STINSON
MORRISON
HECKER LLP

Michael C. Manning
(602) 212-8510
www.stinsonmoheck.com

1850 North Central Avenue
Suite 2100
Phoenix, AZ 85004-4584
Tel (602) 279-1600
Fax (888) 847-6884

February 20, 2008

Sheriff Joseph Arpaio
MARICOPA COUNTY SHERIFF'S OFFICE
100 W. Washington Street, Suite 1900
Phoenix, AZ 85003

Dennis Wilenchik
WILENCHIK & BARTNESS, PC
2810 N. Third Street
Phoenix, AZ 85004

Andrew Thomas
MARICOPA COUNTY ATTORNEY'S OFFICE
301 W. Jefferson, Suite 800
Phoenix, AZ 85003

Re: ***NOTICE OF CLAIM – The Phoenix New Times***

On the night of October 18, 2007, unmarked, dark vehicles (at least one with Mexico license plates) arrived at the homes of Michael Lacey and Jim Larkin, Executive Editor and Chief Executive Officer, respectively, of Village Voice Media, LLC, owners of The Phoenix New Times. Both men were handcuffed and taken to jail by members of Sheriff Joseph Arpaio's elite "Selective Enforcement Unit"—based on a petty misdemeanor charge—for publishing a column in their newspaper earlier in the day entitled "Breathtaking Abuse of the Constitution." This letter puts the masterminds of those late-night raids on notice of the consequences of their actions.

This Notice of Claim is served on behalf of Phoenix New Times, LLC and its founding officers, Michael Lacey and Jim Larkin ("*The New Times*"), in connection with the malicious and unwarranted investigation, and later arrests, of Mr. Lacey and Mr. Larkin on October 18, 2007, undertaken by Sheriff Joseph Arpaio and the Maricopa County Sheriff's Office ("the Sheriff" or "Arpaio"), County Attorney Andrew Thomas and the Maricopa County Attorney's Office ("Thomas"), and Dennis Wilenchik of Wilenchik & Bartness, P.C., appointed as a special Deputy Maricopa County Attorney ("Wilenchik") (collectively, "Defendants").[1]

[1] The Sheriff and County Attorney Offices are named because they are entities separate from Maricopa County and have argued the same in other litigation. In the event that the Sheriff and/or the County Attorney attempt to argue that they are not the proper jural entities and/or that Maricopa County is a proper party or a non-party at fault, this Notice of Claim is thus amended to name Maricopa County. *See, e.g., Gobel v. Maricopa County*, 867

The facts known, thus far, demonstrate a disturbing picture of muscle-bound police and prosecutorial abuse—the corrupt perversion of the law to attack a newspaper, its reporters, and the privacy rights of thousands of its readers. When fair criticism of these public officials became too piercing for them to tolerate, they flexed their political muscle in the form of a conspiracy. They abused their governmental authority by attacking the press, punishing free speech, demeaning the role and function of an impartial prosecutor and an independent judiciary, perverting the grand jury process, and serving notice to citizens who read news online that neither their identities nor their reading habits are safe from the reach of a vindictive government.[2]

Arpaio, Thomas, and Wilenchik's collusion and conduct in pursuit of the conspiracy against *The New Times*, which culminated in the jailing of its two principal owners, instantly became a national news story infused with strong public outrage. The State Bar of Arizona, the *Arizona Republic*, and Phoenix NBC affiliate *KPNX* would intervene in judicial proceedings aimed at securing public disclosure of the processes leading to the arrests of Lacey and Larkin. What emerges is one of the most nakedly oppressive, conscious-shocking assaults on a free press by police and prosecutors in U.S. history.

Our Rights to Free Speech and a Free Press Are Fundamental

"The First Amendment exists precisely to protect against laws [and government intrusion] . . . which suppress ideas and inhibit free discussion of governmental affairs." *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 700 (Wash. 1998); *see also Republican Party v. White,* 536 U.S. 765, 774 (2002) (political speech is "'at the core of our First Amendment freedoms'" (quoting *Republican Party v. Kelly*, 247 F.3d 854, 861 (8th Civ. 2001)).

It is a Free Press that stands at the center of these core First Amendment guarantees.

F.2d 1202, 1208-09 (9th Cir. 1989) (opining that "in Arizona the county attorney is the kind of county official whose policy decisions automatically constitute county policy," but recognizing arguments that the County Attorney was a separate, jural entity). In the meantime, a courtesy copy of this Notice of Claim is being served upon the Board of Supervisors of Maricopa County, out of an abundance of caution.

[2] The facts presented in this Notice of Claim are taken primarily from information in the public domain, as well as information obtained by and in the custody of *The New Times*. *The New Times* expects to issue a formal, Public Records Request pursuant to A.R.S. § 39–121 *et. seq.*, in the coming weeks. Any further information and records, once received, will likely provide additional detail to the claims made herein and may themselves reveal separate, independent claims against the Sheriff, Mr. Thomas, Mr. Wilenchik, and other County officials and/or employees, as yet unidentified, who may have been involved with these events. Once the remaining records are provided, this Notice of Claim may be amended to reflect the existence of additional defendants and/or additional claims.

> The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. ***Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.***

Mills v. State of Alabama, 384 U.S. 214, 218 (1966) (emphasis added).

The founders recognized that the press serves as the primary conduit to encourage, and sometimes incite, free speech. In particular, the drafters were concerned with protecting from government suppression contrary political expression in Holmes' "marketplace of ideas."

