IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

MIRNA RUBIDIA ARTIGA CARRERO	*	
Plaintiff,	*	
v.	*	Civil Action No.: 1:16-cv-03939-JKB
CHRISTOPHER FARRELLY, ET AL.,	*	
Defendants.	*	

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PLAINTIFF'S OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

Introduction

In the aftermath of September 11, 2001, high-ranking officials in the Department of Justice and the Immigration and Naturalization Service – a precursor agency to the Department of Homeland Security – ordered that civil immigration records, including administrative warrants of arrest, be entered into the National Crime Information Center ("NCIC") database, which state and local law enforcement officers access on a daily basis. They did so despite longstanding guidance from the Department of Justice advising against this practice because state and local law enforcement officials do not have the authority to enforce civil immigration laws. ECF No. 1 at ¶¶ 43-47; *see* Section III, *infra*. In fact, as the Fourth Circuit recently observed *in dictum*, there is a "good argument" that the statute that governs the NCIC database, 28 U.S.C. § 534, "does not authorize inclusion of civil immigration records in the . . . database." *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 467 (4th Cir. 2014). Even though Congress has made numerous amendments to § 534, it has never authorized the general inclusion of civil immigration records in the NCIC. *See* Section III, *infra.*

Law enforcement leaders from across the country have expressed concern over the practical implications of the Federal Defendants' *ultra vires* and illegal conduct. As the Major Cities Chiefs Association stated in 2006, the Federal Defendants' practice of including immigration information in NCIC sets up a conflict between "the civil nature of immigration enforcement and the established criminal authority of local police." Major Cities Chiefs Immigration Committee Recommendations for Enforcement of Immigration Laws By Local Police Agencies, Adopted By: Major Cities Chiefs Association, June 2006 ("Major Cities Chiefs Recommendations"), *available at* http://www.houstontx.gov/police/pdfs/mcc_position.pdf at 8. As the Association noted, including matters like administrative arrest warrants stemming from immigration proceedings, which "do not fall within the clear criminal enforcement authority of local police agencies . . . lays a trap for unwary officers who believe them to be valid criminal warrants or detainers." *Id.*

Plaintiff Mirna Rubidia Artiga Carrero ("Ms. Artiga") fell victim to the Federal Defendants' unlawful conduct when Baltimore County Police Officer Christopher Farrelly stopped and detained her, then prolonged her detention and ultimately arrested her based on the presence of a civil immigration warrant in NCIC. Ms. Artiga seeks injunctive relief against the Federal Defendants that will ensure she does not suffer a similar ordeal in the future, as well as damages for the Federal Defendants' contribution to her unconstitutional and tortious detention and arrest.

Factual Background

In 2006, ICE officials entered a civil administrative warrant of arrest for Ms. Artiga into the NCIC system. The warrant was based on an order of removal issued *in absentia* by an

immigration judge in Texas. ECF No.1 ¶ 48; ECF No. 28 at 4-5 and 7.[1] To date, the Federal Defendants continue to maintain and disseminate this record to local law enforcement officers across the country through the NCIC database without any authorization from Congress to do so. ECF No. 1 ¶ 49.

On August 26, 2014, as she was driving home from a late night shift at work, Christopher Farrelly, a Baltimore County police officer, stopped Ms. Artiga. Based entirely on the presence of a civil immigration warrant for her arrest in the NCIC database, Officer Farrelly detained her to investigate her immigration status before arresting her, transporting her across the county line, and transferring her into ICE custody. ECF No. 1 ¶¶ 20-26.

Pursuant to 28 U.S.C. § 534, Congress has limited the type of information that may be entered into the NCIC database. ECF No. 1 ¶¶ 38-39. Since its passage in 1930, Congress has amended the language multiple times, but has never authorized federal agencies to enter information about civil immigration warrants wholesale into NCIC. *Id.* In 1996, in a separate section of the United States Code, Congress authorized the entry of records related only to previously deported persons with felony convictions. 8 U.S.C. § 1252c. But it did not authorize, in that section or in any other, the addition of civil immigration records into the NCIC system.[2] In fact, Congress has repeatedly considered and rejected amendments intended to allow records of civil violations into the database. *See, e.g.,* H.R. 842, 110th Cong. (1st Sess. 2007); H.R.

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[1] Ms. Artiga originally alleged that the record was entered into NCIC in 2005, but as Federal Defendants note in their Motion to Dismiss, she was ordered removed *in absentia* in February 2006 and the record was created in March 2006. *See* ECF No. 28 at 4-5 & 7.

[2] Congress also, as Defendants note in their Motion to Dismiss, authorized the Department of Homeland Security to create and maintain a *separate* database for maintaining and disseminating information about certain civil immigration violations. ECF No. 28-1 at 5 (citing Illegal Immigration Reform & Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, Title III, § 326, 110 Stat. 3009-623, 3009-630 (reprinted as a note to 8 U.S.C. § 1252).

