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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, et al., Plaintiffs, vs. Joseph M. Arpaio, et al., Defendants.	No. CV 07-2513-PHX-MHM **MOTION FOR CLASS CERTIFICATION** (Oral Argument Requested)

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Plaintiffs Manuel de Jesus Ortega Melendres, Jessica Quitugua Rodriguez, David Rodriguez, Velia Meraz, Manuel Nieto, Jr. and Somos America/We Are America (Plaintiffs) respectfully move for class certification pursuant to Fed. R. Civ. P. 23. This Motion is supported by the following Memorandum, Plaintiffs' First Amended Complaint (FAC) and the attached Declarations of Aaron J. Lockwood, Pedro Marquina Manzanarez, Julio Mora and Andrew Sanchez.

Preliminary Statement

In a marked departure from past practice, and as more fully alleged in the FAC, Defendants Joseph Arpaio, Maricopa County Sheriff's Office (MCSO) and Maricopa County (collectively, Defendants) have adopted a race-based policy, pattern and practice of stopping Latino-looking drivers and passengers for the purpose of interrogating them about immigration status. **While ostensibly concerned with "going after illegals," Defendants' policy and practice is targeted at one ethnic group in particular and constitutes precisely the type of invidious racial discrimination that has long been rejected as anathema to this country's Constitution, laws and values.** Defendants have executed this policy and practice through "crime suppression sweeps" in predominately Latino neighborhoods and day laborer areas, and through highly-discretionary traffic stops that single out Latinos. To challenge Defendants' conduct efficiently and effectively, Plaintiffs seek class certification.

Specifically, pursuant to Rule 23(b)(2), Plaintiffs seek to certify a class of "All 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." [FAC ¶ 121] This class easily satisfies Rule 23(a). First, it includes thousands of motorists: Defendants perform tens of thousands of traffic stops each year in a jurisdiction with the nation's fifth-largest Latino population. [Lockwood Decl. ¶ 2, Ex. A, at 2; http://pewhispanic.org/states/population] The class size therefore far exceeds the minimum required for certification, and is so numerous that joinder is impracticable.

Second, the claims of Plaintiffs and the class members share many common, core issues arising under the Fourth and Fourteenth Amendments to the U.S. Constitution, the Arizona Constitution and the Civil Rights Act, and involving Defendants' policy and practice of targeting Latino motorists and passengers. [*See, e.g.*, Dkt. 60 at 9 ("Hispanic appearance is of little or no use in determining which particular individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens.") (citation and quotation omitted)] Third, Plaintiffs' claims are typical of those of the class because they arise from the same challenged policy, pattern and practice. *See, e.g., Daniels v. City of New York*, 198 F.R.D. 409, 417 (S.D.N.Y. 2001) (granting class certification in racial profiling challenge of NYPD policy of stopping cars without cause; "typicality" met where named plaintiffs' and class claims arose from the same policy). Fourth, Plaintiffs and their counsel will fairly and adequately represent the class.

Moreover, this civil rights lawsuit is ideally suited for Rule 23(b)(2) class certification because Defendants' improper use of race (an immutable characteristic) applies to the entire class and violates the civil rights of Latinos in Maricopa County, the vast majority of whom are here lawfully. Indeed, Defendants' targeting of Latinos cries out for class-wide declaratory and injunctive relief to (a) prohibit Defendants from continuing to engage in such racial or ethnic discrimination, and (b) require Defendants to institute safeguards against its recurrence. [FAC p. 30] Furthermore, class certification will advance the policies that support class actions by conserving judicial resources and providing relief for class members unable to vindicate their rights due to financial inability or fear of retaliation.

Background

Plaintiffs, on behalf of themselves and those similarly situated, have sued Defendants under the Fourth and Fourteenth Amendments to the U.S. Constitution, Title VI of the Civil Rights Act and Article II, § 8 of the Arizona Constitution, alleging that Defendants and their agents have been stopping, detaining, questioning and searching

Latino-looking motorists and passengers in Maricopa County based on their race, ethnicity or national origin, without reasonable suspicion or probable cause, and merely as a pretext for investigating immigration status. [*See* Dkt. 60 at 2] On February 10, 2009, the Court denied Defendants' Motion to Dismiss. [Dkt. 60]

Argument

I. THE STANDARDS GOVERNING CLASS CERTIFICATION STRONGLY FAVOR PLAINTIFFS AT THIS EARLY STAGE.

Rule 23's mandate that the Court determine class certification "at an early practicable time" creates a strong presumption in favor of granting certification at this time. Fed. R. Civ. P. 23(c)(1). In evaluating a motion for class certification, the Court must take Plaintiffs' substantive allegations as true and may not advance to a preliminary evaluation of the merits. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). A well-pled complaint therefore generally constitutes a *prima-facie* showing for class certification that shifts the burden to the defendant. *See, e.g., Blackie v. Barrack*, 524 F.2d 891, 900-01 (9th Cir. 1975) (class certification warranted if complaint and other materials provide the Court information sufficient to make a reasonable judgment that each requirement of Rule 23 is satisfied); 3 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 7:20, at 65 (4th ed. 2002) (*Newberg*).

