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January 16, 2014

Hon. Eric H. Holder, Jr.
Attorney General, United States of America
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

ICE Office of General Counsel
2035 North Central Avenue
Phoenix, Arizona 85004

Re: Melendres v. Arpaio, United States District Court, District of Arizona CV2007-02513-PHX-GMS; NOTICE OF CLAIM FOR BREACH OF CONTRACT AND CLAIM FOR IDEMNITY

Dear Attorney General Holder and ICE Office of General Counsel, Arizona:

You will recall that via letter dated April 17, 2009 from my attorneys to you, I and the Maricopa County Sheriff's Office ("MCSO"), as named defendants in the above-referenced litigation, tendered our defense to, and requested indemnification from, the United States in the above-referenced matter pursuant to Section XIII of the 2007 Memorandum of Agreement between myself, the MCSO, Maricopa County, State of Arizona and the United States Immigration and Customs Enforcement ("ICE") ("the MOA"). You and ICE ignored the tender of defense and request for indemnification. For whatever reasons neither you nor ICE chose to respond to that demand.

MCSO proceeded to defend itself in the about-referenced litigation at its own expense. In 2011, the United States District Court certified a plaintiff class of "[a]ll Latino persons who, since January 2007, have been or will be in the future stopped, detained, questioned or searched by MCSO agents while driving or sitting in a vehicle on a public roadway or parking area in Maricopa County Arizona." *Ortega-Melendres v. Arpaio,* 836 F. Supp. 2d 959, 992 (D. Ariz. 2011) (internal quotation marks omitted).

The Court conducted a bench trial in July of 2012. The issues for trial in the lawsuit were: (1) whether, and to what extent, the Fourth Amendment permits the MCSO to question, investigate, and/or detain Latino occupants of motor vehicles it suspects of being in the country without authorization when it has no basis to bring state charges against such persons; (2) whether the MCSO uses race as a factor, and, if so, to what extent it is permissible under the Fourth Amendment to use race as a factor in forming either reasonable suspicion or probable cause to detain a person for being present without authorization; (3) whether the MCSO uses race as a factor, and if so, to what extent it is permissible under the equal protection clause of the Fourteenth Amendment to use race as a factor in making law enforcement decisions that affect Latino occupants of motor

vehicles in Maricopa County; (4) whether the MCSO prolongs traffic stops to investigate the status of vehicle occupants beyond the time permitted by the Fourth Amendment; and (5) whether being in this country without authorization provides sufficient reasonable suspicion or probable cause under the Fourth Amendment that a person is violating or conspiring to violate Arizona law related to immigration status.

Following the bench trial and receipt of the evidence, the Court issued on May 24, 2013 its 142 page Findings of Fact and Conclusions of Law. The Court found that the MCSO had violated the Fourth and Fourteenth Amendment rights of class members. More specifically, the precise factual basis for these findings were that some MCSO deputies, while exercising their authority as 287(g) certified law enforcement officers under the MOA with ICE, used or relied on race or ethnicity as one of many factors to determine whether a person was present in the United States without authorization, and such use or reliance was contrary to Ninth Circuit law. In short, the Court determined the MCSO had violated the constitutional rights of the class members because some MCSO deputies acted and relied on the ICE training and education provided to them in the 287(g) program which was, in fact, contrary to Ninth Circuit law. But for ICE's wrongful and mistaken training that MCSO deputies that served as 287(g) officers could lawfully use and rely on race or ethnicity as one of many factors to determine whether a person was present in the United States without authorization, there would have been no adverse finding against the MCSO. But for ICE's wrongful and mistaken training, MCSO would not have to incur further litigation costs, and the expenses associated with the Court's implementation order dated October 2, 2013.

