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.)

REPLY MEMORANDUM OF LAW IN FURTHER 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

ROSLYNN R. MAUSKOPF
United States Attorney
Eastern District of New York

F. FRANKLIN AMANAT
Assistant United States Attorney
One Pierrepont Plaza, 14th Floor
Brooklyn, NY 11201-2776
(718) 254-6024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. PLAINTIFFS HAVE FAILED TO ESTABLISH STANDING. 2

A. Plaintiffs' Reference to a Heightened Risk of Future Unlawful Arrest Is Insufficient to Establish an Injury-In-Fact Which Is Fairly Traceable to the Defendants. 2

1. Plaintiffs Have Failed to Establish that the Allegedly Heightened Risk of Future Unlawful Arrest Constitutes an Injury-in-Fact Sufficient to Confer Standing. 2

2. Plaintiffs Have Failed to Establish that the Allegedly Heightened Risk of Future Unlawful Arrest Is Fairly Traceable to the Alleged Actions of the Defendants. 8

B. Plaintiffs' Allegations Concerning Other Forms of Alleged Injuries Are Also Insufficient to Confer Standing to Sue Defendants. 14

II. PLAINTIFFS' ARGUMENT THAT THE DEFENDANTS ARE NOT AUTHORIZED TO USE THE NCIC TO DISSEMINATE ABSCONDER AND NSEERS INFORMATION IS UTTERLY WITHOUT MERIT. 18

A. Use of the NCIC Is Authorized by the Plain Text of 28 U.S.C. § 534. 18

1. "Crime . . . Records." 19
2. "Other Records." 22

B. The Defendants' Use of the NCIC Is Authorized by the Legislative History of 28 U.S.C. § 534. 29

C. The Defendants' Use of the NCIC Is Authorized by the Plain Text of Numerous Immigration Statutes and Regulations. 35

Page

III. PLAINTIFFS' ARGUMENT THAT THE DEFENDANTS' ALLEGED USE OF THE NCIC IS UNLAWFUL BECAUSE IT CAUSES LOCAL POLICE TO MAKE IMMIGRATION ARRESTS THAT CONGRESS HAS FORBIDDEN IS ENTIRELY WITHOUT MERIT. 39

A. Plaintiffs' Argument that Congress Has Occupied the Field of Immigration Regulation, Barring the Defendants' Alleged Use of the NCIC to Disseminate Immigration Information, is Without Merit. 39

B. Plaintiffs' Efforts to Refute Defendants' Showing that State Police Have Inherent Authority to Make Federal Immigration Arrests Fail. 41

C. Even if Plaintiffs Could Somehow Establish that Local Police Authority to Arrest Aliens for Immigration Violations Was Preempted by Federal Law, Their Complaint Would Still Fail to State an Actionable Claim. 45

CONCLUSION 47

TABLE OF AUTHORITIES

Pages

CASES

American Trucking Associations, Inc., United States v., 310 U.S. 534 (1940) 27-28

Baur v. Veneman, 352 F.3d 625 (2d Cir. 2004) 4, 6, 11, 12

Bennett v. Spear, 520 U.S. 154 (1997) 8

Bernard v. United States, 25 F.3d 98 (2d Cir. 1994) 3

Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993) 39

Caban v. United States, 728 F.2d 68 (2d Cir. 1984) 3

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 29

Chy Lung v. Freeman, 92 U.S. 275 (1875) 39, 40

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 6, 7, 11

City of New York v. United States, 179 F.3d 29 (2d Cir. 1999) 38

County of Suffolk v. First American Real Estate Solutions, Inc., 261 F.3d 179 (2d Cir. 2001) . . 27

De Canas v. Bica, 424 U.S. 351 (1976) 40

Dow Chemical Co. v. United States, 476 U.S. 227 (1986) 28-29

Fifth Avenue Peace Parade v. Gray, 480 F.2d 326 (2d Cir. 1973) 15

Garcia v. United States, 469 U.S. 70 (1984) 22

Golden v. Zwickler, 394 U.S. 103 (1969) 3, 17

Graham v. Richardson, 403 U.S. 365 (1971) 40

Harrison v. PPG Industries, 446 U.S. 578 (1980) 22

Heldman v. Sobol, 962 F.2d 148 (2d Cir. 1992) 8

Pages

Laird v. Tatum, 408 U.S. 1 (1972) 15

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 2, 3, 8

Maryland v. Louisiana, 451 U.S. 725 (1981) 39

Mena v. City of Simi Valley, 332 F.3d 1255 (9th Cir. 2003), *cert. granted sub nom. Mueller v. Mena*, __ U.S. __, No. 03-1423, 2004 WL817138 (June 14, 2004) 44

Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974) 16, 17, 21, 22

Northwest Airlines v. FAA, 795 F.2d 195 (D.C. Cir. 1986) 11

O'Shea v. Littleton, 414 U.S. 488 (1974) 7

Powell, United States v., 423 U.S. 87 (1975) 22-23

Presbyterian Church (USA) v. United States, 870 F.2d 518 (9th Cir. 1989) 17

Reporters Committee for Freedom of the Press v. United States Department of Justice, 816 F.2d 730 (D.C. Cir.), *modified*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989) 21

Reporters' Committee for Freedom of the Press, United States Department of Justice v., 489 U.S. 749 (1989) 21, 33-34

Rizzo v. Goode, 523 U.S. 362 (1976) 6, 7

Roe v. City of New York, 151 F. Supp. 2d 495 (S.D.N.Y. 2001) 4, 5, 6

Salinas-Calderon, United States v., 728 F.2d 1298 (10th Cir.1984) 42

Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976) 8, 11

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 29

Students Challenging Regulatory Agency Procedures (SCRAP), United States v., 412 U.S. 669 (1973) 12

Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974) 16, 17

Toll v. Moreno, 458 U.S. 1 (1982) 40

Pages

Turkette, United States v., 452 U.S. 576 (1981) 22

United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) 15

Vasquez-Alvarez, United States v., 176 F.3d 1294 (10th Cir.), *cert. denied*, 528 U.S. 913 (1999) 41-44

Zanghi v. Village of Old Brookville, 752 F.2d 42 (2d Cir. 1985) 3

CODIFIED STATUTES

5 U.S.C. § 300 (1964) 30, 32, 33, 34, 35

5 U.S.C. § 340 (1964) 30, 33, 34, 35

5 U.S.C. § 552a 17-18

8 U.S.C. § 1226 . . . . . 20, 26, 37

8 U.S.C. § 1227 20

8 U.S.C. § 1231 20

8 U.S.C. § 1252c 27, 41-44

8 U.S.C. § 1253 . . . . . 19, 20

8 U.S.C. § 1306 19-20

8 U.S.C. § 1325 . . . . . 36, 37, 40

8 U.S.C. § 1357 40

8 U.S.C. § 1365a 40

8 U.S.C. § 1373 . . . . . 38, 40

8 U.S.C. § 1644 . . . . . 38, 40

28 U.S.C. § 534 . . . . . 1, 17, 18-35 (*passim*), 37

Virginia Code § 15.2-1726 10

Pages

ENACTED STATUTES

Sedition Act of 1918, ch. 75, 40 Stat. 553 . . . . . 31, 32

Alien Act of 1919 . . . . . 31, 32

Anarchist Act of 1920, ch. 251, 41 Stat. 1008 (June 5, 1920) 31, 32

Act of Mar. 1, 1921, ch. 89, § 1, 41 Stat. 1175 32

Act of Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1410 32

Act of May 28, 1924, Pub. L. No. 68-153, title II, ch. 204, 43 Stat. 217 34

Act of June 11, 1930, Pub. L. No. 71-337, ch. 455, 46 Stat. 554 . . . . . 30, 33

Department of Justice Appropriations Act for fiscal year 1965, Pub. L. No. 88-527, title II, § 201, 78 Stat. 717 (Aug. 31, 1964) 30, 32-33

Pub. L. No. 89-554, §§ 4, 7, 80 Stat. 616 (Sep. 6, 1966), set forth at 1966 U.S.C.C.A.N. 752 . . . . . 30, 34, 35

Missing Children Act of 1982, Pub. L. No. 97-292, 96 Stat. 1259 24-25

Violent Crime Control and Law Enforcement Act of 1994 ("VCCLEA"), Pub. L. No. 103-322, Title XIII, § 130002, 108 Stat. 1796 (Sep. 13, 1994), as amended, codified as a note following 8 U.S.C. § 1226 . . . . . 36-38, 40, 44

Violence Against Women Act ("VAWA"), Pub. L. No. 103-322, Title IV, § 40601, 108 Stat. 1950 (Sep. 13, 1994) 25-26

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, Title IV, § 439, 110 Stat. 1276 (Apr. 24, 1996) 27

Pages

LEGISLATIVE MATERIALS

72 CONG. REC. 1989 (71st Cong., 2d Sess., Jan. 20, 1930) 21

1964 U.S.C.C.A.N. 815 . . . . . 30, 33

H.R. REP. NO. 97-820 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2552 24-25

140 CONG. REC. H2518-01 (daily ed. Apr. 20, 1994) 25

H.R. CONF. REP. NO. 103-711 25-26

142 CONG. REC. 4619 (1996) 42, 43

142 CONG. REC. S4405-01 (daily ed. Apr. 30, 1996) 36

S. REP. NO. 104-249 (1996) 36

Clear Law Enforcement for Criminal Alien Removal (CLEAR) Bill of 2003, pending as H.R. 2671, 108th Cong. (1st Sess. 2003), and as S. 1906, 108th Cong., § 104(b) (1st Sess. 2003) 27-28

REGULATIONS

8 C.F.R. § 1.1 18

8 C.F.R. § 241.3 20

28 C.F.R. § 20.1 17

28 C.F.R. § 20.37 37

28 C.F.R. § 50.12 17

Pages

OTHER SOURCES

Nancy Murray and Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72 (2002) 31, 32

2B NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 49.11 (6th ed. 2000) 24

Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083 (2002) 32

Opinion of the South Carolina Attorney General, March 6, 2002 (2002 WL 399643) . . 10

SANFORD J. UNGER, FBI (1976) 31

www.fbi.gov/libref/historic/earlydays.htm, "History of the FBI: Early Days 1910-1921" (last visited 7/16/2004) 31

www.fbi.gov/libref/historic/lawless.htm, "History of the FBI: Lawless Years 1921-1933" (last visited 7/16/2004) 31, 34

PRELIMINARY STATEMENT

Plaintiffs' arguments in opposition to the defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state an actionable claim fail entirely.

As defendants demonstrated in their initial memorandum of law, plaintiffs lack standing to raise the claims asserted in their complaint. Plaintiffs' response that the defendants' actions create a heightened risk of future unlawful arrest, sufficient to confer standing on the plaintiffs to sue the defendants, lacks merit, given that the alleged harm is conjectural and speculative, and given the complete absence of control which the defendants have over the actions of the state and local agents who are alleged to be making such unlawful arrests. Plaintiffs cannot demonstrate an injury-in-fact which is fairly traceable to the defendants' conduct, and accordingly their complaint must be dismissed.

