2015 WL 13732208 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

MARICOPA COUNTY, ARIZONA, Petitioner,
v.
Manuel De Jesus Ortega MELENDRES, et al., Respondents.

No. 15-376.
September 24, 2015.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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QUESTION PRESENTED

In the State of Arizona, the powers and responsibilities of county government are separated and dispersed, by Arizona's Constitution and acts of the Arizona Legislature, among various separate and distinct county-level institutions of government, each of which is headed by officers whose positions are established in the Arizona Constitution, which also provides for their direct election by the voters in their respective counties. Under this structure, the responsibility for keeping the peace, investigating criminal activity, and arresting individuals suspected of having engaged in criminal conduct is devolved upon the county sheriffs. No such authority or responsibility has been allocated to the county boards of supervisors, who are authorized to exercise other, specifically delineated powers of the county. The question presented is:

Whether the United States Court of Appeals for the Ninth Circuit, acting *sua sponte*, without a motion from any party, without the benefit of briefing or argument, and without conducting the analysis required by this Court's decision in *McMillian v. Monroe County*, 520 U.S. 781 (1997), erred in substituting Maricopa County, Arizona ("the County") for the Maricopa County Sheriff's Office, more than a year after the entry of a final judgment, thereby ignoring structural aspects of Arizona county government that preclude the imposition of liability on the County, raising a question of national importance as to the limits on Federal court power to intrude upon the sovereign choices of the States, and creating a conflict with another United States court of appeals.

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Petitioner is Maricopa County, Arizona ("the County"), whose limited powers are enumerated at A.R.S. § 11-201, which provides for those powers to be exercised only by Arizona boards of supervisors, in this case the Maricopa County Board of Supervisors. Joseph M. Arpaio, the Sheriff of Maricopa County, and a named Defendant throughout the proceedings below, is a separately elected constitutional officer and is separately represented.

Respondents are: (1) Manuel de Jesus Ortega Melendres, Jessica Quitugua Rodriguez, David Rodriguez, Jr., all individual Plaintiffs on behalf of themselves and a Plaintiff class comprised of all Latino persons who, since January, 2007, have been or will be in the future stopped, detained, questioned or searched by Maricopa County Sheriffs Office agents while driving or sitting in a vehicle on a public roadway or parking area in Maricopa County, Arizona; and (2) Plaintiff Somos America/We Are America, a non-profit membership organization.

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***1** INTRODUCTION

Petitioner Maricopa County, Arizona ("the County"), seeks review of a decision by the United States Court of Appeals for the Ninth Circuit, *Melendres v. Arpaio,* 784 F.3d 1254 (9th Cir. 2015) (*Melendres II*),[1] in which the court ordered, *sua sponte,* the post-judgment joinder of the County after finding that the Maricopa County Sheriffs Office ("MCSO"), a non-jural entity under Arizona law, was not a proper party. *Id.* at 1260. The court of appeals took this action without a motion seeking the County's joinder having been filed by any party, without the benefit of any briefing or argument on the subject, and without meaningful analysis.

Petitioner seeks this Court's review because the question of whether the County is a proper party to actions seeking only declaratory and injunctive relief based on law enforcement actions by the Maricopa County Sheriff and those working under his command is a frequently recurring one that necessarily entangles the federal courts in determinations as to the allocations of authorities and responsibilities among the various institutions of county government under Arizona law. Because ***2** trespass by the federal courts on this aspect of State sovereignty is forbidden by the Guarantee Clause and the Tenth Amendment to the U.S. Constitution and the principles of comity, a clear delineation of the limits of federal power regarding such matters is of immediate national importance. The Ninth Circuit's failure to perform the analysis mandated by this Court's decision in *McMillian v. Monroe County,* 520 U.S. 781 (1997), also raises a question of national importance with respect to the power of federal courts to require parties to submit to their jurisdiction without at least a preliminary determination as to their susceptibility to liability under *McMillian,* Further, the Ninth Circuit's decision to substitute the County for MCSO without any motion having been filed seeking such substitution, and without even any briefing or argument on the subject, creates a conflict with the decisions of another United States court of appeals on the same matter.

