Hon. Kathryn J. Nelson, Dept. 13
August 7, 2013
10:30 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

SAMUEL RAMIREZ-RANGEL, LETICIA GONZALES-SANTIAGO, and JOSE SOLIS-LEON,

Plaintiffs,

-vs-

KITSAP COUNTY, JUSTIN T. CHILDS, in his official capacity as a Kitsap County Sheriff's Deputy, and SCOTT C. JENSEN, in his official capacity as a Kitsap County Sheriff's Deputy,

Defendants.

NO. 12-2-09594-4

DEFENDANTS' RESPONSE TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

COME NOW the County Defendants, by and through their undersigned attorneys, and present this response to Plaintiffs' Motion for Summary Judgment. Furthermore, County Defendants move to strike pursuant to CR 56(e) those sections of the plaintiffs' supporting declarations not allowed by CR 56(e). In responding, County Defendants[1] incorporate by reference the factual record presented in support of their own motion for summary judgment.[2]

[1] For simplicity, the County Defendants are henceforth referred to as "Kitsap County" or "the County".

[2] Declaration of Deputy Justin Childs, Declaration of Scott Jensen, Declaration of Dennis Bonneville, Declaration of Cathy Barker, Declaration of Paula Galivan, Declaration of Stephanie Browning.

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I. INTRODUCTION

In the midst of responding to Kitsap County's Motion for Entry of Final Judgment, the plaintiffs have brought their own motion for summary judgment[3], affirming that their "constitutional claims"[4] are nothing more than an attempted declaratory judgment action. Thus far, the Court has dismissed the Complaint's cause of action dubbed "respondeat superior"[5] and has dismissed the false arrest tort cause of action based on the absolute defense of probable cause.[6] For their summary judgment motion, plaintiffs have added no new facts to the record and have cited to declarations already in the record for the County's summary judgment motion.[7]

At the plaintiffs' insistence, the Court delayed hearing Kitsap County's motion for entry of final judgment, giving the benefit of the doubt to plaintiffs' plea that the County had presented a new summary judgment motion. In fact, the County briefed the subject of declaratory judgment in its original motion for summary judgment, though the Court understandably did not focus on declaratory judgment in initially ruling on summary judgment or in reconsidering its ruling on the false arrest tort claim. As the Court will see, the plaintiffs have prolonged this action to engage in another round of finger wagging at Kitsap County, and they have invited the Court to join in.

Under any reading of plaintiff's Complaint, and in response to their current request for a remedy, the most the Court could do is to issue an advisory opinion. However, the Court need not

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[3] "Plaintiffs' Opposition to Defendants' CR 56 Motion for Entry of Final Judgment and Plaintiffs' Cross-Motion for Summary Judgment" (Docket No. 92, filed 6/14/13) ("Plaintiffs' MSJ").

[4] See Declaration of Karin D. Jones in Support of Plaintiffs' Opposition to Defendants' Motion for Entry of Final Judgment (Docket No. 89, filed 5/29/13) ("Jones Declaration"), Exhibit C (Verbatim Transcript Excerpt of April 19, 2013), p. 24.

[5] See Order Granting Motion for Dismissal Pursuant to CR 12(c)(Docket No. 17, filed 8/03/12).

[6] See Order Granting Motion for Reconsideration and Granting Motion for Summary Judgment Dismissal of False Arrest Claim (Docket No. 82, filed 4/19/13).

[7] In its initial summary judgment ruling the Court granted Kitsap County's CR 56(e) motions to strike set forth in the County's Corrected Reply Brief for Defendants' Motion for Summary Judgment Dismissal Pursuant to CR 56 (Docket No. 68, 3/26/13) ("Reply Brief for Defendants' MSJ") (Citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979) (Affidavits and portions thereof not in compliance with CR 56(e) are subject to motion to strike)).

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even reach the merits of a request for declaratory judgment because the Complaint fails to set forth a viable cause of action under Chapter 7.24 RCW. And if the Court reaches the merits, it can decline the plaintiffs' invitation to issue an advisory opinion.

II. LEGAL AUTHORITIES

This brief will re-visit the plaintiffs' Complaint with a fresh look at what the plaintiffs seek from this Court, review the summary judgment procedures and standards of CR 56, and then turn to the issues of applying declaratory judgment to the alleged violations in this case.

A. The Complaint: Same as it ever was; an Amorphous Request for Advisory Opinion on One Agency's Authority.

The Complaint, first filed in January 2012 and never amended, lists three causes of action: "Violations of Washington State Constitution, Article I, Section 7", "False Arrest", and "Respondeat Superior".[8] Plaintiffs have long ago acknowledged there is no cause of action called "respondeat superior"[9] and they can point to no authority recognizing a cause of action called "Violations of the Washington Constitution". In the Complaint, the word "declaratory" appears only in the caption and the word "declaration" first appears in the prayer for relief. That prayer asks for:

> B. A declaration that Defendants are not authorized to enforce federal immigration law; and
>
> C. A declaration that Defendants do not have the authority to prolong a detention to interrogate the individuals detained about their immigration status.[10]

Until now, the County has treated these amorphous prayers for relief as though they were requests for declaratory judgments. However, now that the plaintiffs seek judgment on their prayers for relief in this Complaint, their pleading should go under the microscope. To start with, the phrase

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[8] Complaint, ¶¶ 33-47.

