UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X

NATIONAL DAY LABORER ORGANIZING NETWORK; CENTER FOR CONSTITUTIONAL RIGHTS; and IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW,

Plaintiffs.

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; FEDERAL BUREAU OF INVESTIGATION, and OFFICE OF LEGAL COUNSEL

Defendants.

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ECF CASE

10-CV-3488 (SAS) (KNF)

[Rel. 10-CV-2705]

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION COMPELLING DEFENDANTS TO PRODUCE LIMITED "OPT-OUT" RECORDS RESPONSIVE TO PLAINTIFFS' FOIA REQUESTS

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FEDERAL CASES **PAGES**

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ACLU v.DOD, 357 F.Supp.2d 708, 712 (S.D.N.Y. 2005) 21

ACLU v.DOJ, 321 F. Supp.2d 24, 30 (D.D.C. 2004) 14

Bd. of Educ. v. Pico, 457 U.S. 853, 876 (1982) 15

New York. v. Leavitt, 524 F.3d 408, 414 (2d Cir. 2008) 11

*Ctr. to Prevent Handgun Violence v. Dep't of Treasur*y, 49 F. Supp. 2d 3, 5 (D.D.C. 1999) 16

DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 755 (1989) 12

*Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligenc*e, No. C 07-5278 SI, 2007 WL 4208311 (N.D. Cal. Nov. 27, 2007) 14, 16

Elec. Private Info. Ctr. v. DOJ, 416 F. Supp. 2d 30, 40 (D.D.C. 2006) .... *passim*

Electronic Frontier Found. v. Office of the Dir. of Nat'l Intelligence, 542 F.Supp.2d 1181, 1187 (N.D. Cal. 2008) 15, 16, 20

EPA v. Mink, 410 U.S. 73 (1973) 13

Gerstein v. CIA, 2006 WL 3462659 (N.D. Cal. Nov. 29, 2006) 15

*Grand River Enter. Six Nations, Ltd. v. Pryo*r, 481 F.3d 60, 66 (2d Cir. 2007) 11

Halpern v. FBI, 181 F.3d 279, 284-85 (2d Cir. 1999) 20

Leadership Conf. on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) 14

Moore v. Consol. Edison Co., 409 F.3d 506, 510 (2d Cir. 2005) 11

New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) 15

*Nat'l Archives & Records Admin. v. Favish, 54*1 U.S. 157, 172 (2004) 15

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1979) 22

NXIM Corp. v. Ross Inst., 364 F.3d 471, 476 (2d Cir. 2004) 11

Payne Enters., Inc. v. United States, 837 F.2d 486, 494 (C.A.D.C. 1988).................... 12, 13, 15

United States. v. Suarez, 880 F.2d 626, 630 (2d Cir. 1989) 20

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973) 3

Wash. Post v. DHS, 459 F.Supp.2d 61 (D.D.C. 2006) 16, 19

FEDERAL STATUTES **PAGES**

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5 U.S.C. § 552(a)(6)(A)(i) 13

5 U.S.C. § 552(a)(6)(C)(i) (2009).................... 12

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FEDERAL REGULATIONS **PAGES**

74 Fed. Reg. 4683 (Jan. 21, 2009) 12, 22

OTHER AUTHORITIES **PAGES**

Activated Jurisdictions, ICE (Oct. 26, 2010), http://www.ice.gov/doclib/about/offices/secure-communities/pdf/sc-activated.pdf 3

Secure Communities MOA Template, U.S. Immigration and Customs Enforcement, *available at* http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf (last visited Oct. 19, 2010).................... 6

U.S. Immigration and Customs Enforcement*,* Setting the Record Straight, August 17, 2010, *available at* http://www.aila.org/content/default.aspx?docid=33041.................... 7, 17

Arlington County, Va., Resolution Promoting Community Safety in Accordance with Constitutional Principles (Sept. 28, 2010) http://www.arlingtonva.us/departments/CountyBoard/proclamations/page78364.aspx 8

San Francisco County, Cal., Resolution Urging the San Francisco Sheriff's Department, the Juvenile Probation Department and the San Francisco Police Department to opt-out of participating in the Police Immigration and Customs Enforcement (ICE) collaboration program known as Secure Communities (May 20, 2010) http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/bosagendas/materials/bag052510_100650.pdf 8

Santa Clara County, CA, Agenda Item No. 11 BOS2-092810-1 (Sept. 28, 2010) http://uncoverthetruth.org/wp-content/uploads/Santa-Clara-S-Comm.pdf........ 8

Secure Communities: Quarterly Report, Fiscal Year 2010 Report to Congress Second Quarter, ICE (May 14, 2010), http://ccrjustice.org/files/10.%202nd%20Quarter%20FY2010%20Report%20to%20Congress%20(part%201%20of%202).pdf 20

Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009)........ 12, 22

DECLARATIONS REFERENCED **PAGES**

Declaration of Melissa Mark-Viverito, Council Member for the 8th Council District of New York, October 27, 2010........ 10, 18

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Declaration of Michael Hennessey, Sheriff, Sheriff, San Francisco County, October 27, 2010........ 6, 8, 9, 18

Declaration of Bridgett Kessler, Clinical Teaching Fellow, Cardozo Immigrant Justice Clinic, October 27, 2010........ *passim*

LETTERS

Letter from Richard S. Gordon, President, San Mateo County Board of Supervisors, to John Morton, Assistant Secretary, ICE (July 21, 2010).

Letter from Zoe Lofgren, Chairwoman, Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, U.S. House of Representatives to Janet Napolitano, Secretary of Homeland Security, DHS and Eric Holder, Attorney General, U.S. Department of Justice (July 27, 2010).

Letter from Miguel Marquez, County Counsel, Santa Clara County to David Venturella, Secure Communities Executive Director, DHS (August 16, 2010).

Letter from Janet Napolitano, Secretary of Homeland Security, DHS, to Zoe Lofgren, Chairwoman, Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, U.S. House of Representatives (Sept. 7, 2010).

Letter from David Venturella, Secure Communities Assistant Director, ICE to Miguel Marquez, County Counsel, Santa Clara County (Sept. 27, 2010).

Letter from Cathy L. Lanier, Chief of Police, D.C. Metropolitan Police Department, to Phil Mendelson, Chairman, Committee on Public Safety and the Judiciary, Council of the District of Columbia (July 22, 2010).

