Appeal No. 16-3400

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARIA MUNIZ-MUNIZ, *et al.*

Plaintiffs

and

OHIO IMMIGRANT WORKER PROJECT;
FARM LABOR ORGANIZING COMMITTEE, AFL-CIO

Plaintiffs- Appellants

v.

UNITED STATES BORDER PATROL,
Customs and Border Protection,
Department of Homeland Security.

Defendants-Appellees

RANDY GALLEGOS, *et al.*

Defendant

On Appeal from the U.S. District Court for the Northern District of Ohio
Case No. 3:09-CV-02865-JZ
Judge Jack Zouhary

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I. CORPORATE DISCLOSURE STATEMENTS

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-3400 Case Name: Muniz-Muniz, et al. v. U.S. Border Patro

Name of counsel: John T. Murray

Pursuant to 6th Cir. R. 26.1, Farm Labor Organizing Committee, AFL-CIO ("FLOC")
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on April 29, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/John T. Murray

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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8/08

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-3400 Case Name: Muniz-Muniz, et al. v. U.S. Border Patro

Name of counsel: John T. Murray

Pursuant to 6th Cir. R. 26.1, Ohio Immigrant Worker Project ("IWP")
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

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IV. STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully request that the Court set this matter for oral argument. The issues presented in this appeal could significantly affect the landscape for Equal Protection claims involving selective enforcement, or "racial profiling," including the appropriate evidentiary and legal standards applicable to Fifth and Fourteenth Amendment claims. If the District Court's decision in this case is affirmed, litigants challenging racially discriminatory law enforcement may face insurmountable legal and evidentiary burdens that could effectively bar the courthouse door. Oral argument would be helpful in clarifying and defining these issues.

The issues in this important constitutional case are complex and oral argument is warranted.

V. REPLY ARGUMENT

Plaintiffs' case is about the forest: the formal policy and institutional practice that leads to a Border Patrol Station consistently apprehending over 90-percent individuals from traditionally Hispanic countries, despite being situated near the Canadian border in Northern Ohio. Plaintiffs' case is focused on the rights of individuals within our borders to be treated equally under the law. The Fifth Amendment guarantees persons equal protection so that one race or ethnicity is not subject to selective enforcement by any law enforcement agency of the United States. Equal Protection means that the use of race as a factor in law enforcement activities is prohibited except in circumstances that are justified by a narrowly tailored compelling governmental reason.

The Government's defense is about the trees: the individual encounters between Sandusky Bay ("SBY") agents and members of the Hispanic community, some with legal status in the United States and some without. The Government's framework drew the District Court into an irrelevant analysis deciphering whether the stop violated the Fourth Amendment. This framework erroneously narrowed the scope of the analysis to whether the SBY agent could utter a plausible after-the-fact race-neutral explanation for his action. This structure obscured the central issue: Does the Border Patrol violate the Fifth Amendment in its enforcement activities by utilizing race as a factor in any respect? The Government does not

want this question answered. Instead, the Government has spent the last seven years justifying the conduct of specific agents in particular stops and counting on distracting the Court from the real issue: is the Border Patrol's conduct at odds with an individual of Hispanic ethnicity's right to be treated in the same way as an individual who is of another race or ethnicity. The Border Patrol admits to utilizing race in its law enforcement activities, the Border Patrol Agents use racially derogatory language against Hispanic people in official correspondence, and the Hispanic population in the apprehension logs is significantly overrepresented when compared to any measure of the the at-risk population for apprehension to such an extent that can only be characterized as extreme. During the trial, SBY agents denied, sometimes implausibly, that race played a significant role in each individual "consensual encounter" and "immigration inspection." It follows, the Government argues, that there can be no "pattern or practice" of profiling, even though the SBY agents claim that they may permissibly use race as "one factor among many" in selecting individuals for stops. The Government is not only wrong on the law, the basic framework of its brief obscures the real issues in this case and this appeal:

1) Does the Border Patrol violate the Fifth Amendment's Equal Protection Clause with its use of race in enforcement activities against the Hispanic population of Northern Ohio; and

2) Did the District Court error as a matter of law under a de novo review by failing to hold the Government to its burden to establish that its use of explicit racial classification survives strict scrutiny.

