

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

ANA MARIA VICENTE, et al.,)	Case No.: 05-CV-00157-JMR
)	
Plaintiffs,)	
vs.)	
)	JOINT PRETRIAL ORDER
ROGER BARNETT, et al.)	
)	
Defendants.)	

The following are pretrial proceedings in this cause pursuant to Rule 2.12 of this Court, and **IT IS ORDERED:**

I.

NATURE OF ACTION

This is an action for: (State nature of action, including relief sought and identification of parties.)

This is an action for the recovery of damages for injuries allegedly inflicted upon Plaintiffs Ana Maria Vicente, Gerardo Gonzalez, Samuel Jordan, Sandra Velazquez, Mateo Jordan, Adela Vicente, Nancy Vicente, Francisco Vilches, Abel Cruz, Manuel Martinez, Jorge Perez, Rigoberto Perez, Rodolfo Torrez, Octavio Perez, Juan Vicente, and Sara Vasquez, by Defendants Roger Barnett, Donald Barnett, and Barbara Barnett. Plaintiffs allege that Defendants have engaged in a private campaign and have conspired with each other to hunt down Latinos at gunpoint, detain them and, in some instances, assault them. Plaintiffs allege that, in furtherance of that conspiracy, Defendant Roger Barnett assaulted Plaintiffs with a semi-automatic handgun and, with the assistance of Defendant Barbara Barnett, falsely imprisoned Plaintiffs, committed battery upon one of the plaintiffs, and violated a number of other state and federal laws.

Plaintiffs seek actual and punitive damages against Defendants and attorneys' fees and costs.

Defendants Roger and Barbara Barnett are owners of the Crossrail Ranch, near Sierra Vista. Donald Barnett is the brother of Roger Barnett, and visits the ranch. The Crossrail Ranch's southern boundary is a few miles from the border with Mexico, and its northern boundary abuts Highway 80. Defendants allege that the ranch is a frequent-used

path for parties of illegal entrants and drug smugglers. Defendants contend that there is no conspiracy: they have simply sought to aid Border Patrol by detecting and reporting the smugglers and illegal entrants crossing their land.

On the date in question, Defendants allege that Roger Barnett came upon a group of about twenty illegal entrants. Defendants contend that Roger Barnett approached the group with a drawn handgun, for safety in that isolated area, and then holstered it upon ascertaining they were unarmed. He then contacted Border Patrol, who Defendants allege arrested the entrants and returned them to Mexico. Defendants deny that Roger Barnett struck or insulted anyone in the process.

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II.

STATEMENT OF JURISDICTION

Plaintiffs assert that this Court has jurisdiction over all the claims asserted in Plaintiffs' Third Amended Complaint (Dkt. Entry No. 147) under 28 U.S.C. § 1332 because Plaintiffs are not citizens of Arizona, Defendants are citizens of the state of Arizona, and the amount in controversy is more than \$75,000. Plaintiffs also assert that this Court has jurisdiction over Plaintiffs' First and Second claims under 28 U.S.C. § 1331 because these claims arise under federal law and because Plaintiffs allege that Defendants' acts were done in furtherance of a conspiracy described by 42 U.S.C. § 1985. Plaintiffs assert this Court has supplemental jurisdiction over Plaintiffs' Third, Fourth, Fifth, Sixth, Seventh and Eighth claims under 28 U.S.C. § 1367 because these claims arise under Arizona law and are so related to the claims arising under federal law that they form part of the same case or controversy.

III.

ADMITTED FACTS

The following facts are admitted by the parties and require no proof:

1. Defendant Roger Barnett and Defendant Barbara Barnett are residents of Sierra Vista, Arizona.
2. Defendant Donald Barnett is a resident of Benson, Arizona.
3. On March 7, 2004, Plaintiffs were traveling north of Douglas, Arizona near Arizona State Highway 80.
4. Plaintiffs are all Latino/Hispanic.
5. On March 7, 2004, Plaintiffs encountered Defendant Roger Barnett, who was armed with a loaded .40 cal. Smith and Wesson semi-automatic handgun.
6. Later, Plaintiffs encountered Defendant Barbara Barnett, who was carrying a loaded .38 cal. handgun.
7. Defendants do not own or control any property that abuts the U.S.-Mexico border.
8. Border Patrol Agent Derek Wesley arrived at the scene where Defendants Roger Barnett and Barbara Barnett encountered Plaintiffs.
9. Following their encounter with the Defendants Roger and Barbara Barnett, Plaintiffs were transported to the United States Border Patrol station outside of Douglas, Arizona.
10. Plaintiffs were interviewed by Cochise County Deputy Luis Hernandez, Cochise County Detective Ursula Ritchie, and U.S. Border Patrol Agent Manuel Rodriguez.

IV.