Letter Barbara M. Donnellan, County Manager, Arlington County to John Morton, Director, ICE (Oct. 7, 2010)

Letter from Ronald Weich, Assistant Attorney General, DOJ, to Zoe Lofgren, Chairwoman, Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, U.S. House of Representatives (Sept. 8, 2010).

Letter from Christopher Connolly, Assistant United States Attorney to Bridget Kessler, Clinical Teaching Fellow, IJC, (Jul. 9, 2010).

NEWSPAPER AND OTHER MEDIA SOURCES **PAGES**

Alex Johnson, *Cities, Counties Can't Stop Federal Immigration Checks*, msnbc.com (Oct. 15, 2010) http://www.msnbc.msn.com/id/39576754/ns/us_news-security/ 10

Shankar Vedantam, *U.S. Deportations Reach Record High*, Wash. Post (Oct. 7, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100607232.html 8, 19

Shankar Vedantam, *No Opt-Out for Immigration Enforcement*, Wash. Post (Oct. 1, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007268.html 8

Dena Potter, *ICE: No Opt-Out For Program Checking Legal Status*, Associated Press (Oct. 8, 2010), http://www.google.com/hostednews/ap/article/ALeqM5go2gKU4PJ-rpoQjObiHGt3qhka3QD9INP8980?docId=D9INP8980 8

Colo. Considers Modifications to Federal Immigration Fingerprint Program, KDVR Denver/Associated Press (Aug. 20, 2010, 3:23 PM), http://www.kdvr.com/news/kdvr-fingerprint-txt,0,4742737 9

Patrick Malone, *Ritter Mulls Nuances in Immigration Pact*, The Pueblo Chieftan (Oct. 5, 2010, 9:17 AM), http://www.chieftain.com/news/local/article_2d97cd46-d039-11df-9cb2-001cc4c03286.html 9

Cris Ornelas, *Maketa Rips Ritter Over Secure Communities*, Colorado Connection/Fox 21 (Aug. 21, 2010, 11:48 AM), http://www.coloradoconnection.com/news/story.aspx?id=502003 9

Maria Sacchetti, *US Pushes State to Join Security Plan*, The Boston Globe (Oct. 6, 2010) http://www.boston.com/news/local/massachusetts/articles/2010/10/06/us_asks_mass_police_to_join_ice_plan 9, 10

Editorial: Gov. Patrick Dodges Secure Communities Questions With Insults, Eagle-Tribune (Oct. 3, 2010), http://www.eagletribune.com/opinion/x1850236140/Editorial-Gov-Patrick-dodges-Secure-Communities-questions-with-insults... 10

Catalina Jaramillo, *More Confusion Over Secure Communities: Did New York Make a Special Deal with Washington?*, Feet in 2 Worlds, Oct. 22, 2010, http://news.feetintwoworlds.org/2010/10/22/more-confusion-over-secure-communities-did-ny-make-a-special-deal-with-washington 10, 18

Elise Foley, *ICE Chief Confirms Secure Communities Participation Is Mandatory*, The Wash. Indep (Oct. 11, 2010) http://washingtonindependent.com/100243/ice-chief-confirms-secure-communities-participation-is-mandatory/... 10, 11

Confusion Over Secure Communities, N. Y. Times (Oct. 5, 2010). http://www.nytimes.com/2010/10/05/opinion/05tue3.html... 11

Michele Waslin, *Counties Say No to ICE's Secure Communities Program; Is Opting Out Possible?*, The LA Progresive (Oct. 4, 2010) http://www.laprogressive.com/immigration-reform/secure-communities 11

Afton Branche, *Can Cities Really Opt-OutOpt-out of Secure Communities*, The Huffington Post (Sept. 2, 2010) http://www.huffingtonpost.com/afton-branche/can-cities-really-opt-out_b_703431.html 11

Editorial, *Immigration Bait and Switch*, N.Y. Times (Aug., 17, 2010) http://www.nytimes.com/2010/08/18/opinion/18wed3.html 11

Alfonso Chardy, *Few Deported Aliens Have Serious Criminal Records, Activists Say*, Miami Herald (Aug. 19, 2010), http://uncoverthetruth.org/few-deported-aliens-have-serious-criminal-records-activists-say-miami-herald. 11

Monika Fabian, *Fear Over Secure Communities: More Immigrants Will Be Lost in Detention System*, Feet in 2 Worlds (Oct. 26, 2010), http://news.feetintwoworlds.org/2010/10/26/fear-over-secure-communities-more-immigrants-will-be-lost-in-detention-system 19

PRELIMINARY STATEMENT

Plaintiffs, National Day Laborer Organizing Network ("NDLON"), Center for Constitutional Rights ("CCR"), and the Immigration Justice Clinic of the Benjamin N. Cardozo School of Law (collectively "Plaintiffs"), seek an injunction compelling U.S. Immigration and Customs Enforcement ("ICE"), U.S. Department of Homeland Security ("DHS"), Federal Bureau of Investigation ("FBI"), and Office of Legal Counsel ("OLC") (collectively "Defendants") to promptly process and produce limited portions of Plaintiffs' request for records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522 ("the Request"). The parties are engaging in negotiations to set a reasonable timeline for processing and production of the remainder of the request.

Plaintiffs filed suit on April 27, 2010 to compel Defendants to produce records relating to ICE's controversial immigration enforcement program, Secure Communities. Once activated, Secure Communities "Interoperability" provides for automatic transmission of fingerprints from the FBI to immigration databases at the time of arrest and booking by local police. Secure Communities raises serious concerns for localities related to cost, the adverse impact on the relationship between local police and the communities they serve, and individual civil liberties. In spite of the concerns, prior to implementation of the program in 2008, ICE did not disclose to the public how or whether localities could refuse or limit participation in the program once ICE signs a Secure Communities Memoranda of Agreement ("MOA") at the state level.

