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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COMMITTEE FOR IMMIGRANT RIGHTS OF SONOMA COUNTY, FRANCISCO SANCHEZ-LOPEZ, CHRISTYAN SONATO-VEGA, and SAMUEL MEDEL MOYADO,

Plaintiffs,

v.

COUNTY OF SONOMA; SHERIFF-CORONER BILL COGBILL and DEPUTY SHERIFF MORRIS ERIC SALKIN, individually and in their official capacities; U.S. DEPARTMENT OF HOMELAND SECURITY, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT; SPECIAL AGENT MARIO HUELGA and SPECIAL AGENT CHRIS MERENDINO, individually and in their official capacities; DOES 1-50; and ROES 1-50, inclusive,

Defendants.

CASE NO. CV-08-4220-PJH

PLAINTIFFS' OPPOSITION TO COUNTY DEFENDANTS' MOTION TO DISMISS

Date: February 17, 2010
Time: 9:00 a.m.
Judge: Hon. Phyllis J. Hamilton

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INTRODUCTION

In their Motion to Dismiss ("County Mot.") Plaintiffs' Second Amended Complaint ("SAC"), County Defendants raise two main arguments. First, they repeatedly assert – without citation to supporting authority – that they cannot be liable for alleged unlawful arrests and detentions because the actions of County employees were "at the behest of" federal officers. The laws of the United States and California, however, require more of our county officials before they deprive people of their liberty; federal officers cannot compel county officials to violate the law. Second, County Defendants attempt to capitalize on recent developments in pleading requirements, ignoring many of Plaintiffs' specific allegations and the reasonable inferences that can be drawn from them. These arguments go too far, taking the "plausibility" standard to an absurd extreme by suggesting that Plaintiffs' claims must be dismissed because it is not "plausible" the County would have adopted policies that are contrary to law. On both arguments, and in the entirety of their motion, County Defendants fail to meet their burden to demonstrate that any claim should be dismissed. County Defendants' motion therefore should be denied.

STATEMENT OF ISSUES TO BE DECIDED

1. Are County Sheriffs authorized to make arrests and jail individuals for civil immigration violations based on federal immigration detainers?
2. Have Plaintiffs stated federal constitutional claims for damages and injunctive relief?
3. Have Plaintiffs stated a claim for relief under 42 U.S.C. § 1985(3) for conspiracy?
4. Have County Defendants adequately moved to dismiss Plaintiffs' claims under the California Constitution and state statutory law?
5. Are Defendants Cogbill and Salkin entitled to qualified, or any other, immunity?
6. Have Plaintiffs adequately alleged that their claims arise from official policies, practices and customs for § 1983 liability against the County?
7. Is the County immune from suit under the Eleventh Amendment or the California Government Code?

STATEMENT OF FACTS

For at least the last four years, the Sonoma County Sheriff's Department and Immigration and Customs Enforcement have worked together, using civil immigration laws to arrest and deport perceived "undocumented alien gang members." SAC ¶¶ 29-31. Plaintiffs allege that this

teamwork takes place though both joint patrols – where Defendants Huelga and Merendino and other ICE agents patrol *with* County employees such as Defendant Salkin – and separately, such as where a County officer identifies an individual and seeks ICE authorization to arrest of that person *on the basis of his suspected civil immigration violation.* SAC ¶¶ 30-33, 34-37. Arrests are made without a warrant and despite the absence probable cause of criminal activity or probable cause that the arrestee is present in violation of the immigration laws *and* "likely to escape before a warrant can be obtained." SAC ¶¶ 41-43 (citing 8 U.S.C. § 1357). Under both schemes, suspected civil immigration violators are arrested and taken into custody by County employees and held in the County jail for approximately four days, before they are transferred into ICE custody for civil immigration proceedings. *Id.* The only purported justification for holding these immigration detainees in County custody is an immigration detainer, Form I-247, addressed to the "Custodian of Records, Holds/Warrants/Detainers" for federal and state prisons, city/county jails, the U.S. Marshall's Service "or any subsequent law enforcement agency." SAC ¶¶ 39, 45, 85, 101. *See* Decl. of Julia Harumi Mass (filed March 12, 2009), Ex. A (Doc. No. 63). The form has spaces for the "name of alien," date of birth, and "date sentenced," among other categories of information, and reads, *inter alia*:

> **You are advised that the action noted below has been taken by U.S. Immigration and Customs Enforcement concerning the above-named *inmate* of your institution.**

Mass Decl., Ex. A (emphasis added).

Once booked into the County jail, civil immigration detainees do not receive notices that are required for warrantless immigration arrestees in federal custody. SAC ¶¶ 50-53. They are also denied any probable cause hearing, notice of the charges against them, notices concerning their rights in immigration proceedings, or even information about how long they will remain in County custody. SAC ¶¶ 54-55, 82, 86, 99, 104. For Plaintiffs Francisco Sanchez-Lopez and Christyan Sonato-Vega, being arrested and placed in the County jail without explanation and without having been engaged in (or charged with) any criminal offense was extremely distressing. SAC ¶¶ 87, 105.[1] Adding insult to injury, County and Federal Defendants

[1] Plaintiff Samuel Medel Moyado has moved for voluntary dismissal of his claims. *See* Doc. No. 148.

misclassify arrestees who are not gang members *as* gang members and cause them to be housed with Sureños (a predominantly Mexican gang) in the County jail. SAC ¶¶ 59-61, 84, 102. In addition, County Defendants impermissibly use race, national origin and/or Spanish surname to identify inmates who are in custody following criminal arrests for consideration by ICE for the issuance of immigration detainers. SAC ¶¶ 48-49.

ARGUMENT

I. STANDARD OF REVIEW

Rule 12(b)(6) motions are viewed with disfavor and are rarely granted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citations omitted). The moving party – here, County Defendants – has the burden of identifying defects in the complaint in support of its position that a claim has not been stated. *Sneed v. Carpenter*, 274 F.2d 414, 418 (9th Cir. 1960). A complaint need only include a "short and plain statement of the claim showing that the pleader is entitled to relief," and give the defendant "fair notice of what the . . . claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Legal conclusions can provide the complaint's framework, but they must be supported by factual allegations; a court should assume that all well-pleaded factual allegations are true, and then determine whether they plausibly give rise to an entitlement to relief. *Ashcroft v. Iqbal*, 129 S.Ct 1937, 1950 (2009) "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1950 (citing *Twombly*, 550 U.S. at 556).[2]

II. THIS COURT HAS ALREADY HELD PLAINTIFFS' HAVE STANDING TO SEEK INJUNCTIVE RELIEF.

In its July 31, 2009 Order, the Court held that Plaintiffs' original Complaint had adequately alleged an ongoing "pattern or practice of constitutional violations or policies