[9] Plaintiffs' Response in Opposition to Defendants' Motion for Partial Dismissal Pursuant to CR 12(c), p. 5.

[10] Complaint, Relief Requested, p. 9.

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"declaratory relief" is a contradiction in terms here: If the Court declared judgment, it would bring no relief whatsoever to *these* plaintiffs. Any declaration would simply be a declaration of authorities – the authorities of one police agency and of two individual deputies.[11]

The Civil Rules apply to a declaratory judgment action.[12] The Complaint does not set forth declaratory judgment as a cause of action, and fails to invoke any statute or court rule authorizing declaratory judgment. Even under Washington's relaxed notice pleading, CR 10(b) requires each claim to be asserted in numbered paragraphs and stated in separate counts, which the Complaint fails to do. Neither does the Complaint include an action for injunctive relief to be coupled with the sought-after "declaration". Nor does the complaint include an allegation that the alleged violations of rights are likely to occur in the future – either generally or at the hands of KCSO.

In their motion, the plaintiffs have re-fashioned their "prayers" into two specific requests. The first request asks the Court to answer mixed questions of law and fact in applying the state constitution to this case's specific facts:

> Plaintiffs respectfully request that this Court issue a declaratory judgment finding that Defendants violated Article I, Section 7 of the Washington State Constitution when they prolonged their detention to question Plaintiffs about their immigration status and when they detained Plaintiffs without authority until Border Patrol arrived at the scene.[13]

The second request seeks a declaration of authority under federal law:

> Plaintiffs also request that this Court issue a declaratory judgment finding that Defendants are not authorized to enforce federal immigration law and thereby are not authorized to question or detain individuals for suspected federal immigration violations without

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[11] The plaintiffs should exercise the courtesy to dismiss the individually named deputies from the remaining action, as the deputies would presumably be aware of a court's declaration of their employer's authority.

[12] CR 57.

[13] Plaintiffs' MSJ, at 14.

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> appropriate authorization or written directives from the federal government.[14]

Thus, the plaintiffs have now revealed what they want:

1. A declaratory judgment that specific law enforcement officers acted contrary to the state constitution on a specific occasion; and
2. A declaratory judgment of the circumstances under which a specific local law enforcement agency can "enforce" a given field of federal statutory authority.

If the Court overlooks the plaintiffs' faulty pleading, these are the requests that Plaintiffs would put to the test of summary judgment and the declaratory judgment statute and case authority.

B. Plaintiffs Cannot Meet Their CR 56 Burden to Demonstrate – Considering Admissible Evidence – That No Genuine Issue of Fact Exists and that the Plaintiffs are Entitled to Judgment as a Matter of Law.

Summary judgment under CR 56(c) is appropriate where, viewing all admissible facts and reasonable inferences most favorably to the nonmoving party, the court finds no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[15] A *genuine* issue of material fact exists where "reasonable minds could differ on the facts controlling the outcome of the litigation."[16] "A material fact is one upon which the outcome of the litigation depends in whole or in part."[17] The moving party's burden is to show that no material fact remains.[18]

When the Court originally denied defendants' summary judgment, the Court stated that "there are issues of material fact with respect to the timing of the identification questions, principally"[19],

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[14] Id.

[15] *Briggs v. Nova Servs.*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009); *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007) (citing *Hubbard v. Spokane County*, 146 Wn.2d 699,707, 50 P.3d 602 (2002)).

[16] *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

[17] *Marshall v. Thurston County*, 165 Wn.App. 346, 267 P.3d 491 (Div. 2 2011) (citing *Atherton Condo. Apartment–Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)).

[18] *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

[19] Jones Declaration, Exhibit B (Verbatim Transcript Excerpt of March 29, 2013), p. 37.

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which is at the core of plaintiffs' contention that the deputies extended the contact and detention without authority. However, the Court reconsidered and dismissed the false arrest tort claim because this question of fact was *not material* in considering whether probable cause existed to arrest. Now, the plaintiffs rely on their version of the police contact to say that there are no material facts after all.

CR 56(c) requires the movant to demonstrate that the "pleadings . . . together with the affidavits, if any" show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". CR 56(e) allows only affidavits or declarations based on personal knowledge which "shall set forth such facts as would be admissible in evidence". CR 56(e) is not new territory: This Court granted the County's motion to strike parts of Plaintiffs' evidence for the County's summary judgment motion, and, to the degree to which the plaintiffs rely on this rejected evidence, the Court should reject it again.[20] Plaintiffs, to their credit, sidestep some of the CR 56(e) hazard by citing extensively to the deputies' declarations, but their factual recitation is of no moment because the Court has already determined that the factual issues of the detention (i.e. the specific sequence of events) are not resolved. With respect to Plaintiffs' current motion, those disputed factual issues are material.