The District Court ultimately accepted the Government's view of the legal framework and credited the agents' testimony that race played little role in any individual encounter considered at trial. To the extent that these findings by the District Court are factual in nature, they are subject to review for clear error. On appeal, the Government attempts to expand the District Court's judgment with respect to these particular findings to all legal and factual issues raised by Plaintiffs in this appeal.

In other words, the District Court lost the forest of discriminatory enforcement practices from the trees of the eight individual stops. In so doing, the District Court applied incorrect legal standards to reach an ultimately erroneous conclusion. The District Court failed to recognize that strict scrutiny was triggered when the Government admitted that it utilized race in enforcement decisions.

Plaintiffs consistently contended that selecting individuals for law enforcement action based, in part, on their Hispanic appearance is unconstitutional even if coated with a race-neutral veneer. The Government has equally consistently responded by pointing to race-neutral criteria purporting to underpin individual stops, while discounting an alarming pattern of enforcement that

disproportionately impacts Hispanics. In the Government's view, as long as the SBY agents can utter some race-neutral justification for each stop, the station's admitted practice of relying partially on race is immune from constitutional challenge. In fact, it is unconstitutional for law enforcement to utilize race as a factor in determining who to encounter, to use racially derogatory language in official law enforcement activity, to mask racial profiling by using canned narratives in arrest records, and to apprehend Hispanic persons at a rate that is significantly overrepresented when compared to the at-risk population.

The District Court's judgment must be reversed.

A. Consistent with the SBY agents' testimony at trial, the Government acknowledges the use of race as "a factor" in routine enforcement. This explicit racial classification is subject to strict scrutiny.

Throughout this litigation, and indeed in its most recent appellate brief, the Government contends both: 1) that SBY agents can and do use race as a factor in enforcement decisions, as long as race is not the "sole factor" in stopping any individual; and 2) because, in the Government's view, the agents proffered sufficient race-neutral explanations for each individual action, no Equal Protection violation could occur. Fundamentally, the District Court's Memorandum Opinion cannot reasonably be read as anything other than adopting the basic legal framework suggested by the Government.

However, this legal standard advocated by the Government and adopted by the District Court is simply at odds with contemporary jurisprudence, from the U.S. Supreme Court on down, regarding the permissible use of race in law enforcement and elsewhere: when the Government explicitly draws lines based on race, even as one factor among many, it must carry the burden of showing that its action is narrowly tailored to achieve a compelling Government interest. That is, the Government's classification is subject to strict constitutional scrutiny. See Plf. Br. at 41-48; see also *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003), *D'Ambrosio v. Marino*, 747 F.3d 378, 386-387 (6th Cir. 2014); *Floyd v. City of New York*, 959 F.Supp.2d 540, 663 (S.D.N.Y. 2013); *Melendres v. Arpaio*, 989 F.Supp.2d 822, 899-900 (D. Ariz. 2013).

1. The Government's appellate brief confirms trial testimony that SBY agents explicitly utilize race as "a factor."

As set forth in detail in Plaintiffs' opening brief, multiple SBY agents testified at trial that they utilize race as "a factor," in combination with other factors, in selecting individuals for either investigative "consensual encounters" or "immigration inspections" (akin to *Terry* stops in most other law-enforcement contexts), or that racial profiling is permissible unless the challenged action was initiated based "solely" on racial considerations.

David York, the second-highest ranking officer at SBY for much of the relevant time period, testified that he believes that race is an appropriate factor in

initiating a "consensual encounter," (York, RE 237, 444:11:444:13) and is a legitimate factor in forming the reasonable suspicion necessary to initiate an immigration inspection (York, RE 237, 444:19:444:22).

Mathew Richardson, who served as a line agent at SBY, believed that SBY agents could use race as "one factor among many" to form the requisite suspicion to support a stop, even on the northern border. (Richardson, RE 240, 943:19-943:22). Richardson also testified that Mexican appearance, combined with other factors, contributes to his generalized suspicion that vehicle occupants could be involved in "smuggling." (Richardson, RE 240, 1040:15-1040:18). Plaintiffs respectfully suggest that Richardson described textbook unconstitutional racial profiling at trial.

Agent Chavez testified to his understanding that "racial profiling" involves targeting an individual based solely on race. (Chavez, RE 241, 1201:25-1202:3). Agent Robert Simon, who was in charge of SBY at the time of trial, testified to his clear misunderstanding that invidious racial profiling cannot occur if both the "profiler" and "profilee" are of the same race. (Simon, RE 237, 492:5-492:16).

