UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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 (Glasser, J.) (Chrein, M.J.)

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

National Council of La Raza, New York Immigration Coalition, American-Arab Anti-Discrimination Committee, Latin American Workers Project, and UNITE bring this action to enjoin defendants from exceeding their statutory authority by unlawfully entering hundreds of thousands of civil immigration records into the National Crime Information Center ("NCIC"), the principal criminal database of the Federal Bureau of Investigation ("FBI"), and disseminating that information to state and local police. Defendants have misused this database in violation of the NCIC statute, 28 U.S.C. § 534, in an unlawful scheme to cause local police, in the course of their routine duties, to make federal immigration arrests that Congress has barred the police from undertaking. The defendants' misuse of the NCIC undermines public safety by deterring immigrant victims and witnesses from cooperating with police, diverts scarce resources from local policing priorities, exposes officers untrained in the complexities of immigration law to liability for wrongful arrests, and leads to increased ethnic profiling. Defendants have moved to dismiss the Complaint on three grounds. Each ground fails.

First, defendants argue that plaintiffs lack standing, because none of their individual members has suffered an injury attributable to defendants' misconduct. Defendants are wrong: individual members of each plaintiff organization have sufficiently alleged injuries-in-fact, including an imminent threat of unlawful arrest as a result of defendants' unlawful policies and procedures and the chilling of vital communications with local law enforcement. Their allegations of injury vest plaintiffs with standing to bring this action.

Second, defendants argue that the civil immigration records at issue in this case fit within the NCIC statute's authorization for entry and dissemination of "crime . . . [or] other records," because the people who are the subject of these records are, as defendants repeatedly assert, "criminals." In making this argument, defendants ignore the language and history of the NCIC statute, which limits the FBI's power to collect and exchange criminal justice information to narrowly delineated categories. The civil immigration records and administrative warrants at issue in this case are not "crime records" under the statute. In addition, the individuals who are the subjects of those records have not been charged or convicted criminally, and are not subject to criminal warrants. These individuals are not "criminals" merely because the defendants so label them. Nor are defendants' arguments strengthened by resort to other general immigration statutes, none of which grants defendants the broad powers claimed here.

Last, defendants argue that Congress has not preempted routine immigration enforcement by police, and thus dissemination of immigration records via the NCIC does not cause police to make illegal arrests. To the contrary, Congress has broadly preempted local police enforcement of immigration laws, subject to specific statutory exceptions that would be rendered impermissibly superfluous by the defendants' sweeping claims of "inherent" local police authority. Simply put, Congress has forbidden the arrests caused by defendants' misuse of the NCIC database.

FACTS AND PROCEEDINGS

Since 1930, Congress has authorized the FBI to operate a massive clearinghouse of federal, state, local, and international criminal justice records, making them available to law enforcement officials across the country. Compl. ¶ 22. Today that clearinghouse is known as the National Crime Information Center, and from the location of its host computer in Clarksburg, West Virginia it processes approximately 4 million transactions per day. Id. ¶¶ 23-24. The dispute in this case concerns defendants' practice of entering administrative warrants for arrest or removal, based on civil immigration records, into the NCIC, and disseminating those records to local police with a request that police arrest the subjects of those administrative warrants when encountered. Id. ¶¶ 29-34.

Since 2002, defendants have entered thousands of administrative warrants for persons with outstanding removal orders into the NCIC, and they have announced their intention to input "each 'absconder' into the NCIC" - a total of over 400,000 records. Id. ¶¶ 30-31.[1] The records being entered include "numerous inaccuracies." Id. ¶ 39. Defendants have also entered and disseminated an unknown number of records regarding persons alleged to have violated a requirement of the National Security Entry-Exit Registration System ("NSEERS"), the "special registration" program launched by the Attorney General in 2002, id. ¶ 32,[2] over the objections of the FBI's own police advisory body. Id. ¶ 45. Finally, defendants have announced their intention to enter additional categories of civil immigration records into the NCIC. Id. ¶ 37.

Defendants' practice of entering administrative immigration warrants for absconders and NSEERS violators has caused police to arrest such individuals in many jurisdictions, including in New York, Illinois, Minnesota, Connecticut, and Florida. Compl. ¶ 54. These arrests have typically occurred without notice to the arrested persons

[1] The Complaint alleges that "approximately 19,000 'absconders'" had been entered into the NCIC as of December 1, 2003. Compl. ¶ 38. Counsel understand that as of March 1, 2004, that figure exceeds 28,000 records.

[2] The Complaint alleges that defendants enter "administrative notices" regarding NSEERS violators into the NCIC. Compl. ¶ 33. Counsel understand that defendants have revised their draft NCIC screen and now enter administrative warrants for arrest for NSEERS violators. This change has no legal significance.

of their Miranda rights, and have resulted in the detention of such persons until transfer to the custody of defendants. Id. ¶ 55. No uniform policy or practice governs the police use of the immigration records in the NCIC. Id. ¶ 58. Among those persons arrested by local police based on defendants' NCIC immigration listings are persons of United States citizenship or who have valid claims for immigration relief to remain in this country, for instance as the spouse or parent of a United States citizen or as a bona fide political asylee. Id. ¶ 56.

In addition to causing police arrests in many jurisdictions, defendants' NCIC practices have "created fear in immigrant communities," id. ¶ 65, "deter[red] immigrants from communicating with state and local law enforcement officials when in need," id. ¶ 66, and "inhibit[ed] immigrants from accessing vital emergency government services such as police and fire protection." Id. ¶ 67.

Individual members of the plaintiff organizations have directly suffered these consequences. The "plaintiff members," as defined in the Complaint, are a group comprised of "[a]t least one member of each plaintiff organization, or of the associations that are members of each plaintiff organization . . . [who] has an outstanding removal order or is not in compliance with an NSEERS requirement." Compl. ¶ 68. Accordingly, defendants "have entered or imminently will enter into the NCIC" an administrative warrant for removal of each of the plaintiff members. Id. ¶ 69. The risk of police arrest based on an NCIC listing is not speculative, as an administrative warrant for removal has or eminently will be entered into the NCIC for the plaintiff members, each of whom "lives or works in a jurisdiction whose state or local police have a policy or practice of making immigration arrests in reliance on NCIC information." Id. ¶ 68. These plaintiff members "regularly come into contact with state and local police," id. ¶ 70, because they either "work in settings in which they are frequently questioned by police, such as those who work as day laborers or street vendors," id. ¶ 71, or "appear Arab, Muslim, or South Asian and, especially since the September 11 attacks, have been regularly questioned by police in the course of their daily lives." Id. ¶ 72.

The plaintiff members therefore are at imminent risk of arrest by state or local police "who stop or question them." Compl. ¶ 73. The plaintiff members reasonably fear that if they "contact state or local law enforcement officials to report a crime, or otherwise speak or communicate with government officials on a matter of public or private concern, they may be arrested based on an NCIC listing." Id. ¶ 74. As a result, the plaintiff members are fearful of "communicating with state and local law enforcement officials when in need and when they would otherwise be willing and able to assist in criminal investigations." Id. ¶ 66. The plaintiff members are also the subject of erroneous information in the NCIC, id. ¶ 76 ("upon information and belief, defendants have entered or imminently will enter erroneous information regarding plaintiff members into the NCIC"), and their personal information "is available to neighbors, private citizens, or commercial enterprises." Id. ¶ 75.

ARGUMENT

I. STANDARD OF REVIEW

On a motion to dismiss, the facts alleged in the Complaint are deemed true, and plaintiffs are entitled to all reasonable inferences drawn therefrom. Lunney v. United States, 319 F.3d 550, 554 (2d Cir. 2003); Baur v. Veneman, 352 F.3d 625, 631 (2d Cir. 2003) (pleadings "need not be elaborate" to state claim) (quotation and citation omitted).

As to a plaintiff's standing to bring suit, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the Court must] presume that general allegations embrace those specific facts that are necessary to support the claim." Bennett v. Spear, 520 U.S. 154, 168 (1997) (internal quotation and citations omitted). Because the jurisdictional requirement of standing is subject to the same degree of proof that governs other contested factual issues, "standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury." Baur, 352 F.3d at 631.

II. THE PLAINTIFFS HAVE STANDING TO VINDICATE THEIR MEMBERS' RIGHTS

The defendants' argument that the plaintiff union, community group, and civil rights organizations do not have standing to sue on behalf of their members, Def. Br. 6-13, lacks merit. An association has standing if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). As alleged in the Complaint, each plaintiff has at least one member at heightened risk of unlawful arrest (the "plaintiff members," Compl. ¶ 68) as a result of the defendants' unlawful NCIC practices. Since the Complaint adequately alleges that the plaintiff members have suffered an "injury-in-fact" that is "fairly traceable" to defendants' unlawful conduct and "likely [to] be redressed by a favorable decision," the plaintiff organizations have associational standing to assert the claims of their individual members. Bennett, 520 U.S. at 162.

A. Plaintiffs Have Adequately Alleged Injuries-In-Fact

In arguing that the plaintiff members must already have been unlawfully arrested to establish an "injury-in-fact," Def. Br. 10, the defendants advance a proposition that is precisely the opposite of what the law requires. A plaintiff seeking injunctive relief ordinarily "cannot rely on past injury to satisfy the injury requirement," but rather must show a probability of future injury. Deshawn E. by Charlotte E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998); see also Los Angeles v. Lyons, 461 U.S. 95, 105-06 (1983); Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004). In assessing that probability of future injury, there is "no per se rule" requiring a court to find "more than one past act, or any prior act, for that matter," as a basis for the threatened injury. Roe v. City of New York, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001); see also New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996) ("a credible threat of present or future prosecution itself works an injury that is sufficient to confer standing, even if there is no history of past enforcement"). Nor must the future injury be an inevitable certainty, for as the Second Circuit has explained, "threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes." Baur, 352 F.3d at 632-33 (discussing cases); accord Roe, 151 F. Supp. 2d at 501-02.

The plaintiff organizations also satisfy the requirements for obtaining judicial review under the Administrative Procedure Act, since they adequately allege that the defendants' NCIC policies cause the plaintiff members (1) to "suffer[] legal wrong because of agency action" - namely, the heightened risk of imminent unlawful arrest - and (2) to be "adversely affected or aggrieved by agency action." 5 U.S.C. § 702; see Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882-83 (1990) (individual seeking judicial review under the APA must (1) "identify some 'agency action' that affects him in the specified fashion," and (2) "show that he has 'suffer[ed] legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute'") (citations omitted).

