IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROXANA ORELLANA SANTOS	*	
Plaintiff	*	
v.	*	Case No: BEL-09-CV-2978
FREDERICK COUNTY BOARD OF COUNTY COMMISSIONERS, et al.	*	
Defendants	*	

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS FREDERICK COUNTY SHERIFF'S DEPUTIES JEFFREY OPENSHAW AND KEVIN LYNCH OR, IN THE ALTERNATIVE, TO BIFURCATE

Frederick County Sheriff's Deputies Jeffrey Openshaw and Kevin Lynch, two of the Defendants, by DANIEL KARP, KARPINSKI, COLARESI & KARP, MICHAEL M. HETHMON and GARRETT R. ROE, IMMIGRATION REFORM LAW INSTITUTE, their attorneys, file this Memorandum in support of their Motion to Dismiss, or in the alternative, to bifurcate, and states:

TABLE OF CONTENTS

Plaintiff filed an Amended Complaint on February 1, 2010, against the Frederick County Board of Commissioners, Frederick County Sheriff Charles Jenkins in his official and individual capacities, Frederick County Deputy Sheriffs Jeffery Openshaw and Kevin Lynch in their official and individual capacities, and past and present federal officials, as a result of the detention of the Plaintiff on October 7, 2008.

The Amended Complaint alleges, in essence, that on the day of the incident the Plaintiff was sitting on a curb near a food store eating her lunch, and not engaged in any unlawful or suspicious activity. Complaint, ¶¶ 41-42 ("Compl."). At that time, a Frederick County Sheriff's Office patrol cruiser drove near the Plaintiff. Deputies Openshaw and Lynch ("the Deputies")

who were in the car stopped, got out of the vehicle, and approached the Plaintiff. *Id.* at ¶ 43. The Plaintiff has alleged, in entirely conclusory terms, that the Deputies stopped the car "solely because they intended to interrogate Ms. Orellana Santos about her immigration status based on her perceived race, ethnicity and/or national origin." In response to the Deputies' request for identification, Plaintiff first told the Deputies that she had none with her, but then the Plaintiff showed them a "National Identification card." Compl. ¶¶ 46-50. Shortly thereafter, when the Plaintiff tried to leave the scene, the Deputies prevented her from doing so and handcuffed her and transported her to the Frederick County Adult Detention Center. *Id.* at ¶¶ 46-56. The Amended Complaint also alleges that the Plaintiff was not charged by the Frederick County Deputies with a violation of any law; that no incident or arrest report was filed; and that the Plaintiff was transferred to the custody of the U.S. Immigration and Customs Enforcement ("ICE"), which transferred her to a contract alien detention facility at the Dorchester County Jail. *Id.* at ¶¶ 2, 56-58.[1]

The essence of the Complaint is that the Deputies asked questions of the Plaintiff without reasonable, individualized and articulable suspicion of wrongdoing, that the Deputies had no legitimate factual or legal basis to approach, interrogate, or detain the Plaintiff, and that the Deputies were without authority to enforce federal civil immigration law. This memorandum addresses the defects in the claims of law alleged in Counts I-IV of the Complaint against Deputies Openshaw and Lynch:

Count I — Unlawful arrest in violation of the Fourth Amendment, actionable under 42 U.S.C. Section 1983, against Deputies Openshaw and Lynch in their official and individual capacities.

[1] The Complaint neglects to mention the salient fact that the Plaintiff had an outstanding ICE warrant for her immediate deportation.

Count II	Violation of Equal Protection clause of the Fourteenth Amendment, actionable under 42 U.S.C. Section 1983, against Deputies Openshaw and Lynch in their official and individual capacities.
Count III	Unlawful seizure in violation of the Fourth and Fourteenth Amendments, actionable under 42 U.S.C. Section 1983, against Deputies Openshaw and Lynch in their official capacity and individual capacities.[2]
Count IV	Conspiracy in violation of the Fourteenth Amendment actionable under 42 U.S.C. Section 1985(3) against Deputies Openshaw and Lynch in their official and individual capacities.

I. When Assisting in the Enforcement of Civil Immigration Law, the Deputies are Acting Under Color of Federal Law Pursuant to 8 U.S.C. § 1357(g)(8) and Therefore May Not be Sued under 42 U.S.C. § 1983.

Plaintiff Roxana Orellana Santos fails to state a proper 42 U.S.C. § 1983 claim upon which relief can be granted. When state and local law enforcement agencies assist in the enforcement of immigration laws, they are acting under color of federal law, not under color of state law. *United States v. Classic*, 313 U.S. 299, 326 (1941); 8 U.S.C. § 1357(g)(8). Therefore, a "*Bivens* action" would be the appropriate cause of action for Plaintiff to file against Deputies Openshaw and Lynch. *Arias v. United States Immig. Customs & Enforcement*, 2008 U.S. Dist. LEXIS 34072, 41 (D. Minn. 2008) (quoting 8 U.S.C. § 1357(g)(8)).

When local and state enforcement agencies are assisting the federal government in the enforcement of immigration laws, they are expressly protected from 42 U.S.C. § 1983 claims under 8 U.S.C. § 1357(g)(8), which reads:

> An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

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[2] It is not clear what Plaintiff believes the difference is between the "unlawful arrest" claim asserted in Count I and the "unlawful seizure" claim asserted in Count III.

By using the conjunctive "or" in § 1357(g)(8), Congress specifically conferred federal authority to both officers who were "acting under color of authority under [§ 1357(g)]" (i.e. assisting in the enforcement of immigration laws) *as well as* officers who had entered into a 287(g) agreement. *Id.* Furthermore, 8 U.S.C. § 1357(g)(10) clarifies that an agreement with ICE is not a prerequisite for a local law enforcement agency to cooperate in the enforcement of immigration laws. *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999); *Arias*, 2008 U.S. Dist. LEXIS 34072 at 42.

When a county deputy sheriff holds a person at the request of ICE, as the Deputies did in this case, the deputy is "assisting the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10). As such, "for purposes of determining the liability, and immunity from suit," the Deputies were "acting under color of Federal authority." *Arias*, 2008 U.S. Dist. LEXIS 34072 at 41. Thus, because the Deputies were cloaked with federal authority when enforcing ICE detainers and assisting in the enforcement of federal immigration laws (the actions complained of in this case), Plaintiff may not proceed under 42 U.S.C. § 1983. *Buonocore v. Harris*, 65 F.3d 347, 359 (4th Cir. 1995) ("Because [sheriff's deputy] Cundiff was acting pursuant to federal authority, he took on the rights and obligations of a federal officer."); *See also Askew v. Bloemker*, 548 F.2d 673, 677 (7th Cir. 1976); *Rosas v. Brock*, 826 F.2d 1004, 1007 (11th Cir. 1987). Instead, Plaintiff must file a *Bivens* action. *Arias*, 2008 U.S. Dist. LEXIS at 41 (citing *Buonocore*, 65 F.3d at 359).

II. Counts I and III Fail to State a Claim Because the Deputies Had Reasonable Suspicion to Detain and Probable Cause to Arrest Plaintiff for Violations of "Criminal" Immigration Law.