OPINIONS BELOW

The Ninth Circuit's opinion in *Melendres II* (Pet. App. 23a-46a) is reported at 784 F.3d 1254. The Ninth Circuit's decision denying rehearing and rehearing en banc (Pet. App. 1a-2a). The relevant decisions of the United States District Court for the District of Arizona (Pet. App. 47a-50a, 51a-62a, 63a-143a, 144a-322a) of which the latter is reported at 989 F.Supp.2d 822.

***3 JURISDICTION**

The Ninth Circuit entered judgment on April 15, 2015, and denied a timely rehearing petition on July 26, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions from the United States Constitution, the Arizona Constitution, and applicable Arizona Statutes are set forth at Pet. App. 323a-363a.

STATEMENT

This action, initially brought by individually named Plaintiffs in December of 2007, alleged that Sheriff Joseph M. Arpaio ("the Sheriff"), MCSO, and the County were engaged in certain law enforcement practices that constituted racial profiling toward Latino persons in Maricopa County. More particularly, Plaintiffs alleged:

> a custom, policy and practice of racially profiling Latino drivers and passengers, and of stopping them pretextually under the auspices of enforcing federal and state immigration-related laws. Plaintiffs alleged that Defendants' discriminatory policy extended to the post-stop investigatory process, ***4** resulting in longer and more burdensome detentions for Latinos than for non-Latinos.

Melendres II, 784 F.3d at 1258. Plaintiffs alleged that this conduct in carrying out law enforcement operations violated the Fourth and Fourteenth Amendments to the U.S. Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-7.

In addition to the Sheriff and MCSO, Plaintiffs named the County as a Defendant in both their original Complaint, and in their First Amended Complaint, filed September 5, 2008. *See* Original Complaint, filed on December 27, 2007, and First Amended Complaint, filed September 5, 2008, both filed in the U.S. District Court for the District of Arizona. Just slightly over a year after amending their Complaint, Plaintiffs joined the County in filing a Joint Motion and Stipulation to Dismiss the claims against the County without prejudice. Joint Motion and Stipulation to Dismiss Maricopa County Without Prejudice, filed September 21, 2009, filed in the U.S. District Court for the District of Arizona. In this Joint Motion, Plaintiffs stated unequivocally that the County "is not a necessary party at this juncture for obtaining the complete relief sought …." *Id.* at 3. This Motion was unopposed, and it was granted by the district court on October 13, 2009, dismissing all claims against the County without prejudice. Order Granting Motion to Dismiss Party, filed October 13, 2009, filed in the U.S. District Court for the District of Arizona. From that time until the Ninth Circuit ***5** issued its decision in *Melendres II* that Petitioner seeks here to have reviewed, none of the remaining parties suggested it was necessary for the County to be brought back into the case for any reason or sought the County's joinder.

The bench trial in this matter was conducted in July and August of 2012, almost three years after the claims against the County had been dismissed. *See* Minute Entries for Proceedings held before Judge G. Murray Snow: Bench Trial Days 1-7, filed July 19, 2012, July 24-26, 2012, July 31, 2012 and August 1-2, 2012, all filed in the U.S. District Court for the District of Arizona. Accordingly, the County did not participate in the trial, and the district court's Findings of Fact and Conclusions of Law, issued in May of 2014, contained no findings adverse to the County, as distinguished from the Sheriff and MCSO. *See Melendres v. Arpaio*, 989 F.Supp.2d 822 (D. Ariz. 2013). Similarly, no relief was ordered against the County (again, as distinguished from the Sheriff and MCSO) in the district court's subsequent remedial orders providing for a court-appointed monitor and granting Plaintiffs extensive injunctive relief. See Supplemental Permanent Injunction/Judgment Order, filed October 22, 2013; Amendment to the Supplemental Permanent Injunction/Judgment Order, filed April 4, 2014; Enforcement Order, filed April 17, 2014; and Order Granting Stipulation to Amend Supplemental/Permanent Injunction/Judgment Order, filed October 10, 2014, all filed in the U.S. District Court for the District of Arizona. The district court did find, however, that the conduct of the Sheriff and MCSO at issue had violated the rights of the Plaintiff class under the Fourth and Fourteenth Amendments ***6** of the U.S. Constitution. *Id.; see also* Supplemental Permanent Injunction/Judgment Order Pet.App. at 51a.