In its brief, the Government again confirms its ongoing contention that SBY agents may utilize race as "one factor among many" in enforcement decisions. The Government even identified the place in SBY's official policy at which this contention is memorialized. See: Gov. Br. at p. 25, citing the DOJ's "Guidance

Regarding the Use of Race by Federal Law Enforcement," Trial Exhibit. 127 at 10 ("because enforcement of law protecting the Nation's borders may necessarily involve consideration of a person's alienage in certain circumstances, the use of race or ethnicity in such circumstances is properly governed by existing statutory and constitutional standards.")

The District Court did not explicitly consider the testimony by SBY agents that they utilize race as "one factor among many" at any point in its Memorandum Opinion, despite the fact that Plaintiffs prominently raised the issue during the trial and in their post-trial brief. (RE 243, Page ID #7260-7262). In its brief to this Court, the Government acknowledges the agents' testimony, but contends that "[t]heir understanding is consistent with Supreme Court precedent." Gov. Br. at 31. Plaintiffs disagree. The issue is subject to *de novo* review.

SBY's acknowledged policy of utilizing race as "one factor among many" in immigration enforcement is subject to strict scrutiny because it constitutes an explicit racial classification. *Farm Labor Org. Comm. v. Ohio State Highway Patrol,* 308 F.3d 523, at n.4 (6th Cir. 2002). Strict scrutiny applies "even in the absence of discriminatory purpose," e.g., deliberate targeting or discrimination. *Id.* Moreover, as set forth in Plaintiffs' opening brief, explicit racial classifications are subject to strict scrutiny even if the challenged policy "involve[s] race as one factor

among many" and "race is not the predominant factor." Pls. Br. at 47-48, citing *Melendres,* 989 F.Supp.2d at 900-901, quoting *Gratz* 539 U.S. at 270.

The Government spills much ink in its appellate brief on rhetorical devices concerning Plaintiffs' alleged failure to demonstrate that "the SBY Station had a practice of targeting specific racial or ethnic groups or of stopping individuals on that basis alone." Gov. Br. at 32. The Government repeats argument and record citations relying on some version of "intentional targeting" and "race alone" formulations throughout its brief. (Gov. Br. at 21, 23, 25, 32, 34). At trial, the Government repeatedly advanced the same formulations. However, the "targeting" and "race alone" formulation have nothing to do with strict scrutiny, which applies: 1) even in the absence of discriminatory purpose; and 3) in the presence of additional race-neutral factors. See: Pls. Br at 41-48.

2. SBY agents may not utilize race in making enforcement decisions, even as "one factor among many."

SBY's acknowledged use of race to make enforcement decisions, even as one factor among many, cannot survive strict scrutiny.

When describing both official policy and attempting to explain away its agents' trial testimony, the Government twice cites to *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975). See: Gov. Br. at 25, 31. Tellingly, the Government identifies no other authority. The *Brignoni-Ponce* court did indeed hold that Border Patrol agents may consider race, in conjunction with other factors in

appropriate contexts, when selecting individuals for enforcement. Unfortunately, the Government completely ignores significant and, in some cases, controlling caselaw raised in Appellants' brief in which courts have elaborated on the "contexts" that Border Patrol agents may consider Mexican appearance as evidence of unlawful alienage. The SBY agents' on-the-ground evaluation of "context" must yield to Supreme Court and other precedent.

The first context is geographical. The *Brignoni-Ponce* court made clear that any permissible use of Mexican or Hispanic appearance is tied to proximity with the Mexican border:

> Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

Id., 422 U.S. at 886-887. The year after *Brignoni-Ponce* was decided, the Supreme Court made the distinction in geographical "context" between the northern and southern border explicit. Border Patrol agents may rely on race as "one factor among many" when directing individuals to checkpoints on the southern border. However, "Different considerations would arise if, for example, reliance were put on apparent Mexican ancestry at a checkpoint operated near the Canadian border." *United States v. Martinez-Fuerte*, 428 U.S. 543, 564 n. 17 (1976). Here, consistent

with testimony by SBY agents at trial, the Government relies on *Brignoni-Ponce* for the proposition that Hispanic appearance may be considered as "one factor among many" by agents patrolling the shores of Lake Erie, thousands of miles from the Mexican border. This position is simply not consistent with the limited license granted by Supreme Court jurisprudence to consider Hispanic appearance in close proximity to the Mexican border.

