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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Manuel de Jesus Ortega Melendres, et al.,)

No. CV-07-2513-PHX-MHM

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Plaintiff,

**ORDER**

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vs.

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Joseph M. Arpaio, et al.,

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Defendant.

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Currently pending before the Court is Defendants Sheriff Joseph M. Arpaio, Maricopa County, and the Maricopa County Sheriff's Office's Motion for Recusal. (Dkt.#63.) After reviewing the relevant documents and determining oral argument unnecessary, the Court issues the following Order.

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**I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

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Having already issued two substantive Orders in this case (Dkt.##25, 60.), the Court is intimately familiar with the underlying facts and sees no reason to go through them now in great detail. On December 12, 2007, Plaintiffs Manuel de Jesus Ortega Melendres, Jessica Quitugua Rodriguez, David Rodriguez, Velia Meraz, Manuel Nieto, Jr., and Sons America

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1 filed suit—on behalf of themselves and all others similarly situated<sup>1</sup>—against Defendants  
2 pursuant to the Fourth and Fourteenth Amendments to the United States Constitution, Title  
3 VI of the Civil Rights Act, and Article II, § 8 of the Arizona Constitution alleging racial  
4 profiling and unlawful detention of persons of Hispanic appearance and/or descent during  
5 Defendants’ attempt to enforce federal immigration laws. On January 3, 2008, Defendants  
6 moved to dismiss the Complaint; Plaintiffs subsequently sought leave to amend.  
7 (Dkt.##12,17.) On September 5, 2008, the Court granted leave to amend and denied as moot  
8 Defendants’ motion to dismiss. (Dkt.#25.) Thereafter, Defendants renewed their dismissal  
9 motion. On February 10, 2009, after holding oral argument, the Court denied Defendants’  
10 renewed motion to dismiss on the merits. See Melendres v. Arpaio, 598 F. Supp. 2d 1025  
11 (D. Ariz. 2009); (Dkt.#60.) On February 23, 2009, thirteen days after the Court’s Order was  
12 entered, Defendants moved to recuse the Court under both 28 U.S.C. § 144 and 28 U.S.C.  
13 § 455.

14 In support of their Motion for Recusal, Defendants submitted the affidavit of Mr.  
15 David Hendershott, Chief of the Maricopa County Sheriff’s Office (“MCSO”), as well as  
16 supporting exhibits. Plaintiffs responded in opposition with a declaration from Mr. Aaron  
17 Lockwood, an attorney with the law firm of Steptoe and Johnson, along with supporting  
18 exhibits. The factual background, as reflected in the filings made by the affiant and declarant,  
19 is as follows.

20 The Court has an identical twin sister, Janet Murguia . Janet Murguia is currently  
21 President and CEO of the National Council of La Raza (“NCLR”). NCLR is the largest  
22 national Latino civil rights organization in the United States. Janet Murguia previously  
23 served as Deputy Director of Legislative Affairs to President William J. Clinton, and as  
24 Executive Vice Chancellor for University Relations of the University of Kansas.  
25 Furthermore, one of the Court’s older brothers, Ramon Murguia, an attorney in private  
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27 <sup>1</sup>Plaintiffs have filed a “Motion to Certify the Class,” and that Motion is currently  
28 pending with the Court. (See Dkt.#93.)

1 practice in Kansas City, Kansas, has also been affiliated with NCLR, having served on the  
2 organization's Board of Directors, including a term as its Chairman.

3 Defendants contend that it was not until February 11, 2009—the day after the Court  
4 ruled against them in its first potentially dispositive Order—that they became aware of the  
5 Court's relationship with her sister and her sister's connection to NCLR. According to  
6 Defendants, on February 11, 2009 the *Phoenix Business Journal* published an article entitled,  
7 "Federal Court sides with ACLU against Arpaio in round 1 of profiling case." Among other  
8 things, this article mentioned that Janet Murguia is "president and CEO of the National  
9 Council of La Raza, a leading Hispanic advocacy group." (Dkt.#63, Exhibit 1.) That same  
10 day, an online version of the *Phoenix New Times* published an article commenting on the  
11 Court's Order. Among other things, the *New Times* article noted that the Court is the "[f]irst  
12 Latina judge appointed to the U.S. District Court in Phoenix." (*Id.* at Exhibit 2.) Similarly,  
13 on February 12, 2009, *The Arizona Republic* ran a story in its local section concerning the  
14 instant case, in which it discussed the Court's personal background, along with that of her  
15 sister. (*Id.*)

16 Through their affiant, Defendants contend that after these and other media sources  
17 publicized the Court's personal background, including her sister's work at NCLR,  
18 Defendants were contacted by members of the public—who were apparently looking to  
19 express their disappointment with the Court's ruling in the instant case. According to  
20 Defendants, it was through these public comments that they were first alerted to the Court's  
21 personal history. Defendants also claim public reaction to the Court's February 10, 2009  
22 Order was alarming, since, according to Defendants, the public appeared to be more focused  
23 on the relationship between the Court and her sister than on the underlying merits of the  
24 action. To this end, Defendants have submitted five 'reader comments' that were posted on  
25 websites belonging to the *The Arizona Republic* and the *Phoenix Business Journal*. These  
26 reader comments were posted alongside online versions of the newspapers' aforementioned  
27 February 11, 2009 articles. Defendants contend that these five reader comments typify the  
28 sentiments communicated to them by members of the public, and that these selected reader

1 comments underscore what Defendants perceive to be the public’s reaction to Court’s  
2 continued role in this case. Defendants’ proffered reader comments include the following:

- 3 • “Of course this Judge will let the lawsuit stand. Her sister is the President of  
4 La Raza. Can you say CONFLICT OF INTEREST!”
- 5 • “They [*The Arizona Republic*] seem to have left out that Judge Murguia is the  
6 sister of the head of La Raza. Kind of important fact to leave out, don’t you  
7 think?”
- 8 • “Judge Murguia ... is only making her sister’s job easier.”
- 9 • “Wrong is just WRONG.... I would have made the same ruling and MY sister  
10 is not connected to La Raza.”
- 11 • “[Judge] Murguia is the twin sister of Janet Murguia, president and CEO of the  
12 National Council of La Raza, a leading Hispanic advocacy group. This judge  
13 should be impeached for not recusing herself. Peter Kozinets should be fired  
14 by the plaintiffs for tainting their lawsuit by getting a judge with such an  
15 obvious conflict of interest to the case. If they ever had a shred of legitimate  
16 claim, this blows it away.”

17 Defendants additionally claim that while researching the Court’s background they  
18 came upon a 2004 newspaper article published in the *Kansas City Star*. This article noted  
19 that the Court and Janet Murguia are the youngest of six children, and that the Court and her  
20 siblings constitute “one big chain,” and “[i]f not for one, the chain would be broken.” (See  
21 Dkt.#63, ¶ 11.) The article also describes the relationship between the Court and her  
22 identical twin sister as “close,” reporting that they “talk constantly,” and speak “to each other  
23 several times a week.” (*Id.*)

24 Questioning Defendants’ factual representations, Plaintiffs responded with their own  
25 submission. Specifically, Plaintiffs point out that on December 11, 2007, the day before the  
26 instant case was filed, *The Arizona Republic*—which is the State of Arizona’s largest daily  
27 circulation newspaper—published a front page story detailing the Court’s sibling relationship  
28 with Janet Murguia. Because this article contains quotes from Sheriff Arpaio as well as the

1 Maricopa County Attorney, and because the article focused on another high profile federal  
2 lawsuit involving many of the same Defendants, Plaintiffs argue that the article contradicts  
3 Defendants' stated position that they were unaware of the Court's background until February  
4 11, 2009. (Dkt.#70, Exhibit A.) Plaintiffs further note that this story was picked up and  
5 reported nationally by the Associated Press. (Id. at Exhibit B.)