Make no mistake that ICE instructing my deputies that it was lawful and constitutional to use, and rely on, a suspect's race or ethnicity as one factor among many to determine whether a person was present in the United States without authorization was the fundamental basis for the Court reaching its decision. The Court specifically held:

> **During the time relevant to this lawsuit**, the Immigration and Customs Enforcement Office of the Department of Homeland Security **("ICE") delegated authority to enforce federal immigration law to** a maximum of 160 **MCSO deputies pursuant to Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g) ("the 287(g) program"). In the 287(g) training that ICE provided... MCSO deputies were instructed that they could consider race or "Mexican ancestry" as one factor among others in making law enforcement decisions during immigration enforcement operations without violating the legal requirements pertaining to racial bias in policing.** Pursuant to its 287(g) authority, the MCSO used various types of saturation patrols described below in conducting immigration enforcement. During those patrols, especially the large-scale saturation patrols, the MCSO attempted to leverage its 287(g) authority by staffing such operations with deputies that both were and were not 287(g) certified.

See 05/24/13 Findings of Fact and Conclusions of Law (Dkt#579) at 1:24 to 2:8.

The Court further specifically held that "**ICE trained [MCSO Human Smuggling Unit] officers that it was acceptable to consider race as one factor among others in making law enforcement decisions in an immigration context.**" *Id.* at 36-13-14.

The Court further found the following:

> **The testimony of MCSO officers and deputies makes clear that ICE training allowed for the consideration of race as a factor in making immigration law enforcement decisions.** At trial, Sgt. Palmer testified that ICE training permitted the use of race as one factor among many in stopping a vehicle, (Tr. at 715:3–19), and that ICE trained him that "Mexican Ancestry" could be one among other factors that would provide him reasonable suspicion that a person is not lawfully present in the United States (*id.* at 715:9–12). Sgt. Madrid testified that he was trained by ICE that a subject's race was one relevant factor among others that officers could use to develop reasonable suspicion that a subject was unlawfully present in the United States. (*Id.* at 1164:4-12.)
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> Lt. Sousa testified at his deposition that since he was not 287(g) certified and his sergeants were, when it came to what ICE taught in 287(g) training regarding the use of race, "I would have to rely on my sergeants," and that "when we start getting into all the specifics, that's when I lean on my sergeants." (Doc. 431-1, Ex. 90 at 56:15–19.) Nevertheless, Lt. Sousa testified at trial that it was his understanding that ICE officers taught MCSO deputies in their 287(g) training that while race could not be used even as one factor when making an initial stop, it could be used as one of a number of indicators to extend a stop and investigate a person's alienage. (Tr. at 1016:3–7.)
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> **Similarly, the ICE 287(g) training manual expressly allows for consideration of race**. The 287(g) training manual for January 2008 that was admitted in the record cites to *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), for the proposition that "apparent Mexican ancestry was a relevant factor" that could be used in forming a reasonable suspicion that a person is in the country without authorization "but standing alone was insufficient to stop the individuals." (Ex. 68 at 7.) In referring to *Brignoni-Ponce,* the ICE materials go on to observe that "[t]his is an administrative case but it also applies in criminal proceedings" and further notes that "[a]n example of this in action in the criminal context is that a LEA Officer

cannot stop a vehicle for an investigation into smuggling just because the occupants appear Mexican." (*Id.*)[1]

Alonzo Pena, ICE's Special Agent in Charge of Arizona at the time that ICE began its 287(g) certification training of MCSO officers, testified that it was his understanding that officers with 287(g) authority can form a reasonable suspicion that a person is unlawfully present when "several factors in combination" are present, with race being one of those factors. (Tr. at 1831:17–832:19.) Agent Pena does not believe that race is sufficient in and of itself to give rise to such suspicion, but he does believe that race can be a factor in forming such a suspicion. (*Id.*)

Id. at 36:15 to 37:21 (emphasis added).