FACTS NOT ADMITTED, BUT WILL NOT BE CONTESTED

The following facts, although not admitted, will not be contested at trial by evidence to contrary:

11. Defendants never observed any of the plaintiffs armed with any weapons of any kind at any time on March 7, 2004.
12. None of the plaintiffs at any time made any threats or acted in a threatening manner towards Defendants.
13. Defendants did not observe or hear any of the plaintiffs making loud or unusual noises; did not observe any of the plaintiffs engaging in tumultuous or offensive conduct of any kind; did not observe any of the plaintiffs quarreling or challenging anyone to fight; did not observe any of the plaintiffs applying violent, abusive or obscene epithets to another; and did not observe any of the plaintiffs otherwise engaging in conduct that would amount to a breach of the peace.
14. Defendants did not observe how any of the plaintiffs arrived at the location where they were encountered by Defendants Roger and Barbara Barnett.
15. Defendants did not, at any time, observe Plaintiffs in the possession of drugs or any other illegal items.
16. Defendants did not, at any time, request that any of the plaintiffs leave the area or property where Defendants encountered Plaintiffs.
17. Defendants did not, at any time, observe any of the plaintiffs enter or remain in any residential structure or residential yard controlled by Defendants.

18. Defendants did not, at any time, observe any of the plaintiffs enter or remain in any nonresidential structure controlled by Defendants.
19. Defendants did not, at any time, vocally communicate to any of the plaintiffs that they may have been on private property.
20. Defendants did not, at any time, observe any of the plaintiffs destroying any property belonging to Defendants.
21. The March 7, 2004 incident involving Plaintiffs and Defendants occurred at least five miles from the U.S.-Mexico border, near milepost 373 of Arizona State Highway 80.
22. On March 7, 2004, Plaintiffs' final destinations were places outside Arizona.
23. In 1994, Plaintiff Gerardo Gonzalez was deported from the United States.
24. In 1993, Plaintiff Gerardo Gonzalez was convicted of a drug offense.

V.

TRIABLE ISSUES OF FACT

The following are the issues of fact to be tried and determined upon trial: (Each issue of fact must be stated separately and in specific terms. The parties' contentions as to each issue must be set forth beneath.)

Issue of Fact 1:

Whether Defendants conspired for the purpose and intent of depriving Latinos of their federally protected rights, including the right to interstate travel and, if so, whether the conspiracy was motivated by race and resulted in an overt act towards Plaintiffs that injured them.

Plaintiffs contend:

Defendants Roger Barnett, Donald Barnett, and Barbara Barnett have engaged in a long-standing and race-motivated conspiracy to deny Latinos they encounter near

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Douglas, Arizona of their federally protected rights, including the right to interstate travel. On March 7, 2004, Defendant Roger Barnett, assisted by his wife Defendant Barbara Barnett and in furtherance of the conspiracy with his wife and his brother, Donald Barnett, forcibly detained Plaintiffs at gunpoint. Defendant Barnett then assaulted Plaintiffs, threatened them with his dog and physically attacked Ana Maria Vicente by kicking her twice as she lay on the ground. Defendants' actions taken in furtherance of their conspiracy have not been limited to immigrants and have not been limited to the property that Defendants own or lease from the State. Defendants have, in fact, assaulted and detained both citizens and non-citizens alike, and have hunted down and detained Latinos both on the property they own or lease and off the property they own or lease.

Defendants contend:

Defendants have engaged in no conspiracy to deny Latinos any right to interstate travel. They have sought to alert Border Patrol to illegal entries. Roger Barnett did not assault nor batter Plaintiffs, nor forcibly detain them.

Issue of Fact 2:

Whether Defendants acted with racially discriminatory intent during their alleged assault and detention of Plaintiffs and whether the alleged assault and detention of Plaintiffs denied Plaintiffs of the equal benefit of laws for the security of persons.

Plaintiffs contend:

Defendants Roger Barnett and Barbara Barnett acted with racially discriminatory intent during their assault and detention of Plaintiffs which denied Plaintiffs of the equal benefit of laws for the security of persons.

Defendants contend:

Defendants above deny that they have acted with racially discriminatory intent, and that they assaulted or detained Plaintiffs. They did not deny Plaintiffs equal benefit of laws for the security of persons; indeed have no power to do so.

Issue of Fact 3:

Whether Defendant Roger Barnett intended to cause a harmful or offensive contact with Plaintiffs or imminent apprehension of such contact and Plaintiffs were indeed put in imminent apprehension of being harmed by Defendant Roger Barnett or his dog.

Plaintiffs contend:

Defendant Roger Barnett intended to cause a harmful or offensive contact with Plaintiffs or imminent apprehension of such contact when he pointed his loaded .40 cal. semi-automatic handgun at Plaintiffs and screamed racial epithets at them and threatened to kill them. Defendant also intended to cause Plaintiffs imminent apprehension of being attacked by his dog. Plaintiffs feared for their lives and were put in immediate apprehension of imminent harm or death by Defendant Roger Barnett and his dog.

Defendants contend:

Roger had no such intent, nor did he threaten or insult Plaintiffs, nor did he cause such apprehension. He drew his handgun temporarily, as is not unexpected upon encountering a group of persons, possible armed drug smugglers, in the open desert. He holstered it after ascertaining it was safe to do so. He did not scream epithets nor threats. His dog is a trained herding dog, not aggressive, who caught scent of Plaintiffs, ran after

them, and barked but did no more. A dog's owner is in any event not responsible for its barking at persons, nor for conduct short of biting.

Issue of Fact 4:

Whether Defendant Roger Barnett kicked Plaintiff Ana Maria Vicente.

Plaintiffs contend:

Defendant Roger Barnett kicked Ana Maria Vicente.