6 With respect to Janet Murguia's work with NCLR, Defendants allege that NCLR has  
7 continually offered public comments about the facts of this case, including published articles  
8 and speeches by Janet Murguia herself. For example, according to Defendants, NCLR is on  
9 record as "strongly oppos[ing] efforts to make state and local police responsible for the  
10 enforcement of federal immigration laws." (See id. at Exhibit 7.) Similarly, according to  
11 Defendants, NCLR has issued statements claiming that the local enforcement of federal  
12 immigration laws is "having a serious negative impact on Latino communities," and that  
13 "delegation of immigration authority is likely to result in racial profiling, police misconduct,  
14 and civil rights violations." (Id. at ¶ 15.)

15 Defendants have also submitted evidence that NCLR has a Phoenix office, and  
16 therefore has a direct presence in Maricopa County. (Id. at ¶ 19.) Defendants also note that  
17 NCLR's website directs individuals who believe that their rights have been violated to  
18 contact one of NCLR's affiliate organizations. Among the organizations listed as affiliates  
19 are the American Civil Liberties Union ("ACLU") and the Mexican American Legal Defense  
20 and Education Fund ("MALDEF"). Both the ACLU and MALDEF, while not parties to this  
21 case, are providing legal representation to the named Plaintiffs.

22 Among the litany of reasons Defendants submit to support their recusal motion, one  
23 concerns a recent public awareness campaign launched by NCLR, "We Can Stop the Hate."  
24 (See [www.wecanstopthehate.org](http://www.wecanstopthehate.org).) The We Can Stop the Hate campaign contains a  
25 prominent picture of Janet Murguia, and links to several of her public speeches. Specifically,  
26 Defendants point to a February 4, 2009 article available on the website. This article addresses  
27 actions taken by Sheriff Arpaio and the Maricopa County Sheriff's Office ("MCSO").  
28 Although the actions of Sheriff Arpaio and Maricopa County addressed in the article appear

1 to be unrelated to the instant lawsuit, <sup>2</sup> Defendants point out that disparaging statements  
2 directed towards Sheriff Arpaio and MCSO are included in the online publication. Examples  
3 of such statements include the following: “[ i]n true Arpaio form , his office sent a press  
4 release to the media inviting them to this event, proving that he’s more interested in drawing  
5 attention to himself than actually doing his job.” (Dkt.#63, at ¶ 17; Exhibit 9.) Among an  
6 assortment of epithets, Sheriff Arpaio is called “a relentlessly self-promoting caricature of  
7 a sheriff (ever closer to ‘I’m not a real Sheriff, I just play one on TV’ territory), not an actual  
8 law enforcement official. The march is yet another stunt to distract people from his  
9 incompetent, lawsuit-riddled folly of a department.” (Id.) The article further refers to  
10 members of the MCSO as “Arpaio and his thugs.” (Id.)

11 The Court notes that after independently reviewing the We Can Stop the Hate  
12 campaign’s website, it encountered numerous other articles relating to Sheriff Arpaio and the  
13 MCSO. For reasons that are altogether unclear, these articles were not made part of  
14 Defendants’ factual submission. Interestingly, two such articles directly address the  
15 underlying facts of the instant case. Given the nature of the assertions that Defendants have  
16 raised against the Court in their recusal motion, the absence of these highly relevant articles  
17 from Defendants’ factual submission is somewhat puzzling. The first article encountered by  
18 the Court is dated January 20, 2009 and entitled “Join a Call for an Investigation of Sheriff  
19 Arpaio.” In this article, NCLR asks members of the public to support a public call for an  
20 immediate investigation by the federal government into the legality of the agreement between  
21 U.S. Immigration and Customs Enforcement and MCSO, which permits MCSO to work with  
22 federal law agencies to aid in the enforcement of federal immigration laws. This agreement  
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25 <sup>2</sup>Although the article refers to a “parade” of “hundreds of detained immigrants in  
26 shackles through the streets of Phoenix,” which seemingly implicates and casts aspersions  
27 on Defendants immigration enforcement policy, the thrust of the article is concerned with  
28 Sheriff Arpaio’s general treatment of detained prisoners, rather than the legality of an  
immigration detention and whether such detentions were predicated upon constitutional  
violations. (Id.)

1 is referred to as the “§ 287(g)” agreement.<sup>3</sup> In the instant lawsuit, Plaintiffs’ claim  
2 Defendants have violated their civil rights in the course of carrying out their activities under  
3 the § 287(g) agreement, and Plaintiffs seek to enjoin Defendants from enforcing federal  
4 immigration laws pursuant to the 287(g) agreement.

5 The second article independently encountered by the Court is dated October 22, 2008  
6 and is entitled “Sheriff Joe Strikes Again.”<sup>4</sup> In this article, NCLR refers to Sheriff Arpaio  
7 as “a man who has made a career of humiliating prisoners, harassing Latinos of every variety,  
8 wasting taxpayer dollars with dubious results, and having a less than stellar respect for civil  
9 rights and due process.” (Id.) The article goes on to characterize Sheriff Arpaio as  
10 “unrepentant, arrogant, and monumentally disingenuous.” (Id.) It also addresses the precise  
11 legal and factual issues of the instant lawsuit. Specifically, this article alleges that Sheriff  
12 Arpaio and MCSO deputies have engaged in acts of racial profiling. The article states that  
13 “Arpaio claims he does not know what racial profiling is since he can’t possibly define  
14 something he’s never engaged in. Here’s a hint, Joe: the stuff you’re doing to Latinos in  
15 Arizona—the ACLU noted in July that ‘Arpaio has made no secret that he believes physical  
16 appearance alone is sufficient reason to stop and question individuals regarding their  
17 immigration status’—that’s racial profiling.” (Id.)

18 Another item in Defendants’ factual submission concerns an April 16, 2008 speech  
19 by Janet Murguia entitled “Conventional Wisdom” This speech is also available on the We  
20 Can Stop the Hate website. (Id. at ¶ 18; Exhibit 10.) While Janet Murguia’s speech refers

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23 See We Can Stop the Hate,  
24 [http://www.wecanstopthehate.org/site/latest/join\\_the\\_call\\_for\\_an\\_investigation\\_of\\_sheriff\\_arpaio](http://www.wecanstopthehate.org/site/latest/join_the_call_for_an_investigation_of_sheriff_arpaio) (last visited June 1, 2009.)

25 4

26 See We Can Stop the Hate,  
27 [http://www.wecanstopthehate.org/site/latest/sheriff\\_joe\\_strikes\\_again](http://www.wecanstopthehate.org/site/latest/sheriff_joe_strikes_again) (last visited June 1, 2009.)

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1 to “hate groups and extremists pulling the levers and turning the wheels,” these comments  
2 were not directed towards any of the Defendants, and no reasonable person could infer that  
3 the speech was in any sense about them. In fact, the “Conventional Wisdom” speech, for all  
4 practical purposes, appears to be completely unrelated to the instant case, other than the fact  
5 that it highlights Janet Murguia and NCLR’s involvement in Latino civil rights issues. (Id.)

6 Lastly, Defendants point to Plaintiff Somos America’s website, which lists the  
7 organization’s political and social interests. (See Dkt.#63, ¶ 21.) Defendants argue that  
8 Somos America’s website demonstrates that it shares a common ideology with NCLR, and  
9 presumably with the Court’s sister. Defendants lastly state that Somos America’s website  
10 contains a link to Janet Murguia’s “Conventional Wisdom” speech. (Id.) .