[2] County Defendants suggest that Plaintiffs' allegations based "upon information and belief" render their allegations conclusory. County Mot. at 1, n.2. Governing pleading standards say otherwise. *See, e.g.*, 5 Wright and Miller, Federal Practice and Procedure § 1224 (3d ed. 2009) ("permitting allegations on information and belief is a practical necessity").

promoting constitutional violations, including racial profiling" so as to establish standing to assert claims for injunctive relief. Order at 18, lines 5-19 (Doc. No. 121) (citing *Rodriguez v. California Highway Patrol*, 89 F.Supp.2d 1131, 1142 (N.D. Cal. 2000)). County Defendants, however, repeat their challenge to Plaintiffs' standing to seek injunctive relief, claiming that "two intervening events" warrant "renewed consideration of jurisdictional issues." County Mot. at 3; *cf.* County Mot. to Dismiss (Jan. 29, 2009) at 5-9 (Doc. No. 38). The first event – the *Iqbal* decision – was not only issued before the Court's previous Order, it was widely cited by the Court in its Order. With respect to the second event – "clarifications made in the SAC" – County Defendants fail to identify any changes to the SAC that purportedly warrant reconsideration of the Court's finding on standing. In any event, the court's previous ruling finding standing constitutes the law of the case, and may not now be reopened or relitigated. *See, e.g., Pitt River Home & Agric. Co-op. v. United States*, 30 F.3d 1088, 1096-97 (9th Cir. 1994); *NRDC v. Patterson*, 333 F. Supp. 2d 906, 914 (E.D. Cal. 2004) (on standing). County Defendants are not entitled to "another bite at the apple" regarding Plaintiffs' standing for injunctive relief. *Securities Investor Protection Corp. v. Vigman*, 74 F.3d 932, 938 (9th Cir. 1996).

III. THE COUNTY AND ITS AGENTS LACK AUTHORITY TO ENFORCE CIVIL IMMIGRATION LAW.

A. Sheriff Deputies Are Preempted from Arresting Individuals for Civil Immigration Law Violations.

By way of background, it is important to understand that civil immigration enforcement is entirely the responsibility of the federal government. In light of the extremely complex nature of civil immigration law, courts acknowledge that federal laws preempt state and local enforcement of civil immigration law. *See Gonzalez v. City of Peoria*, 722 F.2d 468, 474-76 (9th Cir. 1983) (holding that state law authorized police to enforce only criminal immigration laws; "[a]rrest of a person for illegal presence would exceed the authority granted [local] police by state law"), *partially overruled on other issue by Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1041 n. 1 (9th Cir. 1999); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 771 (C.D. Cal. 1995) ("*LULAC*") ("a state may not require its agents to (i) make independent

determinations of who is and who is not in this country in violation of immigration laws;[] (ii) report such determinations to state and federal authorities; or (iii) 'cooperate' with the INS, solely for the purpose of ensuring that such persons leave the country"). Moreover, given this exclusively federal responsibility, "Congress is prohibited by the Tenth Amendment from passing laws requiring states to administer civil immigration law." *Sturgeon v. Bratton*, 174 Cal. App. 4th 1407, 1412 (2009) (citing *City of New York v. United States*, 179 F.3d 29, 33-35 (2d Cir. 1999)).

In California, local law enforcement officers may only detain individuals with the requisite level of suspicion of *criminal* conduct, including criminal immigration violations. Under California Penal Code § 836, their arrest authority is limited to "public offenses" committed in the officer's presence or cases in which the officer has probable cause to believe the arrestee committed a felony. *Gates v. Super. Ct. of Los Angeles County*, 193 Cal. App. 3d 205, 218 (1987) (upholding trial court's finding that Los Angeles Police Department policy that allowed law enforcement officers to arrest immigrants for civil violations of federal immigration laws was constitutionally defective).[3] ICE alone has the authority to arrest individuals for civil immigration violations.

B. The Sheriff May Not Rely on Immigration Detainers to Initiate County Custody of Civil Immigration Detainees.

County Defendants provide *no* justification for its officers acting outside the scope of their arrest authority by arresting Plaintiffs Sanchez-Lopez and Sonato-Vega without a warrant or probable cause of criminal activity, except that the arrests were made "at the direction and at the behest of ICE Agents." County Mot. at 6; *also* 15, 20 (agreeing they do not have authority to arrest for civil immigration violations and asserting deputies "did not act on their own or without direction from ICE"). They cite no exception to Penal Code § 836 or the well-established rule

[3] There are important practical reasons for this rule, *e.g.*, local police departments do not have the training or expertise to enforce federal immigration laws. *See, e.g.*, *LULAC*, 908 F. Supp. at 770 ("Permitting state agents, who are untrained – and unauthorized – under federal law to make immigration status decisions, incurs the risk that inconsistent and inaccurate judgments will be made."). Moreover, local law enforcement of civil immigration laws would undermine community policing efforts, diverting local police resources from their primary duties and deterring victims or witnesses from reporting crimes to the police.

that local law enforcement agents *are preempted* from making civil immigration arrests. *See Sturgeon*, 174 Cal. App. 4th at 1412. And, indeed there is none. For even under § 287(g) agreements, wherein local law enforcement agencies voluntarily contract with ICE to assist in civil immigration enforcement, arrests by local law enforcement agents are limited to criminal arrests. *See* 8 U.S.C. § 1357(g); DHS Press Release, "Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements" (July 10, 2009)[4] (revising form § 287(g) agreements to require local law enforcement agencies to "pursue all criminal charges that originally caused the offender to be taken into custody" in order to prevent arrests for minor offenses "as a guise to initiate removal proceedings").[5]

8 C.F.R. § 287.7 is the sole legal authority the County cites for its ongoing practice and custom of arresting individuals without a warrant or probable cause of criminal activity, and holding them in the jail with no probable cause hearing or other Fourth Amendment or due process procedures. But County Defendants disclaim *any* responsibility for understanding the limitations or requirements of § 287.7 or the federal civil immigration law they are "assisting" in "enforcing." County Mot. at 20; *see also* SAC ¶ 40 (alleging ICE, Sonoma County, and Sheriff Cogbill "do not provide adequate training to the deputy sheriffs regarding the law and regulations governing ICE detainers, or any federal immigration law"). As Plaintiffs explain in detail in their opposition to the Federal Defendants' Motion to Dismiss the SAC, § 287.7 does not authorize the initiation of custody by local agencies for civil immigration violations. Rather, by a plain reading of its terms, as well as legislative history, subsequent agency statements, and case law, that regulation authorizes the issuance of immigration detainers to *briefly prolong* the detention of individuals already in custody on some other basis so that ICE can take custody of

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[4] http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

[5] *See IMMIGRATION ENFORCEMENT: Better Controls Needed Over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, United States Government Accountability Office (January 2009), at http://www.gao.gov/new.items/d09109.pdf at 13 ("according to ICE officials and other ICE documentation, 287(g) [§ 1357(g)] authority is to be used in connection with an arrest for a state offense" and "the processing of individuals for possible removal is to be in connection with a conviction of a state or federal felony offense").

the person soon after he would otherwise be released from local custody. *See* Pls.' Opp. to Fed. Mot. Sec. II (filed concurrently herewith).