1. Plaintiff Members Reasonably Fear They Will Be Illegally Arrested Because Of The Defendants' Unlawful NCIC Policies

The Complaint sufficiently alleges that at least one member of each plaintiff organization reasonably fears a future unlawful arrest as a direct and foreseeable result of the defendants' policy of using the NCIC to "encourage[], cause[], and induce[] state and local police to arrest immigrants listed" in the database. Compl. ¶ 51. See Deshawn E., 156 F.3d at 344 (plaintiffs who "are likely to suffer future interrogations" using challenged methods have standing). An established government policy or practice that is directed at an identifiable group and is an alleged cause of probable future injury is sufficient to confer standing upon members of that group. Roe, 151 F. Supp. 2d at 506; Deshawn E., 156 F.3d at 345 (finding likelihood of recurring injury since "challenged interrogation methods . . . are officially endorsed policies"); see also Baur, 352 F.3d at 637 (existence of policy that causes risk of harm critical in holding that plaintiff had standing). The plaintiff organizations have accordingly established their standing by alleging both (1) the existence of an official policy that causes their plaintiff members harm and (2) a probability of future harm to their plaintiff members.

First, there is no question that the Complaint sufficiently alleges the existence of an official government policy that creates a heightened risk of harm to the plaintiff members. Defendants have announced policies regarding the entry of data into the NCIC, see Compl. ¶¶ 30, 32, and have begun placing "civil immigration records regarding hundreds of thousands of non-citizens into the NCIC," Compl. ¶ 29, for the very purpose of causing police to arrest the listed persons. Id. ¶ 51. As a result, police in "New York, Illinois, Minnesota, Connecticut, Florida, and elsewhere have arrested immigrants" similarly situated to the plaintiff members based on information directly obtained pursuant to their "polic[ies] or practice[s] of arresting 'absconders' and/or alleged NSEERS violators listed in the NCIC." Id. ¶ 53.

Second, the Complaint alleges a probability of harm to the plaintiff members sufficient to confer standing upon the organizations in which they are members. Defendants have entered or imminently will enter administrative warrants for the plaintiff members into the NCIC, Compl. ¶ 69, and the plaintiff members live or work in jurisdictions whose state or local police have policies or practices of making immigration arrests in reliance on NCIC information. Id. ¶ 68. Plaintiff members also regularly come into contact with local police because they either (1) work in settings in which they are frequently questioned by police or (2) have been regularly questioned by police in the course of daily life because the members appear Arab, Muslim, or South Asian. Id. ¶¶ 70-72. The plaintiff members thus reasonably fear that police will run their names and arrest them based on the administrative warrants in the NCIC. Id. ¶ 73. That objectively reasonable fear is sufficient to establish standing to contest defendants' NCIC policies. See Roe, 151 F. Supp. 2d at 504 ("Courts have repeatedly found that plaintiffs who are members of such an identifiable class of targeted individuals have standing to sue").[3]

[3] In Roe, for instance, the court concluded that intravenous drug users had sufficiently alleged standing to challenge a police practice of arresting participants in a state-authorized needle exchange program, based on the plaintiffs' reasonable fear of future arrest. 151 F. Supp. 2d at 506. The plaintiffs' fear was reasonable because of prior arrests and an "ongoing" police practice of targeting "persons in 'high drug areas'" for unlawful arrest, including the neighborhoods where the needle exchange programs visited by plaintiffs were located. Id.

While the defendants protest that the Complaint does not identify any of the illegal policies and practices at issue, Def. Br. 9, that assertion plainly misreads the Complaint, which explicitly identifies the defendants' policies regarding the entry and dissemination of civil immigration records through the NCIC to cause police officers to make immigration arrests that Congress has preempted the police from making. Compl. ¶¶ 29-32, 51-54. Nor are the defendants correct in arguing that the Complaint fails because it lacks "allegations that specific members have actually been or actually will be unlawfully arrested based on information reported in the NCIC database," Def. Br. 10, since the Complaint unmistakably alleges that the plaintiff members face a heightened risk of unlawful arrest, and as discussed below, those allegations are sufficient to establish the plaintiff organizations' associational standing. See Compl. ¶¶ 68-74; infra Point I.C; see also Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269, 286-89 (D. N.J. 2003).

Finally, the defendants are mistaken that the allegations are inadequate to establish plaintiffs' standing simply because the Complaint does not include the word "same" before "plaintiff members." See Def. Br. 9. The Complaint alleges that each plaintiff organization has at least one member subject to an outstanding removal order or not in compliance with an NSEERS requirement, Compl. ¶ 68, and that these "plaintiff members" regularly come into contact with state and local police, id. ¶¶ 70-72. As alleged in the Complaint, these "plaintiff members" therefore are at risk of arrest when they come into contact with the police, and reasonably fear being illegally arrested during any such encounter. Id. ¶¶ 73-74. Since the Complaint explicitly defines the "plaintiff members" whose risk of unlawful arrest is increased as a result of defendants' actions, the defendants' insistence on the use of the word "same" amounts to a technicality at best and is inconsistent with the obligation to draw all reasonable inferences in the plaintiff organizations' favor at this stage of the litigation. See, e.g., Lunney, 319 F.3d at 554 (court "must draw all reasonable inferences in favor of the plaintiff"); Bennett, 520 U.S. at 168 (on motion to dismiss, court must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim") (internal quotation and citations omitted).

Defendants also incorrectly argue that the Complaint is inadequate because it does not allege that the plaintiff members' contacts with the police result from information obtained through the NCIC. Def. Br. 9. This assertion misstates the nature of the harm that the plaintiff members face. The Complaint concretely alleges that the plaintiff members face a heightened risk of illegal arrest as a result of defendants causing police to arrest persons subject to administrative warrants as absconders or NSEERS violators, following routine police-civilian encounters. Compl. ¶¶ 24, 36, 54. Defendants' unlawful NCIC practices directly cause police to arrest persons listed in the database, regardless of the reason for the initial police contact, and the allegations in the Complaint are amply concrete to support that injury.

Moreover, as in Roe, the defendants' actions cause a "distinct and palpable" injury to both the plaintiff members and other members of the plaintiff organizations. Roe, 151 F. Supp. 2d at 506. In Roe, the fear of arrest translated "directly into less frequent visits to the NEP centers, more frequent use of 'dirty' and dulled needles, and a significantly higher risk of HIV contraction and transmission." 151 F. Supp. 2d at 506. In this case, immigrants already significantly underreport crimes and hesitate to cooperate with the police as witnesses when they fear deportation, and the defendants' misuse of the NCIC further deters "immigrants from communicating with state and local law enforcement officials when in need and when they would otherwise be willing and able to assist in criminal investigations." Compl. ¶¶ 62-66. The plaintiff members suffer the distinct and palpable injury of not being able fully to cooperate with and access police and other government services to which they are entitled in their local communities. Id. ¶¶ 66-67.[4]

2. The Plaintiff Members Are Adversely "Affected Or Aggrieved" By Defendants' Actions

As an independent basis for standing, the plaintiff members also are "affected or aggrieved" by defendants' actions, since the injuries of which the plaintiff organizations complain fall "within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for [the] Complaint." Lujan, 497 U.S. at 883 (internal quotation omitted); see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686 (1973). This lenient standard only "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be

[4] In this context, defendants' reliance on Laird v. Tatum, 408 U.S. 1 (1972) and United Presbyterian Church in the USA v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984), Def. Br. 11-13, is misplaced. Unlike the plaintiffs in Laird, 408 U.S. at 10-13, or in United Presbyterian, 738 F.2d at 1378-79, who asserted no injury other than a "chilling effect" caused by the challenged law enforcement practice, here the plaintiff members clearly and sufficiently allege that they also face a heightened risk of unlawful arrest due to defendants' NCIC policies. The United Presbyterian court itself recognized that "threatened arrest" constitutes a "concrete, harmful action" sufficient to "support standing," id. at 1380; see also Laird, 408 U.S. at 11 (approving standing where "challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging"). Nor can defendants' invocation of these cases be reconciled with more recent precedent. See, e.g., Baur, 352 F.3d at 632-33 (heightened risk of future injury may establish injury-in-fact); Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996) ("a small probability of injury is sufficient" and "relatively modest increments in risk . . . qualify for standing").

assumed that Congress intended to permit the suit." Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987).

Defendants' NCIC practices injure interests of the plaintiff members that fall within the NCIC statute's zone of interests. Defendants' practices result in the improper inclusion of administrative warrants for plaintiff members in the NCIC criminal database, when these persons they have been neither charged with nor convicted of an immigration crime, nor even made the subject of a criminal arrest warrant. Compl. ¶¶ 29, 69. Defendants' practices also inhibit plaintiff members from speaking, communicating, and interacting with local law enforcement officials, because plaintiff members reasonably fear that their names are included in the NCIC and that, upon any encounter, police officials may arrest them illegally. Id. ¶¶ 74, 75. Finally, inclusion in the NCIC harms the plaintiff members' privacy interests because private citizens and commercial enterprises access the NCIC file in which their names are included. Id. ¶¶ 44, 74; see also 28 C.F.R. § 50.12(a) (authorizing dissemination of NCIC records to banking and financial institutions, state agencies for employment or licensing purposes, "segments of the securities industry," and registered futures associations). The FBI's own regulations recognize this privacy interest. See 28 C.F.R. § 20.1 ("purpose" of regulations implementing NCIC statute includes "to protect individual privacy").

Plaintiff members have more than the small direct stake in the outcome of the litigation that would be sufficient to sustain standing. See SCRAP, 412 U.S. at 689 n.14. As subjects of records in the NCIC, they are the persons upon whom Congress must have intended to rely "to challenge agency disregard of the law." Clarke, 479 U.S. at 399. See Menard v. Saxbe, 498 F.2d 1017, 1023 (D.C. Cir. 1974) (holding subject of NCIC record has standing to challenge lawfulness of its inclusion in database and ordering expungement of non-criminal information wrongly included in NCIC criminal files); Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974) (holding subject of NCIC record has standing to challenge accuracy of record and further that FBI has duty to maintain accurate information in NCIC).[5]

For the foregoing reasons, the injuries to the plaintiff members fall within the zone of interests of the NCIC statute. See Nat'l Credit Union Admin. v. First Nat'l Bank and Trust Co., 522 U.S. 479, 492 (1998) (interest to be protected must only be "arguably" within zone of interests of statutory provision); see also Bennett, 520 U.S. at 163 (emphasizing that, for APA claims, courts must construe zone of interests test against backdrop of "generous review provisions of the APA").

B. Defendants' Actions Cause The Plaintiff Members' Injuries And The Requested Relief Will Redress The Injuries Alleged

The plaintiff organizations also sufficiently allege causation and redressability, since the plaintiff members' injuries can be "fairly . . . traced to the challenged action of the defendant[s]" and are not injuries that result "from the independent action of some third party not before the court." Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976). 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 that Congress has forbidden." Compl. ¶ 60; see Simon, 426 U.S. at 45 n.25; Heldman on Behalf of T.H. v. Sobol, 962 F.2d 148,

[5] In addition, the interest of plaintiff members in preventing their own illegal arrest is related to the purpose of the statute, which aims to promote public safety and effective criminal law enforcement, see infra Point III.A.2. Impediments to effective communication between police and the public frustrate this legislative purpose.

156 (2d Cir. 1992). In addition, as discussed above, a similarly clear and unattenuated chain of causation exists between the defendants' actions and the ways in which the plaintiff members are "affected or aggrieved" - the defendants' own actions directly cause the wrongful inclusion of plaintiff members' names in the NCIC database, the heightened risk of unlawful arrest, the chilling of speech and other communication to local officials, and the harm to plaintiff members' privacy interests.