## 11 **II. LEGAL STANDARD**

12 Two statutes govern the recusal of district judges: 28 U.S.C. § 144 and 28 U.S.C. §  
13 455(a)-(b). Section 144 applies when a party to a proceeding believes that the district judge  
14 “has a personal bias or prejudice either against him or in favor of any adverse party[.]”  
15 28 U.S.C. § 144. “Section 144 expressly conditions relief upon the filing of a timely and  
16 legally sufficient affidavit.” United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980)  
17 (citations omitted). Specifically, the statute provides:

18 The affidavit shall state the facts and the reasons for the belief that bias or  
19 prejudice exists, and shall be filed not less than ten days before the beginning  
20 of the term at which the proceeding is to be heard, or good cause shall be  
21 shown for failure to file it within such time. A party may file only one such  
22 affidavit in any case. It shall be accompanied by a certificate of counsel of  
23 record stating that it is made in good faith.

24 28 U.S.C. § 144. When a party files a timely and legally sufficient affidavit pursuant to §  
25 144 that plainly sets forth a compelling case for recusal, the district judge “shall proceed no  
26 further therein, but another judge shall be assigned to hear such proceeding.” Id. Sibla, 624  
27 F.2d at 867. However, “if the motion and affidavit required by [§] 144 [are] not presented  
28 to the judge, no relief under [§] 144 is available.” Sibla, 624 F.2d at 868.

29 Section 455 has two recusal provisions. The first provision, subsection (a), states that  
30 “[a]ny justice, judge, or magistrate of the United States shall disqualify himself [or herself]



1 in any proceeding in which his [or her] impartiality might reasonably be questioned.”  
2 28 U.S.C. § 455(a). Subsection (b) provides that any justice, judge, or magistrate shall also  
3 disqualify themselves under the following situations:

4  
5 (1) Where he has a personal bias or prejudice concerning a party, or personal  
6 knowledge of disputed evidentiary facts concerning the proceeding;

7 \* \* \*

8 (4) He knows that he, individually or as a fiduciary, or his spouse or minor  
9 child residing in his household, has a financial interest in the subject matter in  
10 controversy or in a party to the proceeding, or any other interest that could be  
11 substantially affected by the outcome of the proceeding;

12 \* \* \*

13 (5) He or his spouse, or a person within the third degree of relationship to  
14 either of them, or the spouse of such a person:

15 \* \* \*

16 (iii) Is known by the judge to have an interest that could be substantially  
17 affected by the outcome of the proceeding;

18 28 U.S.C. § 455.

19 Unlike section 144, section 455 “sets forth no procedural requirements.” Sibla, 624  
20 F.2d at 867-68. Instead, that section is directed towards the judge, rather than the parties, and  
21 is self-enforcing on the part of the judge. Id. Moreover, “section 455 modifies section 144  
22 in requiring the judge to go beyond [a] section 144 affidavit and consider the merits of the  
23 [recusal] motion pursuant to section 455[.]” Id. at 868. The recusal standards under § 144  
24 and § 455 are identical, and decisions interpreting one section are controlling in the  
25 interpretation of the other. Id.

#### 26 **IV. DISCUSSION**

27 Because Defendants have moved to recuse the Court under both § 144 and multiple  
28 sub-sections of § 455, the Court will address each of these claims in turn. Before turning to

1 the merits of Defendants’ individual contentions, the Court will first address whether  
2 Defendant’s recusal motion has been timely filed.

3 **A. Whether Defendants’ Motion is Untimely**

4 Recusal motions brought under either § 144 and § 455 must be filed in a timely  
5 manner. See 28 U.S.C. § 144(a) (motions “must be made in a timely fashion”); Davies v.  
6 Commissioner, 68 F.3d 1129, 1131 (9th Cir. 1995) (motions under § 455 must also “be made  
7 in a timely fashion”). The recusal statute “is not intended to give litigants a veto power over  
8 sitting judges, or a vehicle for obtaining a judge of their choice.” United States v. Cooley,  
9 1 F.3d 985, 993 (10th Cir. 1993). Moreover, “where the facts are known before a legal  
10 proceeding is held, waiting to file . . . a motion until the court has ruled against a party is  
11 untimely.” Summers v. Singletary, 119 F.3d 917, 921 (11th Cir. 1997).

12 Plaintiffs contend that the instant motion to recuse is untimely and has been brought  
13 in bad faith, since this case was first assigned to the Court in December 2007 and Defendants  
14 waited for over a year before moving for recusal. Plaintiffs cite to examples where other  
15 courts have rejected recusal motions when the delays at issue involved appreciably shorter  
16 time periods than here. See e.g., United States v. Simmons, 1997 U.S. Dist. LEXIS 22658,  
17 \*17 (E.D. Cal. July 28, 1997) (“foreclos[ing] relief” for a 10-month delay); Singer v.  
18 Waldman, 745 F.2d 606, 608 (10th Cir. 1984) (denying a recusal motion filed over one-year  
19 after the complaint).

20 Plaintiffs also take issue with Defendants’ assertion of prior ignorance regarding the  
21 Court’s family background. Plaintiffs argue that Defendants’ contentions strain all credulity  
22 and should be rejected. According to Plaintiffs, the Court’s background, including her  
23 sister’s position with NCLR, was a matter of public record as far back as 2001, when the  
24 *Washington Post* printed an article discussing the Court’s relationship with her twin sister.  
25 Furthermore, Plaintiffs have submitted a December 2007 front page article from *The Arizona*  
26 *Republic*, which details the Court’s family history, including Janet Murguia’s work at NCLR.  
27 Notably, Plaintiffs also point to the fact that this article quoted both Sheriff Arpaio and the  
28 Maricopa County Attorney at length. Plaintiffs contend that because the article was focused

1 on MCSO's implementation of a controversial and well-known statewide law sanctioning  
2 Arizona employers who hire illegal workers, Defendants must have read the article and been  
3 aware of its contents. Plaintiffs argue that from the surrounding circumstances one could  
4 reasonably infer that Defendants have intentionally held on to this information, and are now  
5 seeking to recuse the Court after having lost the first round of substantive briefing. In other  
6 words, Plaintiffs have accused Defendants of knowing about the Court's sister and NCLR,  
7 and attempting to use this information as a proverbial ace in the hole, to be pulled out and  
8 played when it made convenient trial strategy to do so.

9 Plaintiffs also contend that if the Court is unwilling to make a determination that  
10 Defendants possessed actual knowledge regarding the Court's background around the time  
11 the lawsuit was filed, then Defendants should at least be charged with 'constructive  
12 knowledge' of all facts that were readily available and commonly known during that same  
13 period of time. See Drake v. Birmingham Bd. of Edu., 476 F. Supp. 2d 1341, 1347 (N.D.  
14 Ala. 2007) (rejecting a recusal motion on timeliness ground where a party could have  
15 discovered through reasonable diligence that the judge was a deacon in the same church as  
16 plaintiff and her husband). This would, of course, include knowledge that the Court has a  
17 twin sister who serves as President and CEO of NCLR.