The County incorporates its factual basis for summary judgment by reference and will spare the Court another recitation. However, the County must present the timeline established by the County's unrebutted evidence through DFW and DOH officials, which proved beyond all doubt that Plaintiffs were committing criminal shellfishing violations on February 2, 2010:

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[20] Plaintiffs' MSJ at 6-7, citing Declaration of Skylee Robinson, Declaration of Samuel Ramirez Rangel, Declaration of Jose Solis-Leon. The Court previously granted Kitsap County's motion to strike: Robinson Declaration's Exhibit A (KCSO Incident Report), Exhibits B, C and D (DHS Forms I-213 for Jose Solis-Leon, Leticia Gonzales-Santiago and Samuel Ramirez-Rangel), and Exhibit H (internal KCSO emails), Exhibit J (Orders of the Immigration Court for Leticia Gonzales / Jose Solis); Ramirez Rangel Declaration (¶¶ 4, 5, 6, 17); and Soliz Declaration (¶ 11). See Reply Brief for Defendants' MSJ at 4-5 (Robinson, Exhibit A), 5-6 (Robinson, Exhibits B-D), 6 (Robinson, Exhibit H), 7 (Robinson, Exhibit J), 7-9 (Ramirez Rangel, ¶¶ 4,5,6,17), 9-10 (Solis-Leon, ¶ 11); Court's Order Denying Kitsap County's Motion for Summary Judgment and Granting Motion to Strike (Docket No. 75, entered 3/29/13).

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(i) DFW commercial emerging fisheries license: Issued to D.D. DeNotta LLC as of time of incident;[21]

(ii) DFW site-specific emerging fisheries permit: Issued to D.D. DeNotta LLC on February 22, 2010;[22]

(iii) DOH general shellfish operation license: Issued to D.D. Denotta LLC as of time of incident;[23] and

(iv) DOH harvest site certificate: Issued to D.D. Denotta LLC as of time of incident, but prohibited harvesting of 1.7-mile stretch of shoreline including incident site.[24]

The timeline proves that the harvesters could not have possessed each of the required licenses and authorizations at the time and place of the incident and were therefore criminally liable, notwithstanding lack of actual charges. That, is why the Court dismissed the false arrest tort claim. The plaintiffs now attempt to re-litigate state constitutionality, as if the tort of false arrest did not encompass alleged violations of the state and federal constitutions.

Even if the Court was to take all of the admissible evidence, this time viewing facts and inferences in the light most favorable to Kitsap County, and find that no material questions of fact remain, the plaintiffs must still prove that they have established a case for declaratory judgment, which includes proving the elements of a justiciable controversy.

C. Plaintiffs Fail to Establish a Proper Action for Chapter 7.24 RCW Declaratory Judgment: They Pursued Their Alternative Remedy, They Named Only One Affected Agency and They Cannot Establish a Justiciable Controversy.

Under the Uniform Declaratory Judgments Act ("UDJA"), Chapter 7.24 RCW, courts have the power to "declare rights, status and other legal relations" and "declarations have the force and

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[21] Notice of Errata Re: Declaration of Paula Galivan ("Galivan Decl."), ¶ 6, Exh. 1.
[22] Galivan Decl., ¶¶ 7-8, Exh. 2.
[23] Barker Decl., ¶ 10.
[24] Barker Decl., ¶¶ 11 – 13, Exh. 1.

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effect of a final judgment or decree, and may be either affirmative or negative in form and effect."[25] The Court may declare the rights, status or other legal relations of persons, including municipal corporations, under a statute or ordinance.[26] The trial court is empowered to determine questions of fact when necessary or incidental to the declaration of rights, status, and other legal relations.[27]

There is no "right" to a declaratory judgment:

> It is never safe to assume a party has a ***right*** to a declaratory judgment. The requirements of standing and of a justiciable controversy . . . give the court considerable discretion in determining whether declaratory relief is appropriate.
>
> In addition, RCW 7.24.060 expressly states, "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."
>
> The court should generally decline to render piecemeal declarations when it appears that all of the issues are not before it. However, there are circumstances in which a declaration on a given issue may be of such utility that a declaration is justified.[[28]]

Plaintiffs' request would forge new ground: It asks for the Court to rule on constitutionality of a detention under Article I, Section 7 of Washington's Constitution[29] as a matter of declaratory judgment. In the published declaratory judgment cases involving the state constitution, the plaintiff raised constitutionality of a statute or ordinance, or of a current program or procedure, not whether an actor's past conduct was authorized under a statute or a constitutional provision. Subjects for which plaintiffs have sought declaratory judgment on our state's constitution include:

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[25] RCW 7.24.010.
[26] RCW 7.24.020, RCW 7.24.130.
[27] RCW 7.24.090; *Trinity Universal Ins. Co. v. Willrich,* 13 Wn.2d 263, 268, 124 P.2d 950 (1942)(citing cases).
[28] 15 Tegland Washington Practice, Civil Procedure § 42:21 (2d ed.) (footnotes omitted).
[29] Article I, Section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