Plaintiffs in no way dispute that County Defendants can communicate with ICE regarding the citizenship or immigration status of any individual, as long as they do not use race as a motivating factor to determine whom to report to ICE. *See* 8 U.S.C. §§ 1644, 1373. Plaintiffs also do not seek judicial intervention in "the Sheriff's executive authority to assist ICE," *except* to the extent that County Defendants' *actual practices* violate the limits on their authority. *See* County Mot. at 5 (arguing lack of justiciability due to federalism concerns). What Plaintiffs challenge here is County Defendants' unprecedented practice of arresting and housing individuals in the County Jail based only on civil immigration detainers, without warrants or probable cause of criminal activity. With the exception of their hollow invocation of § 287.7, County Defendants have failed to provide *any* legal analysis in support of that practice.

IV. PLAINTIFFS HAVE STATED § 1983 CLAIMS AGAINST COUNTY DEFENDANTS FOR DAMAGES.

County Defendants simply cannot hide behind federal legal authority when it suits them, but then exploit the federal detainer process to engage in a systematic process of eliminating perceived "undocumented alien gang members" from the community. As explained below, Plaintiffs Sanchez-Lopez and Sonato-Vega have adequately alleged that Defendants Cogbill and Salkin violated their well-established constitutional rights.

A. The Alleged Constitutional Violations Were Carried Out Under Color of State Law.

County Defendants argue that § 1983 is inapplicable because they acted under "color of federal law."[6] County Mot at 6. Not so. ICE agents cannot stop vehicles without reasonable suspicion that the occupants are present in the United States without authorization. *United States*

[6] *Billings v. United States*, cited by County Defendants, is inapposite. 57 F.3d 797, 801 (9th Cir. 1995) (arrest in question was "initiated and effected solely by the Secret Service Agents, pursuant to the procedures and protocols of their [federal] agency"). In addition, County Defendants' participation in the joint operation also goes well beyond the mere sharing of information at stake in *Scott v. Rosenberg*. 702 F.2d at 1269 (finding no evidence that federal employees participated in investigation or asked state investigators to provide them information about it), *cert. denied*, 465 U.S. 1078 (1984).

v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (border patrol officers "may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country"). For this reason, the scheme challenged here depends on the concerted action of local officers, under color of *state* law, to detain persons on some (pretextual or not) state law basis, and then turn them over to ICE agents for immigration-related questioning (or conduct the questioning themselves). *See, e.g.*, SAC ¶¶ 75, 82, 92, 93, 103 ("Defendants Merendino, Huelga, and *Salkin* stopped the car"; Defendant *Salkin* put Sanchez-Lopez in handcuffs and walked him over to a Sonoma County Sheriff's patrol car"; "[Plaintiff and girlfriend] were ordered to stop by two MAGNET officers, Defendant *Salkin* and an unknown DOE Defendant;" "*Salkin* immediately ordered Sonato-Vega to "stop;" "Contrary to Sonato-Vega's request, Defendants County, *Cogbill*, and DOE Defendants housed him with Sureño inmates...."). Most obviously, arrestees are being booked in the *County* jail, rather than taken into federal immigration custody. SAC ¶¶ 38-39.

Moreover, the fact County Defendants' alleged conduct is outside their authority under state law or in violation of state or federal law is beside the point. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'" *Scott v. Rosenberg*, 702 F.2d 1263, 1269 (9th Cir. 1983) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *see also Flagg Bros. v. Brooks*, 436 U.S. 149, 157, n.5 (1978); *Green v. Dumke*, 480 F.3d 624, 629 (9th Cir. 1973).

B. Plaintiffs Have Alleged Violations of Clearly Established Fourth Amendment Rights By County Defendants.

Plaintiff Sonato-Vega has made specific allegations of Defendant Salkin personally and directly violating Sonato-Vega's clearly-established Fourth Amendment rights.[7] Defendant Salkin stopped Sonato-Vega without reasonable suspicion of criminal activity and subjected him

[7] Plaintiffs do not allege Defendant Cogbill was personally involved in the challenged conduct, but do assert his liability as a supervisor who "set in motion" the policies and practices that led to Plaintiffs' injuries. *al-Kidd v. Ashcroft*, 580 F.3d at 965. *See infra* at 20.

and the vehicle in which he was traveling to a search without probable cause of criminal activity or reasonable suspicion that he was armed and dangerous or that he had a weapon in the car. SAC ¶¶ 26, 30-35, 42, 62-64, 135(a), 151(a); *Terry v. Ohio*, 392 U.S. 1, 26 (1968) (limited exception to probable cause requirement allowing limited seizure where there "are facts sufficient to warrant a belief that the person has committed or is committing a crime"); *United States v. Grigg*, 498 F.3d 1070, 1074-75 (9th Cir. 2007). Salkin prolonged the stop beyond any legitimate purpose to question Sonato-Vega about his immigration status. SAC ¶¶ 135(b), 151(b); *see also Florida v. Royer*, 460 U.S. 491, 500 (1983) (*Terry* stop must be "temporary" and last no longer than is necessary to effectuate the purpose of the stop.")

Plaintiffs have also alleged that Defendant Salkin was an integral participant in violations of Sanchez-Lopez's clearly-established rights. *See Hopkins v. Bonvicino*, 573 F.3d 752, 770 (9th Cir. 2009) ("integral participants" in constitutional violations are liable "even if they did not directly engage in the unconstitutional conduct themselves"); *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004) (denying qualified immunity for officer who was aware and provided armed back-up to officer using explosive device). Salkin was part of the group of officers that stopped the car, and he was present while Federal Defendants Merendino and Huelga subjected Sanchez-Lopez to searches without reasonable suspicion that he was armed and dangerous and unreasonably prolonged his detention to question him about his immigration status, beyond the scope of the initial stop.[8] *See Florida*, 460 U.S. at 500.

