UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FA6117

NATIONAL COUNCIL OF LA RAZA, NEW YORK IMMIGRATION COALITION, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, LATIN AMERICAN WORKERS PROJECT, and UNITE, *Plaintiffs*, *v.* JOHN ASHCROFT, Attorney General of the United States, TOM RIDGE, Secretary of Homeland Security, ROBERT MUELLER, Director, Federal Bureau of Investigation, MICHAEL GARCIA, Assistant Secretary of Homeland Security in charge of the Bureau of Immigration and Customs Enforcement, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, FEDERAL BUREAU OF INVESTIGATION, and BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, *Defendants*.	No. 03-CV-6324 (ILG/ASC) (Glasser, J.) (Chrein, M.J.)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

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PRELIMINARY STATEMENT

This case concerns the National Crime Information Center ("NCIC"), a database maintained by defendant Federal Bureau of Investigation ("FBI"). Five plaintiff organizations purporting to act on behalf of various segments of the immigrant community commenced this action seeking declaratory and injunctive relief to prevent the Government from including in the NCIC certain information about two specified categories of aliens, and from disseminating that information to the state and local law enforcement agencies which use that database. One category of aliens allegedly affected by the Government's actions are persons with outstanding orders of removal who have failed to comply with those orders and who have unlawfully remained in the United States ("Absconders"). The other category consists of individuals who have violated a requirement of the National Security Entry-Exit Registration System ("NSEERS"), a program established by the Attorney General in June 2002 to assist the Government in tracking the movements of aliens from certain countries and of aliens believed to present a potential threat to national security. Plaintiffs contend that the inclusion of information about Absconders and NSEERS violators in the NCIC database exceeds the Government's authority and therefore violates the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 501 *et seq.* Plaintiffs further contend that the inclusion of this information induces and causes state and local police agencies to unlawfully arrest aliens in violation of the Supremacy Clause and the Fourth Amendment.

Pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6), the complaint must be dismissed. As a threshold matter, the Court lacks subject matter jurisdiction because plaintiffs lack standing to raise the claims asserted in the complaint. In the absence of allegations of concrete injury-in-

fact actually caused by the Defendants' alleged actions, the complaint fails to allege facts sufficient to confer organizational standing on plaintiffs.

Even if plaintiffs could somehow establish this Court's subject matter jurisdiction to hear their claims, their complaint must be dismissed for failure to state a claim upon which relief can be granted. Count I of the complaint, alleging that the Government acted *ultra vires* in entering and disseminating information about Absconders and NSEERS violators in the NCIC, fails to state an actionable claim under the APA. Plaintiffs' allegations that the Government lacks the statutory authority to include that information in the NCIC ignore numerous statutory sections providing that authority, are based on an incorrect reading of 28 U.S.C. § 534 and 8 U.S.C. § 1252c, and fail as a matter of law. Count II of the complaint, alleging that the Government is violating the Supremacy Clause and the Fourth Amendment by "causing and inducing" state and local law enforcement agencies to make unlawful warrantless arrests of individuals wanted for immigration violations, likewise fails to state a claim. Count II is predicated on the assumptions that Absconders and NSEERS violators have not committed any crimes, that state and local law enforcement agencies lack the authority to make warrantless arrests of such individuals based solely on their immigration violations, and that federal law preempts state and local agencies from attempting to exercise such authority. As set forth below, all of these assumptions are wrong as a matter of law. Nothing in federal law precludes or preempts state and local police officials from exercising any powers they may possess under state law to arrest Absconders and NSEERS violators without a warrant on account of their federal crimes, or, indeed, on account of their non-criminal violations of the federal immigration laws. Plaintiffs' constitutional claims must therefore be dismissed.

STATEMENT OF FACTS

According to the complaint,[1/] the FBI established a clearinghouse of federal, state, local, and international criminal justice records in 1930. Compl. ¶ 22. In 1967, this clearinghouse was renamed the NCIC, which the complaint describes as a "host-computer and telecommunication network" which provides information "to a control terminal agency in each of the fifty states." Compl. ¶ 23. This system allegedly provides "direct on-line access to its computerized index of criminal justice information for more than 700,000 law enforcement officers nationwide, twenty-four hours per day, 365 days per year." *Id.* Specifically, over 17,000 law enforcement agencies at multiple levels of government are alleged to submit queries to the NCIC in the performance of their daily activities, resulting in an average of 3.7 million informational transactions per day. Compl. ¶¶ 2, 24.

Historically, the database is alleged to have contained "principally criminal justice records, such as rap sheets, criminal warrants, and stolen property records." Compl. ¶ 25. As alleged by plaintiffs, the Government recently began to enter information into the database about two discrete categories of aliens – information which the complaint describes as "civil immigration records regarding hundreds of thousands of non-citizens." Compl. ¶¶ 1, 29. Specifically, in 2002, the Government allegedly began to enter information into the database about Absconders – aliens with outstanding final orders of removal who are believed to have remained in the United States. Compl. ¶ 30. There are alleged to be 400,000 Absconders living in the United States, and the Defendants are claimed to have already entered information about 19,000 Absconders into the NCIC. Compl. ¶ 30, 38. More recently, in 2003, the Government

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[1/] Since this is a motion to dismiss made at the pleadings stage, the facts set forth herein are as alleged in the complaint. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

allegedly began to enter information into the NCIC about NSEERS violators, defined in the complaint as "persons whom defendant DHS believes have violated a requirement" of the NSEERS program; plaintiffs claim to be unaware of the size of this group of violators, except to say that information about "dozens" of such individuals has already been entered into the database. Compl. ¶ 32, 38.

According to the complaint, the agency with the authorization and responsibility for compiling and entering Absconder and NSEERS violator information into the NCIC is the Department of Homeland Security's ("DHS") Law Enforcement Support Center ("LESC"). Compl. ¶ 35. When a law enforcement agent runs an NCIC check on an individual, if the Immigration Violator File returns a positive hit, the agent is instructed to contact the LESC immediately for confirmation of the information. Compl. ¶ 36. Once the information is confirmed, DHS allegedly requests the police officer to arrest or detain the alien until DHS officials can arrive to take custody of him. Compl. ¶ 37. Plaintiffs claim that DHS and its predecessor, the Immigration and Naturalization Service ("INS"), have a poor track record for maintaining data reliability, resulting in "numerous inaccuracies" in the information which DHS provides to the FBI for inclusion in the NCIC. Compl. ¶¶ 4, 39-40, 76. Plaintiffs further claim that persons described in the database as Absconders may not have been given proper notice of one or more determinations in their immigration proceedings and therefore may not be aware that they are subject to a final order of removal; in addition, a number of NSEERS violators are alleged to have been unaware of their failure to comply with the registration requirements of the NSEERS program. Compl. ¶¶ 41-42.

According to plaintiffs, the Defendants have "facilitated," "encouraged, caused, and induced state and local police to arrest immigrants listed in the NCIC" in the course of their

routine duties. Compl. ¶¶ 1, 3, 6, 51. Although some local jurisdictions have "resisted" this request, others have adopted a policy or practice of arresting Absconders and/or NSEERS violators based on information listed in the NCIC. Compl. ¶¶ 52-53. Plaintiffs claim that police in New York, Illinois, Minnesota, Connecticut, Florida, and elsewhere have arrested aliens with outstanding removal orders or with a record of NSEERS violations, in reliance on the information they received in the NCIC. Compl. ¶ 54. Plaintiffs allege that these arrestees are typically not informed of their *Miranda* rights, are not made subject to state or federal criminal prosecution, and are detained by local police only until they are transferred to the custody of the Bureau of Immigration and Customs Enforcement ("ICE"). Compl. ¶ 55.