The second "context" neglected by the Government is temporal. Since *Brignoni-Ponce* was decided in 1975, the U.S. Supreme Court has repeatedly emphasized that strict scrutiny applies to all racial classifications because they represent such highly suspect tools. Pls. Br. at 47-49. Even on the southern border, where the proportion of the Hispanics in the population is far higher than SBY, the *en banc* Ninth Circuit has rejected Border Patrol agents' use of Hispanic appearance in any way unless searching for a specific suspect.[1] *United States v. Montero-Camargo,* 208 F.3d 1122, 1134-1136 (9th Cir. 2000), en banc, cert. denied 531 U.S. 889. The Ninth Circuit cited both the changing demographic makeup of the United States, as well as evolving jurisprudence on the use of race, even as "one factor among many," and concluded that "the likelihood that in an

[1] For example, a specific request to "be on the lookout for a Hispanic male with a white T-shirt, jeans and long hair" who has committed a specific offense in a specific place. Here, for example, Agent Richardson's testimony makes clear that he views Mexican appearance as a generalized "plus factor" that a Northern Ohio driver may be involved in "smuggling." (Richardson, RE 240, 1040:15-1040:18).

area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus." *Id.* at 1332. This Court cited with approval the Ninth Circuit's reasoning that "equal protection principles precluded use of Hispanic appearance as a relevant factor for Fourth Amendment individualized suspicion requirement." *Farm Labor Org. Comm.*, 308 F.3d at 533. Despite all of this, the Government continues to defend the use of race as "one factor among many" by SBY agents.

Simply put, SBY's acknowledged use of Hispanic appearance, even when combined with other factors, constitutes an explicit use of race that cannot survive strict scrutiny.

B. The District Court lost its way when evaluating the statistical evidence of disparate impact.

Plaintiffs' statistical expert, Dr. Kara Joyner, offered a two part opinion at trial: 1) SBY's enforcement activity, which never apprehended less than 90-percent individuals from traditionally Hispanic countries, disproportionately[2] impacts

[2] This basic methodology is widely accepted in the field of racial profiling research, including by the DOJ itself in evaluating the performance of the infamous Ferguson, Missouri police department. (Joyner, RE 238, Page ID #579:10-579:16). In the Ferguson example, 93 percent of arrests involved an African American, who made up only 67 percent of the population, generating a "disproportionality index" of 1.39 when comparing arrests to that local residential

Hispanics; and 2) the overrepresentation was so significant as to constitute evidence of intentional discrimination by SBY agents.

The District Court rejected Joyner's testimony wholesale. Any fair reading of the District Court's Memorandum Opinion regarding Joyner's testimony involves an adverse determination regarding the weight and credibility. The Government repeatedly makes this point in its appellate brief. However, the same fair reading of the District Court's opinion acknowledges that the District Court both: 1) misconstrued the legal showing that Plaintiffs were required to make through Joyner's testimony; and, 2) accepted a number of unquantified criticisms of her methodology advanced by the Government's expert, including a strange distinction between "Hispanic appearance" and "Hispanic nationality" that he repudiated in his deposition and at trial.

If the Court were to determine that SBY did not utilize explicit racial classifications that trigger strict scrutiny, Plaintiffs' additional theory that SBY agents are engaged in selective enforcement of facially race-neutral immigration laws contains two elements: discriminatory purpose and discriminatory effect. *Farm Labor Org. Comm.*, 308 F.3d at 533. Joyner offered an opinion that the extreme overrepresentation on the SBY logs constitutes evidence of both elements.

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population. (Joyner, RE 238, Page ID #580:14-580:17). Here, using the same methodology, the disproportionality index for SBY's apprehensions is significantly more egregious, ranging from 2.6 to 8.1 depending on the benchmark.