Defendants contend:

Roger Barnett didn't. Border Patrol agents inspected her leg where Roger allegedly kicked her and could find no trace of a contact. They photographed her leg and the image shows no trace of a contact.

Issue of Fact 5:

Whether Defendants Roger Barnett and Barbara Barnett acted to confine Plaintiffs within boundaries fixed by Defendants; whether Defendants' acts resulted in such confinement, either directly or indirectly; and whether Plaintiffs were conscious of the confinement or harmed by it.

Plaintiffs contend:

Defendants Roger Barnett and Barbara Barnett confined Plaintiffs without consent and without justification within boundaries fixed by Defendants and Defendants' acts resulted in such confinement and Plaintiffs were conscious of the confinement and were harmed by it.

Defendants contend:

Roger Barnett did not detain Plaintiffs. Upon encountering them, he contacted Border Patrol, which was also tracking Plaintiffs and thus nearby, and they took custody

of Plaintiffs. If his actions are construed as confining Plaintiffs, they were justified, as discussed below. Barbara Barnett arrived at the scene later and did nothing but observe. Plaintiffs suffered no severe emotional injury from either.

Issue of Fact 6:

Whether Defendants Roger Barnett and Barbara Barnett were negligent in that they failed to act as reasonably careful persons would act under the circumstances and whether Defendants' negligence caused injury to Plaintiffs.

Plaintiffs contend:

Defendants Roger Barnett and Barbara Barnett were negligent in that they failed to act as reasonably careful persons would act under the circumstances and Defendants' negligence caused injury to Plaintiffs

Defendants contend:

Roger and Barbara Barnett acted as a reasonably careful person would have under the circumstances, and Plaintiffs suffered no harm.

Issue of Fact 7:

Whether Defendants Roger and Barbara Barnett maintained troops under arms and whether such actions caused injury to Plaintiffs.

Plaintiffs contend:

In furtherance of their conspiracy, Defendants have maintained troops under arms in violation of state statute, and by the maintenance of such troops have caused injury to Plaintiffs.

Defendants contend:

Roger and Barbara Barnett are not “troops,” and if they did have troops, Plaintiffs suffered no harm thereby.

Issue of Fact 8:

Whether Defendants Roger and Barbara Barnetts' actions on March 7, 2004 were outrageous and intended to cause Plaintiffs emotional distress or were carried out with reckless disregard for the near certainty that such distress would result from their conduct; and whether Plaintiffs suffered severe emotional distress as a result of Defendants' conduct.

Plaintiffs contend:

Defendants Roger and Barbara Barnetts' actions were outrageous and intended to cause Plaintiffs emotional distress or were carried out with reckless disregard for the near certainty that such distress would result from their conduct. As a result of this outrageous and race-motivated conduct, Plaintiffs suffered severe emotional distress.

Defendants contend:

Defendants' actions were none of these, and Plaintiffs suffered no severe emotional distress as a result.

Issue of Fact 9:

Whether Defendants' actions were committed maliciously, oppressively, and in reckless disregard of Plaintiffs' rights.

Plaintiffs contend:

Defendants' actions were committed maliciously, oppressively, and in reckless disregard of Plaintiffs' rights.

Defendants contend:

Defendants did not act maliciously, oppressively, or with reckless disregard.

Issue of Fact 10:

Whether Defendants' conduct rose to the level of outrageous conduct guided by an evil mind in that: Defendants intended to cause injury to Plaintiffs; Defendants' conduct was motivated by spite; or Defendants' actions were self-serving and the product of a conscious disregard of a substantial risk of harm to others.

Plaintiffs contend:

Defendants' conduct rose to the level of outrageous conduct guided by an evil mind because Defendants intended to cause injury to Plaintiffs; Defendants' conduct was motivated by spite; and Defendants' actions were self-serving and the product of a conscious disregard of a substantial risk of harm to others.

Defendants contend:

Defendants deny all of the above.

Issue of Fact 11:

Whether Plaintiffs are entitled to recover actual damages and punitive damages against Defendants.

Plaintiffs contend:

Each of the plaintiffs are entitled to cover actual damages from Defendants as each has suffered severe and lasting emotional and mental distress, fear, anxiety, humiliation, stress, frustration and sadness. Most have been diagnosed with post-traumatic stress disorder caused by Defendants' actions. Each of the plaintiffs are also entitled to recover punitive damages against Defendants because the actions taken against

them were committed maliciously, oppressively, and in reckless disregard of Plaintiffs' rights and were guided by an evil mind.

Defendants contend:

Plaintiffs suffered no emotional distress, fear, or whatnot. The notion that five or ten minutes in Roger's presence would give a person, let alone a large group, post traumatic stress syndrome is at best pseudo-science. As noted above, Defendants deny having acted maliciously, oppressively, etc.

Issue of Fact 12 :

Whether Defendants' actions were justified as a citizen's arrest under A.R.S. §13-3884 and the common law.

Plaintiffs contend:

Defendants' conduct cannot be justified as a citizen's arrest. First, the defense of citizen's arrest, even if applicable here, would only justify Defendants' detention of Plaintiffs and would not justify the assault and battery upon Plaintiffs or relieve Defendants of liability for their negligence or for the intentional emotional distress they inflicted upon Plaintiffs. In addition, Defendants assertion of citizen's arrest cannot justify their violation of federal civil rights statutes.