As alleged in the complaint, the inclusion in the NCIC of information concerning Absconders and NSEERS violators has "created fear in immigrant communities," which has allegedly caused immigrants to become more reticent about coming forward to state and local police authorities with information they may possess about the commission of various crimes. Compl. ¶¶ 61-66. As a result, "police effectiveness is undermined and public safety is diminished for all." Compl. ¶ 5, 61. In addition, the Defendants' practices allegedly "place immigrants at imminent risk of unlawful arrest, inhibit immigrants from accessing vital emergency government services such as police and fire protection, and compromise the privacy interests of immigrants." Compl. ¶¶ 3, 67. Allegedly, the practice of including the information in the database also "diverts scarce resources from local policing priorities, and exposes officers untrained in the complexities of immigration law to liability for wrongful arrests. Police enforcement of immigration laws also encourages racial and ethnic profiling . . . ." Compl. ¶ 5.

ARGUMENT

I. STANDARD OF REVIEW

In deciding a motion to dismiss, whether upon the ground of lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted, the allegations in the complaint are assumed to be true and should be construed in the light most favorable to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The complaint must be dismissed if it is beyond doubt that plaintiff can prove no set of facts which would allow this Court to exercise subject matter jurisdiction over the case and would entitle her to the relief she seeks in her complaint. *See Conely v. Gibson*, 355 U.S. 41, 45-46 (1957); *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1001 (2d Cir. 1986).

II. BECAUSE PLAINTIFFS LACK STANDING TO BRING THESE CLAIMS, THE COMPLAINT MUST BE DISMISSED FOR LACK OF JURISDICTION.

Plaintiffs are ***not*** individual alien Absconders and NSEERS violators who allege that information about them was actually entered into the NCIC database, resulting in their actual or imminent unlawful arrest by state or local law enforcement agencies. Rather, plaintiffs are organizations who claim to have unidentified alien Absconders and NSEERS violators among their membership, and who allege on behalf of those aliens that information about them ***may*** have been added to the NCIC database, which ***may*** subject them to some speculative future risk of arrest by state or local authorities. *See generally* Compl. ¶¶ 68-76. Such allegations are insufficient as a matter of law to give plaintiffs standing to bring these claims.

A. Requirements for Standing.

Article III, section 2 of the Constitution limits the subject matter jurisdiction of federal courts to actual cases and controversies. A corollary to this requirement of an actual case

or controversy is that plaintiffs bringing suit in federal courts must demonstrate that they have standing to seek the relief sought in the complaint. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). To make such a showing, a plaintiff must satisfy three requirements:

First, a plaintiff must show an "injury in fact," which is defined as "an invasion of a legally protected interest which is (a) concrete and particularized [meaning that the injury must affect the plaintiff in a personal and individual way], and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), in turn quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *see also Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-41 n.16 (1972). If the injury has not already occurred, plaintiffs must demonstrate a "credible threat" of imminent future injury, *see, e.g., Presbyterian Church (USA) v. United States*, 870 F.2d 518, 528-29 (9th Cir. 1989), and that threat must be real and immediate. *See Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *see also Eckles v. City of Corydon*, 341 F.3d 762, 767 (8th Cir. 2003) (plaintiff must allege facts which show a substantial likelihood that he will suffer imminent future injury to obtain declaratory judgment).

Second, the plaintiff must demonstrate a "causal connection between the injury and the conduct complained of." *Defenders of Wildlife*, 504 U.S. at 560. This means that the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

Third, the injury in question must be redressable by the relief sought by the complaint. This means that it "must be 'likely,' as opposed to merely 'speculative,' that the

injury will be 'redressed by a favorable decision.'" *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38); *see also Allen,* 468 U.S. at 750-51.

The party invoking federal jurisdiction bears the burden of establishing all three of these elements. *See, e.g., Northeastern Fla. Chapter, Associated General Contractors of Am. v. Jacksonville*, 508 U.S. 656, 663 (1993); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Warth*, 422 U.S. at 508; *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003). Moreover, when the plaintiff predicates its claim to standing not on injury to itself but on injury to third parties on whose behalf it claims to be acting, its burden is "substantially more difficult" to establish. *Allen*, 468 U.S. at 758; *see also Defenders of Wildlife*, 504 U.S. at 562; *Simon*, 426 U.S. at 44-45; *Warth*, 422 U.S. at 505. Such is the case here, where plaintiffs assert the existence of a case or controversy based on what has been called organizational or associational standing. *See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551-52 (1996).

B. Plaintiffs Have Failed to Allege Injury-in-Fact.

It is well-established that an organization or association has standing to sue on behalf of its members only when (1) "its members would otherwise have standing to sue in their own right," (2) "the interests at stake are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 181 (2000); *see also Local 751,* 517 U.S. at 551-53; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Warth*, 422 U.S. at 511. Thus, such an organization must first establish that at least one of its members has suffered an injury in fact sufficient to satisfy the first requirement for standing. *See Simon*, 426 U.S. at 40 (the association "can establish standing only as representatives of those of their members who have been injured in fact, and thus could

have brought suit in their own right."). Plaintiffs here have not alleged facts sufficient to establish this element.

Plaintiffs generally allege that "at least one member of each plaintiff organization" is an Absconder or NSEERS violator "and lives or works in a jurisdiction whose state or local police have a policy or practice of making immigration arrests in reliance on NCIC information." Compl. ¶ 68. Plaintiffs do not identify these alleged members or the jurisdictions in which they are alleged to live or work. Nor do they identify any of the policies or practices which they claim to be illegal. Plaintiffs further allege that Defendants "have entered or imminently will enter" information about these Absconders and NSEERS violators into the NCIC. Compl. ¶ 69.

They go on to allege that some of their unidentified members – not necessarily the Absconders and NSEERS violators referred to in paragraph 68 – "regularly come into contact with state and local police." Compl. ¶ 70. They provide no description as to the nature of or circumstances surrounding these contacts, nor do they allege that any of these contacts has taken place in consequence of any information disseminated through the NCIC.

Still other unidentified members, who may or may not be the same as the members referenced in paragraphs 68 and 70, "work in settings in which they are frequently questioned by the police." Compl. ¶ 71. However, there is no allegation that any of these individuals is questioned as the result of any information obtained through the NCIC, and there is no description as to the nature of or circumstances surrounding this questioning.

Another group of unidentified members, which again is not alleged to be the same as any of the various members mentioned in paragraphs 68, 70, and 71, allegedly "appear Arab, Muslim, or South Asian," and "have been regularly questioned by police in the course of their daily lives." Compl. ¶ 72. Again, there is no allegation that this questioning was the result of

any information obtained through the NCIC (or, for that matter, on account of the individuals' race, ethnicity, or appearance), and no description as to the nature of or circumstances surrounding this questioning.

In describing these various groups of unidentified members, the complaint contains no allegation that any member of any plaintiff organization has actually been arrested, detained, deported, mistreated, or otherwise made the subject of any unlawful state action as the result of the entry or dissemination of any information in the NCIC. Plaintiffs instead describe their members' alleged injuries as being strictly prospective in nature, and these speculative injuries are alleged to take two forms. Compl. ¶¶ 73-75.