Plaintiff repeatedly claims that the Deputies do not have the authority to enforce "civil immigration law." *See e.g.* Compl. ¶ 74. However, the Court need not address this issue because the Deputies had probable cause to believe that the Plaintiff had violated "criminal" provisions of the INA when they arrested her. Plaintiff appears to concede that if the Deputies had probable cause to arrest her for a "criminal" immigration violation, the arrest was lawful.[3] *See* Compl. ¶ 74. The Fourth Circuit appears to agree, but without delineating between "civil" and "criminal" violations. *See United States v. Soriano-Jarquin*, 492 F.3d, 495, 501 (4th Cir. 2007) (holding that it was lawful for the trooper to detain aliens unlawfully present in the United States).

To begin with, it is unclear how Plaintiff can claim that she was unlawfully arrested when the Deputies were acting pursuant to a facially valid warrant. *Porterfield v. Lott*, 156 F.3d 563, 568 (4th Cir. 1998). Plaintiff does not inform this Court that she was in fact detained pursuant to an arrest warrant for failing to comply with a removal order. Ms. Santos' NCIC warrant number is N060255090. While Plaintiff claims that she was "not arrested for or charged with the violation of any state, local or federal criminal law," Compl. ¶ 57, it is important to note that this determinative fact is omitted from her Amended Complaint.

As for the criminal acts Ms. Santos had committed at the time of her arrest, the first federal crime was her failure to comply with a valid removal order. The warrant for her arrest was for this crime. Failing to follow a deportation order is a criminal offense under 8 U.S.C. § 1253.

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[3] However, the arrest was lawful regardless of whether the immigration violations were "criminal" or "civil" in nature.

The other two federal crimes for which the Deputies had the authority to arrest Plaintiff involved crimes related to alien registration documents. Plaintiff alleges that when the Deputies asked for her identification, she told them that "she did not have any identification with her" and that "her passport was at home." Compl. ¶¶ 46-47. Then, "[a]fter a few minutes passed, Ms Orellana Santos remembered that she had a national identification card in her purse which she then retrieved and showed to Defendants." *Id.* at ¶ 50. These pled facts in and of themselves established a "reasonable suspicion that criminal activity 'may be afoot.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2006); *Estrada v. Rhode Island*, 2010 U.S. App. LEXIS 2390, **32-33 (1st Cir. 2010) (J. Lynch concurring); *see also United States v. Guijon-Ortiz*, 2009 U.S. Dist. LEXIS 110505, *13 (D.W.V. Nov. 25, 2009) (once a discrepancy in an alien's identification is noticed, reasonable suspicion properly arises concerning the alien's status).

It is a misdemeanor for an alien aged 18 years or older to fail to carry with her in her personal possession her certificate of alien registration or registration receipt card. 8 U.S.C. § 1304(e); *Estrada*, 2010 U.S. App. LEXIS 2390, at *32. It is also a misdemeanor for an alien to willfully fail to apply for alien registration. 8 U.S.C. § 1306(a); *Estrada*, 2010 U.S. App. LEXIS 2390, at *32.[4] The Deputies were already placed on notice that Ms. Santos claimed to have no form of identification on her. Compl. ¶¶ 46-47. She then showed the Deputies that she had a "national identification card," which means that she has asserted that she is an alien whose nationality is recognized by the foreign state which issued the card (in this case El Salvador). *Estrada*, 2010 U.S. App. LEXIS 2390 at *32, n19 (*citing* H.R. Rep. 108-804, at 97-98 (2005).[5]

[4] Failure to apply for alien registration is also a deportable offense. 8 U.S.C. § 1227(a)(3)(B)(i).

[5] The "national identification card" is also known as a "Matricula" card or "Consular" card. "[There are] no references to matricula or consular identification cards in either federal statues or the statutes of selected states. [These]...cards are a form of identification for foreign nationals who are present in the United States. These cards certify the nationality of the card

Santos did not claim to any FCSO deputy nor has she claimed to this Court that she possesses United States citizenship or any lawful immigration status. *See generally* Compl. As such, the Deputies had a reasonable suspicion that the Plaintiff was an alien who was either not carrying her registration documents, or had entered the United States without inspection and never applied for alien registration. As a result, defendant Deputies had reasonable suspicion to confirm the validity of their suspicion.[6] After it was confirmed that Plaintiff was unlawfully present and ICE had issued a warrant for her arrest, the Deputies possessed probable cause to arrest her for a "criminal" immigration violation.

The remaining question is whether the State of Maryland prohibits Sheriff Jenkins and his Deputies from making arrests for violations of federal law. *United States v. Di Re*, 332 U.S. 581, 591 (1948); *see also United States v. Daigle*, 2005 U.S. Dist. LEXIS 14533, **10-12 (D. Me. 2005) (finding that based on *Di Re*, a Maine peace officer could arrest someone for entering the United States without inspection). The Maryland Court of Appeals has expressly held that, "we agree...that state and local law enforcement officials may appropriately enforce federal law." *Department of Pub. Safety & Correctional Servs. v. Berg*, 324 Md. 126, 139 (Md. 1996). As such, Plaintiff's claims of "unlawful arrest" and "unlawful seizure" should be dismissed, because even under her theory that a local officer can arrest her only for "criminal" immigration violations, the Deputies had all the authority they needed.

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holder but not his or her legal residency status in the United States." *Border Security/Consular Identification Cards Accepted within the United States, but Consistent Federal Guidance Needed*, GAO Report -4=881, at 30 (August 2004).

[6] A "seizure" implicating the Fourth Amendment did not occur until after Santos presented her national identification card. *See infra.*

III. State and Local Law Enforcement Officers Have the Authority to Assist in the Enforcement of Federal Civil Immigration Law.

Although this Court need not reach the issue of whether state and local officers have the authority to arrest individuals for civil immigration violations, if this Court does reach this issue, the Complaint must still be dismissed. State and local law enforcement officers have the authority to assist in the enforcement of federal "civil" as well as "criminal" immigration law. Plaintiff's argument is essentially her belief that Deputies of the Frederick County Sheriffs Department lack the police power to assist ICE in making arrests of individuals that are unlawfully present in the United States. *See* Compl. ¶ 74. However, no Court has so held, and her theory is illogical.

The inherent authority of State and local law enforcement to enforce violations of federal law is no different in the civil immigration context. *See generally,* Kris W. Kobach, "The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests," 69 Alb. L. Rev. 179, 199, 219-233 (2006) ("Kobach").[7] A State's "inherent authority" derives from its status as a sovereign entity, and allows the State to assist another sovereign entity, the federal government, in the enforcement of its laws. Kobach at 199-200. Also, the Fourth Circuit does not distinguish between state and local arrest authority for the civil and criminal prohibitions of federal immigration law. *Soriano-Jarquin*, 492 F.3d, at 501; *see also United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001) ("[S]tate law enforcement officers ... have the general authority to investigate and make arrests for violations of federal immigration laws, and [] federal law as currently written does nothing to displace...state or local authority to arrest individuals for violating federal immigration laws.").

[7] This article provides "[a] very thorough discussion on the inherent authority of the states to arrest aliens for violating criminal provisions of the [INA] and to arrest for civil violations that render an alien deportable..." *Ochoa v. Bass*, 2008 OK CR 11, P3 (OK Ct. App. 2008) (J. Lumpkin concurring in part and dissenting in part).