3938, 109th Cong. (1st Sess. 2005); *see also Doe v. ICE*, Case No. M-54(HB), 2006 WL 1294440 at *3 (S.D.N.Y. May 10, 2006) (noting that recent "legislation in both houses of Congress that would provide the needed statutory authority for ICE to enter non-criminal immigration information into the NCIC has not passed," and highlighting that if the Government was correct that the statute as currently drafted permits the entry of immigration information, such attempts to amend the statute "would be superfluous.")

Notwithstanding these limitations, in late 2001, the Department of Justice began identifying persons with outstanding civil immigration warrants in NCIC even when they had not been convicted of felonies and previously deported. ECF No. 1 ¶ 40. This was a radical departure from longstanding Department of Justice guidance advising against the entry of such warrants into NCIC because state and local law enforcement officials are prohibited from making immigration arrests and do not have the authority to enforce federal immigration laws. ECF No. 1 ¶¶ 43-47; ECF No. 1-7 at 1 ("Because not everyone for whom a warrant of deportation is outstanding has violated a criminal law, we believe that a warrant of deportation fails to constitute a sufficient basis for including in the NCIC Wanted Person File all persons subject to such a warrant."); ECF No. 1-7 at 1 n.1 (citing policy "to enter only those warrants into the NCIC system which may be executed by any law enforcement officials with general arrest powers"); *see also* Major Cities Chiefs Recommendations at 8 ("The N.C.I.C. system had previously only been used to notify law enforcement of strictly criminal warrants and/or criminal matters.").

The decision to include this information in NCIC was made by high-ranking officials in the Department of Justice and has been continued and implemented by the Federal Defendants, their agencies, and their employees. ECF No. 1 ¶¶ 41 & 49. The change was intended to induce

and encourage local police officers to make immigration arrests and to enforce immigration laws, and, as Ms. Artiga's ordeal shows, it has done so. ECF No. 1 ¶¶ 43-46. Officer Farrelly, based on the presence of Ms. Artiga's civil immigration information in NCIC, prolonged his stop of her beyond the point of any concern that might have justified the original stop, detained her, and transported her to another county so she could be taken into custody by ICE. ECF No. 1 ¶¶ 22, 24-27. Both the Federal Defendants' and the Local Defendants' illegal conduct caused Ms. Artiga to be subjected to an unlawful stop and arrest and to be detained for six weeks, separated from her United States citizen son who was scheduled for surgery and who has ongoing special needs. ECF No. 1 ¶¶ 2, 29-30.

Legal Standards

I. Failure to State a Claim.

In deciding a motion to dismiss, the only question for the court is whether the plaintiff has stated a claim for relief that is plausible on its face. Fed. R. Civ. P. 12(b)(6); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). In determining whether a plaintiff has alleged a claim that is plausible on its face, the court must accept as true all of the well-pleaded allegations in the plaintiff's complaint and must construe the facts and the reasonable inferences that can be drawn therefrom in the light most favorable to the plaintiff. *McKnight v. Stewart*, Case No. JKB-14-2042, 2015 WL 461896, at *2 (D. Md. Feb. 2, 2015); *Hall v. DIRECTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017).

II. Subject-Matter Jurisdiction.

In determining whether the Court has subject-matter jurisdiction, courts must apply a strong presumption "favoring judicial review of administrative action." Where a statute is "reasonably susceptible to divergent interpretation, [courts should] adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Kucana v. Holder*, 558 U.S. 233, 251-52 (2010) (citing *Gutierrez de Martinez v. Lamagno*, 515 US 417, 434 (1995)). This bedrock principle applies to "legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Id.* (citing *INS v. St. Cyr*, 533 U.S. 289, 298 (2001); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 63-64 (1999)*; McNary v. Haitian Refugee Center,Inc.*, 498 U.S. 479, 496 (1991)). This presumption of judicial review can be dislodged only by "clear and convincing evidence." *Kucana*, 558 U.S. at 252 (internal citations omitted) (finding that 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar judicial review of motions to reopen immigration proceedings).

Argument

I. This court has jurisdiction to hear Ms. Artiga's claims.

Federal Defendants present a sweeping reading of 8 U.S.C. § 1252(g), and urge that this Court does not have jurisdiction over Ms. Artiga's claims. ECF No. 28-1 at 11-13. This is not a novel argument. Instead, numerous courts, including the Supreme Court and the Fourth Circuit, have rejected it multiple times based on the plain language of § 1252(g). Section 1252(g) addresses only three specific actions: (1) the initiation of deportation proceedings; (2) the adjudication of cases in immigration court; and (3) the execution of removal orders – none of which is at issue in this case. 8 U.S.C. § 1252(g); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999); *see also, infra* at 8-9 (citing cases). Instead, Ms. Artiga

here challenges Federal Defendants' decision (unrelated to the formal immigration and deportation process) (1) to enter and maintain *civil* immigration records in a database that Congress created, and has continued to reserve, for *criminal* records, and (2) to disseminate that information to state and local law enforcement officers who do not have the authority to make immigration-related arrests. ECF No. 1 ¶¶ 31 & 38-47.