The Court's analysis continued:

And, in fact, the MCSO deputies operated under the idea that they were allowed to consider race in making immigration-related law enforcement decisions. The large-scale saturation plans contained a paragraph prohibiting racial profiling and specifically prohibiting deputies from making a decision to stop a vehicle based on the race of its occupants. Nevertheless, as previously discussed, the MCSO determined that it did not constitute racial profiling to base decisions in part on race, so long as race was not the sole basis for that decision. **The operations plans for the large-scale saturation patrols explicitly instructed the MCSO officers who were 287(g) certified that they could use the indicators taught them in their 287(g) training in deciding whether to initiate investigations into a contact's immigration status. And all MCSO officers testified that ICE taught them that one such indicator, among others, was a person's race.** The operations plans also instructed non-287(g)-certified officers that they should not summon a 287(g) officer to initiate such an investigation based on race alone. But, as at least Sgts. Palmer and Madrid testified, this instruction meant that officers could consider race as one amongst a number of factors in making such a determination.

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[1] The Court held that "ICE failed to take into account that its interpretation of the *Brignoni-Ponce* dicta in this respect was rejected by the en banc Ninth Circuit 13 years ago in *United States v.Montero-Camargo,* 208 F.3d 1122 (9th Cir. 2000) (en banc)." *Id.* at 117:12-14.

Id. at 74:16 to 75:2 (emphasis added).

Finally, the Court held:

> **The MCSO asserts that it had no discriminatory purpose in promulgating its policies because they were based on training received by ICE.** Even assuming this is true, the MCSO cannot suggest that it can continue system-wide policies applying racial classifications, because even though they are legally erroneous and facially discriminatory, the MCSO believed in good faith that they were permissible at the time of their adoption. Such reliance does not prevent the Equal Protection Clause from barring the future use of such facially discriminatory systemic classifications, even assuming they were implemented in good faith. Defendants cite numerous cases holding that advice of counsel is a defense to an equal protection claim. **They do not cite any evidence that the ICE officers conducting the training were attorneys providing legal advice to the MCSO. And again, even assuming that counsel wrongfully advised the MCSO that it could promulgate system wide policies in enforcing laws related to immigration, the MCSO has a constitutional responsibility to refrain from wrongfully using race in law enforcement decisions independent of any advice provided by another law enforcement agency, even ICE.**

Id. at 130:16 to 131:5 (emphasis added).

Based on the foregoing, it is neither appropriate nor fair that the taxpayers of Maricopa County be responsible for the costs and expenses incurred in this matter. These expenses are a direct result of ICE providing substandard and erroneous instruction on how MCSO deputies were to lawfully fulfill their obligations as 287(g) certified deputies. ICE and the Department of Justice are responsible for the Court's decision and thus the expenses to be incurred as a result of the remedies ordered by Judge Snow. This letter, therefore, demands that the United States immediately reimburse and indemnify the MCSO pursuant to the MOA for the following expenses and costs resulting from the Federal government's improper 287(g) training of my deputies:

(a) $1.2 million in costs for defense of the foregoing litigation;

(b) $18,000.00 in taxable court costs that MCSO was required to pay plaintiffs as a prevailing party;

(c) $7.4 million in attorney's fees and non-taxable costs that plaintiffs are seeking from the MCSO as a prevailing party;

(d) $19.2 million in costs and expenses for the first twelve months of MCSO complying with the Court's October 2, 2013 Order; and

(e) An estimated $10 million for five years of annual compliance for MCSO to adhere to the Court's October 2, 2013 Order (estimated annual cost of $2 million over the anticipated duration of the Order for a time period of five years).

(f) Any other expenses which accrue as a result of implementation of the Order until MCSO is relieved of continued compliance.

(g) Interest at the highest rate allowed under the laws of the State of Arizona until the above sums are paid in full.

I await your prompt attention to this matter. My office is proceeding in good faith to comply with the Court's order. Expenditure of Maricopa County funds has already taken place and additional expenditures are being made on a daily basis. The Federal government's failures (as set forth above) are the direct cause of these expenditures. I will take whatever legal actions are necessary to remedy this injustice caused by the Federal agencies failures and errors.

Sincerely,

Joseph M. Arpaio
Sheriff of Maricopa County