First, plaintiffs claim that those of their members who have already been listed in the NCIC as Absconders or NSEERS violators "are at imminent risk of arrest by state or local law enforcement officials who stop or question them." Compl. ¶ 73. As will be seen below (*see infra* pp. 28-31), any arrest by state or local law enforcement officers of Absconders or NSEERS violators listed in the database would be entirely lawful and therefore would not constitute "an invasion of a legally protected interest." *Defenders of Wildlife,* 504 U.S. at 560. Even if it did, the allegation fails because it is neither "concrete" nor "particularized" – as noted above, plaintiffs do not identify these alleged members or the jurisdictions in which they live or work. In the absence of allegations that specific members have actually been or actually will be unlawfully arrested based on information reported in the NCIC database, the allegation that some members subjectively fear that their arrests are imminent is strictly "conjectural" and "hypothetical," *id.,* and plaintiffs have not alleged a "credible threat" of real and immediate future injury. *See Golden,* 394 U.S. at 109; *see also Defenders of Wildlife,* 504 U.S. at 564 n.2 ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond

its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is *certainly* impending." (citations and internal quotation marks omitted; emphasis in original)).

In *United Presbyterian Church in the U.S.A. v. Reagan,* 738 F.2d 1375 (D.C. Cir. 1984), the District of Columbia Circuit rejected a claim of standing based on allegations similar to those offered by plaintiffs here. In the suit, a number of political and religious organizations sued the President and various Government officials to enjoin the conduct of certain intelligence and counterintelligence activities authorized by an Executive Order, alleging that the conduct of those activities subjected their members to "the immediate threat of being targeted for surveillance" in violation of their constitutional rights. *Id.* at 1377. Writing for the court, then-Judge Scalia stated that the plaintiffs' alleged grievances were "insufficient to satisfy the injury-in-fact requirement imposed by Article III of the Constitution" because the plaintiffs had failed to allege injury which was "distinct and palpable," "direct," and "both real and immediate, not conjectural or hypothetical." *Id.* at 1378 (citations and internal quotations omitted).

As do plaintiffs here, the plaintiffs in *United Presbyterian* had alleged that "their activities are such that they are especially likely to be targets of the unlawful activities authorized by the order." *Id.* at 1380; *compare* Compl. ¶¶ 70-73. The reason that these allegations fell short, Judge Scalia explained, was that the order in question "does not *direct* intelligence-gathering activities against all persons who could conceivably come within its scope, but merely *authorizes* them. To give these plaintiffs standing on the basis of a threatened injury would be to acknowledge, for example, that all churches would have standing to challenge a statute which provides that search warrants may be sought for church property if there is reason to believe that felons have taken refuge there. That is not the law." *Id.* at 1380 (emphasis in original).

Similarly, the actions of the Defendants in entering Absconder and NSEERS violator information into the NCIC database do not *direct* state and local law enforcement agencies to arrest aliens for whom there is a positive NCIC hit; they merely provide information to those agencies, which may in turn use the information to effectuate an arrest to the extent that they believe they have the authority to do so under state law. *See infra* p. 33. Plaintiffs' conclusory allegations of imminent unlawful arrest thus do not satisfy the injury-in-fact requirement.[2/]

Second, plaintiffs allege that, as the result of the alleged entry into the NCIC of information about those of their members who are Absconders and NSEERS violators, their members as a whole "reasonably fear that if they contact state or local law enforcement officials to report a crime, or otherwise speak or communicate with government officials on a matter of public or private concern, they may be arrested based on an NCIC listing as an 'absconder' or 'NSEERS violator.'" Compl. ¶ 74; *see also* Compl. ¶¶ 5, 61-66. In effect, plaintiffs allege that the Defendants' actions have a chilling effect on their alleged right to contact law enforcement or government officials. Such allegations have repeatedly been rejected as insufficient to establish the injury-in-fact element of the standing requirement. In *Laird v. Tatum*, 408 U.S. 1 (1972), the Supreme Court dismissed for lack of a justiciable controversy a complaint alleging that an intelligence-gathering and distribution system developed by the Army had a chilling effect on the exercise of the plaintiff's constitutional rights. The Court explained that, absent allegations of specific action against the plaintiffs, there was no actual case or controversy, notwithstanding the plaintiffs' allegations that they feared that the Army might at some future date misuse the

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[2/] *See also Reno v. Catholic Social Servs.*, 509 U.S. 43, 57-58 (1993) (A federal court generally ought not entertain a request for an injunction or declaratory judgment regarding the validity of an administrative regulation unless the request is brought by someone who has actually been concretely affected by the regulation. The mere existence of the regulation is not enough; rather, the regulation must actually have been applied to the plaintiff.).

information in a way that would cause them direct harm. 408 U.S. at 11-14. *See also United Presbyterian*, 738 F.2d at 1378-80 (finding allegations that government's alleged surveillance program had a chilling effect on plaintiffs' constitutionally protected activities to be insufficient to establish standing); *Fifth Ave. Peace Parade v. Gray*, 480 F.2d 326, 330-33 (2d Cir. 1973).

C. Plaintiffs Have Failed to Allege Causation.

The second requirement for standing is that the plaintiff must allege a "causal connection between the injury and the conduct complained of." *Defenders of Wildlife*, 504 U.S. at 560. Much of the discussion in the preceding section is also germane to this element: as noted above, plaintiffs' descriptions of the injuries allegedly suffered by their members (if any) do not concretely connect those injuries to the specific actions of the Defendants in adding certain information to the database. *See supra* pp. 9-10; Compl. ¶¶ 68-72.

Plaintiffs' efforts to establish the requisite causal connection suffer from an additional difficulty. As the Supreme Court held in *Simon*, 426 U.S. at 41-42, standing cannot be established if the injury in question is the "result [of] the independent action of some third party not before the court." To the extent that plaintiffs complain about the risk of being unlawfully arrested by state and local law enforcement agencies (Compl. ¶ 73), that is a risk which can only be realized as the result of the independent actions of those agencies, over which the Defendants possess no cognizable control. *See infra* pp. 28-31. Put another way, any chain of causation which plaintiffs may allege between the Defendants' allegedly unlawful actions and the concrete injury of an unlawful arrest of necessity contains a link supplied by agencies who are not before this Court. The presence of such a link is fatal to the justiciability of plaintiffs' alleged controversy. *Simon*, 426 U.S. at 41-42.

III. EVEN ASSUMING THE JURISDICTION OF THIS COURT, COUNT I OF THE COMPLAINT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UNDER THE APA.

Count I of the complaint asserts that the Defendants violated the APA (specifically, 5 U.S.C. § 702), in that they "exceeded the statutory authority granted them by Congress to establish and administer the NCIC database, pursuant to 28 U.S.C. § 534 and 8 U.S.C. § 1252c(b)." Compl. ¶ 80. According to plaintiffs, Congress "has not authorized the entry or dissemination of administrative warrants for 'absconders' or information regarding alleged 'NSEERS violators' via the NCIC." Comp. ¶ 79. The allegations in Count I are predicated on assumptions which are incorrect as a matter of law, and that count must be dismissed for failure to state an actionable claim.

Repeatedly throughout their complaint, plaintiffs allege that Congress placed express limitations on the types of information the FBI is permitted to include in the NCIC. *See, e.g.,* Compl. ¶¶ 2 ("Congress's careful delineation of the categories of criminal justice information that may lawfully be collected and exchanged through this powerful database"); 22 ("Congress scrupulously limited the types of records that the FBI was empowered to acquire and exchange through its vast new clearinghouse"); 29 ("careful statutory limitations on entry and dissemination of non-criminal records via the NCIC"); 78 ("Congress has specifically enumerated the categories of information that may be lawfully entered into and disseminated via the NCIC database"). Although plaintiffs nowhere cite the basis for these characterizations of the law, they refer to 28 U.S.C. § 534 and 8 U.S.C. § 1252c(b) in claiming that the Defendants exceeded the authority granted them by those statutes to establish and administer the NCIC database. *See* Compl. ¶ 80. Such a claim is entirely without merit.