A Free Press is fundamental to our nation and precious to its citizens. Even County Attorney Andrew Thomas has professed agreement. Last October 20, at a news conference firing Dennis Wilenchik as a special Deputy Maricopa County Attorney and announcing an "end" to the harassment of *The New Times* and its readers that forms the basis of this Notice, he told assembled reporters, "The First Amendment is extremely precious to all Americans; it is particularly precious to me." But, Thomas' words were nothing more than the press conference pandering of an elected prosecutor confronting an outraged public and a disbelieving press, when compared to the reprehensible nature of his official and unofficial conduct in this case. Indeed, the three Defendants' conduct here threatens the vigor and vitality of these "precious" freedoms.

The Genesis of *The New Times*' Inquiries that Irritated Arpaio

The history of this dispute began in the early 1990's, when *The New Times* published its first article critical of Sheriff Joseph Arpaio. That was hardly the first time a newspaper had been critical of a politician, certainly not this politician. But, in July 2004, when *The New Times* investigated the personal and highly questionable commercial land transactions of Sheriff Arpaio, the Sheriff's anger could not be contained.

The question that was the catapult for this conspiracy was a simple one. *The New Times* asked how Sheriff Arpaio could possibly afford to invest more than $690,000 cash in commercial real estate, based on an annual salary of $72,000 and a small federal pension.[3] The paper's investigation revealed that Sheriff Arpaio

[3] *See* "Sheriff Joe's Real Estate Game," July 1, 2004 and "Stick it to "Em!," July 8, 2004.

clumsily redacted information from the County Recorder's public records about his commercial landholdings (but not his home address), by using a little-known Arizona statute to remove pertinent information about his deeds, mortgages, affidavits of value, and conveyances of title. Arpaio said the need to hide the truth about his commercial real estate investments arose from his concern about "death threats."[4] But, while our Sheriff used this feign to hide his commercial investments, he left his home address available in the public domain, published on numerous public internet websites.

The New Times' investigation of the Sheriff's commercial holdings culminated in a July 8, 2004 article written by the paper's widely-respected investigative reporter, John Dougherty.[5] The article questioned the Sheriff's motives for hiding his commercial investments from inspection and argued that it made no sense to remove information about his personal commercial holdings from public records, but not his home address. To make this point, the final paragraph of the

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[4] There has never been any credible evidence of death threats against our Sheriff. Indeed, the only "death threats" to Sheriff Arpaio have been made-for-TV productions procured or created by the Sheriff's sizable PR staff. For example, in July 1999, Sheriff's deputies entrapped an 18-year-old boy, James Seville, using undercover agents to suggest that he should plant a bomb in a truck outside a restaurant the Sheriff frequented. Using questionable sources and methods, undercover deputies convinced the boy that he had to build a bomb or else be killed by the "Irish Mafia." Then, they picked him up and drove him around town, even paying for the parts he said he needed. When Seville wanted to go home, the deputies refused and forced him to build the non-functioning bomb. They then drove him to the restaurant and asked him to get out and familiarize himself with the truck. Seville was immediately apprehended, an event captured on video by a pre-alerted media.

It was a setup from the beginning. Arpaio and his Chief Deputy waited in the restaurant for Seville to arrive, having tipped off the media earlier in the morning, and even stationed a news cameraman in the bushes to capture everything on film. Then, they held a press conference, reporting publicly that the Sheriff had been the victim of an attack. Seville spent nearly four years awaiting his trial. After a jury sat and heard the evidence of the setup, they unanimously acquitted him. The details of this sorry spectacle were chronicled in a 2005 article in *Phoenix Magazine*, entitled, "Will the Sheriff Stop at Nothing?" Last summer, the *Arizona Republic* answered *Phoenix Magazine's* rhetorical question—reporting on yet another trumped-up, manufactured, "plot" put forth by Arpaio's PR machinery; this one involving allegedly conspiratorial elements from the Minutemen, Los Zetas and a girl's school in Connecticut.

[5] John Dougherty has twice won the Arizona Press Club's "Virg Hill Newsperson of the Year" award, the highest honor an Arizona journalist can receive. He has also been awarded the Press Club's "Don Bolles Award for Investigative Journalism" and its "John Kolbe Award for Politics and Government Reporting."

article revealed the Sheriff's home address, obtained from public websites.[6] America's Toughest Sheriff was hiding his significant commercial real estate holdings because he could not or would not explain how he could legitimately afford those investments.

No law prohibited the publication of the Sheriff's home address in print or broadcast material. In fact, such information could have been lawfully printed in banner newspaper headlines, showcased on billboards, or saturated in television and radio airtime. However, an obscure and never-applied Arizona statute made it illegal to publish the S heriff's address on the "world wide web," if, and only if, such publication "posed an imminent and serious threat" to the Sheriff or his immediate family, *and* if it was "reasonably apparent" to Dougherty and *The New Times* that "making the information available on the web" created a "serious and imminent" threat to the safety of the Sheriff or his immediate family. While there was nothing even arguably wrong with the article in its print form—and the only "imminent threat of harm" Arpaio really fears is a staged press opportunity gone poorly—*The New Times* allegedly came close to violating the statute when the article was automatically uploaded to its electronic form on the internet.