As the Supreme Court held in *Reno v American-Arab Anti-Discrimination Committee*, § 1252(g) does not "cover[] the universe of deportation claims" and instead "is much narrower."[3] 525 U.S. at 482. Section 1252(g) "applies *only* to [the] three discrete actions" that the Attorney General can take – commencing proceedings, adjudicating cases, or executing removal orders." *Id.* (emphasis added). The Court explained: "There are of course many other decisions or actions that may be a part of the deportation process – such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order." *Id.* But "[i]t is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *Id.* The Court thus found that § 1252(g) is not the "general jurisdiction limitation" that the Federal Defendants argue it is here. *Id.* at 482-83.

The Supreme Court's refusal to construe § 1252(g) this broadly has provided the foundation for numerous Courts of Appeal, including the Fourth Circuit, to hold that § 1252(g) and other subsections of the same statute do not bar judicial review of constitutional and statutory claims arising out of actions related to the deportation process. *See, e.g.*, *Bowrin v INS*,

[3] Unlike Ms. Artiga, the *Reno* plaintiffs directly challenged the Attorney General's decision to initiate deportation proceedings against them. 525 U.S. at 474.

194 F.3d 483, 488-89 (4th Cir. 1999) (Section 1252(g) did not strip court of habeas jurisdiction over both constitutional and statutory claims; instead, it "stripped the federal courts of jurisdiction only to review challenges to Attorney General's decision to exercise her discretion to initiate or prosecute these specific stages in the deportation process") (internal citations omitted); *Selgeka v. Carroll*, 184 F.3d 337, 341-42 (4th Cir. 1999) (Section 1252(g) does not bar jurisdiction over claim that asylum seeker was entitled to have his application heard by an immigration judge); *Smith v. Ashcroft*, 295 F.3d 425, 431 (4th Cir. 2002) (jurisdiction-stripping provisions did not eliminate district court's habeas jurisdiction to adjudicate due process claims raised in connection with prior deportation proceedings); *Obioha v. Gonzales*, 431 F.3d 400, 404-09 (4th Cir. 2005) (interpreting different subsection of 1252 narrowly so as not to strip court of jurisdiction to review Board of Immigration Appeals remand decision); *Medina v. United States*, 92 F. Supp. 2d 545, 550 (E.D.V.A. 2000) (exclusive jurisdiction clause did not divest district court of jurisdiction to hear Federal Tort Claims Act claims against Immigration and Naturalization Service officers); *Welch v. Reno*, Case No. CCB-99-2801, 2000 WL 1481426, at *2 (D. Md. Sept. 20, 2000) (Section 1252(g) did not deprive court of jurisdiction over challenge to the statute under which adjudication of his immigration case must proceed); *see also Kwai Fun Wong v. United States*, 373 F.3d 952, 965 (9th Cir. 2004) (Section 1252(g) did not strip court of jurisdiction over equal protection claim "arising from the discriminatory animus that motivated and underlay the actions of the individual defendants which resulted in the INS's decision to commence removal proceedings"); *Zhislin v. Reno*, 195 F.3d 810, 814 (6th Cir. 1999) (Section 1252(g) does not apply where petitioner is "not asking the Attorney General to exercise her discretion to allow them to remain in the United States," because "§ 1252(g) was directed against 'attempts to impose judicial restraints upon prosecutorial discretion."); *Adegbuji v.*

Fifteen ICE Agents, 169 Fed. App'x 733, 735-36 (3d Cir. March 8, 2006) (district court retained jurisdiction over excessive force claims); *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 124-25 (D. Conn. 2010) (finding with respect to § 1252(g) that the court "does not have jurisdiction to hear claims arising from the decision to issue a notice to appear, but does have jurisdiction to hear claims arising from a plaintiff's arrest and detention," and finding that plaintiff's, equal protection, procedural due process, and Fourth Amendment claims were not barred by § 1252(g)); *De La Paz v. Coy*, 954 F. Supp. 2d 532, 544-45 (W.D. Tex. 2013) (traffic stop did not arise from decision to commence proceedings); *Argueta v. ICE*, Case No. 08-1652 (PGS), 2009 WL 1307236, at *15-16 (D.N.J. May 7, 2009) (Section 1252(g) did not bar claims arising from arrests made during a residential immigration raid); *El Badrawi v. DHS*, 579 F. Supp. 2d 249, 266 (D. Conn. 2008) (internal citations omitted) ("DHS's decisions to arrest and detain El Badrawi were decisions that were separate and discrete from the agency's decision to initiate removal proceedings against him."). Ms. Artiga's case, which raises constitutional claims and does not directly challenge discretionary decisions or removal proceedings, clearly falls within the ambit of matters that this Court has the power to review.