Therefore, the Request asked Defendants to disclose records related to "opt-out"—the existence or inexistence of a procedure for states and localities to decline or limit participation in Secure Communities, and the technological capacity of ICE and the FBI to honor requests to opt-out, opt-in or limit participation by ensuring that fingerprints are not transmitted from the FBI to

ICE ("Opt-Out Records"). Plaintiffs anticipate responsive records will derive from five categories of the Request: Records relating to "opt-out" and responsive to Section (1) a. "Overview Documents," Section (1) b. "State and Local Agreements," Section (1) c. "Secure Communities Inquiry and Response Procedures," Section (4) a. Monetary incentives, and Section (5) Communications. Declaration of Bridget P. Kessler ("Kessler Decl."), Ex. A (Plaintiffs' Request).[1]

Plaintiffs have attempted to obtain Opt-Out Records through good faith negotiations with Defendants, but any further delay will cause irreparable harm. The urgent public need for the limited Opt-Out records shedding light on the issue of opt-out has escalated significantly in recent weeks. The District of Columbia rescinded its Secure Communities MOA on June 23, 2010, signaling that the program was voluntary. In August 2010, ICE confirmed the voluntary nature of Secure Communities by outlining a procedure for localities to request to opt-out. Based on this procedure, San Francisco and Santa Clara, California and Arlington, Virginia requested to opt-out of Secure Communities. The week of October 6, 2010, however, Secretary Janet Napolitano and various ICE officials made public statements implying that, for localities, opting-out might not be possible. Public officials from Arlington, San Francisco and Santa Clara have scheduled meetings to discuss their requests to opt-out with ICE on November 5, 8 and 9, 2010 respectively. Officials and residents of those three localities are involved in conversations with ICE without a complete understanding of the federal government's own position on opt-out and the technological operation of the program.

Despite the growing confusion and public scrutiny of the opt-out process, ICE is rapidly expanding Secure Communities. When Plaintiffs served the Request in February, 116

[1] "Ex." refers to exhibits annexed to the Kessler Decl.

jurisdictions in 16 states had entered the program. The current ICE website now shows a six-fold increase to 746 jurisdictions in 34 states.[2] State officials across the country are making complex policy determinations about whether to sign or rescind Secure Communities MOAs without clear information about the implications for localities that do not want to participate.

The confusion and lack of information surrounding the issue of opt-out is precisely the lack of transparency that FOIA is intended to remedy. FOIA recognizes that the democratic process requires an informed public. Further delay in the processing and production of the Opt-Out-Records will result in irreparable harm to 1) localities in ongoing negotiations with ICE to opt-out of Secure Communities; 2) states making public policy decisions about whether to sign or rescind Secure Communities MOAs; and 3) the ability of Plaintiffs, the American public, and its elected representatives to participate meaningfully in the policy debate surrounding opting-out of Secure Communities, a program which imposes the unprecedented requirement that local police in participating states and localities automatically check immigration status.

Plaintiffs are entitled to timely processing and production of the Opt-Out Records under FOIA. Therefore, Plaintiffs respectfully request that this Court (1) order Defendants to produce Opt-Out Records to Plaintiffs within five days, (2) order Defendants to provide Plaintiffs with declarations, as specified in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) within ten days thereafter, and, (3) set a schedule for expedited summary judgment briefing on any contested claimed exemptions.

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[2] *Activated Jurisdictions*, ICE (Oct. 26, 2010), http://www.ice.gov/doclib/about/offices/secure-communities/pdf/sc-activated.pdf.

STATEMENT OF FACTS

Plaintiffs' FOIA Requests

On February 3, 2010, Plaintiffs submitted FOIA requests to ICE, DHS, FBI, and OLC, seeking information regarding ICE's controversial new immigration enforcement program, Secure Communities. *See* Kessler Decl. ¶ 3 (Ex. A) (Plaintiffs' Request). Plaintiffs sought records related to policies, procedures, and objectives; data and statistical information; individuals subject to Secure Communities queries or ICE detainers; fiscal impact; agency communications; program assessment; and complaint mechanisms and oversight. *Id.* Plaintiffs requested expedited processing citing "an urgent need to inform the public about Secure Communities." *Id.*

Agency Processing

On March 2, 2010, the FBI granted Plaintiffs' request for expedited processing. Kessler Decl. Ex. B (Letter from David M. Hardy, Section Chief, Records Management Division, Fed. Bureau of Investigation, to Bridget Kessler, Clinical Teaching Fellow, IJC (Mar. 2, 2010)). ICE, DHS, and OLC denied Plaintiffs' requests for expedited processing. Kessler Decl. Ex. C (Letter from Catrina M. Pavlik-Keenan, FOIA Officer, Immigration and Customs Enforcement to Bridget Kessler, Clinical Teaching Fellow, IJC (Feb. 23, 2010)); Ex. D (Letter from Sabrina Borroughs, Disclosure and FOIA Operations Manager, Dep't of Homeland Sec., to Bridget Kessler, Clinical Teaching Fellow, IJC (Mar. 5, 2010)); Ex. E (Letter from Paul P. Colburn, Special Counsel, Office of Legal Counsel, to Bridget Kessler, IJC (Apr. 16, 2010)). Plaintiffs appealed the denial of expedited processing to DHS and ICE on March 15, 2010. Kessler Decl. Ex. F (Letter from Bridget Kessler, Clinical Teaching Fellow, IJC, to Associate General Counsel (General Law, Department of Homeland Security (Mar. 15, 2010)); Ex. G (from Bridget Kessler,

Clinical Teaching Fellow, IJC, to Associate General Counsel (General Law, Department of Homeland Security (Mar. 15, 2010)). After receiving no substantive response from the agencies, Plaintiffs brought a civil action under FOIA 5 U.S.C. § 552 against, among others, ICE, DHS, FBI, and OLC April, 27, 2010 seeking the release of the records withheld by the agencies.

Parties' Rapid Production List Agreement

On July 7, 2010, Defendants agreed to produce the records identified in Plaintiffs' Rapid Production List ("RPL") with the bulk of responsive, non-exempt materials produced by July 30, 2010. *See* Kessler Decl. Ex. H (Letter from Christopher Connolly, Assistant United States Attorney, to Bridget Kessler, Clinical Teaching Fellow, (Jul. 9, 2010)) (hereafter "RPL Agreement"). In return, Plaintiffs agreed to limit the scope of the Request, by allowing each Defendant agency to search for and produce only records originating in that agency both for the RPL productions and for the remainder of the Request. *Id.* The RPL included records relevant to the issue of opt-out and several other categories of records. *See* Kessler Decl. Ex. I (Plaintiffs' Rapid Production List (Jun. 25, 2010)).

