



At the outset of their Complaint, Plaintiffs note that “the United States is currently engaged in a national debate over the country’s immigration policy.” Complaint, Preliminary Statement. In discussing this debate, they take no notice of the fact that illegal immigration has real world consequences in places where illegal immigrants locate in significant numbers. These consequences are felt most keenly at the local government level, where law enforcement and public services are provided directly to individuals, and where individuals can (and do) seek swift and effective correction of the problems they encounter in their daily lives. It is undeniably true that there are many good people engaged in the national debate that Plaintiffs describe. It is likely that many of them have been led to whatever position they take in that debate by some one or more of the high principles on which this country was founded – be it devotion to the rule of law and acceptance of the responsibilities that the law lays on us all, or a generous wish to see the freedom which has blessed this society shared.

But it is also true, and more relevant to this suit, that the Board does not have the luxury of engaging in an academic exercise on this issue, divorced from reality. The Board is engaged in the act of governing, and governing democratically. Certainly it must do so in accordance with the U.S. Constitution and federal and state laws. It has done so thus far, contrary to the assertions of this Complaint.

## **ARGUMENT**

### ***Standard for granting Motion to Dismiss:***

A motion to dismiss can only be granted when “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *De Sole v. United States*, 947 F.2d 1169, 1177 (4th Cir. 1991), quoting *Coakley*

*& Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 457 (4th Cir. 1983)). When considering a Rule 12(b)(6) motion, a court must take the plaintiff's factual allegations as true. *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989). *See also Oram v. Dalton*, 927 F. Supp. 180 (E.D.Va. 1996). A court is not, however, bound to accept legal conclusions pled in a Complaint in weighing a motion to dismiss. "Were it otherwise, Rule 12(b)(6) would serve no function, for its purpose is to provide a defendant with a mechanism for testing the legal sufficiency of the complaint." *District 28, United Mine Workers of American, Inc. v. Wellmore Coal Corporation*, 609 F.2d 1083, 1085 - 1086 (4<sup>th</sup> Cir. 1979). Further, a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Markets, Inc. v. J.D. Associates Limited Partnership*, 213 F.3d 175 (4<sup>th</sup> Cir. 2000).

In a case premised on 42 U.S.C. §1983, a motion to dismiss may be granted if a defendant can satisfy the court that no set of facts exists to support an allegation that its challenged action deprived a plaintiff of a right "secured by the constitution and laws." *District 28, United Mine Workers of America*, at 1085.

**I. The Complaint fails to allege any justiciable issue.**

This suit challenges Prince William County Resolution No. 07-609 (Res. 07-609) adopted by the Board on July 10, 2007, and proposed General Orders 45.01 and 45.02, presented to the Board in draft form on September 18, 2007. Complaint, Attachments A, H, and I.

The Complaint misrepresents the Resolution in several particulars. It is primarily a set of directives to County employees. The Board directed:

- Police Officers to

- “inquire” into the citizenship or immigration status of any individual otherwise lawfully detained for a violation of county or state law IF
  - There is probable cause to believe the individual is in violation of federal immigration laws AND
  - The inquiry will not expand the duration of the detention;
- “verify” pursuant to 8 U.S.C. §1373(c)<sup>1</sup> (meaning call Immigration and Customs Enforcement – “ICE”) the person’s status IF the person indicates that he or she is not a citizen or lawfully present in this country; and
- “cooperate” with any request made by ICE to detain or transfer the person to ICE custody based on a verified immigration violation.
- The Police Department to
  - “establish” appropriate standards for officers to determine probable cause and the methods of verifying lawful presence, reporting back to the Board on its progress toward these objectives in 60 days; and
  - “enter” into a cooperative agreement under 8 U.S.C. §1357(g) and designate those officers who will be qualified to exercise the enforcement powers of federal immigration officers;
  - “revise” the Department’s illegal immigration policy to incorporate a new program at the Adult Detention Center; and
  - “establish” a protocol for the expedited transfer of illegal aliens into federal custody
- All employees and agents of the County to:
  - refrain from prohibiting or restricting, except as otherwise restricted by federal or state law, any official, employee or agent of the County, including Police Department employees, from sending, receiving or maintaining lawfully obtained information regarding the immigration status, lawful or unlawful, of any individual, or exchanging such information with any other federal, state or local government entity for the purpose, briefly stated, of determining eligibility for government services where immigration status is an element of eligibility or verifying a claim of domicile, where domicile is legally required, by a person who admits that he or she is not a citizen or legal resident of the United States.<sup>2</sup>

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<sup>2</sup> More than once in the Complaint, Plaintiff refers to this directive as if it is some novel idea of the Board that County employees cannot be restrained from seeking, maintaining and sharing information about immigration status with their counterparts within County government and in other governments.