Plaintiffs' reading of 28 U.S.C. § 534 is not supported by the plain text of the statute, or by its legislative history. The portions of section 534 which are germane are as follows:

> **§ 534. Acquisition, preservation, and exchange of identification records and information; appointment of officials**
>
> (a) The Attorney General shall –
>
> (1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; . . . and
>
> (4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government . . ., the States, cities, and penal and other institutions. . . .

28 U.S.C. § 534(a)(1),(4).[3/]

A. Because Information about Absconders and Willful NSEERS Violators Constitutes Crime Records, the Plain Language of 28 U.S.C. § 534(a) Authorizes Defendants to Acquire, Collect, and Disseminate It.

Throughout their complaint, plaintiffs repeatedly characterize the Absconder and NSEERS violator information which the government is allegedly entering into the NCIC database as "civil immigration information" and as "non-criminal records." *See, e.g.,* Compl. ¶¶ 1, 2 ("non-criminal administrative information"), 4, 6, 29, 54, 80, 86. Likewise, they repeatedly allege that the inclusion of these data in the NCIC will lead state and local law enforcement agents to make what they describe as "federal immigration arrests" of aliens. *See, e.g.,* Compl. ¶¶ 1, 3, 5 ("police enforcement of immigration laws"), 6, 49, 54, 57, 84, 86. Plaintiffs' allegations therefore appear to be predicated on an assumption that Absconders and NSEERS

[3/] *See also* 28 C.F.R. §§ 0.85(b), 20.31(a); *see generally* 28 C.F.R. Part 20.

violators have committed no crime, and that any ensuing arrest is strictly for civil and/or administrative violations of immigration laws. This assumption is unfounded.

Absconders are criminals. By definition, they are individuals who are subject to an outstanding order of removal and who have remained in the United States in contravention of such orders. Compl. ¶ 30. This constitutes a federal felony, punishable by imprisonment of up to four years, and, in certain cases, up to ten years. *See* 8 U.S.C. § 1253(a)(1). As set forth in that statute, any alien subject to a final order of removal who

> (A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal . . .,
>
> (B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,
>
> (C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or
>
> (D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order,

is guilty of a federal felony. 8 U.S.C. § 1253(a)(1). Moreover, any alien who willfully fails to comply with the terms of any pre-removal release under 8 U.S.C. § 1231(a)(3) is guilty of a federal misdemeanor punishable by a fine of up to $1,000 and by up to one year's imprisonment. 8 U.S.C. § 1253(b).

Likewise, NSEERS violators are criminals, at least to the extent that their violations of the NSEERS registration requirements are willful.[4/] Under 8 U.S.C. § 1306, any alien who willfully fails to register with the Government when required to do so, who fails to provide the Government with updated information as to his whereabouts, and/or who provides false or fraudulent information to the Government in connection with his alien registration, is guilty of a federal misdemeanor punishable by a fine of up to $1,000 and by up to six months' imprisonment. 8 U.S.C. § 1306(a),(b),(c).

As a result of these provisions, the information which the Government allegedly enters into the NCIC database with regard to Absconders and willful NSEERS violators is not, as alleged, "civil immigration information," but rather "crime" records establishing that the individual in question has committed a crime and is wanted for arrest on account of that crime. These "crime" records plainly fall within the scope of section 534(a)(1),(4), and the FBI is authorized to acquire, collect, preserve, and disseminate them. *See, e.g., Doe v. Webster,* 606 F.2d 1226, 1231 (D.C. Cir. 1979) (describing the compilation of the records described in section 534(a)(1) as a "statutory duty").

[4/] The NSEERS program was initiated pursuant to authority granted by 8 U.S.C. § 1305(b). *See* 8 C.F.R. § 264.1(f). When the program was established effective September 11, 2002, its purpose was to "broaden the special registration requirements for nonimmigrant aliens from certain designated countries, and other nonimmigrant aliens whose presence in the United States requires closer monitoring, to require that they provide specific information at admission, and to ensure that they depart the United States at the end of their authorized stay." AG Order No. 2608-2002, 67 Fed. Reg. 52,584 (INS Aug. 12, 2002). DHS has recently published an interim rule which suspends many of the requirements which had originally been put into place for NSEERS, including the requirements that aliens specially registered at a port of entry must appear before DHS officials thirty days after their admission into the United States for a continuing registration interview (*see* 8 C.F.R. § 264.1(f)(3)) and the requirement that all aliens who are subject to special registration must appear for an annual re-registration interview (*see* 8 C.F.R. § 264.1(f)(5)). *See* ICE No. 2301-3, 68 Fed. Reg. 67,578 (DHS Dec. 2, 2003).

Whether the information is entered into the database to facilitate the arrest of the alien on criminal charges under 8 U.S.C. §§ 1253 or 1306, or to facilitate the apprehension of the alien so that he can be deported under 8 U.S.C. § 1231, is irrelevant. Once an Absconder or willful NSEERS violator has been taken into custody, the Government can determine, in the exercise of its prosecutorial discretion, whether it wishes to criminally prosecute the alien, to remove the alien, or to take some other course of action. This discretionary determination is, of course, outside the scope of this Court's judicial review powers. *See, e.g., Heckler v. Chaney*, 470 U.S. 821 (1985); *Walker v. Reno*, 925 F. Supp. 124, 127-28 (N.D.N.Y. 1995). For purposes of plaintiffs' complaint, the critical consideration is that Absconders and willful NSEERS violators are criminals as to whom the Government has the ***option*** of prosecution, and the availability of that option makes them subject to arrest on criminal charges.

B. Even if the Information about Absconders and NSEERS Violators Does Not Constitute Crime Records, Both the Plain Language and the Legislative History of 28 U.S.C. § 534(a) Support the Acquisition, Collection, Preservation, and Dissemination of the Information as "Other Records," and Numerous Immigration Statutes and Regulations Further Authorize the Collection and Dissemination of the Information.

Even if the information concerning the Absconders and NSEERS violators which is entered into the NCIC database did not amount to "crime" records, its inclusion in the database is still justified by section 534's catch-all allowance for "other records." The meaning of that provision can be extrapolated from the plain wording of the text: since the series immediately preceding the words "other records" included "criminal identification records" and "crime" records, the words "other records" ***must*** refer to some unspecified type of records which are not crime records and not criminal identification records. Any other reading of the provision would render the words "other records" superfluous. Thus, far from a "careful delineation" and

"scrupulous limitation" on the type of records which section 534 authorizes the FBI to maintain (*see* Compl. ¶¶ 2, 22, 29, 78), Congress has left the scope of that information open-ended, to be fleshed out at the discretion of the Attorney General. Manifestly, the breadth of this provision permits the FBI to accept into the NCIC database immigration records of the sort at issue here.

This reading of the statute is supported by its legislative history. Section 534 is the product of a 1966 statute which combined and reorganized two predecessor provisions: 5 U.S.C. § 300 (1964) and 5 U.S.C. § 340 (1964). *See* historical and statutory note following 28 U.S.C.A. § 534 (2004), citing Pub. L. No. 89-554, § 4(c), 80 Stat. 378, 616 (Sep. 6, 1966). Prior to the enactment of that 1966 statute, the most recent source for 5 U.S.C. § 300 was the Department of Justice Appropriations Act for fiscal year 1965, Pub. L. No. 88-527, title II, § 201, 78 Stat. 717 (Aug. 31, 1964). In that statute, Congress stated that "for the acquisition, collection, classification and preservation of ***identification and other records*** and their exchange with, and for the official use of, the duly authorized officials of the Federal Government, of States, cities, and other institutions, . . . the Attorney General is authorized to appoint officials who shall be vested with the authority necessary for the execution of such duties." *Id.*, codified at 5 U.S.C. § 300 (1964) (emphasis added); *see also* 1964 U.S.C.C.A.N. 815.