The District Court not only rejected Joyner's testimony with respect to intentional targeting, but also drew adverse inferences regarding her overall reliability and credibility because she even offered the opinion. Memorandum Opinion, RE 251, Page ID# 7417-7418. However, as set forth in Plaintiffs' opening brief, Joyner's conclusion that extreme overrepresentation can be evidence of intentional discrimination is conceptually consistent with existing caselaw. Pl. Br. at 58-59. While the District Court may have acted within its discretion as fact-finder to determine that the statistical pattern in this case was not sufficiently stark to justify an inference of intentional discrimination, it erred as a matter of law to make a sweeping negative statement about Joyner's methodology on the basis that it apparently believed that this opinion was far removed from legal precedent and accepted statistical methodology. Structurally, Joyner's opinion that extreme overrepresentation can be evidence of intentional discrimination is well-rooted in both fields.

In focusing on the portion of Joyner's opinion that addressed deliberate targeting, the District Court overlooked the overwhelming documentary and statistical evidence of disparate impact. In each year since SBY opened, its agents have apprehended individuals from traditionally Hispanic countries at a 90-percent rate. This figure comes from SBY's apprehension logs, which directly records "nationality" for each arrest. SBY Apprehension Logs, Trial Exhibits 25, 26, 27.

This no-less-than-ninety-percent figure is undisputedly accurate and the SBY logs unquestionably contain a very high proportion of nationals from these countries. From this simple starting point, which should have significant persuasive value on its face, the Defendant led the experts to embark on a winding and complex road. Along that road, the District Court lost its way.

The District Court's first wrong turn was its conclusion that Joyner's use of "national origin" as a proxy for "race" was so offensive as to "taint" the remainder of her testimony. Memorandum Opinion, RE 251, Page ID# 7417-7418. As explained in Plaintiffs' opening brief, the Government's own statistical and racial profiling expert, Brian Withrow, repeatedly minimized the importance of this criticism, going so far as to indicate he was being "facetious" when even raising it. Pl's Br. at 23. As a practical matter, the District Court's conclusion on this point very likely originated with the testimony of FLOC President Baldemar Velasquez, who testified that he has not personally encountered problems with Border Patrol agents because he considers himself a "guero," or light-skinned Hispanic who is sometimes mistaken for Caucasian. (Velasquez, RE 236, 164:16-165:2). The Government repeatedly raised Velasquez's "guero" comment during the trial and does so again on appeal. (Joyner, RE 238, 635:6-635:14; Carrillo-Vasquez, RE 239, 838:14-838:21; Gov. Br. at 40). Velasquez's off-hand comment clearly made an impression on the District Court.

However, the Government has never even attempted to link Velasquez's description of himself to the statistical evidence that can be gleaned from SBY's apprehension log. That is, at the margin, there may be a distinction between Mexican nationality and Mexican appearance. Testimony from both experts at trial is consistent that this distinction makes no difference. Withrow agrees that Joyner's decision to use "nationality" as a proxy for "race" was reasonable, consistent with accepted statistical methodologies and made no meaningful difference in Joyner's conclusion. Pls' Br. at 23-24. Nonetheless, the Government attempts to rehabilitate the District Court's analysis by unleashing a series of strange distinctions between "ethnicity," "race," "nationality" and "appearance." Gov. Br. at 40. These distinctions, regardless of whether they are rhetorically appealing, are without a difference recognized by sound statistical methodology. The Government's own expert repeatedly said so.

The District Court's second wrong turn came when evaluating the statistical evidence. It involves its willingness to accept Withrow's criticisms of Joyner without holding the Government to its burden to establish that any alleged flaws made a difference in the outcome. As explained in Plaintiffs' opening brief, the District Court erred as a matter of law when it accepted Withrow's laundry list of unquantified statements that certain alleged flaws in Joyner's study "could" have made a difference. In addition to the nationality/race issue, the Government

focuses on two such issues: 1) whether Joyner's benchmarks for measuring the population "at risk" for apprehension were appropriate; and 2) whether Joyner's inclusion of apprehensions resulting from stops initiated by other agencies (recorded as "OA" on the SBY logs), mostly state and local law enforcement, undermined her conclusion.