- The County Executive to
  - report back to the Board in a work session 90 days on various matters to assist the Board in determining if it has legal authority to restrict County services based on immigration status, and if so, which services should be restricted and how to restrict them.

The Resolution does not direct the Police Department to (1) stop or detain anyone on suspicion of violating immigration law or (2) violate immigration law or (3) violate anyone's constitutional rights, through discriminatory enforcement, through violation of the Fourth Amendment, or otherwise, in performing law enforcement functions. The Resolution does not, by its express terms or by reasonable inference, threaten any individual with unlawful prosecution or detention. Further, the Resolution does not direct County staff to deny any services to anyone based on immigration status, or, for that matter, to inquire into immigration status in the delivery of these services.

This language from the last paragraph of the directives section of the Resolution is worth quoting:

**The preceding directives shall be implemented in a manner fully consistent with federal law regulating immigration and protecting the civil rights of all citizens and aliens.**

Res. 07-609, p. 3, Paragraph E.

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Complaint, Preliminary Statement, p. 2, Paras. 149, 165, 170, and 171 In fact, it is the Board's recognition of the **requirements** of federal law. No less an authority than the United States Congress has decreed:

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

8 U.S.C. §1373. That section goes on to state that government entities and officials cannot be prohibited or restricted from sending immigration status information to, or requesting or receiving it from the INS (now ICE), maintaining the information, or exchanging it with any other Federal, State or local government entity. Finally, the section requires ICE to respond promptly to any inquiry for immigration status information from a Federal, State or local government agency to assist that agency in verifying status for any individual, for any purpose authorized by law.

**A. *Plaintiffs lack standing to seek injunctive or declaratory relief as none of them, as a matter of law, alleges an injury.***

In *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), the Supreme Court made it clear that

At an irreducible minimum, Art. III [of the United States Constitution] requires the party who invokes the court's authority to [1] “show that *he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,*” ... and that [2] the *injury “fairly can be traced to the challenged action”* and [3] “*is likely to be redressed by a favorable decision ...*”

*Id.* (citations omitted and emphasis added). “The requirement that a plaintiff suffer ‘actual injury redressable by the court ... tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.’” *Kemler v. Poston*, 108 F. Supp. 2d 529 (2000), quoting *Valley Forge*, 454 U.S. at 472.

The injuries stated by the Plaintiffs generally fit into the following categories:

Claims of possible future discriminatory requests for status documentation, unlawful detention and unfair denial of services.

Jane Roe 1, Jane Roe 2, John Doe 1, Rubin Ochoa Contreras, Jose Barrientos, Hugo Giron, Tulio Diaz, Yolanda Lemus, and the Woodbridge Workers Committee generally complain that unless Resolution 07-609 and the draft General Orders are enjoined, they will be asked to prove their lawful status while traveling through the County as a motorists or passengers, or as residents seeking County services. They claim that they are more likely to be asked to prove their status because of their race, color, national origin, accents and/or weak English skills. Complaint, Paras. 10, 14, 26, 36, 41,

48, 72, 75, and 81, respectively. Some of them<sup>3</sup> (Jane Doe 1, Jane Doe 2, John Doe 1, Rubin Ochoa Contreras, Jose Barrientos, Hugo Giron) have sued the Defendants because they are “concerned that [they] may be unlawfully detained by the police or unfairly denied benefits or services by County employees” or some variation on that theme. Complaint, Paras. 11, 15, 27, 37, 42, and 49.

Claims of possible future family separation and self-exclusion  
from educational opportunities and other public services

Some Plaintiffs (Jane Roe 3, Jane Roe 4 and John Doe 1, and Jane Roe 6) claim, on behalf of themselves and their children, that Res. 07-609 causes them to fear that their families will be separated. Complaint, Paras. 21, 31, 61. Some of them allege that Res. 07-609 interferes with their ability to participate in the education of their children. Complaint Paras. 29-31 (Jane Roe 4), 60-61, 63 (Jane Roe 6). Some allege that it denies them the enjoyment of County services. Complaint, Paras. 29-30 (Jane Roe 4), 62 (Jane Roe 6).