Congress had enacted similar provisions, containing substantially the same language, in each appropriations act for the Department of Justice dating back to 1921. *See* historical note following 5 U.S.C. § 300 (1964); historical and statutory note following 28 U.S.C.A. § 534. The original 1921 appropriations statute was enacted to fund the FBI's General Intelligence Division, which was established during World War I to collect criminal and non-criminal information about enemy aliens, anarchists, and communists, in connection with the FBI's mandate to enforce several statutes of that era relating to certain categories of aliens and to certain potential

threats to national security. *See* Act of Mar. 1, 1921, ch. 89, § 1, 41 Stat. 1175; Act of Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1410.

Meanwhile, in 1930, Congress enacted the second of the two predecessor provisions, which came to be codified at 5 U.S.C. § 340 (1964). *See* Act of June 11, 1930, Pub. L. No. 71-337, ch. 455, 46 Stat. 554. That provision established a division of the FBI known as the Division of Identification and Information, which was "vested with the duty of acquiring, collecting, classifying, and preserving ***criminal identification and other crime records*** and the exchanging of said criminal identification records with the duly authorized officials of government agencies, of States, cities, and penal institutions." *Id.*, codified at 5 U.S.C. § 340 (1964) (emphasis added).[5/]

When, in 1966, Congress chose to merge 5 U.S.C. § 300 and 5 U.S.C. § 340 and transfer them to Title 28 as the new 28 U.S.C. § 534, Congress combined the "identification and other records" phrase from 5 U.S.C. § 300, and the "criminal identification and other crime records" from 5 U.S.C. § 340, to create the new operative wording for 28 U.S.C. § 534: "identification, criminal identification, crime, and other records." *See* Pub. L. No. 89-554, § 4(c), 80 Stat. 378, 616 (Sep. 6, 1966), set forth at 1966 U.S.C.C.A.N. 752. The legislative history surrounding this enactment is sparse. However, we know that the phrase "identification and other records" from 5 U.S.C. § 300 included a wide range of non-criminal information, including immigration information, not only because the language was initially enacted to fund

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[5/] According to the legislative history of the provision, gleaned from the floor debates incident to its enactment, "criminal identification" was intended to refer to matters of public record, such as judgments of conviction, whereas "other crime records" was intended to refer to "information about criminals that is not a matter of record." 72 Cong. Rec. 1989 (71st Cong., 2d Sess., Jan. 20, 1930 (Statement of Rep. Graham)); *see also Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 735-36 (D.C. Cir.), *modified*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989).

the FBI's enforcement of several statutes relating to aliens and to potential threats to national security, but also because Congress distinguished that language from the language it used in a different statute codified nearby. If section 300's "identification and other records" meant the same thing as section 340's "criminal identification and other crime records," the statutes would have been redundant; Congress's purpose in using different language when enacting section 300 must have been to allow the FBI to collect "identification and other records" about people which went beyond the "criminal identification and other crime records" described in section 340.

Moreover, when Congress combined the two provisions in 1966, it chose to use all four categories of information described in the two predecessor statutes, collapsing the two formulations into "identification, criminal identification, crime, and other records." 28 U.S.C. § 534(a)(1). Had Congress wanted to strip the FBI at that juncture of its authority to collect and maintain the wide range of "identification and other records" which the FBI had been authorized to collect for decades, Congress could have easily accomplished this, simply by transposing one word: instead of using "crime, and other records" as the last four words of the new 28 U.S.C. § 534, it could have written "and other crime records," following the language of the previous 5 U.S.C. § 340. It chose not to, and instead included the language from the previous 5 U.S.C. § 300. In fact, it took pains to note that the legislative purpose of its enactment was "to restate, without substantive change, [both of] the laws replaced by" the new section. Pub. L. No. 89-554, § 7(a), 80 Stat. 378, 616 (1966). And although Congress has amended 28 U.S.C. § 534 on numerous occasions since 1966, it has never modified the scope of the information which the provision authorizes the FBI to collect.[6/]

[6/] Plaintiffs allege, in paragraph 26 of the Complaint, that Congress has, "on occasion," "specifically authorized by statute the addition of non-criminal records to this powerful database." As an

This legislative history speaks volumes about the meaning of the operative language of the statute, especially since it is consistent with the statute's plain language. Indeed, the District of Columbia Circuit has made it clear that this history supports a reading of section 534 which authorizes the FBI to collect a wide range of information about individuals which may have nothing to do with criminal activity. In *Menard v. Saxbe*, 498 F.2d 1017, 1028-29 (D.C. Cir. 1974), the court observed that "Congress intended to differentiate 'criminal identification' from other information that the FBI is authorized to gather." Although the Court stated that the FBI was required to take steps to ensure that its "criminal identification files" (i.e., its database of rap sheets) did not contain information which did not actually reflect a criminal record, it held that there was no impediment to the FBI's maintenance of other information in "its neutral non-criminal files." 498 F.2d at 1030. Thus, the authority set forth in 28 U.S.C. § 534 for Defendants to acquire, collect, preserve, and disseminate "other records" about Absconders and NSEERS violators fully defeats plaintiffs' claim that the inclusion of such information in the NCIC is *ultra vires*.

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example, plaintiffs mention the amendment to "the NCIC statute to allow the FBI to include civil orders of protection against domestic violence and stalking in the database." Although the Complaint does not provide a citation, this presumably refers to 28 U.S.C. § 534(e), which was added by the Violence Against Women Act (VAWA), Pub. L. No. 103-322, Title IV, § 40601(a), 108 Stat. 1950 (Sep. 13, 1994), and which authorizes the dissemination of "information from national crime information databases consisting of identification records, criminal history records, protection orders, and wanted person records" for use in domestic violence and stalking cases. If by these allegations plaintiffs are suggesting that information of a non-criminal nature can be added to the NCIC only pursuant to an express statutory authorization, the Court should reject such a suggestion. First, as set forth in the text, the specific information at issue in this case has multiple sources of express statutory authorization, making plaintiffs' suggestion irrelevant. Second, nothing in the VAWA suggests that the FBI did not have the authority to acquire, collect, classify, or preserve the information referenced in 28 U.S.C. § 534(e) prior to the enactment of that statute; rather the sole purpose of that section was to expand the range of entities authorized to gain access to this information.

In addition to that authority, numerous immigration statutes, along with the corresponding regulations, specifically authorize the DHS to compile information about Absconders and NSEERS violators and to share that information with other federal agencies and/or with state and local authorities. DHS's principle authority for compiling and entering Absconder and NSEERS information into the NCIC database derives from Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA),[7/] which requires ICE to operate a computer database which "shall be used to assist Federal, State, and local law enforcement agencies in identifying and locating aliens who may be subject to removal by reason of their conviction of aggravated felonies, subject to prosecution under [8 U.S.C. § 1325], not lawfully present in the United States, or otherwise removable." Absconders are "not lawfully present in the United States," *see, e.g.,* 8 U.S.C. § 1231, and by definition are "removable."[8/] Likewise, willful NSEERS violators are not lawfully present in the United States and are removable.[9/]

[7/] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title XIII, § 130002, 108 Stat. 1796 (Sep. 13, 1994), as amended by Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title IV, § 432, 110 Stat. 1273 (Apr. 24, 1996), as amended by Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Title III, §§ 308(g)(5)(B), 326, 327, 110 Stat. 3009-623, 3009-630 (Sept. 30, 1996), codified as a note following 8 U.S.C. § 1226.