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- Proposed initiative to prohibit red-light cameras in City of Longview (pre-election action).[30]
- Voter-enacted initiative requiring supermajority for Legislative votes to increase taxes.[31]
- Use of fuel tax revenues for off-road vehicle recreation.[32]
- The state Smoking in Public Places Act and a health district's clean indoor air ordinance.[33]
- City of Pasco's ordinance requiring residential landlords to obtain health and safety certification.[34]
- Force-feeding of a prison inmate engaged in a hunger strike.[35]
- Washington's voting disenfranchisement scheme for convicted felons.[36]
- The 1998 state Defense of Marriage Act.[37]
- Proposed state initiative to limit recovery of noneconomic damages and attorneys fees in health care personal injury actions (pre-election action).[38]
- Adoption of the petition method as an alternative form of annexation.[39]
- Inspection warrants procured under Seattle's Residential Housing Inspection Program.[40]

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[30] *City of Longview v. Wallin*, __ Wn.App. ___, 301 P.3d 45 (Div. 2 2013) (Wash. Const. Art. I, §§ 4, 5). Parenthetical citations for this list of cases are to Washington Constitutional provisions only.

[31] *League of Educ. Voters v. State*, 176 Wn.2d 808, 295 P.3d 743 (2013) (Wash. Const. Art. II, §§ 1, 22).

[32] *Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 290 P.3d 954 (2012) (Wash. Const. Art. II, § 40).

[33] *American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 192 P.3d 306 (2008) (Wash. Const. Art. I, § 7).

[34] *City of Pasco v. Shaw*, 161 Wn.2d 450, 166 P.3d 1157 (2007), *cert. denied*, 128 S.Ct. 1651 (2008) (Wash. Const. Art. I, § 7).

[35] *McNabb v. Department of Corrections*, 163 Wn.2d 393, 180 P.3d 1257 (2008) (Wash. Const. Art. I, § 7).

[36] *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007). (Wash. Const. Art. I, §§ 12, 17).

[37] *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006) (Wash. Const. Art. I, §§ 3, 7, 12, 32).

[38] *Coppernoll v. Reed,* 155 Wn.2d 290, 119 P.3d 318 (2005) (Wash. Const. Art. I, § 21, Art. II, § 1).

[39] *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (2002) (Grant County I) (Wash. Const. Art. I, § 12).

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1. Declaratory Judgment is Disfavored with "Existence of Another Adequate Remedy"

Plaintiffs may cite Civil Rule 57's provision that "existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate"[41]. Prior to adoption of this provision in 1967, Washington followed the rule that "declaratory judgment could not lie where any alternative remedy was available."[42] Now, "our Supreme Court has approved limited use of this exception",[43] though "the courts will be circumspect in granting [declaratory] relief".[44] In the case of *Wagers v. Goodwin*, Division Two reconciled the prior rule and CR 57 thusly:

> The court rule and the case law can be harmonized in this way: Ordinarily, where a plaintiff has another adequate remedy, he or she should not proceed by way of a declaratory judgment action; but declaratory relief may be "appropriate" in some situations, notwithstanding the availability of another remedy.[[45]]

For example, in *Wagers*, the Court approved use of a declaratory judgment "where the only alternative remedy was a motion to reopen an original dissolution judgment, a remedy granted under extraordinary circumstances."[46]

In the instant case, Plaintiffs brought another "adequate remedy", i.e. the false arrest tort action, which the Court dismissed based upon the absolute defense of probable cause. Thus, even before justiciability is considered, Plaintiffs' request for declaratory judgment is disfavored. As a declaratory judgment cause of action coupled with a false arrest tort claim for a single incident not

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[40] *City of Seattle v. McCready*, 123 Wash.2d 260, 868 P.2d 134 (1994) (Wash. Const. Art. I, § 7); *City of Seattle v. McCready*, 124 Wn.2d 300, 877 P.2d 686 (1994) (Wash. Const. Art. I, § 7).

[41] CR 57.

[42] *Ronken v. Board of County Com'rs of Snohomish County*, 89 Wn.2d 304, 310, 572 P.2d 1 (1977).

[43] *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 105, 38 P.3d 1040 (Div. 1,2002) (citing *Ronken*, 89 Wn.2d at 310).

[44] *Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 105, n. 28 (quoting *Ronken*, 89 Wn.2d at 310).

[45] *Wagers v. Goodwin*, 92 Wn.App. 876, 880, 964 P.2d 1214 (Div. 2 1998) (citing *City of Federal Way v. King County*, 62 Wn.App. 530, 535 n. 3, 815 P.2d 790 (1991) (Declaratory judgment action is proper to challenge facial validity of ordinance vacating public road, whereas writ of certiorari is used to review typical land use decision)).

[46] *Grandmaster Sheng-Yen Lu*, 110 Wn.App. at 105 (citing *Wagers*, 92 Wn.App. at 882).