Additionally, it must be made clear that the basis for Plaintiff's Counts I and III for unlawful arrest and unlawful seizure, that state and local law enforcement officers may not enforce or even assist in the enforcement of federal civil immigration law absent a 287(g) agreement, is legally unsupported. *See e.g.* Compl. ¶¶ 63-66. Federal law expressly allows state and local officers to enforce immigration law without any such agreement. 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...to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present...or otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present..."). Furthermore, nothing in § 1357(g)(10) distinguishes between the "civil" and "criminal" violations for purposes of "identification, apprehension, detention, or removal of aliens not lawfully present..." Plaintiff Santos cites no statute, regulation or other legal authority that precludes or preempts state and local law enforcement officers from enforcing civil immigration law[8] and it is unclear why Plaintiff asserts that such an agreement is necessary, based on the plain language of 8 U.S.C. § 1357(g)(10).

A. Federal Law Does Not Preempt State and Local Officers from Arresting Illegal Aliens for Civil Immigration Violations.

The Deputies have already established that they have the authority to enforce federal law. Now, the Court must determine whether Congress has displaced such authority in the "civil"

[8] It should be noted that Plaintiff uses a misnomer to describe the actions of the defendant Deputies in this case. Plaintiff consistently states that the Deputies were "enforcing civil immigration law." *See e.g.* Compl. ¶ 74. Deputies did not arrest Ms. Santos because they were "enforcing" immigration law themselves. Instead, they were assisting ICE in the enforcement of immigration law by detaining her. The Fourth Circuit agrees that nothing prohibits such actions. *See Soriano-Jarquin*, 492 F.3d at 501.

immigration context, as Plaintiff contends. Compl. ¶ 74. When conducting a preemption analysis, a Court must begin "with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). When the inquiry involves the context of state arrests for violations of federal law, rather than state legislation, the presumption against preemption is particularly strong. The Court must determine that the federal government did not intend to deny itself any assistance that the states might offer. *See 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.").

Two types of preemption exist: "express preemption" and "implied preemption." Express preemption is found when Congress expressly preempts state action through the express language in a statute. *Altria*, 129 S. Ct. at 543. No federal statute, regulation, or other law expressly preempts the enforcement of civil immigration law. Additionally, the federal laws that expressly contemplate enforcement of immigration laws by state and local officers do not distinguish between "civil" and "criminal" violations. *See e.g.* 8 U.S.C. § 1103(a)(9) (authorizing the Attorney General to make payments to states for detention of illegal aliens in non-federal facilities); 8 U.S.C. § 1103(c) (Commissioner of the INS is authorized to enter into any "cooperative agreements with State and local law enforcement agencies for the purpose of assisting in the enforcement of immigration laws."); 8 U.S.C. § 1357(g) (authorizes the Attorney General to enter into "287g" agreements but makes clear that such agreements are not necessary for local officers to enforce immigration laws). In fact, the only "express preemption" found in federal immigration enforcement law preempts state and local officials from prohibiting officers

from assisting in the enforcement of immigration law, without distinguishing between civil and criminal violations. 8 U.S.C. § 1373.

"Implied preemption" comprises two subcategories: "field preemption" and "conflict preemption." "Field preemption" occurs when Congress has legislated so pervasively as to make reasonable the inference that Congress has left no room for the States to supplement it. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). As previously noted, Congress has in numerous statutes expressly allowed not only state and local officers, but also state and local governments, to enter the field of assisting in the enforcement of immigration laws without restricting such actions to "criminal" violations. *See e.g.* 8 U.S.C. §§ 1357; 1373. Additionally, the federal government even requires states to check the status of aliens seeking public benefits. 8 U.S.C. § 1621. As Congress has expressly contemplated that state and local officers and officials will assist in the enforcement of civil immigration laws, the Deputies are not field preempted from enforcing civil immigration law.

Conflict preemption occurs when either compliance with both state and federal law is impossible or state law prevents the accomplishment of congressional objectives. *Gade*, 505 U.S. at 98. To find "conflict preemption," an actual conflict must exist, *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). No conflict preemption can be shown in this case. The arrest by the Deputies in no way "prevented the accomplishment of congressional objectives." The Plaintiff was detained pursuant to a warrant issued by the federal government. *See* Compl. ¶¶ 16, 56. ICE then proceeded as it deemed fit. Additionally, nothing illustrates that it was "impossible to comply" with both federal and state law. The Deputies have the authority to make arrests for federal law and nothing in federal law prevented the Deputies from making lawful arrests of violators of federal immigration law. *Soriano-Jarquin*, 492 F.3d at 501.

Three Circuits have held that state law enforcement officers possess the unpreempted authority to make immigration arrests of aliens who have committed any violations of federal immigration law, whether the violations are civil or criminal. *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 2001); *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *United States v. Rodriguez-Arreola*, 270 F.3d 611, 619 (8th Cir. 2001).[9] Of the three, the Tenth Circuit has analyzed the question of civil immigration arrests the most thoroughly, over a series of opinions stretching from 1984 to 2002. *United States v. Salinas-Calderon*, 728 F.2d 1298, 1300 (10th Cir. 1984); *Santana-Garcia*, 264 F.3d at 1193; *United States v. Favela-Favela*, 41 F. App'x 185, 191 (10th Cir. 2002).

Directly on point is *Vasquez-Alvarez*, 176 F.3d 1294, where the Tenth Circuit expressly held that state and local officers are not preempted from enforcing "criminal" or "civil" immigration laws. The facts of *Vasquez* are particularly relevant to the issue before this Court. For instance, "[t]he arrest [of Vasquez] was based solely on the fact that Vasquez was an illegal alien" and the officer did not know of any prior felony convictions or deportations of Vasquez at the time of the arrest. *Id.* at 1295-96. Plaintiff here essentially alleges that she was arrested solely because she was an illegal alien and argues that she had not committed any "criminal" immigration crime. *See* Compl. ¶ 74. The Tenth Circuit found that federal law "does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration law." *Id.* at 1295. The Tenth

[9] In *Rodriguez-Arreola*, the Court held that questioning an illegal alien without first issuing him *Miranda* warnings was lawful because the trooper and the INS viewed the detention of the alien 'as part of an administrative procedure," rather than part of a criminal procedure. *Id.* at 615. Thus, the Court recognized, that the trooper could make an administrative immigration arrest with the expectation that only civil removal, and not criminal prosecution, would follow. Kobach at 218. If such authority to arrest for "merely civil" violations were preempted, the arrest would have been unlawful.

Circuit could not find any "federal limitation on the authority of state and local officers" to enforce civil immigration law. *Id.* at 1300.

Only the Ninth Circuit in old *dicta,* has ever attempted to draw a distinction between civil and criminal immigration enforcement in the area of preemption, as Plaintiff attempts here. *See Gonzalez v. City of Peoria*, 722 F.2d 468, 474-77 (9th Cir. 1983). In passing the Ninth Circuit "assumed that civil provisions of the [INA] regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration." *Id.* at 474-475 (emphasis added). This statement involved no analysis and was purely an assumption in *dicta,* as the case involved enforcement of "criminal" immigration law only. Also, because the issue was not before the court, the Ninth Circuit did not apply the strong presumption against preemption. *See Marsh*, 29 F.2d at 174 (Courts should presume that federal government intended states to assist it in enforcing laws); s*ee also Altria*, 129 S. Ct. at 543 (Courts should always assume that Congress did not preempt state authority). More importantly, subsequent enactments by Congress underline that such *dicta* could not constitute valid precedent in any case. *See e.g.* 8 U.S.C. §§ 1357(g)(10), 1373, 1644. Of particular relevance is § 1373, passed in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act, which evidences that Congress expressly contemplated local officers asking aliens about their "immigration status" by prohibiting not only the "receiving," but also the "sending" of information.