Moreover, even if plaintiffs could somehow establish this Court's subject matter jurisdiction to hear their claims, their argument that the defendants are not authorized to use the NCIC to disseminate Absconder and NSEERS violator information is utterly without merit. As set forth in the defendants' opening brief, the plain text of 28 U.S.C. § 534 provides ample authority for the defendants' alleged practice of including Absconder and NSEERS violator information in the NCIC. Plaintiffs' arguments to the contrary rely on a misreading of the plain language of the statute, a misapplication of the canons of statutory construction, and an incorrect recitation of the statute's legislative history.

Finally, plaintiffs' argument that the defendants' alleged use of the NCIC is unlawful, because it causes local police to make immigration arrests that Congress has forbidden, is frivolous. Plaintiffs argue that the defendants' use of the NCIC for immigration information is barred because Congress has occupied the field of immigration regulation. This argument fails,

for it misstates the nature of field preemption, mischaracterizes the scope of Congressional legislation in the immigration arena, and fails to provide a basis for barring the specific government action at issue here. Plaintiffs also attempt to refute defendants' showing that state and local police have inherent authority deriving from state law to make federal immigration arrests, but the arguments on which they rely have all been rejected as without merit by the only court of appeals to have squarely ruled on the matter. Finally, even if plaintiffs could somehow establish that state and local police authority to arrest aliens for immigration violations is preempted by federal law, their complaint would still fail to state an actionable claim, for they can prove no set of facts which would establish the defendants' vicarious responsibility for the allegedly illegal actions of independent state and local authorities.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO ESTABLISH STANDING.

A. Plaintiffs' Reference to a Heightened Risk of Future Unlawful Arrest Is Insufficient to Establish an Injury-In-Fact Which Is Fairly Traceable to the Defendants.

1. Plaintiffs Have Failed to Establish that the Allegedly Heightened Risk of Future Unlawful Arrest Constitutes an Injury-in-Fact Sufficient to Confer Standing.

As set forth in the government's opening brief, plaintiffs have failed to allege facts which, if true, would demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Def. Br. at 9-12, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992). 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 or

federal action as the result of the entry or dissemination of any information in the NCIC, nor has the complaint even identified any plaintiff members as to whom information has actually been entered into the database. 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 unlawful arrests are imminent is strictly "conjectural" and "hypothetical," *id.* at 560, and plaintiffs have not alleged a "credible threat" of real and immediate future injury. *See Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *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 attempting to establish their standing to bring suit, plaintiffs do not allege that any of their members has actually been arrested, much less ***unlawfully*** arrested,[1/] as the result of any actions allegedly undertaken by the defendants. *See* Pl. Br. at 6, 8-9. Instead, the injury-in-fact which the plaintiffs identify relates to the "heightened risk of future unlawful arrest" by state and local police, which the plaintiffs claim that persons "similarly situated" to their members experience as the result of the defendants' alleged use of the NCIC to disseminate information about Absconders and NSEERS violators. *See* Pl. Br. at 6, 8-9. These allegations are plainly insufficient to confer standing on the plaintiffs.

[1/] Plaintiffs have no argument that they would suffer any injury-in-fact from an arrest which is *lawful,* simply because the arrest would not have taken place but for the inclusion in the NCIC of information leading to their arrest. As the Supreme Court has explained, an injury in fact is defined as "an invasion of a legally protected interest." *Defenders of Wildlife*, 504 U.S. at 560 & n.1. One does not have a legally protected interest in not being arrested for violations which lawfully subject one to arrest. *See, e.g., Bernard v. United States*, 25 F.3d 98, 102 (2d Cir. 1994); *Zanghi v. Village of Old Brookville*, 752 F.2d 42, 45 (2d Cir. 1985); *Caban v. United States*, 728 F.2d 68, 72-73 (2d Cir. 1984).

The cases on which plaintiffs rely to support their standing arguments are entirely inapposite. Plaintiffs rely primarily on *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2004), and on *Roe v. City of New York*, 151 F. Supp. 2d 495 (S.D.N.Y. 2001), to support their proposition that a "heightened risk" of future injury can be sufficient to substantiate an injury-in-fact. However, both of these cases are distinguishable. In *Baur*, the plaintiff brought an action against the United States Department of Agriculture, challenging certain USDA regulations which allowed downed livestock to be used for human consumption after passing a post-mortem inspection. *See* 352 F.3d at 628-31. The consumer claimed that this policy violated federal statutes regarding food, drugs, and meat inspection, and further alleged that the consumption of downed animals created a serious risk of transmission of mad cow disease. *See id.* The court of appeals held that "at least for the purposes of this type of administrative action, [the] relevant injury-in-fact may be the *increased risk* of disease transmission caused by exposure to a potentially dangerous food product." *See id.* at 632-33 (emphasis in original). From this limited holding, the plaintiffs extrapolate the general proposition that a heightened risk of future arrest is sufficient to confer standing. Pl. Br. at 7. This extrapolation is inappropriate, however, as the court specified that its holding was limited to the narrow context of food and drug safety suits:

> In this case, we need not decide as a matter of law whether enhanced risk generally qualifies as sufficient injury to confer standing, nor do we purport to imply that we would adopt such a broad view. *In the specific context of food and drug safety suits*, however, we conclude that such injuries are cognizable for standing purposes where the plaintiff alleges exposure to potentially harmful products.

Baur, 352 F.3d at 634 (emphasis added). Furthermore, the court stressed that "like the other aspects of standing, the injury-in-fact analysis is highly case-specific, and the risk of harm necessary to support standing cannot be defined according to a universal standard." *Id.* at 638.

Similarly, *Roe*, 151 F. Supp. 2d 495, is distinguishable on its facts. In *Roe*, the plaintiffs alleged that the defendants had unlawfully harassed, arrested, and prosecuted injection drug users who were registered participants in state-authorized New York City needle exchange programs. *Id.* at 499-501. Plaintiffs contended that this not only violated their rights under the United States Constitution and state law, but also threatened public health by eviscerating the effectiveness of lawful exchange programs. *Id.* The unique set of facts alleged in *Roe* "suggest that the plaintiffs' fear of arrest [was] reasonable because it [was] grounded in both prior arrests and an allegedly ongoing NYPD practice of targeting for unlawful arrest persons in 'high drug areas' such as neighborhoods around needle exchange programs the plaintiffs frequent." *Id.* at 506. The *Roe* court found standing precisely because there had been actual unlawful arrests of the plaintiffs by the defendants, there were ongoing arrests of the plaintiffs by the defendants, and the plaintiffs constituted a distinct, identifiable group of people in a discrete geographic area who were being continuously targeted for arrests by the defendants. *See id.* None of those circumstances bears any resemblance to the case at bar.

Here, not only have the plaintiffs not alleged that any of their members has actually been unlawfully arrested, whether by the defendants or by anyone else, but also their members do not consist of a single identifiable group or class. The plaintiffs' members come from a variety of different backgrounds, races, and national origins and presumably live in locations throughout the country. Therefore, although the court in *Roe* "found that plaintiffs who are members of such an identifiable class of targeted individuals have standing to sue," *Id.* at 504, because they were geographically and demographically isolated, the plaintiffs' members in this case are neither an identifiable class, nor have they been targeted as a class.

Whereas *Baur* and *Roe* are readily distinguishable for the reasons set forth above, this case is on all fours with the Supreme Court's decisions in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and *Rizzo v. Goode*, 523 U.S. 362 (1976). In *Lyons*, a motorist was injured by the city police when he was once subjected to a choke hold after being stopped for a traffic violation. *Lyons*, 461 U.S. at 97-100. He had brought a suit against the City seeking money damages for his alleged injuries, but he also sought to enjoin the city from using a choke hold except when the proposed victim reasonably appears to be threatening the immediate use of deadly force. He alleged in his complaint that he "'justifiably fears that any contact he has with Los Angeles Police officers may result in his being choked and strangled to death without provocation, justification, or other legal excuse." *Id.* at 98. Lyons argued that an injunction was warranted to prevent him and others similarly situated from being threatened with injury in the future. *See id.* The Supreme Court disagreed, finding that Lyons lacked standing in view of the absence of a showing that he was in immediate danger of being subjected once again to a choke hold. *Id.* at 105.

In analyzing the standing issue, the Supreme Court took pains to note that no actual injury would be realized unless a future police officer were to choose to act illegally in placing a motorist in a choke hold. *Id.* at 105-06. It held this, notwithstanding the presence of a specific allegation in the complaint that "the City authorized the use of the control holds in situations where deadly force was not threatened." *Id.* at 106. The Supreme Court found that this allegation "falls far short of the allegations that would be necessary to establish a case or controversy between these parties," largely because Lyons had failed to allege why he "might be realistically threatened" by police officers who are presumed to act in accordance with their authority. *Id.* at 105-06, 108. As the Court put it,

> Of course, it may be that among the countless encounters between the police and the citizens of a great city such as Los Angeles, there will be certain instances in which strangleholds will be illegally applied and injury and death unconstitutionally inflicted on the victim. As we have said, however, it is no more than conjecture to suggest that in every instance of a traffic stop, arrest, or other encounter between the police and a citizen, the police will act unconstitutionally and inflict injury without provocation or legal excuse. And it is surely no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a choke hold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury.

Id. at 108. Thus, the Supreme Court held that the alleged heightened risk of unlawful use of the choke hold was too speculative to confer standing on Lyons to sue the city. *Id.* at 108-10.

Rizzo is of similar tenor. In that case, plaintiffs alleged widespread illegal and unconstitutional police conduct aimed at minority citizens and against city residents in general. The Supreme Court observed, in rejecting the plaintiffs' claim of standing, that the claim of injury rested upon "what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception" of departmental procedures. *Rizzo*, 423 U.S. at 372. The Court found this hypothesis to be "even more attenuated than those allegations of future injury found insufficient in [*O'Shea v. Littleton*, 414 U.S. 488 (1974)] to warrant [the] invocation of federal jurisdiction." *Id.*

In short, plaintiffs' efforts to demonstrate an injury-in-fact by reference to the alleged increased risk of unlawful arrest fail.

2. Plaintiffs Have Failed to Establish that the Allegedly Heightened Risk of Future Unlawful Arrest Is Fairly Traceable to the Alleged Actions of the Defendants.

Even assuming *arguendo* that the plaintiffs have alleged injury-in-fact, that is not sufficient to confer standing on them to press their claims. *See* Def. Br. at 7, 13. Rather, they must also satisfy a second requirement for standing: that the injury-in-fact be "fairly traceable" to the *defendants'* unlawful conduct, as opposed to the unlawful conduct of entities who are not parties to the litigation. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 168 (1997); *Defenders of Wildlife*, 504 U.S. at 560; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).[2/]

Plaintiffs argue that "the Complaint fully describes a simple, unattenuated chain of causation, stating plainly that the '[d]efendants' practice of entering "absconder" and "NSEERS violator" information into the NCIC and disseminating it to local police upon inquiry illegally causes and induces police to make arrests Congress has forbidden.'" Pl. Br. at 14, quoting Compl. ¶ 60. The problem with this argument is that the defendants' use of the NCIC to disseminate information about Absconders and NSEERS violators, while it may increase the likelihood that the affected aliens will ultimately be arrested, cannot affect the possibility that those aliens will be *unlawfully* arrested. As set forth in the defendants' opening brief (at pp. 10-13, 28-31), that possibility depends entirely on choices made by independent state and local law enforcement agencies which are not parties to this action. The lawfulness or unlawfulness of such agencies' arrests of Absconders and NSEERS violators turns on whether States have given their local police the authority to arrest such violators, on whether local police who lack such

---

[2/] *See also Heldman v. Sobol*, 962 F.2d 148, 156 (2d Cir. 1992) ("To establish standing, a plaintiff must also demonstrate a causal nexus between the defendant's conduct and the injury. The causation requirement ensures that the injury alleged is attributable to the defendant. The injury claimed . . . must be fairly traceable to the governmental conduct claimed as illegal.").

authority choose to make such arrests anyway, and on what methods those police choose to follow in making such arrests. Because the plaintiffs' injuries, if any, derive from the alleged *unlawfulness* of their members' arrests, rather than from the arrests themselves, plaintiffs have not alleged any injuries-in-fact which are fairly traceable to the defendants' conduct.