18 In their reply brief, Defendants adamantly deny that they intentionally waited to file  
19 their recusal motion until after the Court had ruled against them on their renewed motion to  
20 dismiss. Instead, Defendants claim that they were genuinely unaware of the Court's  
21 background during the early stages of the litigation. According to Defendants, the Court's  
22 February 10, 2009 ruling is relevant to the timing of their recusal motion only insofar as the  
23 Order was the catalyst for local and national media reporting, after which members of the  
24 public allegedly began to contact Defendants' offices. Defendants claim that, in actuality,  
25 their recusal motion was brought within days of discovering the Court's relationship with her  
26 sister. According to Defendants, the Court's Order played little role in the timing of their  
27 motion because they were not expecting to win the motion anyway. As Defendants note,  
28 there is nothing particularly unusual about a district court denying a motion to dismiss

1 brought under Fed. R. Civ. P. 12(b)(6), particularly when the facts are heavily disputed, as  
2 they are here. Defendants invoke the Ninth Circuit holding that “[i]t is axiomatic that the  
3 motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.”  
4 See Gilligan v. Jamco Dev. Corp., 108 F.3d 246 (9th Cir. 1997).

5 The Court finds that serious questions exist as to the veracity of the representations  
6 made by Defendants, their affiant, and defense counsel as to whether Defendants were aware  
7 of the Court’s relationship with her twin sister prior to the February 10, 2009 Order. The  
8 Court agrees with Plaintiffs that the timing of Defendants’ motion was bound to raise  
9 significant questions as to whether the filing constitutes a bad faith litigation tactic,  
10 particularly in light of the December 2007 front page article in *The Arizona Republic*, which  
11 discussed the Court’s personal history and includes quotes from a key Defendant and  
12 counsel. The Court further agrees that under the circumstances it seems implausible that  
13 Defendants were unaware of the Court’s sister’s role at NCLR, and were not at least on  
14 notice that there might be a familial relationship between Janet Murguia and the Court.  
15 Indeed, Defendants’ own arguments themselves undermine their claim to reasonable  
16 ignorance. Noting that the standard for recusal under 28 U.S.C. § 455(a) is applied by  
17 considering “a reasonable person with knowledge of all the facts,” Taylor v. Regents of  
18 Univ. of Cal., 993 F.2d 710, 712 (9th Cir. 1993), cert. denied, 510 U.S. 1076 (1994),  
19 Defendants argue that such a reasonable person would know about Janet Murguia and the  
20 activities and interests of NCLR and would question the Court’s impartiality based upon that  
21 knowledge. At the same time, Defendants assert that they themselves were not aware that  
22 the Court had a twin sister who is the President and CEO of NCLR until some 15 months into  
23 the litigation. Effectively, then, Defendants ask this Court to find that they were less aware  
24 of the relevant facts than a “reasonable person” would have been. This strains credulity,  
25 especially in light of the public record described earlier and the Defendants’ participation in  
26 the public debate surrounding the issues that underlie this case. Nevertheless, there is no  
27 direct evidence conclusively demonstrating that Defendants or their counsel have made a  
28

1 factual misrepresentation to the Court— notwithstanding the improbability of Defendants’  
2 claims.

3 Overall, the law supports the denial of Defendants’ recusal motion as untimely.  
4 However, because the Court must abide by an unwavering commitment to the perception of  
5 fairness in the judicial process, it will not deny the petition on the basis of timeliness and will  
6 instead address the substantive questions raised by the request for recusal.

7 **B. Whether The Court Is Actually Biased Against Defendants Under §**  
8 **455(b)(1)**

9 Defendants’ first substantive argument is that, pursuant to § 455(b)(1), the Court is  
10 actually and personally biased against Defendants. The moving party carries a “substantial  
11 burden” of overcoming the presumption that a district court is free from bias. United States  
12 v. Denton, 434 F.3d 1104, 1111 (8th Cir. 2006). Under § 455(b)(1), actual bias is defined  
13 as “a personal animus or malice that the judge harbors against [a party] of a kind that a fair-  
14 minded person could not entirely set aside when judging certain persons or causes.” Hook  
15 v. McDade, 89 F.3d 350, 355 (7th Cir. 1996). Recusal for actual bias is required only if the  
16 moving party can prove by “compelling evidence” that “a reasonable person would be  
17 convinced the judge was biased.” Id.

18 Defendants set forth their bias argument by asserting, without reference to any  
19 evidence whatsoever, that the Court “has a natural, personal bias in favor of Plaintiffs, as well  
20 as [a] corresponding, natural prejudice against Defendants.” (Dkt.#63, at p. 14.) This bare  
21 bones assertion, even in combination with similar statements peppered throughout  
22 Defendants’ motion, falls well short of the “compelling evidence” standard promulgated by  
23 the Seventh Circuit in Hook. See Hook, 89 F.3d at 355. As Plaintiffs argue in their  
24 opposition brief, Defendants can point to nothing the Court has ever done to suggest that it  
25 holds an opinion of any party that is wrongful or inappropriate.

26 Moreover, Defendants, in particular Maricopa County and Sheriff Arpaio, are frequent  
27 litigants before this Court on a wide variety of civil matters. It is not an overstatement to say  
28 that the Court has presided over a countless number of cases involving these Parties, and it

1 has ruled in Defendants’ favor on scores of their dispositive motions. The Court can think of  
2 no other case involving either Maricopa County or Sheriff Arpaio where it has been accused  
3 of harboring a “personal animus or malice” towards either one of them. See Hook, 89 F.3d  
4 at 355. In fact, as recently as September 2008, the Court presided over a bench trial where  
5 Sheriff Arpaio was the only named Defendant. See Mitchell v. Arpaio, CV-06-1963-PHX-  
6 MHM; 2008 U.S. Dist. LEXIS 80179 (D. Ariz. Sept. 19, 2008). After reviewing all  
7 admissible evidence in that case, which included live in-court testimony given personally by  
8 Sheriff Arpaio, the Court ruled in the Sheriff’s favor, holding that “Defendant [was] entitled  
9 to judgment dismissing the . . . Complaint with prejudice.” Id. at \* 16. Certainly, Sheriff  
10 Arpaio’s victory in the September 2008 Mitchell bench trial, along with many other  
11 successfully defended civil actions before this Court, undercuts any claim of actual bias  
12 towards him or any of the other Defendants. See Alexander v. Primerica Holdings, 10 F.3d  
13 155, 163-64 (3d Cir. 1993) (noting that there is heightened concern regarding judicial recusal  
14 in a bench trial where the court is “deciding each and every substantive issue at trial”).

15 In light of the record before the Court, Defendants’ “natural bias” contention could  
16 easily be interpreted as an argument that this Court’s alleged bias somehow flows from her  
17 racial heritage. Obviously, such an argument would be unwarranted and baseless. Beyond  
18 that, the idea that an Hispanic judge should never preside over a controversial case concerning  
19 alleged acts of racial profiling purportedly committed against Hispanics is repugnant to the  
20 notion that all parties are equal before the law, regardless of race. See Plessy v. Ferguson, 163  
21 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind, and neither  
22 knows nor tolerates classes among citizens.”).<sup>5</sup> Given the absence of any factual foundation  
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24 <sup>5</sup>In their reply brief, Defendants proclaim that the Court’s race played no role in their  
25 recusal motion, and that they are not contesting whether a Hispanic judge should ever sit on  
26 a case concerning Hispanic civil rights, only that this Court should not sit on this case given  
27 the nature of her sister’s work and the public positions advocated by her employer. (Dkt#.73  
28 at p. 2.) However, Defendants’ main brief does not appear to be quite as measured as their  
reply. For example, Defendants, for reasons that are both unstated and unknown, quoted in  
bold the following passage from an article found in the *Phoenix New Times*: “Hmm - we

1 supporting Defendants' claim of bias, and given the Court's extensive history of presiding  
2 over disputes involving Sheriff Arpaio, MCSO and Maricopa County in a neutral and  
3 impartial manner, the Court does not see how any reasonable attorney could set forth an  
4 accusation of actual bias. As the Second Circuit stated, in upholding the imposition of  
5 sanctions under Rule 11 of the Federal Rules of Civil Procedure against an attorney, the  
6 "suggestion that a judge cannot administer the law fairly because of the judge's racial and  
7 ethnic heritage is extremely serious and should not be made without a factual foundation  
8 going well beyond the judge's membership in a particular racial or ethnic group." See  
9 MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 138 F.3d 33, 37 (2d Cir. 1998).