As shown below, the FAC's detailed, well-pled allegations, and additional materials filed with this Motion, provide ample basis for the Court to find that Rule 23(a)'s requirements of numerosity, commonality, typicality and adequacy are met here. In addition, the record demonstrates that the proposed class satisfies Rule 23(b)(2), which applies where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Indeed, Rule 23(b)(2) was adopted to redress the kind of systemic civil-rights violations at issue here, and thus provides the most appropriate vehicle for class certification. *See* Fed. R. Civ. P. 23(b)(2) Advisory Committee Notes to 1966

Amendment; *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (Rule 23(b)(2) facilitates civil rights actions). In such cases, as here, class members seek to invalidate a policy, pattern or practice on constitutional or statutory grounds, rather than seek monetary damages that require individualized findings. *See Walters*, 145 F.3d at 1047 ("It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole."). In the context of a similar racial profiling challenge, another district court in this Circuit found that a complaint alleging a pattern and practice of traffic stops based on race was sufficient to maintain the litigation as a class action. [*See* Order Granting Class Certification, *Rodriguez et al. v. California Highway Patrol et al.*, C 99 20895 JF (N.D. Cal. May 10, 2001) (Attachment 1 hereto)]

Defendants have acted on grounds that apply to all class members, making appropriate final injunctive and declaratory relief for the class as a whole.

II. PLAINTIFFS AND THE PROPOSED CLASS SATISFY THE FOUR REQUIREMENTS OF RULE 23(a).

A. The Proposed Class Is So Numerous that Joinder Is Impracticable.

The proposed class easily meets the numerosity requirement of Rule 23(a)(1). First, a class of 40 is sufficiently numerous to make joinder *presumptively* impracticable, and the proposed class far exceeds that threshold. 1 *Newberg* § 3:5, at 247. Plaintiffs seek to represent *all* Latino motorists and passengers in Maricopa County who have been or will be subjected to Defendants' discriminatory policies and practices. From Defendants' arrest records from various "sweeps," Plaintiffs can already identify, by name, 255 class members. [Lockwood Decl. ¶¶ 14-16, Exs. M-N] Those 255 Latinos were arrested during sweeps pursuant to routine traffic stops. The number of Latinos stopped and *not* arrested likely is much higher.

Second, simple, common-sense assumptions about population estimates and traffic stop data also support a finding of numerosity. 1 *Newberg* § 3:3, at 225-26 (courts are permitted to take common-sense approach to Rule 23(a)(1)). Approximately 1.2 million Latinos reside in Maricopa County, representing about 30% of the County's

total population. [http://pewhispanic.org/states/population/] Defendants conducted more than 63,000 traffic stops in 2007, and as of early December, they had conducted more than 70,000 traffic stops in 2008. [Lockwood Decl. ¶ 2, Ex. A, at 2] Assuming that 30% of Defendants' traffic stops involved Latinos, they would have stopped 18,900 Latinos in 2007, and 21,000 in 2008 – far exceeding the numerosity threshold.

Third, Defendants will continue to stop Latinos in large numbers in the future pursuant to the race-based policy, pattern and practice at issue in this case, and all of those stopped are potential class members. The inclusion of future, unnamed class members also makes joinder inherently impracticable. *Jack v. Am. Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974); *Murillo v. Musegades*, 809 F. Supp. 487, 500 (W.D. Tex. 1992). The proposed class satisfies Rule 23(a)(1).

B. Several Issues Are Common to the Class.

Plaintiffs and the class members share several common questions of law or fact in their claims against Defendants, satisfying the second requirement of Rule 23(a)(2) – "commonality." That requirement is construed "permissively," and a single issue central to the case can justify certification. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *see also Walters*, 145 F.3d at 1047.

