INSTITUTE FOR JUSTICE
Paul V. Avelar (Bar No. 023078)
Keith E. Diggs (Bar No. 032692)
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Telephone: (480) 557-8300
Fax: (480) 557-8305
Email: pavelar@ij.org
kdiggs@ij.org
Attorneys for Plaintiffs William and Maria Platt

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

William Terence Platt, et al.,

Plaintiffs,

v.

Jason Moore, et al.,

Defendants.

Case No. CV-16-8262-PCT-BSB

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO NAVAJO COUNTY, TASK FORCE, AND CITY/TOWN DEFENDANTS' MOTION TO DISMISS

(Oral Argument Requested)

Plaintiffs William Terence Platt and Maria B. Platt respectfully offer the following points and authorities in opposition to the motion to dismiss filed by Defendants Moore, Carlyon, Clark, Navajo County, Navajo County Drug Task Force, City of Winslow, Vasquez, City of Holbrook, Jackson, Town of Snowflake, Town of Taylor, Scarber, City of Show Low, Shelley, Town of Pinetop-Lakeside, and Sargent (collectively, "Defendants") (ECF No. 43) ("MTD"). For the reasons set forth below, this Court should deny Defendants' motion.[1]

//

[1] Defendants also join in the arguments of Intervenor State of Arizona (ECF 44). *E.g.*, MTD 12–13, 15, Plaintiffs therefore refer the Court to their memorandum of points and authorities in opposition to the State's motion, which has been filed concurrently with this opposition.

I. THE PLATTS HAVE STANDING TO SEEK INJUNCTIVE AND DECLARATORY RELIEF; IF THEY DO NOT, THIS CASE MUST BE REMANDED, NOT DISMISSED.

While avoiding the word "moot," Defendants argue that the Platts' claims for injunctive and declaratory relief should be dismissed for lack of standing because, after the Platts filed this civil rights action, Defendants gave their car back, the forfeiture action against the car was dismissed, and there is (therefore) no reasonably expected future forfeiture proceeding against them. MTD 6–9.[2] Although the Platts do have possession of their car back, their rights remain threatened under Arizona law because of Defendants' actions. Am. Compl. ¶¶ 220–27. There is nothing to prevent Defendants from reopening the forfeiture proceedings against the Platts' car any time in the next six-plus years. *Id.* ¶¶ 224–27. Rather, Defendants have voluntarily ceased their activities as to the Platts while continuing to defend the legality of what they have done to the Platts. *Id.* ¶ 224. Accordingly, the Platts are entitled to prospective injunctive and declaratory relief. And even if the Platts lack standing for their claims, 28 U.S.C. § 1447(c) requires remand to state court, not dismissal of their claims.[3]

A. The Platts Have Standing to Seek Prospective Relief Because Arizona Law Allows Defendants to Reinitiate Forfeiture Proceedings Whether or Not the Platts (or Their Property) Ever Encounter Defendants Again.

Defendants' standing argument is premised on a single assumption: That the Platts do not face "continuing, present adverse effects" from Defendants' actions. MTD 7. But this assumption is wrong. Accordingly, the Platts are entitled to pursue prospective relief.

The Platts have insisted since the beginning of the underlying forfeiture proceeding that Defendants were not allowed to forfeit (or seize for forfeiture) their car.

---

[2] Defendants admit the Platts' claims for nominal damages and return of the hearing aids are not moot. MTD 9 & n.4

[3] Moreover, Defendants' assertion that this Court should be "reluctant to grant declaratory relief that entail[s] heavy federal interference in sensitive state activities, *i.e.* the administration of the judicial system," MTD 8, is particularly misplaced. It is the Defendants who have brought this action to this Court by removing it from state court. If this Court entertains such reluctance, it should remand this action.

Am. Compl. ¶¶ 176–219. At the time this civil rights action was initiated in state court, they were contending with an active forfeiture proceeding against their car. *Id.* ¶¶ 218–20. Before any judicial determination of the Platts' rights was made—and *after this civil rights action was initiated* in state court—Defendants voluntarily withdrew the forfeiture proceeding against the Platts' car. *Id.* ¶¶ 219–20, 224. Although Defendants released the Platts' car back to them, Defendants insisted they had done nothing wrong; that the withdrawn forfeiture was legally justified; that the "'seizure and forfeiture proceedings were proper under Arizona law'"; that the Platts never obtained standing to contest the forfeiture; and that the decision to return the car was wholly discretionary. *Id.* ¶ 224. On November 8, 2016, an unsigned "Notice" was entered in the forfeiture proceeding acknowledging receipt of the Withdrawal, and "order[ing] dismissing any current, or future, claim in forfeiture as to the 2012 Volkswagen Jetta." *Id.* ¶ 225. But the Notice is not a judgment, is not binding on Defendants, and has neither issue- nor claim-preclusive effect. *Id.* ¶¶ 225–26.