[8/] Under 8 U.S.C. § 1231(a)(1)(A), the Government is obliged to take all necessary steps to remove an alien from the United States within 90 days after issuance of a final order of removal, and he is required by 8 U.S.C. § 1231(a)(2) to take the alien into custody after the issuance of the final order of removal and to detain the alien until the removal can be effectuated. *See also* 8 C.F.R. § 241.3(a) ("Once the removal period defined in section 241(a)(1) of the Act begins, an alien in the United States will be taken into custody pursuant to the warrant of removal."); 8 C.F.R. §§ 241.1, 241.2.

[9/] Aliens subject to NSEERS are required to comply with all of the provisions of 8 C.F.R. § 264.1(f), and a willful failure to comply with those requirements constitutes a failure on the part of the alien to maintain his nonimmigrant status under 8 U.S.C. § 1227(a)(1)(C)(i). *See* 8 C.F.R. § 264.1(f); AG Order No. 2638-2002, 67 Fed. Reg. 77,642 (INS Dec. 18, 2002). Pursuant to 8 U.S.C. § 1227(a)(3)(A), an alien who fails to comply with the registration requirements under the NSEERS is deportable, unless the alien establishes that his failure was reasonably excusable or was not willful. *See* AG Order No. 2638-2002, *supra*, 67 Fed. Reg. at 77,642.

Thus, the VCCLEA provides direct authority for the Government to compile and disseminate the information at issue in this case relating to Absconders and NSEERS violators.

Moreover, specifically with regard to Absconders, 8 U.S.C. § 1231 and its implementing regulations authorize and require the DHS[10/] to obtain and maintain all information necessary to effectuate the removal of aliens with final orders of removal. *See* 8 U.S.C. § 1231(a)(3)(C), (D); 8 C.F.R. § 241.5 (2003). And with regard to NSEERS violators, 8 U.S.C. § 1225(a)(3) and 8 C.F.R. § 264.1(f)(2), (3) authorize the DHS to obtain and maintain information about aliens subject to the NSEERS requirements.

Critically, 8 U.S.C. § 1373 provides that no federal, state, or local government entity or official may interfere with any other government entity or official's communication with the

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10/ Many provisions in the INA and its implementing regulations continue to refer to "the Attorney General" and "the INS." However, the INS has been abolished, and its functions have been transferred to the new Department of Homeland Security. *See* 8 U.S.C. § 1103(a)(1) (2004) (the Secretary of Homeland Security, rather than the Attorney General, is now charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens, except insofar as certain powers, functions, and duties may be expressly conferred on the President, the Attorney General, or officials in the State Department, and with the caveat that the determination and ruling by the Attorney General with respect to all questions of law shall be controlling); 6 U.S.C. § 202(3) (the Secretary of Homeland Security, through the Under Secretary of Homeland Security for Border and Transportation Security, shall carry out the immigration enforcement functions previously vested by statute in, or performed by, the INS, its Commissioner, and its employees); 6 U.S.C. §§ 251-252 (establishing the Bureau of Border Security, now called ICE, reporting to the Under Secretary for Border and Transportation Security, to which are transferred the INS's previous functions involving, *inter alia*, intelligence, investigations, detention, and removal); 6 U.S.C. § 291(a) (abolishing the INS); Consolidated Appropriations Resolution for 2003, Pub. L. No. 108-7, sec. 105(a), 117 Stat. 11 (2003); Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 402, 441-42, 471, 1102, 116 Stat. 2135, 2177, 2192-93, 2205, 2273-74 (Nov. 25, 2002)). Although the Attorney General continues to have some involvement in the enforcement of the immigration laws, most references to "the Attorney General" which survive in the immigration statutes actually refer to the Secretary of Homeland Security or his subordinates in ICE; Congress has simply not yet revised the INA to reflect the new organizational structure. *See, e.g., Armentero v. INS*, 340 F.3d 1058, 1072 (9th Cir. 2003); *In re D-J-*, 23 I. & N. Dec. 572, 573-74 (A.G. Apr. 17, 2003) ("Although authority to enforce and administer the INA and other laws related to the immigration and naturalization of aliens has recently been transferred to the Secretary of Homeland Security by the HSA, the Attorney General retains his authority to make controlling determinations with respect to questions of law arising under those statutes.").

ICE "regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a). Moreover, "no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

> (1) Sending such information to, or requesting or receiving such information from, the [ICE].
>
> (2) Maintaining such information.
>
> (3) Exchanging such information with any other Federal, State, or local government entity.

8 U.S.C. § 1373(b). The statute goes on to impose an obligation on the ICE to respond to any inquiry by any federal, state, or local government agency "seeking to verify or ascertain the citizenship or immigration status of any individual . . . for any purpose authorized by law, by providing the requested verification or status information." 8 U.S.C. § 1373(c). *See also* 8 U.S.C. § 1644 (no state or local government entity "may be prohibited, or in any way restricted, from sending to or receiving from the [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States.").

Plaintiffs nevertheless allege that DHS's and ICE's inclusion in the NCIC database of information relating to NSEERS violators and Absconders exceeds the statutory authority set forth in 8 U.S.C. § 1252c(b). *See* Compl. ¶ 80. That statute provides as follows:

> The Attorney General shall cooperate with the States to ensure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials.

Subsection (a) of 8 U.S.C. § 1252c provides, in turn, that "to the extent permitted by relevant State and local law," state and local police are authorized, under certain circumstances and with certain limitations, to arrest and detain illegal aliens who have previously been convicted of a felony in the United States and deported or left the United States after such conviction. 8 U.S.C. § 1252c(a). A fuller discussion of 8 U.S.C. § 1252c(a), and an analysis of plaintiffs' allegation that this provision preempts state and local police agencies from arresting aliens based on information in the NCIC except as allowed in the section, is set forth *infra*, at p. 36. For purposes of the present discussion, suffice it to say that 8 U.S.C. § 1252c(b) is neither a limiting section nor a prohibitory one. It simply provides that, in those narrow circumstances when state and local law enforcement authorities are exercising the authority afforded to them in 8 U.S.C. § 1252c(a), the federal Government is required to cooperate with them to ensure that they have access to all the information that would be of help to them in carrying out those duties. Nothing in this provision, however, limits the federal Government's authority to provide such cooperation or such information to situations in which state and local police departments exercise powers vested in them by section 1252c(a). *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1297-1300 (10th Cir.), *cert. denied*, 528 U.S. 913 (1999). Indeed, as set forth in the preceding paragraphs, numerous statutory provisions not only authorize but require such cooperation.

Accordingly, plaintiffs' allegations that the Defendants violated the APA by exceeding their statutory authority as to information entered into and disseminated through the NCIC database fail to state an actionable claim and must be dismissed.

IV. COUNT II OF THE COMPLAINT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UNDER THE CONSTITUTION.

In Count II of their complaint, plaintiffs allege that the Defendants' alleged practice of including Absconder and NSEERS violator information in the NCIC database violates two provisions of the Constitution, to wit, the Supremacy Clause and the Fourth Amendment. Compl. ¶¶ 83-87. As to both constitutional provisions, Count II is predicated on several assumptions which are legally unsupported. Absconders and willful NSEERS violators have violated federal criminal laws, and nothing in federal law precludes or preempts state and local police from exercising any powers they may possess under state law to arrest such individuals on account of those federal criminal violations or on account of their non-criminal violations of the immigration laws.

A. State and Local Police Do Not Need Authority Conferred by Federal Law to Arrest Absconders and Willful NSEERS Violators, but May Do So Based Solely on the Exercise of State Law Powers. Accordingly, Plaintiffs' Allegations Under the Fourth Amendment Fail to State an Actionable Claim.