Defendants failed to meet the deadlines set by the RPL agreement. On August 3, 2010, September 8, 2010, and October 22, 2010, ICE produced some records responsive to Plaintiffs' RPL. Kessler Decl. ¶¶ 12, 15. The FBI produced some records responsive to Plaintiffs' RPL on August 13, 2010**.** Kessler Decl. ¶ 13. To date, nearly three months after the agreed upon deadline, Defendants have still not completed processing and production of records related to the opt-out issue. *See* Kessler Decl. ¶ 16.

Confusion About the Ability of Localities to Opt-Out of Secure Communities

ICE's lack of transparency has created significant confusion for States, localities, Congress and the public about whether localities can opt-out of Secure Communities, the meaning of opt-out, and the procedure by which a locality can request to opt-out. The standard Secure Communities MOA between ICE and state-level criminal justice information departments available at the time this suit was filed does not address the scope of local autonomy or discretion. *See Secure Communities MOA Template*, U.S. Immigration and Customs Enforcement, *available at* http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf (last visited Oct. 19, 2010).

Due to the lack of clarity, local officials, law enforcement agencies, members of Congress and the public have repeatedly requested information from ICE about how states and localities can opt-out of the program. *See e.g.*, Kessler Decl. Ex. T (Letter from Michael Hennessey, Sheriff, San Francisco County, to Edmund G. Brown, Jr., Attorney General, California Department of Justice (May 18, 2010) ("hereinafter Hennessey May 18, 2010 Letter), annexed to Declaration of Michael Hennessey, San Francisco Sheriff, (hereinafter "Hennessey Decl.")); Ex. K (Letter from Richard S. Gordon, President, San Mateo County Board of Supervisors, to John Morton, Assistant Secretary, ICE (Jul. 21, 2010) (hereinafter "Gordon Jul. 21, 2010 Letter to Morton")); Ex. L (Letter from Zoe Lofgren, Chairwoman, Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, U.S. House of Representatives to Janet Napolitano, Secretary of Homeland Security, DHS and Eric Holder, Attorney General, U.S. Department of Justice (July 27, 2010)) (hereinafter Lofgren July 27, 2010 Letter to Napolitano); Ex. M (Letter from Miguel Marquez, County Counsel, Santa

Clara County to David Venturella, Executive Director, Secure Communities, DHS (August 16, 2010) ("hereinafter Marquez Aug. 16, 2010 Letter to Venturella")).

In August 2010, ICE claimed that there was a procedure by which local jurisdictions could opt-out of Secure Communities. *See* U.S. Immigration and Customs Enforcement, Setting the Record Straight, August 17, 2010, *available at* http://www.aila.org/content/default.aspx?docid=33041 (stating that jurisdictions that do not want to participate in the program "must formally notify [their] state identification bureau and ICE in writing (email, letter or facsimile)," after which ICE will meet with the involved parties and come to a resolution which "may include…removing the jurisdiction from the deployment plan."); *see also* Kessler Decl. Ex. N (Letter from Janet Napolitano, Secretary of Homeland Security, DHS, to Zoe Lofgren, Chairwoman, Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, U.S. House of Representatives (Sept. 7, 2010) (hereinafter "Napolitano Sept. 7, 2010 Letter to Lofgren"); Ex. R (Letter from Ronald Weich, Assistant Attorney General, DOJ, to Zoe Lofgren, Chairwoman, Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, U.S. House of Representatives (Sept. 8, 2010) (hereinafter "Weich Letter to Lofgren"); Ex. O (Letter from David Venturella, Secure Communities Assistant Director, ICE to Miguel Marquez, County Counsel, Santa Clara County (Sept. 27, 2010), (hereinafter "Venturella Sept. 27, 2010 Letter to Marquez").

On October 6, 2010, however, Secretary Napolitano stated, in apparent contradiction to these previous statements, that DHS does "not see [Secure Communities] as an opt-in, opt-out

program."[3] The contradictory statements have created significant confusion and impact the upcoming meetings between local jurisdictions and DHS.

Local Officials Have Insufficient Information to Engage in Negotiations to Opt-Out of Secure Communities or Decide Whether to Opt-Out

At least one jurisdiction, Washington, D.C., has successfully declined to participate in the program. *See* Kessler Decl. Ex. P (Letter from Cathy L. Lanier, Chief of Police, D.C. Metropolitan Police Department, to Phil Mendelson, Chairman, Committee on Public Safety and the Judiciary, Council of the District of Columbia) (July 22, 2010) (hereinafter "Lanier July 22, 2010 Letter to Mendelson")). At least three other localities have requested to opt-out of the Secure Communities program in states where MOAs have been signed: San Francisco, California; Santa Clara, California; and Arlington, Virginia.[4] To date, ICE has not honored these

[3] Shankar Vedantam, *U.S. Deportations Reach Record High*, Wash. Post (Oct. 7, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100607232.html; *see also* Shankar Vedantam, *No Opt-Out for Immigration Enforcement*, Wash. Post (Oct. 1, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007268.html; Dena Potter, *ICE: No Opt-Out For Program Checking Legal Status*, Associated Press (Oct. 8, 2010), http://www.google.com/hostednews/ap/article/ALeqM5go2gKU4PJ-rpoQjObiHGt3qhka3QD9INP8980?docId=D9INP8980.

[4] Arlington County, Va., Resolution Promoting Community Safety in Accordance with Constitutional Principles (Sept. 28, 2010) http://www.arlingtonva.us/departments/CountyBoard/proclamations/page78364.aspx; San Francisco County, Cal., Resolution Urging the San Francisco Sheriff's Department, the Juvenile Probation Department and the San Francisco Police Department to opt-out of participating in the Police Immigration and Customs Enforcement (ICE) collaboration program known as Secure Communities (May 20, 2010) http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/bosagendas/materials/bag052510_100650.pdf; Santa Clara County, CA, Agenda Item No. 11 BOS2-092810-1 (Sept. 28, 2010) http://uncoverthetruth.org/wp-content/uploads/Santa-Clara-S-Comm.pdf. Letter from Cathy Lainer, Chief of Police, D.C., to David Venturella, Executive Director of Secure Communities, ICE (June 23, 2010) (terminating the Secure Communities Memorandum of Agreement); D.C., Secure Communities Act of 2010 (May 4, 2010) (proposed, but never passed); Kessler Decl. Ex. T (Letter from Michael Hennessey, Sheriff, San Francisco County, to Edmund G. Brown, Jr., Attorney General, California Department of Justice, David Venturella, Secure Communities

