly found
21 that, at the highest level, MCSO believes the Court’s orders to be illegitimate.
22 Immediately following the issuance of the permanent injunction, Sheriff Arpaio and
23 Chief Deputy Sheridan began “maligining the order as unconstitutional, ‘ludicrous’ and
24 ‘crap’” to officers in MCSO training sessions. (*Id.* ¶ 367.) Sheriff Arpaio “knowingly and
25 intentionally” failed to implement the preliminary injunction because of his belief that
26 violation of the order would benefit his reelection campaign. (*Id.* ¶¶ 11-65.) And in
27 testifying about their roles directing the Seattle investigation—itsself a probe into a
28 conspiracy theory involving the Court—Sheriff Arpaio and Chief Deputy Sheridan both,

1 while under oath, made “deliberate misstatements of fact . . . in bad faith.” (*Id.* ¶ 378
2 (Arpaio); ¶ 385 (Sheridan); *see also* ¶¶ 66-92 (Chief Deputy Sheridan intentionally
3 violated the Court’s order); ¶¶ 93-120 (Former Executive Chief Sands intentionally
4 violated the Court’s order).)

5 Fourth, it is not just that there is a “lack of leadership to turn the tide within a
6 reasonable period of time.” Rather, MCSO’s leadership is directly responsible for the
7 Agency’s repeated violations. Four of MCSO’s current and former high level
8 commanders have been individually held in contempt. Other MCSO commanders and
9 representatives, including a lawyer whose role it is to provide legal advice to MCSO on
10 how to comply with the Court’s orders, have been untruthful in their testimony and in
11 their dealings with the Monitor. (*See id.* ¶¶ 342-48 (“Chief Deputy Sheridan, Captain
12 Bailey and Ms. Iafrate violated the specific and direct orders of this court without a
13 justifiable basis for doing so.”).)

14 Fifth, bad faith is abundant in this case. “The Defendants have engaged in multiple
15 acts of misconduct, dishonesty, and bad faith with respect to the Plaintiff class and the
16 protection of its rights.” (*Id.* at 3; *see, e.g., id.* ¶ 341 (Chief Deputy Sheridan’s suspension
17 of the investigation into 1459 Knapp IDs was bad faith attempt to avoid the Court’s order
18 requiring disclosure); ¶ 378 (Sheriff Arpaio’s testimony that he was unaware of any
19 MCSO investigation initiated against the Court was deliberate misstatement of fact made
20 in bad faith); ¶ 385 (Chief Deputy Sheridan’s testimony concerning the Montgomery
21 investigation made in bad faith); ¶ 463 (Chief Olson made bad faith determination that
22 Chief Trombi was unaware of the Court’s preliminary injunction); ¶ 668 (Captain Bailey
23 and Chief Deputy Sheridan’s defense of Sergeant Tennyson’s problematic questioning of
24 HSU deputies reflects “their own lack of good faith in directing the investigation and/or
25 in testifying about it”); ¶ 692 (MCSO carried out bad faith investigation into the
26 allegations raised by Cisco Perez that HSU deputies pocketed items).)

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1 Sixth, considerable resources are being wasted due to the MCSO's obfuscation
2 and delay. Despite strong oversight from the Monitor, the parties, and this Court, MCSO
3 carried out "whitewash" investigations (*id.* ¶ 690) that now must be completely redone.

4 Finally, putting into place an "independent authority" over internal affairs is the
5 most efficient way—and indeed, perhaps the *only* way—to transform MCSO's
6 misconduct investigations into an effective means of ensuring that deputies are held
7 accountable for constitutional violations. The re-investigation of cases found void or
8 invalid, the investigation of misconduct identified in the Court's findings, and the
9 handling of future misconduct allegations related to the Plaintiff class will, together, be a
10 significant undertaking, and one that will require dedication, expertise, and impartiality.
11 MCSO has demonstrated, and the Court has found, that MCSO does not have the
12 capability and the impartiality to handle these functions on its own at this time.

13 **C. Misconduct Investigations Conducted by an Independent Entity**

14 In paragraphs 903 to 907 of its contempt findings, the Court has suggested that an
15 independent entity should be vested with the authority to conduct three categories of
16 investigations: those found void by the Court, those involving as-yet-uninvestigated
17 misconduct identified by the Court in its findings, and possible future misconduct related
18 to the Plaintiff class. The Court also has asked the parties to address the possibility of
19 suspending the Sheriff's authority for invalidating decisions made by the independent
20 entity and for the transfer of authority back to MCSO at the appropriate time. The United
21 States addresses each of those topics below.