The New Times' **Criticism Became Too Tough For America's Toughest Sheriff**

While there was no evidence that Sheriff Arpaio was then, or ever, under anything but a theatrical threat of "imminent harm," publication of his home address was all the provocation our Sheriff needed to unleash his retribution. But it was obviously clear to former County Attorney Rick Romley and his professional charging staff that there was no "case" to "investigate" here. There was no "imminent threat of harm" in Dougherty's story. A reporter had simply reported "truthful, lawfully obtained, publicly available personal identifying information [and this is] precisely the kind of speech the First Amendment protects." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). The Sheriff's home address was available on government web sites and "once the government places personal identifying information in the public domain, reliance must rest on the judgment of those who decide what to publish or broadcast." *The Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989). Again, there was no "case" to "investigate" and Rick Romley's office did not placate an angry Sheriff by ignoring, as Thomas later would, the clear language of the statute or the equally clear First Amendment commands of no lesser authority than the U.S. Supreme Court. Reporters *report*—that's what reporters do. And any public information on a government web site is fair game for a free press.

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[6] Writing in Slate.com after the arrests of Lacey and Larkin, Jack Shaffer said, "How difficult is it to find Arpaio's home address? It took me five minutes of web plinking and I didn't need *New Times* to find it."

Six months later, however, a newly elected Andrew Thomas would take office and Sheriff Arpaio would be waiting impatiently with a simmering grievance.

Using the full force of his—and his new ally's—governmental muscle, Arpaio recruited his new and compliant County Attorney to initiate the prosecution, persecution, and intimidation of *The New Times*, its reporters, its editors, and publishers. Of course, Thomas wanted to help Arpaio attack *The New Times* because the newspaper had begun criticizing Thomas' own ethical and office irregularities—though it is highly doubtful Thomas' professional staff found any more lawful merit in an investigation of *The New Times* than Romley's had. Thomas also knew that his office could not ethically pursue this case due to a "conflict of interest." That conflict was *The New Times*' inquisitive and critical articles about Thomas.[7] So, Thomas shipped the case to the Pinal County Attorney's Office for "prosecution."

Of course, the Pinal County Attorney's Office did not share the Defendants' passion for political revenge, any more than Romley had, and refused to be used in the persecution. In over two years, Pinal County did not issue a single investigative subpoena or empanel a grand jury.

But the Pinal County Attorney's quite laudable refusal to stand the information-disclosure statue and the Constitution on their collective ear for Arpaio's private benefit was unacceptable to Arpaio. So when Pinal County Attorney Carter Olson accepted appointment to the bench and his replacement, James Walsh, announced a conflict with MCAO in the spring of 2007, the matter was returned to Thomas. Caught between Thomas' already announced and quite obvious "conflict," and Arpaio's passion to punish this nuisance newspaper, Thomas and Arpaio decided to retain Thomas' friend, former employer, financial benefactor, campaign finance manager, and a civil attorney (with an appalling lack of prosecutorial training, temperament, or experience), Dennis Wilenchik, to prosecute a criminal case against *The New Times*. Wilenchik was hired to be Thomas' and Arpaio's own "Independent" Deputy Maricopa County Attorney.

Prosecutors have inherent legal and ethical duties to be independent; Wilenchik was anything but that, particularly under the strict ethical rules and judicial opinions governing the conduct of prosecutors in Arizona. First, Thomas knew that Wilenchik suffered from the very same "conflict of interest" that he did when he actively sought appointment of Wilenchik as Special Prosecutor in this matter.[8] *The*

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[7] Thomas has stated: "I still did not feel that it was appropriate for our office to directly prosecute the matter, because of the appearance of the conflict of interest."

[8] *See* Minutes of the Maricopa County Board of Supervisors, Special Session, July 11, 2007. After being told by the Board's Chief Counsel that "the County Attorney's Office is unable to advise the Sheriff's Office related to the [*New Times*] matter as the County Attorney has a conflict...," Supervisor Stapley advised his colleagues that, "he had personally spoken to Maricopa County Attorney Andrew Thomas [and been told by Thomas that] "this

New Times had published myriad articles critical of Wilenchik.[9] Thomas and Arpaio knew they were hiring an attack ally—not an "independent" prosecutor untainted by benefactors to please and grudges to settle. Second, the ties among the three—Arpaio, Thomas, and Wilenchik—are a tangled web of financial, personal, and political connivances. For example, and as *The New Time*s published, Wilenchik once hired County Attorney candidate Thomas as an "associate" in his law firm, although Thomas was not actually hired to perform legal work for Wilenchik or his firm's clients. Thomas took his salary from Wilenchik, but spent his days campaigning for County Attorney. The arrangement was merely a disguised campaign contribution.

This dubious professional relationship paid the designed dividends for both: Thomas won his election and Wilenchik won an enormous attorneys' fee annuity from Thomas' new Maricopa County Attorney's Office, one he had not enjoyed during Rick Romley's service. Thomas and Arpaio immediately began funneling civil work to Wilenchik. To date, Wilenchik has been paid more than $2,350,000 in attorneys' fees representing Arpaio and the County. And, Thomas and Arpaio have even used Wilenchik to serve as their own, personal counsel on a number of occasions, though Arpaio and Thomas were never charged for the work Wilenchik did as their personal counsel. Wilenchik was not representing any public body when, prior to becoming special prosecutor, he demanded a retraction from *The New Times*, and threatened legal action on behalf of his personal client Thomas, after Michael Lacey published a parody piece critical of Thomas. And Wilenchik was obviously not defending the people of Maricopa County when, prior to becoming Special Prosecutor, he threatened *The West Valley View* and *Phoenix Magazine* with defamation claims based on stories critical of his personal client Arpaio.[10]

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is an unusual case and situation that warrants the appointments of [Wilenchik and his law firm]."