requests. *See e.g.*, Kessler Decl. Ex. Q (Letter Barbara M. Donnellan, County Manager, Arlington County to John Morton, Director, ICE (Oct. 7, 2010) (hereinafter "Donnellan Oct. 7, 2010 Letter")). Arlington, San Francisco and Santa Clara have scheduled meetings with ICE on November 5, 8, and 9, respectively, to discuss their requests to opt-out of Secure Communities. Kessler Decl. Ex. U (Declaration of Sarahi Uribe (hereinafter "Uribe Decl.") ¶¶ 16-17). Plaintiff NDLON has been closely involved in efforts to opt-out of Secure Communities and providing information to the local officials who will be meeting with ICE and urgently need information before those meetings. *See id.* Kessler Decl. Ex. T (Hennessey Decl. ¶ 4) (stressing the need for information about opt-out so he can "adequately represent the interests of [his] constituents…"). Elected officials, advocates and the community members lack the information they need about opt-out to inform these negotiations with the federal government.

State Officials Have Insufficient Information About Opt-Out to Make Informed Policy Judgments About Secure Communities MOAs

States that have not signed Secure Communities MOAs lack information to make an informed public policy judgment about entering the agreement. *See e.g.*, *Colo. Considers Modifications to Federal Immigration Fingerprint Program,* KDVR Denver/Associated Press (Aug. 20, 2010, 3:23 PM), http://www.kdvr.com/news/kdvr-fingerprint-txt,0,4742737.story; Patrick Malone, *Ritter Mulls Nuances in Immigration Pact*, The Pueblo Chieftan (Oct. 5, 2010, 9:17 AM), http://www.chieftain.com/news/local/article_2d97cd46-d039-11df-9cb2-001cc4c03286.html; Cris Ornelas, *Maketa Rips Ritter Over Secure Communities*, Colorado Connection/Fox 21 (Aug. 21, 2010, 11:48 AM), http://www.coloradoconnection.com/news/story.aspx?id=502003; Maria Sacchetti, *US Pushes*

Executive Director, DHS, and Marc Rapp, Secure Communities Deputy Director, DHS (Aug. 31, 2010), annexed to Hennessey Decl).

State to Join Security Plan, The Boston Globe (Oct. 6, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/10/06/us_asks_mass_police_to_join_ice_plan/; *Editorial: Gov. Patrick Dodges Secure Communities Questions With Insults*, Eagle-Tribune (Oct. 3, 2010), http://www.eagletribune.com/opinion/x1850236140/Editorial-Gov-Patrick-dodges-Secure-Communities-questions-with-insults.

Other States, that have signed Secure Communities MOAs, need clarity about opt-out to make public policy judgments about whether to rescind the MOA. For example, New York signed a Secure Communities MOA with the explicit understanding that localities could opt-out. *See* Catalina Jaramillo, *More Confusion Over Secure Communities: Did New York Make a Special Deal with Washington?*, Feet in 2 Worlds, Oct. 22, 2010, http://news.feetintwoworlds.org/2010/10/22/more-confusion-over-secure-communities-did-ny-make-a-special-deal-with-washington/. Advocacy groups have asked Governor Patterson to rescind New York's MOA on account of the confusion surrounding opt-out and, as a result, Secure Communities has become an issue in the current gubernatorial election. *Id*. The lack of clarity is inhibiting elected officials and the public from addressing the issue of opt-out through local legislation. Kessler Decl. Ex. V (Declaration of Melissa Mark-Viverito, Council Member for the 8th Council District of New York (hereinafter "Mark-Viverito Decl.") ¶¶ 4, 5, 7, 8, 9)).

The American Public, Advocates and Congressional Representatives Have Insufficient Information to Participate in the Policy Debate Surrounding Opt-Out

The escalating confusion about the ability of localities to opt-out of Secure Communities has lead to widespread public debate and media attention,[5] in addition to general public interest

[5] A Google search on October 24, 2010 date for "Secure Communities" and "opt-out" yielded 8,670 hits. Kessler Decl. ¶ 26. *See e.g.*, Kessler Decl. Ex. S (Alex Johnson, *Cities, Counties Can't Stop Federal Immigration Checks*, msnbc.com (Oct. 15, 2010), http://www.msnbc.msn.com/id/39576754/ns/us_news-security/; Elise Foley, *ICE Chief Confirms*

and concern about Secure Communities. Plaintiffs, in particular, have been central in uncovering and disseminating information about Secure Communities to the public.[6] Plaintiff NDLON consists of members groups nationwide involved in advocacy and public education related to Secure Communities. Kessler Decl. Ex. U (Uribe Decl. ¶¶ 2, 3, 5-8). At this time, however, Plaintiffs, the American public and its elected representatives lack the information needed to participate in a meaningful public debate about whether and how localities can opt-out of Secure Communities.

ARGUMENT

In order to prevail on a motion for a preliminary injunction Plaintiffs "must show: (1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and balance of hardships tipping decidedly in the movant's favor." *New York. v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008) (citing *NXIM Corp. v. Ross Inst.*, 364 F.3d 471, 476 (2d Cir. 2004). District Courts have "wide discretion" in deciding "whether grant a preliminary injunction. . . ." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (citing *Moore v. Consol. Edison Co.*, 409 F.3d 506, 510 (2d Cir. 2005).

Secure Communities Participation Is Mandatory, The Wash. Indep (Oct. 11, 2010) http://washingtonindependent.com/100243/ice-chief-confirms-secure-communities-participation-is-mandatory; *Confusion Over Secure Communities*, N. Y. Times (Oct. 5, 2010). http://www.nytimes.com/2010/10/05/opinion/05tue3.html; Michele Waslin, *Counties Say No to ICE's Secure Communities Program; Is Opting Out Possible?*, The LA Progresive (Oct. 4, 2010) http://www.laprogressive.com/immigration-reform/secure-communities/; Afton Branche, *Can Cities Really Opt-OutOpt-out of Secure Communities*, The Huffington Post (Sept. 2, 2010) http://www.huffingtonpost.com/afton-branche/can-cities-really-opt-out_b_703431.html;

[6] *See e.g.*, Editorial, *Immigration Bait and Switch*, N.Y. Times (Aug., 17, 2010) http://www.nytimes.com/2010/08/18/opinion/18wed3.html; Alfonso Chardy, *Few Deported Aliens Have Serious Criminal Records, Activists Say*, Miami Herald (Aug. 19, 2010), http://uncoverthetruth.org/few-deported-aliens-have-serious-criminal-records-activists-say-miami-herald.