22 *i. Investigations Found Insufficient, Invalid, or Void by the Court*

23 The United States requests that the Court appoint an independent authority to
24 conduct misconduct investigations found by the Court to be insufficient, invalid, or void.
25 These investigations are listed in the attached Appendix. Given the scope and complexity
26 of such investigations, the United States recommends that the independent authority have
27 a team of investigators, in order to be able to complete the investigations in a timely
28 manner. The establishment of such an independent authority would, clearly, be a less

1 extreme measure than a traditional receivership. Because the legal standard for
2 receivership is fully met here, as discussed above, the Court is well within its authority to
3 impose the lesser remedy of an independent authority to conduct misconduct
4 investigations.

5 The Court has found that, in many instances, MCSO officials deliberately
6 extended investigations past the 180-day statute of limitations under state law, A.R.S. §
7 38-1110 (2015), in a bad-faith effort to make it impossible to impose discipline. (*See*
8 Doc. 1677 ¶¶ 574-83.) For this reason, when these and other investigations are conducted
9 anew and discipline is imposed, deputies are likely to appeal that discipline to the County
10 Merit Commission on the grounds of timeliness; the Commission could then rule in
11 deputies' favor and rescind the discipline. Such rulings would clearly stand as an
12 impediment to the vindication of the constitutional rights of the Plaintiff class. The Court
13 should therefore consider designing a process whereby disciplinary appeals will not
14 frustrate the Court's objectives in this way. The Court could, for example, designate that
15 any cases in which the Commission overturns the independent entity's findings or
16 discipline would come to the Court for final resolution. Given that MCSO personnel are
17 public-sector employees who likely have a property interest in their continuing
18 employment, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985), the
19 Court should consider designing mechanisms to ensure that the imposition of discipline
20 comports with any constitutional procedural due process rights that personnel might have.

21 *ii. Investigations of Incidents Identified in the Court's Contempt*
22 *Findings*

23 The United States also requests that the Court appoint an independent entity to
24 conduct misconduct investigations into matters identified in the Court's contempt
25 findings, as described in paragraph 904 of the Findings. The United States further
26 recommends that this independent entity be vested with a screening function, meaning
27 that the entity will review the Court's findings and the misconduct investigations
28 discussed within, identify those that it believes fall within the broad parameters of

1 Paragraph 904, and provide the parties an opportunity to suggest additional investigations
2 or object to those identified by the independent entity. This process will ensure that the
3 Court's intentions are fully realized and will avoid the risk of MCSO subverting the
4 Court's order or evading the independent entity's review by miscategorizing allegations.

5 *iii. Investigations of Future Incidents Related to the Plaintiff Class*

6 With regard to investigations of future allegations of misconduct related to the
7 Plaintiff class, the Court has already granted the Monitor substantial authority over such
8 investigations. Under the Court's November 20, 2014 Order (Doc. 795), the Monitor
9 already has the authority to: receive complete access to all MCSO internal affairs matters
10 and receive ongoing updates from the Professional Standards Bureau about the status and
11 progress of all investigations (*id.* at 17-19); advise MSCO as appropriate on those
12 investigations, such as by providing guidance on conducting investigations, including the
13 identification of possible misconduct, the creation of investigative plans, the course of
14 interviews, the collection of evidence, and the writing of investigative reports (*id.*); and
15 conduct independent investigations of misconduct upon approval by the Court (*id.* at 19-
16 20).

17 The United States requests that oversight of investigations or allegations relating
18 to the Plaintiff class be extended further, by granting an independent entity the authority
19 to make findings in misconduct investigations (i.e., determinations of whether
20 misconduct occurred) and to determine the level of discipline to be imposed for sustained
21 allegations of misconduct. The independent entity should also be vested with the
22 authority to conduct its own investigations, as the Monitor is now, and with the authority
23 to hire investigators into the Professional Standards Bureau and remove from the Bureau
24 investigators who repeatedly conduct deficient investigations. The United States
25 recommends that this independent entity's oversight function in a separate, but
26 complementary, fashion with the Monitor's review; the Monitor would retain its role in
27 ensuring that findings and discipline are consistent with MCSO's policy and the Court's
28 injunctive orders. As the Court's contempt findings make clear, expanding oversight of

1 the investigations of allegations relating to the Plaintiff class is necessary to ensure that
2 serious misconduct is addressed and that constitutional rights are protected. This vesting
3 of authority in an independent entity is also necessary because the Court's less intrusive
4 remedies have failed to yield adequate internal investigations, even when MCSO knew
5 that the Court, Monitor, and parties would subject its internal investigations to intense
6 scrutiny.