While the defendants insist that their NCIC policies "do not direct state and local law enforcement agencies to arrest aliens for whom there is a positive NCIC hit," Def. Br. 12 (citing United Presbyterian), this assertion misses the mark. Police access the NCIC database - which is maintained by defendants, not by local police themselves - literally "millions of times each day during ordinary encounters with motorists, pedestrians, and other persons." Compl. ¶¶ 2, 23-25. Defendants have "encouraged, caused, and induced" police to make arrests forbidden by Congress, by using a criminal database that those police routinely rely upon for a plethora of law enforcement purposes having nothing to do with immigration enforcement. Compl. ¶¶ 50-51. This "end run" around established limits on the arrest authority of state and local police is the direct source of the heightened risk of unlawful arrest that the plaintiff members reasonably fear. Any such arrests are - and, as the Complaint alleges, Compl. ¶¶ 54-56, already have been - the natural and foreseeable result of the defendants' misuse of the NCIC.[6]

The causal relationship between the defendants' actions and the plaintiff members' injuries becomes even more readily apparent upon consideration of the

[6] Moreover, even on their own mistaken assumptions concerning the source of the heightened risk of arrest, the defendants are simply wrong that presence of a supposed "link supplied by agencies who are not before this Court" is "fatal" to the plaintiff organizations' standing. Def. Br. 13. "[I]ndirectness of injury . . . [is] not necessarily fatal to standing." Simon, 426 U.S. at 44; see also Meese v. Keene, 481 U.S. 465, 472-77 (1987); Heldman, 962 F.2d at 156.

overlapping analysis of causation and redressability, particularly because the remedy requested by plaintiff organizations is cessation of the defendants' illegal conduct. Heldman, 962 F.2d at 157 n.8. Enjoining defendants from disseminating the administrative warrants at issue herein via the NCIC will eliminate both the plaintiff members' fear of unlawful arrest and the chilling effect upon their cooperation with local law enforcement. Nor will there be any longer the violation of the privacy interests based on their inclusion in a "hot file." Since the relief sought by the plaintiff organizations will fully redress their members' injuries, the causal link between the defendants' actions and those injuries is abundantly clear.

C. Plaintiffs May Sue To Seek Relief For Their Members' Injuries

Finally, having alleged sufficiently concrete and particularized injuries such that the plaintiff members would "otherwise have standing to sue in their own right," the plaintiff organizations have established their own standing to seek relief for those members' injuries. Hunt, 432 U.S. at 343. In addition, as the defendants apparently concede (since they make no argument to the contrary), the plaintiff organizations also have established that (1) the interests they seek to protect through the prosecution of this lawsuit are germane to their respective purposes, Compl. ¶¶ 9-13, and (2) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt, 432 U.S. at 342-43; see Bano v. Union Carbide Corp., 361 F.3d 696, 714 (2d Cir. 2004) (participation of individual members unnecessary when associational plaintiff "seeks a purely legal ruling without requesting that the federal court award individualized relief to its members"). The Complaint raises purely legal questions, the analysis of which does not require any individualized consideration of the injuries of the plaintiff members, and the declaratory and injunctive relief sought by the plaintiff organizations "will inure to the benefit of those members of the association actually injured." Warth v. Seldin, 422 U.S. 490, 515 (1975).

III. DEFENDANTS' ENTRY AND DISSEMINATION OF HUNDREDS OF THOUSANDS OF CIVIL IMMIGRATION RECORDS VIA THE NCIC IS NOT AUTHORIZED BY STATUTE

Defendants principal argument is that the civil immigration records at issue in this case - administrative warrants for removal or arrest - constitute "crime . . . [or] other records," as those terms are used in the NCIC statute. Def. Br. 15-22. In the alternative, defendants maintain that dissemination of these records via the NCIC is permitted by some other generalized immigration provision. Id. at 22-26.

Defendants are mistaken. Congress has carefully limited the categories of records that may be lawfully disseminated via the powerful NCIC database, as the text and history of 28 U.S.C. § 534 reveal. The D.C. Circuit has made clear, in two opinions carefully examining the text and history of the NCIC statute, that the FBI's statutory powers to disseminate records via the NCIC must be narrowly construed. See Menard, 498 F.2d 1017 (holding record of lawful police arrest and overnight detention, where arrestee was later released without charge, does not constitute "crime" record that may be disseminated via NCIC, in light of text and history of § 534(a)(1)); Tarlton, 507 F.2d 1116 (affirming Menard and holding FBI has reasonable duty of care to ensure accuracy of records in NCIC). The D.C. Circuit's reasoning in Menard and Tarlton is equally applicable to the immigration records at issue in this case. In the thirty years since Menard, Congress has on several occasions amended § 534 to authorize entry of additional records into the NCIC, and has considered - but not adopted - legislation specifically authorizing entry of immigration records. The text and history of § 534 and the case law interpreting its terms refute the defendants' arguments on this motion. Nor does the other grab-bag of statutes invoked by the defendants permit dissemination of civil immigration records via the NCIC.

A. Defendants' Practices Are Not Authorized By The NCIC Statute

1. Defendants' Interpretation Is Contrary To The Statutory Text

The text of the statute establishing and governing the NCIC appears at 28 U.S.C. § 534. It sets forth several categories of information that may be entered and disseminated via the database: "identification, criminal identification, crime, and other records," id. § 534(a)(1); records which would assist in the "identification of any deceased individual" or "missing person," id. §§ 534(a)(2), (a)(3); and "protection orders for the protection of persons from stalking or domestic violence," whether issued by "civil or criminal courts." Id. §§ 534(e)(2)(B), (e)(3)(B). A separate provision that refers by name to the NCIC database authorizes the entry and dissemination of information regarding previously deported felons. See 8 U.S.C. § 1252c(b).

The defendants argue first that administrative warrants for absconders or NSEERS violators are "crime . . . records" within the meaning of 28 U.S.C. § 534(a)(1). The defendants cite no case law, nor regulation, nor even longstanding agency practice, in support of their position that administrative warrants constitute "crime . . . records." The defendants also do not contend that administrative warrants, deportation orders, and NSEERS determinations are "crime . . . records" in the ordinary meaning of that term. Rather, the defendants' position is simply that "[a]bsconders are criminals," Def. Br. 16 (citing 8 U.S.C. § 1253(a)(1)), and "[l]ikewise, NSEERS violators are criminals, at least to the extent that their violations of the NSEERS registration requirements are willful." Def. Br. 17 (citing 8 U.S.C. § 1306). In defendants' view, this allegation alone is sufficient to render the administrative warrants at issue "crime . . . records."

But the facts contradict the defendants' labels. The plaintiff members who are the subjects of the administrative warrants at issue in this case have been neither charged nor convicted of criminal offenses under either 8 U.S.C. § 1253(a)(1) (criminal penalties for "willful" failure to depart after entry of removal order) or 8 U.S.C. § 1306 (criminal penalties for "willful" failure to comply with registration requirements). Defendants have not even obtained criminal warrants, on a showing of probable cause to believe that plaintiff members have committed these "willful" violations.[7]

Nor could the defendants charge all "absconders" or "NSEERS violators" criminally. Many alleged "absconders" and "NSEERS violators" have committed no willful violations of the immigration laws, and therefore are not criminally liable under § 1306 or § 1253(a)(1). Many so-called absconders were "not present" in Immigration Court when they were ordered removed, Compl. ¶ 41, and "did not receive notice of their scheduled court hearing, the entry of their removal order, or the denial of their administrative or judicial appeals." Id.[8] Similarly, in the "widespread confusion"

[7] Police have specifically criticized defendants' practice of entering administrative warrants into the NCIC instead of obtaining criminal arrest warrants. See Compl. ¶ 52; see also Craig E. Ferrell, Jr., The War on Terror's 'Absconder Initiative, The Police Chief (Oct. 2002), at 12, available at http://www.iacp.org/documents/index.cfm?fuseaction=document&document_type_id=1&document_id=359 ("The NCIC database has always been used to aid law enforcement officers in identifying persons wanted criminally. The FBI and Department of Justice should take steps to immediately remove those individuals from the database who only have civil absconder warrants.").

[8] Plaintiffs note that defendants' own website indicates a large number of removal orders are entered *in absentia*. See U.S. Department of Justice, Executive Office for Immigration Review, FY 2003 Statistical Year Book H-1 (2004) (191,456 orders of removal entered *in absentia* in 1999 - 2003), available at http://www.usdoj.gov/eoir/statspub/fy03syb.pdf; see also Nina Bernstein, Old Deportation Orders Leading To Many Injustices, Critics Say, N. Y. TIMES (Feb. 19, 2004), at B1 (DOJ study indicates "two-thirds of [removal] orders were issued in absentia," due in part to "chronic problem notifying immigrants of hearings and of removal orders").

accompanying "defendants' announcement and implementation of NSEERS, many persons are ignorant of their obligations" and "unaware that they have failed to comply with an NSEERS rule." Id. ¶ 42. In fact, some absconders and NSEERS violators "have valid claims of United States citizenship or are eligible for immigration relief based on their marriage to a U.S. citizen, as a political asylee, or otherwise." Id. at 43.[9]

The interpretation of "crime . . . records" advanced by the government is enormously broad in its reach. Nearly all statutory schemes in the modern administrative state combine civil and criminal sanctions. If the unilateral allegation by the government that individuals have violated a civil or regulatory obligation, for which there may also be criminal penalties, is enough to convert those individuals into "criminals," Def. Br. 16-17, and thus the underlying administrative records into "crime . . . records" for dissemination via the NCIC, then untold numbers of tax records, see 26 U.S.C. § 7203 (criminal penalties for willful failure to file return or pay tax), child support orders, see 18 U.S.C. § 228 (criminal penalties for willful failure to pay child support); environmental records, see, e.g., 33 U.S.C. § 1319(c) (criminal penalties for negligent and knowing Clean Water Act violations), and many other administrative files are eligible for entry into the NCIC as "crime . . . records." Even local housing code violations would qualify. See N.A. Dev. Co. v. Jones, 99 A.D.2d 238, 472 N.Y.S.2d 363 (1st Dep't 1984) (affirming criminal sentence of incarceration for landlord's failure to make court-mandated repairs). This is not the plain meaning of "crime . . . records," however, and as nearly a century of legislative history evidences, see infra Point III.A.2, this was not at all the intention of Congress.

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[9] The immigration statutes specifically authorize a waiver for persons subject to an outstanding removal order. See 8 U.S.C. § 1182(a)(9)(A)(iii); 8 C.F.R. § 212.2.

The case law interpreting the NCIC statute confirms the narrow meaning of "crime . . . records." In Menard v. Saxbe, the D.C. Circuit reviewed the legislative history and then narrowly construed the terms of the NCIC statute, holding that a Los Angeles Police Department arrest of a man sleeping in a park, classified as a "detention" under California law, was not a "criminal identification" or "crime" record. 498 F.2d at 1030 n.53. The D.C. Circuit therefore ordered the FBI to expunge Menard's arrest and detention from the NCIC. Id. at 1028-29.[10] In a later decision, the D.C. Circuit adhered to the validity of Menard's narrow construction of § 534(a)(1). Tarlton, 507 F.2d at 1122 ("We reaffirm the holding of Menard . . .").