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tied to an agency policy or custom, it is also without precedent.[47]

2. The Plaintiffs Cannot Establish a Justiciable Controversy, as They Cannot Meet Standing, Mootness, Ripeness and Case-or Controversy Requirements

Justice Utter once wrote that "[b]oth history and uncontradicted authority make clear that ' "[i]t is emphatically the province and duty of the judicial department to say what the law is." ' ".[48] Earlier this year, our state Supreme Court re-affirmed that statement (quoting *Marbury v. Madison*!), in concluding its opinion for the *League of Educ. Voters v. State* declaratory judgment case.[49] The case affirmed that, despite the Court's inherent power and authority, a plaintiff must still demonstrate a justiciable controversy.

"Unless a dispute involves 'issues of major public importance, a justiciable controversy must exist before a court's jurisdiction may be invoked under the [UDJA].'"[50] To invoke jurisdiction under the UDJA, a plaintiff must establish a justiciable controversy, i.e.:

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.[51]

These four justiciability elements must "coalesce, otherwise the court steps into the prohibited area

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[47] Washington's law is a uniform law intended to be harmonized with federal laws and laws of enacting states on the subject of declaratory judgments. RCW 7.24.140. Kitsap County would challenge the plaintiffs to find a reported decision in which an appellate court approved prosecution of both a false arrest tort claim and an action for declaratory judgment that a statute or constitution does not authorize the kind of detention employed on the occasion said to constitute a false arrest. Compare *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018 (1978) ("Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.").

[48] *League of Educ. Voters*, 176 Wn.2d at 828 (quoting *In re Salary of Juvenile Dir.*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976) (alteration in original) (quoting *United States v. Nixon*, 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803)))).

[49] Id.

[50] *League of Educ. Voters*, 176 Wn.2d at 816 (quoting *Nollette v. Christianson*, 115 Wn.2d 594, 598, 800 P.2d 359 (1990)).

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of advisory opinions."[52] Inherent in the four requirements to establish justiciability "'are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement.'"[53]

To establish standing under the UDJA, a party must meet a two-part test: The first part of the test asks whether the interest sought to be protected is " 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'"[54] The second part of the test is whether the challenged action has caused "injury in fact", economic or otherwise.[55] Plaintiffs argue they fall within the zone of interests of federal immigration law, but a plaintiff's "interests" must be "direct and substantial" as opposed to "potential, theoretical, abstract or academic."[56] For instance, a plaintiff has no standing under the UDJA to challenge constitutionality of a statute "unless it appears that he will be ***directly*** damaged in person or in property by its enforcement."[57] Here, each plaintiff has alleged a past constitutional injury. Standing is personal for declaratory judgment, i.e. one litigant may not raise another's rights.[58] Thus, to the extent that these plaintiffs contend that future contacts with KCSO will have an adverse impact upon any one of

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[51] *Coppernoll*, 155 Wn.2d at 300 (citing *To-Ro Trade Shows v. Collins,* 144 Wn.2d 403, 411, 27 P.3d 1149 (2001); *Diversified Indus. Dev. Corp. v. Ripley,* 82 Wn.2d 811, 815, 514 P.2d 137 (1973)).

[52] *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815.

[53] *Wallin*, 301 P.3d at 53 (quoting *To–Ro Trade Shows*, 144 Wn.2d at 411).

[54] *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (*Grant County II*) (quoting *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152–53, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970))).

[55] Id. Washington's standing Washington's standing doctrine is drawn from federal law. See *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (citing *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) and *Craig v. Boren*, 429 U.S. 190, 193–94, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)).

[56] *To-Ro Trade Shows*, 144 Wn.2d at 411 (citing *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815).

[57] *To-Ro Trade Shows*, 144 Wn.2d at 411-12 (quoting *DeCano v. State*, 7 Wn.2d 613, 616, 110 P.2d 627 (1941) (emphasis added by court); citing *Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d 920 (1994) (finding that petitioners' failure to identify any "actual, concrete harm" caused by Initiative 601 precluded declaratory action)).

[58] *Grant County I,* 145 Wn.2d at 713 (citing *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994)); *Grant County II*, 150 Wn.2d at 802-3.

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them beyond the alleged harm from the February 2, 2010 incident, each plaintiff has failed to show that his or her interests are "direct and substantial, rather than contingent and inconsequential."[59]

A case is ripe if the issues raised are primarily legal and do not require further factual development, and the challenged action is final.[60] Plaintiffs' requested declaratory judgment is both factual and legal in nature, and their request for declaratory judgment that KCSO may not "enforce" federal immigration law is imprecise. Random House defines "enforce" as "to put or keep in force; compel obedience to" and Webster's defines "enforce" as "to give force to".[61] So, is it "enforcement" if a state or local *law enforcement* agency acts in any way whatsoever to assist U.S. Border Patrol? As discussed in the summary judgment discussion supra, this case presents undeveloped questions of fact about the detention, and the Court has already ruled on the false arrest tort claim encompassing constitutionality of the continued detention. As for the legal interpretation in Plaintiffs' requested declaratory judgment, it would be anything but "final and conclusive".