Defendants never say the Platts' claims are "moot" because they would "bear[] the formidable burden of showing that it is absolutely clear the[ir] allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 190 (2000). Instead, Defendants argue the Platts have pled no facts showing a "real threat of future injury," citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). MTD 7. *Lyons* deals with the uncontroversial proposition that "[p]ast exposure to illegal conduct does not in itself" give rise to a need for injunctive relief. 461 U.S. at 102 (internal quotation marks omitted). But *Lyons* does not apply to this case.

In *Lyons*, the Court held that a plaintiff, who had been choked by an LAPD officer five months before filing suit, had no standing to seek an injunction against the LAPD's practice of using chokeholds. Although he could seek damages, the Court reasoned that he had no standing for forward-looking relief, as that required speculation that he would be stopped by the LAPD in the future *and* "that *all* police officers in Los Angeles *always*

choke any citizen with whom they happen to have an encounter," or at least that the City "authorized police officers to act in such manner." *Id.* at 105–09. This chain of contingencies meant the plaintiff was not "realistically threatened by a repetition of his [past] experience." *Id.* at 109.

Unlike *Lyons*, the Platts' allegation of future harm does not depend on speculative future conduct by the Platts and is clearly authorized by statute. First and foremost, at the time the Platts filed their civil rights complaint they were contending with an active forfeiture proceeding against their car. Am. Compl. ¶¶ 218–20. This alone entitled them to seek prospective relief. *See Friends of the Earth*, 528 U.S. at 184 (distinguishing *Lyons* because "it is undisputed that Laidlaw's unlawful conduct . . . was occurring at the time the complaint was filed"); *Haro v. Sebelius*, 747 F.3d 1099, 1108–09 (9th Cir. 2014) (distinguishing *Lyons* because the plaintiff's injury was ongoing at the time the complaint was filed—she was deprived of $103.87 for one month—and an injunction would have redressed her injury). Defendants point only to actions subsequent to the initiation of this civil rights lawsuit to support their argument that the Platts lack standing for prospective relief. *Lyons* therefore does not apply.

Even taking the post-complaint developments into account, the Platts remain threatened by Defendants' past actions. Under Arizona law, Defendants' return of the car is legally meaningless. Am. Compl. ¶ 227. Under A.R.S. § 13-4308(B), Defendants need not immediately pursue forfeiture; they can give the property back to the owners and then have seven years to pursue "further [forfeiture] proceedings." Thus, Defendants have the statutory right to reopen forfeiture against the Platts' car at any time in the next seven years, whether or not the Platts (or their car) ever enter Arizona again.

Neither does the November 8 "notice" filed in the forfeiture proceeding end the threat to the Platts' rights. Am. Compl. ¶ 226. By its own terms, the "notice" is not a judgment. *Cf.* Ariz. R. Civ. P. 54(b)–(c) (requiring any judgment to have specific language to be effective). Neither is it, as claimed by Defendants, an order "dismissing"

the proceeding because it was not issued or signed by a judge. *Cf.* MTD 7.[4] There has been no judicial determination (1) that forfeiture of the Platts' car is not legally permitted or (2) of the Platts' rights. *Cf.* Am. Compl. Prayer A–G. And without a judgment on the merits, the notice cannot have preclusive effect. *Dressler v. Morrison*, 130 P.3d 978, 981 (Ariz. 2006) (claim preclusion requires "a final judgment on the merits in a prior suit involving the same parties or their privies"); *Hullett v. Cousin*, 63 P.3d 1029, 1034–35 (Ariz. 2003) (issue preclusion requires an issue have been "actually litigated in a previous proceeding, there was a full and fair opportunity to litigate the issue, resolution of the issue was essential to the decision, a valid and final decision on the merits was entered, and there is common identity of parties").

Ultimately, the Platts do not complain that their own speculative future conduct may lead to a repetition of past actions, as in *Lyons*, rather they complain that the Defendants' past actions *continue* to threaten and cloud their property rights in their car. Am. Compl. ¶¶ 243–44. This continuing threat is why prospective relief is necessary. *See Jacobus v. Alaska*, 338 F.3d 1095, 1104 (9th Cir. 2003) (case not moot despite repeal of challenged statute because of continuing threat of prosecution and civil penalties for past violations of the repealed statute).