The defendants also argue that, if not "crime . . . records," then the administrative warrants at issue here constitute "other records," 28 U.S.C. § 534(a)(1), which may lawfully be entered and disseminated via the NCIC. Def. Br. 18-19 (arguing the scope of "other records" is "open-ended, to be fleshed out at the discretion of the Attorney General"). Yet the category "other records," construed under ordinary canons of statutory interpretation, necessarily means others similar to those previously listed. See, e.g., Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001) (applying canon of *ejusdem generis*, or principle that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words"); 2A Norman J. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991) (same). In

[10]The defendants misapprehend the Menard decision. Def. Br. 22. In a later passage in Menard, the court indicated that the arrest/detention information could be retained in the FBI's own identification records, which contain fingerprint data on millions of persons with no involvement in the criminal justice system, from certain federal employees to tourists who visit FBI headquarters. 498 F.2d at 1121. The court emphasized, however, that these records held for the FBI's own use could not be disseminated based on ordinary police inquiries, but were reserved for inquiries regarding unidentified corpses or missing persons. Id. at 1028-29.

context, the plain meaning of the phrase "other records" is other like records – not any and all administrative records relating to uncharged, unconvicted individuals deemed "criminals" by defendants (and certainly not records regularly understood as "civil"). See also Menard, 498 F.2d at 1028-30 (even records of arrest and lawful detention by Los Angeles police not subject to dissemination via NCIC under any statutory category of § 534(a)(1)).

Finally, as shown in the legislative history that follows, defendants' interpretation of "other records" would render superfluous legislative enactments over the past twenty years adding new categories of records to § 534. See Missing Children Act of 1982, Pub. L. No. 97-292, 96 Stat. 1259 (codified at 28 U.S.C. § 534(a)(2), (3) (amending § 534 to authorize entry of records related to missing persons and unidentified corpses to NCIC); Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, 108 Stat. 1796 (codified at 28 U.S.C. § 534(e)) (amending § 534 to authorize entry of civil orders of protection to NCIC); Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1276 (codified at 8 U.S.C. § 1252c(b) (enacting 8 U.S.C. § 1252c(b) to authorize entry of records regarding previously deported felons into NCIC); infra Point II.A.2. Notably, 121 members of Congress have sponsored legislation that would be unnecessary if the government's interpretation of § 534 were correct. See H.R. 2671, 108th Cong. (1st Sess. 2003) (bill to amend § 534 to authorize entry of "records of violations of the immigration laws of the United States" into NCIC); see also S. 1906, 108th Cong. (1st Sess. 2003) (same).

2. Defendants' Interpretation Is Contrary To The Structure And History Of The NCIC Statute

The defendants offer a truncated version of the origins and development of 28 U.S.C. § 534 before concluding that "[t]his legislative history speaks volumes about the meaning of the operative language of the statute." Def. Br. 22. That legislative history does indeed "speak volumes," but it is a narrative that powerfully contradicts the defendants' sweeping interpretation of their powers under § 534.

The narrow scope of the terms of 28 U.S.C. § 534(a) is confirmed in the statute's earliest origins. In the 1920s, the International Association of Chiefs of Police ("IACP") asked the Department of Justice ("DOJ") to take over a program by which the IACP had collected records of convictions and criminal arrest warrants and shared them with law enforcement officials upon request. At first, the Attorney General demurred, citing a lack of statutory authorization to accept and distribute these criminal records.[11] Even after Congress appropriated funds for the program, DOJ recognized that it lacked authority to operate the criminal records clearinghouse. See Letter from Attorney General Sargent to Rep. George Graham, Chair, House Judiciary Committee, dated April 2, 1928 (noting that "there is no legislative authority for it other than that which appears in the appropriation bill and it is desired, for this reason, that" authorizing legislation be adopted), reprinted in H.R. Rep. No. 71-85, at 2 (1929); see also 72 Cong. Rec. 1989 (1930) (statement of Rep. Graham) (clearinghouse must be established "[b]y a proper law, where it is now illegal. We are authorizing it so that it will be legalized so [DOJ] can do

[11] Before IACP's initiative, there had been no efficient way for police in one city to learn of a person's criminal history in another, nor for agencies to respond to inquiries from police authorities in foreign countries. See Hearing on H.R. 8580 and H.R. 8409 Before the Comm. on the Judiciary, 68th Cong. 63-65 (1924) (statement of Maj. Richard Sylvester, Hon. President of the International Association of Chiefs of Police) (copy annexed as Exhibit A).

it in the right way"). From the beginning, Congress was exceedingly conscious that the DOJ's power to operate a criminal record clearinghouse was strictly subject to the authority granted by Congress.

The drafting history of H.R. 977, the 1929 bill that became the NCIC statute, also reflects a clear legislative intent that the record categories be narrowly construed. As introduced, H.R. 977 authorized DOJ to collect and exchange "criminal identification records." The House Judiciary Committee then expanded this authorization by amending the bill to permit the collection and exchange of "criminal identification <u>and</u> <u>other</u> records." H.R. Rep. No. 71- 85, at 1 (1929) (emphasis added). This amendment prompted an objection on the House floor from Rep. Cochran:

> I want to call attention to the fact that in the War Department, the Civil Service Commission, the Veterans' Bureau, and other Government agencies applications are filed in connection with certain matters and in every instance they require the applicant to submit their fingerprints. They have millions of fingerprints. Even widows and dependent mothers are required to place fingerprints on applications . . . . Just think of it. It is an insult to them. If you are going to confine the division solely to criminal records, then I have no objection, but here you put in 'and other records'.

72 Cong. Rec. 1989 (1930). Graham responded that Cochran's concerns "have no application whatever to the matter of fingerprints. This has nothing to do with the bureau of the Department of Justice where criminal records are kept." <u>Id.</u> Thus "millions" of fingerprints and other records already possessed by federal agencies were to be <u>excluded</u> from the record-keeping authority conferred by Congress on the FBI.

Next, even as to records that might relate to criminal investigations, Graham carefully distinguished between crime records, which were to be collected for dissemination to local police, and general investigative materials, which the FBI might maintain for its own investigations but which would not be disseminated to police:

> There are two classes of information that is gathered. One is criminal records, and another is the information that is gathered about criminals that is not a matter of record. That they do not give out, but the criminal records they do give out. That information [not of record] is gathered for the department itself and its agents, in order that they more effectually do their work.

Id. LaGuardia next offered a floor amendment to insert the word "criminal" after "other," so that the authority to collect and exchange records would be restricted to "criminal identification and other criminal records." Id. Graham agreed, and the bill was enacted without further change. Act of June 11, 1930, ch. 455, Pub. L. No. 71-337, 46 Stat. 554; see also Menard, 498 F.2d at 1028 (DOJ must "maintain[] an appropriate separation of the various files it is authorized to establish, and for preventing the criminal identification files, subject as they are to dissemination, from containing inappropriate material. This appears from the legislative history"); id. at 1028 n.42 (reviewing Cochran-Graham exchange). Thus, the 1930 legislative history contradicts defendants' broad claims of authority to disseminate civil immigration records.

In this action, the defendants also invoke a 1966 congressional recodification. Def. Br. 19-22.[12] The invocation is unhelpful to the government's cause, however, because in 1966 Congress declared its purpose to "restate, without substantive change, the laws replaced." Act of Sept. 6, 1966, § 7(a), Pub. L. No. 89-554, 80 Stat. 631, (reprinted at 28 U.S.C. § 534 note). DOJ's power remains limited to the dissemination of

[12] The 1966 statutory reorganization combined the language of the 1930 statute - "criminal identification and other criminal records" - with that of the most recent appropriations bill funding the criminal clearinghouse - "identification and other records" - to yield the four categories authorized by the modern 28 U.S.C. § 534(a)(1) ("identification, criminal identification, crime, and other records"). The appropriations bills had had a life of their own. The 1928 appropriations bill had provided for collection and exchange of "criminal identification records." Act of Feb. 15, 1928, ch. 57, Pub. L. No. 70-32, at 78. The 1930 appropriations bill was enacted after the House Judiciary Committee amendment had added "and other records" but before LaGuardia's floor amendment narrowed the statute to "and other criminal records"; not surprisingly, therefore, the 1930 appropriations bill tracked the then-approved Committee language. Act of Apr. 18, 1930, ch. 184, Pub. L. No. 71-142, at 187. In 1932, the appropriations language became simply "identification and other records," Act of July 1, 1932, ch. 361, Pub. L. No. 72-232, at 488, and remained unchanged through 1964.

crime records, as that term was meant by Congress in 1930. See also Menard, 498 F.2d at 1028 n.42 (noting that 1966 recodification made no substantive change to authority of DOJ to disseminate records).

Moreover, congressional rules generally prohibit amendment by appropriation, and thus the 1930 statute was not amended by the broader language of any subsequent appropriations bills. See Andrus v. Sierra Club, 442 U.S. 347, 359-60 (1979) (legislation by appropriation violates rules of Congress); Rostker v. Goldberg, 453 U.S. 57, 74-75 (1981) (recognizing that "appropriations legislation should not be considered as modifying substantive legislation"). At a minimum, arguments that appropriations bills have amended authorizing statutes must satisfy a "clear statement" rule of interpretation. See Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992) (Congress may, in some circumstances, "amend substantive law in an appropriations statute, as long as it does so clearly"); Auburn Hous. Auth. v. Martinez, 277 F.3d 138, 145 (2d Cir. 2002) ("While Congress may amend or repeal a statute by means of an appropriations bill, its intention to do so must be clear"). As the D.C. Circuit concluded in Menard, Congress did not clearly expand its authorization for DOJ to exchange "crime . . . records" in any appropriations act, nor in its 1966 recodification.

Most importantly, legislative developments since the 1966 recodification demonstrate a plain legislative intent that the categories of the NCIC be strictly construed. In 1982, Congress added two additional categories of records to the NCIC statute, for missing persons and unidentified deceased individuals. See Missing Children Act of 1982, §§ 2, 3(a), Pub. L. No. 97-292, 96 Stat. 1259 (codified at 28 U.S.C. § 534(a)(2), (3)). Under the defendants' interpretation of "crime . . . [or] other records," however, the

Missing Children Act is superfluous. If defendants were correct, for instance, that the scope of "other records" is "open-ended, to be fleshed out at the discretion of the Attorney General," Def. Br. 19, then surely records relating to a missing child or unidentified corpse - both circumstances that frequently involve criminal conduct - would have already been authorized in 28 U.S.C. § 534(a)(1), and the Missing Children Act would have been unnecessary.