A case is moot if it involves only purely academic or abstract propositions or if the substantial questions presented to the trial court have ceased to exist.[62] "Generally, we will dismiss a case as moot if we 'can no longer provide effective relief.' "[63] Here, the Court has ruled on the false arrest tort claim, and the question of authority to prolong detention of a detained non-citizen has become academic as to each of these plaintiffs.

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[59] *To-Ro Trade Shows*, 144 Wn.2d at 412.

[60] *Rhoades v. City of Battle Ground*, 115 Wn.App. 752, 63 P.3d 142 (Div. 2 2002) (citing *First Covenant Church v. City of Seattle*, 114 Wn.2d 392, 400, 787 P.2d 1352 (1990), adhered to on remand, 120 Wn.2d 203, 840 P.2d 174 (1992)).

[61] *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 10, 802 P.2d 784 (1991) (citing Random House Dictionary 644 (2d ed. 1987); Webster's Third New International Dictionary 751 (1986)).

[62] *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005); *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983).

[63] *Washington Off Highway Vehicle Alliance*, 176 Wn.2d at 232 (citing *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004) (quoting *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984))). However, a court may review a moot declaratory judgment case "if it presents issues of continuing and substantial public interest," discussed infra. *Washington Off Highway Vehicle Alliance*, 176 Wn.2d at 232.

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In and of itself, a declaratory judgment "'has no direct, coercive effect.'"[64] The case of *Brown v. Vail* put the "final and conclusive" requirement to the test: In *Brown*, the plaintiffs were death-row inmates who requested declaratory judgment that the Department of Correction's use of a three-drug protocol to carry out death sentences (a) violated the Eighth Amendment prohibition against "cruel and unusual punishment" and Washington's article I, section 14 constitutional ban on "cruel punishment"; and (b) violated state and federal controlled substances acts.[65] The trial court denied their request and the Supreme Court took direct review. While review was pending, the DOC announced that it was switching to a one-drug protocol for lethal injections. The Supreme Court found that the constitutional challenge to the three-drug protocol was moot and declined to rule on constitutionality of the one-drug protocol, for which an inadequate trial record had been developed.[66]

As for declaratory judgment regarding the federal and state controlled substances acts, the *Brown v. Vail* court expressed its concern about final and conclusive effect:

> The Appellants have not established that any declaratory judgment in this matter would produce a final and conclusive determination. Such a judgment would look very much like an advisory opinion, which we issue only in rare circumstances.[[67]]

The Court found that the decision to enforce provisions of a controlled substances act is best left to the discretion of agencies overseeing that statute.[68]

If our Supreme Court can reject the bid by current death row inmates for a declaratory judgment invaliding a lethal injection procedure, then this case's bid for a non-binding declaratory judgment of one agency's authority to question detainees about citizenship status (brought by persons detained three-plus years ago) will not fare any better. In the instant case, Plaintiffs can

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[64] *Brown v. Vail*, 169 Wn.2d 318, 334, 237 P.3d 263 (2010) (quoting 15 Karl B. Tegland, Washington Practice: Civil Procedure § 42:1 (2d ed.2009)).

[65] *Brown*, 169 Wn.2d at 321.

[66] *Brown*, 169 Wn.2d at 337-38.

[67] *Brown*, 169 Wn.2d at 334 (citing *To-Ro Trade Shows*, 144 Wn.2d at 416).

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articulate only a hypothetical or potential affect upon the rights of potential detainees in the custody of one law enforcement agency, while the detainees are in turn regulated by the federal immigration authority, the United States Border Patrol.

Of course, part of Plaintiffs' request is constitutional, not statutory, in its focus. Plaintiffs point to the case of *Kitsap County v. Smith*[69] for the proposition that "a declaratory judgment is peculiarly well-suited to a judicial determination of controversies concerning constitutional rights."[70] Neither that quote nor that proposition appear in the *Smith* case, though the Supreme Court has certainly discussed this proposition in the context of the justiciability test, writing in *To-Ro Trade Shows v. Collins*[71]:

> ***While we have acknowledged that the Uniform Declaratory Judgments Act provides a procedure "peculiarly well suited to the judicial determination of controversies concerning constitutional rights and ... the constitutionality of legislative action," we have resolutely maintained that no decisions should be made under the Act absent a "justiciable controversy."***[72]

Thus, a party must still satisfy the four-factor justiciability test for a constitutional issue, i.e. a party must "demonstrate a direct, substantial interest in an actual, immediate dispute with a truly adverse party, and that dispute must be one that the court's decision will conclusively resolve."[73]

3. Plaintiffs Cannot Demonstrate a Matter of "Great Public Importance" so as to Avoid the Prerequisite of Justiciability

If a proponent cannot establish a justiciable controversy, declaratory judgment may yet be rendered if the matter is of "great public importance". In Plaintiffs' cited case of *Kitsap County v. Smith*, Kitsap County brought an action for declaratory judgment that its employee criminally

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[68] *Brown*, 169 Wn.2d at 334 (citing *To-Ro Trade Shows*, 144 Wn.2d at 416).