In FOIA matters, the Court must review the agencies' decisions *de novo*, 5 U.S.C. § 552(a)(4)(B), and the agencies bear the burden of justifying their actions. *See DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989) (stating, "[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden on the agency to sustain its action and directs the district courts to 'determine the matter *de novo*.'" (quoting 5 U.S.C. § 552(a)(4)(B)).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE RECORDS THEY SEEK GO TO THE HEART OF THE PUBLIC'S RIGHTS UNDER FOIA

Since Plaintiffs only seek timely processing of a limited set of Opt-Out Records and an opportunity to contest improper withholdings, there is no doubt Plaintiffs will succeed on the merits of their claim. FOIA entitles Plaintiffs prompt processing of their Request. 5 U.S.C. § 552. ("Each agency, upon any request for records . . . shall determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore. . . ."). When an agency receives a proper FOIA request for records, it must make those records "promptly available" unless they are exempt from mandatory disclosure. 5 USC § 552(a)(3); 5 U.S.C. § 552(a)(6)(C)(i).

"A democracy requires accountability, and accountability requires transparency." Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009). In order to ensure this transparency, agencies should "adopt a presumption of disclosure," and "disclosure should be timely." 74 Fed. Reg. 4683 (Jan. 21, 2009). Courts, therefore, have a general "duty" to prevent "unreasonable delays in disclosing non-exempt documents." *Payne Enters., Inc.*, 837 F.2d at 494 (citations omitted). FOIA's statutory scheme

and the case law analyzing it recognize the importance of timely production. *See e.g.*, 5 U.S.C. § 552(a)(6)(A)(i) (requiring agency to determine whether to comply with the request 5 U.S.C. § 552(a)(6)(E)(iii) (providing for expedited processing to require agency to process request "as soon as practicable"); *Elec. Private Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 40 (D.D.C. 2006). Congress has recognized that delay in complying with FOIA requests may be "tantamount to denial." *ACLU v. DOD.*, 339 F.Supp.2d 501, 504 (S.D.N.Y. 2004) (citing H. Rep. No. 876, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News, 6267, 6271). Since "FOIA imposes no limits on courts' equitable powers in enforcing its terms," *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (C.A.D.C. 1988) (citations omitted), courts have granted injunctions to compel the processing of FOIA requests when the public's need for the requested records is time sensitive. Even in cases when expedited processing is not required "[Defendants'] unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses." *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C.C. 1988).

FOIA was enacted to create a "judicially enforceable public right to secure" government documents. *EPA v. Mink*, 410 U.S. 73 (1973). In this case, the Court has jurisdiction to vindicate the public's right to know by ordering the production of Opt-Out Records, as "agency records improperly withheld from the complainant." *See* 5 U.S.C. § 552(a)(4)(B); 5 U.S.C. § 552(a)(6)(E)(iii); *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (C.A.D.C. 1988). Plaintiffs submitted the Requests for records about Secure Communities to Defendants ICE, DHS, the FBI and OLC on February 3, 2010. DHS, ICE, the FBI, and OLC failed to meet the statutory requirements to respond to the request within 20 days and make the non-exempt records "promptly available." 5 USC § 552(a)(3).

Plaintiffs filed suit on April 27, 2010, in order to vindicate the public's right to *prompt* disclosure under FOIA, *ACLU*, 339 F.Supp.2d at 504; *Elec. Private Info. Ctr. v. Dep't of Justice*, 416 F.Supp.2d 30, 40 (D.D.C. 2006). The parties then reached an agreement that on or before July 31, 2010, the Defendants would produce a limited portion of the records responsive to the Request, including records relating to opt-out. Kessler Decl. Ex. H (RPL Agreement). After Plaintiffs filed suit, ICE produced records to Plaintiffs on August 3, 2010 and September 3, 2010, and the FBI produced 51 pages on August 13, 2010. Kessler Decl. ¶¶ 12-15. Few of the records produced related to the opt-out issue or the technological capacity to facilitate jurisdictions' wishes to opt-out. *See id.* at ¶ 16.

In this case, the Plaintiffs are entitled to timely production of the Opt-Out Records, which the public urgently needs to inform decisions at the Federal, State and local levels about Secure Communities: a rapidly-expanding immigration law enforcement program. Indeed, FOIA is recognized as an essential tool to inform current policy decisions. *See Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU v. DOD*, 321 F. Supp. 2d 24, 30 (D.D.C. 2004); *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, No. C 07-5278 SI, 2007 WL 4208311 (N.D. Cal. Nov. 27, 2007). Plaintiffs will use the Opt-Out Records to inform the ongoing public policy debate about Secure Communities and negotiations between States, localities, Congress and the federal agencies administering the program.

Therefore, plaintiffs are clearly entitled under the statute to the relief sought: timely production of the Opt-Out Records—a limited category of the records requested over eight

months ago and urgently needed by the public—and an opportunity to contest any exemptions claimed.[7]

II. IRREPARABLE INJURY WILL RESULT IF PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION IS NOT GRANTED

Public awareness of the government's actions is a "structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004); *see also Bd. of Educ. v. Pico*, 457 U.S. 853, 876 (1982) ("the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs") (Blackmun, J., concurring). "[A] core purpose of FOIA is to allow the public to be informed about 'what their government is up to.'" *Gerstein v. CIA*, 2006 WL 3462659 (N.D.Cal. Nov. 29, 2006). "*[T]imely* public awareness" is a parallel necessity because "stale information is of little value." *Elec. Private Info. Ctr. v. Dep't of Justice*, 416 F.Supp.2d 30, 40 (D.D.C. 2006) (citing *Payne Enters.*, 837 F.2d 486, 494 (C.A.D.C. 1988)). Delayed disclosure of requested materials may cause irreparable harm to a vested constitutional interest in "the uninhibited, robust, and wide-open debate about matters of public importance that secures an informed citizenry." *Electronic Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F.Supp.2d 1181, 1187 (N.D. Cal. 2008) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Plaintiffs' inability to engage in a meaningful debate about opt-out as a result of Defendants' failure to produce the Opt-Out Records undermines Congress' intention in enacting FOIA. Accordingly, "[a]s time is