Congress next expanded the NCIC record categories in a provision of the VAWA. See VAWA, § 40601(a), Pub. L. No. 103-322, 108 Stat. 1796 (codified at 28 U.S.C. § 534(e)) (authorizing entry of protection orders against domestic violence and stalking issued by civil courts into NCIC). The defendants argue that "nothing in the VAWA suggests that the FBI did not have the authority" to collect and disseminate protection orders, Def. Br. 22 n.6, and that "the sole purpose" of the 1994 VAWA amendment "was to expand the range of entities authorized to gain access to this information." Id. (emphasis added). But the defendants' account carefully elides the most relevant history, which contradicts their views.

The provision that became 28 U.S.C. § 534(e) originated in a floor amendment by Rep. Kennedy, addressing both the need for improved access to the NCIC by court personnel (as emphasized by the government, Def. Br. 22 n.6, and now codified at § 534(e)(1)) and the need for entry of civil orders of protection into the NCIC (ignored by defendants and now codified at § 534(e)(2)). Subsection (a) of the first provision of Rep. Kennedy's amendment concerned access to the NCIC; subsection (b), not mentioned by defendants, specified:

> (b) ENTRY. The Attorney General shall amend existing regulations to permit . . . criminal justice agencies, assigned to input information into [the NCIC], to

> include arrests, warrants, and orders for the protection of parties from stalking or domestic violence, whether issued by a criminal, civil, or family court . . .

140 Cong. Rec. H2518-01 (daily ed. Apr. 20, 1994). This amendment instructing the Attorney General to "amend existing regulations" 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. The House adopted Kennedy's amendment, but the conference committee abandoned his approach. Instead, in the conference version of the bill (which was enacted as VAWA), Congress added new statutory authorization for entry of civil protection records into the NCIC. H.R. Conf. Rep. No. 103-711, at 161-62 (1994) (in § 40601, adding new 28 U.S.C. § 534(e)(2), authorizing entry of orders for "protection of persons from stalking or domestic violence," violations of such orders, and "arrests, convictions, and arrest warrants for stalking or domestic violence").[13]

Section 534(e)(2) and its history directly contradict the defendants' interpretation of "crime . . . [or] other records." If Congress intended for the term "other records" to be "open-ended" and "fleshed out at the discretion of the Attorney General," Def. Br. 19, and for "crime . . . records" to include any record "establishing that the individual in question has committed a crime," id. at 17, then the 1994 VAWA amendments are superfluous. Violation of a civil order of protection is a crime, see, e.g., N.Y. Penal Law § 215.50-52 (imposing criminal contempt penalties for violation of civil order of protection), and hence, if defendants were correct, protection orders, violations of protection orders, and arrest warrants would already be covered by § 534(a)(1). Yet Congress, when specifically presented with a House-approved measure to combat

[13] Congress defined "protection orders" for the purposes of this provision to include "temporary and final orders issued by civil or criminal courts." 28 U.S.C. § 534(e)(3)(B).

domestic violence through promulgation of new NCIC regulations, pursuant to statutory authority already conferred, declined that approach and, instead - contrary to the defendants' interpretation of § 534(a)(1) - expanded the statutory categories themselves.

Another legislative amendment in the 1990s is inconsistent with the defendants' sweeping interpretation of 28 U.S.C. § 534(a)(1). In 1996, Congress authorized the entry of information regarding deported felons into the NCIC. AEDPA, Title IV § 439, Pub. L. No. 104-132, 110 Stat. 1276 (codified at 8 U.S.C. § 1252c(b) ("information in the control of the Attorney General, including information in the [NCIC]" to be "made available" to "assist State and local law enforcement officials in carrying out duties under subsection (a) of this section," relating to arrest of previously deported felons). At least until the creation of the Department of Homeland Security, information regarding the deportation of persons with felony convictions was in the control of the Attorney General. See 8 U.S.C. § 1103(a)(2). Section 1252c(b) thus provides statutory authority to DOJ to enter and disseminate information regarding previously deported felons, and further demonstrates that when Congress meant to authorize the entry of civil information, indeed civil immigration information, into NCIC, it said so in statutory terms.

Finally, it is noteworthy that 121 members of the current Congress have co-sponsored legislation, now pending, to allow entry into the NCIC of the very records for which defendants already claim statutory authority – immigration records. See H.R. 2671, 108th Cong. (1st Sess. 2003); see also S. 1906, 108th Cong. § 104(b) (1st Sess. 2003) (same). In sections entitled "Listing of Immigration Violators in the National Crime Information Center Database," the bills provide:

> Section 534(a) of title 28, United States Code, is amended by redesignating paragraph (4) as paragraph (5) and inserting after paragraph (3) the following:

> ‘(4) acquire, collect, classify, and preserve records of violations of the immigration laws of the United States’.

H.R. 2671, § 104(b); S. 1906, § 104(b).

In sum, the legislative history of the NCIC statute, from its 1930 origins through the 1966 recodification, the amendments in the 1980s and 1990s, and up to the pending House and Senate proposals to authorize entry and dissemination of immigration records, contradicts the extraordinarily broad claim made by the government in this case. If the defendants were correct that “crime . . . records” includes any record “establishing” criminal culpability, and “other records” leaves to the “discretion of the Attorney General” entry of any other records, then all manner of tax, child support, environmental, housing, and other administrative orders or determinations would be candidates for dissemination via the NCIC - and Congress’ cautious, incremental expansion of 28 U.S.C. § 534(a) in 1982, 1994, 1996, and perhaps 2004 are meaningless. On the defendants’ broad view, too, the D.C. Circuit misinterpreted the legislative history of the NCIC statute, and Menard v. Saxbe should have come out the other way. To the contrary, Congress has not authorized dissemination via the NCIC of the civil immigration records and administrative warrants at issue in this case, and the defendants’ practices are not authorized by law.

3. Defendants’ Practices Contradict Their Own Regulations

The defendants’ position in this case also impermissibly contradicts the FBI’s own regulations. See United States ex. rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-268 (1954); Morton v. Ruiz, 415 U.S. 199, 235 (1974) (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.”); Montilla v.

INS, 926 F.2d 162, 166 (2d Cir. 1991) ("The seeds of the Accardi doctrine are found in the long-settled principle that the rules promulgated by a federal agency, which regulate the rights and interests of others, are controlling upon the agency").

NCIC regulations address collection and dissemination of "criminal history record information," defined as "identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom . . ." 28 C.F.R. § 20.3(d) (2004). See also 28 C.F.R. App. to Part 20, Subpart A-Commentary on § 20.3(d) ("Intelligence or investigative information (e.g., suspected criminal activity, associates, hangouts, financial information, and ownership of property and vehicles) is not included in the definition of criminal history information") (emphasis added). Furthermore, "[c]riminal history record information" does not include "identification information such as fingerprint records if such information does not indicate the individual's involvement with the criminal justice system." 20 C.F.R. § 20.3(d). Thus, the terms of the FBI's own regulatory definition of "[c]riminal history record information" exclude administrative warrants, deportation records, and determinations of NSEERS violations. Moreover, not even all criminal history may be entered into the NCIC, as "non-serious" offenses are excluded. 28 C.F.R. § 20.32(b) (excluding "arrests and court actions concerning nonserious offenses" from databases linked to NCIC).

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In sum, defendants' practice of entering administrative warrants for removal of alleged "absconders" and "NSEERS violators" into the NCIC database and the dissemination of those warrants to local police with a request that the subjects of the administrative warrants be arrested is not authorized by the NCIC statute, 28 U.S.C. § 534. Administrative warrants of removal are not "crime . . . [or] other records" as those terms are used in § 534(a)(1). The text, history, and structure of the statute, as well as the defendants' own regulatory materials, refute the government's sweeping claim that Congress has authorized the collection and exchange of any administrative record which, in the Attorney General's view, establishes criminal culpability.

B. Defendants' Practices Are Not Authorized By Any Other Statute

The government argues that, even if not authorized by the NCIC statute, the database practices challenged by plaintiffs are lawful under a grab-bag of immigration statutes. Def. Br. 23-26. The defendants are mistaken.

The government begins with a provision of the Violent Crime Control and Law Enforcement Act of 1994, Title XIII § 130002, Pub. L. No. 103-322, 108 Stat. 1796 ("VCCLEA"), which it characterizes as "DHS's principle authority for compiling and entering Absconder and NSSERS information into the NCIC database." Def. Br. 23. See also id. at 24 ("the VCCLEA provides direct authority for the Government to compile and disseminate the information at issue in this case"). But the 1994 VCCLEA provision is of no help in justifying defendants' NCIC practices.

First, the provision was an appropriation measure to effectuate the creation of an entirely distinct database, the Criminal Alien Tracking Center (renamed the Criminal Alien Identification System in 1996), in a different agency (INS, now DHS), in a different city (Burlington, Vermont). "The Criminal Alien Tracking Center - also known as the Law Enforcement Support Center . . . is located in South Burlington, VT." 142 Cong. Rec. S4405-01 (daily ed. Apr. 30, 1996) (statement of Sen. Leahy); see also Compl.

¶ 35 (describing "the Law Enforcement Support Center . . . a unit of DHS located in Burlington, Vermont"); VCCLEA § 130002 ("The Commissioner of Immigration and Naturalization . . . shall operate a criminal alien identification system"), reprinted at 8 U.S.C. § 1226 note; S. Rep. No. 104-249, at 57 (1996) (minority views) (describing "Criminal Alien Tracking Center (Law Enforcement Support Center) established by the INS . . . [and] located in South Burlington, VT").[14] The 1994 VCCLEA appropriation is no authority whatsoever for the FBI's dissemination of immigration records via its NCIC database in Clarksburg, West Virginia.

Second, in words that begin the appropriation provision relied on by the defendants but which are omitted from their brief, Congress has made clear that the VCCLEA funds are to be expended by the INS Commissioner "under the authority of section 236(d) of the Immigration and Nationality Act [8 U.S.C. § 1226(d)]."[15] This authority, in turn, permits a computer records system only "to maintain a current record of aliens who have been convicted of an aggravated felony." 8 U.S.C. § 1226(d)(1)(C). Few, and certainly not most, of the absconder and NSEERS violators records at issue in this case are for persons "who have been convicted of an aggravated felony." VCCLEA

[14] Nor is this unintentional: the Senate version of what became VCCLEA § 130002 designated the appropriation for use by the Commissioner of INS "with the cooperation of the Director of the Federal Bureau of Investigation," 139 Cong. Rec. S17095-03, S17186 (1993) (H.R. 3355, § 5007, as passed by Senate), but in conference committee, the provision was amended and the funds were reserved exclusively for the INS Commissioner, for her establishment of the database within INS. See H.R. Conf. Rep. No. 103-711, at 236-37 (1994) (accepting Senate's § 5007 but deleting reference to FBI from provision, renumbered § 130002 of H.R. 3355). Appropriating the funds to INS was also consistent with the earlier congressional directive that had prompted the 1994 bill. See Anti-Drug Abuse Act of 1988, § 7380(a)(1), Pub. L. No. 100-690, 102 Stat. 4181 (establishing INS pilot program to respond to police inquiries regarding aliens arrested, convicted, or under investigation for controlled substance offense). Confirming its intent that the program funded by VCCLEA § 130002 be operated directly by the INS, in 1996 Congress substituted "the Commissioner of Immigration and Naturalization" for "the Attorney General" in the first sentence, AEDPA, Title IV, § 432, Pub. L. No. 104-132, 110 Stat. 1273.