Defendant Salkin arrested both Sonato-Vega and Sanchez-Lopez without a warrant and without probable cause of criminal activity, in violation of well-established Fourth Amendment law *and* federal immigration preemption law. *Virginia v. Moore*, 553 U.S. 164 (2008) (police can make warrantless arrest with probable cause of crime); *Gates v. Super. Ct.*, 193 Cal. App. 3d at 218 (California peace officers preempted from enforcing civil immigration law). *See also* 8 C.F.R. § 287.5(c) (listing types of immigration officers with authority to exercise warrantless

[8] While the driver was questioned about a "For Sale" sign, Plaintiffs do not concede that there was reasonable suspicion of a traffic violation to justify the stop. The driver was not cited for any reason. Moreover, even if there was reasonable suspicion of a traffic violation, there were no additional "suspicious facts" that would justify prolonging the detention.

arrest power upon completion of adequate training). Even assuming direction from ICE could authorize Salkin's arrest, the arrests violated well-established limits for warrantless civil immigration arrests as well. *See* 8 U.S.C. § 1357 (warrantless arrest authorized only where agent has reason to believe the alien is unlawfully present in the United States and is likely to escape before a warrant can be obtained); *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995) (warrantless arrests illegal under 8 U.S.C. § 1357(a)(2) where "the INS did not allege nor do appellants concede the existence of grounds for a reasonable belief that they were particularly likely to escape"); *United States v. Khan*, 324 F.Supp.2d 1177, 1187-88 (D. Colo. 2004) (suppressing statements made within 48 hours of unlawful arrest, where probable cause to believe immigration violations but no probable cause of flight risk). And because the arrests were illegal, the searches incident to those unlawful arrests also violated clearly established Fourth Amendment rights. *Cf. United States v. Robinson*, 414 U.S. 218, 226 (1973) (search incident to lawful arrest permitted).

County Defendants cite no authority that permits Sheriff's deputies to take custody of individuals, including Sanchez-Lopez and Sonato-Vega, based on civil immigration violations alone.[9] As stated above, the immigration detainers contain no such permission, since the "face" of the detainer itself gives several indications that it is not intended to act as a warrant authorizing arrest.[10] Given also the usual legal meaning of the word "detainer" and well-established purpose of immigration detainers to *prolong* rather than *initiate* local custody for civil immigration purposes, County Defendants were *not* entitled to rely on a detainer to justify such an unprecedented assertion of authority.[11] *See* Pls.' Opp. to Fed. Mot. Sec. II.

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[9] Although the County disclaims responsibility for making immigration arrests, it is well established that persons in state or federal criminal custody for whom immigration detainers have issued are not in federal immigration custody. *See Campos v. I.N.S.*, 62 F.3d 311, 314 (9th Cir. 1995).

[10] For example, the form reads, "You are advised that the action noted below has been taken by U.S. Immigration and Customs Enforcement concerning the above-named *inmate* of your institution." "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 quarters assignments . . ." "Notify this office of the time of release at least 30 days prior to release or as far in advance as possible." Mass Decl., Ex. A (Doc. No. 63) (emphasis added).

[11] Courts do not uphold seizures based on facially deficient warrants. *See United States v. Leon*, 468 U.S. 897, 923 (1984) ("a warrant may be so facially deficient – i.e., in failing to particularize ... the things to be seized – that the executing officers cannot reasonably presume it to be valid"); *United States v. Crozier*, 777 F.2d 1376, 1379, 1381 (agent cannot reasonably rely on overbroad and vague warrant authorizing seizure of "evidence of violation" of statutes).

Finally, County Defendants seem to misunderstand Plaintiffs' final subclaims under the Fourth Amendment, *i.e.*, that failure to provide probable cause determinations within 48 hours of warrantless arrest or initiation of the immigration detainer-based prolonged custody violates the rule set forth in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The Fourth Amendment requires that custodial officials provide an arrestee a *prompt* probable cause hearing before a neutral magistrate on the violations cited to justify the arrest. *Gerstein v. Pugh*, 420 U.S. 103, 105, 114 (1975). Officials have presumptively unconstitutionally delayed a hearing if they wait longer than 48 hours to provide the hearing. *McLaughlin*, 500 U.S. at 56, 57; *accord Gorromeo v. Zachares*, 15 Fed.Appx. 555, 557 (9th Cir. 2001).

The *McLaughlin* rule is not limited to criminal arrests, but applies to administrative detentions as well. *See United States v. Adekunle*, 2 F.3d 559, 562 (5th Cir. 1993) (holding *McLaughlin*'s 48-hour time limit applicable to border detention by customs officials to determine reasonableness of detention); *United States v. Onyema*, 766 F.Supp. 76, 81-84 (E.D.N.Y. 1991) (same); *United States v. Contreras*, 197 F.Supp.2d 1173, 1173-74, 1175-77 (N.D. Iowa 2002) (holding *McLaughlin* applicable to defendant's detention for 35 days without judicial reasonableness determination on drug charges with INS hold based on civil immigration violations); *but see Rhoden*, 55 F.3d 428, 432 n.7 (9th Cir. 1995) (*McLaughlin* did not apply to detention at border). As an integral participant in a policy, custom and practice that denied probable cause hearings to civil immigration detainees, and as Sanchez-Lopez's and Sonato-Vega's arresting officer, Salkin is liable for the violation of their clearly-established rights to a timely probable cause hearing.[12]

Even if the true purpose of these stops was gang or immigration enforcement, the Fourth Amendment analysis is the same. Being a member of a street gang is not a crime, and indicia of gang membership do not justify stops and searches under the Fourth Amendment. *People v. Rodriguez*, 21 Cal. App. 4th 232, 239 (1993). Stops made in the course of joint operations aimed

[12] Plaintiff Committee for Immigrant Rights of Sonoma County ("Committee") also seeks injunctive relief against County's failure to provide probable cause hearings pursuant to *McLaughlin* for people, arrested on criminal grounds, whose detentions are *prolonged* pursuant to an immigration detainer after the individual would otherwise be released from County custody. SAC ¶ 135(g).

at targeting undocumented alien gang members must be supported by reasonable suspicion of criminal activity or unlawful presence. *See Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971). That suspicion cannot be predicated on the detained person's racial characteristics or location in a particular neighborhood, and questioning regarding immigration status can only be justified by reasonable suspicion regarding the legitimately detained person's immigration status. *United States v. Rodriguez*, 976 F.2d 592, 595 (9th Cir. 1992); *Nicacio v. INS*, 797 F.2d 700, 703 (9th Cir. 1985) (Mexican appearance insufficient to justify stop in areas where INS suspected high concentration of illegal aliens). Plaintiffs have alleged the policy and practice as well as detailed facts regarding individual instances of Defendants stopping and questioning Latinos in Sonoma County without adequate justification, prolonging detentions and engaging in searches without probable cause of criminal activity or reasonable suspicion that the persons stopped are armed and dangerous, arrests beyond the authority of the arresting officers, and failure to bring arrestees before a neutral magistrate within 48 hours of being brought into custody. Therefore, County Defendants' motion to dismiss Plaintiffs' claims under the Fourth Amendment should be denied.