Claims of economic loss – present and potential.

Jane Roe 3 (Complaint, Para. 22), Jane Roe 4 and John Doe 1 (Complaint, Para 32), Hugo Giron (Complaint, Para. 52) complain that they own rental properties and they fear that the Board’s Resolution is the cause of business losses they have sustained, or will sustain when tenants leave the County. Further, Jose Barrientos claims that he has noticed a decline in his real estate and tax preparation businesses since the Resolution was adopted. He attributes this to the possibility that his clientele is moving out of the County in response to the Resolution. Complaint, Paras. 44 and 45. Hugo Giron runs a

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<sup>3</sup> Plaintiffs Diaz, Lemus, and the Woodbridge Workers Committee have not included allegations that they fear unlawful detention or unfair denial of County services as a result of being asked to prove legal status.

landscaping business, and he alleges that he has lost business because some of his clients were immigrants who moved out of the County in response to the Resolution.

Complaint, Para. 52.

Claims of Woodbridge Workers Committee

This Plaintiff claims as an association that the passage of the Resolution interferes with its efforts and programs and frustrates its mission (Complaint, Para. 85) and that it has diverted significant resources from other planned programs to allay fears within the community and organize support for the Resolution’s repeal. Complaint, Para. 86.

Having now summarized Plaintiffs’ claims, we turn now to the reasons why they should all be dismissed as non-justiciable.

1. *Plaintiffs Jane Roe 5, John Doe 2, Jane Roe 7, Jane Roe 8, and Lisandro Vigil should be dismissed immediately for insufficient allegations against Defendants.*

The style of the Complaint names 16 individuals and one entity as Plaintiffs.<sup>4</sup> While the Complaint itself contains numerous allegations on behalf of most of them, some Plaintiffs make insufficient allegations for this suit to be carried forward in their names.

“Jane Roe 8” is listed in the style of the case, but no factual allegations whatsoever are made on her behalf. She should, therefore, be dismissed as a Plaintiff. John Doe 2 is alleged to be an undocumented immigrant, married to Jane Roe 5 (Complaint, Para. 54), with a U.S.-born son (Complaint, Para. 55), but nothing else is alleged on his behalf. Since he fails to allege that he suffered or will suffer any injury due to Defendants’ actions, he should be dismissed. Jane Roe 5 is alleged to be a citizen

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<sup>4</sup> Many of these Plaintiffs are proceeding anonymously, and they have thus far failed to seek leave of court. Should this matter proceed beyond this Motion to Dismiss, if Plaintiffs do not put the question before the Court, Defendants will likely move for application of Rule 10(a), to require identification.

(Complaint, Para. 54) who “is concerned for the safety, well-being and financial stability of her family if the Resolution remains in effect” (Para. 55), and who “will likely move her family from Prince William County” “[i]f the implementation and enforcement of the Resolution is not halted.” (Complaint, Para. 57). She does not allege how her “concern” is a legally attributable to Defendants’ actions. She makes no attempt to allege a specific action of Defendants, real or potential, that has caused or will cause injury to her. She should be dismissed.

Jane Roe 7 (Complaint, Paras. 64-66) alleges that a church volunteer denied her charity, citing the Board’s Resolution. As the Resolution is attached to the Complaint, it is manifest at this stage that 1) it does not deny any government sponsored service to illegal immigrants and 2) it makes no law requiring any private party to deny charity to illegal immigrants. Jane Roe 7 fails to allege facts sufficient to support any claim that the Defendants are legally answerable for the actions of an unnamed church volunteer. She should be dismissed.

Lisandro Vigil alleges that he has Temporary Protected Status from the federal government and, until September 30, 2007, he had a valid work authorization card. His application for a renewed card is pending with the federal government, and he fears that until he receives it, if he is asked to demonstrate his lawful status by a local official or police officer, he will not be able to do it. Complaint, Paras. 67-68. He alleges no wrongful act Defendants may commit against him due his lack of documentation, nor any fear of potential discrimination or unlawful treatment by any of the Defendants.

