No. _____

In The
Supreme Court of the United States

FREDERICK COUNTY BOARD OF COMMISSIONERS, SHERIFF CHARLES JENKINS, and DEPUTY SHERIFFS JEFFREY OPENSHAW and KEVIN LYNCH,

Petitioners,

v.

ROXANA ORELLANA SANTOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal law preempts the brief detention of an alien by a local police officer, pursuant to a federal warrant, for the purpose of contacting Immigration and Customs Enforcement to determine if the alien should be taken into custody, when it is unknown whether the alien's violation of federal immigration law was criminal or civil.

2. Whether the Fourth Amendment prohibits a brief investigative stop of an alien when the law enforcement officer reasonably suspects that the alien has committed a violation of federal immigration law, regardless of whether it is civil or criminal in nature.

PARTIES TO THE PROCEEDING BELOW

All parties are named in the caption above. Petitioners who were defendant/appellees below are: Frederick County Board of Commissioners; Charles Jenkins, Frederick County Sheriff, in his official and individual capacity; Jeffrey Openshaw, Frederick County Deputy Sheriff, in his official and individual capacity; and Kevin Lynch, Frederick County Deputy Sheriff, in his official and individual capacity.

Respondent who was plaintiff/appellant below is Roxana Orellana Santos.

Defendants Julie L. Meyers, former Assistant Secretary for Homeland Security of Immigration and Customs Enforcement, in her official and individual capacity; Calvin McCormick, Field Office Director of the ICE Office of Detention and Removal, in his official and individual capacity; and James A. Dinkins, Special Agent in Charge of the ICE Office of Investigations, Baltimore, MD, in his official and individual capacity were not parties in the Fourth Circuit.

RULE 29.6 STATEMENT

The Petitioners are a Maryland county and county officials. There are no parent corporations or publicly-held corporations that own stock in the Petitioners.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

STATUTES, REGULATIONS AND RULES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER MATERIALS

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is published at 884 F. Supp. 2d 420 (D. Md. 2012) and reproduced below at App. 37. The opinion of the Fourth Circuit is published at 725 F.3d 451 (4th Cir. 2013) and reproduced below at App. 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit, affirming in part, vacating in part, and remanding to the District of Maryland, was entered on August 7, 2013. The Fourth Circuit denied rehearing and rehearing *en banc* on September 10, 2013. This Court possesses jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Federal Constitutional and Statutory Provisions

United States Constitution, Article VI (Supremacy Clause):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the

Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

8 U.S.C. § 1373

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of Government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

8 U.S.C. § 1357(g)(10)

Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a state or political subdivision of a State –

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

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INTRODUCTION

This case concerns a challenge to a state officer's authority to detain an alien, pursuant to an Immigration Customs Enforcement ("ICE") warrant, for the purpose of contacting ICE for further direction and possibly arresting the alien at ICE's request. The United States Court of Appeals for the Fourth Circuit applied a combination of preemption analysis and Fourth Amendment analysis to conclude that a state officer is prohibited from detaining an alien on a "civil" immigration warrant for the purpose of contacting ICE. The Fourth Circuit reached this conclusion despite the fact that "there [was] no dispute" that the ICE warrant was valid and ICE wanted the illegal alien in custody. App. 24.

The decision by the Fourth Circuit below deepens a circuit split that already existed between the Sixth and Ninth Circuits (which recently reached holdings similar to the Fourth Circuit) and the Fifth, Eighth, and Tenth Circuits (which have long held the opposite). The writ should be granted to resolve the profound disagreement between the circuits on this matter.

As importantly, however, the petition should be granted to authoritatively address the crippling uncertainty in immigration law enforcement that the Fourth Circuit's decision will produce. In the wake of that decision, it is all but impossible for local police to execute ICE warrants issued for the arrest of aliens. Because ICE does not patrol streets and communities like a typical state or local law enforcement agency, ICE is heavily dependent upon state and local law enforcement agencies for locating and detaining wanted

aliens. Only by cooperating with state and local police can ICE realistically hope to detain the many dangerous illegal aliens listed in the National Crime Information Center ("NCIC") database. However, the Fourth Circuit's decision now confuses state and local police as to which aliens they can lawfully detain and discourages them from assisting in immigration enforcement. The Fourth Circuit's sharp rebuttal of local police efforts to cooperate with ICE defeats the clear intent of Congress expressed in the text of Sections 1373 and 1357(g)(10) of Title Eight of the United States Code.

STATEMENT OF THE CASE

I. Factual Background

During a routine patrol, two Frederick County Sheriff's Deputies encountered Respondent Roxana Santos while she was sitting behind her place of employment. App. 3-4. The Deputies approached Santos and initiated a consensual encounter in which they asked her questions, including whether she had any identification documents. App. 4-5. Santos indicated that she did not have identification. App. 5. The Deputies stepped away to speak privately and Santos then recalled that she had an El Salvadoran identification card, which she provided to the Deputies. *Id.* The Deputies contacted dispatch to run a warrant check. *Id.*

Dispatch responded to the Deputies that Santos had an outstanding ICE warrant for "immediate deportation." *Id.* Following standard procedure, Deputy

Openshaw asked dispatch to verify that the ICE warrant was still "active." *Id.* Before ICE confirmed that the warrant was active, Santos "asked the deputies if there was any problem[,]" to which Deputy Openshaw replied, "'No, no, no," and held out his hand, gesturing for her to remain seated. App. 6. The circuit court concluded that no detention had occurred until that point. App. 6, 16-17. Within twenty minutes after she handed the Deputies her identification card, the Deputies were notified by dispatch that ICE had confirmed that Santos's warrant was active; and the Deputies immediately arrested her. App. 6. Approximately forty-five minutes after the arrest, an ICE Senior Special Agent filed an immigration detainer requesting that Santos be held on ICE's behalf.[1] App. 25.

The Fourth Circuit acknowledged that the discussion between the Deputies and Santos began as a consensual interaction. App. 13-16. The court found that the detention began when the Deputies gestured for Santos to remain seated – *after* the Deputies had already determined that there was an ICE warrant out for her arrest. App. 6, 16-17. The Deputies detained Santos only for the limited purposes of awaiting confirmation that the ICE warrant was active and

[1] A detainer is issued for a specific alien and states that the state or local officer is "require[d]" to detain the alien for ICE. App. 67; *see also* 8 C.F.R. § 287.7(d)(3) (state agency "shall maintain custody" after Department of Homeland Security issues a detainer).

to receive direction from ICE as to whether ICE wanted to take custody of Santos. App. 5-6. There is "no dispute" that ICE repeatedly directed the deputies to detain Santos, first through the posting of the warrant, second through the oral confirmation with dispatch that the warrant was still active, and third through the issuance of the immigration detainer. App. 5-6, 24.

The underlying immigration law violation(s) that gave rise to the ICE warrant for Santos's arrest were not stated on the face of the warrant. Nor did ICE personnel identify or discuss those violations with the Deputies, either verbally or in the issuance of the detainer. Nevertheless, the Fourth Circuit supposed that because the warrant indicated that the alien was wanted for "immediate deportation," and because deportation is a civil proceeding, the underlying immigration violations must have been civil, rather than criminal. App. 6, 17, 19, 27. The Fourth Circuit did not acknowledge the fact that numerous *criminal* provisions of immigration law also render an alien deportable;[2] instead the court merely relied on the fact that deportation is a "civil proceeding." App. 27. There is no evidence in the record that the immigration violation giving rise to the ICE warrant was civil

[2] *See*, *e.g.*, 8 U.S.C. § 1306(b) (the crime of failure to notify the federal government of a change of address); 8 U.S.C. § 1306(c) (the crime of making a false statement in an immigration registration document); 8 U.S.C. § 1253(a) (the crime of failure to depart after a final order of removal).

rather than criminal. *Id*. The facts that were evident to the Deputies at the time Santos was detained simply did not permit a conclusion one way or the other.

II. Procedural History

On November 10, 2010, Santos filed a Complaint alleging eight claims against Petitioners and officials from the Department of Homeland Security. Counts One through Four were alleged against Petitioners Sheriff's Deputies Openshaw and Lynch.[3] Count One alleged a Fourth Amendment violation for unlawful arrest. Count Two alleged a Fourteenth Amendment violation of Respondent's Equal Protection rights. Count Three alleged a Fourth and Fourteenth Amendment violation for unlawful seizure. Count Four alleged a Section 1985 claim for conspiracy to violate Santos's Fourteenth Amendment rights. Count Five alleged a Section 1983 claim for supervisory liability against Petitioner Sheriff Jenkins. Count Six alleged a Section 2000d claim against Petitioner Frederick County Board of Commissioners for violating Title VI of the Civil Rights Act of 1964. Count Seven alleged a *Monell* claim against Petitioner Frederick County Board of Commissioners. Count Eight alleged a failure to supervise against the DHS officials.

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[3] At the time the Complaint was filed, Santos used the name "John Doe" as the second deputy in addition to Openshaw. Respondent later substituted Deputy Lynch for John Doe.

On January 29, 2010, Santos filed an Amended Complaint. On August 25, 2010, the United States District Court for the District of Maryland granted Petitioners' Motion to Dismiss the Section 1983 claims against Petitioners Openshaw, Lynch, and Jenkins, with leave to file an amended complaint, on the grounds that the claims that the Deputies and the Sheriff were participating in the enforcement of federal immigration law should be brought as a *Bivens* claim. On that same date, the District Court granted in part and denied in part a Renewed Motion to Dismiss or, in the Alternative, to Bifurcate filed by Petitioner Frederick County Board of Supervisors. *Id.* The District Court granted in part and denied in part the Motion to Dismiss filed by the DHS officials. The District Court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367 and 2201.

On February 18, 2011, Santos filed a Second Amended Complaint which did not include claims against the DHS officials. On February 7, 2012, the District Court granted Petitioners' Motion for Summary Judgment. On March 6, 2012, Santos filed a Fed. R. Civ. P. 59(e) Motion to Amend or Alter Judgment. On July 11, 2012, the District Court denied Santos's Motion.

On August 9, 2012, Santos appealed the decision to the United States Court of Appeals for the Fourth Circuit. On August 7, 2013, the Fourth Circuit affirmed in part, vacated in part, and remanded the decision of the District Court. The decision is published at 725 F.3d 451 (4th Cir. 2013).

The Fourth Circuit held that the detention of Santos violated the Fourth Amendment because the Deputies did not have the authority to detain her under federal immigration law. The Fourth Circuit's Fourth Amendment holding was dependent upon the court's underlying preemption holding. The court made this clear throughout its opinion. The court characterized Santos's claim as "that her seizure and arrest violated the Fourth Amendment because neither of the deputies was certified or authorized to engage in enforcement of federal civil immigration law." App. 17. The court concluded that because the Deputies were not specially trained under the County's 8 U.S.C. § 1357(g) program, they "thus lacked authority to enforce civil immigration law and violated Santos's rights under the Fourth Amendment when they seized her solely on the basis of the outstanding civil ICE warrant." App. 23.[4] The court reiterated that the "deputies violated [Respondent's] constitutional rights when they detained and subsequently arrested her on the civil ICE warrant." App. 29.

On August 21, 2013, Petitioners filed a Petition for Rehearing and Rehearing *En Banc*. On September 10, 2013, the Court denied Petitioners' Petition.

[4] It should be noted that 8 U.S.C. § 1357(g)(10) expressly states that no such training is needed for a state or local police officer to cooperate with ICE in the "identification, apprehension, detention, or removal" of unlawfully present aliens.

Petitioners now file this timely Petition for Writ of Certiorari on December 9, 2013.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Exacerbates a Circuit Split on the Question of Whether State and Local Law Enforcement may Make Arrests for any Violation of Immigration Law, or only for Criminal Violations of Immigration Law.

The Fourth Circuit acknowledged that its decision was in conflict with the holdings of the Tenth Circuit. The court below stated that "before *Arizona v. United States*, our Sister Circuits were split on whether local law enforcement officers could arrest aliens for civil immigration violations." App. 32.[5] The court then pointed to an already existing conflict between the Sixth and Tenth Circuits. *Id*. However, the court failed to acknowledge the depth of the entrenched disagreement on this issue. The Fourth Circuit's holding conflicts not only with multiple decisions of the Tenth Circuit, but also with the holdings of the Fifth and Eighth Circuits. On the side of the Fourth and Sixth Circuits, the Ninth Circuit has also weighed in.

[5] The court's suggestion that *Arizona* invalidated the Tenth Circuit's position is incorrect as explained in Section II below.

This case presents a question that has been percolating among the lower courts for three decades – to what extent, if any, can state and local police officers make arrests for violations of immigration laws. In 1982, the Tenth Circuit held that: "A state trooper has general investigatory authority to inquire into possible immigration violations." *United States v. Calderon*, 728 F.2d 1298, 1301, n.3 (10th Cir. 1982). In that case, like the instant case, a state trooper detained an illegal alien for the purpose of transferring the alien to the INS, even though the state trooper did not know the specific immigration laws that the alien had violated. The Tenth Circuit sustained the arrest. Moreover, that case lacked the additional factor present in the instant case – the fact that the federal government had already issued a warrant for the alien. For thirty years, the Tenth Circuit has consistently maintained and reinforced its holding that state officers can arrest aliens for all violations of federal immigration laws, both criminal and civil. *See also United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999) ("[S]tate law-enforcement officers have the general authority to make arrests for violations of federal immigration laws."); *United States v. Santana-Garcia*, 264 F.3d 1188, 1193-94 (10th Cir. 2001); *United States v. Treto-Haro*, 287 F.3d 1000, 1006 (10th Cir. 2002).