C. Plaintiffs Have Alleged Violations of Clearly Established Equal Protection Rights By Individual County Officers.[13]

Plaintiffs' allegations also describe ongoing practices and individual instances of, "unfortunately, an all too familiar set of circumstances – an intrusive law enforcement stop and seizure of innocent persons on the basis of suspicions rooted principally in the race of 'the suspects.'" *See Washington v. Lambert*, 98 F.3d 1181, 1182, 1187 (9th Cir. 1996) (acknowledging disproportionate burden of intrusive police conduct on African-American and Latino males). "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). To prove an equal protection violation,

[13] As noted by County Defendants, Plaintiffs' allegations with respect to equal protection are directly relevant to their Title VI claim and state civil rights claims. However, as discussed below, the California Constitution and Gov't Code § 11135 provide broader relief than their federal counterparts. *See infra* Section VI.

discrimination need not be the sole motivation for the conduct, as long as it is a "motivating factor." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

Plaintiffs agree with County Defendants that the "fact that a person is a particular race or national origin" *alone* is not enough to draw an inference of discrimination and that instead, the defendant must have acted "'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." County Mot. at 17 (quoting *Iqbal*, 129 S.Ct. at 1951). But, Plaintiffs allege that MAGNET has an ongoing practice and custom of using race as a *motivating* factor for its law enforcement actions and that Defendant Salkin – alone and as a part of a MAGNET team – used race as a factor to target Plaintiffs Sanchez-Lopez and Sonato-Vega. SAC ¶¶ 75, 77-80, 92-94, 97-98.[14] *See Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533-540 (6th Cir. 2002) (no qualified immunity on summary judgment where question of fact whether state trooper relied on race to prolong traffic stops for immigration questioning); *Rodriguez*, 89 F.Supp.2d at 1140-41. County Defendants' suggestion that their "legitimate and lawful" law enforcement objectives, including targeting criminal gangs, are "obvious alternative explanations," for their conduct begs precisely the same question. *See* County Mot. at 4, 17, 23 (citing *Iqbal*, at 1951-52). Plaintiffs do not suggest that MAGNET operates under a facially discriminatory policy against Latinos. Rather, Plaintiffs claim that its officers consciously and impermissibly use race (and engage in other unlawful conduct) in furtherance of presumably legitimate law enforcement objectives.

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."

[14] Plaintiffs' allegations, therefore, are unlike those in *Ivey* or *Iqbal*, cited by County Defendants. *See Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982) (allegations not supported by reference to specific actions, practices, or policies of defendants); *Iqbal*, 129 S.Ct. at 1945, 1948-49 (complaint failed to allege that prison housing decisions were based on race). Indeed, *none* of County Defendants' authority requires allegations of "derogatory statements," and all recognize that such facts may not be available at the pleadings stage. *See Ibrahim v. Dep't of Homeland Security*, 2009 WL 2246194, at *10 (N.D. Cal., July 27, 2009) (complaint alleged only that TSA detention and inclusion on federal no-fly list was motivated by race or religion, with no supporting facts); *and Smith v. Commonwealth of Virginia*, 2009 WL 2175759, at *4 (E.D. Va., July 16, 2009) (complaint alleged only that plaintiff was African-American and that his voter's registration was denied, with no other facts that "remotely suggest" race was the basis for denial).

Vill. of Arlington Heights, 429 U.S. at 265.[15] Because direct evidence of discrimination, such as a racist remark or other "smoking gun," is rare, a plaintiff making such allegations generally relies on circumstantial evidence. In *United States v. Ortiz-Hernandez*, the court determined that the "stop, arrest, and search of a defendant" who had done nothing incriminating "were based at least in part on his race" despite the absence of direct evidence, such as discriminatory remarks, from the record. 276 F.Supp.2d 1113, 1117 (D. Or. 2003) (finding it "hard to envision" a non-Hispanic being arrested after only "walking to and using a public telephone outside a large public grocery store in the middle of the afternoon, then being picked up in a car."); *see also Lacy v. Villeneuve*, 2005 WL 3116004, at *4 (W.D. Wash. Nov. 21, 2005).

Here, Plaintiffs have alleged both the legal conclusion that race is a motivating factor for MAGNET's ongoing operations and specific facts that raise the necessary inference of discrimination.[16] Most telling were the experiences of Plaintiffs Sanchez-Lopez and Sonato-Vega themselves.[17] With the stated goal of arresting "undocumented alien gang members," a MAGNET team, including Defendant Salkin, pulled over a car with Latino occupants to ask about a "For Sale" sign in the back window. The driver was not cited for any traffic infraction, yet Plaintiff Sanchez-Lopez was removed from the car, interrogated about gang affiliations, and searched without reasonable suspicion that he was engaged in criminal activity, illegally present,

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[15] Most courts are lenient in allowing issues to withstand dismissal especially where the "motion raises latent fact issues such as motive, intent, knowledge, or credibility and the moving party has exclusive control over those facts." *See Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 981 (C.D. Cal.1999) (citations omitted); *Meijer, Inc. v. Ferring B.V. (In re DDAVP Direct Purchaser Antitrust Litigation)*, 585 F.3d 677 (2d. Cir. 2009).

[16] Among other things, Plaintiffs also allege disparate impact, which can support an inference of discriminatory intent. *See, e.g.*, SAC ¶¶ 72, 216. *See Washington v. Davis*, 426 U.S. at 242 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another"); *see Rodriguez*, 89 F. Supp. 2d at 1141, n. 7.

[17] Plaintiff Committee seeks injunctive relief from County officers using race as a factor in deciding to contact ICE to seek immigration detainers for arrests outside ICE officers' presence, when classifying criminal arrestees as gang members and making decisions regarding placement in jail, and using race, Spanish surname, or national origin as a motivating factor recommend inmates for consideration by ICE as subjects of immigration detainers. SAC ¶ 141. As explained above, Plaintiffs do not dispute County Defendants' prerogative to contact ICE regarding a person's citizenship and immigration status, *as long as race and national origin are not motivating factors in Defendants' actions*. County Defendants' duties regarding consular notification and state law requirements for contacting ICE regarding drug arrestees reasonably believed to be undocumented do not undercut Plaintiffs' insistence that such processes be carried out in a non-discriminatory manner. *See* County Mot. at 14. These duties also do not impose any affirmative obligation on County officers to question inmates about their alien status. *See* Cal. Penal Code § 834c; Cal. Health & Safety Code § 11369.

or armed and dangerous. Defendant Salkin then arrested Sanchez-Lopez based on a suspected civil immigration violation, mocking him in front of his companions in the process. Finally, *despite the lack of indicia of gang membership and Sanchez-Lopez's denial of gang affiliation*, Defendant Salkin mischaracterized Sanchez-Lopez as a gang member and he was housed with Sureños in the County Jail. SAC ¶¶ 31, 74, 76, 78, 81, 82, 84.[18] Like the Plaintiff in *Ortiz-Hernandez*, it is "hard to envision," given the purpose of MAGNET's mission, that a white passenger in the car would have been searched and interrogated, or that a white criminal arrestee would be misclassified as a Sureño at the Jail against his own statements.