Much of plaintiffs' complaint is predicated on the premise that Absconders and willful NSEERS violators are non-criminals who are wanted solely for civil immigration violations. *See, e.g.,* Compl. ¶¶ 1-6, 29, 54, 57, 80, 84, 86. From this incorrect premise, *see supra* pp. 16-17, plaintiffs leap to the equally incorrect conclusion that state and local police may not lawfully arrest such individuals without a warrant, absent the existence of a specific federal provision authorizing such arrests. *See* Compl. ¶¶ 84-87. Plaintiffs essentially contend that by entering what they characterize as "civil information" into the NCIC database, and by allegedly "advising police to arrest absconders and NSEERS violators based on administrative warrants or information," the Defendants have allegedly "caused and induced . . . police to make

immigration arrests that Congress has forbidden them from undertaking." Compl. ¶ 86. According to plaintiffs, the Defendants' alleged practices "create an imminent risk that plaintiff members will be wrongfully arrested by state or local police," a risk which they contend entitles them to injunctive relief. Compl. ¶ 87. These allegations find no support in Fourth Amendment jurisprudence or in any other body of law and therefore fail to state an actionable claim.

As a general matter, the authority of state police to arrest individuals for violations of federal law is not limited to those instances in which they are exercising delegated federal power. Rather, such arrest authority inheres in the States' status as sovereign entities. In the same way that police in Canada do not exercise delegated Article II power when they arrest someone who has violated U.S. law and turn him over to U.S. authorities, State police, too, need not be exercising such federal power when they arrest Absconders and NSEERS violators. Instead, the power to make such arrests is inherent in the ability of one sovereign to accommodate the interests of another sovereign.

Case law reflects this conclusion. Although no act of Congress specifically authorizes state police to arrest for federal offenses without an arrest warrant, the Supreme Court has held that States have inherent authority to authorize their police to make warrantless arrests for federal criminal violations. *See, e.g., United States v. DiRe*, 332 U.S. 581, 589-591 (1948).[11/] Seventy-five years ago, Judge Learned Hand discussed the issue as follows:

> . . . [It] has been a universal practice of police officers in New York to arrest for federal crimes, regardless of whether they are felonies or misdemeanors . . . . True, the state may

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[11/] The Fourth Amendment does not prohibit all warrantless arrests, only "unreasonable" ones, and it has long been held that whether a particular warrantless arrest is "unreasonable" is to be determined with reference to the law of the State where the arrest is made. *See, e.g., Miller v. United States*, 357 U.S. 301, 305 (1958); *United States v. Rosse*, 418 F.2d 38, 39 (2d Cir. 1969).

> not have, and has not, passed any legislation in aid of the Eighteenth Amendment, but from that we do not infer that general words used in her statutes must be interpreted as excepting crimes which are equally crimes, though not forbidden by her express will. We are to assume that she is concerned with the apprehension of offenders against laws of the United States, valid within her borders, though they cannot be prosecuted in her own courts.

Marsh v. United States, 29 F.2d 172, 173-74 (2d Cir. 1928) (L. Hand, J.).

The Second Circuit's most extensive discussion of this issue is in *United States v. Swarovski*, 557 F.2d 40 (2d Cir. 1977). In that case, agents of the Customs Service arrested without warrant an individual known to have violated a provision of the Munitions Control Act, a statute as to which Customs agents lacked the authority under federal law to make arrests. The court considered the question whether the Customs agents may have derived authority to make the arrest from New York State's general "citizen's arrest" provision, which authorizes a private person to arrest another person for any crime committed or attempted in his presence, or for any felony, whether or not it was committed in his presence. 557 F.2d at 44, citing N.Y. CRIM. PRO. LAW § 104.30 (1975). The court of appeals held that "the great weight of opinion in the federal courts and in the courts of the State of New York, as well as the understanding and practices of the executive branches of the federal and state governments is to the effect that the statutory provisions of the state of New York which authorize arrests by private persons of another person who is in the act of committing or has in fact just committed a felony in the State of New York, include felonies under the laws of the United States as well as those under the laws of New York." *Swarovski*, 557 F.2d, at 46-47. The court's ensuing discussion is sufficiently germane to the issues in this case to merit quoting at some length:

> We are entirely unpersuaded that the Legislature of the State of New York . . . either intended to or did, in fact,

> dissolve all participation by the executive and judicial branches of the State government in dealing with federal criminal offenses, occurring within the boundaries of the State, to the extent and degree that it has developed for nearly 100 years . . . and has become the established practice recognized by the executive and judicial branches of the State and Federal Governments. This is particularly true with respect to arrests by New York peace officers and by private citizens, of persons who are committing or who have committed federal felonies in the State of New York. There is not a scrap of legislative history to show that the termination of such participation was ever contemplated. . . . The New York State Legislature could, of course, have codified the interpretation of existing statutes to include the right to arrest federal felons, but this was hardly necessary in the light of 200 years of a well developed custom and a pattern of state participation and cooperation in arresting, and placing in federal custody, violators of federal criminal law in the State – a practice which is now so vital and important in any high crime area of the nation.
>
> If the district court's chain of reasoning, which would thus remove from the State's consideration and authority, an offense, which is a federal felony or misdemeanor, is followed, it would apparently likewise render nugatory 18 U.S.C. § 3041, which grants powers in the apprehension and holding of those charged with federal crimes, to certain executive and judicial officers of the states. This statute is almost an exact copy of its ancestor, in direct line of continuous descent, from the first such statute, 'The Act of Sept. 24, 1789' (Ch. 20, § 33, 1 Stat. 91), which over the span of the lives of the federal government and of the State of New York has been an important and useful factor in fostering New York's (and other States') participation in the administration and enforcement of federal criminal laws.

Swarovski, 557 F.2d at 47-48. *See also United States v. Burgos*, 269 F.2d 763, 766 (2d Cir. 1959) ("Defendant [who had been ordered deported] was committing a felony by his presence in this country, 8 U.S.C. § 1326. Consequently, the Customs Agents, as private persons, could validly

arrest him under Section 183 of the New York Criminal Code."); *United States v. Lindenfeld*, 142 F.2d 829, 831-32 (2d Cir. 1944) (Clark, C.J.).

Courts in other Circuits have reached the same conclusions. *See, e.g., Vasquez-Alvarez*, 176 F.3d at 1297-1300; *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983); *Gonzales v. City of Peoria*, 722 F.2d 468,474-77 (9th Cir. 1983) (federal law did not preclude local enforcement of criminal provisions of the Immigration and Nationality Act, and Arizona law authorized local officers to arrest for criminal violations of that Act); *United States v. Bowdach*, 561 F.2d 1160, 1167-68 (5th Cir. 1977).

As seen above (pp. 16-17), plaintiffs' assumption that Absconders and willful NSEERS violators have committed no crime is baseless. When a state or local police officer encounters an individual who, based on information in the NCIC database as confirmed by DHS, is an Absconder or willful NSEERS violator, the officer is not confronted with an individual who is only guilty of non-criminal, administrative immigration violations. Rather, the officer is confronted with an individual who has committed a federal crime in the officer's presence, simply by being in the United States at the time of the encounter. As the result of this circumstance, and pursuant to the authorities cited above, a State or local police officer would have the inherent authority to take the alien into custody based solely on powers conferred by State law and would not need to exercise any authority provided to her under federal law.