[9] For example, in "Doubting Thomas," June 15, 2006, John Dougherty questioned the ethical conduct of both Thomas and Wilenchik. He questioned hundreds of thousands of dollars in fees paid to Wilenchik's law firm by Maricopa County, a "firm that employed Andrew Thomas immediately before his election as county attorney." Dougherty opined that it appeared Thomas was using his office to "steer public contracts to his previous employer" and questioned what work, if any, Thomas had performed for Wilenchik's firm while running for County Attorney. In "Bully Pulpit," June 29, 2006, Dougherty pointed out how Thomas had "not only steered a lot of business to his old firm, he has hired his old boss (Wilenchik) to harass Sheriff Joe Arpaio's chief political rival." He also stated a strong suspicion that Wilenchik had paid Thomas "a fat salary in exchange for little work during the months leading up to his election which, if true, would constitute an unlawful campaign contribution."

[10] *See* "Sheriff demands View retract headline," *West Valley View*, October 31, 2006; "First Things First," *Phoenix Magazine*, December 2007.

So, by the time Thomas secured Wilenchik's appointment as his "Independent" Deputy Maricopa County Attorney, his friend and financial benefactor was already cashing in on their relationship.[11] Wilenchik took on his new role as a criminal prosecutor with all the zeal and ruthlessness that Arpaio and Thomas required and reasonably expected. Armed with daunting prosecutorial power, and with the approval of Arpaio and Thomas, Wilenchik engaged in a series of inappropriate, unethical, and unlawful acts that violated *The New Times*' constitutional and Arizona law rights.

Wilenchik's malignant mindset against his two primary investigative targets, *The New Times* and John Dougherty, was made chillingly clear in an email he authored *less than a week* before being named a special Deputy Maricopa County Attorney. In the email, Wilenchik angrily railed against *The New Times* and Dougherty for having questioned, in print, his lucrative relationship with his former employee, Thomas:

> [W]henever they have no point they revert to this tired shit again. Like Napolitano never hired Lewis and Roca? Or her (sic) and Goddard never used me after I represented the former ag (sic)? Or Romley fired me from the cty (sic) list for doing so? They (*New Times*) are so full of it. I refused to speak with him (Dougherty).

Later, in the same email, Wilenchik summarized his feelings. "Birdcrap is what (Dougherty's) article should be called. But really noone (sic) reads his crap and he has no credibility." Less than a week after authoring this angry email, Dennis Wilenchik would undertake his duties as an "Independent" Deputy Maricopa County Attorney tasked to investigate *The New Times* and John Dougherty.

The ethically corrupt and dangerous actions for which Thomas was later forced to fire Wilenchik were not, as Thomas sheepishly urged, a bolt from the blue. They were the perfectly foreseeable consequence of Arpaio's anger with *The New Times* and Thomas and Wilenchik's glaring conflicts of interest. What Thomas could not foresee when he secured the appointment of Wilenchik was that *The New Times* would courageously resist Wilenchik's tactics, the press and public would become enraged with this blatant assault on a free press, and Thomas would be forced to fire

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[11] When asked on October 20, 2007 how he could select his former boss, Wilenchik, as a Special Prosecutor in a case against *The New Times*, Thomas stated, "I think given the circumstances it was appropriate for him to so serve and that he had the confidence of the Sheriff who was the victim in this case." This, despite *The New Times* having been critical of both Thomas and Wilenchik, creating a "conflict" for both Wilenchik and Thomas, and Wilenchik's prior role as the alleged victim, Arpaio's, personal attorney. As Thomas put it, "*The New Times* has not been, let's say, a fan of mine." Nor, again, had the newspaper been a "fan" of Wilenchik's or Arpaio's either.

Wilenchik and abandon an investigation that should never have been undertaken in the first place.

Defendants Conspired to Abuse the Power of a Grand Jury to Punish Political Free Speech

Without ever appearing before any grand jury, Allegedly-Independent-Prosecutor Wilenchik hit the ground running. He began issuing outrageous and invasive subpoenas against *The New Times*, its reporters, its editors, and its readers. On August 24, 2007, Wilenchik authored and approved two grand jury subpoenas, which demanded that *The New Times* reveal confidential sources and produce extensive records on nearly four years' worth of notebooks, memoranda, and documents, for any story that was critical of Sheriff Arpaio. They also sought detailed information on ***thousands of private citizens*** who had visited *The New Times*' website since 2004, including internet cookies and browsing information on every individual who looked at any story, review, listing, or advertisement. Professor James Weinstein of the Sandra Day O'Connor College of Law at Arizona State University characterized the subpoenas as "grossly, shockingly, breathtakingly overbroad." He said this was quite clearly a "case of harassment of the press."

Wilenchik's subpoenas were obviously unreasonable and facially unconstitutional affronts to freedom of speech and freedom of the press. In her final Order of November 28, 2007, Judge Anna Baca found a compelling case of grand jury abuse at the hands of Wilenchik. No grand jury had approved the Wilenchik subpoenas—Wilenchik acted as a one-man grand jury. County prosecutors, the Judge ruled, have no common law powers to subpoena witnesses or documents in Arizona (citing *Gershon v. Broomfield*, 131 Ariz. 507, 642 P.2d 852 (1982)). A prosecutor seeking grand jury evidence by subpoena must either secure the prior permission of the grand jury or must notify the grand jury foreperson and the presiding criminal judge within 10 days of issuing a subpoena unilaterally. Wilenchik did neither. The grand jury was nothing more than an empty prop, a potted plant without role or function, to Dennis Wilenchik.