[7] The FBI recognized the urgent public need for information about Secure Communities and granted expedited processing for the Request on March 2, 2010. *See* Ex. B. Plaintiffs meet the standard for, and would be entitled to, expedited processing by all Defendants. It is unnecessary, however, to engage in an analysis of entitlement to expedited processing because (1) this analysis is beyond the scope of this injunction, and (2) Plaintiffs are likely to succeed on the merits of their claim of prompt production of the Opt-Out Record under the general FOIA standard.

necessarily of the essence in cases like this, such harm will likely be irreparable." *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F.Supp.2d 30, 40-41 (D.D.C. 2006).

In FOIA cases, irreparable harm can result when the subject matter of the request concerns "ongoing public and congressional debates about issues of national importance [that] 'cannot be restarted or wound back.'" *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F. Supp. 2d 1181, 1186 (N.D.Cal. 2008) (holding "irreparable harm exists where Congress is considering legislation that would amend the FISA and the records may enable the public to participate meaningfully in the debate over such pending legislation."); *see also Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F.Supp.2d 30, 41 (D.D.C. 2006) (finding Plaintiff met irreparable harm standard to support preliminary injunction upon showing that, absent the injunction, Plaintiff would be unable to obtain information in a timely fashion, central to ongoing public debate about warrantless surveillance); *Wash. Post v. DHS*, 459 F.Supp.2d 61 (D.D.C. 2006) (granting Plaintiffs' motion for a preliminary injunction, and stating that since "FOIA request is predicated on a matter of current national debate, due to the impending election, a likelihood for irreparable harm exists if the plaintiff's FOIA request does not receive expedited treatment"); *Ctr. to Prevent Handgun Violence v. Dep't of Treasury*, 49 F. Supp.2d 3, 5 (D.D.C. 1999) (stating that "[t]here is public benefit in the release of information that adds to citizens' knowledge…"); *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, No. C 07-5278 SI, 2007 WL 4208311 (N.D. Cal. Nov. 27, 2007) (rejecting defendants' argument that theory of harm was "speculative" when plaintiffs sought release of records related to FISA amendments subject to policy debate at the time of plaintiffs' request for injunction).

Plaintiffs seek the Opt-Out Records to inform the ongoing current public debate about a controversial federal immigration enforcement program involving states and localities.

Defendants' continued failure to comply with the obligation under FOIA to promptly process and produce the Opt-Out Records, will result in irreparable harm to (1) localities seeking to opt-out of Secure Communities (2) states deliberating whether to implement the program, and (3) the ability of Plaintiffs, the public, and national elected officials to participate in ongoing public and policy debate about the program. This Court must require Defendants to process and produce the limited, but critical, records Plaintiffs seek to prevent irreparable injury.

A) **Harm to Localities Trying to Opt-Out of Secure Communities**

Without a preliminary injunction ordering the prompt production of the Opt-Out Records, public officials and the residents of the cities attempting to opt-out of Secure Communities will be forced to engage in negotiations with ICE without knowing ICE's position on opt-out or technological capability to facilitate a request to opt-out. Based on ICE's announcement of an opt-out procedure on August 17, 2010, U.S. Immigration and Customs Enforcement*,* Setting the Record Straight, August 17, 2010, Arlington, San Francisco, and Santa Clara sought, through a democratic process, to opt-out of the Secure Communities. *See* discussion *supra* pp. 9-11. Several weeks after outlining the opt-out process, however, DHS and ICE issued contradictory statements implying that opting-out of Secure Communities might not be an option. *See* discussion *supra* pp. 9-11.

Secure Communities has been implemented in Santa Clara County, San Francisco and Arlington over the objections of local officials. The confusion surrounding the federal government's position on opt-out inhibits local elected officials from being accountable to their constituents and causes particular confusion when, as in San Francisco, the program results in the

violation of local law and longstanding practices. *See* Kessler Decl. Ex. T (Hennessey Decl. ¶¶ 8, 11, 13); Kessler Decl. Ex. V (Mark-Viverito Decl. ¶¶ 3-4).

Plaintiff NDLON has received inquiries from local groups about the implications of DHS' recent statements about opt-out. Kessler Decl. Ex. U (Uribe Decl. ¶ 10, 19). The publically available information does not permit NDLON to provide the needed guidance to jurisdictions negotiating with ICE. If the Defendants had promptly disclosed the Opt-Out Records, this confusion could have been avoided. Prompt production of the Opt-out Records will permit Plaintiffs and other advocates to disseminate information about ICE's position on local discretion and Secure Communities and the agencies' technological capacity to facilitate opt-out to the elected officials currently engaged in negotiations with ICE. This would prevent irreparable harm to residents and elected officials of Arlington, Santa Clara County, and San Francisco. Kessler Decl. Ex. T (Hennessey Decl. ¶¶ 13, 15).

B) **Harm To States Determining Whether to Implement Secure Communities**

As ICE rapidly expands Secure Communities, state officials are in the position of making a policy judgment about whether to sign, rescind, or modify Secure Communities MOAs without full information. *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F. Supp. 2d 1181, 1186 (N.D.Cal. 2008). In particular, the implications of the MOA on localities that may not want to participate in the program are unclear. For example, New York has signed a Secure Communities MOA based on representations that Secure Communities is optional for local jurisdictions. Catalina Jaramillo, *More Confusion Over Secure Communities: Did NY Make a Special Deal with Washington?*, Feet in 2 Worlds, Oct. 22, 2010, http://news.feetintwoworlds.org/2010/10/22/more-confusion-over-secure-communities-did-ny-make-a-special-deal-with-washington/. This understanding conflicts with DHS and ICE's most

recent statements. Shankar Vedantam, *U.S. deportations reach record high*, Wash. Post (Oct. 7, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100607232.html (stating that she "do[es] not consider Secure Communities an opt-in/opt-out program."). Advocacy groups are demanding that Governor Patterson rescind New York's Secure Communities MOA before he leaves office. Monika Fabian, *Fear Over Secure Communities: More Immigrants Will Be Lost in Detention System*, Feet in 2 Worlds (Oct. 26, 2010), http://news.feetintwoworlds.org/2010/10/26/fear-over-secure-communities-more-immigrants-will-be-lost-in-detention-system/. New Yorkers will suffer irreparable harm if the public and the Governor do not have the Opt-Out Records when making this important public policy decision before Secure Communities is activated. *Cf. Wash. Post v. DHS*, 459 F.Supp.2d 61 (D.D.C. 2006) (finding irreparable harm where public needed information before an upcoming election).