Second, under Arizona law, the defense of citizen's arrest is an affirmative defense to the tort of false imprisonment or arrest only if: 1) the person arrested has, in the presence of the arresting person, committed a misdemeanor amounting to a breach of the peace; or 2) a felony has in fact been committed and the arresting person has reasonable grounds to believe that the person arrested has committed the felony. *See* A.R.S. § 13-3884. Arizona has codified the common law as expressed in the Restatement

of Torts and, specifically with respect to citizen's arrest, has codified Rest. Torts. 2d § 119(b) (which requires both that a felony has in fact been committed *and* that the arresting person reasonably suspects that the person being arrested has committed that felony) and not Rest. Torts. 2d § 119(a) (which may require only that the person being arrested has committed the felony). *See* Rest. Torts. 2d § 119(b) and (a) and compare with A.R.S. § 13-3884.

Defendants concede that Plaintiffs did not commit a misdemeanor amounting to a breach of the peace in their presence. Furthermore, none of the Plaintiffs, except for the possibility of Gerardo Gonzalez, had previously been convicted for entering the country illegally or had previously been removed or deported from the country. As to Gerardo Gonzalez, even if it is true that he committed a felony on March 7, 2004 by reentering the country after a drug conviction, there is no conceivable way that Defendants could have suspected this prior to or at the time they assaulted him at gunpoint and forcibly detained him against his will. Instead, all Plaintiffs were assaulted, detained and threatened at gunpoint because they were Latinos traveling near the state highway patrolled by Defendants Roger, Barbara and Donald Barnett.

Defendants also cannot justify their detention of any of the Plaintiffs based on their contention that Plaintiffs may have been violating A.R.S. § 13-1506(A)(1) at the time they were detained. That statute provides that a person commits burglary in the third degree when they enter or remain "unlawfully in a nonresidential structure or in a fenced commercial or residential yard with *intent to commit any theft or any felony therein.*" A.R.S. § 13-1506(A)(1) (emphasis added). Plaintiffs were not in a fenced residential yard or fenced commercial yard at the time they were detained. In addition, as

noted above, none of the Plaintiffs were engaged in any conduct that could possibly constitute a felony being committed within such a yard. Even if Gerardo Gonzalez had committed a felony by reentering the United States after a previous drug conviction, and even if he was within a fenced residential or commercial yard, he did not enter that yard with the intent to commit a felony therein and he did not in fact commit a felony therein.

Defendants also cannot justify their actions on March 7, 2004, by claiming that Plaintiffs may have conspired with "guides" to enter the country illegally because Plaintiffs did not have any "guides." To the extent Defendants are referring to conduct proscribed by A.R.S. § 13-2319 (which one county attorney in Arizona has tried to use to prosecute immigrants for felony conspiracy for allegedly "conspiring" with their guides), that statute was enacted in 2005, well after the incident related to Plaintiffs' detention had occurred. Therefore, even if Plaintiffs had used guides, at the time they were confronted by Barnett they could not have been violating a statute that did not yet exist.

Finally, Defendants' unlawful detention of Plaintiffs cannot be justified as a citizen's arrest simply by requesting, without citation to any legal authority, that state common law be extended to justify a citizen's arrest for misdemeanor illegal reentry.

Defendants contend:

A.R.S. §13-3884 authorizes citizen's arrest when a felony is committed in the defender's presence, or when a felony has been committed and he has reasonable ground to believe the arrestee has committed it. Second-offense illegal entry is a felony, as is re-entry after deportation. At least one Plaintiff, Gerardo Gonzales was, at the time, illegally re-entering the U.S. after deportation and conviction of a drug distribution felony. Additionally, Plaintiffs may have conspired with guides to enter illegally, which

would constitute felony conspiracy. Third degree burglary, under A.R.S. §13-1506, is a State felony. As this is a draft pretrial order rather than a trial memorandum, we will not lengthen it with our research and arguments.

Moreover, the common law is somewhat broader than the statute. Defendants contend that the common law justification should extend to misdemeanor illegal entry.

Issue of Fact 13 :

Whether Defendants' conduct was justified by self-defense under A.R.S. §13-404 and the common law.

Plaintiffs contend:

Defendant Roger Barnett's use of physical force against Plaintiff Ana Maria Vicente and his threat of deadly force against all Plaintiffs cannot be justified by the affirmative defense of self-defense. Under Arizona law, a person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force. *See* A.R.S. § 13-404. There is no evidence that Plaintiffs acted in any manner that would lead a reasonable person to believe that physical force was immediately necessary for Roger Barnett to protect himself against the use of force by Plaintiffs.

Defendants contend:

At the time Roger encountered Plaintiffs, he was alone and confronted by a large group in the desert. The Arizona and US Constitutions protect a right to keep and bear arms for self-defense. Drug smugglers frequently take paths across his land, are armed,

and dangerous. He drew his pistol for protection, and holstered it after ascertaining that Plaintiffs were unarmed. He used physical force against no one.

Issue of Fact 14:

Whether Defendant's actions were justified to terminate a criminal trespass under A.R.S. §13-407.