Sonato-Vega was *also* a passenger in a car whose driver was not cited for any reason and was targeted by Defendant Salkin for questioning and an aggressive pat-down search without reasonable suspicion of criminal activity. Thereafter, Defendant Salkin confronted Sonato-Vega at his place of employment, with ICE Agent Huelga – despite the fact that Sonato-Vega *had declined to answer Salkin's previous questions about his immigration status.*[19] SAC ¶¶ 92-99. Defendant Salkin's partner used profanity toward Sonato-Vega, called him "illegal," and mocked him during his pat-down search. SAC ¶ 99. Salkin and a DOE Defendant classified Sonato-Vega as a Sureño despite a lack of reliable indicia and in spite of Sonato-Vega's disclaiming gang membership, and *specifically asking* to be housed with non-gang-affiliated inmates. SAC ¶¶ 30-32, 34-35, 62-64, 68, 75 77-80, 84, 92-94, 97-98, 103. These detailed factual allegations "raise a reasonable expectation that discovery will reveal evidence" in support of Plaintiffs' equal protection claims. *al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009) (quoting *Twombly*, 550 U.S. at 556). Therefore, County Defendants' motion to dismiss Plaintiffs' Equal Protection claims should be denied.

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[18] Contrary to County Defendants' assertions, Plaintiffs do not challenge Defendants' practice of segregating inmates by gang membership. County Mot. at 19. Instead, Plaintiffs contend that the County violates equal protection by using race as a *proxy* for gang membership, *i.e.*, by having used race to *mis*classify Plaintiffs Sanchez-Lopez and Sonato-Vega as gang members. *See Johnson v. California*, 543 U.S. 499, 511 (2005) ("When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers.").

[19] Reasonable suspicion of unlawful presence cannot be based on a failure to answer officer's questions or refusal to cooperate with immigration officer. *Murillo v. Musegades*, 809 F.Supp. 487, 498-99 (W.D. Tex. 1992).

D. Plaintiffs Have Alleged Violations of Clearly Established Fourteenth Amendment Rights to Due Process By Salkin, Cogbill, and DOES 1-50.

With respect to Plaintiffs' procedural due process rights, whether the protections of 8 C.F.R. § 287.7 or some other "process" is due depends on the balance between Plaintiffs' interests in their liberty and the minimal imposition that compliance with such process would impose on the County. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (procedural due process balances private interest at stake, risk of erroneous deprivation of that interest through procedures used, and government's interest). The SAC describes the distress suffered by Plaintiffs' incarceration in the County jail without notice of the charges against them (there were none), information about what would happen to them, or notice of their right to a hearing with counsel. SAC ¶¶ 82, 86, 87, 99, 104, 105. County Defendants offer no basis for their failure to provide even minimal notice of what was happening to Plaintiffs in their custody. While discovery is necessary to ascertain the government's interest, the presumption that ICE generally complies with the requirements of §287.7 for civil immigration detainees in *its* custody suggests that the requirements are not overly burdensome.[20]

As to substantive due process, County Defendants' imposition of pretrial detention without *any* lawful authority conflicts with our nation's "concept of ordered liberty." *See United States v. Salerno*, 481 U.S. 739, 755 (1987). "[G]overnment detention violates [the Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections . . . or, in certain special and 'narrow' non-punitive 'circumstances,' . . . where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citing *Salerno*, 481 U.S. at 746); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (citations omitted)). Here, County Defendants fail even to argue that the categorical detention of individuals without a lawful criminal basis and on the basis of suspected immigration status alone is "narrowly tailored to serve a compelling

[20] Plaintiff Committee also seeks to enjoin the denial of *any* process, such as notice and an opportunity to be heard, prior to the additional four day detention imposed upon inmates who would otherwise be released from custody but for the issuance of immigration detainers. SAC ¶ 147(d).

government interest." *See Salerno*, 481 U.S. at 749-51; *Zavala v. Ridge*, 310 F.Supp.2d 1071, 1075-77 (N.D. Cal. 2004) (regulation permitting automatic detention of individuals pending government appeal from bond order violates due process because no special justification exists that outweighs individual's constitutionally protected interest in avoiding physical restraint).

V. PLAINTIFFS HAVE SUFFICIENTLY STATED CLAIMS FOR CONSPIRACY.

To prove the existence of a conspiracy, even at the summary judgment stage, proof of an agreement to conspire "need not be overt, and may be inferred on the basis of circumstantial evidence such as the actions of the defendants." *See Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1301-02 (9th Cir. 1999) (citations omitted); *also Hampton v. Hanrahan*, 600 F.2d 600, 621, *rev'd on other grounds*, 446 U.S. 754 (1980). "[S]howing that the alleged conspirators have committed acts that are unlikely to have been undertaken without an agreement may allow a jury to infer the existence of a conspiracy." *Mendocino*, 192 F.3d at 1301 (citing *Kunik v. Racine County*, 946 F.2d 1574, 1580 (7th Cir. 1991)). Even after *Twombly*, courts in this circuit recognize they may not apply a heightened pleading standard to a plaintiff's allegations of conspiracy. *See Pizarro v. Schultz*, 2009 U.S. Dist. LEXIS 97161 at *9 (E.D. Cal. 2009) (citations omitted).

Plaintiffs' allegations make clear an agreement is in place between County Sheriff's officers and ICE agents, with Defendant Cogbill's approval. Plaintiffs allege, for example: Defendant Cogbill's confirmation of regular joint patrols and the use of immigration detainers to justify County custody without probable cause of criminal activity and the concerted actions taken by Defendants Salkin, Merendino, Huelga and other officers on patrol, including their joint decisions to stop Latinos on apparently pretextual grounds, their mutual silence with respect to rights or charges when taking Plaintiffs' into custody, and their understood arrangement to hold Plaintiffs in County Jail before turning them over to ICE custody. SAC ¶¶ 29, 64, 74, 82, 93, 99, 100.

Plaintiffs have also alleged circumstantial evidence of an agreement to use race as a factor in carrying out MAGNET's mission. *See* July 31, 2009 Order at 30 (Doc. No. 121) (plaintiffs must demonstrate that the deprivation of the right was motivated by "some racial, or

perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action") (citing *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992)). This motivation requirement is not a test of "specific intent to deprive a person of a federal right" and does not require "willfulness." *Griffin v. Breckenridge*, 403 U.S. 88, 102 n.10 (1971). Here, Plaintiffs' allegations in support of their equal protection claims lead to the reasonable inference that race-based animus underlies Defendants' conspiracy, *i.e.*, that County and Federal Defendants shared an understanding that race was an appropriate factor for identifying individuals to contact, question, search, detain, and arrest in furtherance of their ongoing joint goal of targeting "undocumented alien gang members."

Ultimately, whether Defendants have been involved in an unlawful conspiracy is a factual issue – claims survive "so long as there is a possibility that the jury can 'infer from the circumstances (that the alleged conspirators) had a 'meeting of the minds' and thus reached a[n] understanding' to achieve the conspiracy's objectives.'" *Hampton*, 600 F.2d at 621 (citations omitted). Because any non-circumstantial evidence of the conspiracy can only come from adverse witnesses in this case, Plaintiffs should be entitled to test their allegations through discovery. *See Twombly*, 550 U.S. at 556; *Ibrahim*, 2009 WL 2246194, at *10.