The cases Defendants cite, none of which are binding on this Court, are either inapposite or do not support Defendants' contention that claims such as Ms. Artiga's are barred by § 1252(g). In *Sissoko v. Rocha*, the plaintiff's false arrest claim, unlike Ms. Artiga's, "directly challenge[d] Rocha's decision to *commence* expedited removal proceedings." 509 F.3d 947, 950 (9th Cir. 2007) (emphasis added). In *Adegbuji v. United States*, the court found only that it lacked jurisdiction over "his claims for damages 'arising out of the decision to commence removal proceedings' or 'arising from or relating to the implementation of or operation of an order of removal.'" 223 F. App'x 194, 194-95 (3d Cir. 2007). It reviewed the lower court's

dismissal of the plaintiff's claims for assault, battery, and excessive force. *Id.* at 195. In *Mata v. Secretary of the Department of Homeland Security*, the plaintiff sought "review of his order of removal" and a "stay of his removal from the United States and the reopening of his removal proceedings," relief that Ms. Artiga is not seeking here. 426 F. App'x 698, 700 (11th Cir. 2011). The remaining cases cited also address direct challenges to the deportation process or claims of wrongful deportation that required substantive findings on the validity of prior orders of removal. *See, e.g.*, *Foster v. Townsley*, 243 F.2d 210, 214-15 (5th Cir. 2001); *Guardado v. United States*, 774 F. Supp. 2d 482, 487 (E.D. Va. 2010). None of these cases raise claims even remotely similar to the unlawful policy and conduct Ms. Artiga here challenges.[4]

The jurisdictional bar in § 1252(g) additionally cannot apply to Ms. Artiga's claims because the conduct she challenges is unlawful and therefore by definition not discretionary. *Reno*, 525 U.S. at 485 (Section 1252(g) "seems clearly designed to give some measure of protection to . . . *discretionary* determinations"). As several courts have noted, conduct that violates a legal mandate or that is outside the scope of a federal official's authority cannot be discretionary. *See Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000); *Meyers v. United States Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975) ("a federal official cannot have discretion to behave . . . outside the scope of his delegated authority"); *see* Section V. A., *infra*. Because maintaining and disseminating civil immigration records in the NCIC database is *ultra*

[4] Federal Defendants also cite an Eleventh Circuit case, *Gupta v. McGahey*, 709 F.3d 1062 (11th Cir. 2013), to support an expansive interpretation of § 1252(g) as applying to "any claim for which the 'decision or action' of the Attorney General . . . to commence proceedings, adjudicate cases, or execute removal orders is the basis of the claim." ECF No. 28-1 at 12. But *Gupta* is inconsistent with controlling Fourth Circuit precedent and cannot be squared with the Supreme Court's narrow reading of § 1252(g) in *Reno*, which the court in *Gupta* does not cite, discuss, or distinguish. In addition, the facts in *Gupta* are distinguishable to the extent that the plaintiff there challenged the procurement of a warrant and the issuance of a notice to appear, which could be actions taken in order to initiate removal proceedings.

vires of the authorizing statute, 28 U.S.C. § 534, *see* Section III, *infra,* those actions are not discretionary and, therefore, are plainly not within the jurisdictional bar of § 1252(g).[5]

II. Ms. Artiga has standing to challenge Federal Defendants' conduct.

To establish standing for injunctive relief, a plaintiff must allege (1) a future injury that is "imminent," (2) that the injury is "fairly traceable" to the defendant, and (3) that the injury is "likely to be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & 590 (1992). Ms. Artiga's allegations meet all three requirements.

As an initial matter, the Federal Defendants do not contest that Ms. Artiga meets the injury prong of the standing inquiry; nor do they contest that her injury is likely to be redressed by a favorable decision. Instead, the Federal Defendants rely on the Second Circuit's decision in *National Council of La Raza v. Mukasey*, 283 F. App'x 848 (2d Cir. 2008) (hereinafter "*NCLR*") to argue that Ms. Artiga's injury is not traceable to their conduct. That case, however, is not an appropriate analogue to this one because the plaintiffs in *NCLR* were all organizations, while Ms. Artiga is an individual who has plainly alleged a deprivation of her own constitutional rights in addition to other injuries, and that those injuries would not have occurred but for the Federal Defendants' unlawful entry and maintenance of her immigration information in NCIC.[6]

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[5] In a footnote, Defendants cite 8 U.S.C. § 1252(b)(9) to suggest that Ms. Artiga's claims are pending in the wrong court. But § 1252(b) and all of its subparts are plainly inapplicable here since they apply only to claims that could have been brought in removal proceedings and then directly in courts of appeal by petition for review from "an order of removal under subsection (a)(1)." *See* 8 U.S.C. § 1252(b); *Reno*, 525 U.S. at 483.

[6] Ms. Artiga has also properly alleged that she is at risk of similar treatment in the future based on the Federal Defendants' unlawful conduct. ECF No. 1 ¶¶ 50, 59 & 62; *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 184-85 (2000) (reasonable fear of future injury sufficient to support standing); *Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police*, 72 F. Supp. 2d 560, 565 (1999).