In addition to the Tenth Circuit, the Fifth and Eighth Circuits have also held that arrests pursuant to civil immigration violations are not preempted. In upholding detentions of illegal aliens by local police,

the Fifth Circuit pointed out that the question turns on whether or not Congress has enacted a law specifically prohibiting state or local arrests. The court concluded: "No statute precludes other federal, state, or local law enforcement agencies from taking other actions to enforce this nation's immigration laws." *Lynch v. Canatella*, 810 F.2d 1363, 1371 (5th Cir. 1987). Nor has any such statute been enacted by Congress in the intervening years. The Eighth Circuit has similarly recognized the unpreempted authority of state and local police to assist the federal government by making immigration arrests. According to the Eighth Circuit, the initial local detention of an illegal alien for subsequent transfer to ICE is merely the first step in the civil process of removal. Detention and questioning of the alien by local police is simply "part of the administrative procedure" culminating in removal by federal officials. *United States v. Rodriguez-Arreola*, 270 F.3d 611, 615, 619 (8th Cir. 2001); *United States v. Quintana*, 623 F.3d 1237, 1242 (8th Cir. 2010) (state trooper took custody of alien to initiate federal government's "administrative arrest based upon probable cause that an alien is deportable").

On the opposite side of this split are the Fourth and Ninth Circuits. In reaching its conclusion, the Fourth Circuit relied on the Ninth Circuit opinion of *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012). *See*

App. 21-23.[6] In that case, the Ninth Circuit held that state officers may not detain aliens for civil immigration violations. "[I]f the Defendants are to enforce immigration-related laws, they must enforce only immigration-related laws that are criminal in nature, which they are permitted to do even without section 287(g) authority." *Id*. at 1001.[7] The Ninth Circuit's holding had its roots in a 1983 case in which it "assume[d]" in *dicta* that the civil provisions of federal immigration law constituted "a pervasive regulatory scheme" that preempted arrests by state police. *Gonzales v. City of Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983). The Sixth Circuit, in a case involving a lawfully detained alien motorist, has likewise found that a state officer had the authority to detain aliens only for criminal violations of the immigration law. *United States v. Urrieta*, 520 F.3d 569, 573-75 (6th Cir. 2008) (*cited at* App. 32).

Review of this case is warranted to resolve this deep split between the circuits. As it currently stands, state and local police in three circuits are preempted from rendering assistance to ICE unless they have clear evidence that an alien's underlying immigration

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[6] The Fourth Circuit also relied on an Indiana District Court case which found preempted a state law permitting Indiana officers to make a warrantless arrest of an alien against whom a removal order has been issued, a detainer for arrest has been lodged, or when an alien has committed any aggravated felony. App. 21 (*citing Buquer v. City of Indianapolis*, 2013 U.S. Dist. LEXIS 45084 (D. Ind. March 28, 2013)).

[7] Section 287(g) refers to Immigration and Nationality Act Section 287(g).

violation is a criminal, rather than civil, infraction.[8] In stark contrast, state and local police in three other circuits have broader, unpreempted, immigration arrest authority. In the rest of the country uncertainty governs. This gross uncertainty and disparate treatment is unfair to state and local law enforcement, unfair to aliens, and unfair to lower courts. Without guidance from this Court, this divisive multi-circuit split will persist, and the ability of local police to assist ICE by making immigration arrests will vary widely from state to state and be fraught with doubt.[9]

II. The Decision Below Conflicts with this Court's Decision in *Arizona v. United States*.

Granting the writ is also warranted because the opinion of the Fourth Circuit below stands in direct conflict with this Court's recent decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012). In *Arizona*, this Court upheld, against a preemption challenge, a state

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[8] The Fourth Circuit, perhaps recognizing the problem that such an absolute rule would create, seemed to backtrack at one point in its opinion. The court suggested that "express direction or authorization by federal statute or federal officials" might make such a detention permissible. App. 23. However, federal officials did give express direction in this case by posting an immigration warrant in the NCIC database.

[9] In the wake of the Ninth Circuit's *Melendres* decision, a lawsuit was recently filed in Montana challenging a local law enforcement agency's detention of aliens suspected of immigration violations. *Rios-Diaz v. Butler*, Case No. 2:13-cv-00077 (Oct. 7, 2013).

law that required state or local police officers to determine the immigration status of any lawfully stopped or detained alien whom the officer had reasonable suspicion to believe was unlawfully in the country. Such determinations were to be made by contacting ICE, just as the determination was made by dispatch for the Deputies in the instant case. *Id.* at 2507-08. The Arizona law asserted an unpreempted arrest authority much broader than the arrest authority asserted by the Deputies in this case. Yet this Court held that the law was not preempted. The Fourth Circuit's decision conflicts with *Arizona* in four ways, as explained below.

A. In *Arizona*, this Court Specifically Noted that State Arrest Authority Exists Where an Immigration Warrant has Been Issued.

In *Arizona*, this Court addressed preemption challenges to four different sections of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act ("SB 1070"). The section that was most relevant to the case at bar was Section 2(B), which required every police officer in the state to determine the immigration status of any person whom the officer contacted during the enforcement of another law (such as during a traffic stop) and whom the officer reasonably suspected to be an alien unlawfully present in the United States. In Arizona, as in this case, the wording of 8 U.S.C. § 1357(g)(10)(B) was at issue. That statutory provision states that no special agreement

need be in place, and no special training of the officer need occur, for an officer "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."

This Court made clear that where a federal warrant *has* been issued for a particular alien, as was the case here, there is no question that a state officer has arrest authority. "[W]hether a federal warrant has issued" is a decisive factor in determining whether a state officer has the authority to arrest an alien. 132 S. Ct. at 2506. Indeed, the Court in *Arizona* provided, as a paradigmatic "example[ ] of what would constitute [permissible] cooperation under federal law," a state officer "provid[ing] operational support in executing a warrant." *Id*. at 2507. This Court made no distinction between warrants based on violations of criminal immigration provisions versus warrants based on violations of civil immigration provisions. The Fourth Circuit did not explain its direct contradiction of this Court's example in *Arizona*.

The Fourth Circuit also overlooked the longstanding principle that a sovereign State has inherent authority to make arrests for violations of federal law in order to assist the federal government, unless Congress acts to preempt that authority. *Id.* at 2509-10 (*citing United States v. Di Re*, 332 U.S. 581, 589 (1948)); *see also Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) (Hand, J.) ("[I]t would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow."). Here, the Deputies were clearly trying to

"cooperate" with and "help" the federal government; they were acting pursuant to an ICE warrant, and they even sought additional input from ICE on how to proceed. The lower court did not identify any federal statute that preempts the detention of an alien by a local officer in order to contact ICE and execute a federal immigration warrant.

B. In *Arizona*, this Court Held that Congress has Encouraged, not Discouraged, Cooperation from State Police in Making Immigration Arrests.

The Fourth Circuit's second conflict with *Arizona* is that it fails to recognize that congressional intent is the focus of all preemption analysis. "'The purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (*quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978); *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977); *English v. General Electric Co*., 496 U.S. 72, 79 (1990). Article III Courts are bound by an "obligation to infer pre-emption only where Congress' intent is clear and manifest." *Cipollone v. Liggett Group*, 505 U.S. 504, 524 (1992) (Blackmun, J., dissenting).

In *Arizona*, this Court reaffirmed that longstanding principle. "In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*, 132 S. Ct. at

2501 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This Court explained that, rather than preempting local law enforcement's brief detention of suspected illegal aliens in order to contact ICE, Congress has encouraged these actions. "Congress has made clear that no formal agreement or special training needs to be in place for state officers to 'communicate with the [ICE] regarding the immigration status of any individual. . . . ' And Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status." *Id.* at 2508. "Indeed, it has encouraged the sharing of information about possible immigration violations." *Id.* That is what happened here. ICE put the warrant in the NCIC database, and the Deputies sought further input from ICE when they learned of the warrant. *Id.*

The Fourth Circuit below ignored this portion of the *Arizona* decision and conducted no analysis concerning congressional intent. Consequently, its preemption holding was inconsistent with *Arizona* as well as with longstanding precedent concerning congressional intent in preemption analysis.

C. The Fourth Circuit's Conclusion that Preemption Occurs Unless Congress has Authorized State Activity Conflicts with *Arizona* and Other Precedents of this Court.

The third way in which the Fourth Circuit holding below conflicts with *Arizona* is by creating a new preemption standard which asks not whether Congress intended to preempt, but rather whether Congress affirmatively authorized a State to act: "[W]e hold that, absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law." App. 23. In other words, the Fourth Circuit held that preemption is the default scenario – a state activity is presumed to be preempted unless Congress has specifically authorized such state activity. Therefore courts must search for Congressional statutes authorizing, rather than displacing, state activity.

That holding stands in contradiction to this Court's precedents. This Court in *Arizona* and in the two seminal immigration-related preemption decisions issued before *Arizona* took the opposite approach, examining whether Congress *removed* state authority, not whether Congress *granted* state authority. *De Canas v. Bica*, 424 U.S. 351, 355 (1976) ("there would be no need . . . to even discuss the relevant congressional enactments in finding pre-emption of state regulation" if the Constitution preempts all

state actions); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977-78, 1981-82 (2010) (reviewing whether Congress displaced state authority); *Arizona*, 131 S. Ct. at 2508 ("The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter.").

The Fourth Circuit's decision turns well-established preemption doctrine on its head. Under the Fourth Circuit's reasoning, state or local police cannot act unless Congress first provides authorization; and congressional *silence* prohibits such state or local activity. But the opposite has long been true.

The baseline assumptions of our federal system are that States have inherent, plenary police power and that cooperative law enforcement is the norm. States, unlike federal agencies, are not creatures of Congress and do not depend on federal statutes for authorization. Thus, concluding that state officers are foreclosed from assisting in the enforcement of federal laws requires a clear and unmistakable "statement" of congressional intent to displace the States: "[W]e will not infer pre-emption of the States' historic police powers absent a clear statement of intent by Congress." *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 111-12 (1992) (Kennedy, J., concurring) (*citing Rice*, 331 U.S. at 230). Displacing state power requires that "Congress . . . unequivocally expres[s] its intent to abrogate." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (internal quotation marks and citation omitted). This is specifically true in the immigration context: "[F]ederal regulation . . .

should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has *unmistakably* so ordained." *De Canas*, 424 U.S. at 356 (*quoting Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)) (emphasis supplied). Such "unmistakable" congressional statements cannot be found in congressional silence. In the absence of preemptive congressional abrogation of state arrest authority, the states need not seek permission before they can act.

The Fourth Circuit fashioned its novel preemption theory by taking three words out of context in the *Arizona* decision. The Fourth Circuit claimed that "state and local law enforcement officers may participate in the enforcement of federal immigration laws only in 'specific, limited circumstances' authorized by Congress." App. 19 (*quoting Arizona*, 132 S. Ct. at 2507). Those three words came from a separate section of the *Arizona* decision addressing Section 6 of the Arizona law. Section 6 gave state officers the authority to independently make determinations of aliens' removability without federal input and to make arrests based on such determinations. This Court held Section 6 to be preempted because "[t]his state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case." *Arizona*, 132 S. Ct. at 2506. The "specific, limited circumstances" that this Court was speaking of in *Arizona* referred to state arrests based on "unilateral" determinations

of "possible removability," made without any input from the federal government. *Id*. at 2507.[10] That is not what happened here; the arrest in this case did not involve any independent, local determination of immigration status. Indeed, it was made pursuant to a federal warrant for the arrest of Santos.

D. Section 2(B) of the Arizona Law could not have Survived a Preemption Challenge Under the Fourth Circuit's Theory.

A final problem with the Fourth Circuit's preemption analysis is that Section 2(B) of the Arizona law could not possibly survive it. That provision of the Arizona law required state and local police officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." Ariz. Rev. Stat. Ann. § 11-1051(B); *see also Arizona*, 132 S. Ct. at 2507. Such determinations were to be made by contacting ICE. Section 2(B) did not distinguish

[10] This Court offered examples of when state police could exercise the full powers of federal immigration officers (as opposed to merely making arrests subject to federal direction), including when authorized by the Secretary of Homeland Security due to a "mass influx of aliens arriving off the coast of the United States," 8 U.S.C. § 1103(a)(10), and when authorized by a specific agreement permitting specially-trained local officers to exercise the powers of federal immigration officers, under 8 U.S.C. § 1357(g). *See Arizona*, 132 S. Ct. at 2506.

between civil immigration violations (e.g., overstaying a visa) and criminal immigration violations (e.g., entering the United States without inspection). State and local police were simply instructed to contact ICE when they reasonably suspected such a person of being unlawfully present in the country. Section 2(B) reached well beyond the actions of the Deputies in the instant case. While the Deputies detained Santos pursuant to a warrant discovered during a consensual encounter, Arizona officers did not need an ICE warrant on which to base their reasonable suspicion. Nevertheless, this Court sustained that provision against a conflict preemption challenge.

III. The Fourth Circuit's Argument Barring *Terry* Stops Where Civil Immigration Violations are Concerned is Inconsistent with this Court's Fourth Amendment Precedents.

While the opinion below is fundamentally a holding based on preemption, at one point the court did make a pure Fourth Amendment argument. The court argued that (a) the detention of Santos in this case was a *Terry* stop,[11] and (b) *Terry* stops are only allowed where "criminal activity may be afoot,"[12] so (c) state and local police therefor cannot make *Terry* stops on suspicion of civil immigration violations.

[11] That is, a brief investigative detention without a warrant where the officer has reasonable suspicion that illegal activity may be afoot. *See Terry v. Ohio*, 392 U.S. 1 (1968).

[12] *Terry*, 392 U.S. at 30.

App. 22-23 or 27-28. In other words, the court used the phrase in *Terry* stating that "criminal activity may be afoot," *Terry* 392 U.S. at 30, to radically restrict brief investigative stops in the non-criminal context. The court held that an officer must first determine whether an immigration violation is civil or criminal prior to detaining an alien for the purpose of contacting ICE. App. 28. The same argument was made by the Ninth Circuit in *Melendres*: "[B]ecause mere unauthorized presence is not a criminal matter, suspicion of unauthorized presence alone does not give rise to an inference that criminal activity is 'afoot.'" *Melendres*, at 1001 (*quoting Terry*, 392 U.S. at 30). Both circuits seized upon a phrase that was specific to the fact pattern of *Terry*.[13] This Court in *Terry* described the situation in which "a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." 392 U.S. at 30. By taking this phrase out of the *Terry* context and turning it into a requirement applicable to immigration cases, the Fourth and Ninth Circuits have created a rule that conflicts with the longstanding case law of this Court.