The last illegal subpoena Wilenchik served in this matter is perhaps the most instructive of all. On September 20, 2007 *The New Times* published "Below the Belt," by Paul Rubin.[12] The article criticized Wilenchik's extra-judicial conduct in defending Sheriff Arpaio and others in a defamation suit brought by Buckeye Police Chief Dan Saban. Rubin's story relied solely on interviews and public records. It made no reference—none—to any grand jury investigation, nor did it contain the Sheriff's home address. Yet, less than 24 hours after Rubin's story appeared in *The New Times* he was served with a grand jury subpoena by Wilenchik seeking "all

[12] Paul Rubin has been named Arizona's Top Journalist three times by the Arizona Press Club, most recently in 2005. In addition, he is a five-time winner of the Press Club's "Don Bolles Award for Investigative Journalism."

documents, records, and files" associated with the writing and editing of the Saban story, as well as "conversations and meetings relating to its publication." Again, Rubin's only "misstep" was in criticizing Arpaio and Wilenchik. His story was not even remotely relevant to the matter Wilenchik had been hired to pursue (a 2004 story Rubin did not author). Lacey and Larkin, in the column disclosing the profound corruption of the investigation that led to their arrest, succinctly summarized what was all too clear: "It is impossible to view Rubin's subpoena as anything other than what it was: an act of vengeance by Wilenchik."

And it did not stop there. Wilenchik also made a crude, *ex parte* attempt on October 10, 2007 to influence or compromise Judge Anna Baca, who was presiding over the county grand jury. He did so by recruiting a political intermediary, Carol Turoff, a former lay member of the committee charged with appointing Appellate Judges ***and the wife of a member of Thomas' senior management team***, Larry Turoff. Ms. Turoff was tasked by Wilenchik to call Judge Baca at home to attempt to arrange an *ex parte* meeting with Wilenchik! In an emergency closed hearing called October 11, 2007, an obviously agitated Judge Baca called Wilenchik's attempt at initiating an *ex parte* communication "absolutely inappropriate." Specifically, Judge Baca's recital of the damning ethical facts were that she had been (a) called at home, (b) late at night, (c) by a third party Wilenchik had engaged to make the call, (d) at the instigation of a "prosecutor" (Wilenchik) the judge did not even know, (e) for the purpose of soliciting *ex parte* communications between the judge and Wilenchik, and (f) whilst Wilenchik had motions in *The New Times* matter and the Judge Ryan judicial disqualification matter pending before Judge Baca. There is not a professional prosecutor in Arizona who could not instantly state what was wrong with this behavior.

Greatly concerned about the abusive and intrusive subpoenas, the clandestine attempt to compromise the presiding Judge, and the patently inappropriate abuse of governmental power, *The New Times* made a conscious decision to assert its First Amendment rights and responsibilities to its readers. In their October 18, 2007 column, Mr. Lacey and Mr. Larkin wrote:

> This is hardly the first time – even if the scope here is breathtaking – that law enforcement attempted to use a grand jury to get at the confidential records of reporters and editors. But the contemptuousness of this troika of ambitious politicos is reflected in their attempt to target the readers of *The New Times*.

Their response was a selfless exercise of free press and the freedom to express political speech in opposition to facially improper government oppression:

> In our deliberations we faced the obvious: A grand jury investigation is a fearsome thing; a tainted grand jury is a tipping point.

We intend now to break the silence and resist.[13]

Publishing the terms of a grand jury subpoena is a minor misdemeanor. The statute was designed primarily to "[protect] witnesses, targets of investigation and others from negative publicity."[14] It was not designed to insulate, from public disclosure by a newspaper, the unethical and unlawful behavior of a prosecutor who is misusing the grand jury to attack the newspaper, its reporters, and its readers' right to privacy. Nevertheless, realizing the risks, *The New Times* published the demands of the subpoenas, and questioned the motives and actions of Arpaio, Thomas, and Wilenchik. Once again, that was all Arpaio, Thomas, and Wilenchik needed to unleash abusive power in retaliation against *The New Times*' exercise of free speech.

The Conspiracy Culminated: Late-Night Raids and Arrests by Arpaio's "Selective Enforcement Unit"

That same afternoon—October 18, 2007, the date the article was published—Wilenchik filed a request for an Order to Show Cause, demanding that Judge Baca hold *The New Times* in contempt, issue arrest warrants for Mr. Lacey, Mr. Larkin, and three of their lawyers, and fine *The New Times* what could amount to a bankrupting $90 million. But, the ire of these public officials, whose feelings were too wounded by this "misbehaving" newspaper, could not await the Court's response to their motion. That night, they dispatched their "Selective Enforcement Unit" in unmarked, black vehicles to arrest these writers, reporters, and publishers, and take them to jail.

The purported purpose for such swift and severe retaliation: *The New Times* committed a minor misdemeanor and hurt these politicians' feelings by daring to publish the intrusive, abusive, and facially unconstitutional grand jury subpoena—by daring to tell the public about Wilenchik's efforts to "get to" Judge Baca, and the government's demand that it be allowed to take possession of records showing the identities and reading habits and preferences of thousands of law-abiding citizens. Misdemeanor violations that do not threaten lives are usually handled by the issuance of citations, not by commando raids, arrests, handcuffs, and jail cells in the dead of night. Responsible prosecutors know these circumstances would never—never—justify such conduct.[15]

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[13] *The Phoenix New Times*, Breathtaking Abuse of the Constitution, *supra*, (emphasis added).

[14] *See Samaritan Health System v. Sup. Ct.*, 182 Ariz. 219 (Ct. App. 1994).