Class certification is particularly warranted because the FAC involves two overarching issues that apply to all class members: (1) Whether Defendants engage in a policy, pattern or practice of racial, ethnic and/or national origin profiling in violation of the Equal Protection Clause when targeting cars and occupants they stop for traffic or vehicle violations; and (2) Whether Defendants engage in a policy, pattern or practice of conducting stops, searches, interrogations or arrests without reasonable suspicion or probable cause in contravention of the Fourth Amendment and the Arizona Constitution.

The well-pled allegations of the FAC and the declarations submitted with this Motion amply demonstrate that the Equal Protection Clause claim raises issues common to Plaintiffs and the class. To establish this claim, Plaintiffs must show that Defendants acted with "racially discriminatory intent or purpose." *Vill. of Arlington*

Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266 (1977). Proof of discriminatory intent – standing along – is sufficient to establish an Equal Protection violation because "a government that sets out to discriminate intentionally in its enforcement of some neutral law or policy will rarely if ever fail to achieve its purpose." *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 543 (S.D.N.Y. 2006). *See also Vill. of Arlington Heights*, 429 U.S. at 265-66 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, … judicial deference is no longer justified"); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1071 (9th Cir. 2004) (proof of intentional discrimination is sufficient in cases other than those challenging prosecutors' decisions); *Farm Laborer Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 534 n.4 (6th Cir. 2002) (use of explicit racial criteria or evidence of racially-motivated decision making triggers strict scrutiny); *Pyke v. Cuomo*, 258 F.3d 107, 108-09 (2d Cir. 2001) (equal protection permits a "theory of discriminatory motivation underlying a facially neutral policy . . . [without] show[ing] the disparate treatment of other similarly situated individuals"); *Murillo v. Musegades*, 809 F. Supp. 487, 500 (W.D. Tex. 1992) (stopping individuals "based solely upon racial and ethnic appearance reprehensively violates" the Equal Protection Clause). To determine racially-motivated intent, courts may inquire into "such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights*, 429 U.S. at 266. Proof of disparate impact is not required, but may provide circumstantial evidence of intent. *Id.* at 265-66.[1]

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[1] Even if a showing of disparate impact is required, plaintiffs in racial profiling cases should not be limited to only one type of proof of impact (*i.e.*, proving the existence of a similarly situated group of better treated people) because such evidence is not the only – or necessarily best – way to prove an Equal Protection violation. *Vill. of Arlington Heights*, 429 U.S. at 266; *Rodriguez v. Calif. Highway Patrol*, 89 F. Supp. 2d 1131, 1140-41 (N.D. Cal. 2000). Moreover, the equal protection analysis for selective prosecution claims used in *United States v. Armstrong*, 517 U.S. 456 (1996), does not apply to this civil racial profiling case for the reasons set forth in Plaintiffs' Response to Defendants' Motion to Dismiss, dkt. 48 at 15-16 (citing cases). *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1152-53 (9th Cir. 2007), which did not involve racial profiling, applied *Armstrong* to a challenge to a noise ordinance permitting scheme, without analysis and without citing *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1071 (9th Cir. 2004) (holding *Armstrong* inapplicable to intentional racial discrimination claims against public officials other than criminal prosecutors).

The record abounds with well-pled allegations and evidence showing that Defendants' challenged policy, pattern and practice applies to the class as a whole, and is permeated with discriminatory intent. First, Defendants' admissions and public statements, and news reports of Defendants' "sweeps," provide clear evidence of Defendants' racially-discriminatory motivations. [*See, e.g.*, FAC ¶¶ 33-34, 49-51 (describing Defendants' public statements and other acts); Dkt. 60 at 13-14 (recognizing that the FAC "is replete with references to acts of intentional discrimination by Defendants against Plaintiffs on the basis of race")] Defendants themselves have publicized their actions as part of a relentless media campaign that supposedly concerns "illegal aliens," but that targets and vilifies Latinos – evincing discriminatory intent. *See, e.g., Vill. of Mamaroneck*, 462 F. Supp. 2d at 547-49 (contemporaneous comments of public officials that stigmatized and displayed hostility toward day laborers showed discriminatory intent). As part of this campaign, Defendant Arpaio has made repeated statements that, to him, illegal immigrants and persons from Mexico are synonymous:

> "As far as I am concerned, **the only sanctuary for illegal aliens is in Mexico**." [Lockwood Decl. ¶ 7, Ex. F (emphasis added)]
>
> "**I don't want to turn them [illegal immigrants] over to Border Patrol for a free ride to Mexico. . . . They get a free ride to jail**." [Lockwood Decl. ¶ 4, Ex. C (emphasis added)]
>
> "I have compassion for **the Mexican people**, but if **you come here illegally you are going to jail**." [*Id.* ¶ 5, Ex. D (emphasis added)]
>
> "If you get caught by immigration, you get **a free ride back to Mexico** in an air-conditioned bus. . . . A free ride? Not in my country." [*Id.* ¶ 6, Ex. E (emphasis added)]

Defendant Arpaio's public statements highlight Defendants' emphasis on the person stopped, not the underlying crime – if any. As Arpaio said in one news conference, "Ours is an operation where we want to go after illegals, not the crime first…. It's a pure program. You go after them, and you lock them up." [*Id.* ¶ 8, Ex. G; *id.* ¶ 9, Ex. H ("Arpaio said he was planning to send deputies 'right down there to the

main street in Mesa and arrest some illegals.'")] Responding on CNN's "Lou Dobbs" to an accusation that his tactics resembled those of the Ku Klux Klan, Arpaio stated: "I think its an honor, right? It means we're doing something." [*Id.* ¶ 10, Ex. I]

Second, Defendants have focused their anti-illegal immigrant activities in communities with high Mexican/Hispanic populations by, *inter alia*, conducting a series of unprecedented "crime suppression sweeps" – involving large numbers of MCSO officers, "posse" members and other volunteers – in predominately Latino neighborhoods and day laborer areas.[2] [Lockwood Decl. ¶ 11, Ex. J (news reports indicate "sweeps frequently target[] heavily Latino areas or day-labor corridors"); *id.* ¶ 12, Ex. K (MCSO press release calling day-labor centers "magnets for more illegal aliens"); *id.* ¶ 17, Ex. O ("Beginning last month, Arpaio ordered his deputies and posse members into Hispanic neighborhoods, where they have generally been citing drivers for minor traffic violations and arresting any suspected illegal immigrants they encounter."; *id.* ¶ 20, Ex. R (Paul Giblin, "Reasonable Doubt III: Sweeps and saturation patrols violate federal civil rights regulations," *East Valley Tribune*, July 11, 2008 ("The human smuggling unit, police dogs and even the SWAT team spent hours swarming the intersection of Thomas Road and 36th Street, a primarily Hispanic neighborhood in Phoenix. [MCSO] had conducted major operations there for weeks, using minor traffic violations as legal cover to stop cars that might carry illegal immigrants."))[3]]

The sweeps began in September 2007, just seven months after Defendants Arpaio and Maricopa County entered a Memorandum of Agreement with U.S. Immigration and Customs Enforcement (the MOA) that enabled Defendants to assist in the enforcement of federal immigration law in certain limited circumstances that do not

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[2] In connection with the sweeps, Defendants have accepted the support of volunteers known for anti-Latino and anti-immigrant statements. [*See* Dkt. 60 at 14 (Plaintiffs have alleged that "MCSO has used volunteers to assist in these crime sweeps who have known animosity towards Hispanics and immigrants")]

[3] On April 20, 2009, Paul Giblin and Ryan Gabrielson were awarded the Pulitzer Prize for their multi-part "Reasonable Doubt" series on Defendants' sweeps. [Lockwood Decl. ¶ 32, Ex. DD]

include random street sweeps. [FAC ¶ 20, Ex. A] Defendants' sweeps, and their impermissible targeting of Latino motorists in other contexts, have continued through 2009. [Lockwood Decl. ¶ 18, Ex. P; Mora Decl. ¶¶ 3, 5-7, 11-12]

Third, Latino-appearing drivers and passengers are the primary targets of the sweeps, during which Defendants conduct pretextual traffic stops to root out "illegals." [FAC ¶ 30; Lockwood Decl. ¶ 13, Ex. L (quoting Arpaio, "If we come across any illegal aliens in the course of this operation, they will be arrested and put in jail…. We're going to do what we have to do to clean up this area."). Defendants use minor traffic violations, arising from highly-discretionary traffic stops during the sweeps, to interrogate Latino-looking persons about their immigration status. [*See, e.g.*, Lockwood Decl. ¶ 19, Ex. Q ("Maricopa County sheriff's deputies are out prowling. Their prey? Illegal immigrants. Their method? Look for minor traffic violations."); *id.* ¶ 20, Ex. R, at 3 (MCSO reports to ICE show that "once [MCSO officers participating in a sweep] spotted a vehicle picking someone up, detectives in undercover cars 'would establish probable cause for a traffic stop'")] As Defendant Arpaio himself has stated: "When we stop a car for probable cause, we take the other passengers too." [*Id.* ¶ 33, Ex. EE, at 23]