VI. CALIFORNIA'S CONSTITUTION AND STATUTES PROVIDE BROADER RIGHTS THAN THE U.S. CONSTITUTION.

Defendants err in stating that the analysis of claims under the California Constitution and statutes is identical to the U.S. Constitution and fail to meet their burden in moving to dismiss Plaintiffs' state claims.[21] The California Constitution is broader than its federal counterpart. For example, under the California Constitution, a traffic stop must be supported by a *subjective* suspicion of criminal activity that is objectively reasonable under the circumstances. *See In re Tony C.*, 21 Cal. 3d 888, 893 (1978).[22] For this reason, a pretextual traffic stop – such as one

[21] *Sanchez v. County of San Diego*, 464 F.3d 916 (9th Cir. 2006), does not support Defendants' position. In *Sanchez*, the Ninth Circuit merely found that *Parrish v. Civil Service Commission*, 66 Cal. 2d 260 (1967), did not establish broader rights under Article I, § 13 than the Fourth Amendment because *Parrish* was decided under federal, rather than state law *See Sanchez*, 464 F.3d at 930. The court did not purport to address all of the cases that have since established what *Parrish* did not.

[22] Although *Tony C.* is no longer relevant to criminal cases for the purpose of excluding evidence, it still defines the substantive reach of the "independent and more exacting standards of article I, section 13" in civil cases. *In re Lance W.*, 37 Cal. 3d 873, 879 (1985).

based on broken headlamp, that was really intended to pave the way for civil immigration enforcement – could be actionable under Article I, § 13, even if it were not actionable under the Fourth Amendment's objective reasonableness test. *See Whren v. United States*, 517 U.S. 806, 814 (1996). Similarly, the state constitution provides stronger scrutiny for equal protection claims. *See, e.g. Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17-20 (1971) (finding that gender is suspect classification, whereas U.S. Constitution had not).

Finally, California state due process analysis differs from federal analysis in that a claimant does not have to establish a recognized property or liberty interest to invoke due process protection. *See, e.g., Ryan v. Calif. Interscholastic Fed'n*, 94 Cal. App. 4th 1048, 1069 (2002). The focus, instead, falls on "the individual's due process liberty interest to be free from arbitrary adjudicative procedures." *Id.* In addition, California's balancing test for procedural due process violations includes an additional factor: "the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official." *People v. Ramirez*, 25 Cal. 3d 260, 269 (1979).[23]

Plaintiffs' state statutory claims are also broader than the federal constitution provides. For example, under California law, a plaintiff may bring a claim for discrimination in state-funded programs under Cal. Gov't Code § 11135 under a disparate impact theory without the need to prove intentional discrimination, as required by the Equal Protection Clause and Title VI. *Darensburg v. Metro. Transp. Comm'n*, 611 F.Supp.2d 994, 1041-43 (N.D. Cal. 2009). *See* SAC ¶ 216. The Bane Act, Civil Code § 52.1, also provides broader protection than the state and federal constitutions in that it provides for statutory damages for every instance of "interference" with the exercise of rights guaranteed by *law*, and is not limited to constitutional violations. While Plaintiffs' supporting allegations in their Thirteenth Claim for Relief do not reference particular laws, Plaintiffs would argue, for example, that Defendant Salkin is liable for arrests

[23] Plaintiffs concede that following *Katzberg v. Regents of Univ. of Cal.*, 29 Cal. 4th 300 (2002), damages are not available for their due process and equal protection claims under the California Constitution. However, their Article 1, § 13 claims are tied to the common law torts of false arrest and false imprisonment, and Cal. Civ. Code § 52.1, and damages remain available for violations of that constitutional provision. *Id.* at 303-04.

made outside the parameters of Penal Code § 836 even if such arrests were held not to violate the Fourth Amendment. *See* Cal. Civ. Code § 52.1.

Thus, Defendants' claim that the analysis of state and federal constitutional claims and state statutory claims are "[c]onveniently" the same has no merit. *See* County Mot. at 21.

VII. DEFENDANT COGBILL IS LIABLE FOR DAMAGES.

Defendant Cogbill is sued in his official capacity for injunctive relief and in his individual capacity for damages.[24] As to his individual capacity, Plaintiffs do not allege that Defendant Cogbill participated directly, but as a supervisor who "set in motion" the challenged practices, who failed to train his subordinates on the requirements for warrantless immigration arrests and the proper scope of immigration detainers, who acquiesced in the violations of Plaintiffs' constitutional rights, and for conduct showing "'reckless or callous indifference to the rights of others.'" *al-Kidd v. Ashcroft*, 580 F.3d at 965 (*citing Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991) (police chief liable in his individual capacity because he condoned, ratified, and encouraged the excessive use of force and failed to discipline individual officers and establish new procedures)); *see also Blankenhorn v. City of Orange*, 485 F.3d 463, 486 (9th Cir. 2007) (approving personnel evaluations and failing to effectively discipline despite repeated and serious complaints regarding use of excessive force sufficient for supervisory liability).

Here, Plaintiffs' claims arise pursuant to Sonoma County's well-established practices and policies as admitted to and confirmed by Defendant Sheriff Cogbill, who is the policymaker for the county with respect to the conduct at issue. *See* Cal. Gov. Code § 26605 (delegating official policymaking authority over prisoners in county jails to sheriffs); *see also Brandt v. Board of Supervisors*, 84 Cal. App. 3d 598, 601 (1978). Cogbill announced to Plaintiffs on October 5, 2007, that Sheriff's deputies had regularly engaged in joint patrols with ICE for the previous three years, arrested and booked individuals based on suspected immigration violations without a basis for arrest outside of ICE presence, and held individuals solely on the basis of suspected

[24] The remedy sought against Defendants Cogbill and Salkin in their official capacities is confined to injunctive relief. Thus, the County's argument that Cogbill and Salkin should be dismissed in their official capacities because the County is the employing entity that would be liable for any damages is off the mark. *See* County Mot. at 14.

civil immigration violations and without any criminal basis, at the request of ICE agents. SAC ¶ 63; *also* ¶ 62 (sheriff directs the ongoing operations, staffing, and investigations conducted by MAGNET), ¶¶ 64, 68 (sheriff personally received memoranda from his employees informing him of their practices and has taken no actions to stop them), and County Mot. at 10 (admitting failure to properly train its deputy sheriffs by asserting that it is not within the sheriff's "duty to train staff on application of federal immigration laws that are administered and enforced by ICE"). Plaintiffs have alleged that the violations of their rights occurred as a result of the Defendant Cogbill's establishment of, and supervision of, the MAGNET program. *See* SAC ¶¶ 30, 62.