As the parties and experts agree, the level of overrepresentation of Hispanics in SBY's enforcement activity is best measured by comparing the percent of Hispanics on SBY's apprehension log (numerator) to the percent of Hispanics in the population "at risk" for apprehension (dominator, or benchmark[3]). As set forth in Plaintiffs' opening brief, Joyner utilized a variety of population benchmarks for Mexicans and Hispanics generally in SBY operations area, including: the overall population taken directly from census data, the foreign-born population taken directly from census data and the estimates of the unauthorized population[4] provided by the Pew Hispanic Center, the Department of Homeland Security, and

[3] There is considerable debate in traditional racial profiling literature, and thus the caselaw, over the "at risk" population in traditional law-enforcement setting because those "at risk" for enforcement action are those that may be legitimately suspected of having committed a crime. This population necessarily differs for the overall residential population of a given area and has proven difficult to estimate. Here, the experts agree that the ideal benchmark would capture those in SBY's enforcement area who lack legal status to be present in the United States. (Joyner, RE 238, 576:9-576:23; Withrow, RE 240, 1072:22-1073:2).

[4] As the Government points out, some of these estimates begin with estimates for state and nationwide data. All of these estimates put the percent of Mexican nationals among Ohio's undocumented population at approximately 34 percent. Trial Exhibit 101 at p. 17.

researchers Warren and Warren. The use of various data sources serves as a cross check on the accuracy of the findings. Each comparison shows a gross overrepresentation of individuals from traditionally Hispanic countries generally and Mexico in particular.

At trial, Withrow offered a number of criticisms of each benchmark. For example, on appeal, the Government repeats Withrow's criticism using census data to estimate the undocumented population because "when one takes national statistics and drills down to a small geographic area like Northern Ohio, the analysis is infused with the risk of error." Gov. Br. at 37. The Government also points out that Withrow provided "pointed criticism" of the Pew data. *Id.* Whatever the merits of this criticism, Withrow does not go one step further: offer a reliable opinion, based on some literature or calculation, that the potential error in the underlying census data is so extreme as to undermine Joyner's ultimate conclusion that Hispanics and Mexicans are grossly overrepresented on SBY's apprehension logs. When the best available estimates suggest that Mexicans make up 34 percent of Ohio's undocumented population but no less than 63 percent of the SBY apprehension log, the "potential error" in the estimates would have to be severe indeed in order to make a difference. Withrow did not, and could not, testify that the error met this threshold.

Plaintiffs also urge the Court to consider the practical implications of Withrow's suggestion, repeated by the Government here, that Joyner should have "gathered data at a much more local level (including school districts, housing records, and other locally-produced economic data) to get a sense of what the population at risk [for apprehension on suspicion of violating immigration law] might be." Gov. Br. at 38. Nobody seriously suggests that, for example, local school districts maintain uniform and easily accessible data about how many of their students are present in the United States without legal status. As a result, the undertaking demanded by Withrow and the Government would necessarily involve plaintiffs' expert making judgment calls about selecting school districts to ask and interpreting the data that each produces. In addition to exponentially increasing the complexity and expense of the study, each judgment call would be subject to debate and attack by an expert hired by the defendant. Are five school districts sufficient? How about ten? Are the schools that keep accessible data sufficient, or must one access data from the last marginal district that only maintains paper records and rarely responds to phone inquiry? The endless possibilities, combined with the District Court's willingness to accept the type of criticism-only commentary from a defense expert such as Withrow, would effectively bar Plaintiffs from presenting statistical proof of disparate impact in an Equal Protection case.

The District Court's treatment of OA stops is similarly troubling. This case has been ongoing for approximately seven years. As explained in Plaintiffs' opening brief, the litigation originally involved a series of local law-enforcement agencies and their interactions with SBY agents. Pls. Br. at 6-7. As a result, the bulk of Joyner's reports and analysis included the OA stops. By the time of trial, these stops played a less significant role in the case due to the dismissal/settlements with the local agencies. Withrow, the Government and the District Court are highly critical of Joyner for including the OA stops in much of her trial presentation, but it made no difference to her conclusion. Early on, as explained in Plaintiffs' opening brief, Joyner concluded that a breakdown between OA stops and those initiated by SBY agents in the first instance made no difference to her underlying conclusions. Pls. Br. at 23. In other words, even if all of the OA interactions were excluded from Joyner's analysis, the result would be the same: SBY agents are apprehending Hispanics in extremely disproportionate numbers. If Withrow and the Government seriously believed that Joyner's inclusion of OA stops fatally undermined her conclusion, they could have performed a fairly simple mathematical calculation to support this assertion.[5] Without demanding at least

[5] Like nationality, the "Arrest Method" such as "OA" ("Other Agency,"meaning state or local law enforcement) and "PB" ("Patrol Border," or direct Border Patrol apprehensions) appears on the face of the SBY apprehension logs for each interaction. Trial Exhibits 25, 26, 27.

this much, the District Court is simply accepting a criticism that is not anchored in any statistical methodology.