Plaintiffs allege that police in "New York, Illinois, Minnesota, Connecticut, Florida, and elsewhere have arrested immigrants" "similarly situated" to the plaintiffs' members (although not the plaintiffs' members themselves), based on information obtained pursuant to those States' "polic[ies] or practice[s] of arresting 'absconders' and/or alleged NSEERS violators listed in the NCIC."' Pl. Br. at 9, quoting Compl. ¶ 53; *see also* Compl. ¶ 68. Yet they have not sued New York, Illinois, Minnesota, Connecticut, or Florida, or any of their municipalities, nor do they challenge any of the policies or practices of those States. If it is the plaintiffs' belief that these States have caused the plaintiffs' members injuries by arresting them without the legal authority to do so, or that they plan to make such arrests imminently, then plaintiffs' claim for declaratory and injunctive relief, if any, lies solely against those governmental entities.

An example aptly illustrates why the plaintiffs' failure to sue the correct defendants in this case entirely defeats their standing arguments. Assume that an individual–a U.S. citizen–is indicted by a federal grand jury sitting in this District on federal criminal charges. The individual absconds, and a judge of this court issues a bench warrant for his arrest. The Marshals Service enters into the NCIC the particulars of the fugitive's crime and indictment, along with notice of the arrest warrant and identifying information about the fugitive. Some time later, the individual is pulled over for a routine traffic violation by a state trooper in South Carolina or Virginia. (In these two jurisdictions, state law seemingly precludes state and local police officials from arresting persons for violations of federal law even in the face of a valid arrest warrant for

federal criminal violations.[3/]) The trooper submits an NCIC inquiry concerning the motorist and receives a positive hit as to the federal arrest warrant. For whatever reason (whether because he is unfamiliar with the state law precluding him from arresting the individual on the federal warrant, or because he willfully disobeys the law), the trooper arrests the defendant on the federal criminal charges despite his clear absence of authority to do so under state law. He then detains the individual until the Marshals arrive to take him into federal custody.

In this situation, it is perhaps conceivable that, but for the inclusion of the information about the fugitive in the NCIC database and its dissemination to the state trooper, the trooper would not have arrested the individual. But the decision to arrest the fugitive despite the absence of authority to do so was the trooper's, not the Marshals', and certainly not the FBI's. Put another way, while this situation arguably demonstrates a causal ("but for") relationship between the federal agencies' inclusion of information in the database and the arrest of the plaintiff, it does not demonstrate a causal relationship between the inclusion of that information and the ***unlawful arrest*** of the plaintiff. What made the fugitive's arrest unlawful (if indeed it was) was not the federal government's use of the NCIC but rather the ***independent decision*** of the trooper to arrest the fugitive despite his lack of lawful authority.[4/]

[3/] A recent opinion of the South Carolina Attorney General observes that "this Office has consistently concluded that state or local law enforcement officers do not possess the authority to enforce federal law," citing to 1966 and 1971 opinions. Opinion of the South Carolina Attorney General, March 6, 2002 (2002 WL 399643). Section 15.2-1726 of the Virginia Code, meanwhile, provides in part that "no police officer of any locality shall have authority to enforce federal laws unless specifically empowered to do so by statute, and no federal law-enforcement officer shall have authority to enforce the laws of the Commonwealth unless specifically empowered to do so by statute."

[4/] To the extent that plaintiffs may be arguing that their injury stems from the fact that the FBI lacks the authority to enter and disseminate Absconder and NSEERS violator information in the NCIC, tainting any arrests which would not have taken place but for the inclusion of that information, the argument is without merit. First, as will be seen *infra*, pp. 18-38, the notion that the FBI lacks such authority is entirely without merit. Second, even assuming that the entry of the information into the

In characterizing the injury-in-fact which they claim confers standing, plaintiffs do not complain of a heightened risk that their members will be ***arrested*** by ***federal*** agents. They complain of a heightened risk that their members will be ***unlawfully*** arrested by ***state*** agents. But the fact that an independent actor is necessary to supply a link in the chain of causation leading from the FBI's dissemination of the information in the NCIC to the allegedly unlawful arrest of the plaintiffs' members by local police defeats any claim that their members suffered an injury which is fairly traceable to ***the FBI***. *See Simon*, 426 U.S. at 41-42.[5/]

Taking the plaintiffs' arguments to their logical conclusion, an organization which advocates on behalf of criminal defendants would, in the hypothetical example, have standing to sue the federal government to enjoin it from using the NCIC to disseminate any information concerning its members, on the theory that some of its members might be fugitives from federal arrest warrants, who might one day find themselves in South Carolina or Virginia, where they might be pulled over in a routine traffic stop, and then might encounter a trooper who, upon obtaining a positive NCIC hit, would arrest them despite the absence of lawful authority.

---

database is somehow unlawful, that fact does not in and of itself cause the ensuing arrest to be unlawful, for if the arrestee has committed a violation which lawfully subjects him to arrest, and the agency which effectuates the arrest has the authority to do so, the arrestee has not been injured by his arrest simply because he would have gotten away with his violation had the information supporting his arrest not been placed in the NCIC.

[5/] Critically, the court in *Baur* noted the necessity of a clear and direct causal link between the actions of the defendant of which the plaintiff complains and the ensuing injury to the plaintiff. Where "the occurrence of the alleged future injury rest[s] on the independent actions of third-parties not before the court," it held, "the asserted injury [is] too speculative for standing purposes." 352 F.3d at 640, citing *Lyons*, 461 U.S. at 106, and *Northwest Airlines v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986). Here, the "chain of contingencies" (*Baur*, 352 F.3d at 641) leading from the defendants' inclusion of Absconder and NSEERS information in the NCIC to the heightened risk of arrest of which plaintiffs complain "rests on the independent actions of third-parties not before the court."

Indeed, taken even further, plaintiffs' argument implies that *any* individual about whom the FBI maintains information in the database–from terrorists to fugitives to convicts to individuals wanted for violating an order of protection–would have standing to challenge the inclusion of information about him in the NCIC, merely by alleging that some police officer in some jurisdiction might some day arrest him under circumstances that render the arrest unlawful. The frivolousness of this argument is as self-evident as is its dangerousness.

Plaintiffs nevertheless argue that because the complaint contains a vague and conclusory allegation (in paragraph 51) that the defendants use the NCIC to somehow "encourage, cause, and induce state and local police" to arrest immigrants listed in the NCIC database, they have alleged a sufficient nexus between the defendants and the unlawful arrests of their members to establish standing as against the defendants. Pl. Br. at 8. This argument, however, misses the mark. As the Second Circuit recently held in *Baur,* although "the standard for reviewing standing at the pleading stage is lenient, a plaintiff cannot rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing." 352 F.3d at 636-37. Or, as the Supreme Court put it, "pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 688-89 (1973). In alleging conclusorily that the defendants use the NCIC to somehow "encourage, cause, and induce state and local police" to arrest immigrants listed in the NCIC database, the plaintiffs have asked this Court to draw unreasonable, and ultimately unprovable, inferences in order to find standing.

We live in a federal system comprised of separate and coordinate sovereigns, each of which makes its own independent decisions as to the utilization of its police power. The FBI and ICE cannot force or direct a state or local police officer to arrest an Absconder or NSEERS violator (or any other person, for that matter), any more than they can direct the Royal Canadian Mounted Police to arrest an individual found in Canada who is wanted for arrest here. The most that federal agencies can do is to request, or perhaps urge, the state or local authorities to take an individual into custody on the basis of federal charges, and to provide those authorities with the information germane to the request. If the state authorities accede to the request in a manner that turns out to be unlawful, the federal agencies which made the request and provided the information cannot be held responsible for that illegality.

Some states have adopted policies authorizing or encouraging their local law enforcement agencies to cooperate with federal immigration authorities in various ways, including through the apprehension of aliens listed in the NCIC as wanted for arrest; other states have adopted policies limiting or precluding such cooperation.[6/] In all cases, the determination as to what to do with the information received from the FBI in response to an NCIC query is made by state agencies, and the federal government has no control over that determination.[7/]

[6/] *See, e.g.* Pl. Br. at 4, citing Comp. ¶ 58 ("No uniform policy or practice governs the police use of the immigration records in the NCIC."); Compl. ¶¶ 52-53 (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).

[7/] For this reason, plaintiffs' allegation that the arrests of alien Absconders and NSEERS violators by state and local police "have typically occurred without notice to the arrested persons of their *Miranda* rights, and have resulted in the detention of such persons until transfer to the custody of defendants" (Compl. ¶ 55), is irrelevant. Obviously, the notion that federal agencies could be legally responsible for the decision of state and local authorities to engage in such actions is simply wrong.

Plaintiffs seek to hold one sovereign (i.e., the defendants in this case) vicariously responsible for the allegedly unlawful acts of entirely separate sovereigns, which are not parties to this proceeding and not under the control of the federal government. Rather than suing to enjoin the allegedly illegal actions of the independent entities who are using the NCIC information in ways that allegedly injure the plaintiffs' members, they are "shooting the messenger"–suing the compilers and distributors of that information. Such a suit, however, is not based on an actual injury-in-fact which is fairly traceable to the defendants.

B. Plaintiffs' Allegations Concerning Other Forms of Alleged Injuries Are Also Insufficient to Confer Standing to Sue Defendants.

In addition to alleging that the defendants' practice of including Absconder and NSEERS information in the NCIC injures them by increasing the risk of unlawful arrest, plaintiffs allege that the practice adversely affects their members in three more collateral respects. First, plaintiffs argue that the defendants' alleged practice has "created fear in immigrant communities," "deters immigrants from communicating with state and local law enforcement officials when in need," and "inhibits immigrants from accessing vital emergency government services such as police and fire protection." Compl. ¶¶ 65-67, 74-75. *See* Pl. Br. at 4, 12, 13, 16. Second, plaintiffs argue that the data entered into the NCIC are unreliable and contain "numerous inaccuracies," resulting in numerous individuals being classified as Absconders and NSEERS violators who should not be. Compl. ¶¶ 4, 39-42, 76. *See* Pl. Br. at 3, 4, 5, 14. Third, plaintiffs argue, albeit rather inchoately, that the inclusion of Absconder and NSEERS violator data in the NCIC somehow violates the "privacy" rights of their members because that information is allegedly accessible to certain non-governmental entities. Compl. ¶¶ 44, 74, 75. *See* Pl. Br. at 5, 13, 16. All three of these arguments are entirely without merit.