10 The Court therefore rejects the unsupported assertion that it is actually biased against  
11 Maricopa County, Sheriff Arpaio or MCSO, in this or any other case. Further, the Court  
12 admonishes counsel for Defendants that in all future pleadings he should adhere scrupulously  
13 to the requirements of Fed. R. Civ. P. 11(b) or be prepared to face sanctions for failing to do  
14 so.

15 **C. Whether The Court Has An Interest That Could Be Substantially Affected**  
16 **By The Outcome Of These Proceedings Under § 455(b)(4)**

17 Under § 455(b)(4), a judge must recuse herself if "individually or as a fiduciary . . .  
18 [the court has] a financial interest in the subject matter in controversy or is a party to the  
19 proceeding, or any other interest that could be substantially affected by the outcome of the  
20 proceeding." 28 U.S.C. § 455(b)(4).

21 Defendants contend that the Court's interest in the well being of her sister constitutes  
22 an "other interest" within the meaning of § 455(b)(4), since a victory on the merits for  
23 Plaintiffs would, according to Defendants, help to advance NCLR's stated social and political  
24 goals, and, in turn, advance Janet Murguia's career. Plaintiffs respond by arguing that courts  
25 have narrowly defined "other interests" to include only financial or pecuniary interests of

26 \_\_\_\_\_  
27 can't but wonder what the first Latina judge appointed to the U.S. District Court in Phoenix  
28 thinks of the idea that 'physical appearance alone' should merit a police investigation." (See  
Dkt.#63 at p. 4.)

1 some variety, see e.g., In re Virginia Elec. & Power Co., 539 F.2d 357, 367-68 (4th Cir.  
2 1976), and that a purported interest in the career advancement of one's sibling does not square  
3 with any accepted interpretation of the statute. See Guardian Pipeline, L.L.C. v. 950.80 Acres  
4 of Land, 525 F.3d 554, 557 (7th Cir. 2008); In re New Mexico Natural Gas Antitrust Litig.  
5 620 F.2d 794, 796 (10th Cir. 1980). Defendants, in reply, cite to In re Virginia Elec. & Power  
6 Co., arguing that Plaintiffs' reliance upon that case is misplaced, since in that case the Fourth  
7 Circuit specifically stated:

8 Unlike [the term] 'financial interest' [found in § 455(b)(4)] the term 'any other  
9 interest' [also found in § 455(b)(4)] is not defined in terms of ownership or in  
10 any other manner. It is not easy to conclude what the term means. But it must  
11 have been the congressional intent to make an interest of lesser degree than  
ownership disqualify. That would seem to be so for otherwise there would be  
no purpose in defining financial interest in terms of ownership and failing to  
apply such a limitation on any other interest.

12 In re Virginia Elec. & Power Co., 539 F.2d at 367 (emphasis added).

13 With respect to Defendants novel interpretation of § 455(b)(4), the Court does not  
14 accept that a sibling relationship can constitute an 'interest' within the meaning of the recusal  
15 statute. Notwithstanding Defendants' argument, the language of Virginia Elec discusses 'any  
16 other interest' in terms of the degree of ownership over something that is financial or  
17 proprietary in nature. See also E. & J. Gallo Winery v. Encana Energy Serv., Inc., 2004 U.S.  
18 Dist. LEXIS 29380, \*13-15 (E.D. Cal. Feb. 20, 2004) (citing to Virginia Ele c. and  
19 characterizing an 'other interest' as decidedly financial, albeit one that is indirect or remote  
20 in nature). Moreover, the Court is not aware of any case law that would tend to support  
21 Defendants' proffered reading. The Court will not endorse an untethered expansion of the  
22 recusal statute to the point where a litigant can engage in a broad based fishing expedition to  
23 dig up potentially disqualifying 'interests' that a judge may be accused of having in a  
24 particular case. The Court therefore agrees with Plaintiffs that the term 'any other interests'  
25 should be interpreted as being limited to financial or pecuniary interests, whether by  
26 ownership or some other means.

27 Defendants go on to claim that even if the Court were to apply the more restricted  
28 interpretation of § 455(b)(4) advocated by Plaintiffs—that the Court's interest must involve



1 “an investment or other asset whose value depends on the outcome, or some other concrete  
2 financial effect”—recusal would still be warranted. (See Dkt.#70 at p. 10.) This, according  
3 to Defendants, is because an adverse ruling here would likely cause an appreciable drop in the  
4 amount of “public donations” to NCLR, since “the positions, causes and relationships it  
5 advances and develops [may not be bearing] fruit in society’s executive, legislative, judicial  
6 branches of government.” (See Dkt.#72 at p. 8.)

7 There is nothing in the record, however, to support Defendants’ speculation that the  
8 Court’s sister’s career or her organization would be materially affected by the outcome of the  
9 proceedings. Similarly, there is nothing in the record to suggest that the Court has an interest  
10 in her sister’s well being that would somehow be inconsistent with the fair resolution of this  
11 case, or that the Court has a personal stake in the advancement of her sister’s career that  
12 would create an untenable conflict of interest. Furthermore, even if a victory for Plaintiffs here  
13 would somehow help to advance Janet Murguia’s interests, nothing in the record suggests that  
14 the Court itself would derive any type of financial, proprietary or otherwise tangible benefit  
15 from her sister’s potential career advancement. Defendants’ theory that NCLR might stand  
16 to lose “public donations” depending on the outcome of this case is not actionable under the  
17 relevant sub-section of the recusal statute, since § 455(b)(4) is directed towards interests held  
18 by the Court, not its siblings or its siblings’ employer.<sup>6</sup>

19 \_\_\_\_\_  
20 <sup>6</sup>There is one final issue under § 455(b)(4) which, in an abundance of caution, the  
21 Court must raise, even though it was not addressed by either of the Parties. This issue is  
22 whether the Court is a potential member of Plaintiffs’ proposed class, and if so, whether  
23 recusal is required. In their First Amended Complaint, Plaintiffs redefined their proposed  
24 class to include the following individuals: “all Latino persons who, since January 2007, have  
25 been or will be in the future, stopped, detained, questioned or searched by MCSO agents  
26 while driving or sitting in a vehicle on a public roadway or parking area in Maricopa County,  
27 Arizona.” (See Dkt.#18 at p. 24.) Although the Court can be fairly characterized as a “Latino  
28 person,” it has not, admittedly, been “stopped, detained, questioned or searched by MCSO  
agents” since January 2007. Moreover, the Court does not foresee being stopped,  
questioned, detained or searched in the near future, but must concede that it always remains  
a theoretical possibility, even if remote. While the Court is mindful of the Ninth Circuit’s  
admonition that “no man can be the judge in his own case [or] try cases where he has an  
interest in the outcome,” Exxon Corp. v. Heinze, 32 F.3d 1399, 1403 (9th Cir. 1994), the

1 Thus, the Court has no conceivable interest in this case that would serve as a grounds  
2 for recusal under § 455(b)(4).