In order to discount Joyner's testimony so thoroughly, the District Court must demand that the Government make a showing that any alleged flaws in her methodology actually prejudiced the result. Here, the District Court uncritically accepted Withrow's laundry list of "potential" problems at face value. Along this road, the District Court lost sight of her fundamentally simple conclusion: SBY agents apprehend over 90-percent individuals from traditionally Hispanic countries in a geographic region in which Hispanics constitute a far smaller fraction of the overall and undocumented population. As a result, SBY's enforcement program is disproportionately impacting Hispanics.

C. The District Court committed clear error by failing to consider the cumulative evidence of intentional discrimination and racial animus among SBY agents.

As set forth in Plaintiffs' opening brief, testimony at trial produced substantial evidence of racial animus on the part of SBY agents and a lack of training and supervision at a station at which agents are: 1) not required to keep records of almost any interaction that did not result in an apprehension; 2) routinely dispatched on routine patrol to areas as large as entire counties with little direction as to what to do and no obligation to record their activities; 3) not able to accurately describe key constitutional concepts such as "reasonable suspicion" and

"probable cause" in race-neutral terms; and, 4) cannot recall regular training regarding racial profiling and related issues. Pls. Br. at 24-30.

Predictably, the Government responds by minimizing each individual issue and pointing to the District Court's role as fact finder. However, particularly in light of the District's Court's apparent belief that SBY agents could permissibly consider race in enforcement decisions as long as they considered other factors as well, the ultimate conclusion that SBY agents did not systematically engage in intentional discrimination amounts to clear error. Two particular issues, the SBY agent's acknowledgement that they utilize race and the use racial slurs in official email correspondence, require response here.

Even if the Court concludes that SBY does not maintain an explicit policy of considering race in enforcement actions (and the station does), the testimony by SBY agents admitting to considering race, particularly that of Agents York and Richardson, is at least some evidence that SBY agents consider race in enforcement. And even Defendants' own expert witness testified that the widespread usage of "canned narratives" in arrest records so the process can be "expedited" could very well "mask the problem of racial profiling." (Richardson, RE 240 1034:12-1034:20; Withrow, RE 240, 1107:1-1107:2).

The agents' testimony undoubtedly informs any inquiry into whether SBY's enforcement actions are motivated by intentional discrimination, which "demands

a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Farm Labor Org. Comm.*, 308 F.3d at 534, quoting *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The District Court failed to consider this testimony at all.

Second, the Government continues to minimize and defend the use of racially charged language by SBY's two top agents in official correspondence, including repeatedly describing the population within the station's jurisdiction as "wets," which the District Court concluded was a shortened version of "wetback." Memorandum Opinion, RE 251 at PageID# 7425. At times, the Government has defended this language as a race-neutral term utilized to describe immigration status. (Opening Arg., RE 236, 21:12-21:18). At other times, the SBY agents and the Government's counsel acknowledged that the term is "unfortunate." (Martinez, RE 242, 1331:1-1331:7). The District Court describes the term, and its use by SBY agents in their official capacity carrying out law enforcement duties, as "distasteful" and "poor judgment." Memorandum Opinion, RE 251, Page ID# 7426. On appeal, the Government is unwilling repeat the agents' language in its brief. Gov. Br. at 26-29. Instead, the Government presents a sanitized version of each email, expounding on the official purpose intended by the author. *Id.* The Government then advances a somewhat bizarre argument that as long as racial slurs do not also involve the direct instruction to take enforcement action, they

cannot constitute evidence of intentional discrimination or racial animus. The Government cites no legal support for this position, nor can it.

To the contrary, recently, in *Foster v. Chatman*, the Supreme Court rejected the trial court's conclusion that the prosecution's strikes against two black jurors demonstrated no discriminatory intent. In so doing, the Court did not limit its analysis to only the facts elicited through individual voir dire exchanges between the juror and prosecutor, but took into account "all of the circumstantial evidence," including "the persistent focus on race in the prosecution's file." All of this, the Court found, "bears upon the issue of racial animosity." *Foster v. Chatman*, 578 U.S. ___, 195 L.Ed. 2d 1, 20 (2016). The Court found unpersuasive the State's claim that the numerous references to race in the prosecution's file should not be considered as evidence of intent because the files do not indicate any attempt to exclude them from the jury, instead finding the references to race appropriate to consider in concluding that the "prosecutors were motivated in substantial part by race." *Id*.