As their allegations cannot support any claim against the Defendants, these Plaintiffs should be immediately dismissed.

2. *Claimed future injuries are too speculative to meet the requirements for standing.*

“Allegations of possible future injury only rarely will satisfy the standing requirements of Art. III.” *Kemler v. Poston*, 108 F. Supp. 529, 535 (2000), citing *Babbitt v. Farm Workers*, 442 U.S. 289 (1979). A complaint must allege an invasion of a legally protected interest which is concrete and particularized. *Warth v. Seldin*, 422 U.S. 490 (1975).<sup>5</sup> Further, a complaint must allege that the invasion is “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Whitmore v. Arkansas*, 495 U.S. 149,155 (1990), quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

In *Los Angeles v. Lyons*, the Supreme Court foreclosed a complaint of feared injuries that would only occur based on future contingencies. In that case, plaintiff, who had in the past been subjected to a chokehold by Los Angeles police officers, asked the court to issue a declaratory judgment and injunction against the police department’s use of the technique in future. The Court held:

That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties.

*Id.* at 105.

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<sup>5</sup> The Court also noted in *Warth* that “when the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.” 422 U.S. at 499.

The allegations of possible future injuries – of the possibility that some of the Plaintiffs might be asked to prove their legal status because of their race, color or ethnicity, and the possibility that they might be unlawfully detained or unfairly denied services to which they are entitled, are even more speculative than the allegations made in *Los Angeles v. Lyons*. In this case, Plaintiffs can point to no past instances of injuries they have suffered as a consequence of Res. 07-609. They can point to no language in that Resolution that authorizes or encourages discrimination based on race, color, national origin, or ethnicity. They can point to no language that authorizes Police or County employees to take actions which violate the Constitution. Indeed, where the Resolution requires any action by County officials, it requires those officials to be guided by the Constitution and federal law in the performance of those actions.

Plaintiffs cannot be injured as a matter of law by that part of the Resolution directed to the Police Department, because it only applies to the treatment of those detained on suspicion of violating state or County laws. That a Plaintiff might be stopped, and that stop might result in the development of probable cause to believe he or she has violated federal immigration laws, thus requiring the police officer to inquire into Plaintiff's immigration status, and that, contrary to the plain language of the Resolution, the officer would unlawfully extend the duration of the detention, is a course of speculation that has repeatedly been found by the courts as insufficient to allege injury for standing purposes. *Id.*, *Ashcroft v. Mattis*, 431 U.S. 171 (1977), *Rizzo v. Goode*, 423 U.S. 362 (1976), *O'Shea v. Littleton*, 414 U.S. 488 (1974).

By its terms, Res. 07-609 does not direct County employees to deny services to illegal immigrants, nor does it direct them to impose a new eligibility criterion for County

services that does not presently exist based on immigrant status.<sup>6</sup> In order for the County to commit the legal wrongs Plaintiffs allege they “fear” in this context, several contingencies must be met. First, the Board must adopt a resolution, which it did not do on July 10, 2007, and which it has not done thus far, denying certain of its services to illegal immigrants. Second, Plaintiffs must be able to show that they are eligible for the services that are being denied them, absent their illegal status. Finally, they must show that the denial of services to them is unlawful – either because they have a legal entitlement to the service or because its denial works an unconstitutional result with respect to them. Whether and how these contingencies might occur in future is a matter for speculation, and Plaintiff’s allegations of future harm are insufficient to state an injury for standing purposes.

Certainly, it is rank speculation that, as a result of Res. 07-609, a stop for a violation of state or County law, or an inquiry made by a County official in the course of determining eligibility for as-yet undetermined County services would lead to a Plaintiff’s deportation by federal authorities and enforced separation of the Plaintiff from his or her children. Similarly, Plaintiffs’ allegations that they may suffer economic harm in future as a result of how their clients and tenants perceive the Resolution are too attenuated and speculative to allege injury against these Defendants for standing purposes.