The causal nexus prong of the standing inquiry, on which the Federal Defendants focus their attention, does not require a plaintiff to show that a defendant is the *sole* cause of the injury or that they are the *proximate* cause of the injury, or even the "very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169 (1997); *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014); *Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992). Instead, the standard for causation is that the injury suffered is "fairly traceable" to Defendants. *Lujan*, 504 U.S. at 590; *Watkins*, 954 F.2d at 980. This includes actions that simply "cause[] or contribute[] to the kinds of injuries alleged," even if only as one cause among many. *Watkins*, 954 F.2d at 980; *see also Neighborhood Assistance Corp. of America v. Consumer Financial Protection Bureau,* 907 F.Supp.2d 112 (D.D.C. 2012) (injury inflicted on one party by another through a third party intermediary may be sufficient for standing). As amply alleged in her Complaint and demonstrated in the supplemental materials provided by Baltimore County, the Federal Defendants' conduct is, at the very least, a contributing cause of her injury. ECF No. 1 ¶¶ 21-25 & 48-50; ECF No. 13-2 ¶ 6.

Indeed, many of Ms. Artiga's critical allegations related to the standing inquiry have already been confirmed by Baltimore County and Officer Farrelly. Ms. Artiga alleges that Officer Farrelly prolonged the stop based on his review of Ms. Artiga's immigration record in the NCIC database, ECF No. 1 ¶¶ 21-25, and Officer Farrelly admits as much in his declaration submitted in support of his own Motion for Summary Judgment. *See* ECF No. 13-2 ¶ 6. By Officer Farrelly's own account, he would not have detained Ms. Artiga to investigate her immigration status, contacted ICE, and ultimately arrested her had her information not been in

the database he accessed.[7] *Id.* Because the NCIC record continues to exist and is available to any law enforcement officer who stops Ms. Artiga for any reason (justified or unjustified), she is at constant risk of future unlawful detention and arrest.[8] *See Maryland State Conference of NAACP Branches*, 72 F. Supp. 2d at 565 (finding that plaintiffs had standing because, in relevant part, they alleged that they were likely to be stopped if they committed "no more than a minor, perhaps unintentional, traffic infraction" or "even if no traffic violation had been committed"). That risk of injury would immediately be eliminated if this Court were to enjoin the maintenance of her immigration records in the NCIC database.

Even by the standard described in *Bennett* and cited by the Federal Defendants, Ms. Artiga's allegations are sufficient to show that Federal Defendants caused her injury. ECF No. 28-1 at 16. Ms. Artiga has alleged that immigration records are entered into NCIC for the express purpose of inducing local law enforcement officers to detain and arrest individuals for immigration violations. ECF No. 1 ¶¶ 45-46. Indeed, at the time immigration records were first entered into the NCIC, Department of Justice officials used their positions to encourage local law enforcement officers to do just that. ECF No. 1 ¶ 46; *see also* ECF No. 1-7 (recommending against inclusion of civil warrants because local law enforcement are not authorized to act on such warrants); Major Cities Chiefs Recommendations at 8 (inclusion of civil immigration

[7] Thus, Ms. Artiga's allegations meet a standard for causation that Fourth Circuit precedent finds *too stringent* for standing purposes, since her allegations (and Officer Farrelly's declaration) establish that but for the presence of the civil immigration warrant in the NCIC database, her unlawful stop and detention would not have occurred. *Watkins*, 954 F.2d at 980.

[8] *See* ECF No. 24 (Opp'n to Mot. to Dismiss or Mot. for Summ. J. filed by Officer Farrelly and Baltimore County) at 8 (explaining that it is now clearly established that stopping, detaining, or prolonging the detention of individuals to investigate their immigration status does not comport with the Fourth Amendment's requirement that a law enforcement officer have reasonable suspicion that criminal activity is afoot) & 11-14 (explaining Ms. Artiga's allegation that, at the very least, Officer Farrelly prolonged his detention of her to investigate her immigration status – conduct that is specifically prohibited under *Santos* and *DiGiovanni*).

warrants in NCIC "lays a trap for unwary officers who believe them to be valid criminal warrants"). If Ms. Artiga's well-pleaded allegation is ultimately established, it would follow from that fact, in combination with the now-undisputed record regarding Officer Farrelly's decision to detain and arrest Ms. Artiga based on the presence of her information in NCIC, ECF No. 13-2 ¶ 6, that the Federal Defendants' conduct had a "determinative or coercive effect upon" Officer Farrelly. *Bennett*, 520 U.S. at 169.[9]

III. The NCIC statute does not authorize the entry, maintenance, and dissemination of civil immigration records.

The Federal Defendants' claim that the entry and maintenance of civil immigration records in the NCIC is authorized and not *ultra vires* forms the basis of their argument that Ms. Artiga has failed to state a claim upon which relief may be granted. ECF No. 28-1 at 20-24. But, as the Fourth Circuit recently observed in *Santos*, "there is a good argument that Section 534(a)(1) . . . does not authorize inclusion of civil immigration records in the NCIC database."