Defendants' reliance on such minor traffic infractions illustrates the pretextual nature of their stops, and the true immigration-enforcement purpose of the sweeps. [Lockwood Decl. ¶ 14, Ex. M (sweep arrests often arise from traffic stops for "cracked windshield" or "broken tail light")] Yet, the Supreme Court has made clear that even traffic stops supported by reasonable suspicion or probable cause of a traffic infraction violate Equal Protection if executed to effectuate a racially-discriminatory policy, pattern or practice. *Whren v. U.S.*, 517 U.S. 806, 813 (1996) (the "Constitution prohibits selective enforcement of the law based on considerations such as race").[4]

[4] Public concern over Defendants' use of its MOA-granted authority during the sweeps and otherwise has been well documented in the media. [Lockwood Decl. ¶ 11, Ex. J (Daniel Gonzales, "Crime-Sweep Records Raise Suspicions of Racial Profiling," *Arizona Republic*, Oct. 5, 2008); *id.* ¶ 20, Ex. R (Paul Giblin, "Reasonable Doubt Part III: Sweeps and Saturation Patrols Violate Civil Rights Regulations," *East Valley Tribune*, July 11, 2008); *id.* ¶ 21, Ex. S (Howard Witt, "Does Crackdown Cross Line? Arizona's Efforts Stir Racial Profiling Claims," *Chicago Tribune*, May 26, 2008); *id.*

Fourth, Defendants' arrest records exemplify the unequal treatment of Latinos during the sweeps. For seven sweeps conducted in 2008, nearly 70% of those arrested were Latino. [Lockwood Decl. ¶¶ 14-16, Exs. M-N] Yet Latinos only constitute about 30% of the County's population. [http://pewhispanic.org/states/population] As *The Arizona Republic* reported, based on its analysis of Defendants' records:

> The sweeps frequently targeted heavily Latino areas or day-labor corridors, and most of those arrested during highly discretionary stops for reasons such as cracked windshields were Latinos, the records show. Immigration enforcement also seemed to be the main goal of the operations which is prohibited; in five of the eight sweeps, immigration arrests outnumbered other types of arrests, the records show.

[Lockwood Decl. ¶ 11, Ex. J]

Fifth, the sweeps represent a sharp break with past practice and normal procedures. *See, e.g., Vill. of Mamaroneck*, 462 F. Supp. 2d at 548-49 (departures from historic practice and normal procedures are probative of officials' intent to discriminate). They have involved the sudden, intense enforcement of highly-discretionary traffic laws to stop Latinos for the purpose of inquiring into their immigration status. [*See, e.g.*, Sanchez Decl. ¶¶ 2-6 (April 3-4, 2008 Guadalupe sweep involved sudden, unprecedented deployment of dozens of MCSO vehicles and personnel)] The MOA, however, does *not* permit random street operations, or the use of the traffic code to perform immigration-enforcement activity. [FAC ¶¶ 22-23 and Ex. B] Nor does it grant Defendants law-enforcement authority greater than that permitted by the Fourth Amendment and Fourteenth Amendments to the U.S. Constitution and other law. [FAC ¶ 25, Ex. A, Part XV] Nevertheless, Arpaio often precedes and follows Defendants' sweeps with press releases that boast about his enforcement of federal

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¶ 8, Ex. G (Richard Ruelas, "ICE Stays Silent on Real ICE Plan," *Arizona Republic*, March 2, 2007)] Defendants' activities have also raised concerns among numerous political leaders and institutions, Phoenix Mayor Phil Gordon, the Arizona Civil Rights Advisory Board and the Goldwater Institute. [Lockwood Decl. ¶¶ 22-26, Exs. T-X] These concerns have also led to a hearing by two subcommittees of the U.S. House of Representatives Judiciary Committee, and to an investigation by the U.S. Department of Justice. [*Id.* ¶ 34, Ex. FF]

immigration law, and that trumpet the number of persons arrested for immigration violations. [FAC ¶¶ 37-47 (citing press releases and arrest statistics)] While on occasion persons facing particular criminal charges are also detained, the sweeps are clearly focused on finding individuals who are allegedly here unlawfully, as Arpaio acts on his promise to make MCSO "a full-fledged anti-illegal immigration agency." [Lockwood Decl. ¶ 3, Ex. B, at 2]