The Fourth Amendment prohibits federal officers from making unreasonable searches and seizures, just as it does state officers. *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1976) (Fourth Amendment forbids Border Patrol from stopping vehicles absent

[13] The Indiana District Court did the same. *Buquer*, 2013 U.S. Dist. LEXIS 45084, at *35-39.

reasonable suspicion of illegal aliens); *United States v. Arvizu*, 534 U.S. 266 (2002) (Fourth Amendment requirement of reasonable suspicion applies to Border Patrol stops of vehicles). Applying the reasoning of the Fourth Circuit, a Fourth Amendment requirement of suspicion that "criminal activity [be] afoot" in order to lawfully detain an illegal alien would equally prohibit detentions by federal officers for civil immigration violations. However, "from almost the beginning of the Nation," federal arrests of deportable aliens for both criminal and civil violations have been permitted. *Abel v. United States*, 362 U.S. 217, 234 (1960). "[T]here remains overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens. . . ." *Id*. at 233. This Court has also held that aliens can be detained upon reasonable suspicion of unlawful status as long as federal officers comply with federal statutes and regulations. *Brignoni-Ponce*, 422 U.S.at 883.[14]

The reasoning of the Fourth Circuit also conflicts with this Court's longstanding validation of searches based on civil violations of laws outside of the immigration context. *See, e.g., Camara v. Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 538

[14] The fact that Congress gives federal officers the authority to make investigative stops for civil violations does not eliminate the problem in the Fourth Circuit's analysis. The court held that the *Fourth Amendment* prohibits detentions based on civil violations. A federal statute cannot trump the Fourth Amendment. *Knowles v. Iowa*, 525 U.S. 113 (1998).

(1967) (upholding the use of administrative warrants for code inspections). Under the Fourth Circuit's reasoning, basic state and city code enforcement of civil violations would likewise violate the Fourth Amendment.

By granting review in this case, the Court could helpfully clarify that the *Terry* phrase "criminal activity may be afoot" does not strictly bar brief investigative stops in non-criminal contexts. Without such clarification, *Terry* will continue to be misconstrued. As explained below, such misapplication of *Terry* would severely hobble immigration enforcement by both federal and state law enforcement officers.

IV. This Case Concerns an Issue of Great National Importance.

Cooperation in immigration enforcement between federal, state, and local law enforcement officers is essential to achieving federal law enforcement objectives. Congress has stressed the importance of robust enforcement of immigration laws. As a conference committee report in 1996 succinctly stated: "[I]mmigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Rep. No. 104-725, at 383 (1996). In order to achieve this objective, Congress enacted multiple statutory provisions designed to maximize cooperation between federal, state, and local law enforcement agencies in enforcing

immigration laws – most notably 8 U.S.C. §§ 1357, 1373, and 1644. In a contemporary Senate report, the intent to maximize cooperation between federal immigration authorities and state and local governments was clear:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.[15]

This statement reiterates the unambiguous intent of Congress to maximize cooperation between state and local authorities in the enforcement of immigration laws.

Congress facilitated this cooperation by creating programs that allow state and local police officers to more easily contact ICE (or its predecessor agency, the Immigration and Naturalization Service). In 1994 Congress created and began appropriating funds for the Law Enforcement Support Center (LESC) in Williston, Vermont. The existence of the LESC is predicated on the assumption that state and local police will be making immigration arrests:

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[15] S. Rep. No. 104-249, at 19-20 (1996).

> When a law-enforcement officer arrests an alien, LESC personnel are able to provide him or her with vital information and guidance, and if necessary, place the officer in contact with an [ ] ICE immigration officer in the field. The partnerships fostered by the LESC increase public safety. Every day, they result in the apprehension of individuals who are unlawfully present in the United States, many of whom have committed a crime and pose a threat to the local community or our Nation.[16]

During fiscal year 2012, Law enforcement specialists and deportation officers at the LESC responded to 177,043 calls from law enforcement officers across the country.[17] That translates to an average of 485 LESC responses per day.

ICE simply does not have the resources to independently track down the millions of illegal aliens living in the United States. ICE lacks the manpower necessary to engage in the patrolling that a typical state or local law enforcement agency undertakes. Consequently, ICE must rely heavily on state and local police to execute the warrants for criminal,

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[16] *Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement: Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 108th Cong. 12 (2003) (prepared statement of Asa Hutchinson, Under Sec'y for Border and Transp. Sec., Dep't of Homeland Sec.).

[17] *See* http://www.ice.gov/lesc/.

terrorist, and other high-priority illegal aliens listed in the NCIC. There are currently more than 296,200 warrants for previously deported aggravated felons, other criminal aliens, and immigration fugitives listed in the NCIC.[18] It is in practical terms impossible to execute those warrants without the help of state and local police. In fiscal year 2012, the LESC confirmed 5,258 NCIC hits by law enforcement agencies across the country.[19]

The Fourth Circuit's decision cripples this law enforcement cooperation that is relied upon by ICE and encouraged by Congress. As a consequence of this decision, state and local officers will no longer be able to detain known unlawfully present aliens – even if they have an outstanding warrant – for the purpose of reporting immigration violations to ICE and seeking guidance on how ICE wishes to proceed. That is because maintaining a distinction between arrests by state police for criminal violations and arrests by state police for civil violations is unsustainable in practice. Often, it is not intuitively determinable which immigration violations are criminal and which violations are civil. For example, overstaying a visa is a civil violation of immigration law,[20] while entering without inspection is a criminal violation.[21] Yet both

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[18] *See* http://www.ice.gov/lesc/.

[19] *See* http://www.ice.gov/lesc/.

[20] *See* 8 U.S.C. § 1182(a)(9)(B)(ii).

[21] See 8 U.S.C. § 1325(a). Entry without inspection also carries civil penalties under 8 U.S.C. § 1325(b).

are means by which millions of illegal aliens have entered and remain in the United States.[22] Therefore, while it is reasonable to expect a police officer to understand what the indicators of unlawful presence in the United States may be, it is not practical to expect the police officer to remember which immigration violations carry criminal penalties and which violations trigger civil proceedings.[23] Indeed, most lawyers are unaware that such distinctions exist.

Furthermore, in some scenarios, distinguishing between civil and criminal violations at the time of arrest may be impossible. For example, if a police officer comes into contact with a group of aliens who are being transported within the United States and who are revealed to be illegally present, as was the case in *United States v. Favela-Favela,* 41 Fed. Appx.

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[22] Passel, Jeffrey, *Modes of Entry for Unauthorized Migrant Population*, *Fact Sheet* (May 22, 2006) ("Nearly half of all the unauthorized migrants now living in the United States entered the country legally through a port of entry . . . "), *available at* http://www.pewhispanic.org/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/; The Wall Street Journal, *Many in U.S. Illegally Overstayed Their Visas, Those Who Entered Legitimately Account for 40% of the 11 Million Total, Complicating Attempts to Craft New Legislation* (Apr. 7, 2013), *available at* http://online.wsj.com/news/articles/SB10001424127887323916304578404960101110032.

[23] It is also common for an alien to have committed *both* civil and criminal violations of federal immigration law. For example, an alien might overstay a visa (a civil violation under 8 U.S.C. § 1182(a)(9)(B)(ii)) and also fail to carry registration documents on his person (a criminal violation under 8 U.S.C. § 1304(e)).

185 (10th Cir. 2002), the aliens may be unable or unwilling to explain to the officer whether they overstayed their visas (a civil violation), entered without inspection (a criminal violation), or presented fraudulent documents at the port of entry (a criminal violation).[24] For these reasons, maintaining a criminal-civil distinction in arrest authority is unworkable in practice. It is difficult, if not impossible, for an officer to establish at the outset of the stop that a criminal violation of immigration law has occurred.

The ability of ICE to utilize state and local assistance in making immigration arrests is crucial to the ability of the federal government to enforce immigration laws. It is also crucial to the United States in preventing terrorism. By depriving state and local police of the ability to make immigration arrests where the underlying violation of immigration law is a civil one, the Fourth Circuit would make it impossible for police to assist in detaining suspected terrorists who overstay their visas. The case of 9-11 hijacker Ziad Jarrah – the foreign national believed to have been at the flight controls of United Airlines Flight 93, which crashed in rural Pennsylvania – illustrates the point. Jarrah entered the United States on June 27, 2000, on a B-2 tourist visa. He immediately committed a civil immigration violation by going directly to the Florida Flight Training Center in Venice, Florida, where he would study until January

[24] Use of a false immigration document is a crime under 18 U.S.C. § 1546(b).

31, 2001. He never applied to change his immigration status from tourist to student. He was therefore detainable and removable under 8 U.S.C. § 1227(a)(1)(C)(i). At 12:09 a.m. on September 9, 2001, two days before the attack, he was clocked at 90 MPH in a 65 MPH zone on Interstate 95 in Maryland. He was traveling from Baltimore to Newark, in order to rendezvous with the other hijackers. The Maryland trooper did not know that Jarrah had been attending classes in violation of his immigration status. The trooper also did not know that Jarrah's visa had expired more than a year earlier, a second civil violation of immigration law. The trooper issued Jarrah a speeding ticket and let him go.[25]

If, however, the trooper had developed reasonable suspicion regarding Jarrah's unlawful status and had contacted federal immigration authorities using the LESC 24/7 hotline, a detainer might have been issued. But not now – not in the Fourth Circuit. No matter how much the federal authorities might have wanted Jarrah detained, the Fourth Circuit holds that the state trooper would not have been able to detain Jarrah to briefly contact ICE for direction.[26]

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[25] The series of facts in this narrative come from *9/11 and Terrorist Travel: A Staff Report of the National Commission on Terrorist Attacks Upon the United States* 15-23 (2004). *See also* John Ashcroft, *Never Again: Securing America and Restoring Justice* 197-200 (2006).

[26] Jarrah's case is not unique; three other members of the 9-11 cohort committed civil immigration violations and were stopped by state and local police. *See 9/11 and Terrorist Travel:*

(Continued on following page)

That cannot be right. This Court's review of this latest addition to a longstanding, solidly entrenched, and deeply important circuit split is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 9, 2013

A Staff Report of the National Commission on Terrorist Attacks Upon the United States 15-23.

ROXANA ORELLANA SANTOS, Plaintiff-Appellant, v. FREDERICK COUNTY BOARD OF COMMISSIONERS; CHARLES JENKINS, Frederick County Sheriff, in his official and individual capacity; JEFFREY OPENSHAW, Frederick County Deputy Sheriff, in his official and individual capacity; KEVIN LYNCH, Frederick County Deputy Sheriff, in his official and individual capacity, Defendants-Appellees, and JULIE L. MEYERS, former Assistant Secretary for Homeland Security of Immigration and Customs Enforcement, in her official and individual capacity; CALVIN MCCORMICK, Field Office Director of the ICE Office of Detention and Removal, in his official and individual capacity; JAMES A. DINKINS, Special Agent in Charge of the ICE Office of Investigations, Baltimore, MD, in his official and individual capacity, Defendants. IMMIGRATION REFORM LAW INSTITUTE, Amicus Supporting Appellees.

No. 12-1980

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

725 F.3d 451*; *2013 U.S. App. LEXIS 16335

May 15, 2013, Argued
Aug. 7, 2013, Decided

COUNSEL: ARGUED: John Carney Hayes, Jr., NIXON PEABODY, LLP, Washington, D.C., for Appellant.

Sandra Diana Lee, KARPINSKI, COLARESI & KARP, P.A., Baltimore, Maryland, for Appellees.

ON BRIEF: Daniel Karp, KARPINSKI, COLARESI & KARP, Baltimore, Maryland, for Appellees.

Michael M. Hethmon, Garrett R. Roe, IMMIGRATION REFORM LAW INSTITUTE, Washington, D.C., for Amicus Supporting Appellees.

JUDGES: Before DAVIS and WYNN, Circuit Judges, and JAMES R. SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION BY: WYNN

OPINION

WYNN, Circuit Judge:

Plaintiff Roxana Orellana Santos appeals the dismissal of her 42 U.S.C. § 1983 action against the Frederick County (Maryland) Board of Commissioners, the Frederick County Sheriff, and two deputy sheriffs. Santos alleged that the deputies violated her Fourth Amendment rights when, after questioning her outside of her workplace, they arrested her on an outstanding civil warrant for removal issued by Immigration and Customs Enforcement ("ICE"). The U.S. District Court for the District of Maryland granted summary judgment to all defendants, concluding that Santos's initial questioning by the deputies did not implicate the Fourth Amendment and that the civil

immigration warrant justified Santos's subsequent stop and arrest.

We agree with the district court that the deputies did not seize Santos until one of the two deputies gestured for her to remain seated while they verified that the immigration warrant was active. But the civil immigration warrant did not provide the deputies with a basis to arrest or even briefly detain Santos. Nonetheless, we conclude that the individual defendants are immune from suit because at the time of the encounter neither the Supreme Court nor this Court had clearly established that local and state law enforcement officers may not detain or arrest an individual based on a civil immigration warrant. Qualified immunity does not extend, however, to municipal defendants. We therefore affirm the district court's award of summary judgment to the deputies and the Sheriff and vacate the district court's dismissal of Santos's action against the municipal defendants.

I.

A.

A native of El Salvador, Santos moved to the United States in 2006. On an October morning in 2008, Santos sat on a curb behind the Common Market food co-op in Frederick, Maryland, where she worked as a dishwasher. Santos ate a sandwich while waiting for her shift to begin. From the curb, Santos faced a grassy area and pond that ran along the rear

of the shopping complex in which the co-op was located. A large metal shipping container stood between her and the shopping complex. As Santos ate, she saw a Frederick County Sheriff's Office (the "Sheriff's Office") patrol car slowly approach her from her left. She remained seated, in full view of the patrol car, and continued eating her sandwich.