One of the issues appealed to the Ninth Circuit by the Sheriff and MCSO was the question of whether MCSO was a non-jural entity and, as such, not a proper party to this action. *Melendres II*, 784 F.3d at 1260. The issues of whether, in the event of a dismissal of MCSO, it would be necessary for another party to be joined and, if so, who that party might be, were neither briefed nor argued by any party to the appeal. *See* excerpts from *Melendres II* Defendants/Appellants Opening Brief, pp. 2, 13, 16-17, filed on March 17, 2014; *Melendres II* Answering Brief for Plaintiffs-Appellees, pp. 2, 14, 57-59, filed on July 14, 2014; *Melendres II* Defendants/Appellants Reply Brief, pp. 2-5, filed on August 27, 2014, all filed in the United States Court of Appeals for the Ninth Circuit. Thus, the County was provided no notice of its possible substitution for MCSO, and no opportunity to inform the court of appeals of Arizona law clearly delineating the county level agency responsible for law enforcement operations, or of the problems inherent in the prospect of exposing the County to equitable orders that could require it to act beyond its lawful authority.

After finding that MCSO is a non-jural entity under Arizona law and, therefore, had "improperly been named as a party in this action," the Ninth Circuit, *sua sponte* and without explaining its reasoning for doing so, ordered the substitution of the County for MCSO. *Melendres II*, 784 F.3d at 1260. ***7** The entirety of the portion of the Ninth Circuit's discussion of this point is as follows:

We therefore order that Maricopa County be substituted as a party in lieu of MCSO. *See* Fed.R.Civ.P. 21 ("Misjoinder of parties is not a ground for dismissing an action. On … its own, the court may at any time, on just terms, add or drop a party").

Id.

The County timely filed a Petition for Panel Rehearing and Petition for En Banc Consideration solely addressed to the question of whether the Ninth Circuit panel's late substitution of the County for MCSO had been proper. *See* Notice of Filing Petition for Panel Rehearing and En Banc Determination Recently Filed in the U.S. Court of Appeals for the Ninth Circuit, filed on May 21, 2015, filed in the U.S. District Court for the District of Arizona. On June 26, 2015, the Court of Appeals summarily denied the County's Petitions, offering no substantive explanation for the basis of its ruling. *See* Ninth Circuit Order, Pet.App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's ruling compelling the postjudgment substitution of the County for MCSO requires immediate review in this Court because of its far-reaching implications for the principles of federalism and the balance finely struck by the Founding Fathers between the powers granted to the ***8** national government under the Constitution, and. those reserved to the States and the people. In addition, the apparent failure of the court of appeals even to consider structural aspects of county-level government under the Arizona Constitution and statutes is of a piece with its failure to perform the critical analysis for determining whether there is even the possibility of County liability on the facts of this case mandated by this Court's decision in *McMillian v. Monroe County*, 520 U.S. 781 (1997). Finally, the Ninth Circuit's late substitution of the County for MCSO created a conflict with the decisions of at least one of its sister circuits.

I. The structure of governmental institutions at the county level under Arizona's Constitution and statutes precludes any finding of liability on the part of the County for the law enforcement actions of the Sheriff and those working under his command, and the Ninth Circuit's decision intrudes impermissibly upon the sovereign choices made by Arizona in assigning power and responsibility among the various institutions of county government protected by the Guarantee Clause on the Tenth Amendment of the U.S. Constitution, raising a question of national importance as to limits on the power of the federal judiciary to interfere with such sovereign choices.

Arizona's Constitution establishes the State's counties as "bod[ies] politic and corporate." Az. Const., art. XII, § 1. It also provides for certain ***9** specified county Constitutional Officers, each of whom is to be directly elected for terms of four years, including a Sheriff and at least three Supervisors. *Id.*, art. XII, § 3. The Arizona Constitution also provides that the "duties, powers, and qualifications of such officers shall be as prescribed by law." *Id.*, art. XII, § 4. This provision

> makes clear that the legislature retains general authority over county government. This means, unlike the situation in some other states, Arizona counties have no constitutional "home rule" powers. Because the duties of county officers are prescribed by the legislature, questions about their authority to act in particular circumstances require interpretation of applicable statutes.