VIII. THE COUNTY IS A PROPER DEFENDANT.

A. Plaintiffs Have Alleged A Custom, Policy, or Practice Resulting in Liability for the County.

Defendants do not dispute that the County can be held liable under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978), for causing Plaintiffs' deprivation of constitutional rights. *See* County Mot. at 12. Aside from stating in a conclusory manner that Plaintiffs have not alleged sufficient facts, Defendants' argument against *Monell* liability rests on the shaky proposition that Plaintiffs' allegations against the County are "implausible" precisely because they allege the implementation of unlawful policies and practices. County Mot. at 13. However, as described in detail above, Plaintiffs have alleged a number of ongoing policies and practices adopted by Sheriff Cogbill as the policy-maker for the County from which Plaintiffs' claims arise. This is sufficient to overcome a motion to dismiss. *See Shaw v. State of California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 610 (9th Cir. 1986) (plaintiff "need not specifically allege a custom or a policy; it is enough if the custom or policy can be inferred from the allegations of the complaint"); *Powe v. City of Chicago*, 664 F.2d 639, 651 (7th Cir. 1981) (officers' repeated failure to issue adequate warrants that led to plaintiff's unlawful arrests was systemic in nature and sufficient to defeat Defendants' Motion to Dismiss with respect to municipal liability).

B. Plaintiffs' Claims Are Not Barred by the Eleventh Amendment.

County Defendants invoke the Eleventh Amendment for immunity from claims against the County and County officials. While the Ninth Circuit has already provided the analysis necessary to dismiss this defense, Plaintiffs first clarify that the County's argument – if successful – would affect *only* Plaintiffs' claims for damages against the County. *See Home Telephone & Telegraph v. Los Angeles*, 227 U.S. 278 (1913) (suits against a state officer in his personal capacity are excluded from Eleventh Amendment immunity) and *Ex parte Young*, 209 U.S. 123 (1908) (Eleventh Amendment does not prevent suits for prospective relief against state officer acting in his official capacity); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) (same).[25]

More to the point, Ninth Circuit opinions treating Sheriffs as county, rather than state, officials have largely reviewed and dismissed the arguments relied on by the California Supreme Court in *Venegas v. County of Los Angeles*, 32 Cal. 4th 820 (2004). In *Brewster v. Shasta County*, 275 F.3d 803 (9th Cir. 2001), the Ninth Circuit considered and rejected the conclusion reached by the California Court of Appeal in *County of Los Angeles v. Superior Court (Peters)* that the Los Angeles Sheriff's Department was entitled to 11th Amendment immunity, and did not give weight to California Attorney General's supervisory role over county sheriffs in its analysis. *Brewster*, 275 F.3d at 807, 809; *cf. Venegas*, 32 Cal. 4th at 832-33 (invoking Attorney General supervision to support Eleventh Amendment immunity and following *Peters*). Thus, with respect to the operation of the jail and law enforcement duties, the Ninth Circuit has held that California sheriffs are county actors. Moreover, under *McMillian v. Monroe County*, the relevant inquiry is "whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." 520 U.S. 781, 785 (1997). Here, the "particular issue" is the level of collaboration the County chooses to have with ICE. Given the different positions taken by local governments throughout California on this issue, it would be odd indeed to assert that Sheriff Cogbill is making immigration enforcement policy for the State

[25] Plaintiffs' § 1983 claims against County Defendants in their official capacity seek only prospective, injunctive relief. *See, e.g.*, SAC ¶ 135. Plaintiffs' damages claims against County Defendants under § 1983 seek relief against County Defendants "in their personal capacities." *See, e.g.*, SAC ¶ 136.

of California. *See, e.g.*, San Francisco Admin. Code Ch. 12, §12H.2 (precluding the use of city and county funds for enforcing immigration law), *Sturgeon*, 174 Cal. App. 4th 1407 (*review denied* 2009 Cal. LEXIS 9646 (Sept. 9, 2009)) (upholding Los Angeles Police Department's policy of not initiating contact for the purpose of investigating immigration status).

C. The Government Code Sections Cited by County Defendants Do Not Immunize the County from Damages Claims in this Case.

None of County Defendants' laundry list of California statutes immunizes them from Plaintiffs' claims. County Mot. at 23. Cal. Gov. Code § 820.2 draws the line between planning and operational functions of government, offering immunity only to the former. "[T]here is no basis for immunizing lower-level, or ministerial decisions that merely implement a basic policy already formulated" and "[t]he fact that a public employee normally engages in discretionary activity is irrelevant if, in a given case, the employee did not render a considered decision." *Caldwell v. Montoya*, 10 Cal. 4th 972, 981 (1995). An arrest is "not a basic policy decision, but only an operational decision by the police purporting to apply the law. The immunity provided by Government Code section 820.2 therefore does not apply." *See also Johnson v. State*, 69 Cal. 2d 782, 789 (1968).

County Defendants' invocation of Cal. Gov. Code §§ 820.4 and 820.6 is premature, as both require factual determinations contrary to those assumed true at the pleading stage. *See Ogborn v. City of Lancaster*, 101 Cal. App. 4th 448, 462 (2002) (§ 820.4 immunity inapplicable where question of fact existed regarding officer's care in relying on warrant). Section 821.6 applies only to malicious prosecution and investigatory actions related to actual formal proceedings and is no defense where "the alleged tortious conduct occurred during an arrest, not an investigation." *Blankenhorn*, 485 F.3d at 488; *see also Phillips v. City of Fairfield*, 406 F.Supp.2d 1101, 1118-9 (E.D. Cal. 2005).

County Defendants also argue they are immune from liability for false imprisonment, relying on *Garcia v. City of Merced*, 637 F.Supp.2d 731 (E.D. Cal. 2008). County Mot. at 25. However, *Garcia*, addressed arrests pursuant to a facially valid ***warrant*** and makes clear that a "false imprisonment claim based upon an arrest without a warrant merely requires an allegation

that there was an arrest without process, an imprisonment occurred and damages." *Garcia*, 637 F.Supp.2d at 752; *see, e.g.*, SAC ¶¶ 36, 41, 45. As explained above, and in Plaintiffs' opposition to the Federal Defendants' Motion to Dismiss, immigration detainers are *not* warrants and on their face, could not reasonably be interpreted to authorize arrest.

Finally, since the individual County Defendants are not immunized under the above sections, nor any other relevant defense, § 815.2 is inapplicable to immunize the County. According to the California Supreme Court, "in governmental tort cases, the rule is liability, immunity is the exception." *Lopez v. Southern Cal. Rapid Transit Dist.*, 40 Cal. 3d 780, 792 (1985) (citations omitted). The extent to which any of County Defendants' cited immunities may apply to portions of Plaintiffs' claims is certainly not ascertainable on a motion to dismiss Plaintiffs' Second Amended Complaint.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the County Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint be denied.

Dated: December 16, 2009

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