Plaintiffs contend:

Defendants' racially motivated assault and battery upon Plaintiffs cannot be justified as being necessary to terminate a criminal trespass. Under Arizona law, use of physical force in defense of premises can only be justified "to the extent that a reasonable person would believe it immediately necessary to prevent or terminate the commission of a criminal trespass by the other person in or upon the premises." *State v. Hussain*, 189 Ariz. 336, 942 P.2d 1168 (Ct. App. 1997); *see also* A.R.S. § 13-407. In this case, Plaintiffs were not committing a criminal trespass at the time they were attacked by Defendant Roger Barnett. Even if they had been, Defendant's armed assault upon Plaintiffs was not reasonable or immediately necessary to terminate any alleged criminal trespass. Defendant's conduct was plainly not reasonable in light of the complete lack of danger posed by the unarmed, non-threatening individuals he encountered – which included young women and one teenage girl.

Defendant's armed assault upon Plaintiffs was also not immediately necessary. Defendant admits that he never asked Plaintiffs to leave the area and never even informed them that they were on private property. There is also no dispute that Plaintiffs never threatened Defendants, or indicated they were going to run away or cause any kind of disturbance. Thus it was not immediately necessary for Defendant to threaten the lives of

Plaintiffs with a loaded semi-automatic handgun, to use vulgar language and racial epithets, or to physically attack Plaintiff Ana Maria Vicente.

Defendants contend:

13-407 permits reasonable use of force, or threat of deadly force, to terminate a criminal trespass. In summoning Border Patrol, Defendants terminated the trespass. We deny the above hyperbole and, as this is a draft pretrial order rather than a jury argument, will say no more.

Issue of Fact 15:

Whether Defendants' conduct is justified as an execution of public duty under A.R.S. §13-402.

Plaintiffs contend:

Defendants' violation of Plaintiffs' civil rights and the racially motivated armed assault, detention and battery of Plaintiffs cannot be justified as an execution of public duty. Such justification is only applicable to conduct that a reasonable person would believe is required or authorized to assist a peace officer in the performance of such officer's duties. *See* A.R.S. § 13-402. Attacking Plaintiffs with loaded weapons and physically assaulting one of the young female Plaintiffs was not reasonable and a reasonable person would not believe that such heinous actions were required or authorized to assist a peace officer in the performance of his duties. No officer requested assistance from any of Defendants in performing his/her duties. Moreover, Defendants did not see Plaintiffs commit any crime. The only facts Defendants knew about Plaintiffs were that they were Latinos and that they were near the highway that Defendants patrol in furtherance of their conspiracy to capture and detain Latinos. A.R.S. § 13-402 has

never been used and cannot be used to justify violent acts against Latinos or against Latinos perceived to be immigrants.

Defendants contend:

13-402 renders conduct justifiable if a reasonable person would believe it was required to assist a peace officer in performance of his duties. A reasonable person would have believed that Defendants' conduct was required in order to assist Border Patrol in performance of its duties. We deny the above hyperbole and alleged "heinous" conduct, and as this is a draft pretrial order rather than a jury argument, will rest at that.

Issue of Fact 16:

Whether Defendants' conduct is justified as a matter of public necessity under A.R.S. § 13-417.

Plaintiffs contend:

Defendants' conduct cannot be justified as a matter of public necessity. The relevant statute provides that "[c]onduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct." A.R.S. § 13-417 (A). A reasonable person would not have been compelled to forcibly detain Plaintiffs at gunpoint or commit assault and battery upon Plaintiffs to avoid imminent public or private injury. In addition, Defendants' conduct cannot be justified as a public necessity because Defendants cannot show that they had no reasonable alternative to avoiding whatever harm Defendants claim Plaintiffs would cause the public.

The justification of public necessity also does not apply here because the relevant Arizona statute makes clear that "an accused person may not assert the defense [of public necessity] if the person intentionally, knowingly or recklessly placed himself in the situation in which it was probable that the person would have to engage in the proscribed conduct." A.R.S. § 13-417 (B). Here, by conspiring to hunt down and capture Latinos in the area near Douglas, Arizona, Defendants placed themselves in a situation in which it was probable that Defendants would engage in the armed assault and detention of Plaintiffs.

Defendants contend:

Defendants' actions were aimed at preventing imminent private and public injury caused by illegal entry, which outweighed any injury their conduct might have caused.

Issue of Fact 17:

Whether Defendants' conduct is justified as use of force in law enforcement under A.R.S. §13-409.

Plaintiffs contend:

Defendants' conduct cannot be justified under A.R.S. § 13-409. A person is justified in threatening or using physical force against another if in making or assisting in making an arrest or detention or in preventing or assisting in preventing the escape after arrest or detention of that other person: 1) a reasonable person would believe that such force is immediately necessary to effect the arrest or detention or prevent the escape; 2) such person makes known the purpose of the arrest or detention or believes that it is otherwise known or cannot reasonably be made known to the person to be arrested or

detained; and 3) a reasonable person would believe the arrest or detention to be lawful.

A.R.S. §13-409.

The justification is not available to Defendants. First, Defendants are not law enforcement officials and the statute is applicable only as a justification for the use of physical force during an arrest by an officer of the law. *See State v. Yoshida*, 195 Ariz. 183, 986 P.2d 216 (Ct. App. 1998); *State v. Fontes*, 195 Ariz. 229, 232, 986 P.2d 897, 900 (Ct. App. 1998) (explaining that the statute justifies *an officer's* use of physical force while making an arrest under certain circumstances). Second, even if the justification was available to Defendants, a reasonable person would not have thought that the force used by Defendants was necessary to make an arrest of Plaintiffs or to prevent Plaintiffs from effectuating an escape after a lawful arrest.