[15] Thomas referred to the jailing of Mr. Larkin and Mr. Lacey as "very disturbing"—noting that there had been "serious missteps taken" in the matter. He expressed no contrition for having actively facilitated the appointment of an ethically and legally conflicted Dennis Wilenchik to act as Arpaio's personal prosecutor. Nor did he admit the slightest understanding of a sentiment expressed nearly a century ago that encapsulates the corrupt

The public outcry after the arrests quickly forced Thomas to "fire" Wilenchik from further County criminal cases (but not civil cases, where he continues to collect tax dollars representing the County and Sheriff through the good offices of his former employee, Thomas). Thomas eagerly, if unconvincingly, disavowed knowledge or authorization of Wilenchik's actions in his October 20 news conference:

> There is a right way and a wrong way to bring prosecution, and to hold people accountable for their offenses. And what happened here was the wrong way. I do not condone it, I do not defend it. And so it ends today.

Of course Arpaio, too, disavowed advance knowledge of the subpoenas and denied that he ordered the arrests. Wilenchik also denied ordering the arrests. However, Wilenchik's former partner, William French, later confirmed the obvious: that Wilenchik did indeed authorize the arrests by the Selective Enforcement Unit—the same arrests Wilenchik specifically sought in his Order to Show Cause motion filed hours before the arrests occurred. The only honorable behavior of the day occurred when, upon hearing of the arrests, Mr. French immediately resigned from Wilenchik's law firm.

So, who is responsible for this blatantly retaliatory assault on free speech? All of the Defendants. Arpaio is the Sheriff who persistently pushed for this political prosecution of a newspaper that criticized him too often and was asking too many questions about his cash real estate transactions. His office made the late-night arrests and jailings. Wilenchik was the "Independent" Deputy Maricopa County Attorney who so eagerly did the bidding of Thomas and the Sheriff—under an information-disclosure statute obviously inapplicable to the facts of this case—filing odious papers in court and issuing outrageous subpoenas on a newspaper that had been too often and too poignantly critical of him, as well. And, Thomas is the County Attorney—the elected public official—who actively sought the appointment of Wilenchik to prosecute this annoying newspaper; in a highly questionable case, under a facially inapplicable statute, with no reasonable likelihood of conviction—a case he knew presented the same "conflict of interest" for both he and Wilenchik.

All of these Defendants share responsibility for the violations of Arizona and federal law in this case, and for the assault on the constitutional rights of *The New Times*, its reporters, and its readers. Accordingly, they all must face a jury and the citizens of this County to account for their vindictive, oppressive, and unlawful actions.

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moorings of his conduct in this case, to the letter. "A county attorney has no right to turn a defendant over to his enemies, after first having armed them with the entire power of the state to be used as they see fit in his prosecution." *Hartgraves v. State*, 114 P. 343, 346 (Okla. 1911).

Defendants' Pattern and Practice of Misusing Their Power to Punish & Suppress Political Opposition

Of course, this is not the first time these Defendants have abused their authority by retaliating against their political opponents. In fact, they have a custom, pattern, and practice of doing so.

For example, the Sheriff once authorized deputies to conduct surveillance on two men, Tom Bearup and Ernest Hancock, who expressed interest in running against him, including tapping their phones, tailing them, and searching their trash. The Sheriff's Office labeled them a threat to the Sheriff—even tapping the phones of a campaign aide to Bearup, Jim Cozzolino. Eventually, Mr. Cozzolino was arrested and served time in jail under highly-suspect circumstances. When he was released, he sued the Sheriff's office for violating his constitutional rights, a lawsuit the Sheriff's office quickly settled.

Dan Saban, Arpaio's most recent political opponent, was publicly humiliated when the Sheriff's Chief Deputy, David Hendershott, leaked a false story to the press that Saban had raped his adoptive mother. Arpaio hired Wilenchik to represent him, successfully, in a defamation lawsuit. Wilenchik not only defended the suit, but also engaged in a letter-writing campaign to get Saban fired from his job as Police Chief in Buckeye. Jurors concluded that it was clear the Sheriff's Office went too far when it leaked the story to the press, but that it was not enough to prove defamation damages. But, one juror said: "Morally? That's a whole different kettle of fish. If we were to vote on those things, [the verdict] may have turned out differently."

In the late 1990's, a Sheriff's deputy, Kelly Waldrip, spoke with the media regarding an investigation into the Sheriff's misuse of County funds. Arpaio was livid. Waldrip soon retired, but Arpaio did not let the matter go. Arpaio wrote to Waldrip's supervisors in the Naval Reserve, alleging that he misused his Navy Service credentials. The Navy concluded that Waldrip did nothing wrong, but Arpaio continued to pursue him, even contacting his next employer to request the IP address on his computer to track Waldrip's online activity. Once again, the Sheriff claimed Waldrip was a threat.

Lee Watkins was also labeled a threat to the Sheriff for his political opposition. An avid operative in Republican circles, Watkins owned a towing company. For a while, Watkins even supported Arpaio. Then, in the 2004 election, Watkins decided to support Arpaio's opponent, W. Steven Martin. In April 2005, a manager at Watkins' towing company was awakened by Sheriff's deputies at 4:30 a.m. His wife was taken to a squad car and his children kept in a room alone. Boxes of documents were seized, including the children's homework and pictures of their little league teams. Deputies also raided Watkins' rental property and, eventually, the towing company offices. The raids were widely broadcast on TV and covered by the papers. Watkins was publicly accused of unethical business practices, although he

denies any wrongdoing. His reputation was destroyed and his business decimated. Yet, after three years, there have been no indictments and no charges have been filed.