Deputy Sheriffs Jeffrey Openshaw and Kevin Lynch were in the car conducting a routine patrol of the area. Although the Sheriff's Office had reached an agreement with ICE under 8 U.S.C. § 1357(g) authorizing certain deputies to assist ICE in immigration enforcement efforts, neither Openshaw nor Lynch was trained or authorized to participate in immigration enforcement.

The deputies parked the patrol car on the side of the shipping container opposite Santos. Openshaw and Lynch stepped out of the patrol car and walked toward Santos, going around opposite sides of the shipping container to reach her. Both deputies wore standard uniforms and carried guns.

Openshaw stopped about six feet away from her and asked her if she spoke English, to which she responded, "No." J.A. 095, 398-99. Lynch stood closer to the patrol car. It was immediately apparent to Openshaw that Santos, a native Spanish speaker, had difficulty communicating in English. Openshaw asked Santos in English whether she was on break, and she replied that she was. He then asked her if she worked at the Common Market, and she said she

did. Again in English, Openshaw asked her whether she had identification, and she responded in Spanish that she did not.

At this point, Openshaw stepped away from Santos to speak privately with Lynch near the patrol car. Santos remained seated. After a few minutes, Santos recalled that she had her El Salvadoran national identification card in her purse. Still sitting, she showed the card to the deputies. Openshaw took the card and asked her whether the name on the ID was hers. She told him it was, and he walked back to the car to speak with Lynch. Santos estimated that by this time at least fifteen minutes had passed since the deputies first approached her. As the deputies stood together talking, Santos saw Openshaw use his radio.

The deputies said that once they received Santos's identification information, they relayed it to radio dispatch to run a warrant check on Santos. After completing the warrant check, dispatch informed the deputies that Santos had an outstanding ICE warrant for "immediate deportation." J.A. 188. Following standard procedure, Openshaw asked dispatch to verify that the ICE warrant was active. Although he did not know what dispatch did in this particular case, Openshaw testified that dispatch typically contacts ICE when verifying an immigration warrant. Openshaw also said that at this point he considered Santos to be under arrest, though he had not yet handcuffed her.

After dispatch had initially notified the deputies of the ICE warrant but before dispatch had determined whether the warrant was active, Santos asked the deputies if there was any problem. Openshaw replied, "No, no, no," and held out his hand, gesturing for her to remain seated. J.A. 136.

About twenty minutes after she handed the deputies her national ID card, Santos decided to head into the food co-op to start her shift. When she attempted to stand, the deputies, who just had been informed by dispatch that the warrant was active, grabbed her by the shoulders and handcuffed her. Until this point, neither deputy had had any physical contact with her.

The deputies placed Santos in the patrol car, transported her to patrol headquarters, and then transferred her to a Maryland detention center. Approximately forty-five minutes after Santos's arrest, ICE Senior Special Agent S. Letares requested that the detention center hold Santos on ICE's behalf. ICE initially held Santos in two Maryland facilities and then transferred her to a jail in Cambridge, Massachusetts, where she stayed until her supervised release on November 13, 2008. *Santos v. Frederick Cnty. Bd. of Comm'rs,* 884 F. Supp. 2d 420, 425 (D. Md. 2012).

B.

In November 2009, Santos filed a Section 1983 complaint against Openshaw and Lynch, Frederick

County Sheriff Charles Jenkins, the Frederick County Board of Commissioners, and several individuals from ICE and the Department of Homeland Security. The complaint alleged that the deputies violated her Fourth Amendment rights when they seized and later arrested her. The complaint also alleged that the deputies violated her rights under the Equal Protection Clause of the Fourteenth Amendment because the deputies "approached . . . and interrogated her based solely on her perceived race, ethnicity and/or national origin." J.A. 102.

All defendants moved to dismiss Santos's initial complaint under Rule 12(b)(6). The district court dismissed without prejudice the Section 1983 claims against the deputies on grounds that the complaint alleged that the deputies were acting under the color of federal law and thus the action should have been brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).[1] *Santos v. Frederick Cnty. Bd. of Comm'rs,* No: L-09-2978, 2010 U.S. Dist. LEXIS 884489, 2010 WL 3385463, at *3 (D. Md. Aug. 25, 2010). The district court also bifurcated her supervisory liability claims against Sheriff Jenkins and the Board of Commissioners, and stayed those claims pending resolution of Santos's claims against

[1] *Bivens* established a private right of action to remedy constitutional injuries attributable to individuals acting under the color of federal law. 403 U.S. at 397.

the deputies. 2010 U.S. Dist. LEXIS 88449, [WL] at *4.

Santos filed a second amended complaint against the same defendants, asserting essentially the same claims as in the previously dismissed complaint. And she did not recharacterize her claims against the municipal defendants as *Bivens* claims.

After discovery, the deputies moved for summary judgment. The district court granted the deputies' motion, concluding that there was no dispute of fact regarding whether the deputies violated Santos's Fourth Amendment rights. *Santos,* 884 F. Supp. 2d at 428-29. In particular, the district court held that Santos was not "seized" for purposes of the Fourth Amendment until Openshaw gestured for her to remain seated, and that, at that time, the civil ICE warrant provided the deputies with adequate justification for the seizure. *Id.* The district court further concluded that Santos's Equal Protection claim failed as a matter of law, holding that law enforcement officers do not violate the Equal Protection Clause if they initiate consensual encounters solely on the basis of racial considerations.[2] *Id.* at 429-30. Having

[2] Santos did not appeal the district court's Equal Protection decision, and it is therefore not before us. Nevertheless, we note that while this Circuit has not yet addressed the issue, *see United States v. Henderson,* 85 F.3d 617, 1996 WL 251370, at *2 (4th Cir. 1996) (unpublished table decision) (declining to decide "whether selecting persons for consensual interviews based solely on race raises equal protection concerns"), two other Circuit Courts have indicated that consensual encounters initiated

(Continued on following page)

concluded that the deputies did not violate Santos's constitutional rights, the district court also dismissed Santos's claims against Sheriff Jenkins and the Frederick County Board of Commissioners. *Id.* at 432.

Santos moved for reconsideration under Federal Rule of Civil Procedure 59(e), highlighting a number of federal court decisions authored after the district court's summary judgment hearing holding that state and local governments lack inherent authority to enforce civil federal immigration law. The district court denied Santos's motion, holding that even if the other federal court decisions and the Supreme Court's landmark immigration decision in *Arizona v. United States,* 132 S. Ct. 2492, 2507, 183 L. Ed. 2d 351 (2012), suggested an "emerging consensus" that local officers may not enforce civil immigration law, the deputies were still entitled to qualified immunity for their conduct. J.A. 624. Santos timely appealed.

II.

The Fourth Amendment secures an individual's right to be free from "unreasonable searches and

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solely based on race may violate the Equal Protection Clause, *United States v. Avery,* 137 F.3d 343, 353 (6th Cir. 1997) ("[C]onsensual encounters may violate the Equal Protection Clause when initiated solely based on racial considerations."); *United States v. Manuel,* 992 F.2d 272, 275 (10th Cir. 1993) ("[S]electing persons for consensual interviews based solely on race is deserving of strict scrutiny and raises serious equal protection concerns.").

seizures." U.S. Const. amend. IV. In determining whether a law enforcement officer unconstitutionally seized an individual, we engage in a multi-step inquiry. Because "not every encounter between a police officer and a citizen is an intrusion requiring an objective justification," *United States v. Mendenhall,* 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (opinion of Stewart, J.), we first must decide if and when the individual was "seized" for purposes of the Fourth Amendment, *United States v. Wilson,* 953 F.2d 116, 120 (4th Cir. 1991). If we conclude the individual was "seized," we then determine whether the law enforcement officer had adequate justification to support the seizure. *Terry v. Ohio,* 392 U.S. 1, 20-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Finally, in Section 1983 cases, even if a seizure runs afoul of the Fourth Amendment, a plaintiff may not be able to obtain relief if the defendant is entitled to qualified immunity. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

Santos raises objections to the district court's rulings on each of these three issues. In particular, Santos argues that the district court (1) improperly determined that she was not "seized" when the deputies initially approached and questioned her; (2) incorrectly held that the deputies did not violate her Fourth Amendment rights when they detained and later arrested her based on the civil ICE warrant; and (3) erred in holding that, even if the deputies had violated Santos's constitutional rights, they were entitled to qualified immunity for their actions. We

address these arguments in turn, reviewing each de novo and viewing facts and all reasonable inferences in the light most favorable to the nonmoving party. *Rosetta Stone Ltd. v. Google, Inc.,* 676 F.3d 144, 150 (4th Cir. 2012); *Pritchett v. Alford,* 973 F.2d 307, 313 (4th Cir. 1992).

III.

A.

Regarding the threshold question of whether the encounter constituted a Fourth Amendment seizure, the Supreme Court has identified three categories of police-citizen encounters. *United States v. Weaver,* 282 F.3d 302, 309 (4th Cir. 2002). Each category represents differing degrees of restraint and, accordingly, requires differing levels of justification. *See id.* First, "consensual" encounters, the least intrusive type of police-citizen interaction, do not constitute seizures and, therefore, do not implicate Fourth Amendment protections. *Florida v. Bostick,* 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). Second, brief investigative detentions – commonly referred to as "*Terry* stops" – require reasonable, articulable suspicion of criminal activity. *Terry,* 392 U.S. at 21. Finally, arrests, the most intrusive type of police-citizen encounter, must be supported by probable cause. *Devenpeck v. Alford,* 543 U.S. 146, 152, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004).

A police-citizen encounter rises to the level of a Fourth Amendment seizure when "the officer, by

means of physical force or show of authority, has in some way restrained the liberty of a citizen. . . ." *United States v. Jones,* 678 F.3d 293, 299 (4th Cir. 2012) (quoting *Terry,* 392 U.S. at 19 n.16). This inquiry is objective, *Weaver,* 282 F.3d at 309, asking whether "'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Jones,* 678 F.3d at 299 (quoting *Mendenhall,* 446 U.S. at 553). An encounter generally remains consensual when, for example, police officers engage an individual in routine questioning in a public place. *United States v. Gray,* 883 F.2d 320, 323 (1989); *see also Bostick,* 501 U.S. at 434 ("[M]ere police questioning does not constitute a seizure.").

We have identified a number of non-exclusive factors to consider in determining whether a police-citizen encounter constitutes a seizure:

> the number of police officers present during the encounter, whether they were in uniform or displayed their weapons, whether they touched the defendant, whether they attempted to block his departure or restrain his movement, whether the officers' questioning was non-threatening, and whether they treated the defendant as though they suspected him of "illegal activity rather than treating the encounter as 'routine' in nature."

Jones, 678 F.3d at 299-300 (quoting *Gray,* 883 F.2d at 322-23). We also consider "the time, place, and purpose" of an encounter. *Weaver,* 282 F.3d at 310.

Although the inquiry is objective – and thus the subjective feelings of the law enforcement officers and the subject are irrelevant – we also consider certain individual factors that "might have, under the circumstances, overcome that individual's freedom to walk away." *Gray,* 883 F.2d at 323. For example, in *Gray,* this Circuit indicated that an individual's lack of familiarity with English may be a relevant consideration. *Id.* Nevertheless, "no one factor is dispositive;" rather, we determine whether an encounter is consensual by considering the totality of the circumstances. *Weaver,* 282 F.3d at 310.

B.

Here, Santos argues that she was "seized" for purposes of the Fourth Amendment when the deputies "surrounded her and began questioning her." Appellant's Br. at 20. In particular, Santos emphasizes, among other factors, that the deputies approached her from opposite sides of the shipping container, that she was questioned by more than one officer, that the deputies wore uniforms and carried guns, and that she was unfamiliar with English. By contrast, the defendants contend that the deputies' interaction with Santos remained consensual until after the deputies had been informed of the outstanding warrant.

The district court decided that Santos was not seized when the deputies initially approached her. *Santos,* 884 F. Supp. 2d at 428. In light of precedent

and the totality of the circumstances before us, we must agree.

The deputies approached Santos during the daytime and in a public area where employees would "frequently" take breaks or eat lunch. J.A. 431; *see Weaver,* 282 F.3d at 312 (finding encounter occurring in "public parking lot in the middle of the day" was consensual); *Gray,* 883 F.2d at 323-24 (holding that "public setting" diminished coerciveness of police-citizen encounter). They came across Santos as part of a routine patrol, rather than singling her out for investigation. *Jones,* 678 F.3d at 301 (holding that "routine" encounters are more likely to be consensual than "targeted" encounters). The deputies stood well away from Santos – Deputy Openshaw stood approximately six feet from her, and Deputy Lynch was even farther way, standing near the patrol car – giving her ample space to leave had she elected to do so.

No evidence suggests that the deputies used a commanding or threatening tone in questioning Santos. And the types of questions the deputies posed – asking her for identification, whether she was an employee of the co-op, and whether she was on break – are the types of questions law enforcement officers generally may ask without transforming a consensual encounter into a Fourth Amendment seizure. *See United States v. Drayton,* 536 U.S. 194, 201, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002) ("Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions [and]

ask for identification. . . ."). Finally, the deputies did not touch Santos until they placed her under arrest.

Additionally, none of the factors Santos highlighted sufficiently call into question our conclusion that the encounter was consensual at inception. Although two deputies were present, only Openshaw approached and questioned Santos. *See United States v. Thompson,* 546 F.3d 1223, 1227 (10th Cir. 2008) (holding that encounter was consensual when there were multiple officers present but only one officer approached the individual). Moreover, absent other indicia that an encounter is nonconsensual, the presence of two officers is generally insufficient. *Mendenhall,* 446 U.S. at 555 (holding that police-citizen encounter was consensual when two officers questioned the individual); *Gray,* 883 F.2d at 323 (same). And even though the deputies approached her from opposite sides of the shipping container, they stood well back from her, leaving her room to walk away.