Finally, the claim of some Plaintiffs that the Resolution has the effect of chilling them in their participation in the education of their children or in their enjoyment of

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<sup>6</sup> The County is already subject to federal and state provisions which prohibit it from providing certain public benefits funded by the federal and state governments, such as Medicaid and Temporary Assistance to Needy Families, to illegal immigrants. See 8 U.S.C. \_\_\_\_\_ and Sec 32.1- \_\_\_\_ and 63.2- \_\_\_\_\_, VA Code Ann. The County does check immigrant status as part of making eligibility determinations, in accordance with those federal and state requirements.

County services does not allege actual injury for standing purposes. “Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.” *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

For these reasons, all claims for future injury alleged as possible results of Res. 07-609 should be dismissed for want of standing.

3. *Claims of present economic injury and frustration of purpose are not fairly traceable to Res. 07-609.*

Some of the Plaintiffs allege, in conclusory fashion, that they have sustained economic damage because tenants have broken their leases, or their clientele has moved from the County. The Woodbridge Workers Committee alleges that it has been diverted from its mission and has had to devote resources it planned to put to other purposes to allaying fear within the community and organizing an effort to force repeal of the Resolution. No facts are alleged to support these conclusions. The Resolution is clearly worded and, for reasons set forth below, it is a permissible exercise of the Board’s authority under both federal and state law. If any of Plaintiff’s tenants or clients has indeed left the County in the wake of adoption of the Resolution, it is because they have given the Resolution a reading which is unreasonable and unwarranted based on its plain language. To the extent that the reactions of others can be counted as a legal injury the Plaintiffs can assert, it is not traceable to the actual language of the Resolution or the draft General Orders, which are the only actions alleged against these Defendants.

4. *The “injuries” alleged by Plaintiffs are not redressable by this action.*

Plaintiffs ask this Court to judicially override Res. 07-609 and proposed General Orders 45.01 and 45.02. Even assuming that they have alleged injuries in fact, fairly

traceable to Res. 07-609 and/or the proposed General Orders, they are not entitled to the remedies they seek here.

In the first place, an injunction is not available to the Plaintiffs unless they can show irreparable injury. That requirement cannot be met where there is no allegation of any real or immediate threat that they will be subjected to harm. In the second place, if the Plaintiffs are ever able to allege they have been injured by Defendants' actions with respect to illegal immigration, such as through an unlawful detention under the Fourth Amendment, the damages remedy afforded by 42 U.S. C. Sec. 1983 provides an adequate remedy at law. *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

***B. The issues raised by the Complaint are not ripe for adjudication in any event.***

At this stage in the County's handling of the illegal immigration issue, the Plaintiffs do no more than raise an abstract dispute with actions they believe the County may ultimately take which they believe would be adverse to them. This dispute is not ripe for adjudication.

Under rules established in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), a dispute is not ripe for judicial action unless 1) the issues are fit for judicial review and 2) the parties will suffer hardship if the court withholds consideration of the issue.

1. *This case is not fit for judicial review.*

The Fourth Circuit has determined that "a case is fit for judicial decision where the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings." *Charter Fed. Sav. Bank V. Office of Thrift Supervision*, 976

F.2d 203, 208 (4<sup>th</sup> Cir. 1992) (citing *Abbott*, 387 U.S. at 149). “The question of an issue’s fitness for judicial decision in turn has two parts: (1) ‘the agency’s interest in crystallizing its policy before that policy is subject to review’; and (2) ‘the court’s interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting.’” *Kemler v. Poston*, 108 F. Supp. 529, 540 (E.D.Va. 2000), citing *Regional Management Corp., Inc. v. Legal Serv’s Corp.*, 186 F.3d 457, 465 (4<sup>th</sup> Cir. 1999).

Resolution 07-609 directs the Police Department to establish standards for determining probable cause for violations of federal immigration law and the methods for verifying legal status, to the end that whenever an officer has probable cause to believe a person he or she has lawfully detained for violations of state or County law has committed federal immigration violations, he or she will take appropriate action to notify federal authorities. The Police Department was directed to report on its progress in implementing those directives in 60 days, which it did on September 18, 2007.

Complaint, Para. 155. During the Board’s meeting on September 18, the Chief of Police presented proposed General Orders 45.01 and 45.02, which are entitled “Local Enforcement Response to Illegal Immigration: General Guidelines” and “Local Enforcement Response to Illegal Immigration: Member Responsibilities.” They are attached as Exhibits H and I to the Complaint. These draft General Orders bear no effective date, because they are not yet effective. If they become effective in their current form, then police officers will be directed and guided in questioning suspects detained on state or County charges about their federal immigration status, and in making contact with ICE. Until these General Orders become effective, the Police Department has no

policy with respect to inquiring into federal immigration status, its prior General Order on this topic having been rescinded. Attachment A to Complain, p. 1.