First, to the extent that Absconders may be inhibited from communicating with state and local law enforcement officials, it is not because defendants disseminated information about them in the NCIC but because they are fugitives from justice–individuals who have no right to remain in the United States and who are attempting to extend their stay in this country illegally. Such individuals would naturally be predisposed to keep a low profile and to avoid contact with police, whether or not information about them is disseminated in the NCIC.[8/] Indeed, ***all*** efforts at enforcing the immigration laws have the potential to cause some aliens to become less forthcoming to the police than they otherwise might be, yet there is no authority for the proposition that this potential in itself confers standing on aliens to challenge those enforcement efforts. For this reason, plaintiffs' supposition that "enjoining defendants from disseminating the administrative warrants at issue herein via the NCIC will eliminate . . . the chilling effect upon their cooperation with local law enforcement" (Pl. Br. at 16) is devoid of logic.

Moreover, plaintiffs have failed to cite a single authority (because there is none) for the proposition that the ability to "communicate with state and local law enforcement officials when in need" is a constitutional or even a statutory right, the impairment of which constitutes an injury sufficient to confer standing. As the defendants stated in their opening brief, Def. Br. at 11-13, the case law decisively rejects that proposition. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 11-14 (1972); *United Presbyterian Church in the U.S.A. v. Reagan,* 738 F.2d 1375, 1377-80 (D.C. Cir. 1984); *Fifth Ave. Peace Parade v. Gray*, 480 F.2d 326, 330-33 (2d Cir. 1973). Indeed, plaintiffs concede (Pl. Br. at 12 n.4) that a "chilling effect" allegedly caused by a challenged law

---

[8/] As the plaintiffs themselves concede, the aliens affected by the defendants' alleged practice had a history of "underreporting" crimes and of minimizing contacts with government agencies even before the defendants' alleged practice commenced. *See* Pl. Br. at 11-12 ("immigrants already significantly underreport crimes and hesitate to cooperate with the police as witnesses when they fear deportation").

enforcement practice is in itself insufficient to establish an injury-in-fact, and that plaintiffs must instead show some concrete injury in addition to the chilling effect in order to obtain standing.

Second, to the extent that plaintiffs claim their members may be injured by alleged inaccuracies in the information concerning Absconders and NSEERS violators which defendants allegedly enter into the NCIC, such allegations are insufficient to confer standing on the plaintiffs to raise the particular claims they raise here. Defendants acknowledge that in *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974), and *Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974), the D.C. Circuit recognized a limited cause of action available to an individual plaintiff who (1) establishes that the NCIC contains entries which inaccurately attribute to him a criminal record, (2) demonstrates that the existence of that inaccurate record actually and proximately caused him injury, and (3) further establishes that the FBI failed to take reasonable measures to safeguard the accuracy of the information in its criminal files. According to the D.C. Circuit, such a plaintiff may sue to compel the FBI to modify its records so as to ensure the correct classification and characterization of its information about the plaintiff. *Menard*, 498 F.2d at 1028-30; *Tarlton*, 507 F.2d at 1122-28.

Even assuming that *Menard* and *Tarlton* are still good law, they are of no help to plaintiffs, since the allegations in their complaint would not support a cause of action under those decisions. Plaintiffs have not identified any specific individual as to whom the NCIC contains entries which inaccurately attribute a classification of Absconder or NSEERS violator. They have not identified any specific individuals for whom the existence of an inaccurate record is alleged to have actually and proximately caused an unlawful arrest. Nor have they alleged that the FBI has failed to take reasonable measures to safeguard the accuracy of the information in its NCIC files. The mere speculative possibility that one of plaintiffs' members might be

unlawfully arrested as the result of inaccuracies in the database does not constitute 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), or an injury which is real and immediate. *See Golden v. Zwickler*, 394 U.S. 103, 109 (1969). Moreover, the broad relief which the plaintiffs are seeking here – *viz.*, a prospective, generalized prohibition on the FBI's compilation and dissemination of an entire class of information in the NCIC – is far more extensive than the limited, individualized, retrospective relief which the D.C. Circuit allowed in *Menard* and *Tarlton*, and there is no support in either of those decisions for the type or extent of relief which the plaintiffs are seeking.

Third, to the extent that the plaintiffs may be inchoately alleging that the inclusion of Absconder and NSEERS violator data in the NCIC somehow violates the "privacy" rights of their members because that information is allegedly accessible to certain non-governmental entities, such allegations are also insufficient to confer standing on the plaintiffs. The only authority plaintiffs cite in support of this claim of injury is 28 C.F.R. § 20.1, in which the FBI describes one of the many purposes of its regulations implementing 28 U.S.C. § 534 as being "to protect individual privacy." *See* Pl. Br. at 13. But as the plaintiffs themselves concede, another FBI regulation, 28 C.F.R. § 50.12(a), specifically authorizes the dissemination of NCIC records to the non-governmental organizations whose access to the records forms the basis for the plaintiffs' claims of invasion of privacy.

Plaintiffs have cited no support, because there is none, for the proposition that Absconders and NSEERS violators have a constitutional or even a statutory right to privacy with regard to records of their immigration violations. The federal Privacy Act, by its express terms, only protects the privacy of information concerning U.S. citizens and lawful permanent residents ("LPRs"). *See* 5 U.S.C. § 552a(a)(2). Because Absconders are, by definition, individuals who

have received final administrative orders of removal, and since an LPR loses his status as such upon the issuance of a final order of removal, *see* 8 C.F.R. § 1.1(p), Absconders are not entitled to any protection under the Privacy Act with regard to their immigration records. For this reason, nothing in the law would preclude DHS, if it wished to do so, from establishing a publicly available website, akin to the FBI's "Ten Most Wanted" website, on which it would post identifying information about Absconders with a view towards inviting the general public to assist with their apprehension. Nor is there any privacy-related barrier to DHS's use of the NCIC to make information about these aliens available to certain non-governmental entities.

II. PLAINTIFFS' ARGUMENT THAT THE DEFENDANTS ARE NOT AUTHORIZED TO USE THE NCIC TO DISSEMINATE ABSCONDER AND NSEERS INFORMATION IS UTTERLY WITHOUT MERIT.

A. Use of the NCIC Is Authorized by the Plain Text of 28 U.S.C. § 534.

As set forth in the defendants' opening brief, the plain text of 28 U.S.C. § 534 provides ample authority for the defendants' alleged practice of including Absconder and NSEERS violator information in the NCIC. *See* Def. Br. at 15-22. This is so for two basic reasons. First, because Absconders and willful NSEERS violators are individuals who by definition have committed a crime, the records documenting those crimes are "crime . . . records" within the meaning of 28 U.S.C. § 534. *See* Def. Br. at 15-18. Second, even if the information concerning Absconders and NSEERS violators entered into the NCIC does not constitute "crime . . . records," the defendants' authority to compile and maintain that information in the NCIC is authorized by the "other records" provision of 28 U.S.C. § 534. *See* Def. Br. at 18-22. Plaintiffs advance several arguments in rejoinder, all of which are without merit.

1. **"Crime . . . Records."**

Plaintiffs first argue that the Absconder and NSEERS violator information allegedly being entered into the NCIC does not constitute "crime . . . records" within the meaning of 28 U.S.C. § 534, because Absconders and NSEERS violators are not, in their view, criminals. Pl. Br. at 18-21. This argument rests on the allegations that the plaintiffs' members who are the subjects of the information "have been neither charged nor convicted of criminal offenses," and that defendants "have not even obtained criminal warrants, on a showing of a probable cause to believe that plaintiff members have committed these 'willful' violations." Pl. Br. at 19. Plaintiffs refer to the allegations in their complaint which contend that many Absconders were "not present" in immigration court when they were ordered removed and did not receive notice of their removal orders, and many aliens subject to the NSEERS registration requirements were not aware of those requirements. Pl. Br. at 19-20.

Even if it is true that a particular Absconder or NSEERS violator has never been charged with or convicted of a criminal offense and has never been made the subject of a criminal warrant, the fact remains that, by definition, the entire class of Absconders and NSEERS violators are at least ***subject to prosecution*** for violation of a criminal statute. When an individual has received a final order of removal and "fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal," there is probable cause to believe that that alien has committed a felony in violation of 8 U.S.C. § 1253(a)(1). And when an alien willfully fails to register with the Government when required to do so, fails to provide the Government with updated information as to his whereabouts, and/or provides false or fraudulent information to the Government in connection with his alien registration, there is probable cause to believe that that alien may have committed a federal misdemeanor in

violation of 8 U.S.C. § 1306(a),(b),(c). If either of these individuals were to come into custody,[9/] the government could determine, in the exercise of its prosecutorial discretion, whether to press criminal charges under 8 U.S.C. §§ 1253 or 1306, whether to pursue the alien's deportation under 8 U.S.C. § 1231 or 1227(a)(3)(A), or whether to take some other course of action. If the government were to choose to criminally prosecute the alien, then the records establishing the defendant's status as an Absconder or NSEERS violator would certainly be available to the government to support the prosecution.[10/] It is for this reason that those records constitute "crime . . . records" within the meaning of 28 U.S.C. § 534.

Essentially, plaintiffs argue that "crime . . . records" do not include records which demonstrate the commission of a crime and which can be used in the prosecution of the crime. Pl. Br. at 20. But they never explain what else, in their view, the statutory words "crime . . . records" could possibly mean. If plaintiffs' arguments are to be credited, then no law enforcement agency would ever have the right to enter records into the NCIC which document potential criminal activity involving an individual unless that individual has already been charged with or convicted of a crime or been made the subject of an arrest warrant. Such an argument is, of course, frivolous, and would defeat the entire purpose of the NCIC.

[9/] Plaintiffs do not dispute that the ***United States*** and its agencies (e.g., ICE) have the power to take the alien into custody, simply on the basis of a finding that the alien is an Absconder or NSEERS violator. *See, e.g.,* 8 U.S.C. § 1231(a)(1)(A), (a)(2) (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 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); 8 U.S.C. § 1226 (alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States); 8 C.F.R. § 241.3(a).

[10/] The defendant would of course be able to raise as a defense to the prosecution any arguments to the effect that he was unaware of the entry of the final order of removal or of the NSEERS registration requirements, etc.

According to the legislative history of the statute's predecessor, "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). *A fortiori*, this definition subsumes investigative information about criminals and suspects which documents the nature of their criminal activity and which can form the basis for a future criminal prosecution. The mere fact that a decision may ultimately be made not to commence criminal proceedings against the individual does not obviate the characterization of those documents as "crime . . . records."

Plaintiffs' reliance on *Menard v. Saxbe,* 498 F.2d 1017 (D.C. Cir. 1974), in support of a more restrained definition of "crime . . . records" is misplaced. That case did not deal with the category of information in the NCIC falling under the rubric of "crime . . . records," but instead with the separate category described as "criminal identification records." The court of appeals took pains to explain that "Congress intended to differentiate 'criminal identification' from other information that the FBI is authorized to gather." 498 F.2d at 1028-29. The court explained that "criminal identification records" referred to records of fingerprints which were collected in connection with an arrest or conviction, which at the time comprised about 19 million of the 200 million fingerprint records the FBI had on file. *Id.* at 1021.