The Government's continued defense of the agents' language is unfortunate at best, and likely better described as outrageous. As Justice Sotomayor recently noted, "[a]lso troubling are the Government's actions on appeal. *** [T]he Government failed to recognize the wrongfulness of the prosecutor's [racially charged] question, instead calling it only 'impolitic' and arguing that 'even

assuming the question crossed the line' it did not prejudice the outcome". *Calhoun v. United States*, 568 U.S. ___, 133 S.Ct. 1136, 1138 (2013) (Sotomayor, J, concurring in the denial of certiorari). Simply put, the Government's continued minimization defense of the agents' racially derogatory language is indefensible, and is itself evidence of a failure to recognize and correct a systematic culture of racial bias. There is simply no race-neutral explanation for this language.

D. This Court must reject the Government's suggestion that SBY agents are obligated to respond to all calls for "translation" and "identification" services by local agencies.

In its appellate brief, the Government appears to casually invite this Court to endorse an incorrect description of the permissible role played by state and local agencies in enforcing immigration law. Gov. Br. at 11-12.

The Government walks a perplexing line in describing Border Patrol's relationship with local law enforcement agencies, but they ignore a crucial and fundamental point: "Detaining individuals solely to verify their immigration status would raise constitutional concerns." *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492, 2509 (2012) (speaking of local law enforcement detentions). The Constitutional guarantee of equal protection under the laws is exactly the concern that Plaintiffs have raised and seek to redress, and the Defendants seem to ignore their own written guidance on this specific topic.

As stated by the U.S. Department of Homeland Security's "Guidance on State and Local Governments," no statute relied upon by the Defendants "gives state or local officials authority to use these communications in a systematic manner for the investigation and apprehension of aliens in ways that are not coordinated with and responsive to federal priorities and discretion." See U.S. Department of Homeland Security, *available at* https://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf at page 11. The claim and distraction that local law enforcement agencies can systematically assist the Border Patrol in enforcing civil provisions of immigration law is inconsistent with Sixth Circuit precedent and an Ohio Attorney General's enforcement decision. *United States v. Urrieta*, 520 F.3d 569, 574 (6th Cir. 2008) ("local law enforcement officers cannot enforce completed violations of civil immigration law (i.e. illegal presence) unless specifically authorized to do so by the Attorney General under special conditions . . ."; *see also* 2007 Ohio Op. Att'y Gen. 2-300 (2007) ("[A] county sheriff's duty to preserve the peace must be interpreted to apply only to the enforcement of criminal laws, rather than civil laws.").

Moreover, any authority to investigate and apprehend noncitizens, regardless of who conducted the initial stop, must be exercised within Constitutional restraints. Even the Defendants' own expert stated at trial so succinctly: "It is

inappropriate to use race as an indicator of the potential for criminal behavior because it's incredibly unreliable and, of course, unconstitutional." Withrow, RE 240, 1129:25-1130:2.

This Court must reject the Government's casual suggestion that Border Patrol agents have a blanket "obligation" to respond to any request for assistance from a state or local agency. Both federal and state law enforcement officers must act within appropriate statutory and constitutional authority.

E. Conclusion.

The District Court's judgment must be reversed. SBY's stated policy of utilizing race in enforcement decisions, even as one factor among many, fails strict constitutional scrutiny. This case should be remanded to the District Court with instructions to enter appropriate injunctive relief.

In the alternative, the case must be remanded for the application of the correct legal standards as set forth above and in Plaintiffs' opening brief.

Respectfully submitted,

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VI. CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B)(C) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type limitations of these Rules.

1. Exclusive of the exempted portions in FRAP 32(a)(7)(B)(i) and (iii), the brief contains no more than 6,137 words in its entirety.

2. The brief has been prepared in 14-point Times New Roman typeface using Word.

3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate of the FRAP 32(a)(7)(B)(C) and Sixth Circuit Rule 32(a) may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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VII. CERTIFICATION

I hereby certify that on September 23, 2016, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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