3 **D. Whether The Court’s Sister Has An Interest That Could Be Substantially**  
4 **Affected By The Outcome Of This Lawsuit Under § 455(b)(5)(iii)**

5 Under § 455(b)(5)(iii), recusal is mandated where “a person within the third degree of  
6 relationship . . . [i]s known by the judge to have an interest that could be substantially affected  
7 by the outcome of the proceeding.” 28 U.S.C. § 455(b)(5)(iii). The phrase “third degree of  
8 relationship” has been interpreted to include a judge’s siblings. See generally Harris v.  
9 Champion, 15 F.3d 1538, 1571 (10th Cir. 1994) (finding that § 455(b)(5)(iii) should apply to  
10 the district court’s uncle).

11 Pursuant to this sub-section, Defendants broadly assert that the Court’s sister has  
12 “ideological, political, social and activist interests” in this lawsuit that are contrary to  
13 Defendants’ interests. (See Dkt.#63 at p. 5.) In response, Plaintiffs point to the Seventh  
14 Circuit case of SCA Serv. v. Morgan, 557 F.2d 110, 116 (7th Cir. 1977), which held that a  
15 partner’s interest in the reputation and goodwill of his law firm fell within § 455(b)(5)(iii).  
16 Id. Plaintiffs argue that the connection between a business’s reputation and goodwill and the  
17 interests of one of its owners are obviously financial in nature, whereas “ideological, political,  
18 social and activist interests” are obviously not. As such, Plaintiffs argue that the definition  
19 of ‘interests’ under § 455(b)(5)(iii) should be co-extensive with the meaning of ‘interests’  
20 under § 455(b)(4). Plaintiffs note that Defendants have cited no examples where courts have  
21 defined the term interests differently under § 455(b)(4) and § 455(b)(5)(iii). See e.g.,  
22 Guardian Pipeline, L.L.C., 525 F.3d at 557.

23 \_\_\_\_\_  
24 Court is not presently a member of Plaintiffs’ proposed class and cannot state with any  
25 degree of certainty whether it will become a member in the future. In any event, even under  
26 the unlikely scenario that the Court becomes an unnamed class member, its interest in the  
27 outcome of the case would likely be de minimis and too insubstantial to necessitate recusal.  
28 See In re New Mexico Natural Gas Antitrust Litig., 620 F.2d 794, 796 (10th Cir. 1980)  
(holding that the district court’s recusal under § 455(b)(4) was unwarranted where the judge,  
like all other consumers in New Mexico, may have benefitted from a lower gas and electric  
bill in a class action lawsuit brought against a statewide utility company).

1 The Court agrees with Plaintiffs. It is not at all clear how the word interests could be  
2 given two different meanings in the same statute, when used in a nearly identical context. See  
3 Ratzlaf v. United States, 510 U.S. 135,143 (1994) (“A term appearing in several places in a  
4 statutory text is generally read the same way each time it appears.”). Thus, if the term  
5 interests is to be given a consistent meaning throughout § 455, then Defendants have failed  
6 to show how the Court’s sister has an interest in the instant lawsuit that can be reasonably  
7 characterized as financial or proprietary in nature. And as previously stated, “ideological,  
8 political, social and activist” interests are not generally recognized as actionable.

9 Additionally, Defendants have not even suggested, much less explained, how any  
10 interest, even under the rejected “social, political, or ideological” standard, might be  
11 “substantially” affected by the outcome of this case, particularly when the degree of any  
12 potential impact on the interests of the Court’s sister or NCLR seems indirect at best. Neither  
13 the Court’s sister, nor her employer, are parties in this case, employed by a party in this case,  
14 or have a direct affiliation with a party in this case or with their counsel. It is far too  
15 speculative to suggest that because Janet Murguia and NCLR might arguably share common  
16 values or pursue the same political or social goals as Plaintiffs and their counsel, that they  
17 might be substantially affected by the outcome of this case. See ESPN, 767 F. Supp. at 1080.

18 The Court therefore rejects § 455(b)(5)(iii) as a basis for recusal in this case.  
19

20  
21 **E. Whether The Court’s Impartiality Might Reasonably Be Questioned under §455(a)**

22 The more difficult question presented by this motion is whether the Court’s impartiality  
23 might reasonably be questioned under 28 U.S.C. §455(a). The standard for recusal under  
24 §455(a) is “whether a reasonable person with knowledge of all the facts would conclude the  
25 judge's impartiality might reasonably be questioned.” Taylor v. Regents of Univ. of Cal, 993  
26 F.2d 710, 712 (9th Cir. 1993), cert. denied, 510 U.S. 1076 (1994).

27 The Court is acutely aware that it owes an independent duty to uphold the integrity of  
28 the judicial system, see Liljeberg v. Health Serv. Acquisition Corp, 486 U.S. 847, 860 (1988)

1 (recognizing that the purpose of § 455(a) is “to promote public confidence in the integrity of  
2 the judicial process by avoiding even the appearance of impropriety whenever possible”),  
3 even when a party’s pleadings are bombastic and its position relies upon inflammatory and  
4 meritless forms of argumentation. This Court will not dodge the critical question of whether  
5 its continued role in this case is appropriate under the circumstances, even though it would  
6 have been entirely justified in denying Defendants’ recusal motion on timeliness grounds  
7 alone.

8 Two competing concerns govern the Court’s decision on the merits of this question.  
9 First, of course, “[t]he test for recusal under [§ 455(a)] asks “whether a reasonable person with  
10 knowledge of all the facts would conclude the judge’s impartiality might reasonably be  
11 questioned.” Taylor, 993 F.2d at 712. Critically, “the judge’s actual state of mind, purity of  
12 heart, incorruptibility, or lack of partiality are not the issue.” Nichols v. Alley 71 F.3d 347,  
13 351 (10th Cir. 1995) (internal quotations and citations omitted). The test is purely an  
14 objective one, which focuses on “whether a reasonable person perceives a significant risk that  
15 the judge will resolve the case on [any] basis other than the merits.” In re Mason, 916 F.2d  
16 384, 385 (7th Cir. 1990); Preston v. United States, 923 F.2d 731, 734 (9th Cir. 1991) (“The  
17 inquiry is whether a reasonable person would have a reasonable basis for questioning the  
18 judge’s impartiality, not whether the judge is in fact impartial.”).

19 It must be noted that in the recusal context, a reasonable person means a  
20 “well-informed, thoughtful observer,” as opposed to a “hypersensitive or unduly suspicious  
21 person.” In re Mason, 916 F.2d at 386. Thus, to the extent that the selected reader comments  
22 left on the *Phoenix Business Journal* and *The Arizona Republic* websites have been offered  
23 by Defendants to exemplify the public’s reaction to the Court’s continued involvement in this  
24 case,<sup>7</sup> that position is rejected. Judges must decide whether to recuse themselves “not by  
25

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26 <sup>7</sup>Of course, not all of the comments cited by the Defendants supported their contention  
27 that the public’s reaction to the Court’s February 10, 2009 Order was one of suspicion and  
28 mistrust. See e.g. these comments: “Wrong is just WRONG . . . I would have made the same  
ruling and MY sister is not connected to La Raza”; and “[t]his judge, like any judge in her

1 considering what a straw poll of the only partly informed man-in-the-street would show[,] but  
2 by examining the record facts and the law, and then deciding whether a reasonable person  
3 knowing and understanding all the relevant facts would recuse the judge.” In re Drexel  
4 Burnham Lambert, Inc., 861 F.2d 1307, 1313 (2d Cir. 1988). “Articles and features in the  
5 media suggesting impropriety cannot act as a barometer” of the reasonable person. TV  
6 Commc’ns Network, Inc. V. ESPN, Inc., 767 F. Supp. 1077, 1080 (D. Colo. 1991).  
7 Obviously, no Court should permit anonymous bloggers to wield a veto power over its  
8 participation in any case.