Because Defendants' argument here turns on post-litigation actions, is really about mootness, not standing. Again, it was only *after* this lawsuit was filed that Defendants voluntarily ceased the forfeiture proceedings and voluntarily returned the Platts' car. Am. Compl. ¶¶ 219–20. Defendants insist that their conduct giving rise to this lawsuit was legal and that the car was returned in an exercise of Defendants' voluntary discretion. *Id.* ¶ 224. Defendants continue to prosecute a forfeiture against the cash they found inside the car. *Id*. ¶ 84 n.8. All of this demonstrates that the Platts could face a renewed attempt

[4] Indeed, there is no mechanism to judicially formalize a voluntary withdrawal. A.R.S. § 13-4314 provides only four ways in which a *court* can terminate a forfeiture proceeding: by ordering property forfeited in an uncontested application, by releasing property pursuant to a stipulation, by disposing of all claims and ordering forfeiture to the state, or by entering judgment for a claimant. None of these things happened here.

at uncontested forfeiture if this Court does not enjoin it.

> A case becomes moot only if:
>
> (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Cty. of L.A. v. Davis, 440 U.S. 625, 631 (1979) (internal quotation marks, citations, and ellipses omitted). "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth*, 528 U.S. at 189 (internal quotation marks omitted). A case is moot only if subsequent events make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," and the party asserting mootness bears a "heavy burden" in meeting this standard. *Id*. Where a defendant voluntarily ceases alleged wrongful behavior but refuses to concede the wrongness, there is a substantial likelihood of recurrence that prevents a finding of mootness. *Armster v. U.S. Dist. Court*, 806 F.2d 1347, 1359 (9th Cir. 1986); *see also Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2287–88 (2012) (a union's voluntary cessation of challenged conduct did not render the case moot, in part because the union continued to defend the practice's legality).

For the reasons set out above, neither the Defendants' discretionary return of the car nor the "notice" filed in state court prevents Defendants from again trying to forfeit the car now that they have given it back. Moreover, Defendants here have not admitted to the illegality of the seizure and forfeiture of the Platts' car. Instead, they continue to insist that the seizure and forfeiture were justified and legal. Am. Compl. ¶ 224; MTD 13 (insisting that Defendant Moore's actions were "justified"). Accordingly, the Platts' claims for prospective relief are not moot.

In sum, the Platts' property rights in their car remain threatened by Defendants' acts and *Lyons* does not apply. In addition, Defendants have not shown that the Platts' claims are moot. All that has happened is Defendants have voluntarily ceased pursuing

forfeiture now, while refusing to admit fault, and state law provides many more years for them to reinstitute forfeiture. There has never been a binding determination on the merits that the Platts' car *cannot* be subjected to forfeiture in the next seven years. The Platts are therefore entitled to seek such a determination here.

B. If the Platts Lack Standing to Claim Injunctive and Declaratory Relief, the Court Must Remand Those Claims to State Court.

This case was removed to federal court from state court. Accordingly, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded," not dismissed. 28 U.S.C. § 1447(c). Although the Ninth Circuit recognizes an exception to the absolute rule of remand, that rule conflicts with the plain language of the statute, conflicts with Supreme Court precedent, and does not apply here in any event.

The Ninth Circuit has created an exception to the absolute rule of remand: no remands where remand would be "futile." *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991). But even if *Bell's* futility rule is good law (and it is not),[5] it does not apply here. *Bell* applies "only when the eventual outcome of a case after remand is so clear as to be foreordained." *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1198 (9th Cir. 2016). Where a plaintiff has been removed to federal court and does not have standing under federal law, but may still have standing under state law, remand is the only option. *Id*. at 1198–99 (finding lack of standing under federal law because plaintiff had been refunded purchase price, but remanding because California state law allowed her to continue to be a class representative).

---

[5] After *Bell* was decided, the Supreme Court declined to apply a futility exception to the remand rule of § 1447(c). *Int'l Primate Protection League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 88–89 (1991). Although the Court did not reject the futility doctrine outright, it did take note of "the literal words of § 1447(c), which, on their face, give no discretion to dismiss rather than remand an action." *Id.* at 89 (quotation marks and alteration omitted). In the wake of *International Primate*, a number of circuits have expressly rejected the futility doctrine. *See Hill v. Vanderbilt Capital Advisors*, LLC, 702 F.3d 1220, 1225–26 (10th Cir. 2012) (collecting cases). The Ninth Circuit has not yet done so, even though at least one panel has noted the issue. *See Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1198 (9th Cir. 2016).