The issue in *Menard* was whether the plaintiff, who had been arrested and detained by the Los Angeles police but then released without charges being filed, was entitled to have a record of his fingerprints removed from the portion of the NCIC's file which consisted of "criminal identification records." What the court ultimately ordered was not the complete

expungement of the fingerprint records from the NCIC database, but rather their reclassification. In other words, the court held that the FBI could not maintain a record of the fingerprints in its "criminal identification records," but it could continue to maintain those records in other parts of the NCIC which did not relate to arrests and convictions and therefore did not carry with them the stigma of a criminal record. *Id.* at 1028-29. The court specifically held that "record of an encounter with law enforcement agencies that did not result in arrest" "is information that may aid FBI personnel to 'more effectively do their work,'" a circumstance which permits the FBI to continue to maintain the fingerprint records in other portions of the NCIC which are not cross-referenced to an arrest record. *Id.* at 1029, 1030. This interpretation of § 534 does not contradict the construction of "crime . . . records" which defendants advocate; it supports it.

2. **"Other Records."**

As defendants noted in their initial brief, the meaning of the "other records" clause of § 534 is evident 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. *See* Def. Br. at 18-22.

Plaintiffs contest this argument. *See* Pl. Br. at 21-22. In doing so, they first argue that the maxim of *ejusdem generis* precludes the defendants' interpretation of the word "other" in § 534. This argument lacks merit. The Supreme Court has repeatedly explained that *ejusdem generis* is no more than an aid to construction and is triggered only by uncertain statutory text. *See, e.g., Garcia v. United States*, 469 U.S. 70, 74-75 (1984); *United States v. Turkette*, 452 U.S. 576, 581 (1981); *Harrison v. PPG Indus.*, 446 U.S. 578, 588 (1980); *United States v. Powell*, 423

U.S. 87, 91 (1975). Moreover, *ejusdem generis* simply requires courts to construe general words as being similar in kind to the more specific words which precede them in an enumeration, not as being exactly the same as the preceding items. Correctly applied, this canon plainly supports the defendants' reading of the statute, not the plaintiffs'.

The enumeration in the statute reads, "identification, criminal identification, crime, and other records." 28 U.S.C. § 534(a)(1). The second and third of these terms refer, at the very least, to records compiled for the purpose of facilitating the apprehension of persons who have violated the law and to bringing those persons to justice. The administrative warrants for the arrest of Absconders and NSEERS violators which the plaintiffs allege the defendants enter into the NCIC are manifestly of the same character as the "criminal identification, and crime . . . records" (including criminal arrest warrants, fugitive bench warrants, and other records of statutory violations) which various agencies enter into the database, and they are therefore amply captured within the "other records" clause of the statute.

Plaintiffs next argue that the defendants' broad interpretation of "other records" would render superfluous legislative enactments over the past twenty years adding new categories of records to § 534. Pl. Br. at 22, 26-29. Defendants disagree. When a statutory enumeration contains a catchall "and other" provision expanding the overall reach of the statute, it is not uncommon for Congress to pass subsequent legislation adding new categories to the enumeration. Congress may do so for any number of reasons, including a desire to clarify or elaborate the scope of the statute, or a political desire to give legislative recognition to a specific class of statutory beneficiaries that previously only benefitted from the catchall term. When Congress passes such legislation, it is not necessarily saying that the authorization was not

already present under the pre-existing "and other" clause, and it is not diluting the breadth of that general provision simply by adding another specific provision to the enumeration.[11/]

Thus, for example, when Congress passed the portion of the Missing Children Act of 1982, Pub. L. No. 97-292, 96 Stat. 1259 (codified at 28 U.S.C. § 534(a)(2),(3)), relating to the entry of information related to missing persons and unidentified corpses into the NCIC, it was not responding to a lack of pre-existing authority on the part of local police to enter these data into the NCIC, but rather added the provision to encourage localities to use the database in order to locate missing children. The legislative history of the statute states as follows:

> One of the most difficult obstacles faced by the families of missing children is the lack of coordinated law enforcement procedures. While some local police departments have excellent resources and methods of finding children, or of identifying them once found, others have no procedures at all. Even more importantly, there is no uniformly used method to notify other law enforcement agencies that a child has been reported as missing. . . . .
>
> This legislation does not in any way alter the obligation of either State or federal law enforcement officials to search for missing children. It creates no new federal jurisdiction. The National Crime Information Center computer system is not designed to locate missing children–or anyone for that matter, only to identify the subject once found. In the case of missing children even the task of identification is rendered more difficult than in the case of adults, because few children maintain common identifiers such as a drivers license number, or a social security number. Fingerprints are rarely on file, and even height and weight descriptions are quickly dated. Despite –or indeed because of–these limitations, *the bill is intended to spur a greater attention to the unique problems of missing children*

[11/] *Cf.* 2B NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 49.11 (6th ed. 2000) (indicating that a subsequent legislative interpretation of a statute is not conclusive of the meaning of the former statute, and may either be read to indicate that the construction of the first statute is the same as the new enactment or to provide evidence that the prior statute meant the contrary of the new enactment).

> *and to encourage local police to place that data which does exist into NCIC's computer system.*

H.R. REP. NO. 97-820, at 2-3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2552, 2553-54. Nowhere in the legislative history did Congress suggest that the FBI previously lacked the authority under 28 U.S.C. § 534 to collect information on missing persons or to disseminate that information to the NCIC's end users. Rather, the impetus for the statute was "the underutilization of available resources by state and local law enforcement agencies, who have primary responsibility for locating missing persons." *Id.*, at 3, 1998 U.S.C.C.A.N. at 2554.

Plaintiffs references 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), are similarly inapposite. *See* Pl. Br. at 22, 27-29. That statute relates to 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. As plaintiffs themselves concede, the original version of this bill adopted by the House of Representatives "was necessarily premised on the understanding that the NCIC statute already authorized DOJ to disseminate protection orders; all that was necessary was a direction from Congress to the Executive Branch to exercise its heretofore unused powers." Pl. Br. at 28, citing 140 CONG. REC. H2518-01 (daily ed. Apr. 20, 1994). Plaintiffs argue that the conference committee "abandoned [the House's] approach" and instead adopted a version of the bill which "added *new* statutory authorization for entry of civil protection records into the NCIC." *Id.* at 28 (emphasis in original), citing H.R. CONF. REP. NO. 103-711, at 161-62. This is incorrect.

The provision of VAWA upon which plaintiffs rely, 28 U.S.C. § 534(e)(2), which was adopted by the conference committee report to which plaintiffs refer, provides as follows:

> Federal and State criminal justice agencies ***authorized to enter information into criminal information databases may include*** –
>
> (A) arrests, convictions, and arrest warrants for stalking or domestic violence or for violations of protection orders for the protection of parties from stalking or domestic violence; and
>
> (B) protection orders for the protection of persons from stalking or domestic violence, provided such orders are subject to periodic verification.

28 U.S.C. § 534(e)(2) (emphasis added). Contrary to the plaintiffs' supposition, the italicized portion of the quoted provision is not a grant of authorization which did not previously exist. Plaintiffs do not and cannot dispute, for example, that information relating to "arrests, convictions, and arrest warrants," referenced in 28 U.S.C. § 534(e)(2)(A), is information which the FBI was already authorized to maintain under the "criminal identification" and "crime . . . records" clauses of 28 U.S.C. § 534(a)(1). Congress merely wished to clarify that the information which Federal and State criminal justice agencies were authorized to enter into the database includes orders related to domestic violence and stalking cases. It made this clarification in part to encourage those agencies to use the database for the purposes of compiling and disseminating information germane to stalking and domestic violence cases, in part to ensure that orders of protection entered into the database "are subject to periodic verification," and in part to clarify who would have access to this category of information. Nothing in the VAWA or its legislative history even intimates that the FBI did not already 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.

Plaintiffs also cite the provision in 8 U.S.C. § 1252c(b) which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, Title IV, § 439, 110 Stat. 1276 (Apr. 24, 1996). *See* Pl. Br. at 22, 29. The provision states that

> 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.

The referenced subsection (a) of 8 U.S.C. § 1252c, which is discussed at great length *infra*, pp. 41-44, authorizes State and local law enforcement officials to arrest and detain previously deported felons, to the extent they are authorized to do so by State law. Plaintiffs extrapolate from this circumstance the conclusion that subsection (b) only "provides statutory authority to DOJ to enter and disseminate information regarding previously deported felons." Pl. Br. at 29. This conclusion is incorrect. Nothing in the language or legislative history of 8 U.S.C. § 1252c(b) suggests that Congress believed that the Attorney General lacked authority to include deported felon or other immigration information in the NCIC; indeed, the plain terms of the statute make clear that the Attorney General already had such authority, and that Congress simply wanted, by enacting the statute, to encourage him to exercise that authority by including in the NCIC the information necessary to effectuate the terms of subsection (a).[12/]

[12/] Plaintiffs also rely on proposed legislation captioned the Clear Law Enforcement for Criminal Alien Removal Bill of 2003, pending as H.R. 2671, 108th Cong. (1st Sess. 2003), and as S. 1906, 108th Cong., § 104(b) (1st Sess. 2003). *See* Pl. Br. at 22, 29-30. However, plaintiffs' reliance on pending legislation to give meaning to a previously enacted statute is wholly misplaced. *See, e.g., County of Suffolk v. First Am. Real Estate Solutions, Inc.*, 261 F.3d 179, 189-90 (2d Cir. 2001) ("Both First American and the State as *amicus* point to the existence of pending legislation or proposals for legislative action to prove their respective contentions that the Legislature intended FOIL to preclude or not to preclude a state agency's assertion of its copyright. In this situation, however, attempting to extrapolate from these bills, which have not yet been enacted, what the Legislature that enacted FOIL intended with respect to a covered entity's copyright is of questionable utility."). *See also United States v. American Trucking Ass'n,* 310 U.S. 534, 550

The critical assumption on which plaintiffs' argument is based is that the FBI cannot collect any type of "other records" for dissemination through the NCIC unless Congress has enacted a specific statutory provision authorizing the collection of that type of information. *See, e.g.,* Compl. ¶¶ 1-3, 26, 80. Plaintiffs offer no support for this assumption. To the contrary, the defendants' determination to utilize the NCIC to compile and disseminate information that could lead to the enhanced enforcement of the immigration laws falls well within the broad range of investigatory and enforcement authority which inheres in law enforcement agencies such as the FBI and ICE. As the Supreme Court stated in *Dow Chemical Co. v. United States*,

> When Congress invests an agency with enforcement and investigatory authority, *it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission*. Aerial observation authority, for example, is not usually expressly extended to police for traffic control, but it could hardly be thought necessary for a legislative body to tell police that aerial observation could be employed for traffic control of a metropolitan area, or to expressly authorize police to send messages to ground highway patrols that a particular over-the-road truck was traveling in excess of 55 miles per hour. . . . *Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.*

(1940) ("We do not think it can be said that the action of the Senate and House of Representatives on this pending transportation legislation throws much light on the policy of Congress or the meaning attributed by that body to § 204(a).").

In any event, the legislation would do much more than "allow entry into the NCIC of the very records for which defendants already claim statutory authority." Pl. Br. at 29. The draft legislation would *require* DHS to enter into the NCIC *all* information which it may have "on any person who has violated any immigration law of the United States." H.R. 2671, 108th Cong. (1st Sess. 2003), § 104(a). The legislation moreover "reaffirm[s] the existing general authority" on the part of "law enforcement personnel of a State or a political subdivision of a State . . . to investigate, apprehend, detain, or remove aliens in the United States . . . [and] in the enforcement of the immigration laws of the United States," *id.* § 101, and it withholds federal funds from States which refuse to enact "a statute that expressly authorizes law enforcement officers of the State, or of a political subdivision within a State, to enforce Federal immigration laws in the course of carrying out the officer's law enforcement duties . . . ." *Id.*, § 102.