9 Second, courts have “a strong duty to sit” when there is no legitimate reason to recuse.  
10 Clemens v. U.S. Dist. Ct. For the Cent. Dist. of Cal., 428 F.3d 1175, 1179 (9th Cir. 2005).  
11 A judge should not recuse himself based “on unsupported, irrational, or highly tenuous  
12 speculation; were he or she to do so, the price of maintaining the purity of appearance would  
13 be the power of litigants or third parties to exercise a negative veto over the assignment of  
14 judges.” In re United States, 666 F.2d 690, 694 (1st Cir. 1981).

15 As the Parties acknowledge in their filings, this is a high profile case, one that is not  
16 likely to be free from controversy, regardless of who is presiding over it. The issue of  
17 whether Maricopa County, Sheriff Arpaio and MCSO ought to be enforcing federal  
18 immigration laws elicits strong feelings, both within the local Phoenix community as well as  
19 across the nation. Further, allegations of violations of Constitutional rights often arouse  
20 strong public passions. These passions are no doubt shared by both those who allege the  
21 violations and those who dispute them. The Court also recognizes the controversial and  
22 sensitive nature of the immigration issue generally within the country. Nothing in this set of  
23 circumstances would, by itself, warrant recusal under the appropriate standard.<sup>8</sup>

24 \_\_\_\_\_  
25 position, simply upheld the legal standard for a motion to dismiss. There were enough facts  
26 alleged to let the case go to the next step.”

27 <sup>8</sup>In the Court's view this case is not about whether sound public policy—which is set  
28 by the political branches and not by the courts—favors having a local Sheriff and his  
deputies enforce federal immigration laws. If it were, this case would never have withstood

1           Nonetheless, the Court recognizes its somewhat unique position, in that the Court's  
2 twin sister plays a prominent public role in advocating policy positions that diametrically  
3 oppose those taken by Defendants. At the same time, the statute does not require the Court  
4 to recuse itself from a matter merely because a case concerns Hispanic civil rights, our  
5 nation's immigration policy, or some related matter. Section 455(a) does not require such a  
6 cautious approach on the part of a judge, and the Court must be careful to avoid allowing her  
7 sister's public profile to serve as a proxy for a race-based recusal challenge. Also providing  
8 context to this inquiry is the rather unremarkable yet often overlooked proposition that "[a]  
9 district judge is not a sterile creature who dons judicial robes without any prior contacts in the  
10 community but rather is very likely to be a man or woman with a broad exposure to all kinds  
11 of citizens of all shades of persuasion and background." United States v. Suren, 1992 U.S.  
12 App. LEXIS 38216, \*16 (9th Cir. Aug. 18 1992) (Memorandum Opinion) (quoting In re  
13 Searches Conducted on March 5, 1980, 497 F. Supp. 1283, 1290 (E.D. Wis. 1980) (internal  
14 citations omitted)).

15           Both Parties devote a great deal of space in their briefs to arguing over the proper  
16 interpretation of two leading U.S. Supreme Court cases dealing with recusal notions brought  
17 under § 455(a): Microsoft v. United States, 530 U.S. 1301 (2000) and Cheney v. United States  
18 Dist. Ct., 541 U.S. 913 (2004). Microsoft concerned whether Chief Justice Rehnquist should  
19 have recused himself from a case where his son, a lawyer who represented Microsoft in  
20 potentially related anti-trust matters, might have stood to gain from a favorable ruling towards  
21 the company. Id. at 1301-02. After rejecting the possibility that his son might have an  
22 interest that could be substantially affected by the outcome of the case, the Chief Justice  
23 addressed whether his continued involvement created the appearance of impropriety. Id.

24 \_\_\_\_\_  
25  
26 even the flimsiest motion to dismiss. Instead, this lawsuit concerns only whether Defendants  
27 have violated Plaintiffs' rights under the Fourth Amendment, Fourteenth Amendment, and  
28 the Arizona State Constitution, while carrying out their otherwise lawful duties to enforce  
federal immigration laws. The Court has not been asked to pass judgment on the wisdom of  
the § 287(g) authorization, nor would it do so if asked.

1 Ultimately, Chief Justice Rehnquist decided against recusal. In so doing, he noted that a  
2 “decision by this Court as to Microsoft’s antitrust liability could have a significant effect on  
3 Microsoft’s exposure to antitrust suits in other courts . . . [but][e]ven our most unremarkable  
4 decision interpreting an obscure federal regulation might have a significant impact on the  
5 clients of our children who practice law.” Id. at 1303. The Chief Justice went on to comment  
6 on the Supreme Court’s unique institutional role, stating:

7 [I]t is important to note the negative impact that the unnecessary  
8 disqualification of even one Justice may have upon our Court. Here—unlike  
9 the situation in a District Court or a Court of Appeals—there is no way to  
10 replace a recused Justice. Not only is the Court deprived of the participation  
11 of one of its nine members, but the even number of those remaining creates a  
12 risk of affirmance of a lower court decision by an equally divided court.

10 Id.

11 Cheney involved an attempt to force the recusal of Justice Scalia from a case  
12 concerning whether the executive branch was required to disclose the identity of persons who  
13 had served on the Vice President’s energy task force. See Cheney, 541 U.S. at 914-16. The  
14 substance of the recusal motion focused on a hunting trip that Justice Scalia had taken with  
15 Vice President Cheney and others. At issue, among other things, was that the host of the trip  
16 had ties to the energy industry and that members of the hunting party, including Justice Scalia,  
17 had traveled to their final destination on the Vice President’s government-issued airplane. Id.  
18 In deciding against recusal, Justice Scalia stated that media commentary constituting “a blast  
19 of largely inaccurate and uninformed opinion cannot determine the recusal question.” Id. at  
20 924. Justice Scalia further commented that recusal might be advisable, “if I were sitting on  
21 a Court of Appeals,” where the recused judge’s place on the panel “would be taken by another  
22 judge and the case would proceed normally.” Id. at 915. Echoing the sentiments of Chief  
23 Justice Rehnquist, Justice Scalia opined that the Supreme Court operated quite differently,  
24 since, “[t]he Court proceeds with eight Justices, raising the possibility that, by reason of a tie  
25 vote, it will find itself unable to resolve the significant legal issue presented by the case.” Id.

26 The helpfulness of the Microsoft and Cheney opinions is debatable in this case. Chief  
27 Justice Rehnquist’s Memorandum, although quite informative in its analysis of when a close  
28 family member’s potential interest in a case might cast aspersions on a judge’s apparent

1 neutrality, is the writing of only one Justice. It is not the opinion of the Court. As such,  
2 Microsoft is not binding precedent. Similarly, Justice Scalia's Memorandum in Cheney  
3 discussing his personal friendship with Vice President Cheney and the media's coverage of  
4 their hunting trip, is non-precedential.

5 More importantly, those cases do not deal with the recusal of a trial court judge. When  
6 a federal district court judge recuses herself from a case, another judge can easily step into her  
7 place. Because every district court judge has taken the same oath to faithfully apply the law,  
8 which includes applying binding precedent from the U.S. Supreme Court as well as the law  
9 of the relevant circuit, very little prejudice results from a district court judge's recusal. On  
10 the other hand, as Chief Justice Rehnquist and Justice Scalia have observed, the U.S. Supreme  
11 Court is sui generis, or one of a kind. There are only nine members, and when one recuses,  
12 only eight will sit. As was noted, the votes of at least five Justices are required to overturn a  
13 lower court opinion. Therefore, when that body is short one or more of its members, there is  
14 a substantial risk that an important legal issue will go completely unresolved, without a  
15 majority opinion. No other case, certainly not one from the federal district court, presents an  
16 analogous situation.