While the *Gonzalez dicta* may or may not be followed in the Ninth Circuit, this Court is bound by the Fourth Circuit. As explained *supra*, the Fourth Circuit does not distinguish between "civil" and "criminal" violations of immigration law. *See Soriano-Jarquin*, 492 F.3d at 501. That case is particularly relevant, as the arresting officer had no idea whether the

passengers were in fact illegal aliens when he detained them for ICE, let alone whether their immigration violations were civil or criminal in nature. *Id.* Additionally, as mentioned *supra*, in addition to the Fourth Circuit, other Circuits in cases more recent than *Gonzalez v. City of Peoria* illustrate that Congress has not preempted the area of "civil immigration law," as Courts have consistently refused to draw such a distinction. *See Salinas-Calderon*, 728 F.2d 1298; *Vasquez-Alvarez*, 176 F.3d at 1296; *Santana-Garcia*, 264 F.3d at 1193; *Favela-Favela*, 41 F. App'x at 191; *Lynch v. Cannatella*, 810 F.2d at 1371; *Rodriguez-Arreola*, 270 F.3d 611; *Estrada v. Rhode Island*, No. 1:07-cv-00010-ML-DLM, at 9 (D.R.I. Dec. 30, 2008) (*aff'd* on other grounds at *Estrada*, 2010 U.S. App. 2390) (Court held that because most of the Plaintiffs had "no identification documents or information regarding the[ir] immigration status," the detention was reasonable and did not distinguish between "civil" or "criminal" violations.).

The United States Department of Justice's Office of Legal Counsel ("OLC") also addressed the issue of "civil immigration" preemption and agrees with the Deputies that state and local officers are not "preempted" from enforcing "civil immigration violations." *See* Memorandum for the Attorney General, *Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations*, (Apr. 3, 2002) *available at* http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf. In that OLC opinion, the U.S. Department of Justice specifically rejected the argument made by Plaintiffs in the case at bar, citing the overwhelming weight of case law supporting the inherent authority of state and local officers to make arrests for civil immigration violations. The District Court of New Jersey has accepted the position of this opinion. *Rojas v. City of New Brunswick*, 2008 U.S. Dist. LEXIS 57974, *84 (D.N.J. 2008). As such, nothing in federal law preempted the Deputies from arresting Plaintiff for a civil violation of federal immigration law.

B. If State and Local Officers Could not Arrest Unlawfully Present Aliens for "Civil" Immigration Violations, ICE Detainers and the NCIC Database, the Principal Mechanisms Through Which State and Local Officers Assist ICE, Would Not Exist.

A perfect example of the illogical nature of the "civil" versus "criminal" distinction in enforcement authority asserted by the Plaintiff is the standard ICE "detainer" or "hold," where an ICE Agent requests a local officer to alert ICE before releasing an illegal alien so that ICE may assume control. ICE detainers are essentially agreements between two sovereign entities, a State or local government and the federal government, to work together to enforce the law. Obviously, the federal government cannot compel state or local law enforcement agencies to arrest or detain aliens in violation of federal immigration laws. *Printz v. United States,* 521 U.S. 898, 925-35 (1997). However, nothing prevents state or local law enforcement from contacting ICE about the status of suspected violators of civil immigration law, and such cooperation is expressly encouraged. 8 U.S.C. § 1357(g)(10); 8 U.S.C. § 1373. ICE detainers are the primary designated procedure through which local and state officers coordinate their assistance to the federal government in enforcing immigration law.

If state and local law enforcement could not assist the federal government in enforcing all kinds of immigration law, ICE detainers, a procedure similar to that under which Plaintiff was booked, would no longer exist. After state or local law enforcement chooses to verify an individual's immigration status with ICE, ICE can respond with a request that the state or local law enforcement authorities detain the individual, if ICE believes the individual's immigration status to be unlawful. 8 U.S.C. § 1357(a)(2). This may occur regardless of whether the violation is a "civil" or "criminal" violation.

An officer may also learn that the federal government has issued a warrant for an alien's arrest through the National Criminal Information Center ("NCIC"). The NCIC is a computerized

database of arrest and identification records developed by local and state police agencies. This database is available nationwide for use by federal, state, and local police officials. *See* The FBI: A Comprehensive Reference Guide 160, 199, 221 (Athan G. Theoharis *et al.* eds., 1999). The federal government has listed more than 100,000 warrants for immigration absconders in the NCIC to alert officers that the alien with whom the officer is currently interacting is wanted by ICE. The underlying "violations" for absconding can be either "civil" or "criminal" in nature, or both. *See* Kobach, 191; *See also Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 353 (2d Cir. 2005). Also, the federal government has put numerous aliens that are of "special interest" to the federal government in the NCIC whose immigration violation is "only" for overstaying their authorized period of stay, a purely civil violation. *Id.* As is evident, the detainer or "ICE hold" process inherent in the cooperative enforcement of state and local officers with the federal government is designed to operate without any distinction in "civil" and "criminal" immigration violations.

Whether the state or local law enforcement officer chooses to detain the confirmed unlawfully present alien is a decision that is at the professional discretion of each respective state and local law enforcement agency. Such enforcement of the civil immigration law by state and local law enforcement is codified in 8 C.F.R. § 287.7(a), which states:

> [ICE detainers serve] to advise another law enforcement agency that the [Department of Homeland Security] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange and to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

As the language of Section 287.7(a) makes clear, an ICE detainer is not "standing alone, an order of custody" by ICE, but instead is a "request" by ICE for a state or local officer to notify ICE prior to release of an alien and to "arrange and to assume" custody of the alien until the federal

government can do so. *United States v. Female Juvenile, A.F.S.*, 377 F.3d 27, 35 (1st Cir. 2004). Therefore, it is at the officer's proper discretion whether or not to maintain custody of aliens subject to ICE detainers. *See United States v. Saul Guijon-Ortiz*, 2009 U.S. Dist. LEXIS 110505, *15 (D.W.V. Nov. 25, 2009) (it is at an officer's discretion whether to arrest an illegal alien or abide by the request of an ICE Agent to detain and transport the alien to an ICE office).[10]

Under Plaintiff's "civil" enforcement theory, compliance with nearly all ICE detainers would be impossible, because an officer would not be able to hold someone at the request of ICE for a mere "civil" violation. The obvious conclusion is that local officers can hold individuals for both "civil" and "criminal" immigration violations for transfer to ICE, consistent with *Soriano-Jarquin*, 492 F.3d 495. The legality and constitutionality of enforcing civil immigration ICE detainers has recently been upheld. *Committee for Immigration Rights of Sonoma County v. County of Sonoma*, 644 F. Supp. 2d 1177, 1198-99 (N.D. Cal. July 29, 2009). The court held that ICE detainers are constitutional and within the Secretary of Homeland Security's "authority to administer and enforce the laws relating to the immigration and naturalization of aliens." *Id.* at 1198. Santos' claims that the enforcement of federal civil immigration law is "inconsistent with the various provisions of the U.S. Constitution" and disregards the "constitutional rights of those who are, or who are perceived to be, non-citizens in Frederick County" simply is not consistent with the law. Compl. ¶¶ 63, 66.