In addition, Arpaio and Thomas have a history of collaborating against their political opponents, including state legislators and the judiciary. Last year, they collectively formed an anti-corruption task force, Operation MACE. Their purpose, ironically, was to root out abuses of the public trust. Their first target was the Maricopa County Community College System. They seized hundreds of boxes of records and alleged that money appeared to be missing. But nothing further happened with the investigation. In fact, the first indictments from Operation MACE had nothing to do with the community colleges. Instead, they brought petty charges against a former state senator from Yuma, Russ Jones, based on activity during a 2006 election. The same allegations had been made against Jones during the election, and were dismissed by the Arizona Supreme Court. Jones eventually lost the election. And yet, Arpaio and Thomas brought the same charges, again, alleging that Jones presented false objects for filing and willfully concealed his activities. Not surprisingly, a trial court quickly dismissed the charges.

Defendants also investigated Arizona's democratic Attorney General, Terry Goddard, one of Thomas' most prominent political opponents. They issued a host of press releases regarding the investigation, which included a public announcement of the beginning of the investigation, a distribution of "evidence" to the media, and allegations that the Attorney General's office was stonewalling. Thus far, there have been no indictments or charges.

Christy Fritz, too, was a target of Defendants' political retaliation. Two weeks before the November 2006 election, Sheriff's deputies arrived at her home and confiscated her computers, utility bills, emails, and financial records. But Fritz was neither a drug dealer nor a criminal; she was a graphic designer. Her problem: She worked for a Democrat, Jackie Thrasher. Ms. Thrasher was running against Jim Weiers, the father of a Maricopa County Sheriff's Deputy and an Arpaio ally. Ms. Thrasher had been endorsed by the Arizona Conference of Police and Sheriffs, but not Sheriff Arpaio. When one of her campaign mailers showed a corrections officer talking with her in front of a Maricopa County Sheriff's Office car, Mr. Weiers complained. Arpaio launched an investigation that included hours of interviews and resulted in three raids on the homes of the corrections officer in the picture, the corrections officer's mother, and Christy Fritz. Despite the issuance of three search warrants and the seizure of four computers, no charges were ever filed.

Indeed, for these Defendants, no political opponent is beyond the reach of their power. Their targets have ranged from the ACLU to members of the judiciary. In October 2007, they used Wilenchik to attack a Superior Court Judge, the Honorable Timothy Ryan. Judge Ryan and other members of the bench had been attempting to instill standards that would require law enforcement to prove that aliens are, in fact, illegal, before they are denied bail under new laws. That runs contrary to Arpaio's and Thomas' popular political stance on immigration issues. As a result,

Thomas and Wilenchik unleashed an outrageous political attack on Judge Ryan and the bench in open court—but not before alerting the press of the attack to come.

And the Arizona Court of Appeals has three times in recent opinions ordered legal fees awarded to three newspapers—*The New Times*, the *West Valley View*, and the *Tucson Citizen*—when these representatives of a free press had to bring law suits in order to secure simple compliance of Arpaio's Sheriff's Office with the basic commands of Arizona's public records law. The "public's right to know" embodied in our state's public records law has meant nothing to America's Toughest Sheriff and County taxpayers, as always, will now pay the bill for the unlawful behavior of Joseph Arpaio and his paid agents.

These and many other incidents show that Defendants' actions against *The New Times* in this case were more than the aberrational consequence of simple neglect. They were the product of a long-standing pattern and practice of the abuse of power against dissenting voices—of intentional, punitive, and retaliatory conduct against *The New Times*, its reporters and its readers.

Claims Against Sheriff Arpaio, Andrew Thomas, and Dennis Wilenchik

The New Times has causes of action for violations of its constitutional rights under Arizona law and 42 U.S.C. § 1983, against all of the above-named individuals and entities and others yet unidentified. It also has claims against them and others for federal and state racketeering violations, campaign finance violations, and other torts and statutory violations under federal and Arizona law, as described generally herein.

Under federal law, *The New Times* has claims for the violations of their constitutional rights under the First, Fourth, and Fourteenth Amendments, including (without limitation), violations of the right to freedom of expression, malicious prosecution and retaliation by law enforcement, false imprisonment/false arrest, and abuse of process.

Under Arizona law, *The New Times* has claims against Defendants for malicious prosecution, abuse of process, and intentional interference with business expectancy and/or business relations.

In addition, *The New Times* also has claims against Defendants under the federal Racketeer Influenced & Corrupt Organizations Act ("RICO") and Arizona's RICO statute (A.R.S. § 13-2301, *et seq.*), based on a series of predicate acts that formed a pattern of related unlawful activity, which was intended to target, defraud, deceive, and/or harm *The New Times*.

Finally, *The New Times* has claims against Defendants for engaging in a conspiracy to act in concert to commit the above unlawful actions, under federal and Arizona law.

Wilenchik and Thomas Are Not Entitled to Prosecutorial Immunity

For several reasons, Thomas and Wilenchik will not be permitted to hide behind the doctrine of prosecutorial immunity to escape liability.

First, Thomas has insisted, repeatedly, that he was not the prosecutor in this case and that his office was not actually prosecuting the case. Since he was not the prosecutor in the case, he will not be able to claim prosecutorial immunity. And, neither will Wilenchik. In his news conference firing Wilenchik, Thomas admitted that Wilenchik was not acting within the scope of his duties or "authorization" from Thomas. Thus, if Wilenchik was not acting in an authorized, prosecutorial capacity, Wilenchik will not be protected from civil liability by the doctrine of prosecutorial immunity.