476 U.S. 227, 233 (1986) (emphasis added). On the basis of the authorities cited here and in defendants' opening brief, the Court should find that the plain language of 28 U.S.C. § 534 authorizes the defendants to maintain and disseminate the records in question.

In the alternative, if the Court were to determine that the language of section 534's "other records" clause is ambiguous with regard to whether it authorizes the defendants to maintain and disseminate the records in question, then it should give effect to the FBI's reasonable interpretation of that provision. As the agency responsible for administering the statute, the FBI is the agency tasked with determining which information is to be entered into the database and how and to whom it is to be disseminated. Its determination that section 534 permits it to accept and disseminate in the NCIC the information concerning Absconders and NSEERS violators which is at issue here is reasonable, given the text and history of the statute, and that determination is entitled to deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). At the very least, it is entitled to "respect." *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

B. The Defendants' Use of the NCIC Is Authorized by the Legislative History of 28 U.S.C. § 534.

Plaintiffs accuse the defendants of having offered "a truncated version of the origins and development of 28 U.S.C. § 534," and proceed to present a fairly lengthy account of what they believe to be the legislative history of that statute. Pl. Br. at 23-30. While the plaintiffs' analysis has the trappings of erudition, it suffers from two major flaws. The first is that they have provided the legislative history of the wrong statute. The second is that their account of American history is simply wrong.

As set forth in the defendants' initial brief (Def. Br. at 18-22), 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). Section 300 was the provision which had authorized the FBI to collect, preserve, and exchange "*identification and other records*." *See* Department of Justice Appropriations Act for fiscal year 1965, Pub. L. No. 88-527, title II, § 201, 78 Stat. 717 (Aug. 31, 1964), codified at 5 U.S.C. § 300 and historical note following (1964) (emphasis added); *see also* 1964 U.S.C.C.A.N. 815; historical and statutory note following 28 U.S.C.A. § 534. In contrast, section 340 was the provision which had authorized the FBI to collect, preserve, and exchange "*criminal identification and other crime records*." *See* Act of June 11, 1930, Pub. L. No. 71-337, ch. 455, 46 Stat. 554, codified at 5 U.S.C. § 340 (1964) (emphasis added).

In their brief, plaintiffs provide several pages of citations to Congressional floor debates and committee reports, and they characterize those citations as constituting the legislative history of § 534. *See* Pl. Br. at 23-25. However, all of these citations relate only to the history of 5 U.S.C. § 340 and have nothing whatsoever to do with the history of 5 U.S.C. § 300. This is a critical flaw, for two reasons. First, as seen above, the broad scope of 28 U.S.C. § 534(a)(1) derives primarily from its use of the clause "and other records." To understand the meaning of that clause, one needs to look at the history of the statute –5 U.S.C. § 300–which actually contained it. The history of section 340, cited by the plaintiffs, has absolutely nothing to do with that clause. Second, the historical context in which Congress enacted 5 U.S.C. § 300, including its "other records" terminology, demonstrates clearly why the current 28 U.S.C. § 534 authorizes the FBI to include in the database the precise information at issue here.

During World War I, the FBI acquired responsibility for enforcing the Espionage, Selective Service, and Sabotage Acts.[13/] To fulfill this responsibility, the FBI had set up a General Intelligence Division ("GID"), which was responsible for investigating enemy aliens as well as suspected anarchists and communists.[14/] In the wake of World War I and the Bolshevik Revolution in Russia, the GID was given specific responsibility for enforcing the Sedition Act of 1918 (ch. 75, 40 Stat. 553), which allowed the summary deportation of any alien deemed subversive; the Alien Act of 1919, which authorized the arrest, detention, and deportation of various classes of aliens, including communists and anarchists; and the Anarchist Act of 1920 (ch. 251, 41 Stat. 1008 (June 5, 1920)), which permitted the exclusion or deportation of aliens who believe in or advocate the overthrow of the Government.

Many of the actions undertaken by the GID at that time were aimed at responding to the numerous international threats to American society and its democratic system of government.[15/] Among these threats were repeated acts of terrorism undertaken by international anarchists and other aliens bent on attacking the American way of life: bombs destroyed the homes of major city mayors, state legislators, judges, industrialists, and the Attorney General,

---

[13/] Much of this historical background is taken from SANFORD J. UNGER, FBI 43-55 (1976). *See also* www.fbi.gov/libref/historic/earlydays.htm, "History of the FBI: Early Days 1910-1921" (last visited 7/16/2004).

[14/] *See* www.fbi.gov/libref/historic/lawless.htm, "History of the FBI: Lawless Years 1921-1933" (last visited 7/16/2004).

[15/] *See, e.g.,* Nancy Murray and Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 77 (2002) ("As the country endured strikes, race riots, and bombings, a sense of hysteria grew. . . . J. Edgar Hoover was asked by Attorney General A. Mitchell Palmer to draw up a list of radicals – he soon had a card index of 200,000 names . . . . Palmer insisted that . . . 'the "Reds" were criminal aliens, and secondly, that the American Government must prevent crime . . . .' Palmer pushed vigorously for an Immigration Act to allow for the deportation of aliens who were anarchists and immigrants active in certain trade unions . . . ." (quoting A. Mitchell Palmer, *The Case Against the Reds*, in THE FEAR OF CONSPIRACY (David Brion Davis ed. 1971))).

and additional bombs were intercepted before they reached such intended recipients as the Chief Justice of the United States and numerous leading industrialists.[16/]

It was in this context that Congress resolved to provide the FBI with the investigative and informational resources which it needed to respond effectively to these international threats.[17/] Thus, in 1921, Congress appropriated funds to permit the FBI to conduct "such other investigations regarding official matters under the control of the Department of Justice or the Department of State as may be directed by the Attorney General." Act of March 1, 1921, ch. 89, § 1, 41 Stat. 1156, 1175; *see also* Act of March 4, 1921, ch. 161, § 1, 41 Stat. 1367, 1410-1411. By its plain terms, this statute was broad enough to authorize the FBI, *inter alia*, to collect the records it needed to investigate potential violations of the Alien, Sedition, and Anarchist Acts, all of which were "official matters under the control of the Department of Justice." Congress passed similar appropriations in subsequent years, modifying the wording slightly to specifically authorize the FBI to collect and exchange records germane to its law enforcement mandate, until in 1932 it adopted the language "identification and other records" which came to be codified in 5 U.S.C. § 300. It then used this identical phrase in each iteration of the statute passed between 1932 and 1965. *See* Department of Justice Appropriations Act for fiscal

---

16/ "On June 2, 1919, bombs went off in eight cities. One detonated in the Massachusetts Legislature. A New York postal clerk found 34 additional bombs in the mail addressed to such people as J.P. Morgan, John D. Rockefeller, and Attorney General Palmer. . . . Before 1920 was over, the whirlwind hit Wall Street in the form of a bomb that exploded in September 1920, killing 33 and wounding over 200." Murray and Wunsch, *supra* note 15, at 77-78.

17/ *See, e.g.,* Murray and Wunsch, *supra* note 15, at 78 (during the 1920s, the General Intelligence Division compiled an index of 450,000 names); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1110 (2002) ("In a climate rife with fear of 'Reds," anarchists, and labor unrest, Congress tasked the [FBI] with addressing these terrorist threats. Under the direction of a young J. Edgar Hoover, the [FBI] developed an extensive index of hundreds of thousands of radicals.").

year 1965, Pub. L. No. 88-527, title II, § 201, 78 Stat. 717 (Aug. 31, 1964), codified at 5 U.S.C. § 300 and historical note following (1964); *see also* 1964 U.S.C.C.A.N. 815; historical and statutory note following 28 U.S.C.A. § 534.

Meanwhile, in 1930, Congress enacted the statute which later 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 and funded an entirely different division of the FBI, known as the Division of Identification and Information ("DII"), 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).

The historical context in which the DII was established and funded was entirely different from the context surrounding the GID's formation. The Department of Justice had established a Bureau of Criminal Identification in 1905 in order to provide a centralized reference collection of fingerprint identification cards. In 1907, the collection was moved, as a money-saving measure, to Leavenworth Federal Penitentiary in Kansas, where it was staffed by convicts. Suspicious of this arrangement, state and local law enforcement agencies refused to cooperate with the Bureau of Criminal Identification and instead formed their own centralized fingerprint identification bureau under the auspices of the Committee on Uniform Crime Reports of the International Association of Chiefs of Police. In 1924, Congress was persuaded to merge the two fingerprint identification collections under FBI administration in Washington. It did this with the enactment in 1924 of an appropriation of funds to enable the Department of Justice "to establish a program to collect and preserve fingerprints and other criminal

identification records" and to exchange such information with "'officials of States, cities and other institutions.'" *United States Dep't of Justice v. Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 751 (1989) (quoting Act of May 28, 1924, Pub. L. No. 68-153, title II, ch. 204, 43 Stat. 217). Law enforcement agencies across the country then began contributing fingerprint cards to the FBI by 1926, and by the late 1920s, the FBI had established the Uniform Crime Reporting ("UCR") Program administered by the DII. It was to support the UCR Program that Congress in 1930 enacted the "criminal identification and other crime records" legislation that eventually became 5 U.S.C. § 340. *See generally* www.fbi.gov/libref/historic/lawless.htm, "History of the FBI: Lawless Years 1921-1933" (last visited 7/16/2004).

As noted above, in 1966 (one year before the NCIC was established), Congress chose to combine these two statutory provisions and transfer them to Title 28 as the new 28 U.S.C. § 534. *See* Pub. L. No. 89-554, § 4(c), 80 Stat. 616 (Sep. 6, 1966), set forth at 1966 U.S.C.C.A.N. 752. In doing so, 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."

When Congress first enacted the "identification and other records" language in 1932, it knew full well what range of information it was authorizing the FBI to collect, and it not only knew but in fact expected that that range would continue to include information related solely to immigration enforcement. As is the case today, the FBI in 1932 was not the government agency primarily tasked with enforcement of the nation's immigration laws, but Congress believed it appropriate to authorize the FBI to lend its substantial intelligence-gathering and information-disseminating abilities to support that enforcement. The fact also remains that,

each year from 1932 to 1965, Congress passed legislation authorizing the FBI to collect the same range of "identification and other records" that it had initially authorized in 1932.

When Congress finally got around to revising the wording of the statute, in 1966, it could have easily stripped the FBI of its authority to maintain the wide range of "identification and other records" which the FBI had been authorized to collect for decades, had it wanted to do so. *See* Def. Br. at 21. It chose not to, and instead deliberately included the language from the previous 5 U.S.C. § 300; *see* Pub. L. No. 89-554, § 7(a), 80 Stat. 611, 616 (1966).[18/]

This deliberate legislative conduct over the last seven decades years speaks volumes about the meaning of the operative language of the statute, especially since it is consistent with the statute's plain language. Plaintiffs' allegation that the inclusion of Absconder and NSEERS violator information in the NCIC database exceeds the FBI's statutory authority under 28 U.S.C. § 534 is entirely without merit.