Santos also notes that the deputies were wearing standard uniforms and carrying guns. But the deputies never brandished their weapons, and, in some cases, uniforms serve as a "cause for assurance, not discomfort." *Drayton,* 536 U.S. at 204-05 (noting that "[t]he presence of a holstered firearm . . . is unlikely to contribute to the coerciveness of [an] encounter absent active brandishing of the weapon"). Finally, although the language barrier may have added to the coerciveness of the situation, because no one factor is dispositive, the language barrier, on its own, is

insufficient to turn the otherwise consensual encounter into a seizure. *See Weaver,* 282 F.3d at 310.

C.

Even though the encounter initially did not implicate the Fourth Amendment, "[s]ome contacts that start out as constitutional may . . . at some unspecified point, cross the line and become an unconstitutional seizure." *Id.* at 309. Like the district court, we conclude that the consensual encounter became a Fourth Amendment seizure when Openshaw gestured for Santos to remain seated. *Santos,* 884 F. Supp. 2d at 428.

Openshaw's gesture "unambiguous[ly]" directed Santos to remain seated. *See Brendlin v. California,* 551 U.S. 249, 255, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) (stating that a seizure occurs "[w]hen the actions of the police . . . show an unambiguous intent to restrain"). As the district court correctly explained, "[u]nder the circumstances, Openshaw's gesture would have communicated to a reasonable person that she was not at liberty to rise and leave." *Santos,* 884 F. Supp. 2d at 428. Indeed, Santos understood as much, remaining seated after Openshaw's gesture. *See United States v. Jones,* 562 F.3d 768, 774 (6th Cir. 2009) (holding that individuals were seized for purposes of the Fourth Amendment when they "passively acquiesced" in response to officer's show of authority).

IV.

Having concluded that Santos was seized when Openshaw gestured for her to remain seated, we now must determine whether the deputies violated her constitutional rights when they detained and subsequently arrested her on the civil ICE warrant. Santos argues that her seizure and arrest violated the Fourth Amendment because neither of the deputies was certified or authorized to engage in enforcement of federal civil immigration law.

A.

Before addressing the merits of Santos's constitutional claims, we first must determine whether this question is properly before us on appeal. The defendants contend that Santos abandoned any claim that the deputies' actions constituted the unauthorized enforcement of federal civil immigration law, or, in the alternative, that Santos waived such argument during oral argument on the summary judgment motion. Both arguments are without merit.

First, the defendants argue that Santos abandoned any claim that the deputies had no authority to enforce federal civil immigration law by failing to restyle her action as a *Bivens* claim after the district court dismissed her initial complaint for failure to state a claim. In the Rule 12(b)(6) dismissal, the district court held that the initial complaint was improperly styled as a Section 1983 action because 8 U.S.C. § 1357(g)(8) provides that a local law enforcement

officer "acting under . . . any agreement [with ICE under Section 1357(g)] shall be considered to be acting under color of federal authority for purposes of determining liability . . . in a civil action." J.A. 81. Yet it is undisputed that the deputies were not participating in the Sheriff's Office's Section 1357(g) program with ICE. And Santos avers that they were not acting under color of federal authority. *See, e.g.,* J.A. 101 ("Defendants Openshaw and Lynch detained [and] arrested Ms. Orellana Santos without the legal authority to do so. . . ."). Accordingly, Santos properly refiled her complaint as a Section 1983 action.

Further, the defendants contend that Santos waived any argument that the deputies lacked authority to make an arrest based on a civil ICE warrant when, during oral argument on the summary judgment motion, her counsel said that "we certainly don't dispute the fact that once . . . the deputies are aware that there is an active warrant, they have probable cause." J.A. 503. But it is not clear from the transcript whether the reference to "active warrant" refers to a civil warrant or a criminal warrant. And earlier during oral argument, Santos's counsel said that local police lack authority to enforce federal immigration laws. Moreover, Santos's summary judgment brief unambiguously argued that the deputies lacked authority to enforce civil federal immigration law. The defendants cite no authority, nor can we find any, holding that an ambiguous statement made during oral argument waives an argument clearly raised in a brief.

B.

Having concluded that the issue is properly before us, we now address the merits of Santos's claim that the deputies violated her Fourth Amendment rights by seizing and arresting her based on the civil ICE removal warrant. Because the Constitution grants Congress plenary authority over immigration, *Johnson v. Whitehead,* 647 F.3d 120, 126-27 (4th Cir. 2011), state and local law enforcement officers may participate in the enforcement of federal immigration laws only in "specific, limited circumstances" authorized by Congress, *Arizona v. United States,* 132 S. Ct. at 2507.

Local law enforcement officers may assist in federal immigration enforcement efforts under 8 U.S.C. § 1357(g)(1), which authorizes the Attorney General to enter into agreements with local law enforcement agencies that allow specific local officers to perform the functions of federal immigration officers. *Arizona v. United States,* 132 S. Ct. at 2506. Even in the absence of a written agreement, local law enforcement agencies may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." § 1357(g)(10)(B). When enforcing federal immigration law pursuant to Section 1357(g), local law enforcement officers are "subject to the direction and supervision of the Attorney General." § 1357(g)(3).

Other statutory provisions authorize local law enforcement officers to engage in immigration enforcement in more circumscribed situations. *See, e.g.,* § 1103(a)(10) (allowing the Attorney General to authorize local law enforcement officers to assist in immigration enforcement in the event of an "actual or imminent mass influx of aliens arriving off the coast of the United States"); § 1252c(a) (authorizing local law enforcement officers to arrest illegally present aliens who have "previously been convicted of a felony in the United States and deported or left the United States after such conviction"); § 1324(c) (allowing local law enforcement officers to arrest individuals for bringing in and harboring certain aliens).

Although not clearly addressed by federal statute, state and local law enforcement officers also may be able to investigate, detain, and arrest individuals for criminal violations of federal immigration law. In particular, before *Arizona v. United States,* some Circuits held that neither the Fourth Amendment nor federal immigration law precludes state and local enforcement of federal criminal immigration law. *See, e.g., United States v. Vasquez-Alvarez,* 176 F.3d 1294, 1296 (10th Cir. 1999). And we have indicated that local law enforcement officials may detain or arrest an individual for criminal violations of federal immigration law without running afoul of the Fourth Amendment, so long as the seizure is supported by reasonable suspicion or probable cause and is authorized by state law. *United States v. Guijon-Ortiz,* 660 F.3d 757, 764 & 764 n.3 (4th Cir. 2011). But we have

not had occasion to address whether federal immigration law preempts state and local officers from enforcing federal criminal immigration laws. And the Supreme Court has expressly left that question open. *Arizona v. United States,* 132 S. Ct. at 2509.

Although the Supreme Court has not resolved whether local police officers may detain or arrest an individual for suspected criminal immigration violations, the Court has said that local officers generally lack authority to arrest individuals suspected of civil immigration violations. Noting that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," the Supreme Court concluded that "[i]f the police stop someone based on nothing more than possible removability, the usual predicate for arrest is absent." *Id.* at 2505. Relying on this rule, the Supreme Court held unconstitutional a provision in an Arizona statute that authorized a state officer to "'without a warrant . . . arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States.'" *Id.* (quoting Ariz. Rev. Stat. Ann. § 13-3883(A)(5)).

Lower federal courts have universally – and we think correctly – interpreted *Arizona v. United States* as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations. *See Melendres v. Arpaio,* 695 F.3d 990, 1001 (9th Cir. 2012); *Melendres v. Arpaio,* No. PHX-CV-07-02513-GMS, 2013 U.S. Dist. LEXIS 73869, 2013 WL 2297173, at *60-63 (D.

Ariz. May 24, 2013); *Buquer v. City of Indianapolis,* No. 1:11-cv-00708-SEB-MJD, 2013 U.S. Dist. LEXIS 45084, 2013 WL 1332158, at *10-11 (S.D. Ind. Mar. 28, 2013).

The rationale for this rule is straightforward. A law enforcement officer may arrest a suspect only if the officer has "'probable cause' to believe that the suspect is involved in criminal activity." *Brown v. Texas,* 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). Because civil immigration violations do not constitute crimes, suspicion or knowledge that an individual has committed a civil immigration violation, by itself, does not give a law enforcement officer probable cause to believe that the individual is engaged in criminal activity. *Melendres,* 695 F.3d at 1000-01. Additionally, allowing local law enforcement officers to arrest individuals for civil immigration violations would infringe on the substantial discretion Congress entrusted to the Attorney General in making removability decisions, which often require the weighing of complex diplomatic, political, and economic considerations. *See Arizona v. United States,* 132 S. Ct. at 2506-07.

Although *Arizona v. United States* did not resolve whether knowledge or suspicion of a civil immigration violation is an adequate basis to conduct a brief investigatory stop, the decision noted that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." *Id.* at 2509. Nonetheless, the Court's logic regarding arrests readily extends to brief investigatory detentions. In

particular, to justify an investigatory detention, a law enforcement officer must have reasonable, articulable suspicion that "criminal activity may be afoot." *Terry,* 392 U.S. at 30. And because civil immigration violations are not criminal offenses, suspicion or knowledge that an individual has committed a civil immigration violation "alone does not give rise to an inference that criminal activity is 'afoot.'" *Melendres,* 695 F.3d at 1001.

Therefore, we hold that, absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.

Like the district court, we conclude that the deputies seized Santos for purposes of the Fourth Amendment when Deputy Openshaw gestured for her to stay seated after dispatch informed him of the outstanding civil ICE deportation warrant. *See supra* Part III.C. At that time, the deputies' only basis for detaining Santos was the civil ICE warrant. Yet as the defendants concede, the deputies were not authorized to engage in immigration law enforcement under the Sheriff's Office's Section 1357(g)(1) agreement with the Attorney General. They thus lacked authority to enforce civil immigration law and violated Santos's rights under the Fourth Amendment when they seized her solely on the basis of the outstanding civil ICE warrant.

C.

We find unpersuasive the defendants' arguments that the deputies lawfully detained and arrested Santos. First, the defendants contend that the deputies properly seized Santos pursuant to Section 1357(g)(10), which, as previously explained, allows state law enforcement officers to "cooperate" with the federal government in immigration enforcement, even when officers are not expressly authorized to do so under a Section 1357(g)(1) agreement. In *Arizona v. United States,* the Supreme Court concluded that "no coherent understanding of ['cooperate' in Section 1357(g)(10)] would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." 132 S. Ct. at 2507. Thus, *Arizona v. United States* makes clear that under Section 1357(g)(10) local law enforcement officers cannot arrest aliens for civil immigration violations absent, at a minimum, direction or authorization by federal officials.

The defendants assert that Santos's detention and arrest was lawful under Section 1357(g)(10) because "there is no dispute that ICE . . . directed the Deputies to detain Santos and to transfer her to the ICE detention facility. . . ." Appellee's Br. at 48. Although there may be no dispute as to whether ICE directed the deputies to detain Santos at some point, the key issue for our purposes is when ICE directed the deputies to detain her. We conclude that the deputies seized Santos when Deputy Openshaw told

her to remain seated – after they had learned of the outstanding ICE warrant but before dispatch confirmed with ICE that the warrant was active. *See supra* Part III.C. Indeed, ICE's request that Santos be detained on ICE's behalf came fully forty-five minutes after Santos had already been arrested. Therefore, it is undisputed that the deputies' initial seizure of Santos was not directed or authorized by ICE.

And the ICE detainer does not cleanse the unlawful seizure, because "[t]he reasonableness of an official invasion of [a] citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." *United States v. Jacobsen,* 466 U.S. 109, 115, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984); *see also Beck v. Ohio,* 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964) ("Whether [an] arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it – whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." (emphasis added)).

The defendants also suggest that in *Guijon-Ortiz* and *United States v. Soriano-Jarquin,* 492 F.3d 495 (4th Cir. 2007), this Court established that evidence of "unlawful[ ] presen[ce]" constitutes reasonable suspicion to detain an individual pending transport to ICE. Appellee's Br. at 40. The defendants' reliance on

Guijon-Ortiz and *Soriano-Jarquin,* both of which were decided before *Arizona v. United States,* is misplaced.

The defendants correctly note that in *Guijon-Ortiz* we said that a county sheriff's deputy had reasonable suspicion to arrest the defendant for "unlawful . . . presence in the country" when, during the course of a lawful traffic stop, the deputy learned that the defendant had presented him with a fraudulent green card. 660 F.3d at 765. *Guijon-Ortiz* is inapposite because the deputy had reasonable suspicion that the defendant violated a criminal provision of federal immigration law – knowingly using a false or fraudulent immigration identification card in violation of 18 U.S.C. § 1546(a), *id.* at 763 n.3 – not a civil provision, as was the case here. Further, in *Guijon-Ortiz* the deputy detained and transported the defendant only after being expressly directed to do so by ICE, *id.* at 760, which, as previously explained, was not the case here.

In *Soriano-Jarquin,* we considered whether a state police officer violated the Fourth Amendment when, during a lawful traffic stop, the officer asked passengers in a van for identification. 492 F.3d at 496. After being advised by the driver of the van that the passengers were illegal aliens and while diligently pursuing the independent basis for the traffic stop, the officer contacted ICE, which directed him to detain the van pending arrival of ICE agents. *Id.* at 496-97. Therefore, like *Guijon-Ortiz, Soriano-Jarquin*

is readily distinguishable because the police officer detained the passengers at ICE's express direction.

Third, the defendants assert that the deputies lawfully detained Santos because there is no evidence in the record that the ICE warrant was civil rather than criminal. But the deputies testified that the warrant was for "deportation." And the Supreme Court has long characterized deportation as a civil proceeding. *See, e.g., Padilla v. Kentucky,* 559 U.S. 356, 130 S. Ct. 1473, 1481, 176 L. Ed. 2d 284 (2010);[3] *United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149, 155, 44 S. Ct. 54, 68 L. Ed. 221 (1923). Therefore, the record does indeed contain evidence the ICE warrant was civil in nature.