Second, both Thomas and Wilenchik lacked the "independent judgment" required to invoke such immunity. The policy rationale underpinning the prosecutorial immunity doctrine protects officials' independence, in order to free them to make independent decisions on behalf of the public. Here, Wilenchik's and Thomas' actions were not undertaken in the public interest or independent; rather, they were inextricably intertwined with and motivated by their own personal, financial, and political interests. *See, e.g., Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004) (noting that presumption of independence can be rebutted by proof of the opposite). Both suffered from a profound and undeniable conflict of interest in prosecuting the case. Wilenchik, in fact, was just as conflicted as Thomas, given *The New Times*' public criticism of him and his ongoing role as a civil lawyer for the alleged "victim" in the case, Sheriff Arpaio. Thomas knew that and Wilenchik knew that. Thus, the appointment of Wilenchik was corrupt from its inception and the public policy behind the doctrine of prosecutorial immunity is inapplicable. There was never any independent judgment here to protect.

In addition (and among others), immunity would also not apply because the actions at issue in this case were not quasi-judicial in nature, but were solely undertaken in an administrative or investigative capacity and/or outside of a grand jury proceeding prior to any determination of probable cause. *See, e.g., State v. Superior Court,* 186 Ariz. 294, 297, 921 P.2d 697, 700 (Ct. App. 1996) (discussing distinction between quasi-judicial and investigative functions); *see also Burns v. Reed*, 500 U.S. 478, 498-505 (1991) (Scalia, J. concurring in part, dissenting in part) (concluding that immunity would not apply to a prosecutor for his decision to initiate search warrant proceeding). On October 24, 2007, after Thomas had fired Wilenchik, and in response to questions in open court by Judge Baca, Sally Wells stated on behalf of the County Attorney's Office that she had talked to Wilenchik, that the matter was "still in the investigative stage" when he was fired, that "there's been no [grand jury] testimony taken," and that "the status of the investigation is that it is no longer going forward." Asked by Judge Baca why nothing in the grand jury file reflected this status, Wells replied that "because it is still in the early stages of investigation, there's nothing to end or dismiss."

The doctrine of prosecutorial immunity will not shield Wilenchik or Thomas from liability in this case. Their conduct was not quasi-judicial; it was administrative, investigative, and corrupt from its inception.

Damages Sought by *The New Times*

The New Times is entitled to monetary damages for the violations of their rights, as set forth above, and all damages that have naturally and proximately resulted therefrom. Given the egregious nature of the evidence and the oppressive actions by these County entities and officers, *The New Times* will also be entitled to recover punitive damages. In addition, *The New Times* will also be entitled to recover their attorneys' fees under the RICO and § 1983 claims. Finally, *The New Times* will be entitled to treble damages under the RICO claims.

A.R.S. § 12–821.01 requires that *The New Times* include in this Notice of Claim a specific dollar amount for which their claims can be settled. *The New Times* has not yet fully assessed the damages here. But, Wilenchik, Thomas, and Arpaio did set the benchmark damages figure for the jury to consider in this case. On the day of the late-night raids and arrests, they told Judge Baca in a motion that *The New Times* should be bankrupted with fines somewhere between $10,000,000 and $90,000,000. ***That was their number***. And, we concur with these conspirators that this is an appropriate range of damages for a jury to consider, given the egregiousness of the public offense, the arrogance of the conduct toward the newspaper, its reporters and its readers, and the threat to our community. We believe a jury would award an amount within the range introduced here by these Defendants, in order to protect the fundamental freedoms at issue and deter such conduct by elected and unelected officials in the future. Until April 19, 2008, this claim can be settled for $15,000,000. If *The New Times* is required to pursue litigation, that settlement demand will increase.

Conclusion

An attack upon First Amendment freedoms by men with guns, badges and grand jury subpoenas is one of the most oppressive constitutional violations imaginable—made even more egregious when the oppressors have sworn to uphold the law and protect the public. The deprivation of such rights by arrogant government officials, in an effort to crush political expression, endangers the core foundations of our civil liberties and threatens the public trust necessary for a representative democracy to exist. After hearing the evidence, a jury will be enraged; it will want to send a message heard round the Country that citizens will not tolerate government despotism and the aggressive attempt at press censorship that occurred here.

Arpaio, Thomas, and Wilenchik may continue to ignore criticisms of their actions and practices. They may continue to act dishonorably and misuse the power they have been given by the people. But, eventually, the public will trumpet its

disdain in the form of a jury verdict. This is the case for them to do so—it is a case that began with an abuse of government power and ended with that abuse laid bare for all to see. It is a case that invites a jury to state in no uncertain terms who it is, what it cares about, and what it is willing to do to protect treasured rights from encroachment by those in high office. Our rights to free expression are too precious to be trampled upon, too fundamental to be ignored without restitution. The verdict in this case will reaffirm a profound national commitment to a precious cornerstone of our constitutional freedoms—that powerful government officials may not use their public positions to persecute, intimidate, or inhibit those in the press who dare to question or criticize their conduct, or those who wish to read a free press without an Orwellian government keeping score of their tastes and preferences. A reporter who is about to publish an article exposing the misconduct of an elected official should know no sense of "dare." And neither should a citizen who logs onto a newspaper's web site.

Our Board of Supervisors should settle this matter immediately—not only to avoid the risk of a substantial jury award, but to announce publicly that this arrogant and dangerous misconduct was and is intolerable and will not be condoned by our elected County leadership.

Sincerely,

STINSON MORRISON HECKER LLP

Michael C. Manning

MCM:JTW

cc: David Smith, Maricopa County Manager
Fran McCarroll, Clerk of Board of Supervisors
Jack McIntyre, Esq.
Barnett Lotstein, Esq.