[15] VCCLEA § 130002 (codified as amended at 8 U.S.C. § 1226 note).

§ 130002 is far from "direct authority," Def. Br. 24, for the government's challenged practices in this case.

The government concludes its defense of the NCIC practices challenged herein with a citation to, but not specific argument from, 8 U.S.C. § 1373 and a nearly-identical provision, 8 U.S.C. § 1644. See Def. Br. 24-25. The government is off the mark. These provisions "prohibit state and local governments from limiting their employees in the voluntary provision of information about the immigration status of aliens to the [INS]," City of New York v. United States, 179 F.3d 29, 31 (2d Cir. 1999) (rejecting Tenth Amendment challenge to §§ 1373, 1644). The legislative target of these provisions were local "anti-snitch" ordinances, such as former New York City Executive Order 124. Id. at 32-33. In this action, plaintiffs do not challenge the authority of state or local police to communicate immigration information that they may acquire to federal officials, nor do they seek to defend state or local rules limiting such communications. Nothing in 8 U.S.C. §§ 1373, 1644, however, authorizes the FBI's entry and dissemination via the NCIC of administrative warrants for removal of absconders and NSEERS violators.[16]

IV. DEFENDANTS' MISUSE OF THE NCIC IS UNLAWFUL FOR THE ADDITIONAL REASON THAT IT CAUSES POLICE TO MAKE IMMIGRATION ARRESTS CONGRESS HAS FORBIDDEN

Plaintiffs also challenge the lawfulness of defendants' NCIC practices on the independent ground that these practices directly cause police to make immigration arrests that Congress has preempted police from undertaking. Compl. ¶¶ 82-87. In its motion, the government makes three arguments that the preemption claim should be dismissed.

[16] The defendants also invoke the powers of the Department of Homeland Security "to obtain and maintain" information on certain immigrants. Def. Br. 24 (citing 8 U.S.C. §§ 1231(a)(3)(C), (D), 1225(a)(3) and DHS regulations). None of these provisions, however, authorizes the FBI to enter civil immigration records or administrative warrants into the NCIC, nor to disseminate them to local police.

The government contends first that state and local police possess "inherent" authority, Def. Br. 28, under state law to make warrantless immigration arrests, id. at 27-33; second, that preemption doctrines are inapplicable to their NCIC practices, because "federal law cannot 'preempt' federal law or federal action," id. at 34; and third, the federal statutory scheme for immigration enforcement does not in fact bar the local immigration arrests caused by defendants that are at issue in this case. Id. at 34-36. As to the first and second points, the defendants misapprehend plaintiffs' legal theories, and as to the third point, defendants are mistaken.

A. Scope Of Police Authority Under State Law To Make Federal Immigration Arrests Is Irrelevant

The government devotes the first portion of its preemption argument to an exegesis of the authority, under state and local law, for police to make warrantless immigration arrests, whether criminal or civil. Def. Br. 27-33. The scope of police authority under state law, however, which necessarily varies among the fifty states, see, e.g., 75 Op. Att'y Gen. 270 (1996) (California police may not arrest immigrants solely for civil deportation and may not arrest for criminal immigration offenses unless misdemeanor committed in presence of officer or felony); 2000 Op. Att'y Gen. (Inf.) 1001 (2000) (New York police may not make civil immigration arrests); 1977 Op. Att'y Gen. H-1029 (1977) (same as to Texas police); 18 Oreg. Rev. Stat. § 181.850 (Oregon police prohibited from "detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship residing in the United States in violation of federal immigration laws"), is not the issue in this case.

Plaintiffs' contention is 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 any such authority. See Point III.C, infra. Defendants do not contest that state law authority to make immigration arrests, if any exists, must necessarily yield under the Constitution's Supremacy Clause to federal law barring those same arrests.

B. Federal Defendants Cannot Cause State And Local Arrests That Congress Has Preempted

The defendants next maintain that preemption doctrines have no bearing on the lawfulness of their NCIC practices, because the defendants are themselves federal agencies and officials. But defendants miss the mark. It is the contention of plaintiffs that Congress has preempted state and local police from making the arrests at issue in the case, see Point III.C below, and that defendants use of the NCIC is therefore unlawful because it causes police to make these illegal arrests. Surely defendants cannot contend, and do not appear to contend, that they may "cause[]," Compl. ¶ 3, "induce[]," id., "request[]," id. ¶ 36, and "encourage[],"police to make arrests that are illegal. Id. ¶ 51. It is axiomatic that the defendants cannot act in ways that cause or induce others to commit unlawful acts. See, e.g., Chamber of Commerce of the United States v. Reich, 74 F.3d 1332, 1339 (D.C. Cir. 1996) (invalidating Labor Department regulations that would "induce . . . the employer . . . [into] committing an unfair labor practice").

C. Congress Has Preempted The Police Arrests That Defendants' NCIC Practices Have Caused And Continue To Cause

The defendants' central argument is that the elaborate statutory scheme of federal immigration regulation and enforcement does not preempt local police arrests, based on administrative warrants listed in the NCIC, of absconders and NSEERS violators. Def. Br. 34-36. The defendants fail to grapple, however, with the full force of this complex statutory scheme, the widespread recognition that Congress has occupied the field of immigration regulation, and most concretely, the reality that Congress has scrupulously delineated for which immigration offenses, and under what circumstances, local police may make arrests. These laws reflect careful and sound policy choices by Congress, and defendants' argument that Congress has not generally preempted police from making immigration arrests renders superfluous numerous federal statutes.

1. Immigration Regulation And Enforcement Is A Federal Concern

It is well-settled 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." Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (invalidating state inspection and bond requirements for arriving noncitizens). The Supreme Court has explained that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." De Canas v. Bica, 424 U.S. 351, 354 (1976); see also Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) ("[T]he authority to control immigration is . . . vested solely in the Federal Government, rather than the States . . . .").[17]

As a consequence, preemption doctrines have long had special force in immigration law. See Toll v. Moreno, 458 U.S. 1, 17 (1982) (invalidating state denial of student financial aid to visa holders as preempted); Graham v. Richardson, 403 U.S. 365, 376–80 (1971) (invalidating state welfare discrimination against permanent residents as preempted); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (stating

[17] The federal nature of immigration regulation derives at least in part from the constitutional command of "uniformity" in immigration law. U.S. Const. Art. I § 8 cl. 4 (Congress may "establish an uniform Rule of Naturalization"); Graham v. Richardson, 403 U.S. 365 (1971) (disparate state welfare rules for immigrants violate constitutional obligation of uniformity).

Congress has enacted "a comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization" and holding state alienage restriction on commercial fishing licenses invalid as preempted); Hines v. Davidowitz, 312 U.S. 52, 69 (1941) (state registration system for noncitizens preempted by federal law); Truax v. Raich, 239 U.S. 33, 42 (1915) (state law regulating employment of non-citizens invalid as preempted); see also LULAC v. Wilson, 908 F. Supp. 755, 775 (C.D. Cal. 1995) (invalidating portions of Proposition 187, requiring state officials to detect immigration violators and report violators to federal officials, as preempted).

The settled principle that immigration regulation is exclusively a federal concern has also long guided congressional enactments regarding immigration enforcement, which have preempted local arrest authority. This is true for both the civil provisions of the immigration statutes, governing removal proceedings, see Gonzales v. City of Peoria, 722 F.2d 468, 472-75 (9th Cir. 1983) ("assum[ing] that the civil provisions" of immigration law preempt local arrest authority), and the numerous criminal provisions of the immigration laws discussed infra. Applying these principles in the years since 1996, when Congress clarified its scheme for local immigration enforcement, two courts of appeals have described police authority to enforce immigration laws as "doubtful," "questionable" Mena v. City of Simi Valley, 332 F.3d 1255, 1265 n.15 (9th Cir. 2003), cert. granted on other grounds sub nom. Mueller v. Mena, __ U.S. __, No. 03-1423, 2004 WL 817138 (June 14, 2004), and "uncertain[]." Carrasca v. Pomeroy, 313 F.3d 828, 837 (3d Cir. 2002).

2. Congress Has Broadly Preempted State And Local Police Enforcement Of Immigration Laws

Despite the well-settled principles that immigration regulation and enforcement is a federal concern, and the recognition by courts of appeals that police arrest authority is thus "doubtful," "questionable" Mena, 332 F.3d at 1265 n.15, and "uncertain[]," Carrasca, 313 F.3d at 837, defendants contend that the arrests at issue here are not preempted. This conclusion reflects a fundamental misunderstanding of the legislative scheme adopted and refined by Congress. Several statutory provisions enacted explicitly to permit local immigration enforcement in narrowly circumscribed areas would be wholly superfluous if states possessed the "inherent authority" the defendants assert.

Congress has expressly authorized direct local enforcement of two criminal immigration provisions. See 8 U.S.C. § 1324(c) (subsection entitled "Authority to Arrest" empowers INS agents "and all other officers whose duty it is to enforce criminal laws" to make arrests for violations of § 1324(a), which criminalizes smuggling, transporting, or harboring illegal immigrants); id. § 1252c(a) (authorizing "state and local law enforcement officials" to arrest and detain "an alien illegally present in the United States" who "has previously been convicted of a felony" and ordered deported).[18] The defendants' argument that the local police possess the power to arrest alleged absconders and NSEERS violators would render § 1324(c) and § 1252c(a) unnecessary.

The legislative history of these two direct-arrest provisions, moreover, confirms their plain meaning and further contradicts the defendants' argument. When first drafted, the bill that became § 1324(c) empowered criminal law enforcement officers "of the United States" to arrest alleged smugglers. Congress eliminated the phrase "of the

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[18] Defendants concede that section 1252c "appears to place conditions and limitations on certain forms of state and local cooperation with federal immigration authorities." Def. Br. 36.

United States," however, so that "other officers whose duty it is to enforce criminal laws, would have authority to make an arrest for a violation of a provision of the act." H.R. Conf. Rep. No. 82-1505, at 1361 (1952), reprinted in 1952 U.S.C.C.A.N. 1360, 1361.[19]

The history of § 1252c(a), authorizing "state and local law enforcement officials" to make arrests for the criminal offense of illegal re-entry by a felon, undermines the defendants' arguments even more powerfully. The provision began as a floor amendment offered by Rep. Doolittle, who explained, "the Federal Government has tied the hands of our State and local law enforcement officials." 142 Cong. Rec. H2191-04 (daily ed. Mar. 13, 1996). This was because, according to Doolittle, "current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encounter[] through their routine duties." Id. His amendment would remedy this problem in part, because it would "untie the hands of those we ask to protect us," id., when encountering a previously deported felon. Congress enacted Rep. Doolittle's amendment, but under the defendants' preemption analysis, this provision was entirely superfluous, because, contrary to Rep. Doolittle's statements, local police already had the power to make all immigration arrests. It is defendants, not Rep. Doolittle and Congress, who are mistaken: federal law has "tied the hands" and preempted local police from making criminal and civil immigration arrests, except as specifically approved by Congress in provisions such as 8 U.S.C. §§ 1252c(a), 1324(c).