Defendants contend:

Defendants' actions were taken under conditions where a reasonable person would believe they were necessary to prevent escape, their purpose would have been known or could not reasonably have been made known, and a reasonable person would have believed that any detention was lawful. Roger Barnett did not use physical force against anyone.

Issue of Fact 18:

Whether fault should be apportioned.

Plaintiffs contend:

Plaintiffs were not, to any extent, at fault for the injuries they endured at the hands of Defendants. Therefore, no fault should be apportioned to Plaintiffs.

Defendants contend:

As to the counts based upon Arizona law, apportionment of fault is required. Defendants contend that Plaintiffs, and any persons guiding them, should be apportioned fault.

Issue of Fact 19:

Whether Defendants are entitled to an offset for trespass to realty.

Plaintiffs contend:

Plaintiffs did not trespass on Defendants' property and thus Defendants have no claim to damages.

Defendants contend:

Plaintiffs trespassed upon the Barnett's land, and Defendants should be entitled to damages.

Issue of Fact 20:

Whether some of Plaintiffs' claims of false imprisonment are barred by the statute of limitations.

Plaintiffs contend:

None of the Plaintiffs' claims of false imprisonment are barred by the statute of limitations. Plaintiffs filed this case on March 4, 2005. *See* Dkt. Entry No. 1. Plaintiffs Jorge Perez, Octavio Perez, Rudolfo Torrez, Juan Vicente and Sara Vasquez sought to proceed as "doe" Plaintiffs. *See* Dkt. Entry No. 2. This Court ultimately denied Plaintiffs' motion and ordered that Plaintiffs amend their complaint to add the real names of these Plaintiffs. *See* Dkt. Entry No. 41. Plaintiffs abided by the Court's order in a timely manner and amended their complaint to include the real names of these Plaintiffs.

See Dkt. Entry Nos. 42-44. It is incorrect to state that these five plaintiffs did not file suit until October 2005.

Defendants contend:

A.R.S §12-541 imposes a one-year limitation for actions based upon false imprisonment or arising out of statute. The events at issue occurred in March 2004. Plaintiffs Jorge and Octavio Perez, Rudolfo Torrez, Juan Vicente and Sara Vasquez were not added to this action until the First Amended Complaint, filed in October 2005. The anonymous Plaintiffs in the original complaint were identified by first name and first letter of last name, and none match the names of these Plaintiffs.

VI.

TRIALABLE ISSUES OF LAW

The following are the issues of law to be tried and determined upon trial: (Each issue of law must be stated separately and in specific terms. The parties' contentions as to each issue must be set forth beneath.

Issue of Law 1:

Whether the affirmative defense of citizen's arrest is available to individuals who make an arrest of persons because they are within the U.S. without authorization or documentation.

Plaintiffs contend:

The affirmative defense of citizen's arrest is not available to individuals who detain others at gunpoint because they believe the detained persons are present in the United States without authorization. Under Arizona law, the defense of citizen's arrest is an affirmative defense to the tort of false imprisonment or arrest only if: 1) the person arrested has, in the presence of the arresting person, committed a misdemeanor

amounting to a breach of the peace; or 2) a felony has in fact been committed and the arresting person has reasonable grounds to believe that the person arrested has committed the felony. *See* A.R.S. § 13-3884.

Unlawful presence in the United States is a civil violation of federal immigration law, and therefore the affirmative defense of citizen's arrest is not available to individuals who forcibly detain others based on their belief that the detained persons are present in the United States without authorization.

Defendants contend:

It is. The common law restrictions on citizen's arrest were meant to safeguard a person's right to be where he had a right to be, and to avoid arrests where the arrestee was unlikely to be taken into actual custody. An illegal entrant has no right to be within the U.S. at all, and is subject to arrest and removal at any time.

Issue of Law 2:

Whether a claim of false imprisonment is available to Plaintiffs.

Plaintiffs contend:

A claim of false imprisonment is available to Plaintiffs. The tort of false arrest or imprisonment "occurs when a person is unlawfully detained without consent" *Torrez v. Knowlton*, 205 Ariz. 550 (App. 2003). "The essence of false imprisonment is the direct restraint of personal liberty or freedom of locomotion, either by actual force or the fear of force." *Deadman v. Valley Nat. Bank of Arizona*, 154 Ariz. 452 (App. 1987).

Defendants are liable to Plaintiffs for false imprisonment or arrest because they detained Plaintiffs at gunpoint without consent, and no justification available under Arizona law applies to exonerate Defendants.

Defendants contend:

One who is convicted of an offense is estopped from asserting lack of probable cause. In this case, there is no dispute that Plaintiffs had knowingly entered the US without authorization. They were arrested by Border Patrol, and returned to Mexico by their own consent. Such a person should be treated, equally with one who is convicted of the offense, as barred from asserting a claim based on false arrest.

Issue of Law 3:

Whether Article II, § 35 of the Arizona Constitution precludes Plaintiffs from recovering punitive damages based upon state law claims.