More significantly, even if the record had been devoid of evidence regarding whether the warrant was civil or criminal, the defendants' argument misses the mark because law enforcement officers, not detainees, are responsible for identifying evidence justifying a seizure. *United States v. Branch,* 537 F.3d 328, 337 (4th Cir. 2008) ("In order to demonstrate reasonable suspicion, a police officer must offer 'specific and articulable facts' that demonstrate at least 'a minimal level of objective justification' for the belief

[3] *Padilla* characterizes "removal" as a civil proceeding. 130 S. Ct. at 1481. In 1996, Congress combined "deportation" proceedings with "exclusion" proceedings to form a single "removal" proceeding. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 304(a), 110 Stat. 3009-587, adding 8 U.S.C. § 1229a.

that criminal activity is afoot." (quoting *Illinois v. Wardlow,* 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000))). Consequently, when affirmative evidence does not justify a seizure, the seizure violates the Fourth Amendment. Therefore, it was the deputies' responsibility to determine whether the warrant was for a criminal or civil immigration violation before seizing Santos. And because they did not determine that the warrant was criminal in nature (nor could they have – because it was not), her detention was unlawful.

Relatedly, the defendants suggest that the ICE warrant was criminal because it was included in the National Crime Information Center ("NCIC") database and "the enabling legislation for the NCIC provides only that crime records can be entered into the database." Appellee's Br. at 48 (citing 28 U.S.C. § 534(a)). We agree with the defendants that there is a good argument that Section 534(a)(1), which directs the Attorney General to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records," does not authorize inclusion of civil immigration records in the NCIC database. *See Doe v. Immigration & Customs Enforcement,* 2006 U.S. Dist. LEXIS 28300, 2006 WL 1294440, at *1-3 (S.D.N.Y. May 10, 2006) (explaining that the plain language of Section 534, ordinary canons of statutory construction, and legislative history demonstrate that the government lacks authority to include civil immigration records in the NCIC database); Michael J. Wishnie, *State and Local Police Enforcement of*

Immigration Laws, 6 U. Pa. J. Const. L. 1084, 1095-1101 (2004) (same).

Nonetheless, in the aftermath of the September 11, 2001 attacks, the Attorney General authorized inclusion of civil immigration records in the NCIC database, including information on individuals, like Santos, who are the subject of outstanding removal orders. John Ashcroft, U.S. Att'y Gen., Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2012), available at http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm. And ICE continues to populate the NCIC database with civil immigration records to the present. *See* Immigration & Customs Enforcement, Fact Sheet: Law Enforcement Support Center (May 29, 2012), http://www.ice.gov/news/library/factsheets/lesc.htm. Therefore, contrary to the defendants' assertion, the NCIC database does indeed include civil immigration records.

In sum, the deputies violated Santos's rights under the Fourth Amendment when they seized her after learning that she was the subject of a civil immigration warrant and absent ICE's express authorization or direction.

V.

A.

Even though the deputies violated Santos's rights under the Fourth Amendment, the deputies still may

be entitled to qualified immunity if the right was not clearly established at the time of the seizure.

The doctrine of qualified immunity "balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). To that end, qualified immunity protects law enforcement officers from personal liability for civil damages stemming from "bad guesses in gray areas and ensures that they are liable only for transgressing bright lines." *Willingham v. Crooke,* 412 F.3d 553, 558 (4th Cir. 2005) (internal quotation omitted).

We apply a two-step test to determine whether a municipal employee is entitled to qualified immunity. First, we decide "whether the facts alleged or shown, taken in the light most favorable to the plaintiff, establish that the [government official's] actions violated a constitutional right." *Meyers v. Baltimore Cnty., Md.,* 713 F.3d 723, 731 (4th Cir. 2013). If we determine that a violation occurred, we consider whether the constitutional right was "clearly established" at the time of the government official's conduct. *Id.* (noting also that the Supreme Court "modif[ied] the . . . approach such that lower courts are no longer required to conduct the analysis in th[is] sequence").

As explained above, the deputies violated Santos's Fourth Amendment rights when they seized her based on the civil ICE warrant. *See supra* Part IV.B. Therefore, the key question is whether the constitutional right was "clearly established" when the arrest occurred. We apply an objective test to determine whether a right is "clearly established," asking whether "a reasonable person in the official's position could have failed to appreciate that his conduct would violate [the] right[ ]." *Torchinsky v. Siwinski,* 942 F.2d 257, 261 (4th Cir. 1991) (internal quotation omitted).

Because government officials cannot "reasonably be expected to anticipate subsequent legal developments," the right must have been clearly established at the time an official engaged in a challenged action. *Harlow,* 457 U.S. at 818. Nonetheless, there need not have been a judicial decision squarely on all fours for a government official to be on notice that an action is unconstitutional. *Meyers,* 713 F.3d at 734 (noting that this Court "repeatedly ha[s] held that it is not required that a right violated already have been recognized by a court in a specific context before such right may be held 'clearly established' for purposes of qualified immunity"); *see also Hope v. Pelzer,* 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (stating that "officials can still be on notice that their conduct violates established law even in novel factual circumstances").

For three reasons, we conclude that when the deputies detained Santos, it was not clearly established that local law enforcement officers may not

detain or arrest an individual based solely on a suspected or known violation of federal civil immigration law. First, the Supreme Court did not directly address the role of state and local officers in enforcement of federal civil immigration law until *Arizona v. United States,* which was decided more than three years after the deputies' encounter with Santos.

Second, until today, this Court had not established that local law enforcement officers may not seize individuals for civil immigration violations. Therefore, no controlling precedent put the deputies on notice that their actions violated Santos's constitutional rights.

And finally, before *Arizona v. United States,* our Sister Circuits were split on whether local law enforcement officers could arrest aliens for civil immigration violations. *Compare, e.g., United States v. Urrieta,* 520 F.3d 569, 574 (6th Cir. 2008) ("To justify [the defendant's] extended detention then, the government must point to specific facts demonstrating that [the Sheriff's] Deputy . . . had a reasonable suspicion that [the defendant] was engaged in some nonimmigration-related illegal activity."), *with United States v. Vasquez-Alvarez,* 176 F.3d 1294, 1296 (10th Cir. 1999) ("[T]his court has held that state law-enforcement officers have the general authority to make arrests for violations of federal immigration laws."). And "if there are no cases of controlling authority in the jurisdiction in question, and if other appellate federal courts have split on the question of whether an asserted right exists, the right cannot be

clearly established for qualified immunity purposes." *Rogers v. Pendleton,* 249 F.3d 279, 288 (4th Cir. 2001).

In sum, even though the deputies unconstitutionally seized Santos, qualified immunity bars her individual capacity claims because the right at issue was not clearly established at the time of the encounter.

B.

Santos further argues that even if qualified immunity precludes her individual capacity claims, the district court improperly dismissed her claims against the Frederick County Board of Commissioners and against Sheriff Jenkins and Deputies Openshaw and Lynch in their official capacities. Plaintiffs alleging constitutional injuries may bring suits under Section 1983 against municipalities for unconstitutional actions taken by their agents and employees. *Monell v. Dep't of Social Servs. of the City of New York,* 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Likewise, a plaintiff may bring a Section 1983 action against governmental officials in their official or representative capacity. *Hafer v. Melo,* 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). For purposes of Section 1983, these official-capacity suits are "treated as suits against the [municipality]." *Id.*

The Supreme Court has emphasized, however, that municipal liability under Section 1983 does not amount to respondeat superior. *Monell,* 436 U.S. at

691. Consequently, a municipality is subject to Section 1983 liability only when its "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the [plaintiff's] injury. . . ." *Id.* at 694. The requirement that the allegedly unconstitutional act stems from an established municipal policy or the actions of a final policymaker ensures that the municipality is "responsible" for the alleged violations of a plaintiff's constitutional rights. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).

Unlike with government officials sued in their individual capacity, qualified immunity from suit under Section 1983 does not extend to municipal defendants or government employees sued in their official capacity. *Owen v. City of Independence, Mo.,* 445 U.S. 622, 650, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980).

The district court dismissed Santos's official-capacity claims and claims against the Frederick County Board of Commissioners because it concluded that the deputies did not violate Santos's Fourth Amendment rights. *Santos,* 884 F. Supp. 2d at 432. Because we hold that the deputies violated Santos's Fourth Amendment rights when they seized her solely on the basis of the civil ICE warrant and because qualified immunity does not extend to municipal defendants, this was error.

Having (erroneously) determined that the deputies did not violate Santos's constitutional rights, the district court did not have occasion to address whether the municipal defendants were "responsible" for the deputies' conduct. Therefore, on remand, the district court should determine whether the deputies' unconstitutional actions are attributable to an official policy or custom of the county or the actions of a final county policymaker.

VI.

In sum, the district court correctly concluded that the deputies seized Santos when Openshaw gestured for her to remain seated after the deputies learned of the outstanding civil ICE removal warrant. But because knowledge that an individual has committed a civil immigration violation does not constitute reasonable suspicion or probable cause of a criminal infraction, the district court erred in holding that Santos's seizure did not violate the Fourth Amendment.

Nonetheless, the deputies are entitled to qualified immunity because the right at issue was not clearly established at the time of the encounter. Qualified immunity does not extend, however, to municipal defendants, and thus the district court erred in dismissing Santos's municipal and official-capacity claims.

Therefore, we affirm the district court's decision regarding Santos's individual-capacity claims, vacate

its decision regarding her municipal and official-capacity claims, and remand the case to the district court for further proceedings in accordance with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

ROXANNA [sic] **SANTOS, Plaintiff, v. FREDERICK COUNTY BOARD OF COMMISSIONERS, et al., Defendants**

Civil No. L-09-2978

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

884 F. Supp. 2d 420*; *2012 U.S. Dist. LEXIS 14394

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JUDGES: Benson Everett Legg, United States District Judge.

OPINION BY: Benson Everett Legg

OPINION

MEMORANDUM

This case concerns the allegedly unlawful detention and arrest of Plaintiff Roxana Santos by two Frederick County Sheriff's Deputies, Defendants Jeffrey Openshaw and Kevin Lynch ("Deputies"). Now pending is the Deputies' Motion for Summary Judgment. Docket No. 84. The issues have been comprehensively briefed, and on November 15, 2011, the Court heard oral argument on the Motion. For the reasons stated herein, the Court will, by separate Order, GRANT the Motion.

I. BACKGROUND

Shortly after 10:00 a.m. on October 7, 2008, Roxana Santos was sitting on the curb in the alleyway behind Common Market, a food co-op where she worked as a dishwasher. Santos was eating a bit of bread while she waited for her 11:00 a.m. shift to begin.

At the same time, Frederick County Sheriff's Deputies Jeffrey Openshaw and Kevin Lynch were

engaged in a routine patrol of the area. Their route took them through the parking lot of the Evergreen Square shopping center, which houses Common Market and several other businesses and restaurants. Openshaw and Lynch drove around to the rear of a large building containing Common Market and Gold's Gym, where they encountered Santos sitting on the curb next to a large storage container of the type transported by cargo ships. There are three separate accounts of the circumstances surrounding the Deputies' approach.

According to Openshaw and Lynch, when Santos observed them driving toward her in a marked patrol car, she got up, quickly gathered her things, and ducked around the corner of the storage container out of their view. Though the patrol car was approximately 150 feet away, Deputy Lynch testified that he saw Santos regard them with a startled look before withdrawing behind the container: "Her eyes got large, like, oh, no, there's the police." Lynch Dep. 43:16-21. The Deputies commented to one another that the behavior seemed odd, and they decided to question Santos.

By contrast, Santos claims that she had just sat down when she noticed the patrol car approaching, but thought nothing of it. She denies doing anything even arguably suspicious. Santos states that as she remained seated, the car pulled up, Deputies Openshaw and Lynch got out, and Openshaw began to ask questions.

The third account comes from Eric Lofhjelm, another Common Market employee. Lofhjelm was standing on the building's loading dock, which looked down the alley towards the far side of the building from which the Deputies approached. Lofhjelm noticed the patrol car come around the corner. When it passed out of his field of view, he stepped out onto a stairwell from which he could see both the patrol car pulling up to the storage container and Santos sitting on the curb. Lofhjelm observed the parties' interaction for a short time before going inside, though he was too far away to hear anything. During the time that he watched, Lofhjelm did not see Santos get up or move.

From this point on, the parties' versions of the facts are largely congruent, except as expressly noted. Accounts agree that the two Deputies circled around the storage container, approaching Santos from opposite directions. They wore standard issue Sheriff's uniforms and had guns on their hips. Deputy Openshaw greeted Santos and asked if she was on break. Santos said, yes. According to Openshaw, a language barrier was immediately apparent. He inquired if Santos worked at Common Market, and again she said, yes. Openshaw then asked if Santos had identification. Santos understood the question, but responded in Spanish that she had none. Openshaw asked if she had a passport and Santos responded, this time in English, that she had a passport but that she had left it at home.

Deputy Openshaw then asked Santos her name. He testified that when he could not understand Santos's attempt to spell it for him, he gave her his notepad with a request that she write out her name and date of birth. According to Openshaw, Santos complied. Santos, by contrast, does not remember either Deputy asking for any such information or giving her paper and pencil.[1] At no point did either Deputy question Santos on the subject of her immigration status.

While Santos remained seated, Deputy Openshaw withdrew to confer with Deputy Lynch. Though Santos could not understand what the officers were doing, Openshaw used his radio to run a routine warrant check, providing the dispatcher with the name Roxanna [sic] Elizabeth Orellana Santos, born [month] [day], 1980.[2] At some point, Santos produced a Salvadoran ID card from her purse. She offered it to the Deputies, one of whom walked over to retrieve it. Openshaw testified that Santos offered the ID after she had written down her name and birthdate, but he could not recall if this occurred before or after he called in the warrant check.