As noted by defendants, Def. Br. 31-32, 36, the Tenth Circuit has adopted a different interpretation of § 1252c, adhering to its pre-1996 view that police possess

[19] By contrast, Congress has made clear its grant of broad immigration enforcement powers to federal immigration officers. See 8 U.S.C. § 1357(a) (empowering "[a]ny officer or employee of the Service" to make warrantless immigration arrests); see also 8 C.F.R. § 236.1(b)(1) ("A [immigration] warrant of arrest may be issued only by [designated] immigration officers").

broad immigration enforcement authority. See United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999) (relying on United States v. Salinas-Calderon, 728 F.2d 1298 (10th Cir. 1984)). The Tenth Circuit has recognized that the history of § 1252c is especially relevant to understanding its meaning, "because Representative Doolittle sponsored the amendment and his statements regarding its purpose were uncontested." Id. at 1299 n.5. Nevertheless, the Vasquez-Alvarez court did not discern from § 1252c and its history a legislative intent to preempt local immigration enforcement authority. Id. at 1298-99 & nn.4-5. The court failed to explain, however, how its interpretation would render § 1252c anything but surplusage. See also Mena, 332 F.3d at 1266 n.15 (noting Vasquez-Alvarez but stating police arrest authority under federal law "doubtful" and "questionable"). It is plain from Rep. Doolittle's statements that § 1252c was designed to expand, not contract, local arrest authority.

Two further immigration statutes confirm that Congress has broadly preempted local police authority to make immigration arrests. These provisions establish emergency and routine procedures by which the Attorney General can formally deputize local police to assist in immigration enforcement. See 8 U.S.C. § 103(a)(10) (emergency procedure allowing Attorney General to authorize "any State or local law enforcement officer" to enforce immigration laws upon certification of "an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border"); id. § 1357(g) (entitled "Performance of immigration officer functions by state officers and employees" and authorizing Attorney General to train, supervise, and execute "written agreement" with local jurisdiction for enforcement of immigration laws); see also Def. Br. 35 (acknowledging §§ 1103(a)(10), 1357(g)).

The scheme set forth at § 1357(g) deserves special note. It includes mandatory training in immigration law for any local officer who would be empowered to enforce immigration law, id. § 1357(g)(2), and requires that local police act under the "direction and supervision of the Attorney General." Id. § 1357(g)(3).[20] Section 1357(g) began as a floor amendment offered by Rep. Latham, who explained the need for the provision in terms that recall Rep. Doolittle's justification for what became § 1252c:

> [T]here is legally nothing that a State or local law enforcement agency can do about a violation of immigration law other than calling the local INS officer to report the case…My amendment will allow State and local law enforcement agencies to enter into voluntary agreements with the Justice Department to give them the authority to seek, apprehend, and detain those illegal aliens who are subject to an order of deportation.

142 Cong. Rec. H2475-01, at H2476-77 (1996). Latham's amendment was responsive to the obvious need for federal training and supervision of local police involved in immigration enforcement, given the "labyrinthine character of modern immigration law" and its "maze of hyper-technical statutes and regulations," Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003),[21] as well as to the obligation of the Executive Branch to ensure responsible implementation of federal statutes. See Printz v. United States, 521 U.S. 898, 922 (1997) ("The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints"). Congress

[20] Congress also recognized that, absent express authorization, local enforcement of immigration laws would run afoul of the law barring the federal government from accepting volunteer services. Compare 31 U.S.C. § 1342 (prohibiting acceptance of volunteer services) with 8 U.S.C. § 1357(g)(1) ("Notwithstanding section 1342 of Title 31 . . . .").

[21] Rep. Becerra responded with concern about how local officers, untrained in immigration law, could be effective. 142 Cong. Rec., at H2477. Apparently, these concerns were widely shared and resulted in Congress adopting § 1357(g)'s training and federal supervision requirements.

approved the Latham amendment, and thus far two states have executed § 1357(g) agreements authorizing immigration enforcement by designated local officials.[22]

Finally, Congress's refusal to authorize blanket immigration enforcement by local police makes sense. Police "rely on the cooperation of all residents of the communities they serve and protect. When any member of a community is afraid to communicate with law enforcement officials, police effectiveness is undermined and public safety is diminished for all." Compl. ¶ 61; see also id. ¶¶ 62-64 (immigrants significantly under-report crimes for fear of deportation); Ferrell, supra note .7, at 12 ("enforcement of civil immigration laws by local law enforcement would have a chilling effect on both legal and illegal aliens reporting criminal activity or assisting police in criminal investigations . . . Police depend on the cooperation of immigrant communities to help them solve all sorts of crimes and to maintain public order").

In short, defendants' arguments about "inherent" immigration arrest power make little sense, contradict well-settled canons of statutory interpretation, and are inconsistent with the text and history of 8 U.S.C. §§ 1103(a)(10), 1252c(a), 1324(c), and 1357(g). Defendants may not ignore the "mass influx" certification requirement of § 1103(a)(10) nor the "written agreement" requirement of § 1357(g) (with its attendant training and

[22] Defendants contend that § 1357(g)(10)(B) (even in absence of written agreement, local police may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States") is inconsistent with plaintiffs' position. 8 U.S.C. § 1357(g)(10)(B). But there is a substantial difference between the power to "cooperate with the Attorney General," as allowed by § 1357(g)(10)(B), and the power to "perform a function of an immigration officer," as allowed by the remainder of § 1357(g). Id. The savings clause of § 1357(g)(10)(B) cannot plausibly authorize police to make immigration arrests in the absence of a written agreement, lest officers operating without a written agreement have more powers than those in a jurisdiction that has executed an agreement. On defendants' interpretation, the remainder of § 1357(g) becomes meaningless. To the contrary, § 1357(g)(10) is a simple savings clause that confers no power for local police to engage in independent immigration enforcement.

supervision obligations) and proceed instead to cause the unilateral, episodic exercise of a claimed "inherent" police power to enforce any and all immigration laws.

3. Congress Has Preempted Police Arrests Of Alleged Absconders And NSEERS Violators

In light of the broad congressional preemption of local enforcement of immigration laws, subject only to specific statutory exceptions and procedures, the question before this court is whether the arrests at issue in this case fit within the statutory exceptions. Neither of the criminal immigration provisions that, by their own terms, authorize local police arrests apply in the case of absconders or NSEERS violators. Section 1324(c) authorizes police arrests for smuggling, harboring, or transporting illegal immigrants, and § 1252c(a) authorizes police arrests for previously deported felons who illegally re-enter the country. Absconders and NSEERS violators are none of these. Similarly, the procedural exceptions enacted by Congress have no applicability in this case. The Attorney General has not certified the existence of a "mass influx" per § 1103(a)(10), and only two states, Florida and Alabama, have executed "written agreements" per § 1357(g) (and even these limit the local law enforcement officials who may enforce immigration laws). The defendants do not contend otherwise.

Instead, defendants argue that absconders "are criminals," Def. Br. 16, and "[l]ikewise, NSEERS violators are criminals, at least to the extent that their violations of the NSEERS registration requirements are willful," id. 17, and thus when a police officer encounters an absconder or NSEERS violator, "the officer is confronted with an individual who has committed a federal crime in the officer's presence." Id. 31. This arguments fails for two independent reasons. First, these are civil arrests. Second, Congress has preempted local arrest authority for these arrests even if criminal.

Defendants do not and cannot contend that persons listed as absconders or NSEERS violators have been charged or convicted of the "willful" violations penalized at 8 U.S.C. §§ 1253(a)(1), 1306, nor even have defendants secured criminal arrest warrants on a showing of probable cause to believe these provisions have been violated. Compl. ¶¶ 31, 33. Rather, the arrests at issue in this action are made pursuant to administrative warrants for removal (absconders) and administrative warrants for arrest (NSEERS violators). See Compl. ¶ 31; supra n.2. Arresting officers "do not typically inform such NCIC immigration arrestees of their Miranda rights." Id. ¶ 55. Defendants have not initiated federal criminal prosecutions of absconders or NSEERS violators. Id. In all respects, these are civil arrests, and they are unlawful. See Gonzales, 722 F.2d at 472-75 ("assum[ing] that the civil provisions" of immigration law preempt local arrest authority).

Moreover, the administrative warrants entered into the NCIC - which contain "numerous inaccuracies," Compl. ¶ 39 - do not establish probable cause for a criminal arrest. The criminal immigration laws that the Defendants contend have been violated require that the offender acted "willfully." 8 U.S.C. §§ 1253(a) (criminal penalties for "willful" failure to depart after entry of removal order), 1306(a) (same for "willful" failure to comply with registration requirement). To satisfy the *mens rea* requirement of "willfulness," an offender must have a specific intent to violate the law. United States v. Schultz, 333 F.3d 393, 411 (2d Cir. 2003). However, in reality, many alleged absconders and NSEERS violators have no idea that they have broken any law. Compl. ¶ 41 ("many persons with removal orders were not present in the administrative court when the order was entered. Many of these persons did not receive notice of their scheduled court hearing, the entry of their removal order, or the denial of their administrative or judicial appeals"); id. ¶ 42 (in "widespread confusion that has accompanied defendants' announcement and implementation of NSEERS, many persons are ignorant of their obligations under NSEERS and may be unaware that they have failed to comply with an NSEERS rule"); see also supra n.9.

Even assuming arguendo that the arrests at issue in this action may fairly be classified as criminal arrests supported by probable cause, they are unlawful. Congress has preempted local police arrests for criminal immigration offenses, except as authorized by 8 U.S.C. §§ 1252c(a), 1324(c) or the procedures set forth at 8 U.S.C. §§ 1103(a)(10), 1357(g). The rationale of Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983) itself, relied on by defendants, Def. Br. 31-32, undermines their argument. The Ninth Circuit concluded that Congress had not preempted criminal immigration arrests because, at the time of the decision, statutes relating to "the regulation of criminal immigration activity by aliens" are "few in number and relatively simple in their terms." Id. at 472-75. Since the Gonzales decision in 1983, however, Congress has added numerous criminal immigration provisions, including those now codified at 8 U.S.C. § 1160(b)(6)(D) (violation of confidentiality provision regarding specified applications); id. § 1160(b)(7) (false statement in specified applications); id. § 1253(a) (willful failure to depart); id. § 1255a(c)(5)(E) (violation of confidentiality provision regarding specified applications); id. § 1255a(c)(6) (false statement in specified application); id. § 1324a(f) (employment of unauthorized immigrants); id. § 1324c(e) (immigration document fraud); id. § 1534(e)(3)(F)(ii) (violation of disclosure rules in specified proceedings). Because federal immigration criminal laws are no longer "few in number and relatively simple in their terms," the underlying the premise of Gonzales is no longer applicable. 722 F.2d at 475.