Sixth, Defendants' much-publicized forced march of more than 200 immigrant detainees – all or nearly all of whom were Latino – to a segregated section of the "Tent City" jail further evinces discriminatory intent. [Lockwood Decl. ¶ 29, Ex. AA (Sarah Fenske, "Mexican Government Denounces Arpaio's Tent City March; Protest Filed with Supervisors," *Phoenix New Times*, Feb. 24, 2009) (reporting that 230 of the inmates were Mexican)] Announcing the plan to move these detainees into an area surrounded by an electrified fence – and inviting public viewing of the shackled detainees' march – Arpaio mockingly stated that the group is "more adept perhaps at escape" "[b]ut this is a fence they won't want to scale because they risk receiving quite a shock – literally." [Lockwood Decl. ¶ 28, Ex. Z (MCSO Press Release, "Arpaio Orders Move of Hundreds of Illegal Aliens to Their Own Tent City," Feb. 3, 2009)] Even Maricopa County Attorney Andrew Thomas questioned whether such conduct violated the Equal Protection Clause. [*Id.* ¶ 29, Ex. AA; *id.* ¶ 30, Ex. BB (Yvonne Wingett and Michael Kiefer, "County to probe segregation in jails," *Arizona Republic*, B3, Feb. 7, 2009) ("Thomas said he disagreed with the measure," "cit[ing] a 2005 U.S. Supreme Court decision that rejected an unwritten policy of segregating prisoners by race")]

While Plaintiffs do not need to establish that similarly-situated members of other, non-minority groups were treated differently in a case where defendants' discriminatory *purpose* is manifest, *see, e.g.*, *Vill. of Arlington Heights*, 429 U.S. at 266, Defendants' polices and practices *have* treated others differently. [*E.g.*, Dkt. 60 at 14 (recognizing allegations of disparate treatment in FAC); FAC ¶ 32 ("Caucasian drivers and passengers . . . are treated differently and their vehicles stopped at much lower rates

than similarly situated Latino drivers and passengers.")] For example, Mr. Ortega was treated much differently than the Caucasian driver of the vehicle he was riding in – who was not detained. [FAC ¶ 56] Defendants' investigation of plaintiffs David and Jessica Rodriguez also presents a stark example of racially disparate treatment, as several, similarly-situated Caucasian drivers were not asked to produce any identification – but rather were given a free pass, while Mr. Rodriguez was compelled to produce a panoply of documents. [FAC ¶¶ 86-87, 96] *See, e.g., Vill. of Mamaroneck*, 462 F. Supp. 2d at 549 (ticketing Latino drivers for not wearing seatbelts, but giving Caucasians not wearing seatbelts a free pass, supported showing of discriminatory intent). Moreover, Defendants' sweeps have occurred in predominately Latino neighborhoods; and even when they reach non-Latino neighborhoods, Latinos are still the main targets. [Lockwood Decl. ¶ 11, Ex. J]

In sum, the claims of Plaintiffs and the class members share the same core issue of whether Defendants have adopted a policy, pattern and practice of targeting Latinos for pretextual traffic stops. The FAC more than adequately alleges that Defendants have done so with respect to the class as a whole, satisfying the commonality requirement of Rule 23(a)(2).

A second, major common issue ties together the claims of the Plaintiffs' and the proposed class members – whether Defendants have executed their immigration-enforcement activities without adequate suspicion or probable cause, in violation of the Fourth Amendment and Arizona Constitution's prohibitions against unreasonable searches and seizures. Whenever a law enforcement officer restrains an individual's freedom to walk away, "that person has been seized within the meaning of the Fourth Amendment." [Dkt. 60 at 6 (citing *Murillo*, 809 F. Supp. at 498)] Consistent with the Fourth Amendment, a police officer "may conduct a brief investigatory stop or seizure when an officer has reasonable suspicion 'supported by articulable facts that criminal activity may be afoot.'" [*Id.* at 7 (quoting *United States v. Sololow*, 490 U.S. 1, 7 (1989))] Such a stop "must be brief and must last no longer than necessary." [*Id.* (citing

cases)] A full custodial arrest "must be based on probable cause." [*Id.* (citing *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984))]

Significantly, the Ninth Circuit has "rejected profiles that are likely to sweep many ordinary citizens into a generality of suspicious appearance." *United States v. Montero-Camargo*, 208 F.3d 1122, 1129-30 (9th Cir. 2000). Indeed, where a large number of people "share a specific characteristic, that characteristic is of little or no probative value in [the required] particularized and context-specific analysis." *Id.* at 1131. Moreover, "Hispanic appearance is of little or no use in determining whether particular individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens." *Id.* at 1134.