[69] *Kitsap County v. Smith,* 143 Wn.App. 893, 180 P.3d 834, *review denied*, 164 Wn.2d 1036 (2008)

[70] Plaintiffs' MSJ, at 11 (citing *Smith*, 143 Wn.App. at 902-903). This is an erroneous citation.

[71] *To-Ro Trade Shows,* supra.

[72] *To-Ro Trade Shows,* 144 Wn.2d at 417 (emphasis added) (citing *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 490, 585 P.2d 71; *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815.).

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violated the state's Privacy Act, Chapter 9.73 RCW, by surreptitiously tape-recording his conversations while on the job, including conversations with citizens.[74] The action was coupled with an action for injunctive relief, which included requests for orders that the employee submit the audio recordings to the county and refrain from further recording activities.[75] Despite the filing of employment claims against the county and threats of future litigation, the trial court found the dispute to be non-justiciable.[76] Division Two reversed, holding that

> the issue of whether conversations with public employees are subject to the Privacy Act and the broader issue of whether certain types of conversations are always considered private conversations for purposes of the Act are issues of great public importance. Not only should the County be able to advise its employees of the legal limits on their ability to record work-related conversations, but all persons have the right to know whether their conversations with public employees can be surreptitiously recorded. Clarification of these issues will enhance the County's ability to properly advise its employees and establish policies ensuring protection of all persons' privacy rights.[77]

In finding that the issues were "of great public importance", the court in *Kitsap County v. Smith* declined to explicitly rule on justiciability and remanded the matter for a full hearing on the declaratory judgment motion.[78] The Court left little question, however, that the County had established a question of statutory interpretation about which it had an ongoing, critical need for judicial guidance in its role as employer directing its personnel and in guiding the public's expectations of privacy in their conversations with county employees.[79]

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[73] To-Ro Trade Shows, 144 Wn.2d at 417 (citing *Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815).
[74] *Smith*, 143 Wn.App. at 899.
[75] *Smith,* 143 Wn.App. at 898-99.
[76] *Smith*, 143 Wn.App. at 900, 903-4.
[77] *Smith*, 143 Wn.App. at 908-9 (footnote omitted).
[78] *Smith*, 143 Wn.App. at 909.
[79] Id.

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For a court to exercise its discretion upon an issue that is not otherwise justiciable, the proponent must establish an issue of "broad overriding import".[80] However, it is not enough to simply invoke the "public interest":

> [T]he existence of a statute implicating the public interest is not sufficient to support the examination of an issue which is not otherwise justiciable. Rather, in deciding whether to review such an issue, courts examine not only the public interest which is represented by the subject matter of the challenged statute, but ***the extent to which public interest would be enhanced by reviewing the case***.[[81]]

In this vein, a declaratory judgment action that is moot may nonetheless be heard *if* the matter is of continuing and substantial public interest. The Court considers three essential factors: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur."[82]

Arguably a fourth factor exists, that being the level of genuine adverseness and the quality of advocacy of the issues.[83] This Court should reject any effort to escape the mootness bar, because Plaintiffs' evidence of one single incident does not demonstrate need for guidance of law enforcement officers' authority to act under federal immigration law. Nor does the evidence establish a likelihood of recurrence of the alleged offense. Finally, the plaintiffs have advocated for a vague declaration of "enforcement" authorities that cannot promote understanding of the issues, by anyone.

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[80] *Snohomish County v. Anderson*, 124 Wn.2d 834, 840-41, 881 P.2d 240 (1994) (citing *DiNino v. State*, 102 Wn.2d 327, 331, 684 P.2d 1297 (1984)).

[81] *Anderson*, 124 Wn.2d at 841 (emphasis in original) (citing *Seattle School Dist. 1 v. State*, 90 Wn.2d 476, 490, 585 P.2d 71 (1978) ("Where the question is one of great public interest ... and where it appears that an opinion of the court will be beneficial to the public and to other branches of the government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation"); *Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976); *Sorenson v. Bellingham*, 80 Wn.2d 547, 496 P.2d 512 (1972) (one consideration in determining the public interest implicated is the desirability of an authoritative determination for future guidance of public officers)).

[82] *Hart v. Department of Social and Health Services*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988) (citing *In re Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983) (citing *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).)).

[83] Id (citing cases).

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4. Declaratory Judgment Would Prejudice the Rights of at Least One "Person" not a Party to this Action: The United States Border Patrol.

The UDJA forbids a declaratory judgment which "shall prejudice the rights of persons not parties to the proceeding."[84] Part of the desired declaratory judgment would interpret authority under federal immigration law, i.e. the Immigration Reform and Control Act ("IRCA"). The UDJA defines "persons" broadly[85] and the U.S. Border Patrol would surely claim interest in an action to declare the ability of a local law enforcement agency to cooperate with its administration of federal immigration law. In the IRCA, 8 U.S.C. § 1357(g)(9) and (10) authorize and encourage federal-local cooperation, with or without a formal agreement:

> (9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.
>
> (10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--
>
> > (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
> >
> > (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

Plaintiffs draw the Court's attention to a lack of written cooperation agreements between Washington law enforcement agencies and the U.S. Border Patrol[86], which could not be less relevant to establishing a justiciable controversy. The IRCA requires no such agreement. Citing 8 U.S.C. § 1357(g)(10), the United States Supreme Court held that "[c]onsultation between federal and state officials is an important feature of the immigration system", for which "Congress has made clear that

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[84] RCW 7.24.110.
[85] RCW 7.24.130.