John D. Leshy, The Arizona State Constitution 323 (2d ed. 2013) (citations and cross-references omitted).

The Arizona Legislature has conferred limited, specifically enumerated powers on the counties, stipulating that such powers

"shall be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law." A.R.S. § 11-201. Separately, the Legislature has dispersed further powers and responsibilities among the various county Constitutional Officers. A number of additional enumerated powers are conferred upon the county boards of supervisors but, with one limited exception, none of these additional grants include ***10** authority over matters of law enforcement. *See generally* A.R.S. §§ 11-251, 11-251.01- 11-251.15.[2]

In contrast, the Legislature has clearly devolved upon Arizona's county sheriffs broad powers with respect to law enforcement. "Since the sheriff is a county officer, the legislature, under [Az. Const., art. XII, § 4], obviously has the power to fix his duties and powers, except insofar as it may be limited by other portions of the constitution." *Merrill v. Phelps,* 52 Ariz. 526, 530, 84 P. 2d 74, 76 (1938). Sheriffs are commanded by statute, *inter alia,* to "[p]reserve the peace," "[a]rrest … all persons who attempt to commit or who have committed a public offense," and "[p]revent and suppress all affrays, breaches of the peace, riots and insurrections …." A.R.S. § 11-441(A)(1)-(3).

It is a principle firmly embedded in Arizona jurisprudence that Arizona's county boards of supervisors have only the powers granted them by the Legislature.

> The boards of supervisors of the various counties of the state have only such powers as have been expressly, or by necessary implication, delegated to them by the state legislature. Implied powers do not exist independently of the grant of express powers and the only function ***11** of an implied power is to aid in carrying into effect a power expressly granted.

Associated Dairy Products Co. v. Page, 68 Ariz. 393, 395, 206 P.2d 1041, 1043 (1949); *Mohave County v. Mohave-Kingman Estates, Inc.,* 120 Ariz. 417, 420, 586 P.2d 978, 981 (1978) (citation and internal quotation marks omitted) ("Actions of the Board [of Supervisors] accomplished by a method unrecognized by statute have been described as without jurisdiction and wholly void."); *Hartford Accident & Indemnity Co. v. Wainscott,* 41 Ariz. 439, 445-46, 19 P.2d 328, 330 (1933) ("… counties have no powers to engage in any activities of any nature unless there is a statute so authorizing them expressly or by strong implication, and … they are only liable for the acts of their agents when liability is expressly imposed by statute or follows as a matter of law from the exercise of powers clearly conferred on the county.").

The U.S. District Court for the District of Arizona has repeatedly recognized that, under Arizona law, counties cannot be held liable on a *respondeat superior* theory for the tortious acts of their sheriffs and personnel working under the sheriffs' direction and control, when those acts are committed in the course of carrying out statutorily mandated duties in the areas of law enforcement and operation of the county jails. *See, e.g., Kloberdanz v. Arpaio,* 2014 WL 309078, *3-4 (D. Ariz. 2014); *Stricker v. Yavapai County,* 2012 WL 5031484, *3 (D. Ariz. 2012); (County not liable for acts of physical abuse by Sheriffs deputies because claim arose out of deputies' performance of statutorily mandated law ***12** enforcement duties); *Nevels v. Maricopa County,* 2012 WL 1623217, *3 (D. Ariz. 2012); *Ochser v. Maricopa County,* 2007 WL 1577910, *2 (D. Ariz. 2007) (County has no supervisory "power over the Sheriffs statutorily mandated duty to arrest those persons who have committed a public offense" and "cannot be held liable for … MCSO officers' conduct under the doctrine of *respondeat superior*"); *see also Fridena v. Maricopa County,* 18 Ariz. App. 527, 530, 504 P.2d 58, 61 (1972) (citation omitted) (County, "having no right of control over the Sheriff or his deputies in service of [a] writ of restitution, [could] not [be held] liable under the doctrine of *respondeat superior* for the Sheriff's torts."). These decisions all acknowledge that, when the actions of Arizona sheriffs and their subordinate officers are in furtherance of responsibilities assigned them by the Arizona Legislature, their respective boards of supervisors have no control over such actions and cannot be held liable for them.