[9] In reaching a different conclusion, the Second Circuit in *La Raza* applied a far more stringent standard than the one articulated by the Fourth Circuit in *Watkins*. It wrongly found that the maintenance and dissemination of the records is not "determinative or coercive" for the sole reason that some jurisdictions fail to act on them. 283 F. App'x at 851-52. But the fact that they are not "determinative or coercive" in all cases does not mean they are not determinative or coercive in the cases where state or local officers do act on them. As the Supreme Court noted in *Bennett*, some "advisory" opinions "in reality . . . ha[ve] a coercive effect on the action agency." 520 U.S. at 169. At the present time, the federal government is doing everything in its power to coerce state and local jurisdictions that fail to comply even with *unconstitutional* requests for assistance with federal immigration enforcement efforts. *See* Executive Order 13768, Enhancing Public Safety in the Interior of the United States (January 25, 2017); *County of Santa Clara v. Trump,* __ F. Supp. 3d __, 2017 WL 1459081 (N.D. Cal. 2017) (enjoining Executive Order 13768 on separation of powers, Spending Clause, Fifth Amendment, and Tenth Amendment grounds). The government should not be heard to both threaten to withdraw funds, publish reports, and use other coercive measures to force jurisdictions to comply with requests to enforce federal immigration laws in practice, and then assert in litigation that those requests are not "coercive or determinative." The entry, maintenance, and dissemination of civil immigration records in NCIC has as its purpose the inducement of state and local law enforcement to participate in the enforcement of federal immigration laws, ECF No. 1 at ¶¶ 42-46, and at the very least "contribute[s] to causing" unlawful arrests on that basis.

725 F.3d at 467 (internal citations omitted). The Court did not "reject" that argument, as the Federal Defendants suggest. ECF No. 28-1 at 23. Instead, it rejected only the assertion that civil immigration warrants were somehow transformed into "criminal" records simply based on their inclusion in the NCIC database. *Santos*, 725 F.3d at 467-68. The court did not address – and the issue was not before it – whether the authorizing statute allows the practice that it acknowledged to be in existence since 2001, beyond noting that it appears not to. *Id.*

Congress has frequently amended the statute authorizing the entry of records into NCIC, ECF No. 1 ¶ 39, including the addition of a specific provision authorizing the entry of immigration records of previously deported persons with felony convictions. That amendment would have been redundant if the statute already authorized entry of *all* immigration records into the NCIC database. But Congress has *never* authorized the inclusion of all civil immigration records in the database. *Id.* As a result, at least one court has found that there is "no statutory authority for entering non-criminal immigration information into the NCIC database." *Doe v. ICE*, Case No. No. M-54(HB), 2004 WL 1469464, at *4 (S.D.N.Y. June 29, 2004). Other courts have also interpreted the language of § 534 narrowly, as Ms. Artiga alleges it should be, ECF No. 1 ¶¶ 39-40, finding that even police arrest records are not "crime" records. *See Menard v. Saxbe*, 498 F.2d 1017, 1030 (D.C. Cir. 1974) (holding record of police arrest not a "crime" record); *Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974) (reaffirming *Menard*).

Because the text of § 534 is squarely against the Federal Defendants' position, they are forced to argue that Congress' separate authorization that DHS establish a new database to maintain and disseminate civil immigration information renders their conduct harmless. ECF No.

28-1 at 22-23.[10] But Congress' decision to create a distinct civil immigration record database, while not amending the NCIC statute to authorize the entry of civil immigration records (for anyone other than those individuals with felony convictions), only reinforces Ms. Artiga's claim that the Federal Defendants' conduct is *ultra vires* to § 534.

Moreover, Congress' decision to keep the records separate is rational. As the Major Cities Chiefs explained, including immigration records commingled with criminal records in a database that is accessed by state and local law enforcement officers who do not have authority to make immigration-related arrests predictably causes unlawful stops, detentions, and arrests, like the ones Ms. Artiga suffered here. *See* Major Cities Chiefs Recommendations at 8 ("An example of this conflict between the civil nature of immigration enforcement and the established criminal authority of local police exists in the federal initiative of placing civil immigration

[10] Defendants also assert that "[u]nderlying criminal violations, whether charged or not, serve as the basis for ICE submitting such information to the NCIC," citing three criminal statutes they believe could apply to Ms. Artiga. ECF No. 28-1 at 7. This assertion is disingenuous at best, and illustrates the danger inherent in using a criminal database to house civil immigration records – a danger Congress clearly sought to avoid. As an initial matter, the only one of the three bases that could even theoretically apply to Ms. Artiga is illegal entry under 8 U.S.C. § 1325, for which the five-year statute of limitations has long since expired. *See* 8 U.S.C. § 1325; 18 U.S.C. § 3282(a); Brian L. Owsley, DISTINGUISHING IMMIGRATION VIOLATIONS FROM CRIMINAL VIOLATIONS: A DISCUSSION RAISED BY JUSTICE SONIA SOTOMAYOR, 163 U. Penn. Law Rev. 1 (2014). As for 8 U.S.C. § 1253 (penalty for failure to depart), on its face it could not possibly apply to a person who entered without inspection and was never admitted into the United States, which is what the United States alleges Ms. Artiga did. By its terms, it applies only to persons found *deportable* under § 1227(a) – a subsection that is solely about persons who have previously been granted admission into the United States, as distinct from persons who entered without inspection or who were found *inadmissible* under § 1182(a). Thus, it plainly does not apply to Ms. Artiga – who also as a separate matter could not "willfully" have failed to depart since the order of removal was issued against her *in absentia*. As to false claims under 8 U.S.C. § 1001, there is no evidence to support such a charge; Ms. Artiga has never at any point been accused of or charged with making any false statements; and the same five-year statute of limitations would rule out the possibility of such a charge in any event. Thus, there is no basis for asserting that the underlying reason for including her record in the NCIC is "uncharged" criminal conduct. Moreover, the NCIC database does not include purported or speculative criminal offenses that are uncharged and instead only includes records of actual crime.