Yet Plaintiffs' FAC and the additional materials submitted with this Motion demonstrate that Defendants have engaged in just such a practice. [*See, e.g.*, Lockwood Decl. ¶ 20, Ex. R, at 2-3 (reporting on a letter to ICE from Lt. Joe Sousa explaining that in a Fountain Hills sweep near a day laborer area, MCSO "deputies in patrol cars watched for vehicles that appeared to pick up illegal immigrants. Then, once they spotted a vehicle picking someone up, detectives in undercover cars 'would establish probable cause for a traffic stop.'")] Defendants arrested plaintiff Mr. Ortega, for example, because the *driver* may have been speeding. [FAC ¶¶ 56, 75-76] They provided Mr. Ortega with no explanation that could support a finding of probable cause capable of justifying his arrest and nine-hour detention, and other mistreatment at the hands of Defendants. [*Id.* ¶¶ 68, 77, 81] Likewise, Defendants stopped declarant Pedro Manzanarez last February without any individualized suspicion. [Declaration of Pedro Marquina Manzanarez ("Manzanarez Decl.") ¶ 3] Rather, it appears Defendants were conducting an unlawful immigration checkpoint to investigate the status of Latino drivers – doing away with even the pretense of a traffic violation in this instance. [*Id.* ¶¶ 4-5] Furthermore, Defendants stopped Julio Mora and his father without any reasonable suspicion or probable cause to believe that they had violated any traffic law, and then detained them for hours while sorting out the immigration status of numerous

other Latino-appearing persons rounded up in the vicinity. [*See generally* Mora Decl.] [See *also* Lockwood Decl. 19, Ex. Q (MCSO Sergeant: "The objective is to make stops on these vehicles, screen these individuals whether they're in this country illegally.")]

As Maricopa County Supervisor Mary Rose Wilcox has stated: "If you are of Mexican-American heritage, if you have brown skin, there is nothing you can do not to be stopped." [Lockwood Decl. ¶ 21, Ex. S, at 2] Defendants' pattern and practice guarantees that many Latino-appearing persons who are here lawfully will be stopped without cause and subjected to resulting harms and indignities, even if not ultimately cited or charged.

At bottom, the commonality requirement is satisfied "if the named plaintiffs share a common question of law or fact with the grievances of the proposed class"; "factual differences among the claims of the class members will not defeat certification." *Daniels*, 198 F.R.D. at 417 (granting class certification in police practices/racial profiling case brought by several named plaintiffs who had been victims of suspicionless stops). *See also Hanlon*, 150 F.3d at 1019 ("[t]he existence of shared legal issues with divergent factual predicates is sufficient"). The named Plaintiffs have suffered from Defendants' policy, pattern and practice of racial profiling, and their claims and the class claims meet the commonality requirement. *Walters*, 145 F.3d at 1047 (pattern and practice claims satisfy commonality).

C. Plaintiffs' Claims Are Typical of the Class.

Plaintiffs' claims also meet the third requirement of Rule 23(a) – typicality. Their claims are typical of the claims of the class because they arise from the same pattern and practice, and are based on the same legal theories. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). Under the permissive standards of Rule 23(a), representative claims are "typical" if they are reasonably co-extensive with those of class members; they do not have to be substantially identical. *Hanlon*, 150 F.3d at 1020; *see also Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996) ("Typicality requirements for class certification should be determined with

reference to the defendant's actions, not with respect to particularized defenses [the defendant] might have against certain class members."). Moreover, a finding of commonality often supports typicality. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1184 (9th Cir. 2007) (noting that commonality and typicality requirements tend to merge).

Plaintiffs have received the same discriminatory treatment and suffered the same civil rights violations as the putative class members. For example, just as Plaintiffs share equal-protection and search-and-seizure claims with Pedro Manzanarez and Julio Mora, they share similar claims with all other putative class members. Plaintiffs' claims arise from the same policy, pattern and practice that give rise to the claims of the proposed class members. As such, Plaintiffs' claims are "typical" and satisfy Rule 23(a)(3). *See, e.g., Daniels*, 198 F.R.D. at 418 (finding typicality where the named plaintiffs and proposed class members' claims "arise from the same allegedly unlawful activity of the [NYPD's Special Crimes Unit] – namely suspicionless stops and frisks").

D. Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.