7 To ensure that the independent entity conducts investigations of all misconduct
8 related to the Plaintiff class, the United States recommends that the entity should review
9 all misconduct investigations at their initiation to determine whether the investigation
10 should be carried out by the entity or by MCSO.

11 *iv. Conditions for Returning Investigative and Disciplinary Authority to*
12 *MCSO*

13 The independent entity can be a temporary measure imposed only as long as
14 necessary to ensure accountability, and the United States suggests that the Court adopt
15 measures to assess when the independent entity is no longer necessary and systems for
16 phasing out its role. Specifically, the United States recommends that future investigations
17 relating to the interests of the Plaintiff class be conducted by the independent entity at
18 least until such time as MCSO has successfully implemented necessary policies and
19 training regarding misconduct investigations. After the necessary policies and training are
20 in place, the Court could transfer the authority to conduct investigations and impose
21 discipline back to MCSO; however, the independent entity should retain a parallel role in
22 those investigations, including receiving all information about investigations, conducting
23 its own investigations when necessary, and having the authority to overrule MCSO
24 regarding the findings of investigations and the discipline to be imposed.

25 We would expect that, as MCSO progresses in its implementation of the policy,
26 training, and related remedies regarding misconduct investigations, the quality of its
27 investigations will improve, and the independent entity will less and less frequently need
28 to exercise its authority to conduct its own investigations or to overrule MCSO regarding

1 findings or discipline. With this in mind, and in order to ensure that MCSO's progress is
2 durable, we recommend that an assessment of compliance with the Court's internal
3 affairs remedies include both a measure of the proportion of MCSO findings and
4 discipline with which the independent entity and the Monitor concur and a requirement
5 that the proportion stay at a certain level for a set period of time. A finding of sustained
6 compliance with the internal affairs remedies might require, for example, that the
7 independent entity concur with the outcomes of MCSO internal investigations in 95
8 percent or more cases over a continuous period of three years. Once MCSO has achieved
9 sustained compliance, full authority over misconduct investigations can revert to the
10 agency.

11 **IV. Structural Reforms**

12 In addition to changes in policies and training and the appointment of an
13 independent entity to conduct misconduct investigations, the United States urges the
14 Court to order structural changes in MCSO's internal affairs systems to ensure that they
15 remain impartial, thorough, and adequate to protect constitutional rights. The United
16 States respectfully suggests that the Court order changes to the configuration of the
17 Professional Standards Bureau and order measures to foster transparency regarding
18 MCSO's misconduct investigations.

19 **A. The Configuration of the Professional Standards Bureau**

20 The Court's findings demonstrate the many problems that can occur when the
21 head of the Professional Standards Bureau has ties with other components and personnel
22 in MCSO. (Doc. 1677 ¶¶ 407-09, 411, 619-26, 660-68, 684-89, 707-11, 774-75, 786-97,
23 803-08, 821-25, p. 104 n. 26 (finding, in numerous cases, that Captain Bailey's previous
24 positions and existing relationships led to inadequate investigations by the Professional
25 Standards Bureau).) As we indicated during oral argument on November 20, 2015, and in
26 the notice of authorities filed afterward, consent decrees entered into by the Department
27 of Justice and law enforcement agencies have at times required agencies to appoint a
28 civilian head of their internal affairs unit. (Nov. 20, 2015 Hr'g Tr. 4690; Doc. 1590 at 3.)

1 That remedy would be appropriate here. The Professional Standards Bureau should be
2 headed by a qualified civilian who is neither a current nor former employee of MCSO
3 and neither a current nor retired law enforcement officer. In terms of qualifications, it
4 would be advisable to require an individual with legal training, as such training would
5 help to ensure the proper application of policies and discipline and the sustainability of
6 discipline through the appeals process.