Resolution 07-609 directs the County Executive to provide information to the Board about County services and recommendations on which, if any, of those services could be restricted by the Board based on federal immigration status. As the Complaint alleges, the County Executive supplied his report on October 2, 2007. Complaint, Para. 161. The July 10, 2007, Resolution does not deny County services to anyone based on immigration status, and the Complaint does not allege that the Board has taken any subsequent action to do so. In fact, it has not.

Because those portions of Res. 07-609 of which Plaintiffs complain have not taken final form, and remain subject to review and, therefore, change, this case is not fit for judicial decision. Further, whether and how the policies ultimately adopted by the County might play out with respect to each Plaintiff is still open to conjecture. Under these circumstances, “to adjudicate the issue now would necessitate speculation about whether there would ever be an issue to decide.” *Kemler*, at 541.

2. *To delay adjudication until the issue is ripe works no hardship on Plaintiffs.*

The purpose of the “hardship to the parties” analysis is to ascertain if the harm that deferring judicial review will cause to Plaintiffs outweighs the benefits it will bring to the County and the Court. *West Virginia Highlands Conservancy, Inc. v. Babbitt*, 161 F.3d 797, 801 (4<sup>th</sup> Cir. 1988).

As previously stated, this case is not fit for adjudication because the County has not taken final action with respect to either Police Department procedures or the delivery of County services. Until final action is taken, Res. 07-609 does not expose Plaintiffs to

additional risk that they will be improperly questioned about their immigration status, nor does it operate to deprive them of access to County services. Therefore, until the County takes final action on these points, the status quo that existed before Res. 07-609 is preserved. Under these circumstances, deferring adjudication of Plaintiff's claims until the County takes final action occasions no hardship to Plaintiffs.

For these reasons, the Complaint should be dismissed because its claims are not ripe.

**II. Even if this dispute were justiciable, none of the four causes of action states a claim for which relief can be granted.**

***A. The First Cause of Action fails: the July 10 Resolution is not preempted.***

Plaintiffs first claim that Res. 07-609 violates the Supremacy Clause because (1) Congress has inhabited the field of immigration enforcement to the complete exclusion of state and local measures like Res. 07-609 and draft General Orders 45.01 and 45.02 and (2) Res. 07-609 sets up a local immigration enforcement system to rival that of the federal government. Both arguments fail.

Plaintiffs are simply wrong in their assertion that Res.07-609 authorizes local police officers or employees to directly enforce federal immigration law. The Resolution does not set up any local criteria for declaring individuals to be "illegal immigrants." The Resolution does indicate that it is the Board's intent, subject to further deliberation, to require County employees to take certain actions in response to learning from federal authorities that an individual is present in this country in violation of immigration laws. Those actions would include turning individuals over to federal authorities for whatever immigration enforcement action federal authorities deem appropriate. This is hardly an attempt to directly enforce immigration law, or to establish a set of standards for

determining who is an illegal immigrant without reference to the federal government's determination on that point.

The enactment of federal immigration law does not, by itself, deprive local governments of all authority to make regulations that may affect illegal immigrants. The Supreme Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised..." *De Canas v. Bica*, 424 U.S. 351 (1976). *De Canas* concerned a California provision that prohibited the employment of illegal aliens cases before Congress adopted the present employment provision (8 U.S.C. §1324a) which specifically preempts parallel state and local measures.<sup>7</sup> Therefore, the specific finding in that case that the California provision was not preempted is no longer good law. However, the reasoning of *De Canas*, as well as other, prior decisions of the Court continue to support the view that "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.*, at 355.

Further, in *Plyler v. Doe*, 457 U.S. 202 (1982), the Court noted

Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct.

457 U.S. at 219. Clearly, the United States Supreme Court does not believe the existence of federal immigration law, by itself, forecloses all state and local governments from

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<sup>7</sup> 8 U.S.C. §1324a(h) provides: Preemption. The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

enacting any measures that affect illegal immigrants. Plaintiff's facial challenge to Res. 07-609 and the draft General Orders cannot succeed on the basis of preemption.