In ordering the substitution of the County for MCSO in this case, the Ninth Circuit either ignored or chose to ride roughshod over the choices the people of Arizona and their representatives have made in distributing powers and responsibilities among the various institutions of county government. It bears emphasizing in this regard that Plaintiffs' action sought only declaratory and injunctive relief.[3] To be ***13** properly joined as a party defendant to such a claim for injunctive relief, there would either have to be evidence that the County had been an active participant in the acts Plaintiffs sought to have enjoined, or the County would have to be in a position effectively to control the Sheriff's law enforcement operations and prevent further violations of the rights of the Plaintiff class.

With respect to the former, the record in this case is devoid of any evidence that the County, whose powers can only be exercised by the Board of Supervisors, involved itself in any way in the law enforcement operations Plaintiffs have now successfully enjoined. Nor is there any support for the notion that the County could, within the limits of its lawful powers under the Arizona Constitution and statutes, require conformance with, or exert significant pressure on the Sheriff to abide by, the law enforcement standards imposed in the district court's remedial orders.

With regard to this latter point, the Arizona Court of Appeals decision in *Hounshell v. White*, 220 Ariz. 1, 202 P. 3d 466 (App. 2008), is instructive. In that case, the Apache County Board of Supervisors imposed disciplinary action against an employee of the Apache County Sheriffs Office ("ACSO"). The ***14** Sheriff filed suit, asserting that only he, not the Board of Supervisors or the County Manager, had authority to mete out discipline to classified employees in the ACSO. This position was sustained by the *Hounshell* court, holding that, inasmuch as the Sheriff was the appointing authority with respect to his own deputies and employees, only he had the power to discipline them for misconduct. 220 Ariz, at 4, 202 P.3d at 469.[4] In response to a Board of Supervisors argument that this conclusion could result in the failure of a Constitutional Officer to exert appropriate control over a "rogue" employee because of favoritism or collusion, the *Hounshell* court held:

Moreover, while a county officer may not be accountable to the Board itself, he or she is accountable to the voting public. Thus, a county officer choosing to overlook egregious employee misconduct may not be reelected, may be subject to a recall election, or may be impeached to the extent the officer's inaction amounts to willful or corrupt misconduct in office.

220 Ariz, at 6, 202 P.3d at 471 (citations and internal quotation marks omitted).[5]

***15** Clearly, a county whose board of supervisors lacks the authority to discipline the employees of a sheriff who engage in "egregious employee misconduct," is perforce also powerless to prevent such misconduct, or effectively to require the sheriff's compliance with corrective measures calculated to remedy it. The parties and the district court in this case essentially acknowledged this by agreeing to dismissal of the Plaintiffs' claims against the County on the ground that it was unnecessary to Plaintiffs' ability to obtain complete relief from the allegedly unconstitutional policies and practices of the Sheriff and MCSO.

By compelling the post-judgment substitution of the County for MCSO in this case, the Ninth Circuit has by clear implication manifested its willingness to override the allocations of powers and responsibilities among the institutions of county government under Arizona's Constitution and statutes. "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Such determinations lie within the "power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.' " *Id.* at 463 (citations omitted) (quoting U.S. Const. art. IV, § 4).

In *Rizzo v. Goode*, 423 U.S. 362 (1976), a case involving allegations against the Mayor and Police Commissioner of Philadelphia similar in many ***16** respects to those in issue in this case, this Court admonished:
Where, as here, the exercise of authority by state official is attacked, federal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law."

Id. at 378 (citations omitted).