A short time later, the dispatch officer notified the Deputies that Santos was the subject of

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[1] When asked what became of the piece of paper, Openshaw responded that he gave it to an ICE agent at the police station.

[2] The Court has redacted Santos's date of birth to preserve her privacy.

an Immigrations and Customs Enforcement ("ICE") warrant for immediate deportation. Openshaw testified that at this point Santos was not free to leave, but he did not immediately place her under arrest. Instead, the Deputies requested verification of the warrant, meaning that someone from the Sheriff's Office would contact ICE to determine whether it was still active.[3]

While the warrant was being verified, Santos asked the Deputies if she could get up. Openshaw said, no, and gestured that she should remain seated. Eventually, the dispatch officer radioed back that the warrant was verified and active. Santos, deciding it

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[3] Deputy Openshaw testified that this was standard procedure:

> At that point they need to verify the warrant, okay. In other words, contact whatever agency . . . had the warrant. Our agency would contact that agency to verify that the warrant was still active, because at times sometimes there may be a warrant that has been served or has, for whatever reason, gone inactive, for whatever reason, and they may not want it.
>
> Or there would be instances from other states where a warrant – they may not want to extradite. . . . Let's say somebody's from Oklahoma and they're up here and we pull them up here and run a check on them, they have a warrant, it may be for like a child support, they're not going to extradite the person. So we just say, "Hey, you got a warrant through Oklahoma for whatever reason, you might want to get that taken care of, we're not taking you in, they don't want you," that type of thing.

Openshaw Dep. 71:8-72:5.

was time for her to go to work, attempted to stand up and leave. At this point the Deputies handcuffed her, placed [sic] in the patrol car, and transported her to patrol headquarters.[4]

At headquarters, Santos was turned over to an ICE agent for questioning. After temporary detention in the Frederick County Adult Detention Center and Baltimore Adult Detention Center, ICE transferred Santos to the Dorchester County Jail in Cambridge, Maryland, where she remained until her supervised release on November 13, 2008. Santos was not deported, and the record does not reveal her current immigration status.

On November 10, 2009, Santos filed the instant suit, naming as defendants Deputies Openshaw and Lynch, Frederick County Sheriff Charles Jenkins, the

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[4] The amount of time taken up by these events is somewhat unclear. Santos claims that the initial questioning session, after which she presented her ID card, lasted fully 15 minutes. An "event chronology" offered by the Defense shows that a report of suspicious activity was called in at 10:27 a.m., and that the information relating to the warrant check was communicated to dispatch at 10:28 a.m. Openshaw testified that standard protocol would have been to send the initial communication to dispatch before the Deputies left the car, but that he could not remember specifically whether the standard protocol was followed on the day in question. The chronology shows "pending confirmation of warrant" at 10:37 a.m., and arrival at Patrol Headquarters by 10:42 a.m. Lofhjelm testified that the entire encounter, from the time of the Deputies' arrival to the time they handcuffed Santos and placed her in the patrol car, lasted somewhere between five and eight minutes.

Frederick County Board of Commissioners, and several other individuals from ICE and the Department of Homeland Security. Santos eventually agreed to dismiss her claims against the federal Defendants and to bifurcate all claims of supervisory liability against Sheriff Jenkins and the Board of Commissioners. The supervisory liability claims have been stayed pending resolution of the case against the officers. Santos filed a Second Amended Complaint containing the following counts:

- Count I – Unlawful seizure, under 42 U.S.C. § 1983, against Deputies Openshaw and Lynch in their official and individual capacities.

- Count II – Unlawful arrest, under 42 U.S.C. § 1983, against Deputies Openshaw and Lynch in their official and individual capacities.

- Count III – Violation of Fourteenth Amendment right to equal protection, under 42 U.S.C. § 1983, against Deputies Openshaw and Lynch in their official and individual capacities.

- Count IV – Conspiracy under 42 U.S.C. § 1985(3), against Deputies Openshaw and Lynch in their official and individual capacities.

- Count V – Supervisory liability, against Sheriff Jenkins, in his official and individual capacities. (bifurcated and stayed)

- Count VI – A claim against the Frederick County Board of Commissioners under 42 U.S.C. § 2000d, which prohibits exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin. (bifurcated and stayed)

- Count VII – *Monell* entity liability against the Frederick County Board of Commissioners. (bifurcated and stayed)

Deputies Openshaw and Lynch now move for summary judgment as to Counts I-IV.

II. Legal Standard

The Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *see also Felty v. Graves-Humphreys Co.,* 818 F.2d 1126, 1128 (4th Cir. 1987) (recognizing that trial judges have "an affirmative obligation" to prevent factually unsupported claims and defenses from proceeding to trial).

Nevertheless, in determining whether there is a genuine issue of material fact, the Court views the facts, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving

party. *Pulliam Inv. Co. v. Cameo Properties,* 810 F.2d 1282, 1286 (4th Cir. 1987). Hearsay statements or conclusory statements with no evidentiary basis cannot support or defeat a motion for summary judgment. *See Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro,* 64 F.3d 962, 967 (4th Cir. 1995).

III. ANALYSIS

a. Unlawful Seizure (Counts I and II)

The Supreme Court has recognized three distinct types of police-citizen interaction: (i) arrests, which must be supported by probable cause, *see Brown v. Illinois,* 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), (ii) brief investigatory stops, which must be supported by reasonable articulable suspicion, *see Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and (iii) consensual encounters between police and citizens, which require no objective justification, *see Florida v. Bostick,* 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). As the first step in determining whether Santos was seized unlawfully, the Court must decide when she was seized for purposes of the Fourth Amendment. The Court must then decide whether the Deputies possessed adequate justification for the seizure at the time it occurred.

A seizure does not occur so long as, in view of the totality of the circumstances surrounding the stop, "a reasonable person would feel free to decline the officers' request or otherwise terminate the encounter."

Id. at 436; *United States v. Weaver,* 282 F.3d 302, 309 (4th Cir. 2002). The encounter triggers Fourth Amendment scrutiny only when it loses its consensual nature. *Bostick,* 501 U.S. at 434. The test is one of objective reasonableness, and the subjective feelings of both the officers and the subject are irrelevant. *Weaver,* 282 F.3d at 309. Factors considered by the courts to determine whether there has been a seizure include the time, place, and purpose of the encounter, the words used by the officer, the officer's tone of voice and general demeanor, the officer's statements to others present during the encounter, the threatening presence of several officers, the potential display of a weapon by an officer, and the physical touching by the police of the citizen. *Id.* at 309-10.

While there is no bright line test for determining when a seizure has occurred, courts have offered guidance by identifying factors and circumstances that do not, in and of themselves, constitute a seizure. For example, a seizure "does not occur simply because a police officer approaches an individual and asks a few questions." *Bostick,* 501 U.S. at 434. "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty.,* 542 U.S. 177, 185, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004) (quoting *INS v. Delgado,* 466 U.S. 210, 216, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984)). While retention of a subject's identification card or other personal property is "highly material," the subject is not

seized merely because an officer retains the identification beyond the time needed for a routine procedure, such as a warrant check. *Weaver,* 282 F.3d at 310.

Santos urges that she was seized as soon as the Deputies approached and began to question her. Openshaw and Lynch submit that Santos was not seized until she was actually handcuffed. In this respect both sides ask too much.

Given the totality of the circumstances, the Deputies' initial approach and questioning fell well short of seizure. Santos points to certain factors in an attempt to demonstrate that the Deputies asserted authority over her from the very beginning. She was approached by not one but two officers, who circled around the storage container in order to approach her from opposite directions and who stood while she remained sitting. There were no other people nearby. The storage container was between Santos and the Common Market, and the Deputies stood on either side of her, limiting her possible avenues of departure. The Deputies did not ask Santos whether she would mind answering questions, and they did not advise her that she was free to decline or to leave. They "repeatedly" requested identification. Finally, Santos points out that she spoke limited English,

had little formal education, and was unfamiliar with American police procedure.[5]

On the other side of the ledger, however, the Deputies did not touch Santos, brandish their weapons, or even use a commanding tone of voice. From all indications, they were perfectly polite. Santos was alone and clearly the target of their investigation, but the questioning occurred outside, in broad daylight. Though the Deputies stood between Santos and her place of employment, they did not box her in. The case law is clear that just because a police officer has possession of a subject's ID, this does not mean that the subject cannot leave. Pedestrian encounters are much less restrictive than traffic stops, and a police

[5] The parties have strenuously debated whether these last elements may properly be considered in an objective analysis of the circumstances faced by a hypothetical reasonable person. A language barrier, at least, may be relevant in some limited cases. *See United States v. Gray,* 883 F.2d 320, 323 (4th Cir. 1989) (citing *United States v. Patino,* 649 F.2d 724 (9th Cir. 1981)). Yet, courts must be mindful of the Supreme Court's admonition that "[t]he benefit of the objective custody analysis is that it is designed to give clear guidance to the police" and to avoid burdening them "with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind." *J.D.B. v. North Carolina,* 131 S. Ct. 2394, 2402, 180 L. Ed. 2d 310 (2011) (quotations and citations omitted). Taking into account factors such as level of education and knowledge of police procedure would, at the least, strain this dictate. Because consideration of the personal characteristics proffered by Santos would not alter the Court's final determination of when a seizure occurred, there is no need to reach the question.

encounter does not constitute a seizure just because it would be awkward for the subject to walk away. *See Id.* at 311-12.

The Court must also reject the argument that Santos was seized only when she was placed in handcuffs. Santos was seized within the meaning of the Fourth Amendment when she asked if she could get up and Deputy Openshaw gestured that she should remain seated. Under the circumstances, Openshaw's gesture would have communicated to a reasonable person that she was not at liberty to rise and leave. The gesture was a show of authority to which Santos submitted by remaining seated. From that point forward the encounter was nonconsensual, and Santos's Fourth Amendment rights were implicated.

The level of suspicion required to justify the seizure depends on the extent of the restraint. When Openshaw directed Santos to remain seated, she was not yet under arrest. Instead, she was temporarily detained while the Deputies inquired whether the ICE warrant was still in effect. Santos was "stopped" as that term is defined in *Terry,* meaning that reasonable articulable suspicion was required.

The Deputies contend first that any seizure was lawful from the very beginning of the encounter because, having observed Santos duck behind the storage container, they possessed reasonable suspicion that criminal activity was afoot and were, accordingly, entitled to investigate. They argue that while Santos claims she did nothing suspicious, her

deposition testimony is not necessarily inconsistent with their account. What may seem innocent to a civilian may appear suspicious enough to a trained police officer to warrant at least a brief detention.

On the basis of the record, the Court finds that the versions of events related by Santos and by the Deputies differ sufficiently to create a disputed question of fact as to whether Santos did, indeed, move behind the storage container upon apprehending the Deputies' approach. Such behavior would have given the Deputies the reasonable suspicion required for a *Terry* stop. For purposes of the pending Motion for Summary Judgment, however, the Court will assume that Santos did nothing when she first spotted the Deputies that would have warranted an investigatory stop.

As stated, however, seizure did not occur until Deputy Openshaw gestured to Santos that she should remain seated. Openshaw testified that, at the time he did so, he had already received notice from the dispatch officer that Santos was the subject of an outstanding warrant. Santos has offered no evidence to rebut Openshaw's testimony, and she acknowledges that this piece of information supplied not just reasonable suspicion, but the probable cause required for an arrest.[6] For this reason, the Deputies' actions at no time violated Santos's Fourth Amendment rights.

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[6] Relegating this dispositive question to a footnote, Santos attempts to call the sequence of events into question by pointing

(Continued on following page)

b. Equal Protection (Count III)

Santos alleges violation of her Fourteenth Amendment Equal Protection rights on the ground that the Deputies' decision to question her was predicated on nothing more than her Latina appearance. An equal protection violation occurs in one of two ways: (1) when a law or policy explicitly classifies people based on race, or (2) when a law is facially neutral, but its administration or enforcement disproportionately affects one class of persons over another and discriminatory intent or animus is shown. *Sylvia Dev. Corp. v. Calvert Cnty.,* 48 F.3d 810, 818-19 (4th Cir. 1995). Santos does not allege that the Sheriff's Office had a policy of explicit classification on the basis of race or ethnicity. She does, however, allege that "Defendants Openshaw and Lynch subjected Plaintiff Orellana Santos to selective law enforcement out of a bad faith and unlawful intent to drive her and other

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to certain inconsistencies in the parties' deposition testimony. *See* Pl.'s Opp. 22 n. 10 ("Defendant Openshaw stated that she wrote her information down on a notepad; Defendant Lynch stated that he did not remember; and Ms. Orellana Santos said she never was asked for her name or date of birth and never wrote it down. . . . Furthermore, Defendant Openshaw admitted that he did not know when he received the national identification card in the sequence of events."). It is undisputed, however, that Openshaw somehow obtained Santos's name and date of birth and called them in to dispatch. It is immaterial whether he retrieved this information from Santos's ID card, a piece of paper, or both, because there is nothing in the record to contradict his assertion that he had already received a response to the warrant check at the time he motioned Santos to stay seated.

residents of Latino and/or foreign-born appearance from Frederick County." Am. Compl. ¶ 79.

It is well established that police may not seize a person[7] or otherwise selectively enforce the laws solely on the basis of race or ethnicity. *See, e.g., Whren v. United States,* 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). As stated above, however, Deputies Openshaw and Lynch had ample neutral evidence to seize Santos when the dispatcher informed them of the open warrant. Moreover, Santos has pointed to no similarly situated individuals – those with outstanding warrants – who received preferential treatment from the Deputies.