17 One of the focal points of the Parties' arguments in this case is the notion that a judge  
18 might be seen as unwilling to take a position inconsistent with her sibling's ideological,  
19 political or social interests. Defendants argue that a reasonable observer, one who is apprised  
20 of all the facts, might assume that siblings, like the Court and her sister, share common  
21 pursuits, points of view or even political ideology. Defendants further claim that siblings who  
22 are personally close are likely to influence each other's thinking, even indirectly. When the  
23 siblings are twins, no less identical twins, according to Defendants, the likelihood of  
24 confusion is even greater. Plaintiffs respond by arguing that people frequently disagree with  
25 their siblings, even with their identical twin, on a wide variety of issues and that no reasonable  
26 person would question this Court's ability to do so here. Additionally, the Plaintiffs argue, the  
27 mere fact that Janet Murguia is President and CEO of an organization that advocates for the  
28 rights of Latinos would not cause a reasonable person to question the Court's impartiality.



1 In weighing the Parties' competing views, there is little, if any, guidance from case  
2 law. The Parties have not cited to—and the Court is not aware of—a similar case, where  
3 nothing more than a sibling's political or social affiliations could arguably create the  
4 appearance of impropriety for a judge under § 455(a). Cognizant that a "reasonable person"  
5 is well-informed and thoughtful, the Court agrees with Plaintiffs that no reasonable person  
6 would automatically ascribe the views of one sibling to another. It is certainly part of the  
7 common experience that brothers and sisters often disagree about all sorts of issues, regardless  
8 of how personally close they are or how often they speak on the telephone. There is no reason  
9 to believe that this reality would change when the siblings are identical twins. A reasonable  
10 and impartial observer apprised of all the facts would not conclude that identical twins are  
11 more likely to share a common view point or interests than other siblings, much less that a  
12 twin who is a judge would be incapable of impartiality. The Court is not aware of any  
13 evidence that would tend to show that it has been unduly influenced by her sister's political  
14 or social views. Moreover, there is no proof that the Court, in light of her sister's stated  
15 positions, would be hesitant to rule against Plaintiffs, if the law so required. That the Court's  
16 identical twin is on record as opposing the enforcement of federal immigration laws by Sheriff  
17 Arpaio and MCSO does not by itself mandate the Court's recusal under § 455(a). If the only  
18 grounds for recusal were Janet Murguia's role as President and CEO of NCLR and the public  
19 comments that she has made pursuant to that role, the Court's inquiry would stop there.  
20 However, this is not the case, as the Court must also address the issue of the We Can Stop the  
21 Hate website, which was launched by NCLR while the Court's sister was serving as President  
22 and CEO as a campaign to address acts of discrimination against Latino communities  
23 throughout the United States.

24 Whether the Court's impartiality might reasonably be questioned based on the content  
25 of these internet-based articles is a difficult issue. Obviously, the Court has no connection to  
26 the We Can Stop the Hate campaign. There is also nothing in the record to suggest that the  
27 Court's sister is the author of the offending articles or that she had any personal involvement  
28

1 in their publication. Yet, the Court is mindful that it must be vigilant to avoid even the  
2 slightest appearance of impropriety.

3 Without question, these articles greatly disparage MCSO deputies and personally  
4 attack Sheriff Arpaio. As has been previously pointed out, these articles refer to Sheriff  
5 Arpaio as a “relentlessly self-promoting caricature,” who has “less than stellar respect for civil  
6 rights and due process,” and who is “unrepentant, arrogant, and monumentally disingenuous.”  
7 With respect to the MCSO, its deputies are referred to as “thugs,” while the department is  
8 generally characterized as a “lawsuit-riddled folly” of an agency, among other things. In the  
9 context of a motion for recusal, when comments like these originate from a website that is  
10 associated with the Court’s sister or the organization that she leads, they cannot be taken  
11 lightly.

12 Besides being insulting, the We Can Stop the Hate online articles speak directly to  
13 MCSO’s decision to enforce federal immigration laws pursuant to its § 287(g) authority. In  
14 fact, these articles specifically assert that MCSO has failed to adequately safeguard basic  
15 constitutional rights through its departmental procedures, and that MCSO deputies have  
16 engaged in wide-spread acts of racial profiling and have blatantly violated the Fourth  
17 Amendment rights of detained immigration suspects by predicating stops on “physical  
18 appearance alone.” The instant litigation sets out to determine these exact questions, i.e.,  
19 whether the Fourth and Fourteenth Amendment rights of Latino persons in Maricopa County  
20 have been violated.<sup>9</sup>

21 In applying the objective standard of § 455(a), the Court believes that whether a  
22 reasonable person apprised of all relevant facts would question its impartiality based on  
23 circumstances surrounding the publication of the We Can Stop the Hate website is a close call.

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24  
25 <sup>9</sup>The Court must also note that a prominent picture of Janet Murguia sits immediately  
26 adjacent to each We Can Stop the Hate online article. Even though the picture is correctly  
27 labeled as belonging to Janet Murguia and not the Court, the Court seeks to avoid the risk of  
28 confusing the Court’s picture with that of her sibling. The Court must consider the possibility  
that a reasonably well-informed and impartial observer might mistake the Court for her  
identical twin sister.

1 On the one hand, the views of the Court's sister and her organization cannot be fairly imputed  
2 to the Court, and there is nothing in the record to support an inference that the Court would  
3 be unwilling to issue a ruling contrary to her sister's publicly-held positions. On the other  
4 hand, much of the commentary contained in the articles is highly disparaging of specific  
5 Defendants in this case, and the website takes a strong stand on disputed factual matters lying  
6 at the heart of the litigation.

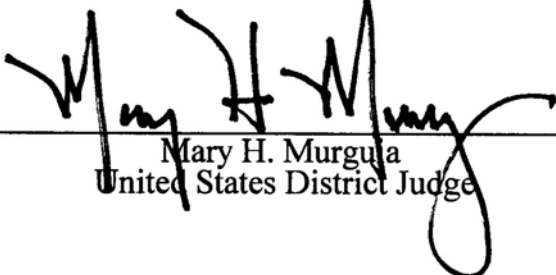
7 The United States Court of Appeals for the Ninth Circuit has instructed that when a  
8 case is close, the balance should tip in favor of recusal. United States v. Holland, 519 F.3d  
9 909, 911 (9th Cir. 2008) (quoting United States v. Dandy, 998 F.2d 1344, 1349 (6th Cir.  
10 1993)). No Court should tolerate even the slightest chance that its continued participation in  
11 a high profile lawsuit could taint the public's perception of the fairness of the outcome.  
12 Certainly, this Court is unwilling to take such a risk. Thus, because at the district court level  
13 all doubts should be resolved in favor of recusal when the issue is close, strictly on the sole  
14 issue remaining—whether the Court's impartiality might reasonably be questioned under  
15 Section 455 (a)—the Court, in an abundance of caution, will recuse itself from this matter.

16 **Accordingly,**

17 **IT IS HEREBY ORDERED** granting Defendants' Motion for Recusal. (Dkt.#63.)

18 **IT IS FURTHER ORDERED** directing that the Clerk reassign this case to another  
19 judge in the District of Arizona by random lot.

20 DATED this 15<sup>th</sup> day of July, 2009.

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24 \_\_\_\_\_  
25 Mary H. Murgula  
26 United States District Judge  
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