Rizzo also noted "the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Id.* at 378-39 (internal quotations and citations omitted). In compelling the late joinder of the County in this case in which the only relief sought and obtained is equitable and aimed at law enforcement policies and practices of the Sheriff and his deputies, the Ninth Circuit has effectively announced its intention to hold the County liable for conduct over which it has no lawful authority or control under Arizona law. Such an intrusion upon the sovereign prerogatives of the States in assigning authority and responsibilities among their governmental institutions flies in the face of the "widest latitude in the dispatch of [State and local governments'] own internal affairs" that, *Rizzo* taught, frames the "appropriate consideration [that] must be given to principles of federalism in determining the availability and scope of equitable relief." *Id.* (citation omitted). This Court's immediate intervention is needed to curb the temptation of the ***17**

federal courts to restructure State and local governments to their liking in fashioning equitable relief, and to preserve the "healthy balance of power between the States and the Federal Government [designed to] reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991).

II. The Ninth Circuit's ill-considered decision to order the substitution of the County for MCSO by-passed the analysis required by this Court's decision in *MacMillian v. Monroe County,* 521 U.S. 781 (1997), as the critical antecedent to any possible assignment of liability to the County for the conduct at issue in this case, thus raising an question of national importance as to the powers of the federal judiciary to require a party to submit to the jurisdiction of the federal courts without at least a preliminary assessment of that party's susceptibility to a finding of liability.

The Ninth Circuit noted in *Melendres II* that the Sheriff had been sued in his official capacity and, citing this Court's decision in *Kentucky v. Graham,* 473 U.S. 159 (1985), suggested that the Sheriff could even be dismissed out of the case because "an official-capacity suit is, in all respects other than name to be treated as a suit against the entity." *Melendres II,* 784 F.3d at 1260 (internal quotations and citations omitted); Pet. App. 23a-46a. The Court of Appeals appears to have taken it for granted that, if MCSO was not the governmental entity behind Sheriff ***18** Arpaio that was amenable to suit, then the role of "the entity" must necessarily fall to the County. If there was any analysis underlying that conclusion, the Ninth Circuit chose not to disclose its reasoning.

This Court has cautioned, however, that when a county sheriff is acting in his law enforcement capacity, it simply cannot be presumed that, in doing so, he is representing or acting on behalf of the county. *See McMillian v. Monroe County,* 520 U.S. 781, 785-86 (1997). In that case, the Court found that Monroe County, Alabama, could not be held liable in a § 1983 action for the unconstitutional actions of its sheriff in suppressing exculpatory evidence to obtain a murder conviction because, when acting in his law enforcement capacity, the sheriff was, under Alabama law, acting on behalf of the State of Alabama, *not* Monroe county.

There are a number of striking factual similarities between *McMillian* and this case. In *McMillian* as in this case, the sheriffs were granted law enforcement authority by State statute, but the counties were granted no such authority. *Id.* at 790. In *McMillian* as in this case, the counties' governing bodies (commissions) "cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime." *Id.* In *McMillian* as in this case, the county commissions had "the discretion to deny funds to the sheriffs for their operations beyond what is reasonably necessary." *Id.* at 791 (citation and internal quotation marks omitted).[6] In ***19** *McMillian* as in this case, Alabama counties were "not liable under a theory of *respondeat superior* for the sheriffs official acts that are tortious." *Id.* at 789 (citation omitted). As is the case with Maricopa County's Sheriff, the sheriffs salary was paid from the county treasury in *McMillian,* and he was elected directly by the voters of Monroe County. *Id.* at 791.[7]

It is clear in this case that Plaintiffs claims arose out of conduct of the Sheriff and MCSO engaged in "under the auspices of enforcing federal and state immigration-related laws." *Melendres II,* 784 F.3d at 1258. This, along with the similarities to the facts at issue in *McMillian* summarized above, compel the conclusion that the Sheriff was not acting on behalf of the County any more than was the Sheriff of Monroe County in *McMillian.* The Ninth Circuit's apparent failure even to consider this before presuming that the County was "the entity" necessarily implicated in a suit against the Sheriff in his official capacity is fatal to its decision to compel the substitution of the County for MCSO.