As in *Polo*, remand of the Platts' claims is required if they lack standing under Article III. Unlike the federal courts, standing can be waived by Arizona courts when the case directly raises issues of great public importance that are likely to recur. *Sears v. Hull*, 961 P.2d 1013, 1019–20 (Ariz. 1998) (describing cases in which standing was waived). Mootness can also be waived. *Ariz. Osteopathic Med. Ass'n v. Fridena*, 463 P.2d 825, 826 (Ariz. 1970) (Arizona courts have "the discretion to decide questions which have become moot"). Because Arizona courts may consider the Platts' claims for injunctive and declaratory relief even if they lack standing in federal court, this Court must remand those claims to state court if it is without jurisdiction to hear them. 28 U.S.C. § 1447(c).

II. THE PLATTS DID NOT NEED TO FILE A NOTICE OF CLAIM TO BRING STATE LAW CLAIMS.

Defendants argue the Platts' claim for nominal damages under state law[6] must be dismissed because they did not file a pre-litigation notice of claims pursuant to A.R.S. § 12-821.01. MTD 17. Defendants are wrong. A notice of claim is not required if the primary purpose of the lawsuit is declaratory or injunctive relief rather than damages. *State v. Mabery Ranch, Co.*, 165 P.3d 211, 223 (Ariz. Ct. App. 2007); *Martineau v. Maricopa Cty.*, 86 P.3d 912, 916–18 (Ariz. Ct. App. 2004). The primary purpose of this lawsuit is declaratory and injunctive relief. Accordingly, even though the Platts seek nominal damages, they were not required to file a notice of claim.

Cases where monetary claims are merely incidental to declaratory or injunctive relief are not subject to the notice of claim requirement. *Cf. Martineau,* 86 P.3d at 918 n.7 (not allowing "an action for monetary damages under the guise of seeking declaratory relief").[7] Nominal damages are the clearest example of damages that are incidental to

---

[6] Notice-of-claim requirements cannot apply to *federal* claims made pursuant to 42 U.S.C. § 1983. *Felder v. Casey*, 487 U.S. 131, 134 (1988).

[7] Similarly, the state and federal California cases that *Martineau* adopted for Arizona all allow claims for damages without a notice of claim where the damages are "'merely incidental to a transcendent interest in injunctive relief.'" 86 P.3d at 916–17 & n.6 (quoting *Gatto v. Cty. of Sonoma,* 120 Cal. Rptr. 2d 550, 563–65 (2002)), *see also id.*

declaratory or injunctive relief. "Nominal damages are a purely symbolic vindication of [a] constitutional right, and are awarded regardless of whether the constitutional violation causes any actual damage." *Schneider v. Cty. of San Diego*, 285 F.3d 784, 795 (9th Cir. 2002) (internal quotation marks omitted). Indeed, in the Ninth Circuit, "[n]ominal damages *must* be awarded if a plaintiff proves a violation of his [or her] constitutional rights." *Id.* at 794.

Moreover, the $1 in nominal damages sought here is certainly incidental to the relief of having multiple Arizona statutes declared unconstitutional on their face or as applied and having Defendants enjoined from enforcing those statutes. Am. Compl. Prayer A–G. In fiscal year 2016 alone, Defendants admit to seizing more than $700,000 of assets, receiving more than $221,000, spending more than $327,000, and having more than $500,000 to spend under those challenged statutes. *Id.* ¶¶ 6, 163–65. Thus, the impact of the $1 nominal damages sought can only be incidental to the impact of the declaratory and injunctive relief sought.

III. THE PLATTS CAN SUE THE TASK FORCE AND/OR ITS COMPONENT MEMBERS.

Defendants seek to prevent the Platts from suing the Task Force and the component members of the Task Force. MTD 9–17. But Defendants cannot have it both ways. The Platts' rights have been violated by the Task Force, and they must be allowed to sue the Task Force. At a minimum, if the Platts are not allowed to sue the Task Force, they must be allowed to sue the members of the Task Force.

A. The Task Force Is a Jural Entity in Forfeiture Actions Because, as a "Seizing Agency," Arizona Law Allows It to Be Named in Judgments of Forfeiture and It Is Subject to Suit.