Plaintiffs contend:

Article II, §35 does not bar Plaintiffs from recovering punitive damages on their state law claims.

Defendants contend:

It does. Art. II, §35, bars recovery of punitive damages by illegal entrants.

Issue of Law 4:

Whether the defense of execution of public duty under A.R.S. § 13-402 is legally available to Defendants.

Plaintiffs contend:

The defense of execution of public duty under A.R.S. § 13-402 is not legally available to Defendants. Such justification is only applicable to conduct that a reasonable person would believe is required or authorized to assist a peace officer in the performance of such officer's duties. *See* A.R.S. § 13-402. No officer requested assistance from any

of Defendants in performing his/her duties. Moreover, Defendants did not see Plaintiffs commit any crime.

Defendants contend:

The statute does not require that law enforcement request assistance. Plaintiffs had illegally entered the country, and Defendant Roger Barnett acted reasonably in assisting Border Patrol in its duties.

Issue of Law 5:

Whether the defense of public necessity under A.R.S. § 13-417 is legally available to Defendants.

Plaintiffs contend:

The defense of public necessity under A.R.S. § 13-417 is not legally available to Defendants. A reasonable person would not have been compelled to forcibly detain Plaintiffs at gunpoint or commit assault and battery upon Plaintiffs to avoid imminent public or private injury. In addition, Defendants' conduct cannot be justified as a public necessity because Defendants cannot show that they had no reasonable alternative to avoiding whatever harm Defendants claim Plaintiffs would cause the public.

The justification of public necessity also does not apply here because the relevant Arizona statute makes clear that "an accused person may not assert the defense [of public necessity] if the person intentionally, knowingly or recklessly placed himself in the situation in which it was probable that the person would have to engage in the proscribed conduct." A.R.S. § 13-417 (B). Here, by conspiring to hunt down and capture Latinos in the area near Douglas, Arizona, Defendants placed themselves in a situation in which it

was probable that Defendants would engage in the armed assault and detention of Plaintiffs.

Defendants contend:

Defendants deny Plaintiffs' factual assertions above, and assert that, as a consideration of law, the defense is available.

Issue of Law 6:

Whether the defense of use of force in law enforcement under A.R.S. § 13-409 is legally available to Defendants.

Plaintiffs contend:

The defense of use of force in law enforcement under A.R.S. § 13-409 is not legally available to Defendants. Defendants are not law enforcement officials and the statute is applicable only as a justification for the use of physical force during an arrest by an officer of the law. *See State v. Yoshida*, 195 Ariz. 183, 986 P.2d 216 (Ct. App. 1998); *State v. Fontes*, 195 Ariz. 229, 232, 986 P.2d 897, 900 (Ct. App. 1998) (explaining that the statute justifies only *an officer's* use of physical force while making an arrest under certain circumstances).

Defendants contend:

The above is, again, a factual rather than legal argument. Defendants have above denied the use of force.

VII.

ISSUES OF LAW DEEMED MATERIAL BY A PARTY

The following additional issues of law are deemed material either by Plaintiffs or by Defendants, but not by both parties.

Deemed Material by Plaintiffs:

Issue of Law:

Whether Article II, § 35 of the Arizona Constitution is invalid under the U.S. Constitution because it is preempted by federal law and because it violates the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs contend:

Even if Article II, § 35 of the Arizona Constitution can be read to bar Plaintiffs from recovering punitive damages on their state law claims, the state constitutional provision is invalid under the U.S. Constitution. Plaintiffs have briefed the issue extensively in their Response to Defendants' Motion to Dismiss Punitive Damages Claims. See Dkt. Entry No. 158-3 at 9-22. In sum, Article II, § 35 cannot withstand constitutional scrutiny because it is preempted by federal law and encroaches on exclusive federal prerogatives, including federal authority to regulate immigration and to enforce immigration law. See U.S. CONST. ART. VI, cl.2; see also e.g., *Gade v. Nat'l Solid Wastes Management Assoc.*, 505 U.S. 88, 108 (1992).

Article II, § 35 is also invalid because it violates the Fourteenth Amendment's Equal Protection Clause. The Supreme Court has held that laws designed to harm a politically unpopular group or to deprive it of a benefit for no reason other than to impose

a disability on the group are constitutionally invalid under the Equal Protection Clause.

See Romer v. Evans, 517 U.S. 620, 634-35 (1996).

Defendants contend:

Article II §35 is a valid use of Arizonans' ability to control what actions may be brought under State law. It does not regulate any area subject to federal pre-emption. That the national government regulates immigration does not mean that State courts cannot regulate civil actions brought by those who violate Federal and State law.

The provision does not fail Equal Protection because it affects no suspect class, impairs no fundamental right, and serves a valid State interest. Moreover, a claim of unconstitutionality requires notice and certification under local rule 24.1.

Deemed Material by Defendants:

Issue of Law 1:

Whether Latinos are a protected class within 42 U.S.C. §1985(3).

Plaintiffs contend:

The parties have briefed the issue regarding the applicability of 42 U.S.C. 1985(3) in this case and this Court has determined that the statute is applicable to the actions alleged to have been taken by Defendants. *See* Dkt. Entry No. at 3-4.