***20 hIII. The Ninth Circuit's unilateral and unprompted decision to compel the substitution of the County for MCSO is in conflict with decisions of at least one sister circuit court of appeals holding that federal appellate courts lack such authority under Rule 25 of the Federal Rules of Civil Procedure and Rule 43 of the Federal Rules of Appellate Procedure.**

The United States Court of Appeals for the Eighth Circuit has held that, in the absence of a motion to substitute a proper party under Fed. R. Civ. P. 25(a) (1) in the district court, or a motion seeking substitution in the court of appeals under Fed.R.App. P. 43(a), "[t]his court has no authority to substitute a proper party …." *Campbell v. Iowa Dept. of Correctional*

Svcs., 702 F.3d 1140, 1141-42. There was no such motion in this case in either the district court or in the court of appeals, and there was even agreement among the existing parties and the district court that the County's presence as a party in the litigation was not necessary. Accordingly, the Ninth Circuit's presumption that it possessed the authority to compel the substitution of an entity it apparently assumed was a proper party, created a split in authority on this point with the Eighth Circuit.

This Court's intervention is needed to establish the circumstances, if any, under which a court of appeals can compel the post-judgment substitution of a party, *sua sponte* and without notice and an opportunity to be heard by the party to be substituted, in the absence of a motion from one of the parties to ***21** the existing appeal seeking the substitution. As effected by the Ninth Circuit in this case, substitution is much more likely to breed problems and complexity in late-stage litigation than to "secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. Pro. 1. Avoiding such problems and complexities, it would seem, should be a matter of great public interest warranting the exercise of this Court's supervisory powers where, as here, the result is to add unnecessarily to litigation burdens born by the taxpayers.

CONCLUSION

For the foregoing reasons, the County's Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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Footnotes

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1 The first appeal in this case concerned a preliminary injunction issued by the district court on December 23, 2011 that prohibited the Sheriff and MCSO from detaining any individual "based only on knowledge or reasonable belief, without more, that the person is unlawfully present within the United States." *Melendres v. Arpaio*, 695 F.3d 990, 994 (9th Cir. 2012) ("*Melendres I*"). As was the case with *Melendres II* prior to the Ninth Circuit's order compelling the County's substitution for MCSO, the County was not a party and did not participate in the appeal in *Melendres I*. *Id.*

[2] The one area related to law enforcement over which Arizona's boards of supervisors are granted narrowly limited authority is with respect to adopting, amending, and repealing "ordinances necessary or proper to carry out the duties, responsibilities and functions of the county which are not otherwise specifically limited by [A.R.S.] § 11-251 or any other law or in conflict with any rule or law of this state." A.R.S. § 11-251.05(A)(1).

[3] Petitioner does not dispute that, if Plaintiffs had sought and obtained an award of monetary damages, the County's Board of Supervisors would have been both financially and legally responsible for ensuring that monies were provided to pay such an award. The County, through the Board of Supervisors, has the responsibility for "[d]etermin[ing] the budgets of all elected and appointed county officers." A.R.S. § 11-201(A)(6). With respect to the Sheriff in particular, the Board is required to provide "actual and necessary expenses incurred by the sheriff in pursuit of criminals, for transacting all civil or criminal business and for service of all process and notices, and such expenses shall be a county charge …." A.R.S. § 11-444(A). Thus, the County has, by statute, the obligation to fund damage awards to persons injured as a result of the actions of the Sheriff and his deputies in carrying out their law enforcement functions.

[4] *See also Kloberdanz v. Arpaio*, 2014 WL 309078, *4 (D. Ariz. 2014) (Given that the County has no power to hire, fire, or discipline the Sheriffs employees, the County cannot be held vicariously liable for the tortious conduct of the Sheriff's deputies.).

[5] The impeachment of county officers entails an accusation of willful or corrupt misconduct presented by a grand jury, and the accusation is then served on the accused and adjudicated in the Superior Court. A.R.S. §§ 38-341, 38-342, and 38-343.

[6] The *McMillian* Court deemed that "at most, this discretion would allow the commission to exert an attenuated and indirect influence over the sheriff's operations." 520 U.S. at 791-92.

[7] Notably, the California courts have found that sheriffs in their State, "while performing state law enforcement duties such as investigating possible criminal activity," are acting on behalf of the State, not the counties. *See Venegas v. County of Los Angeles*, 32 Cal.4th 820, 839, 11 Cal.Rptr.3d 692, 87 P.3d 1 (2004); *Bougere v. County of Los Angeles*, 141 Cal.App.4th 237, 246-48, 45 Cal.Rptr.3d 711 (2006)

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