---

at 918 ("We find the authorities interpreting California's governmental claim notice requirements persuasive and consistent with the purposes of Arizona's public entity notice requirements."). *Accord Indep. Hous. Servs. of San Francisco v. Fillmore Ctr. Assocs.*, 840 F. Supp. 1328, 1358 (N.D. Cal. 1993) ("small and particularly inconsequential" request for damages allowed because declaratory/injunctive relief sought was "of great weight"); *M.G.M. Constr. Co. v. Alameda Cty.*, 615 F. Supp. 149, 151 (N.D. Cal. 1985) (damages claims were relatively small compared to declaration that plaintiff could not be denied public contracts in the future).

The Platts' car was seized for forfeiture by the Task Force. Am. Compl. ¶¶ 54, 150. By Arizona law, the Task Force would be the financial beneficiary of the forfeiture of the car. *Id.* ¶¶ 147–52. The Task Force thus has a profit incentive to seize property—including the Platts' car—that impairs the Task Force's ability to administer justice impartially, violating the Platts' rights. *Id.* ¶¶ 269–73.

Even though the Task Force seized the car and could also have been awarded the car in a judgment of forfeiture, Defendants argue the Task Force is "not a jural entity" and cannot be sued. MTD 9. The jural entity theory rests on the notion that "a governmental entity may be sued only if the legislature has so provided." *Braillard v. Maricopa Cty*., 232 P.3d 1263, 1269 (Ariz. Ct. App. 2010). The Arizona Supreme Court has never affirmed this doctrine, but lower courts have applied it to dismiss Arizona county sheriffs' offices from § 1983 litigation. *See id.*

Unlike in *Braillard*, however, the legislature *has* provided the Task Force with legal standing in forfeiture proceedings: When the Task Force seizes a car for forfeiture—as it did here—and the car is forfeited, the car is awarded to the Task Force for its own benefit. Am. Compl. ¶¶ 15, 148–52. Accordingly, with regard to its seizure for forfeiture of the Platts' car, the Task Force did have the capacity to be awarded property in a lawsuit in its own name and the authority to hold and use that property separate and apart from any other governmental entity. The Task Force is, therefore, a jural entity here.

But even if the Task Force is not a jural entity, dismissal is not proper. Suit against a non-jural entity is "misnomer" or "misjoinder," and does not give rise to dismissal. *Melendres v. Arpaio*, 784 F.3d 1254, 1260 (9th Cir. 2015) (dismissal is not the appropriate remedy, citing Fed. R. Civ. P. 21); *Simon v. Maricopa Med. Ctr*., 234 P.3d 623, 628 (Ariz. Ct. App. 2010) (proper remedy for misnomer of a non-jural entity is leave to amend).

Defendants also argue the Task Force is "nothing more than an intergovernmental association of participating municipalities" and is therefore not a legal entity subject to

suit under 42 U.S.C. § 1983. MTD 10. But the one Ninth Circuit case cited by Defendants, *Hervey v. Estes*, 65 F.3d 784, 792 (9th Cir. 1995), indicates otherwise. *Hervey* recognizes that intergovernmental agencies can be subject to suit where there is "some indication from either state law or from the enabling document" that the task force is intended . . . to be a formal independent entity." *Id.* Here, the Task Force clearly held itself out as the "seizing agency," giving it definite rights and obligations under Arizona forfeiture law including the right to be served with a claim and the right to profit from its seizures for forfeiture. Am. Compl. ¶¶ 15, 116, 148–52, 176. Moreover, and as discussed below, *Hervey* recognizes that a task force's actions cannot be "beyond judicial review" and that the "component members" may be held to answer for the Task Force's constitutional violations if the Task Force itself cannot be. 65 F.3d at 792.

B. If the Platts Cannot Sue the Task Force, They Must Be Able to Sue Its Members.

Defendants argue the Platts cannot sue the county and municipal members of the Task Force. MTD 10–16. But, as noted above, if this Court rules that the Task Force is not a jural entity, the remedy would be to allow suit against the right entity or entities. *Melendres*, 784 F.3d at 1260. Accordingly, the Platts have sued jural entities associated with each of the Task Force's member agencies. Am. Compl. ¶¶ 16, 19, 21, 23–24, 26, 28. They have also sued the policy makers for each member agency in their official capacities. *Id.* ¶¶ 13–14, 17–18, 20, 22, 25, 27, 29. Each member agency has a "pecuniary interest in the county anti-racketeering revolving fund, as well as in the proceeds of any forfeitures obtained by [their] participation in the Task Force." *Id.* ¶¶ 14–16, 18–19, 21, 23–24, 26, 28. Nothing in state law requires these agencies to form or join the Task Force or to share in the forfeiture proceeds generated by the Task Force's activities. Accordingly, their participation in the Task Force represents a "conscious decision to and . . . a policy or practice of seizing property for forfeiture and obtaining forfeiture proceeds." *Id.* ¶¶ 16, 19, 21, 23–24, 26, 28.