notices in the N.C.I.C. system. The N.C.I.C. system had previously only been used to notify law enforcement of strictly criminal warrants and/or criminal matters. . . . This initiative has created confusion due to the fact that these civil detainers do not fall within the clear criminal enforcement authority of local police agencies and in fact lays a trap for unwary officers who believe them to be valid criminal warrants or detainers.").

IV. Sovereign immunity does not protect *ultra vires* conduct.

Defendants also argue that, because an injunction in this case would require "affirmative action" on the part of Defendants in eliminating Ms. Artiga's record from NCIC, it is not covered by the *ultra vires* exception to the doctrine of sovereign immunity. ECF No. 28-1 at 20. But the case law Defendants cite does not involve *ultra vires* claims, and does nothing to establish that the relief requested here demands impermissible "affirmative action" by the United States that would allow invocation of sovereign immunity. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 (1949) (contract suit against federal government not involving *ultra vires* claim); *Johnson v. Fernandez*, Case No. 10-01719, 2011 WL 3236057 (D. Md. July 26, 2011) (declining to issue injunction in case challenging agency denial of grant applications the agency is empowered to make and has the discretion to deny); *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971) (declining to apply the doctrine of sovereign immunity in APA case where attorney alleged he had not been paid for legal services provided to the Tribe).

As the Federal Defendants rightly note, "the Supreme Court has long recognized an exception to sovereign immunity under the ultra vires doctrine." ECF No. 28-1 at 19 (citing *Larson*, 337 U.S. at 689). And courts have issued injunctions in many cases requiring far more extensive "affirmative action" than the elimination of a record from a database; indeed, almost any injunction requires at least *some* affirmative action in order to be carried out. *See, e.g.*,

Brown v. Plata, 563 U.S. 493 (2011) (upholding injunction requiring elimination of overcrowding in California prisons); *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013) (upholding preliminary injunction against the tightening of eligibility requirements for in-home personal care services under Medicaid); *Rodriguez v. Robbins,* 803 F.3d 502 (9th Cir. 2015) (requiring bond hearings for class of individuals in immigration proceedings detained without a bond hearing for prolonged periods of time); *see also Menard*, 498 F.2d at 1030 (enjoining inclusion of police arrest record into the FBI crime database).

The Federal Defendants also grossly overstate the burden they will face if the injunction Ms. Artiga seeks is granted. The only injunctive relief she seeks is the removal of *her own* civil immigration information from NCIC. ECF No. 1 at 17 (Prayer for Relief) ¶ D. The Federal Defendants cannot seriously contend that expunging a single individual's immigration records will "stop[] [the government] in its tracks," or be a "substantial bothersome interference with the operation of government." ECF No. 28-1 at 20 (quoting *Johnson v. Fernandez*, Case No. PJM-10-01719, 2011 WL 3236057, at *4 (D. Md. July 26, 2011) (internal quotations and citations omitted). Quite the contrary, the minimal burden imposed by the injunction – the same burden imposed by the court in *Menard*, 498 F.2d at 1030 – would simply restore the government's operations to its lawful bounds and to its own prior practice with respect to Ms. Artiga.

V. Exceptions to the FTCA do not cover Defendants' conduct.

A. The discretionary function exception does not apply to ultra vires conduct.

The Federal Defendants argue that their conduct falls within the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h). ECF No. 28-1 at 25-29. But the Federal Defendants have no discretion to violate the Constitution, statutes, or regulations, or otherwise violate a legal mandate, which is precisely what Ms. Artiga has alleged they have

done. *E.g.*, *Owen v. Independence*, 445 U.S. 622, 649 (1980)) (there is "no 'discretion' to violate the Constitution"); *Hollar v. Virgin Islands*, 857 F.2d 163, 168 (3d Cir. 1988) (*ultra vires* conduct is by definition impermissible and thus non-discretionary); *Nurse v. United States*, 226 F.3d at 1002; *Meyers v. USPS*, 527 F.2d at 1261 ("a federal official cannot have discretion to behave . . . outside the scope of his delegated authority"). Because the conduct Ms. Artiga challenges is *ultra vires* of § 534, it is not discretionary and cannot be covered by the discretionary function exception. *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) ("[W]e are called upon to . . . determine the bounds of the discretionary function exception found in § 2680(a). In doing so, we begin with the principle that '[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes.'" (quoting *United States Fid & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1998)); *see also Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016) (collecting cases).