Additionally, ICE detainers are not limited in scope to the enforcement of criminal laws as Plaintiff claims. 8 U.S.C. § 1357(d). Instead, "[t]here is nothing in the statute that purports to limit the issuance of immigration detainers to cases where an alien is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances."

[10] The Sheriff may not, however, prohibit or restrict the authority of his Deputies to contact the Department of Homeland Security regarding the immigration status, lawful or unlawful, of any person. 8 U.S.C. § 1373.

Committee for Immigration Rights of Sonoma County, 644 F. Supp. 2d at 1198-99. In sum, it is lawful for the Deputies to enforce federal *civil* immigration laws and detain individuals for such civil immigration violations for ICE. *Santana-Garcia*, 264 F.3d at 1194; *Vasquez-Alvarez*, 176 F.3d at 1295; 8 U.S.C. § 1357(g).[11]

C. The Dichotomy Between "Civil" and "Criminal" Violations is Unworkable.

Plaintiff urges that this Court be the first to hold that a dichotomy exists in the enforcement of "civil" and "criminal" immigration law by local and state officers. Compliance by state and local officers in the future with such a holding would be impossible in practice. For example, if an alien informs the officer during a traffic stop that he is unlawfully present, the officer cannot know if that confession means the individual overstayed his visa for more than 180 days, a "civil" violation," 8 U.S.C. § 1182(a)(9)(B), or had been previously deported and then reentered unlawfully, a "criminal" violation, 8 U.S.C. § 1326. Another example would consist of an officer pulling over a van with ten persons and none of them being lawfully present. Under Plaintiff's theory, the officer could arrest the driver of the van for transporting illegal aliens, 8 U.S.C. § 1324(a), but would have to release the other nine unlawfully present individuals, if they were merely unlawfully present per 8 U.S.C. § 1182(a)(6)(A)(i). Such analysis was glaringly absent in the Fourth Circuit's analysis of a similar case. *See Soriano-Jarquin*, 492 F.3d at 501. In fact, if Plaintiff's theory was correct, the troopers in *Soriano-Jarquin* would have acted unlawfully by detaining the van occupants for ICE. That of course was not the case.

Additionally, the various immigration violations themselves illustrate that no "civil" versus "criminal" distinction exists in a state or local officer's enforcement authority. When an

[11] As has already been established, Maryland law enforcement officials "may appropriately enforce federal law." *Berg*, 324 Md. 126 at 139

officer becomes suspicious of a person's unlawful presence, it is unclear how the officer would even know whether the suspect was committing a "civil" or "criminal" violation, as many actions in the immigration arena trigger both civil and criminal penalties. Kobach at 223-225. For instance, failure to attend a removal proceeding, the action for which the ICE warrant was entered into the NCIC in this case, is both a civil violation, 8 U.S.C. § 1182(a)(6)(B), and a criminal felony, 8 U.S.C. § 1253(a)(1). The logical conclusion is that "federal law as currently written does nothing to displace...state or local authority to arrest individuals violating federal immigration laws." *Santana-Garcia*, 264 F.3d at 1194.

Essentially, Plaintiff asks this Court to hold that officers wanting to assist the federal government in the enforcement of immigration laws must take a "wait-and-see" approach to determine whether they will be liable for damages. An officer typically would not know at the time of arrest which federal immigration laws were violated by the illegal alien, and courts do not require officers to know. *Salinas-Calderon*, 728 F.2d at 1300. The effect of such a ruling would prevent officers from assisting the federal government in the enforcement of any immigration laws; assistance that the federal government not only encourages, but expressly bars state and local governments from restricting. 8 U.S.C. § 1373. It is nonsensical to argue that Congress would effectively prevent something that it has gone to such great lengths to encourage. Clearly, a holding that officers have the authority to detain illegal aliens for "criminal" but not "civil" immigration violations would thwart the "manifest intent" of Congress. *Altria*, 129 S. Ct. 543 .

IV. Plaintiff's Count III for "Unlawful Seizure" Should Be Dismissed Because No "Seizure" Occurred before the Deputies had Reasonable Suspicion of Criminal and Civil Violations of the INA.

Plaintiffs' Count III for "unlawful seizure" comprises her statements that the defendant Deputies stopped and exited their car for the sole purpose of investigating Plaintiff's immigration status, that the Deputies were in uniform, that they asked her for identification, and that Plaintiff first told the defendants she had no identification on her, but subsequently presented the Deputies with a Salvadoran national identification card. Compl. ¶¶ 45-51, 90. The Deputies then verified the information, which Santos voluntarily presented to them, and learned that she was unlawfully present and had an outstanding NCIC warrant for her arrest. Compl. ¶¶ 50, 90.

These facts, even if true, cannot constitute an "unlawful seizure." In reviewing whether a seizure is "unlawful," Courts must first examine whether the "seizure" is one that implicates the Fourth Amendment. *Lemery v. Beckner*, 323 Fed. Appx. 644, 649 (10th Cir. 2009). If it does not, then a claim has not been stated. In assessing whether a "seizure" took place, the Court must look at all the surrounding circumstances. *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994). To elevate an encounter to a seizure, a reasonable person must feel that she "is not free to disregard the officer and terminate the encounter." *Monroe v. City of Charlottesville*, 579 F.3d 380, 387 (4th Cir. 2009). And, once a "seizure" has occurred, the officer must have reasonable suspicion at the inception of the seizure for it to be lawful. *United States v. Robinson*, 221 Fed. Appx. 236, 240 (4th Cir. 2006) (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

A "seizure" did not occur until the Deputies "gestured to [Ms. Santos] that she should stay seated." Compl. ¶ 90(e). Courts have repeatedly held that "[a] seizure does not occur, and the Fourth Amendment is not implicated, when an officer merely 'approaches an individual and

asks a few questions.'" *Monroe*, 579 F.3d at 386 (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991)); *see also United States v. Daigle*, 2005 U.S. Dist. LEXIS 14533, *7 (D. Me. 2005) (*quoting Florida v. Royer*, 460 U.S. 491, 497 (1983) ("Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen..."). This is true "even when officers have no basis for suspecting a particular individual," as Plaintiff claims. *Bostick*, 501 U.S. at 434-35. The consensual encounter also extends to a request by the officer for an individual's identification. *Id.* at 435 (citing *INS v. Delgado*, 466 U.S. 210, 216 (1984)). The fact that the Deputies did not tell the Plaintiff that she could terminate the encounter also did not elevate mere questioning to a "seizure." *Id.* at 387 (citing *Delgado*, 466 U.S. at 216). The fact that the officers were "in uniform...merely describe[s] many consensual encounters, [and is] insufficient to survive a Rule 12(b)(6) motion" for unlawful seizure. *Monroe*, 579 F.3d at 387. Finally, the Plaintiff's subjective beliefs were irrelevant in determining whether a reasonable person would feel free to terminate the encounter. *Id.*