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no formal agreement or special training needs to be in place".[87] Part of Plaintiffs' request calls for declaratory judgment of KCSO's authority to hold detainees at Border Patrol's request[88], which appears to be a solution in search of a non-existent problem.[89]

5. A Decision to Deny Declaratory Judgment Will be Sustained on any Appeal.

The Plaintiffs would have this Court employ declaratory judgments to determine rights "in anticipation of an event or events which may never occur or for the consideration of moot cases or as a medium for the rendition of advisory opinions".[90] The plaintiffs cannot demonstrate a public interest to overcome the justiciable controversy bar, they have proposed declaratory judgment on federal immigration law that would impact the unnamed U.S. Border Patrol, and they have failed to bring an action for injunction so that any contemplated declaratory judgment could have teeth. Even if the plaintiffs had properly pleaded an injunctive action, they have not pleaded or proven an ongoing need for clarification of local law enforcement's authority during contacts with non-citizens. The plaintiffs' most compelling case consists of one dated incident for which the police unknowingly possessed probable cause to arrest throughout their contact, thereby defeating a tort claim for false (read: unconstitutional) arrest, notwithstanding the officers' subjective intentions and beliefs. From this single incident, Plaintiffs make this bald statement about an entire police agency:

> ***"The enforcement of the State Constitution presents a question of pressing public concern, and Kitsap County needs to know how to***

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[86] Plaintiffs' MSJ, at 16.

[87] *Arizona v. United States,* , —— U.S. ——, 132 S.Ct. 2492, 2508, 183 L.Ed.2d 351 (2012).

[88] Plaintiffs' MSJ, at 14 (". . . Defendants violated Article I, Section 7 of the Washington State Constitution when they . . . detained Plaintiffs ***without authority*** until Border Patrol arrived at the scene.") (emphasis added).

[89] See *Arizona v. United States*, —— U.S. ——, 132 S.Ct. 2492, 2507, 183 L.Ed.2d 351 (2012). (8 U.S.C. § 1357(g)(10)(B) authorizes state officers to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States", though the term "cooperation" could not authorize "the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from Federal Government").

[90] *In re Johnson's Estate*, 403 Pa. 476, 488-89, 171 A.2d 518, 524 (1961).

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train, manage, and advise its deputies to comply with the Constitution."[91]

When applied, declaratory judgment is a mechanism for interpretation, not "enforcement", so there are no reported decisions endorsing the plaintiffs' blanket pronouncement. Moreover, the plaintiffs' statement about what Kitsap County "needs" is just patronizing.

This Court may reject Plaintiffs' bid for declaratory judgment with confidence. Refusal to consider a declaratory judgment action is reviewed for abuse of discretion.[92] A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds.[93] Plaintiffs' latest recitation of the facts and its review of Article I, Section 7 law overlooks the fact that this court can simply say "no".

III. CONCLUSION

The plaintiffs' case is terminal, but the plaintiffs will not self-report. This Court has shown enormous restraint in allowing the plaintiffs to air their constitutional claims again and again, now in the guise of a declaratory judgment effort.

The incident occurred in early February of 2010. Plaintiffs originally filed this action in Kitsap County Superior Court on January 31, 2012 and have never moved to amend their complaint. Now, finally, the plaintiffs have asked this court to enter declaratory judgment, pleading that "enforcement of the State Constitution presents a question of *pressing* public concern".[94] Plaintiffs' motion for summary judgment begs the question: If justice cries out for a court's declaration of the legal authorities of one police agency and two law enforcement officers under federal immigration

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[91] Plaintiffs' MSJ, at 13.

[92] *Smith*, 143 Wn.App. at 902 (citing *Wash. Fed'n of State Employees v. State*, 107 Wn.App. 241, 244, 26 P.3d 1003 (2001).

[93] *Smith*, 143 Wn.App. at 902 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002)).

[94] Plaintiffs' MSJ, at 13 (emphasis added).

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law and the state's constitution, then why would the plaintiffs have waited over 16 months after filing and nearly three and one-half years after the incident to seek this judgment? The Court should deny the plaintiffs' motion, dismiss their declaratory relief "action", and enter final judgment dismissing the case.

RESPECTFULLY SUBMITTED this 26 day of July, 2013.

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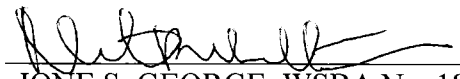

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CERTIFICATE OF SERVICE

I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

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SIGNED in Port Orchard, Washington this 26th day of July 2013.

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