She maintains, however, that the Equal Protection Clause may be violated short of a seizure if police target an individual for informal questioning because of his or her ethnicity. Santos relies on the case of *United States v. Avery,* 137 F.3d 343, 353 (6th Cir. 1997), in which the Sixth Circuit stated that "consensual encounters may violate the Equal Protection Clause when initiated solely based on racial considerations." Santos has not identified, and the Court's own research has not unearthed, any case standing for the same proposition in the Fourth Circuit. In *United States v. Henderson,* 85 F.3d 617 (table)

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[7] The Court pauses to note that Santos's immigration status is irrelevant here. The Supreme Court has long recognized that the guarantees of the Equal Protection Clause extend to illegal aliens as well as to citizens. *See Plyler v. Doe,* 457 U.S. 202, 210-15, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

[published in full-text format at 1996 U.S. App. LEXIS 11254, at *6] (4th Cir. 1996), the court declined to reach the question, upholding the district court's factual determination that police officers approached the defendant based on other, permissible factors "[w]ithout deciding whether selecting persons for consensual interviews based solely on race raises equal protection concerns."

For a number of reasons, the Court declines Santos's invitation to adopt the Sixth Circuit's stance on this issue. By definition, a consensual encounter with the police gives rise to neither claim nor injury. Under existing law, a definable event, either a *Terry* stop or an arrest, must serve as the basis for suit. If Santos is correct, almost any encounter between the police and a person might be actionable, depending on the subjective intent of the officer.

Imagine the instant set of facts, with a few slight variations. The officers, as part of their daily patrol, encounter Santos in the alleyway, eating her lunch. They approach, introduce themselves, and ask if she has noticed any suspicious activity in the neighborhood. Santos says she hasn't seen anything. The officers then ask for identification. Santos produces a Maryland driver's license, which they examine briefly and then hand back. The officers thank Santos for her time, tip their caps, and proceed on their way. Under the standard Santos urges on the Court, she could then sue, claiming that she was approached for no reason other than her Latina appearance. One would

be hard pressed, however, to identify the harm she had suffered.

In addition, recognizing an *Avery* claim would create a host of litigation problems. For instance, using the above hypothetical, one must determine the point at which a claim would accrue. Would it accrue when the Deputies decided to approach Santos, or when they asked for identification, or when they examined her driver's license? Moreover, by focusing on the officers' subjective intentions, *Avery* directs the court into an area that the Supreme Court has repeatedly taken pains to avoid. Under Fourth Amendment jurisprudence, the Supreme Court has instructed the lower courts to focus on the facts and circumstances of the encounter rather than the mind-set of the officers involved. A pure heart will not save an unfounded seizure, and a wicked heart will not invalidate a seizure justified by the attendant facts. *See, e.g., Brigham City v. Stuart,* 547 U.S. 398, 404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) ("The officer's subjective motivation is irrelevant."); *Bond v. U.S.,* 529 U.S. 334, 339 n. 2, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000) ("[T]he issue is not [the agent's] state of mind, but the objective effect of his actions."); *Scott v. U.S.,* 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978) ("Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."); *Massachusetts v. Painten,* 389 U.S. 560, 565, 88 S. Ct. 660, 19 L. Ed. 2d 770 (1968) ("Sending state and federal courts into the minds of police

officers would produce a grave and fruitless misallocation of judicial resources.") (WHITE, J., dissenting).

Even if *Avery* were the law in this Circuit, however, Santos could not succeed. A selective enforcement claim requires a showing that enforcement in this case "had a discriminatory effect and . . . was motivated by a discriminatory purpose." *Wayte v. United States,* 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985). Under the Sixth Circuit's standard, a plaintiff must still "demonstrate by a preponderance of the evidence that a police officer decided to approach [or pursue] him or her solely because of his or her race." *Avery,* 137 F.3d at 355 (quoting *U.S. v. Travis,* 62 F.3d 170, 174 (6th Cir. 1995)). Santos has offered insufficient evidence from which a jury could conclude that Openshaw and Lynch were motivated solely by her ethnicity.

Santos submits that the Frederick County Sheriff's Office has entered into a Memorandum of Understanding with ICE to help enforce certain provisions of federal immigration law. She also points to specific anti-immigrant remarks attributed to Sheriff Jenkins. Neither of these factors specifically implicates Deputies Openshaw and Lynch, however. It is undisputed that neither officer was involved in the so-called "287(g)" program. Lynch was on his seventh day of training as a new officer on the day of Santos's arrest, and Openshaw testified that he had heard of the program but knew little about it. Nor is there any evidence in the record that either officer was aware of

Sheriff Jenkins's alleged stance on illegal immigration. Even assuming such knowledge, however, Santos's theory that Openshaw and Lynch would discriminatorily question Hispanic-looking individuals in an effort to curry favor with Sheriff Jenkins is no more than conjecture.

Santos also seeks to tease discriminatory intent from several alleged instances in which the Deputies deviated from what she characterizes as "normal protocol." For instance, her counsel asked on deposition whether Deputy Openshaw, when encountering a suspect, would normally ask for a name and date of birth. The Deputy agreed, and also testified that he did so in this instance. In her summary judgment papers, Santos claims that the officers failed to take this step, which she characterizes, on the basis of their testimony, as a "normal procedure." *See* Pl.'s Opp. at 38, Docket No. 87. Under the summary judgment standard, the Court must credit Santos's version of events. By this tactic, Santos seeks to create a series of deviations from standard procedure that prove discriminatory intent.

Santos cannot bootstrap her way past summary judgment. All of the deviations concern petty matters about which an officer would enjoy substantial latitude. Moreover, Santos has not shown why these minor deviations, assuming they occurred, would result from racial or ethnic bias.

Santos points out that this Court has, in the past, found that an inference of discriminatory intent may

be warranted when there is arguably no legitimate justification for a seizure. She seeks to intersect a racial profiling case in which the plaintiffs contended that Maryland State Troopers who stopped them were motivated by race. *See Md. State Conference of NAACP Branches v. Md. State Police,* 454 F. Supp. 2d 339 (D. Md. 2006). That case centered on Interstate 95, a highway that runs along the eastern seaboard from Miami to Maine connecting the major east coast cities. I-95 is also a major artery for the transportation of drugs from Florida northward. In *Md. State Conference of NAACP Branches,* several plaintiffs, supported by the NAACP, sued the Maryland State Police and individual troopers. The plaintiffs contended that they were the victims of racial profiling, in which the troopers allegedly targeted cars driven by African Americans for pretextual stops in hopes of interdicting drugs.

In an opinion denying in part the defendant's motion for summary judgment, Judge Bredar of this Court found that there was sufficient evidence from which a jury could find that the stop of plaintiff Gary Rodwell was motivated by Rodwell's race. In making his ruling, Judge Bredar relied on an evidentiary record that included the trooper's statement that the stop was "not really" for speeding, as well as "a backdrop of powerful circumstantial evidence of racial profiling in the form of statistics compiled by the Maryland State Police," showing "a remarkable deviation in regard to the percentage of African-Americans stopped and searched" in the area. *Id.* at 348.

Md. State Conference of NAACP Branches is inapposite to Santos's suit because the quantum of evidence to substantiate an Equal Protection claim is lacking. Santos has offered no evidence, direct or circumstantial, statistical or otherwise, that points to discriminatory intent on the part of Deputies Openshaw and Lynch.[8] Rather, she suggests that any time police target a member of a protected class, and their asserted reasons for doing so are contested, the Court must assume that discrimination against the protected trait was the true motivator. If Santos were correct, the police would be subject to an Equal Protection suit whenever they approached a member of a minority group who contended that she had done nothing to attract their attention. Such a rule, which is not constitutionally mandated, would place the

[8] Santos's Complaint does claim that an unidentified report or reports shows that less than 10% of persons arrested by the Frederick County Sheriff's Office under the "287(g) program" were arrested for a violent or serious crime, that the number of persons detained under the program in Frederick County for non-violent crimes is greater than the national average, and that, in 2008, over 90% of the persons arrested by the Sheriff's Office and detained under the program were of Latino descent. First, Santos has not actually offered any such evidence into the summary judgment record. Second, as stated above, it is clear that Openshaw and Lynch were not acting pursuant to the 287(g) program. Finally, Santos admitted at oral argument that she had no evidence of profiling or discriminatory enforcement relating to the area where the encounter took place, the Sheriff's Department as a whole, or officers not engaged in the 287(g) program in particular.

police in an untenable position and unreasonably hamper law enforcement.

Because Santos has failed to adduce sufficient evidence indicating a discriminatory motive, the Deputies are entitled to Summary Judgment on her Equal Protection claim.

c. Section 1985(3) Conspiracy (Count IV)

Count IV of the Complaint claims that Openshaw and Lynch engaged in a conspiracy to deprive Santos of her civil rights in violation of 42 U.S.C. § 1985(3). An action under § 1985(3) consists of five essential elements: (1) A conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus, to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy. *See United Brotherhood of Carpenters v. Scott,* 463 U.S. 825, 828-29, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983); *Griffin v. Breckenridge,* 403 U.S. 88, 102-03, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971); *Ward v. Connor,* 657 F.2d 45, 47 n. 2 (4th Cir. 1981).

Because the Court finds no evidence of an underlying discriminatory animus, there can be no

conspiracy.[9] Summary judgment is, therefore, proper on this count as well.

IV. CONCLUSION

For the foregoing reasons, the Court will, by separate Order of even date, GRANT the Deputies' Motion for Summary Judgment. Because the Court finds no constitutional violations in the actions of Deputies Openshaw and Lynch, Santos's claims against the Sheriff Jenkins and the Frederick County Board of Commissioners (Counts V through VII of the Second Amended Complaint) must be DISMISSED.

Dated this 7th day of February, 2012

/s/ Benson Everett Legg
United States District Judge

[9] The Court also finds that Santos's conspiracy claim is foreclosed by the intra-corporate conspiracy doctrine. *See Marmott v. Md. Lumber Co.,* 807 F.2d 1180, 1184 (4th Cir. 1986); *Buschi v. Kirven,* 775 F.2d 1240, 1251-52 (4th Cir. 1985).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1980
(1:09-cv-02978-BEL)

ROXANA ORELLANA SANTOS

Plaintiff-Appellant

v.

FREDERICK COUNTY BOARD OF COMMISSIONERS; CHARLES JENKINS, Frederick County Sheriff, in his official and individual capacity; JEFFREY OPENSHAW, Frederick County Deputy Sheriff, in his official and individual capacity; KEVIN LYNCH, Frederick County Deputy Sheriffs, in their official and individual capacities

Defendants-Appellees

and

JULIE L. MEYERS, former Assistant Secretary for Homeland Security of Immigration and Customs Enforcement, in her official and individual capacity; CALVIN MCCORMICK, Field Office Director of the ICE Office of Detention and Removal, in his official and individual capacity; JAMES A. DINKINS, Special Agent in Charge of the ICE Office of Investigations, Baltimore, MD, in his official and individual capacity

Defendants

IMMIGRATION REFORM LAW INSTITUTE; EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND

Amicus Supporting Appellees

ORDER

(Filed Sep. 10, 2013)

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Davis, Judge Wynn, and District Judge Spencer.

For the Court

/s/ Patricia S. Connor, Clerk

U.S. Department of
Homeland Security
Law Enforcement
Support Center
188 Harvest Lane
Williston, VT 05495

[SEAL] **U.S. Immigration and Customs Enforcement**

Facsimile Transmission

To: Frederick County Adult Detention Center
Fax #: 9,1,3016001527

From: S Letares, Senior Special Agent
Fax #: (802)288-1220

Date: 10/7/2008 11:17:57 AM

Number of pages including cover: 0

Please accept attached ICE DETAINER HOLD on Roxana ORELLANA-Santos, 4/20/1980, El Salvador, FBI #: 1S1715KC0, ICE #: A200 135 216, NCIC WANTED PERSON NIC WARRANT #: N060255090.

SUBJECT ENROUTE TO YOUR AGENCY WITH DEPUTY OPENSHAW

Thank you!

cc: BALICE DRO DUTY OFFICER (D.O. B. Zumbano)
*Subject ready for pickup (CONSENSUAL ENCOUNTER ONLY)
*File shipped

www.dhs.gov

Department of Homeland Security
Immigration and Customs Enforcement

Immigration Detainer – Notice of Action

File No. A200135216
Date: 10/07/2008

DR# 00079140 Booking #

To: (Name and Title of Institution)	From: (ICE Office Address)
Frederick County Adult Detention Center 7300 Marcies Choice Lane Frederick, MD 21701 Or Any Subsequent Law Enforcement Agency	Immigration & Customs Enforcement Fallon Federal Building 31 Hopkins Plaza Baltimore, MD 21201 4106374000

Name of alien: ORELLANA-SANTOS, ROXANA

Date of birth: 04201980 Nationality: EL SALVADOR
Sex: F

You are advised the action noted below has been taken by U.S. Immigration & Customs Enforcement concerning the above named inmate of your institution:

☒ Investigation has been initiated to determine whether this person is subject to removal from the United States.

☐ A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on _____.

☐ A Warrant of Arrest in removal proceedings, a copy of which is attached, was served on _____.

☐ Deportation or removal from the United States has been ordered.

It is requested that you:

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work and [illegible] assignments, or other treatment which he or she would otherwise receive.

☒ Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and federal holidays) to provide adequate time for ICE to assume custody of the alien. You may notice ICE by calling 4106374000 during business hours or 4106374000 after hours in an emergency.

☐ Please complete and sign the bottom block of the duplicate of this form and return it to this office. ☐ A self-addressed stamped envelope is enclosed for your convenience. ☐ Please return a signed copy via facsimile to 802-288-1230.

Return fax to the attention of Communications Center Duty Agent, (602) 288-1220

☒ Notify this office of the time of release at least 30 days prior to the release or as far in advance as possible.

☒ Notify this office in the event of the Inmate's death or transfer to another institution.

☐ Please cancel the detainer previously placed by this Service on _____.

S Letares	Senior Special Agent
(Signature of ICE official – on file)	(Title of ICE official)

Receipt acknowledged: 00079140

Date of latest conviction _____

Latest conviction charge: _____

Estimated release date: _____

Signature and title of official: _____