Latinos are a class protected by 42 U.S.C. § 1985(3). Despite Defendants' arguments to the contrary, the statute is not limited to protecting African Americans. *See Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). The second of the four elements of the statute states that a plaintiff must demonstrate "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffith v. Breckenridge*, 403 U.S. 88, 102 (1971). The statute thus protects any

class of persons who can show that its members “require and warrant special federal assistance in protecting their civil rights.” *Sever*, 978 F.2d at 1536.

Defendants contend:

Latinos are not. Case law indicates that courts should be reluctant to extend the statute beyond its original purpose of protecting African-Americans against oppression. We will not repeat here the argument made in our dispositive motions.

Issue of Law 2:

Whether 42 U.S.C. §1985(3) protects a right to interstate travel outside a 14th Amendment context of State action, or a 13th Amendment context of conspiracy against African-Americans, and reaches private conduct that relates to interstate travel.

Plaintiffs contend:

The parties have briefed this question and this Court has already determined the issue in favor of Plaintiffs. *See* Dkt. Entry No. 184 at 3.

As correctly decided by this Court, Section 1985(3) extends beyond the context of state action and reaches purely private conspiracies when certain federally protected rights are at issue, including the right to interstate travel. *See Griffin*, 403 U.S. at 105; *Scott v. Ross*, 140 F.3d 1275, 1284 (“With a few exceptions, claims brought pursuant to § 1985(3) do not require state action.”)

Defendants contend:

It does not. The statute has dual constitutional roots, in the 13th and 14th Amendments, one directed at the badges and incidents of slavery, the other at State Action. It does not outlaw conduct that is outside either Amendment.

Issue of Law 3:

Whether Plaintiffs have federal rights protected by 42 U.S.C. §1985(3), including the right to interstate travel.

Plaintiffs contend:

The parties have briefed this question and this Court has already determined the issue in favor of Plaintiffs. *See* Dkt. Entry No. 184 at 4.

42 U.S.C. §1985(3) makes it unlawful for two or more persons to conspire, “for the purpose of depriving . . . [a] class of persons. . .” of certain federally protected rights, “if one or more persons engaged [in the conspiracy], cause to be done, any act in furtherance of the objects of such conspiracy, whereby another is injured in his person or property. . .”

In this case, Defendants unlawfully conspired to deprive a class of persons (Latinos) of certain federally protected rights and Plaintiffs were injured in their person by Defendants’ acts in furtherance of the conspiracy. Because there is evidence that Plaintiffs were targets of the conspiracy between Defendants because they were Latino, Plaintiffs’ immigration status at the time they were targeted by Defendants is irrelevant.

Defendants contend:

Illegal entrants have no right to be within the U.S., let alone to travel within it. They have no standing to plead the rights of other individuals who are within the U.S. legally.

Issue of Law 4:

Whether a denial of right to interstate travel is a denial of equal protection of laws within 42 U.S.C. §1985(3).

Plaintiffs contend:

It is irrelevant from where the right to interstate travel is derived, because the Supreme Court has nevertheless determined that 42 U.S.C. 1985(3) protects against the denial of the right to interstate travel, *Griffin*, 403 U.S. at 102-105, a holding that this Court has followed. See Dkt. Entry No. 184 at 3-4. Contrary to Defendants' argument, the statute protects against both the denial of the equal protection of the laws *and* the denial of "equal privileges and immunities under the law." See 42 U.S.C. 1985(3).

Defendants contend:

It is not. The statute relates to a deprivation of equal protection of the laws. We will not here repeat the arguments made in our dispositive motions.

Issue of Law 5:

Whether 42 U.S.C. §1985 applies to conduct or conspiracy that limits intrastate travel, and at most indirectly affects interstate movement.

Plaintiffs contend:

Whether 42 U.S.C. § 1985 applies to conduct or conspiracy aimed at intrastate travel is not relevant here because the evidence shows that Defendants aimed at stopping Latinos from engaging in interstate travel.

Defendants contend:

It does not. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. at 275, 277. We will not here repeat the remaining research set out in our dispositive motions.

Issue of Law 6:

Whether an action under 42 U.S.C. §1981 requires proof of State action.

Plaintiffs contend:

The parties have briefed this question and this Court has already determined the issue in favor of Plaintiffs. *See* Dkt. Entry No. 184 at 4-5.

42 U.S.C. § 1981(c) states that the “rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.” As this Court correctly determined, the plain language of 42 U.S.C. § 1981 thus makes it clear that the statute protects against private parties as well as state actors.

Defendants contend:

It does. We will not here repeat the arguments made in our dispositive motions.

Issue of Law 7:

Whether an alleged violation of A.R.S. §26-123 gives rise to a negligence per se liability.

Plaintiffs contend:

The parties have briefed this question and this Court has already determined the issue in favor of Plaintiffs. *See* Dkt. Entry No. 184 at 5-6.

In Arizona, the breach of a statute intended to protect the public safety is evidence of negligence per se. *Crown v. Raymond*, 159 Ariz. 87, 89, 764 P.2d 1146, 1148 (App. 1998). Here, Defendants acted in violation of A.R.S. § 26-123, Arizona’s anti-militia statute. This Court correctly found that this statute, like other statutes regulating firearms, is motivated at least in part by a concern for public safety. Therefore, a violation of A.R.S. §26-123 gives rise to negligence per se liability.

Defendants contend:

It does not. The statute is intended to protect the State, not private individuals.