C. The Defendants' Use of the NCIC Is Authorized by the Plain Text of Numerous Immigration Statutes and Regulations.

As the defendants argued in their opening brief, the inclusion in the NCIC of the information at issue in this case is specifically authorized by a multitude of immigration statutes and regulations, in addition to the authorization provided in 28 U.S.C. § 534. *See* Def. Br. at 23-26. Plaintiffs describe these statutes and regulations as "grab-bag" and "hodgepodge." Pl.

[18/] Plaintiffs' argument as to congressional rules that "prohibit amendment by appropriation" is entirely inapposite. *See* Pl. Br. at 26. Plaintiffs state that "the 1930 statute was not amended by the broader language of any subsequent appropriations bills." However, defendants have never argued that the former 5 U.S.C. § 340 was "amended by" the appropriations statutes which were codified in 5 U.S.C. § 300. Until they were merged in 1966, the two statutes were entirely separate, funded two separate divisions of the FBI, and provided the FBI with two separate sets of authorization with regard to the collection and dissemination of information. Section 340 was not amended to include the broader authorization from section 300 until the 1966 statute was passed, merging the two previous provisions and transferring them to 28 U.S.C. § 534. As the 1966 statute was not an appropriations statute, there was no violation of any purported rule prohibiting amendment by appropriation.

Br. at 32-34. But in the end, it is the plaintiffs who "are mistaken" (Pl. Br. at 32) in their view that the provisions cited by the defendants do not provide authority for the defendants' actions.

Plaintiffs first attack the government's citation to the Violent Crime Control and Law Enforcement Act of 1994 ("VCCLEA"),[19/] a statute which expressly 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." *See* Pl. Br. at 32-33. Plaintiffs state that this provision "was an appropriation measure to effectuate the creation of an entirely distinct database, the Criminal Alien Tracking Center." *Id.* at 32. However, as the plaintiffs themselves acknowledge lower on the same page of their brief, the Criminal Alien Tracking Center is not a database, but rather a component of the DHS which is also known as the Law Enforcement Support Center, or LESC, and which is located in Burlington Vermont. *Id.* at 32-33, quoting 142 CONG. REC. S4405-01 (daily ed. Apr. 30, 1996) (statement of Sen. Leahy), and citing S. REP. NO. 104-249, at 57 (1996); *see also* Compl. ¶ 35.

Plaintiffs go on to argue that "the 1994 VCCLEA appropriation is no authority whatsoever for the FBI's dissemination of immigration records via its NCIC database in Clarksburg, West Virginia." Pl. Br. at 33. This is a rather peculiar argument. For the plaintiffs have sued not only the FBI (accused of disseminating the information) but also the DHS (accused of entering the information). Indeed, their complaint for declaratory and injunctive

---

[19/] 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 AEDPA, 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.

relief seems directed not primarily at the FBI and its essentially clerical and technical functions of maintaining and managing a computer database, but at DHS and ICE, which are responsible for compiling, verifying, entering, updating, and ultimately removing the information regarding Absconders and NSEERS violators that goes into, and is disseminated via, that database. As the plaintiffs allege in their complaint, "the Law Enforcement Support Center ('LESC'), a unit of DHS located in Burlington, Vermont has the responsibility to enter 'absconder' and alleged 'NSEERS violator' records directly into the NCIC Immigration Violators File. Defendant DHS is the only agency authorized to enter and maintain these records." Compl. ¶ 35.[20/]

Defendants have never argued that the VCCLEA authorized the FBI to disseminate immigration information using the NCIC (that authorization, as we have seen, comes from 28 U.S.C. § 534). What defendants instead have argued, and what plaintiffs fail to rebut, is that the statute not only authorizes but ***requires*** DHS and its LESC component to enter information into the NCIC which would allow state and local law enforcement agencies to assist "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."[21/] This, of course, includes the Absconder and NSEERS

[20/] *See* 28 C.F.R. § 20.37 ("It shall be the responsibility of each criminal justice agency contributing data to the [NCIC] to assure that information on individuals is kept complete, accurate, and current so that all such records shall contain to the maximum extent feasible dispositions for all arrest data included therein.").

[21/] Plaintiffs argue that the computer records system authorized by the VCCLEA is limited to a system of records concerning aliens who have been convicted of an aggravated felony, based on preambular language in the appropriations provision which states that the Commissioner shall act "under the authority of [8 U.S.C. § 1226(d)]." Pl. Br. at 33. This argument is without merit. The language of VCCLEA § 130002(a) clearly describes a computer database which is far broader in scope than the system described in section 1226(d) and which is not limited to information about aggravated felons. In fact, if the system described in VCCLEA § 130002(a) was intended to be limited to aggravated felons, it would be entirely redundant of 8 U.S.C. § 1226(d), and no further statute would have been necessary.

violator information at issue here. *See* Def. Br. at 23-24. The presence of such authority is fully dispositive of the plaintiffs' contention that defendants acted *ultra vires,* for if DHS has explicit statutory authority to enter the information into the NCIC database, then the FBI clearly has the authority to maintain and disseminate that information.

Finally, plaintiffs attack the defendants' reliance on 8 U.S.C. §§ 1373, 1644 as additional sources of authority for the defendants' actions. *See* Pl. Br. at 35; Def. Br. at 24-25. This attack fails. While the plaintiffs may be correct that the legislative target of these provisions was local "anti-snitch" ordinances, *see City of New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999), plaintiffs are incorrect in assuming that that target limits the scope of the provisions. For by their plain language, these provisions do not merely prevent municipalities from enacting ordinances which restrict the right of their employees to exchange information with federal immigration authorities concerning the immigration status of any individuals. Rather, they bar any "person or agency"–which would clearly include the plaintiffs herein–from attempting to "prohibit, or in any way restrict, a Federal . . . entity" from exchanging "with any other Federal, State, or local government entity," or from "maintaining," any "information regarding the immigration status, lawful or unlawful, of any individual." 8 U.S.C. §§ 1373(b)(2),(3), 1644. Although plaintiffs may be correct that these statutes do not, in themselves, authorize the defendants' alleged actions in including Absconder and NSEERS violator information in the NCIC, they clearly contemplate that such information would be exchanged among federal, State, and local government agencies, and, more importantly, expressly bar plaintiffs' current efforts to interfere with those information exchanges.

III. PLAINTIFFS' ARGUMENT THAT THE DEFENDANTS' ALLEGED USE OF THE NCIC IS UNLAWFUL BECAUSE IT CAUSES LOCAL POLICE TO MAKE IMMIGRATION ARRESTS THAT CONGRESS HAS FORBIDDEN IS ENTIRELY WITHOUT MERIT.

A. Plaintiffs' Argument that Congress Has Occupied the Field of Immigration Regulation, Barring the Defendants' Alleged Use of the NCIC to Disseminate Immigration Information, is Without Merit.

Plaintiffs argue that Congress has barred state and local police from arresting aliens for immigration violations by enacting an "elaborate statutory scheme of federal immigration and enforcement." Pl. Br. at 36. They argue that "Congress holds a plenary and exclusive power to regulate immigration, and its exercise of this power wholly ousts any state role. The power to regulate immigration 'belongs to Congress, and not to the states.'" Pl. Br. at 37, quoting *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *see also* Pl. Br. at 37-38. To the extent that plaintiffs purport to argue that Congress has "occupied the field" when it comes to immigration regulation and enforcement, leaving no room for state involvement, the argument fails.[22/]

The specific governmental action at issue in this case does not involve any attempt by any state to regulate immigration, or to alter the benefits, rights, and prerogatives which Congress has made available to various classes of aliens. Nor does it involve any attempt by any state to enact or enforce local immigration provisions which conflict with or supplement federal law. Plaintiffs have not sued any state or local agencies; do not seek to invalidate any state or local statutes, regulations, or ordinances; and do not ask to enjoin any state action. What this

---

[22/] "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Accordingly, in the absence of express preemptive language, federal courts should be "reluctant to infer preemption." *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224 (1993).

case has to do with, instead, is the alleged decision by *federal* agencies to disseminate information to State and local police about various classes of immigrants.

Put another way, this case does not implicate the "field" of immigration regulation; at best, it affects the "field" of immigration *information*. Any claim that Congress has occupied *that* field, so as to leave no room for State and local participation, is unsupported by law, as numerous provisions in the INA not only allow but in fact *require* ICE to exchange information about immigrants with State and local authorities.[23/] Plaintiffs' citations to cases such as *Chy Lung*, *De Canas v. Bica*, 424 U.S. 351 (1976), *Toll v. Moreno*, 458 U.S. 1 (1982), *Graham v. Richardson*, 403 U.S. 365 (1971), and the like (*see* Pl. Br. at 37-38), are therefore inapposite, and their arguments concerning field preemption are irrelevant.

[23/] *See, e.g.*, VCCLEA, *supra* pp. 36-38 and nn. 19-21 (expressly requiring 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."); 8 U.S.C. § 1357(g)(10) (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."); 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); 8 U.S.C. § 1373 (providing that no federal, state, or local government entity or official may interfere with any other government entity or official's communication with the ICE "regarding the citizenship or immigration status, lawful or unlawful, of any individual"; precluding any person or agency from prohibiting or restricting "a Federal, State, or local government entity" from maintaining information about "the immigration status, lawful or unlawful, of any individual," or from exchanging such information with ICE or any other federal, state, or local government entity; and imposing on ICE an obligation 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. § 1644 (same).

B. Plaintiffs' Efforts to Refute Defendants' Showing that State Police Have Inherent Authority to Make Federal Immigration Arrests Fail.

Plaintiffs seem to concede that 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 but instead inheres in the States' status as sovereign entities. *See* Pl. Br. at 35-36. But they argue that, "whatever the state-law powers possessed by the police to make arrests for federal offenses–in the immigration area or any other area–as to immigration arrests, Congress has preempted such authority." *Id.* In support of this argument, they cite to 8 U.S.C. § 1252c, which they read as explicitly permitting "local immigration enforcement in narrowly circumscribed areas," and they contend that this provision would be "wholly superfluous" if states possessed the inherent authority to which the defendants referred. Pl. Br. at 39-43.

This precise argument was emphatically rejected by the only appellate court ever to have squarely considered it. *See United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir.), *cert. denied*, 528 U.S. 913 (1999). In that case, the government had argued that "state and local law enforcement officers are empowered to arrest for violations of federal law, as long as such arrest is authorized by state law"–an argument which, incidentally, the court found to be correct as a matter of law. 176 F.3d at 1296-97. In response, Vasquez cited to the same statutory provision upon which plaintiffs rely here–*viz.*, 8 U.S.C. § 1252c–and argued that all arrests not specifically authorized by that provision are prohibited by it. 176 F.3d at 1296-97.

In analyzing the arguments on both sides, the Tenth Circuit first looked at the structure and wording of the statute, and it held as follows:

> It is clear from the . . . clause–"to the extent permitted by state and local law"–that Congress did not intend to preempt state and local law when it granted authority to

> arrest illegal aliens to state and local law enforcement officers. Indeed, the exercise of that power is specifically made dependent on state and local authorization. The second clause of the introductory language expressly negates any intent to preempt state-law limitations on state or local authority to arrest, and strongly suggests an intent to rely solely on state-law authorization to arrest, rather than to broaden or augment such authorization. It is implausible to read any preemptive intent into the immediately preceding clause.