Likewise, states that have not signed Secure Communities MOAs and are currently in the process of determining whether to sign the agreement or to negotiate special terms need information about the existence, or lack thereof, of local autonomy under the agreement. *See* discussion *supra* pp. 9-10. These states will suffer irreparable harm if forced to make these policy judgments without access to the Opt-out Records. Finally, States that have not signed MOAs seek assurance that Interoperability will not be activated without a signed MOA. States and localities have a right to know whether opt-outing out is a possibility before signing a Secure Communities MOA. When such information is not available, states cannot make an informed decision about the program.

C) **Harm To the Public and the Democratic Process**

In this case, the prompt processing and production of Opt-Out Records is central to the public's ability to have an informed debate about opting-out of Secure Communities. Defendants' continued failure to release the Opt-Out Records will result in irreparable harm to the public's ability to engage in this discussion, and understand and debate about opting-out of Secure Communities. *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F.Supp.2d 1181, 1186 (N.D.Cal. 2008). Defendants' failure to process Plaintiffs' request for Opt-Out Records is preventing Plaintiffs from disseminating information, which is vital to the ongoing public debate surrounding opting-out of Secure Communities. Kessler Decl. Ex. U (Uribe Decl. ¶ 9).

Plaintiffs and the public look to Congress to oversee the actions of Executive agencies. But a lack of transparency inhibits Congress' ability to conduct oversight of federal agencies. *ACLU*, 339 F.Supp.2d at 504 (citing *Halpern v. FBI*, 181 F.3d 279, 284-85 (2d Cir. 1999) ("FOIA was . . . intended to provide a means of accountability, to allow Americans to know what their government is doing"). In this case DHS has allocated at least 550 million dollars to Secure Communities. Secure Communities: Quarterly Report, Fiscal Year 2010 Report to Congress Second Quarter, ICE (May 14, 2010), http://ccrjustice.org/files/10.%202nd%20Quarter%20FY2010%20Report%20to%20Congress%20(part%201%20of%202).pdf. As Defendants fail to comply with the statutory requirement to produce Opt-Out Records under FOIA, the expenditure of funds on Secure Communities continues and Congress is unable to conduct the oversight and review central to democracy. *See United States. v. Suarez*, 880 F.2d 626, 630 (2d Cir. 1989) (holding that, "there is an obvious legitimate public interest in how taxpayers' money is being spent, particularly when the amount

is large.”). It is Congress’s duty to represent and advocate for the interests of the public. Without the Opt-Out Records, Congress lacks crucial information about an immigration enforcement program, which ICE is spreading across the nation and into localities, even where unwanted. Congress and the public are engaged in the ongoing debate about Secure Communities and opt-out and Plaintiffs are integral participants of that debate. Kessler Decl. Ex. U (Uribe Decl. ¶¶ 2-3). Irreparable harm will result if Plaintiffs, the public and congressional representatives do not promptly obtain access to Opt-Out Records essential to the ongoing debate.

III. THE BALANCE OF HARDSHIPS FAVORS PLAINTIFFS

The balance of hardships tips sharply in Plaintiffs’ favor. FOIA recognizes not only that the public interest is served by disclosure to government records, but also that there is an interest in prompt disclosure. *ACLU v. DOD*, 357 F.Supp.2d 708, 712 (S.D.N.Y. 2005); *see also* discussion *supra* pp. 17-19. Where agency records shed light on controversial government practices, delays in releasing requested records frustrate the public interests served by the FOIA statute. Defendants’ delays in producing the Opt-Out Records causes Plaintiffs, states, localities, Congress, and the public significant hardships. In light of the significant interest set forth by Plaintiffs and the corresponding lack of equities in Defendants’ failure to disclose Opt-Out Records, which are of such pressing public concern, this Court should issue a preliminary injunction and grant Plaintiffs the requested relief.

The hardship to the Government to process and produce the Opt-Out Records is negligible. First, Plaintiffs received the Request in February and specifically agreed to process and produce records related to opt-out by July 30, 2010. Plaintiffs are simply requesting that Defendants fulfill the obligations under the statute. Second, the requested records should not be

difficult to locate. Records regarding the technical capabilities of the Interoperability system should be readily available. The OLC, in particular, should incur only nominal hardship because legal memoranda or analysis by OLC referencing Secure Communities or Interoperability and the ability of DHS or the FBI to require participation in Secure Communities, or to activate Interoperability without the consent of State and local elected officials should be easily accessible and are not likely to require a voluminous production. Moreover, "[u]nnecessary bureaucratic hurdles have no place in the 'new era of open government,'" Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009).

At this time, Plaintiffs are requesting the intervention of the Court not for the production of the entire Request or even a substantial portion of the Request, but for a limited category of records most urgently needed by the public to resolve pressing questions related to the ability of states and localities to opt-out of Secure Communities —the Opt-Out Records. The parties are engaging in negotiations to set a reasonable timeline for processing and production of the remainder of the Request.

The minimal burden placed on Defendants is outweighed by the public interest in disclosure. Indeed, FOIA's intent is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214. 242 (1979); *see also Electronic Privacy Information Center v. Department of Justice,* 416 F.Supp.2d 30, 42 (D.D.C. 2006) (finding public interest prong met because of an "overriding public interest ... in the general importance of an agency's faithful adherence to its statutory mandate").

CONCLUSION

Plaintiffs respectfully request this Court to order Defendants ICE, DHS, FBI, and OLC search, process and produce Opt-Out Records within five days of the Court's decision; produce a *Vaughn* index detailing claimed exemptions within ten days after production; and expedited partial summary judgment briefing on any contested claimed exemptions.

Dated: October 28, 2010

Respectfully submitted,

__/s/____________________________

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