Again, *Hervey* recognizes that if a Task Force is responsible for constitutional

violations but cannot be sued directly, its actions cannot be "beyond judicial review." 65 F.3d at 792. If the facts ultimately indicate the Task Force "is designed to function as an informal association of various governmental entities setting joint policies and practices . . . its component members may be sued and may be subject to joint and several liability for any constitutional violations." *Id.* at 792.

IV. THE PLATTS HAVE SATISFIED *MONELL.*

Defendants make several arguments based on the rules for suing counties and municipalities established in *Monell v. Dep't of Soc. Servs*., 436 U.S. 658 (1978). But these arguments badly misconstrue the Complaint. It bears repeating here why each of the Defendants has been sued.

The constitutional harms that the Platts have suffered are due to the application of certain state statutes to them. The persons or entities (jural or otherwise) that have applied those statutes to the Platts are: Defendant Moore, the Navajo County Attorney's Office, and the Task Force. If those persons or entities can be sued and enjoined from committing their constitutional violations, there is no need to sue the other entities named in the Complaint. But Defendants insist the Platts cannot sue the Task Force or the Navajo County Attorney's Office. Accordingly, the Platts have to (and have to be able to) also sue the jural entities and officials associated with the Task Force in order to seek the relief to which they are entitled. This includes Navajo County, several municipalities whose police departments participate in the Task Force, and several law enforcement policy making officials in their official capacity. Am. Compl. ¶¶ 13–30.

A. A Municipal Policy Can Be Predicated on a Policy Maker's Conscious Choice to Enforce State Law.

Defendants claim there is no municipal policy that was the "moving force" behind any alleged constitutional violation. MTD 11. But where local policymakers have made a "conscious choice" to enforce a state law, the locality itself can be held responsible under *Monell*. *Vives v. City of New York*, 524 F.3d 346, 352–53 (2d Cir. 2008). For example, in *Evers v. County of Custer*, the Ninth Circuit found that *Monell* was satisfied and a county

could be held liable when state law allowed the county commission to declare a plaintiff's road to be public, but it was the board's choice to so declare. 745 F.2d 1196, 1203 (9th Cir. 1984). The commissioners, as the county's governing body, were policy makers for the County. *Id.* And that the county commissioners were acting in good faith in applying the statute only went to their individual liability; "their good faith does not relieve the County from liability." *Id.* The county and municipal defendants here have made a similar conscious decision to participate in the state's forfeiture scheme that allows them to "police for profit."

There is nothing in state law that requires the various county and municipal defendants to form or join the Task Force or to profit from the activities of the Task Force. Rather, each of the county and municipal defendants made a "conscious decision to and have a policy or practice of seizing property for forfeiture and obtaining forfeiture proceeds." Am. Compl. ¶¶ 16, 19, 21, 23–24, 26, 28. The Task Force's seizure for forfeiture of the Platts' car implements and executes that policy or practice of seizing property for forfeiture and obtaining forfeiture proceeds in doing so. *See Monell*, 436 U.S. at 690; *see also* Am. Compl. ¶¶ 6, 163–65. This policing for profit violated the Platts' rights. Am. Compl. ¶¶ 268–75. Accordingly, the Platts have sufficiently alleged a municipal policy—joining and profiting from the Task Force's forfeitures—that was the moving force behind the constitutional violation committed by the Task Force.

B. The Platts Do Not Need to Plead "Deliberate Indifference."

Defendants claim they are only liable when their policies evince a "deliberate indifference" to the constitutional rights of plaintiffs. MTD 10. This is not correct. The "deliberate indifference" standard applies to a different type of § 1983 case where liability is premised on "a policy of inaction and such inaction amounts to a failure to protect constitutional rights." *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992); *see also Farmer v. Brennan*, 511 U.S. 825, 840–41 (1994) (noting that "'deliberate indifference' is a judicial gloss, appearing neither in the Constitution nor in a statute," and that *Canton* applies only when the question is whether "a municipality [is]

liable for failure to train its employees"); *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) ("Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983."); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996) (deliberate indifference applies to negligent training, supervision, monitoring, or hiring claims); *Oviatt*, 954 F.2d at 1474 (deliberate indifference applies to impose liability for "failing to act to preserve constitutional rights").