Id. at 1298. The Tenth Circuit then looked at the legislative history of the provision, including the very statements by Representative Doolittle upon which the plaintiffs rely on page 40 of their memorandum. Based on this history, the court said, "the purpose of § 1252c was to displace a perceived federal limitation on the ability of state and local officers to arrest aliens in the United States in violation of Federal immigration laws.[24/] This legislative history does not contain the slightest indication that Congress intended to displace any preexisting enforcement powers already in the hands of state and local officers." *Id.* at 1298-99.

The court then considered Vasquez's arguments, identical to those advanced by plaintiffs here, to the effect that the design of section 1252c implied an intention by Congress to preempt the authority of state and local police to arrest aliens for immigration violations. The panel's reasons for rejecting those arguments are so germane to the case at bar as to be worth quoting at some length:

[24/] The opinion contains a footnote here which is very germane to the case at bar: "Unfortunately, during the floor debate on § 1252c, Representative Doolittle did not identify which 'current Federal law' prohibited 'State and local law enforcement officials from arresting and detaining criminal aliens.' Neither the United States nor Vasquez has identified any such preexisting law. Furthermore, this court has not been able to identify any pre-§ 1252c limitations on the powers of state and local officers to enforce federal law. In fact, as set out above, this court has held that state law-enforcement officers have the general authority to investigate and make arrests for criminal violations of federal immigration laws. *See United States v. Salinas-Calderon,* 728 F.2d 1298, 1301-02 (10th Cir.1984)." *Vasquez-Alvarez*, 176 F.3d at 1299 n.4.

> This court finds no federal preemption of state law implicit in the design of § 1252c. As noted by the United States, Vasquez's argument in favor of implied preemption is based solely on the maxim of statutory construction *expressio unius exclusio alterius* (expression of one thing is the exclusion of another). That is to say, when Congress granted arrest power to state and local police officers in certain circumstances, it impliedly precluded the exercise of that power in all other circumstances. . . . We conclude that the canon is overcome here by § 1252c's legislative history and by subsequent Congressional enactments providing additional nonexclusive sources of authority for state and local officers to enforce federal immigration laws.
>
> As discussed at length above, § 1252c's legislative history demonstrates that the purpose of the provision was to eliminate perceived federal limitations which, according to Representative Doolittle, 'tied the hands of our State and local law enforcement officials.' 142 CONG. REC. 4619 (1996).... There is simply no indication whatsoever in the legislative history to § 1252c that Congress intended to displace preexisting state or local authority to arrest individuals violating federal immigration laws.
>
> In addition to this compelling legislative history, we note that in the months following the enactment of § 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws. . . . This collection of statutory provisions evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws. Viewed against this backdrop, Vasquez's claim that allowing state and local officers to arrest illegal aliens pursuant to preexisting state or local authority would impede the accomplishment of Congress' purposes and objectives in enacting § 1252c is particularly unconvincing.

Id. at 1299-1300.

The Tenth Circuit concluded by considering Vasquez's argument, also raised by plaintiffs here, that recognition of the states' inherent authority to arrest for federal immigration violations would essentially render the statute superfluous. The panel concluded that, if the

statute was superfluous, it was because the sponsoring legislator, Rep. Doolittle, was mistaken in his assumption that state and local police did not already possess the powers conferred by the statute. As the court explained, the mere fact that the statute would be rendered superfluous by the court's construction did not render that construction incorrect:

> Both the plain language and legislative history of § 1252c reflect that Congress intended the provision to displace perceived Federal limitations on the authority of state and local officers to arrest "criminal illegal aliens." Nevertheless, as noted above, neither of the parties have identified, and this court has not found, any such extant federal limitation on the authority of state and local officers. *See supra* note four [note 24 above]. Accordingly, it might be argued that this court's interpretation of § 1252c leaves the provision with no practical effect. That reason standing alone is not, however, sufficient for this court to manufacture a purpose for § 1252c by interpreting it to preempt state law.

Vasquez-Alvarez, 176 F.3d at 1300.

As *Vasquez-Alvarez* convincingly establishes, plaintiffs' rejoinder to the defendants' "inherent authority" argument fails.[25/] Ultimately, as the defendants have argued, the question whether state and local police have the authority to arrest an alien on federal immigration charges is a question of state law. If state law provides the police such authority, there is no Congressional enactment which overrides or preempts that authority.

[25/] Plaintiffs rely to a significant extent on the Ninth Circuit's decision in *Mena v. City of Simi Valley*, 332 F.3d 1255, 1265 n.15 (9th Cir. 2003), for the proposition, stated in dicta in that case, that police authority to enforce immigration laws is "doubtful" and "questionable." *See, e.g.*, Pl. Br. 38, 39, 41. However, *Mena*'s overall conclusion that the local police in that case violated the plaintiff's clearly established constitutional rights "by inquiring unnecessarily into her citizenship status," 332 F.3d at 1264, is itself very much in doubt. The Ninth Circuit denied rehearing *en banc* in *Mena* over the objections of seven judges, and the Supreme Court recently granted certiorari (*sub nom. Mueller v. Mena*, __ U.S. __, No. 03-1423, 2004 WL817138 (June 14, 2004)), in part to consider the validity of the local police's questioning of the plaintiff concerning her immigration status.

C. Even if Plaintiffs Could Somehow Establish that Local Police Authority to Arrest Aliens for Immigration Violations Was Preempted by Federal Law, Their Complaint Would Still Fail to State an Actionable Claim.

As shown in the preceding two sections, the plaintiffs' preemption arguments are wrong as a matter of law. As shown in this section, they are also irrelevant. For even if plaintiffs could somehow establish that federal law precludes state and local police from arresting aliens for immigration violations, their complaint would still fail to state an actionable claim.

In their memorandum of law (Pl. Br. at 34-48), plaintiffs repeatedly challenge the lawfulness of the defendants' alleged NCIC practices on the ground that these practices "directly cause police to make immigration arrests that Congress has preempted police from undertaking." Pl. Br. at 34. This challenge, indeed, is the gravamen of Count II of their complaint (Compl. ¶¶ 83-87), in which plaintiffs allege that the federal defendants somehow "cause" state and local police to unlawfully arrest Absconders and NSEERS violators about whom information is entered into the NCIC. *See, e.g.,* Pl. Br. at 35, 36.

The question of causation has already been dealt with at some length in connection with the plaintiffs' standing to bring suit. *See supra* pp. 2-11. Suffice it to say here that, while the plaintiffs may conceivably be able to demonstrate a "but for" relationship between the entry of Absconder and NSEERS information into the NCIC and the local arrest of some of their members, they can prove no set of facts which would demonstrate that the defendants' actions caused the plaintiffs' members to be *unlawfully* arrested. If state and local police in a given jurisdiction are in fact precluded from arresting aliens based on civil immigration violations–whether due to strictures arising from State law or, as the plaintiffs fallaciously contend, because federal law precludes them from making such arrests–and yet choose to make such arrests

anyway, the illegality infecting such arrests is solely a function of State or local policies, decisions, and actions.

Ultimately, plaintiffs root their preemption arguments not in the actions of federal agencies but in the actions of state and local agencies. Plaintiffs do not argue–because it would be absurd to do so–that Congress has preempted federal agencies from gathering and disseminating immigration information for use by other federal agencies in effectuating immigration arrests. Instead, they argue (incorrectly) that Congress has preempted state and local governments from making immigration arrests and that some state and local police have started making such arrests despite this preemption. But they have not sued any such state and local governments, nor have they sued to enjoin any unlawful arrests. Their preemption argument depends entirely on their ability to show that federal agencies are somehow directly responsible for the allegedly illegal actions of state and local governments which are not parties to this case. This is a showing which they cannot make.

Moreover, even if state and local arrest authority is preempted, that would not render invalid the defendants' alleged inclusion in the NCIC of the information at issue in this case. For ultimately, despite the plaintiffs' repeated intimations to the contrary, ***this is not a case about unlawful arrests***. It is a case about ***information***, and more specifically about a computer database used by the FBI to maintain and disseminate information pursuant to authority explicitly set forth in federal statutes. The very notion that the exercise of a *federal* practice, undertaken pursuant to *federal* law, could somehow be deemed to violate the Supremacy Clause, is frivolous. Plaintiffs have cited no case, because there is none, in which a federal program was ever deemed to have violated the Supremacy Clause. Accordingly, their Supremacy Clause claims fail as a matter of law.

CONCLUSION

For the foregoing reasons, and those set forth in the defendants' initial brief, 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
July 22, 2004

ROSLYNN R. MAUSKOPF[26/]
United States Attorney
Eastern District of New York
One Pierrepont Plaza, 14th Floor
Brooklyn, NY 11201-2776

By: _____
F. FRANKLIN AMANAT (FA6117)
Assistant United States Attorney
(718) 254-6024

[26/] The United States Attorney's Office would like to thank Mr. Seena Samimi, a second-year law student at Boalt Hall Law School, University of California–Berkeley, and a summer intern in this Office, for his invaluable assistance in the research and preparation of this memorandum.

CERTIFICATE OF SERVICE

I, F. Franklin Amanat, Assistant United States Attorney, hereby certify under penalties of perjury that I did cause true and correct copies of the above and foregoing instrument, Reply Memorandum of Law in Further 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, to be served on the following persons, in the manner(s) designated below:

By E-mail (on 7/22/04) and by First-class Mail, Postage Prepaid (on 7/23/04):

Michael J. Wishnie, Esq.
Mayra Peters-Quintero, Esq.
Washington Square Legal Services
161 Avenue of the Americas, 4th Floor
New York, NY 10013
E-mail: michael.wishnie@nyu.edu

Carmine D. Boccuzzi, Esq.
Asli U. Bali, Esq.
Anil Kalhan, Esq.
Sheilah Kane, Esq.
Cleary, Gottlieb, Steen & Hamilton
One Liberty Plaza
New York, NY 10006-1470
E-mail: cboccuzzi@cgsh.com

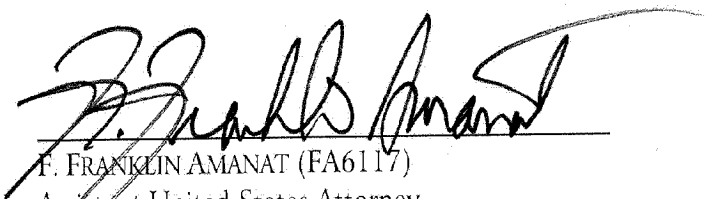
By First-class Mail, Postage Prepaid Only (on 7/23/04):

Peter Markowitz, Esq.
The Bronx Defenders
860 Courtlandt Avenue
Bronx, NY 10451

Lucas Guttentag, Esq.
Lee Gelent, Esq.
Omar C. Jadwat, Esq.
American Civil Liberties Union
Immigrants' Rights Project
125 Broad Street
New York, NY 10004-2400

Arthur N. Eisenberg, Esq.
Christopher Dunn, Esq.
New York Civil Liberties Union
Foundation
125 Broad Street
New York, NY 10004

Baher Azmy, Esq.
Seton Hall University School of Law
Center for Social Justice
833 McCarter Highway
Newark, NJ 07102

By: 

F. FRANKLIN AMANAT (FA6117)
Assistant United States Attorney
(718) 254-6024