B. DHS and ICE officials are law enforcement officials.

Defendants incorrectly assert that Ms. Artiga has not identified any federal officers who meet the definition of "investigative or law enforcement officers" under 28 U.S.C. § 2680(h). ECF No. 28-1 at 29-31. An "investigative or law enforcement officer" is "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). But the measure is not whether an individual was actively engaged in that type of activity. Instead, the Supreme Court has held that an individual's scope of employment defines whether or not they are a law enforcement officer, "regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest." *Millbrook v. United States*, 133 S.Ct. 1441, 1442 (2013). Thus, contrary to Defendants' assertion, the nature of the conduct at

issue here – entering, maintaining, and disseminating Ms. Artiga's immigration records – does not lead to the conclusion that the agents engaged in that conduct are not law enforcement officers.

Moreover, at least one of the ICE agents who was directly involved in Ms. Artiga's detention and arrest was empowered to make arrests for violations of federal immigration law. ECF No. 1 ¶ 27; ECF No. 13-2 ¶ 6. In fact, it appears from the record that the LESC officer involved in the maintenance and dissemination of records in the NCIC database – the individual with whom Officer Farrelly spoke and who later went to the scene to arrest Ms. Artiga – was himself empowered to make arrests for violations of immigration law since he met Officer Farrelly at the Howard County jail and took custody of Ms. Artiga there. ECF No. 1 ¶ 27; ECF No. 13-2 ¶ 6; *Millbrook*, 133 S.Ct. at 1442. Other courts have recognized that ICE is indisputably a law enforcement agency and found that ICE agents are "investigative or law enforcement officers" within the meaning of § 2680(h). *See, e.g.*, *Watson v United States*, 133 F. Supp. 3d 502, 524 (E.D.N.Y. 2015); *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1297 (M.D. Ga. 2012). Thus, Ms. Artiga has identified at least one individual who is a law enforcement official and for whose actions the United States may be held liable.

C. Ms. Artiga's claims are properly pleaded under Maryland tort law.

Defendants argue that they cannot be liable under Maryland law for false arrest as third-party "instigators" – individuals who did not arrest Ms. Artiga themselves – because in Maryland, an instigator is not liable for an arrest made by a police officer if the police officer made the arrest pursuant to a facially valid warrant. ECF No. 28-1 at 31-32. They further argue that law enforcement officers cannot be liable for acts undertaken in the course of their official duties unless they acted with "actual malice." *Id.*

Both arguments fail on the facts as alleged by Ms. Artiga because there was no facially valid warrant for Ms. Artiga's arrest. ECF No. 1 at ¶¶ 20-28; ECF No. 13-2 at ¶ 6. It is well established that civil immigration warrants do not meet basic Fourth Amendment requirements, since they are not issued upon probable cause supported by oath or affirmation, and are not reviewed by a judge or neutral magistrate. U.S. Const. Amend. IV; *El Badrawi*, 579 F. Supp. 2d at 276 (finding arrest based on an immigration warrant to be the equivalent of a warrantless arrest); *United States v. Toledo*, 615 F. Supp. 2d 453, 455 & 457 n.2 (S.D. W.Va. 2009). Under Maryland law, the "actual malice" requirement does not apply where an officer makes an arrest that is beyond the scope of his authority. *Mason v. Wrightson*, 205 Md. 481, 487 (1954). Here, detaining and arresting Ms. Artiga solely on the basis of the civil immigration warrant was beyond the scope of Officer Farrelly's authority. *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012); *United States v. Digiovanni*, 650 F.3d 498, 509 (4th Cir. 2011); *Santos*, 725 F.3d at 465. The federal officials who caused him to do so – from the policymakers down to the individuals with whom he communicated on the evening of August 24, 2014 – are liable as instigators of his unlawful conduct. *See Montgomery Ward v. Wilson*, 339 Md. 701, 722 (1995) ("With respect to warrantless arrests, if a person wrongfully procures another's arrest without probable cause . . . then the tort of false imprisonment may lie against the instigator . . . ."); ECF No 13-2 ¶ 6.

The cases Defendants cite do not support the proposition that law enforcement officials are not liable for any tortious conduct performed in the course of their official duties unless they acted with "actual malice." Rather, they support a more limited proposition, akin to the discretionary function exception, that public officials are not liable for *discretionary acts* performed in the course of their official duties unless those discretionary acts are performed with "actual malice." *Davis v. Muse*, 51 Md. App. 93, 99 (1982); *Thomas v. City of Annapolis*, 113

Md. App. 440, 457 (1997) (finding that public official immunity is not available even for discretionary actions when those actions are performed with "actual malice"). Here, the acts performed – entering and disseminating civil records in a criminal records database, thereby causing Ms. Artiga's false arrest and imprisonment – were *ultra vires* and, therefore, not discretionary. *See* Section III, *supra.*

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Federal Defendants' Motion to Dismiss.

Respectfully submitted,

/s/

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REQUEST FOR HEARING

Plaintiff respectfully requests that the Court hold a hearing on the Federal Defendants' Motion to Dismiss.

/s/
Sirine Shebaya

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2017, a copy of the foregoing Plaintiff's Opposition to Federal Defendants' Motion to Dismiss was filed with the clerk and delivered to all counsel of record by the Court's CM/ECF system.

/s/
Sirine Shebaya