Plaintiffs meet the fourth requirement of Rule 23(a) because their interests are not antagonistic or in conflict with those of the class, and because their attorneys are qualified and able to conduct the litigation. *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994). As set forth above, Plaintiffs and the class members have been subjected to the same unlawful conduct and seek the same relief, making their interests co-extensive. In the absence of conflicting interests, Plaintiffs can vigorously prosecute the case to the mutual benefit of all class members. *Hanlon*, 150 F.3d at 1020.

Plaintiffs' counsel at Steptoe & Johnson LLP, the ACLU Foundation of Arizona, the ACLU Foundation Immigrants' Rights Project and the Mexican American Legal Defense and Educational Fund (MALDEF) are experienced in civil rights, constitutional law and class-action litigation. David J. Bodney, Peter S. Kozinets, Karen J. Hartman-Tellez and Isaac P. Hernandez of Steptoe & Johnson LLP have several decades of combined experience litigating constitutional and civil rights disputes. Co-counsel Daniel Pochoda, the Legal Director of the ACLU Foundation of Arizona, has

litigated numerous class action and constitutional cases since 1968, when he joined the Civil Rights Division of the U.S. Department of Justice. He has argued a civil rights case before the U.S. Supreme Court (*Preiser v. Newkirk*, 1975); has taught constitutional law, federal courts, civil procedure and trial practice; and, in his current position, has been attorney of record on approximately 20 class action and constitutional cases.

Co-counsel Mónica Ramírez is a staff attorney with the ACLU Foundation Immigrants' Rights Project (IRP), which has extensive experience litigating civil rights and class action lawsuits across the country. Ms. Ramírez is class counsel in a pending § 1983 class action lawsuit on behalf of pretrial detainees ineligible for bail because of their presumed immigration status, *see Lopez-Valenzuela v. Maricopa County*, (D. Ariz. No. 08-CV-660-SRB-ECV). She is also class counsel in *Orantes-Hernandez v. Gonzales*, Nos. 07-56509, 08-55231, 2009 WL 905454 (9th Cir. Apr. 6, 2009), a nationwide class action on behalf of Salvadoran refugees.

Co-counsel Kristina M. Campbell is a Staff Attorney with MALDEF, a national civil rights organization whose principal objective is to promote the civil rights of Latinos in the U.S. MALDEF has won numerous significant legal victories, including the landmark 1982 U.S. Supreme Court case *Plyler v. Doe*. Ms. Campbell's litigation experience focuses on class actions and the intersection of immigration, employment and constitutional law. Accordingly, the shared interests of Plaintiffs and class members are well protected by class counsel, satisfying Rule 23(a)(4).

III. THE PROPOSED CLASS IS SUFFICIENTLY DEFINITE TO BE CERTIFIED UNDER RULE 23(b)(2).

Plaintiffs' proposed class is clearly defined, enabling the Court to identify class members and grant class-wide relief pursuant to Rule 23(b)(2). Specifically, Plaintiffs seek to represent "All 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." [FAC ¶ 121] Although class definitions may be more loosely defined when

non-monetary relief is sought, Plaintiffs have focused the definition of the proposed class on Latino individuals traveling in vehicles within the geographic limits of Defendants' jurisdiction. *See, e.g., Rice v. City of Philadelphia*, 66 F.R.D. 17, 19 (E.D. Pa. 1974) (Rule 26(b)(2) classes require less precise definitions; "[i]f relief is granted to the plaintiff class, the defendants are legally obligated to comply, and it usually unnecessary to define with precision the persons entitled to enforce compliance"); 5 James Wm. Moore, *Moore's Federal Practice* § 23.21[3][a] & [5], at 23-47 & 23-52 (3d ed. 1997). Further, the class is defined in terms of, and limited by, Defendants' challenged behaviors. *See Rice*, 66 F.R.D. at 19. The proposed class is therefore ascertainable and sufficiently defined for purposes of Rule 23(b)(2) certification.

In sum, Defendants' policy, pattern and practice of targeting Latino motorists and passengers for pretextual traffic stops applies to all class members, making appropriate the type of injunctive and declaratory relief sought here. [FAC p. 30] Accordingly, class certification under Fed. R. Civ. P. 23(a) and 23(b)(2) is warranted. *See, e.g.*, *Walters*, 145 F.3d at 1047.

Conclusion

For the foregoing reasons, Plaintiffs request that the Court certify this matter as a class action and appoint Plaintiffs' counsel as class counsel.

RESPECTFULLY SUBMITTED this 29th day of April, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2009, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrant:

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I further certify that I caused a copy of the attached document to be mailed on the 29th day of April, 2009 to:

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