However, even if one accepts as true plaintiffs' assumption that Absconders and NSEERS are non-criminals who are wanted for nothing more than civil or administrative immigration violations, their complaint still fails to state a claim under the Fourth Amendment. As with criminal aliens, the question whether State police can lawfully arrest these individuals without a warrant depends entirely on whether they are authorized to do so under the law of the

relevant state, and not whether they are authorized to do so under federal law. The Tenth Circuit has held that the authority of State and local law enforcement officials to make warrantless arrests for both civil and criminal immigration violations requires neither an express federal authorization nor even an express State law provision authorizing such arrests. *See United States v. Santana-Garcia*, 264 F.3d 1188, 1193-94 (10th Cir. 2001). Indeed, the court said "that state and local police officers had implicit authority within their respective jurisdictions 'to investigate and make arrests for violations of federal law, including immigration laws.'" *Id.* at 1194 (quoting *Vasquez-Alvarez*, 176 F.3d at 1295). Although the Ninth Circuit, in *Gonzales v. City of Peoria*, 722 F.2d 468,476-77 (9th Cir. 1983), held that local police had the authority to arrest aliens for criminal violations of the immigration laws but not for civil violations, it predicated that holding entirely on its analysis of State law, finding that Arizona law did not expressly authorize arrests for civil immigration violations; there is no indication in the court's opinion that, had Arizona law permitted arrests for civil violations, a separate federal authorization would have also been required.[12/]

The significance of these authorities for the present case is twofold. First, even if Absconders and NSEERS violators were for some reason not construed to be criminals, their arrest by state or local law enforcement agents, on the basis of purely civil or administrative immigration violations disclosed in the NCIC, would only be unlawful if the law of the State in which the arrest is made fails to permit such an arrest. However, if the law of a particular State does not authorize such arrests, it is highly unlikely that State and local police would actually

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[12/] Indeed, as noted above, the Ninth Circuit held in *Gonzales* that local police had the power to arrest aliens for criminal violations of the immigration laws, and this power came solely from Arizona state law. The Court held expressly that no additional federal authorization was necessary. 722 F.2d at 474-76.

attempt to make such arrests in derogation of State law. In contrast, if the law of a particular State does authorize such arrests for civil immigration violations, then, as seen above, such arrests would not violate the Fourth Amendment or any other federal law. In either event, the likelihood that the rights of plaintiffs' members could be injured solely by virtue of the dissemination of information in the NCIC is negligible.

Second, even assuming that state or local police were to arrest an alien for civil immigration violations despite the absence of State law authority to do so, any illegality with respect to that arrest cannot be attributed to the Defendants. Once state and local police officers confirm with ICE that an individual is an Absconder or NSEERS violator, the determinations whether the officers have the authority to arrest the individual under State law and whether to exercise that authority are made entirely by state agents, non-parties to this action over whom the Defendants possess no cognizable control.

For these reasons, plaintiffs' allegations fail to state a claim under the Fourth Amendment, and any claims based on such allegations must be dismissed.

B. Nothing in Federal Law Preempts States from Taking Measures to Assist the Federal Government with the Enforcement of Federal Immigration Law, and Plaintiffs' Complaint Fails to State an Actionable Claim under the Supremacy Clause.

Plaintiffs allege that "the authority to regulate immigration and naturalization is an exclusively federal power that the Constitution requires be implemented uniformly nationwide," and that "Congress's exercise of this power, and its enactment of a comprehensive scheme for immigration enforcement, has broadly preempted state and local police authority to enforce immigration laws, except where specifically authorized in statute or in conformity with statutory procedures." Compl. ¶¶ 83-84. According to plaintiffs, "Congress has preempted state and local

police from arresting 'absconders' and 'NSEERS violators' on the basis of an administrative warrant or mere listing in the NCIC," Compl. ¶ 85, and the Government's alleged invitation to local police officials to make such arrests violates this principle of preemption. Compl. ¶ 87.

Plaintiffs' preemption arguments are entirely without merit. Essentially, they contend that federal law preempts state and local police authority to enforce immigration laws, but they are not challenging the exercise of any state or local authority over immigration matters. What they are challenging is the exercise of a *federal* practice, undertaken pursuant to *federal* law, which they contend has the effect of inviting state and local police to enforce *federal* immigration laws. Simply stated, federal law cannot "preempt" federal law or federal action.

Unlike the typical case which raises preemption issues, this case does not involve an attempt by States to enact *State* laws, or to promulgate regulations pursuant to State laws, that arguably conflict with federal law or that intrude into a field which is reserved to Congress or which federal law has occupied. Instead, the question presented is whether States can *assist* the federal government by arresting aliens who have violated *federal* law and by turning them over to federal authorities. Judge Hand answered this question affirmatively in 1928 when he wrote for the Second Circuit that "it would be unreasonable to suppose that [the United States's] purpose was to deny itself any help that the states may allow." *Marsh*, 29 F.2d at 174.

Second, plaintiffs' contention that Congress's "enactment of a comprehensive scheme for immigration enforcement" leaves no room for State and local participation, Compl. ¶ 84, is not supported by the plain text of the INA. Numerous provisions in the INA not only allow but in fact *require* the ICE to collaborate with State and local authorities so as to ensure the most effective enforcement of the immigration laws. Several of these provisions have already been

discussed at some length, *supra* at 22-25, namely, VCCLEA, *supra* note 6; 8 U.S.C. § 1373; and 8 U.S.C. § 1644.

Additional provisions can be found at 8 U.S.C. § 1103(a)(10) (authorizing the Attorney General to deputize State and local law enforcement agents under certain circumstances to exercise the powers conferred on ICE); 8 U.S.C. § 1103(a)(11) (authorizing the Attorney General to enter into agreements with State and local entities for the detention and confinement of aliens); 8 U.S.C. § 1357(g) (authorizing the Attorney General to enter into agreements with State and local governments pursuant to which state and local agents can perform the function of an immigration officer in relation to the investigation, apprehension, or detention of aliens); and 8 U.S.C. § 1365a(f)(2) (authorizing the Attorney General to provide access to state and local law enforcement officials to the data contained in the integrated entry and exit data system).

Of the provisions just cited, one bears special mention. Section 1357(g)(10) of Title 8 provides that there is no requirement that an officer or employee of a State or one of its political subdivisions enter into a formal agreement with the Attorney General in order "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 "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." The plain wording of this statute, and of the others cited above, is simply not consistent with plaintiffs' allegation that Congress intended no role for state and local police in immigration enforcement. To the contrary, in each of these provisions, Congress communicated that it considered state and

local agencies to be vital players in the enforcement of immigration laws, particularly in their roles as providers and users of information relevant to such enforcement.

Plaintiffs nevertheless intimate, albeit inchoately (Compl. ¶ 80), that state and local involvement in immigration enforcement is preempted by virtue of 8 U.S.C. § 1252c(b). That statute, which is discussed *supra* at 25-26, does not preempt state and local involvement – it invites it. According to the statute, "the Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials." As with the other statutory sections discussed above, this provision describes state and local law enforcement agents as key figures in the development and use of the information base needed for effective immigration enforcement. And while 8 U.S.C. § 1252c(a), referred to in subsection (b), appears to place conditions and limitations on certain forms of state and local cooperation with federal immigration authorities, the Tenth Circuit has decisively rejected arguments that that provision preempts state law or places any limitations on the extent to which the ICE can rely on state and local police to assist with immigration enforcement. *See Vasquez-Alvarez*, 176 F.3d at 1296-1300.

In sum, plaintiffs will be able to prove no set of facts which would establish an actionable claim under the Supremacy Clause. None of the Defendants' alleged actions with regard to the inclusion of Absconder and NSEERS Violator information in the NCIC "causes or induces" state police to undertake actions preempted by federal law.

CONCLUSION

For the foregoing reasons, plaintiffs' complaint must be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

Dated: Brooklyn, New York
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