7 As another measure to enhance the independence and impartiality of the
8 Professional Standards Bureau, the Bureau should be physically located in a separate
9 building from other MCSO personnel. Upon information and belief, the Bureau is
10 currently housed within MCSO's headquarters building, along with the Sheriff, the Chief
11 Deputy, and much of the command staff. When those coming to the Bureau to be
12 interviewed can be readily observed by command staff, deputies may reasonably feel
13 intimidated, and the secrecy of investigations may be undermined.

14 MCSO has shown itself especially incapable of conducting impartial criminal
15 investigations of its own personnel, and the United States urges the Court to order MCSO
16 to enter into agreements with other law enforcement agencies whereby the other agencies
17 will conduct these investigations. In addition, MCSO should not be permitted to delay an
18 administrative investigation just because a criminal investigation is proceeding; the
19 investigations should proceed in parallel fashion. Parallel investigations are entirely
20 appropriate as long as there are mechanisms to prevent statements administratively
21 compelled under *Garrity v. New Jersey*, 385 U.S. 493 (1967) from tainting criminal
22 investigations.

23 **B. Measures to Foster Transparency in Misconduct Matters**

24 MCSO has gone to great lengths to shield the misconduct of its employees from
25 public view, and the failures in MCSO's misconduct investigations only came to light
26 because of the contempt proceedings. The United States thus urges the Court to order
27 measures that will enhance transparency regarding internal affairs investigations.
28 "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is

1 said to be the best of disinfectants; electric light the most efficient policeman.” Louis D.
2 Brandeis, *Other People’s Money* 62 (National Home Library Foundation ed. 1933).

3 Specifically, MCSO should be required to report to the public on misconduct
4 complaints and investigations. On at least a quarterly basis, the Professional Standards
5 Bureau should publish a report on misconduct matters, including:

- 6 • Aggregate data on complaints received from the public, broken down by
7 district; rank of principal(s); nature of contact (traffic stop, pedestrian stop, call
8 for service, etc.); nature of allegation (rudeness, bias-based policing, etc.);
9 complainants’ demographic information (age, gender, race, ethnicity, etc.);
10 complaints received from anonymous or third parties; and principals’
11 demographic information;
- 12 • Analysis of whether any increase or decrease in the number of civilian
13 complaints received from quarter to quarter is attributable to issues in the
14 complaint intake process or other factors;
- 15 • Aggregate data on internally-generated misconduct allegations, broken down
16 by similar categories as those for civilian complaints;
- 17 • Aggregate data on the processing of misconduct cases, including the number of
18 cases assigned to districts versus the Professional Standards Bureau; the
19 average and median time from the initiation of an investigation to its
20 submission by the investigator to the appropriate official; the average and
21 median time from the submission of the investigation by the investigator to a
22 final decision regarding discipline, or other final disposition if no discipline is
23 imposed; the number of investigations returned to the original investigator due
24 to conclusions not being supported by the evidence; and the number of
25 investigations returned to the original investigator to conduct additional
26 investigation;
- 27 • Aggregate data on the outcomes of misconduct investigations, including the
28 number of sustained, not sustained, exonerated, and unfounded misconduct

1 complaints; the number of misconduct allegations supported by a
2 preponderance of the evidence; the number of sustained allegations resulting in
3 a non-disciplinary outcome, coaching, written reprimand, suspension,
4 demotion, and termination; the number of cases in which findings were
5 changed after a predetermination or name-clearing hearing, broken down by
6 initial finding and final finding; the number of cases in which discipline was
7 changed after a predetermination or name-clearing hearing, broken down by
8 initial discipline and final discipline; the number of cases in which findings
9 were overruled, sustained, or changed by the County Merit Commission,
10 broken down by the finding reached by MCSO and the finding reached by the
11 Commission; and the number of cases in which discipline was altered by the
12 County Merit Commission, broken down by the discipline imposed by MCSO
13 and the disciplinary ruling of the County Merit Commission; and similar
14 information on appeals beyond the County Merit Commission; and

- 15 • Aggregate data on employees with persistent or serious misconduct problems,
16 including the number of employees who have been the subject of more than
17 two misconduct investigations in the previous 12 months, broken down by
18 major and minor misconduct; the number of investigations; the number of
19 employees who have had more than one sustained allegation of minor
20 misconduct in the previous 12 months, broken down by the number of
21 sustained allegations; the number of employees who have had more than one
22 sustained allegation of major misconduct in the previous 12 months, broken
23 down by the number of sustained allegations; and the number of criminal
24 prosecutions of employees, broken down by criminal charge.