The cases relied upon by the defendants for the proposition that state officers may make criminal immigration arrests arise outside the immigration context and are inapposite. See United States v. Di Re, 332 U.S. 581, 589 (1948) (state officer makes federal arrest for possession of counterfeit gasoline ration); Marsh v. United States, 29 F.2d 172 (2d Cir. 1928) (local police make arrest for violation of federal prohibition law).[23] In these cases local officers did not act contrary to any congressional preemption of state power. Di Re, 332 U.S. at 589 ("in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity") (emphasis added).

Finally, defendants make brief reference to several other statutory provisions, none of which authorize police arrests for immigration violations. See Def. Br. 35 (citing 8 U.S.C. §§ 1373, 1644, 1365a(f)(2) and VCCLEA). Plaintiffs analyze these provisions, supra Point III.B, with the exception of 8 U.S.C. § 1365a(f)(2), a provision authorizing the Attorney General to share information from a new entry-exit system, termed "U.S. VISIT," with local police when that system becomes operational at some future time. Nothing in this last provision authorizes the NCIC practices challenged here.

* * * *

Defendants have overreached. They have exceeded their statutory authority by entering civil immigration records and administrative warrants into the NCIC criminal

[23] The defendants also rely on several cases involving federal officers making arrests for federal crimes. Def. Br. 29-31 (citing United States v. Swarovski, 557 F.2d 40 (2d Cir. 1977); United States v. Burgos, 269 F.2d 763 (2d Cir. 1959); United States v. Lindenfeld, 142 F.2d 829 (2d Cir. 1944)). These cases are of no aid in the preemption analysis because no state actor was involved.

database and disseminating those records to state and local police. The defendants' NCIC practices are also unlawful for the independent reason that they have caused, and continue to cause, local police to make immigration arrests that Congress has preempted police from undertaking. Defendants' illegal actions have ignored elaborate congressional schemes to regulate both the NCIC and local enforcement of immigration laws. Their actions have also undermined public safety, frustrated effective policing, and chilled vital communications from non-citizens to law enforcement and other local officials. Individual members of plaintiff organizations have been injured by these actions, and plaintiffs have sufficiently pleaded their standing to pursue the declaratory and injunctive relief they request.

CONCLUSION

For the foregoing reasons, the government's motion to dismiss should be denied.

Respectfully submitted,

By: /s/ Carmine D. Boccuzzi________________

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EXHIBIT A

TO CREATE A NATIONAL POLICE BUREAU
TO CREATE A BUREAU OF CRIMINAL IDENTIFICATION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

SIXTY-EIGHTH CONGRESS
FIRST SESSION

31

ON

H. R. 8580
H. R. 8409

APRIL 17 AND 24, 1924

Serial 31

WASHINGTON
GOVERNMENT PRINTING OFFICE
1924

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CITY OF MONTGOMERY, ALA.,
February 16, 1924.

Hon. W. P. RUTLEDGE,
President International Association Chiefs of Police,
Detroit, Mich.

MY DEAR SIR: I am herewith inclosing a copy of letter I sent to the two United States Senators from this State and the Congressman from this district, pursuant to your request of February 13.

If I can do anything more in furthering this measure, kindly advise me.

I am, yours very truly,

W. H. TAYLOR, *Chief of Police.*

Mr. HERSEY. Several days ago Mr. Enright testified before the committee, representing the International Police Conference, which, he said, "consists of 700 cities and towns in the United States and the most important police departments of foreign countries and all continents." In the course of his statement I asked him this question:

Will you refer to the question of putting the bureau under the Department of Justice? A separate bureau is rather obnoxious to us in Washington.

To this question Mr. Enright replied:

We feel this way regarding the Department of Justice: There is not very much friendship between the Department of Justice and most of the police departments of our country, and we rather object to becoming an annex to the Department of Justice.

That will give you an idea of Mr. Enright's position.

Mr. RUTLEDGE. I think I have stated here that the National Association of Chiefs of Police is the only bona fide police organization in the United States. We have in our membership chiefs of police in almost every country in the world. Mr. Joseph M. Quigley, when president of the association, wrote a letter to every chief of police in the United States putting before them the proposition of turning this identification bureau over to the Department of Justice, and he received a favorable reply, I believe, from every one of them. I believe the response was unanimous. Every chief of police went on record in favor of that proposition. We have had it up from time to time in the conventions, and the organizations have gone on record unanimously in favor of the proposition.

Mr. PERLMAN. Is Commissioner Enright a member of your organization?

Mr. RUTLEDGE. No, sir.

Mr. PERLMAN. He is a member of the other organization?

Mr. RUTLEDGE. He is the president of what is called the New York Police Conference, of New York City. We all believe that that organization was formed for the purpose of disintegrating and undermining the old organization of the chiefs of police of this country.

STATEMENT OF MAJ. RICHARD SYLVESTER, HONORARY PRESIDENT OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

The CHAIRMAN. Major Sylvester, you are the president, or were the president, of this international organization of chiefs of police?

Major SYLVESTER. Yes, sir; I organized the international institution in 1901. and after I retired from the police service, in 1915, out of regard for what I have done as its president for 15 years in the interest of the police of this country and abroad I was elected as honorary president of this association for life.

The CHAIRMAN. You are still the honorary president, then?

Major SYLVESTER. Yes, sir. From that standpoint I have been able to see something of this situation.

The CHAIRMAN. Is that organization still functioning?

Major SYLVESTER. Do you mean the International Association of Chiefs of Police?

The CHAIRMAN. Yes.

Major SYLVESTER. Yes, sir; it has a very extensive membership, embracing the chiefs of police, marshals, commissioners, etc., of most of the cities and towns of the United States. The numerical strength of the organization is probably 600 or more.

The CHAIRMAN. I understand that you have prepared a written statement to submit.

Major SYLVESTER. Yes, sir; and if you will indulge me I will read it as fast as I can. In order that it may be understood I will read it as distinctly as I can. It gives a brief history of this question that is before you.

The CHAIRMAN. If you do not mind, we will have it entered in the record just the same.

Major SYLVESTER. My statement is as follows:

WILMINGTON, DEL., *April 22, 192[illegible]*.

Hon. GEORGE S. GRAHAM,
Chairman Judiciary Committee,
House of Representatives, Washington, D. C.

DEAR SIR: In relation to the establishment of a bureau of criminal information and identification in Washington by the chiefs of police of the United States, in cooperation with the United States Government Department of Justice, in line with the recommendation contained in the message of the President of the United States to Congress, I respectfully beg leave to report:

In 1901 there existed in this country a small organization known as the Chiefs of Police Union, which had for its purposes the bringing about of a closer personal and official relationship between the heads of police forces of the various States, municipalities, and towns of the United States.

At that time, and for a period of about 32 years, the writer had been and was connected as an official of the Metropolitan department of police of the District of Columbia.

In the year 1901 the Police Chiefs Union expanded and became known as the International Association of Chiefs of Police in order to include members from the Dominion of Canada.

Your correspondent was elected to the presidency of that association and was repeatedly selected as such for a period of 15 years, when he ceased to be the head of a police jurisdiction. However, out of respect and in appreciation of long services, the International Association of Chiefs of Police elected the writer a life member and an honorary president of the institution, and from that standpoint I am able to make report of the efforts and activities of the organization looking to a partnership or coordination of some kind whereby the law-enforcing divisions of the Government and those of the States and municipalities might work in harmony in the accomplishment of the greatest good for the public welfare in their respective fields without interference of the rights of the States or the General Government.

The question of State rights was raised by Mr. LaGuardia in speaking on this bill. Therefore, I would like to emphasize that question also by saying that we are fully aware of the delicacy of a situation of that kind. However, it is not contemplated by the International Association of Police Chiefs that the division of bureau of criminal information and identification in the Department of Justice would carry with it anything in the way of law, rule, or regulation as to the directing of State or municipal agencies. It is simply intended to furnish information. It is not for the Department of Justice to direct the police officer or the marshal how to proceed, and it does not mean that the city should direct the Department of Justice how it should proceed in any case. There would be no interference in either direction.

The CHAIRMAN. I do not think you need trouble yourself at all about that question.

Major SYLVESTER. The statement continues [reading]:

The International Chiefs Association has grown in strength and influence, has raised the standard of police forces, has introduced many new methods rapidly leading to a system for the common good. The membership numbers several hundred chiefs of police from the many important cities of the United States (names of cities and chiefs included in attached report).

As an auxiliary the association organized, made effective, and has maintained at its own expense, except a small contribution of $250 from the Government, what is known as the National Bureau of Criminal Identification, wherein are kept in confidential files, available only to a duly accredited chief of police who has assisted support of the bureau, photographs, records, finger-prints, measurements, and information regarding recorded criminals.

Chiefs of police of the association contribute new records, measurements, etc., to these files and seek therefrom records of criminals unknown to them in cases of arrest. A clearing house for such information.

For 15 years efforts were made to have the Government take over this bureau and maintain it as a division of the Department of Justice, and two or three years ago that department gave hearing to the International Chiefs' Association delegates, and the question was considered and the offer of the chiefs was acceptable when measure for lawful transfer of the immense bureau and its hundreds of records could be accomplished. The idea was to establish a division in the Department of Justice to include this bureau as a nucleus for criminal information and identification, records therefrom to be available to General Government certified criminal investigation agents and duly certified chiefs of police. While it would be conducted by the Department of Justice, three chiefs of police, it was proposed, selected from the International Association of Chiefs, should be delegated as an advisory board, to recommend new features and report on its conduct to the Attorney General of the United States.

Under this cooperative division the creation of a new bureau and any great expense would be obviated, the important feature being the placing in charge an expert in police record work acceptable to all parties in interest.

The International Association of Chiefs of Police, by unanimous vote of its members at the annual convention in San Francisco, indorsed this proposal, and at its convention in Buffalo, N. Y., a year ago again expressed its favorable opinion.

This was on motion of Police Chief John Tracey, of Paterson, N. J., as follows:

"I move, Mr. Chairman, that the report of the board of governors be accepted, and that we affirm their position in every particular, giving them full power to make with the Department of Justice the best arrangement they can for the carrying out of this proposition."

The board of governors comprises: J. M. Quigley, chief of police, Rochester, N. Y., chairman; E. Van Buskirk, Washington (expert), secretary; William B. Mills, superintendent, Philadelphia, Pa.; Daniel Sullivan, superintendent, Washington, D. C.; Martin O'Brien, superintendent, St. Louis, Mo.; George B. Henry, superintendent, Baltimore, Md.; John J. Curry, superintendent, Niagara Falls, N. Y.; Fred W. Tepel, chief, Williamsport, Pa.; William A. Pinkerton (deceased), Chicago, Ill.; Michael Long, chief, Newark, N. J.; Richard Sylvester, Wilmington, Del.

This board of governors, excepting Mr. Long, was the delegation that visited the Department of Justice in conference on the subject, together with the president of the International Association of Chiefs of Police, William P. Rutledge, commissioner and superintendent of police of Detroit, Mich., and M. O'Brien, superintendent of police, San Francisco, Calif.