The objective facts as alleged by the Plaintiff show that the initial encounter was not a seizure. Plaintiff pled that the Deputies allowed her to stay seated and continue eating her sandwich, and made no gestures that would indicate she was not free to leave, until after she gave them her foreign identification document. Plaintiff has merely pled that the Deputies stopped their car while in uniform and asked for her identification, an encounter that both the Fourth Circuit and the Supreme Court have held does not constitute a "seizure." Only when the Deputies made the gesture to Ms. Santos that she should stay seated would a reasonable person believe she was not free to leave. However, at that point, the Deputies already had reasonable

suspicion to detain her for commission of both civil and criminal immigration law violations. Because there was "reasonable suspicion" to investigate further, the seizure was lawful.[12]

V. Plaintiff's Count II Fails to State a Claim for a Violation of Plaintiff's Right to Equal Protection.

Plaintiff fails to adequately state a claim for the underlying deprivation of her constitutional right to equal protection in Count II of her Amended Complaint. To prevail under a selective enforcement claim, Plaintiff must allege that she was treated differently than those similarly situated based on an impermissible consideration, such as race. *Orgain v. City of Salisbury*, 521 F. Supp. 2d 465, 477 (D. Md. 2007) (affirmed by *Orgain v. City of Salisbury*, 2008 U.S. App. LEXIS 26596 (4th Cir. 2008). Santos must demonstrate that she was "treated differently from others with whom [s]he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. Va. 2001). If this showing is made, the court then must "determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Id.* Plaintiff might also allege an equal protection violation if she shows either "(1) the government explicitly classifies people based on race, or (2) a law is facially neutral, but its administration or enforcement disproportionately affects one class of persons over another and a discriminatory intent or animus is shown." *Monroe*, 579 F.3d at 387.

It should be noted that Plaintiff is an illegal alien. Even if Plaintiff could show she was discriminated against on account of her immigration status, such discrimination would be between individuals lawfully present in Frederick County and those unlawfully present.

[12] As explained *supra* at Section II and III, Plaintiff's claim for "unlawful arrest" must be also dismissed because the Deputies had probable cause to arrest Plaintiff for 1) a facially valid arrest warrant; 2) criminal immigration violations; and 3) civil immigration violations which they were within their authority to enforce.

Distinctions based on unlawful immigration status are only entitled to rational basis scrutiny. *Plyler v. Doe*, 457 U.S. 202, 218 (1982).

At the outset, Plaintiff's pleading under Count II is contradictory to her account of the facts of the case and must be dismissed because the complained of activity never occurred. Plaintiff alleges in ¶ 81 that she was "interrogated...regarding her immigration status based solely on her perceived race, ethnicity and or/national origin." However, nowhere in Plaintiff's Second Amended Complaint does she ever allege that she was interrogated about her immigration status. *See Compl. generally.* Instead, Plaintiff only hypothesizes that such was the Deputies' intention. Plaintiff's equal protection allegation cannot stand because the complained of activity, asking about her immigration status, never occurred. Instead, the Deputies only asked to see her identification, and in response Plaintiff volunteered a Salvadoran national identification card, without any other identification document.

A. Plaintiff has not Alleged She was Treated Differently than a Similarly Situated Individual.

Beyond that pleading deficiency, Plaintiff has failed to properly allege that she has been treated differently than a similarly situated individual. To properly plead an allegation that an officer singled out a person for selective enforcement on account of their race, the burden is "'demanding' and requires evidence that clearly contradicts the presumption that officers have not violated equal protection." *United States v. Suarez*, 321 Fed. Appx. 302, 305 (4th Cir. 2009). Plaintiff must therefore allege that the Deputies' enforcement practice was not enforced against "similarly situated individuals of a different race." *Id.; see also Morrison*, 239 F.3d at 654 (a plaintiff must "demonstrate that [s]he has been treated differently from others with whom [s]he is similarly situated...) All Plaintiff has alleged, in conclusory terms, is her personal belief that the officers stopped the car, questioned her, and arrested because of her race, ethnicity and/or

national origin. Compl.¶ 81. Such a pleading does not meet the "demanding" requirement of *Suarez*. Instead, to avoid dismissal, Plaintiff must identify some other similarly situated individual of another race, ethnicity of national origin that the Deputies to whom the Deputies did not commit the complained of acts. Or, Plaintiff must allege that another person who has essentially admitted to being unlawfully present at the time when any "seizure" took place would have been released rather than arrested. This Plaintiff has not attempted to do so. In fact, Plaintiff has not even attempted to identify others that fit this category.

Indeed, Plaintiff's Second Amended Complaint also does not meet the *Twombly* standard that the claim be "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 570 (2003). Plaintiff's Equal Protection Claim in her Second Amended Complaint is nothing more than "mere conclusions" and "are not entitled to the assumption of truth." *Iqbal v. Ashcroft*, 129 S. Ct. 1937, 1949 (2008). Plaintiff does not support her legal conclusions with factual allegations, instead merely offering "'naked assertions' devoid of 'further factual enhancement,'" and therefore under the *Twombly* standard, must be dismissed. *Iqbal*, 129 S. Ct. at 1949-1950. As such, Plaintiff has failed to meet either the "demanding" scrutiny of *Suarez* or even the "plausibility" standard of *Twombly* and her Equal Protection Claim must be dismissed.

B. Plaintiff has not Alleged Proof of Racially Discriminatory Intent.

Plaintiff has also failed to properly allege "[p]roof of racially discriminatory intent or purpose" which "is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). When pleading "intent," Plaintiff still must plead more than the "bare elements of [her] cause of action" to survive a motion to dismiss. *Iqbal*, 129 S. Ct. at 1954. Plaintiff has not even attempted to allege that these the Deputies had any racially discriminatory intent in even speaking with Ms. Santos, let alone in

arresting her. Instead, Plaintiff simply states that the officers stopped the car because of her race, ethnicity or immigration status. Compl. ¶ 81. More is required to withstand a motion to dismiss.

Plaintiff's only allegations that could possibly be construed as pleading an intent to discriminate are the statistics regarding the percentage of Latinos that are reportedly arrested pursuant to the County's 287(g) program. Compl. ¶ 40. However, Plaintiff has repeatedly pointed out that the Deputies are not members of the County's 287(g) program, *see e.g.* Compl. ¶ 76. These statistics regarding the County's 287(g) program thus have no bearing on whether the Deputies were personally "detaining and interrogating" her "on the basis of her actual or perceived race, ethnicity and/or national origin." Compl. ¶ 99.

If this Court were to determine that FCSO 287(g) program statistics do have some bearing on this case, those statistics still cannot constitute "proof" of racially discriminatory intent. "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact...Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-265 (1977).

Additionally, the allegations relating to the FCSO 287(g) Program statistics also do not meet the standard required by the Supreme Court in *Iqbal*, 129 S. Ct. 1937 . In *Iqbal*, the federal government instituted a policy after the September 11, 2001 terrorist attacks "to identify the assailants and prevent them from attacking anew." 129 S. Ct. at 1943. Iqbal was one of the individuals detained and arrested for fraud and conspiracy, pled guilty, served his jail term, and was removed to Pakistan. *Id.* Iqbal then filed an action claiming that his First and Fifth Amendment rights were violated by being deemed "a person of high interest on account of his race, religion, or national origin." *Id.* at 1944.