25 In addition, MCSO should make detailed summaries of completed internal affairs
26 investigations readily available to the public to the full extent permitted under state law,
27 in electronic form on a designated section of its website that is linked to directly from
28 MCSO's home page with prominent language that clearly indicates to the public that the

1 link provides information about investigations of misconduct by MCSO employees.
2 These kinds of resources exist for other law enforcement agencies, including the District
3 of Columbia Metropolitan Police Department, *see* Office of Police Complaints,
4 Complaint Examiner Decisions, [http://policecomplaints.dc.gov/page/complaint-](http://policecomplaints.dc.gov/page/complaint-examiner-decisions)
5 [examiner-decisions](http://policecomplaints.dc.gov/page/complaint-examiner-decisions), and the Seattle Police Department, *see* Office of Professional
6 Accountability, Closed Case Summaries, [http://www.seattle.gov/opa/closed-case-](http://www.seattle.gov/opa/closed-case-summaries)
7 [summaries](http://www.seattle.gov/opa/closed-case-summaries).

8 **V. Expert Testimony**

9 During the contempt proceedings in the fall, the United States indicated its
10 willingness to present expert testimony if it would be helpful to the trier of fact in crafting
11 remedies. We also noted our view that an expedited process for presenting such
12 testimony would be appropriate. In light of the Court’s extensive findings, and consistent
13 with paragraphs 899 and 900 of the findings, experts may only be necessary to opine on
14 specific remedial measures where the parties cannot reach agreement.

15 The Court noted that it may find expert testimony helpful in areas where the Court
16 “has found flaws the MCSO has exploited in this action that, while requiring correction,
17 may not require the re-writing of MCSO policy.” (Doc. 1677 ¶ 899.) As paragraph 900
18 indicates, the United States agrees that the parties should attempt to reach resolution
19 regarding policy changes required by the Court’s forthcoming orders, should exchange
20 expert views if necessary, and should seek Court intervention for any related issues or
21 questions that the parties cannot resolve themselves. If expert testimony is necessary, the
22 parties would present it at that point.

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Respectfully submitted this 27th day of May, 2016.

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CERTIFICATE OF SERVICE

I certify that on or about May 27, 2016, I filed the foregoing through the Court's CM/ECF system which will serve a true and correct copy of the filing on counsel of record.

/s/ Paul Killebrew

APPENDIX

Paragraph/Page	IA Number	Allegation	Court's Finding
¶ 490, p. 86	IA #2014-543	Failure to implement injunction	Deemed "invalid"
¶ 572, p. 99	IA #2014-542	Failure to supervise Deputy Armendariz	Deemed "invalid"
¶¶ 584-91, pp. 101-02	IA #2014-544 through #2014-548	Policy violations during Armendariz stops	Deemed "problematic"
¶¶ 644-47, pp. 111-12	IA #2014-774 through #2014-783	IDs obtained by deputies other than Armendariz	Investigations "should not have been dropped"
¶ 653, p. 113-14	IA #2015-021 and IA #2014-541	Mishandling of evidence	Improperly "not sustained" as to Deputy Montoya prior to confession
¶ 692, p. 122	IA #2014-295	Criminal investigations of Cisco Perez allegations	Deemed "void"
¶ 693, p. 122	IA #2015-541	Administrative investigation of Cisco Perez criminal investigation	Deemed "void"
¶¶ 712 n. 38, 738, pp. 125, 130	IA # 2015-018	CDs, reports, license plates, IDs, passport	Deemed "invalid"
¶ 720, pp. 126-27 n. 40	IA #2014-801	License plate	"Inadequate Execution"
¶¶ 722, 733, pp. 127, 129	IA #2014-221	Armendariz umbrella investigation	Completion "manipulated to avoid accountability"
¶¶ 748-51, pp. 132-33	IA #2014-021	Theft of \$260	"Improperly investigated"
¶ 774, p. 135-36		Criminal and administrative Mackiewicz investigations	"Fundamentally Flawed"
¶ 807, p. 142		Mackiewicz's alleged steroid use	Investigator improperly removed