Deliberate indifference is not relevant when county and municipal defendants have made a deliberate choice to act, rather than failed to act. Here, the county and municipal defendants have chosen to actively police for profit and the deliberate indifference standard does not apply.

C. The Platts Have Pled Facts Supporting Official-Capacity Defendants' Liability.

Official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell*, 436 U.S. at 690 n.55. For the reasons set forth above, the Platts have pled a sufficient policy to sue the county and municipal officer defendants in their official capacities as representatives of the county and municipalities. The Platts' claims may thus proceed.

Defendants persist, however, in claiming that only state policies, not local policies, are the moving force behind the constitutional deprivations suffered by the Platts. As stated above, the Platts do not agree. But, depending on a raft of factors, county and municipal officials sued in their official capacities can be agents of either the state or the locality for *Monell* purposes. *See McMillian v. Monroe Cty.*, 520 U.S. 781, 784–86 (1997). No court has addressed whether Arizona local officials act in a local or state capacity when they undertake seizure for forfeiture or forfeiture proceedings. *Cf. Melendres v. Maricopa Cty.*, 815 F.3d 645, 650 (9th Cir. 2016) (county sheriff's "law-enforcement acts constitute Maricopa County policy since he 'has final policymaking

authority'"); *Puente Ariz. v. Arpaio*, No. CV-14-01356-PHX-DGC, 2016 U.S. Dist. LEXIS 162578, at *75 (D. Ariz. Nov. 22, 2016) (county attorney "acts for the state when conducting criminal prosecutions"). But the inquiry is a fact intensive one, *see McMillian*, 520 U.S. at 784–86, and is not amenable to resolution before discovery.

Ultimately, the Platts have pled facts supporting the county and municipal officials as either carrying out State *or* local policy. Defendants' argument that the Platts have not shown a county or municipal policy, as opposed to a State policy, is a red herring at this stage as to the officials.

V. DEFENDANTS DEPRIVED THE PLATTS OF THEIR PROPERTY WITHOUT A MEANINGFUL OPPORTUNITY TO BE HEARD.

The Platts' fourth cause of action arises from the indisputable fact that they were deprived of their property. This triggered the due-process requirement of a meaningful opportunity to be heard. *E.g.*, *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 62 (1993). The Platts allege they were denied this meaningful opportunity.

Defendants, who want this lawsuit to go away, obscure the issue by claiming that "[no] hearing was even necessary" because the Platts (eventually) "obtained counsel" and (sort of) "obtained the relief they sought." MTD 13. This ignores the point of the Platts' fourth cause of action. It is "well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Fuentes v. Shevin*, 407 U.S. 67, 84–85 (1972). The Platts have alleged that Defendants deprived them of their car for five months, that the Platts availed themselves of the statutory opportunity to be heard, and that Defendant Moore acted in concert with the other Defendants to continue the deprivation by ignoring his own statutory duties and applying for a judicial whitewashing of the forfeiture without disclosing the contents of the Platts' petition to the court. Am. Compl. ¶¶ 185–87, 276–85. This is a textbook deprivation of property without due process of law. *Id.* ¶ 286

Brushing aside those issues, Defendants insist that Defendant Moore's actions were lawful because he supposedly did no more than "tak[e] . . . *a position* during the

underlying proceedings"[8] in applying to cut the Platts out of the forfeiture proceeding. MTD 13; *cf.* Am. Compl. ¶ 287. They are wrong. For the reasons set forth more fully in the Platts' brief in opposition to the State's motion to dismiss, Defendant Moore denied the Platts due process of law when he adjudicated their petition by filing an application for forfeiture on July 5, 2016, so as to deprive them of meaningful judicial review. *See* A.R.S. § 13-4314(A) (setting standards for applications for forfeiture); *Wohlstrom v. Buchanan*, 884 P.2d 687, 689 (Ariz. 1994) (describing why the *ex parte* judicial determination following application "virtually assur[es] a forfeiture"); *Norriega v. Machado*, 878 P.2d 1386, 1390 (Ariz. Ct. App. 1994) (confirming that application for forfeiture extinguishes property owner's statutory right to contest forfeiture).

Defendants cannot hide behind the fact that they *eventually* returned the Platts' car. Nor can they write off Moore's conduct as ordinary prosecutorial zeal. The Platts have alleged a temporary deprivation, and they have alleged that Moore deprived them of a meaningful opportunity to be heard by failing to disclose their petition's contents to the Navajo County Superior Court in Moore's application for an *ex parte* judgment of forfeiture. Defendants may contest the merits of this claim later, but a motion to dismiss is not the proper vehicle for doing so.