The Fourth Circuit has interpreted *Iqbal* in a way that is directly on point for the case at bar. The Supreme Court analyzed under the *Twombly* standard whether the factual allegation that "government officials arrested and detained thousands of Arab-Muslim men...as part of its investigation of the events of September 11 plausibly suggested an entitlement to relief for invidious discrimination." *Monroe*, 579 F.3d at 389 (citing *Iqbal*, 129 S. Ct. at 1951). The Court held that it did not because "Arab-Muslim men were responsible for the September 11 attacks, and 'it should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 389 (citing *Iqbal*, 129 S. Ct. at 1951). The Supreme Court held that "[o]n the facts, respondent allege[d] the arrests [Defendant] Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Iqbal*, 129 S. Ct. 1951. The Court found that "between that 'obvious alternative explanation' for the arrests...and the purposeful, invidious discrimination respondent ask[ed the Court] to infer, discrimination [was] not a plausible conclusion." *Id.* at 1951-52.

That analysis is directly relevant to this case. No policy has been instituted by the FCSO to target Latinos, and Plaintiff does not attempt to even identify such a policy. Instead, Plaintiff points out that ninety percent of the individuals arrested and detained under the Sheriff Department's 287(g) program were of Latino descent. Compl. ¶ 40. But that statistic should "come as no surprise" considering the great majority of aliens unlawfully present in this country are Latino. Passel, Jeffrey and Cohn, D'Vera, "A Portrait of Unauthorized Immigrants in the United States," April 14, 2009, Pew Hispanic Center ("About three-quarters (76%) of the

nation's unauthorized immigrants are Hispanic."); Department of Homeland Security, Washington, D.C., "Yearbook of Immigration Statistics 2008, Table 37: ALIENS REMOVED BY CRIMINAL STATUS AND REGION AND COUNTRY OF NATIONALITY" (92% of all criminal alien removals came from six countries whose populations were of Latino ethnicity). The only remotely possible "policy" that Plaintiff mentions are campaign promises by Sheriff Jenkins to make Frederick County safer by helping ICE to address the "nationwide illegal immigration problem," and the bald allegation that his electoral campaign was "based largely on promises of increased immigration enforcement." Compl. ¶ 12. If such campaign statements could for argument's sake constitute a "policy," the more "plausible" explanation is exactly what Plaintiff's concede the Sheriff promised—to lawfully, rather than arbitrarily, assist ICE in its enforcement of the nation's immigration laws—just as the more plausible explanation in *Iqbal* was that the defendant was lawfully, not discriminatorily, pursuing individuals they believed had terrorist connections. *Iqbal*, 129 S. Ct. at 1951-52. *Iqbal* and *Monroe* establish that simply identifying a percentage of arrested minorities, without also identifying an invidious official policy in place, cannot satisfy the equal protection analysis.

C. Discrimination Based on Unlawful Immigration Status is Reviewed Under Rational Basis Scrutiny.

Finally, if it were determined that Plaintiff has established that she was treated differently by the Deputies when she was arrested based on her violations of immigration law, such a classification would be based on her status as an alien unlawfully present in the United States. Status as an illegal alien is only entitled to rational basis scrutiny. *Plyler*, 457 U.S. at 218. When confronted with a challenge to a classification entitled to rational basis review, the Court must sustain such classification if it is "rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). Assisting the federal government in

enforcing its immigration laws clearly is a legitimate state interest. Congress recognized that interest, when it took the unusual step to enact as statutory public policy that it is a "compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). It would be absurd to think that the federal government, through its numerous enactments to encourage state and local officers to assist in the enforcement of immigration laws, did not also believe that it is at least a legitimate government interest to assist in the enforcement of such laws to further discourage illegal immigration.

Plaintiff Santos alleges that the Frederick County Sheriff's Department believes that assisting the federal governing in the enforcement of its immigration laws will help stop crime. *See* Compl. ¶ 12. Detaining illegal aliens for ICE, especially ones with outstanding immigration absconder warrants, clearly is rationally related to that legitimate government interest. As such, Plaintiff cannot state an equal protection claim.

VI. Plaintiff's 42 U.S.C. § 1985(3) Conspiracy Claim Must Be Dismissed.

Plaintiff's conspiracy claim must be dismissed for two reasons. First Plaintiff's §1985(3) claim should be dismissed because it relies on defective underlying claims which Plaintiff alleges the Deputies conspired to violate, namely violations of her equal protection right and her right to be free from unreasonable seizures, which themselves should be dismissed for failure to state a claim. *See supra.* Second, Plaintiff's conspiracy claim must be dismissed because she has not properly pled a § 1985(3) conspiracy.

To allege a § 1985(3) conspiracy claim, Plaintiff must allege the "existence of a conspiracy" and "some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." *C&H Co. v. Richardson*, 78 Fed. Appx. 894, 901 (4th Cir. 2003). Plaintiff must show "(1) a conspiracy; (2) for the purpose of depriving either directly

or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities of the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *Id.* Furthermore, the Supreme Court has stated that "the language requiring intent to deprive of equal protection, or equal privileges and immunities, means there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

First, such a claim must be dismissed because § 1985 claims must be pled with "specificity" and "vague and conclusory allegations unsupported by material facts will not be sufficient to state a claim." *Ctr. For Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 832 (6th Cir. 2009). All Santos has pled in her amended complaint was that the Deputies stopped the car and agreed to act in concert. Compl. ¶ 96. This allegation does not reach the specificity requirement for § 1985(3) claims.

Second, even if such allegations did meet the specificity requirements for a § 1985(3) claim, Plaintiff's Count IV must still be dismissed because she has not alleged a conspiracy. To establish a "conspiracy," Plaintiff must allege "an agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights." *Simmons v. Poe*, 47 F.3d 1370, 1377 (4th Cir. 1996). Specifically in "alleging unlawful intent in conspiracy claims under § 1985(3)," a plaintiff is "required" to "plead specific facts in a nonconclusory fashion to survive a motion to dismiss." *Id.* (quoting *Gooden v. Howard County*, 954 F.2d 960, 969-70 (4th Cir. 1992) (en banc)). Plaintiff Santos has not alleged any specific facts and certainly nothing more than conclusory statements. Plaintiff's only attempt to allege a conspiracy is the bald statement that "Defendants Openshaw and Lynch entered into an agreement, between and among themselves,

to act in concert for the purposes of depriving Ms Orellana Santos of equal protection under the law and her right to be free from unreasonable seizures." Compl. ¶ 96. This allegation does not survive the pleading requirements of § 1985(3).

Third, Plaintiff has not alleged that the acts were done for the purpose of depriving Santos of her equal protection under the laws or her right against unlawful seizure. It has already been established that nothing prevents a Maryland Sheriff's Deputy from enforcing federal law. *See supra.* Beyond that, Plaintiffs' allegations fail because at most they have alleged nothing more than what an officer is allowed to do—stop and ask questions regardless of his level of suspicion. *See supra.* As such, it is unclear how Plaintiff can allege that acts by the Deputies which are entirely lawful can somehow constitute a conspiracy to violate her rights.