Through Res. 07-609, the Board is signaling its intent to support federal immigration enforcement efforts through supplying intelligence gathered lawfully by the police about suspected criminals, and to deny services it has discretion to deny to those who are deemed by the federal government to be illegal immigrants. It cannot be argued, in light of Supreme Court precedent and the current state of federal immigration law, that these objectives violate the Supremacy Clause or interfere with the Congressional scheme of immigration enforcement.

Because Res. 07-609 does not violate the Supremacy Clause, the First Cause of Action should be dismissed.

***B. The Second Cause of Action fails to state a claim.***

The Plaintiffs next allege that it is never permissible to consider race, color or ethnicity as one factor among others in determining probable cause for immigration violations, as proposed General Order 45.01 appears to permit if it is finally adopted in its current form. They further allege that to do so will always violate the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs are simply wrong.

Assuming that proposed General Orders 45.01 and 45.02 will, in their final form, allow officers to consider race, color or ethnicity in determining whether probable cause exists to believe a person is violating federal immigration law, this is neither more nor less than the Constitution permits. As Paragraph D of proposed General Order notes, "Racial profiling, the practice of stopping, detaining, or searching a person based solely on factors such as their race, color, or ethnicity, is prohibited and in fact, illegal. Race,

color, ethnicity, or other non-criminal traits are not, in and of themselves, sufficient to constitute reasonable suspicion or probable cause to justify stopping, detaining, or searching a person.” Attachment H to the Complaint. This is fully consonant with Supreme Court precedent concerning the investigation of suspected violations of federal immigration law:

*The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.”*

*United States v. Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975) (emphasis supplied).

As proposed General Order 45.01, even if it is finally adopted in its current form, does not violate the Equal Protection Clause on its face, as alleged by Plaintiffs, the Second Cause of Action should be dismissed.

***C. The Third Cause of Action fails; it merely duplicates the first two causes.***

Plaintiffs allege in their Third Cause of Action that because Res. 07-609 violates the Supremacy and Equal Protection Clauses of the United States Constitution, it also violates Sec. 1-248, VA Code Ann., which incorporates those provisions. The Third Cause of Action makes no substantive allegations beyond those presented in the First and Second Causes of Action. For the reasons previously stated, the First and Second Causes of Action should be dismissed, and the Third Cause of Action should be dismissed as well.

***D. The Fourth Cause of Action fails: the Board had legal authority to adopt RES 07-609.***

In alleging their Fourth Cause of Action, Plaintiffs must rely on an obvious and apparently willful misreading of Res. 07-609 and proposed General Orders 45.01 and

45.02. They say those documents “authorize and mandate that County Police Officers investigate violations of federal civil immigration law and detain individuals based on a perceived violation of such law.” Complaint, Para. 204.

Again, the Resolution and proposed General Orders speak for themselves, and they do no such thing. The Resolution directs Police Officers to inquire into immigration status when they have already detained a person on suspicion of violating a state or County law, and when they develop probable cause to believe the person has also violated federal immigration law. The Resolution directs Police Officers who are told by a suspect that the suspect is not a citizen or lawfully present here to contact ICE to verify immigration status. If ICE requests assistance in detaining the individual on a criminal charge and forwards the appropriate paperwork, proposed General Order 45.01(H) Police May Arrest (2) does authorize officers to make an arrest on that charge. This is fully consistent with the provisions of §19.2-81, VA Code Ann. That section authorizes local law enforcement officers to arrest on criminal warrants issued by other localities, other states, and the federal government.<sup>8</sup> This authority to arrest on a warrant issued by another law enforcement entity extends to arresting on criminal warrants for immigration violations issued by or at the request of ICE, and this is what the draft General Order provides.

However, if ICE reports that it has no pending enforcement action, or only a civil enforcement action against the suspect, proposed General Order 45.01(H) Police May

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<sup>8</sup> In pertinent part, §19.2-81, VA Code Ann. provides that county police officers “may arrest, without a warrant or a *capias*, persons duly charged with a crime in another jurisdiction upon receipt of a photocopy of a warrant or *capias*, telegram, computer printout, facsimile printout, a radio, telephone or teletype message, in which photocopy of a warrant, telegram, computer printout, facsimile printout, radio, telephone or teletype message shall be given the name or a reasonably accurate description of such person wanted and the crime alleged.”