VI. THE PLATTS DO NOT ALLEGE INDIVIDUAL LIABILITY OR RESPONDEAT SUPERIOR LIABILITY.

Defendants argue it is unclear whether the Platts seek to impose personal liability on the named officers. MTD 16. The Platts do not. Am. Compl. ¶¶ 13–14, 17–18, 20, 22, 25, 27, 29 (suing individuals only in their official capacities).

Defendants also argue the Platts have failed to allege facts supporting respondeat superior liability. MTD 15–16. The Platts are not making such claims.

---

[8] Defendants also argue that Moore was "justified" in finding the Platts' petition noncompliant under A.R.S. § 13-4311(E). MTD 13. Even if that were Moore's decision to make (and the point of this lawsuit is that it cannot be), it is an abuse of discretion to deny a property owner time to correct technical defects in a timely petition or claim. *State v. Benson (In re $70,269.91 in U.S. Currency)*, 833 P.2d 32, 37–38 (Ariz. Ct. App. 1991).

VII. THE PLATTS HAVE ALLEGED SUFFICIENT FACTS TO DEMAND TERRY'S HEARING AIDS BE RETURNED.

Defendants argue the Platts do not allege "that the County/City/Town Defendants have possessed, or currently possess" Terry's hearing aids and, therefore, are not entitled to the return of those hearing aids. MTD 17. The only case cited in support of this argument, *Triple "S" Wildlife Ranch, LLC v. Oklahoma*, No. CIV-16-196-C, 2016 WL 3512269 (W.D. Okla. June 22, 2016) (unpublished opinion), is not relevant here. In Triple "S," the government had seized the plaintiffs' property *and then returned it all*. *Id.* at *3. Accordingly, the claim for the return of seized property was moot—there was nothing more to return. *Id.* ("Plaintiffs' property was returned following entry of an Order by the District Court of Hughes County, Oklahoma.").

But that case simply highlights the problem here. The Task Force seized Terry's hearing aids when it seized the car. Am. Compl. ¶¶ 79, 150. The car was then impounded by the Task Force. *Id*. ¶ 77. When the car was returned the hearing aids were not. *Id*. ¶¶ 79, 223. Thus, the Platts have pled facts showing that the Task Force— and thus its component members—still have possession of them. The Task Force and its members are liable for their return.

CONCLUSION

The Platts' constitutional rights have been violated and continue to be threatened by the seizure for forfeiture and the forfeiture proceeding conducted by the Task Force and the Navajo County Attorney's Office. The Platts have adequately pled these violations against these defendants. This Court should deny the motion to dismiss. If not denied outright, this Court should remand this action to state court rather than dismiss it.

//

//

//

//

//

RESPECTFULLY SUBMITTED this 23rd day of March, 2017.

INSTITUTE FOR JUSTICE

By: /s/ Paul V. Avelar
Paul V. Avelar (Bar No. 023078)
Keith E. Diggs (Bar No. 032692)
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Telephone: (480) 557-8300
Fax: (480) 557-8305
Email: pavelar@ij.org
kdiggs@ij.org
Attorneys for Plaintiffs
William and Maria Platt

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2017, I caused the Plaintiffs' Memorandum of Points and Authorities in Opposition to Navajo County, Task Force, and City/Town Defendants' Motion to Dismiss to be filed with the Clerk's Office and served via ECF upon:

Rusty Duane Crandell
Kenneth Robert Hughes
Office of the Attorney General - Phoenix
1275 W Washington St.
Phoenix, AZ 85007-2997

Thomas James Rankin
Office of the Attorney General - Tucson
400 W Congress St., Ste. S315
Tucson, AZ 85701
Attorneys for Intervenor-Defendant State of Arizona

James M. Jellison
Jellison Law Offices PLLC
2020 N Central Ave., Ste. 670
Phoenix, AZ 85004
Attorney for County, Task Force, and City/Town Defendants (ECF No. 43)

Eli D. Golob
Office of the Attorney General - Phoenix
1275 W Washington St.
Phoenix, AZ 85007-2997
Attorney for Defendant Milstead

Respectfully submitted, this 23rd day of March, 2017.

By: s/ Paul V. Avelar
Paul V. Avelar (AZ Bar No. 023078)
Keith E. Diggs (AZ Bar No. 032692)
INSTITUTE FOR JUSTICE
398 South Mill Avenue, Suite 301
Tempe, AZ 85281
Telephone: 480.557.8300
Email: pavelar@ij.org
kdiggs@ij.org