Additionally, Section 1985(3) "only covers conspiracies against...classes who receive heightened protection under the Equal Protection Clause." *Richardson*, 78 Fed. Appx. at 902. Plaintiff in this case is an illegal alien and alleges that the purpose of the officer was to question her about her immigration status. Compl. ¶ 100. Illegal aliens are subject to "rational basis" scrutiny, and do not receive any "heightened protection" under the Equal Protection Clause. *Plyler*, 457 U.S. at 218. As such, Plaintiff cannot state a § 1985(3) cause of action.

VII. The Deputies are Entitled to Qualified Official Immunity.

If this Court were to find both that a § 1983 claim is the correct cause of action and that Plaintiff has properly pled Counts I-IV, the Court should still dismiss this suit because the Deputies are entitled to qualified immunity. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The Deputies are entitled to qualified immunity against Plaintiff's claims if "their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known." *Melgar v. Greene*, 2010 U.S. App. LEXIS 2020, 20 (4th Cir. 2010); *Estrada*, 2010 U.S. App. LEXIS 2390, *13 (*citing Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 526 (1st Cir. 2009) (*quoting Harlow v. Fitgerald*, 457 U.S. 800, 818 (1982)). The "right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The right is an objective one, *Harlow*, 457 U.S. at 818, and therefore does not include an inquiry into the officer's subjective intent or beliefs." *Anderson*, 483 U.S. at 639.

It is unclear how this court could determine that any of the allegations "violated a clearly established right." To decide whether a right is "clearly established," the court must "look to 'cases of controlling authority in this jurisdiction,' as well as the 'consensus of cases of persuasive authority' from other jurisdictions." *Amaechi v. West*, 237 F.3d 356, 363 (4th Cir. 2001). For purposes of pleading "unlawful arrest" and "unlawful seizure" based on Plaintiff's theory that the Deputies cannot enforce "civil immigration law," it has already been shown that no court has held that a state or local officer cannot enforce civil immigration laws and no federal law precludes such enforcement. *See supra* at III. Moreover, the Fourth Circuit does not distinguish between "civil" and "criminal" violations. *See Soriano-Jarquin*, 492 F.3d 495. The Deputies could not have violated a "clearly established right" of Santos by "enforcing civil immigration law" if no federal law and no court has expressly recognized that violation, and in actuality a "consensus of cases" have held, that the Deputies are not precluded from doing so by the INA. *See Amaechi*, 237 F.3d at 363 ("a reasonable person in the official's position" must be

able to have been on notice that his conduct violates a clearly established right.). As such, the Deputies are entitled to dismissal of the conspiracy claims, based on their qualified immunity.

The Deputies are also entitled to qualified immunity based on the pled facts themselves. To have properly pled unlawful arrest, Plaintiff would have to allege that there was no probable cause to arrest her. As explained, *supra*, the Deputies had "probable cause" to arrest for both "criminal" and "civil" immigration violations." However, for qualified immunity, the standard is even lower. In determining whether qualified immunity exists, the court must look at whether there was "arguable probable cause," not "probable cause in fact." *Brescher v. Von Stein*, 904 F.2d 572, 579 (11th Cir. 1992). The Court must determine whether a reasonable officer "possessing the same knowledge as the Defendants could have believed that probable cause existed to arrest the Plaintiff." *Id.* Here it is clear that the Deputies had "arguable" probable cause to arrest the Plaintiff for multiple offenses. Plaintiff had an NCIC warrant out for her arrest and had essentially admitted to either not carrying her registration documents or not registering at all in violation of federal law. The Deputies are clearly entitled to qualified immunity.

The recent decision in *Estrada* is particularly on point. In that case, the plaintiffs claimed that the defendant Rhode Island state trooper had violated their Fourth Amendment rights by asking about their immigration status, contacting ICE, and then transporting the aliens to the nearest ICE office, at the request of an ICE officer. *Estrada*, 2010 U.S. App. 2390. The Court held that based on the facts alleged in the complaint, that the officer knew that the plaintiffs could not produce identifications other than consulate cards, spoke limited English, and were headed to work, was enough to establish reasonable suspicion to contact ICE and to warrant qualified immunity. *Id.* at **18-19. Additionally, in granting qualified immunity to the trooper

for escorting the plaintiffs to the ICE office, the court held that the fact that the plaintiffs had effectively admitted to being in the country illegally, established that the trooper had probable cause to escort the plaintiffs to an ICE facility after detaining them. *Id.* at *22.

Additionally, the Deputies are entitled to qualified immunity for the alleged unlawful arrest of Santos because she was arrested pursuant to a facially valid warrant. An officer who relies on a facially valid warrant is entitled to qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 341 (1985).

As to the claim for "unlawful seizure," the question is again whether a reasonable officer would know he was violating a clearly established right. *Anderson*, 483 U.S. at 640. An officer is entitled to qualified immunity for "unlawful seizure" if a reasonable officer would believe there was reasonable suspicion for making such seizure. As explained, *supra*, no "seizure" occurred until, "[o]ne of the Defendants took the identification...and made hand gestures to her indicating she should stay seated." Compl. ¶ 51. The Deputies could not have violated a "clearly established right" up to that point, as they merely asked questions. Mere questioning has consistently been held to not constitute a seizure. *Monroe*, 579 F.3d at 386. The Deputies are also entitled to qualified immunity once the "seizure" subsequently occurred, because a reasonable officer would believe that he had a reasonable suspicion that the Plaintiff was violating a law. *See supra.*

Finally, the Deputies are entitled to qualified immunity against Plaintiffs § 1985(3) claim regarding equal protection. *Simmons v. Poe*, 47 F.3d 1370, 1385-86 (4th Cir. 1992). The Deputies are entitled to immunity because Courts have repeatedly held that merely asking questions is not a constitutional violation. *See supra* IV. If this Court finds that the Deputies' actions did violate that right, such right was not "clearly established right" given Supreme Court

and Fourth Circuit precedent holding that Defendant could take such actions. *See supra id.* Finally, the Deputies are entitled to qualified immunity because given the law in case law in this area, a reasonable officer would not believe that he had violated such right. *Simmons*, 47 F.3d at 1386.

The Deputies are also entitled to qualified immunity against Plaintiff's § 1985(3) claim involving whether Plaintiff was unlawfully arrested because the Deputies lacked authority under the immigration laws to arrest her. The Deputies are entitled to immunity because even if this Court determines that they lacked the authority to arrest her for violations of immigration laws, given the case law from this Circuit and other Circuits, the Deputies could not have violated a "clearly established right." Furthermore, a reasonable officer in the same position as the Deputies would believe that he had the right to arrest Plaintiff pursuant to her unlawful immigration status as well as the NCIC warrant for her arrest.

CONCLUSION

For the foregoing reasons, Plaintiff's Counts I-IV against Deputies Openshaw and Lynch should be dismissed for failure to state a claim upon which relief can be granted and because the Deputies are entitled to qualified immunity on all Counts. In the alternative, the case against Openshaw, Lynch, Sheriff Charles Jenkins, and the Frederick County Board of Supervisors should be bifurcated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of February, 2010, a copy of the foregoing Memorandum in Support of Motion to Dismiss by Defendants Frederick County Sheriff's Deputies Jeffrey Openshaw and Kevin Lynch or, in the alternative, to Bifurcate, was electronically filed, with notice to:

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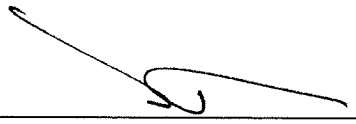

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