Not Arrest (1) and (2) make clear that officers are not authorized to exercise their arrest powers in these circumstances, if the suspicion of violation of state and local law which caused the initial detention has been cleared.

Plaintiffs have not simply misread the Resolution and proposed General Orders 45.01 and 45.02 on this point; they have also misstated the law of Virginia with respect to the investigatory and arrest powers of local law enforcement officers for crimes committed outside their jurisdictions. While it is true that §19.2-81.6 provides express authority for arrest certain illegal aliens without a warrant, it is not true that this is the only source of arrest authority. Section 19.2-81, the general provision relating to warrantless arrests, also permits County police officers to arrest illegal immigrants if those immigrants are in fact subject to a criminal warrant for a federal immigration violation issued by or at the behest of ICE. The authority of Prince William County police officers to arrest on criminal warrants issued by other jurisdictions is as strong under §19.2-81 for this class of illegal immigrants as it is to arrest a person for whom, for example, Minnesota has issued a warrant for murder.

For these reasons, Res. 07-609 and proposed General Orders 45.01 and 45.02 do not exceed the powers given to local law enforcement by the Code of Virginia. The Fourth Cause of Action should be dismissed.

**III. All claims against individually-named Defendants should be dismissed:**

***A. No cause of action lies against any individual member of the Board of County Supervisors, acting in either an official or an individual capacity.***

The Complaint challenges Res. 07.609, which was the unanimous act of the Board of County Supervisors. The powers of the County as a body corporate and politic are vested in the Board of County Supervisors, pursuant to §15.2-502, VA Code Ann.

The County is properly sued in the name of the Board, pursuant to this provision and §15.2-1404, VA Code Ann. No provision of the Code of Virginia allows an individual Board member to act alone on behalf of the governing body, or to bind the body. All actions of a local governing body require a majority vote. Because no Board member can take a binding action that subjects the entire County to suit, suit cannot be maintained against individual Board members acting in their official capacities.

The Complaint makes no factual allegations against individual Board members in their private capacities. For these reasons, the claims against individual Board member should be dismissed.

***B. No cause of action lies against the County Executive or Chief of Police of Prince William County.***

The only factual allegations made against Craig Gerhart, the County Executive, are that he is the County Executive, that he was charged with providing the Board with a work session that would assist the Board in identifying which benefits it could lawfully deny to illegal immigrants (Complaint, Para. 97) and that he provided that work session and some recommendations (Complaint, Para. 161). These allegations fail to support any allegation of a legal wrong committed by Craig Gerhart, much less any claim made by these Plaintiffs. He should be dismissed as a Defendant.

The Complaint alleges that Chief Deane intends to promulgate proposed General Orders 45.01 and 45.02. For the reasons set forth in Section 1, none of the Plaintiffs have standing to challenge the future implementation of these draft General Orders, and their claims based on the draft General Orders are ripe at least until the General Orders become effective. For the same reasons that the claims made against the Board based on

passage of Res. 07-609 should be dismissed, the claims made against Chief Deane should likewise be dismissed.

### **CONCLUSION**

Throughout the lawsuit Plaintiffs mischaracterize Res.07-609 as an “immigration regulation.” It is not. The Resolution does not determine who may be legally present in this country or in the County; it does not establish criteria or determine a person’s “legal” status or whether he or she should be deported; it does not determine whether any particular county service or benefit should be provided or restricted to an illegal alien and it does not regulate the conduct of anyone who is not a County employee. This Resolution and the proposed General Orders are purely internal documents that first, address constitutionally permissible operations of local law enforcement and second, call for the provision of information to a local legislative body for its consideration in the provision of purely local services with scarce local resources.

While not in any manner an “immigration regulation,” the Resolution and draft General orders are fully consistent with existing federal constitutional and statutory law with respect to immigration. For the foregoing reasons, this Complaint should be dismissed against all Defendants.

October 30, 2007

Respectfully submitted,

**COUNTY ATTORNEY'S OFFICE**  
**PRINCE WILLIAM COUNTY**  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of October, 2007, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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And I hereby certify that I will mail the document by U.S. mail to the following non-filing users on the same day:

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