Docket Nos. 20-55175, 20-55252

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Gerardo Gonzalez, *et al.*,
Plaintiffs-Cross-Appellants/Appellees,
v.

Immigration and Customs Enforcement, *et al.*,
Defendants-Cross Appellants/Appellees.

On Appeal from the United States District Court for the Central District of California,
Civil Action No. 13-cv-04416-AB-FFMx

BRIEF FOR *AMICI CURIAE* NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD; IMMIGRANT LEGAL RESOURCE CENTER; UNIVERSITY OF NEVADA, LAS VEGAS IMMIGRATION CLINIC; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; WASHINGTON DEFENDER ASSOCIATION; BROOKLYN DEFENDER SERVICES; BRONX DEFENDERS; AND IMMIGRANT DEFENSE PROJECT IN SUPPORT OF APPELLEES

DLA PIPER LLP (US)

Susan M. Krumplitsch (susan.krumplitsch@us.dlapiper.com)
2000 University Avenue
East Palo Alto, California 94303
(650) 833-2000

Alexis Burgess (alexis.burgess@us.dlapiper.com)
2000 Avenue of the Stars, Suite 400 North Tower
Los Angeles, California 90067
(310) 595-3000

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae National Immigration Project of the National Lawyers Guild ("National Immigration Project") is a not-for-profit charitable organization. National Immigration Project has no parent corporation. It does not issue stock.

Amicus Curiae Immigrant Legal Resource Center ("ILRC") is a not-for-profit charitable organization. ILRC has no parent corporation. It does not issue stock.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The National Immigration Project of the National Lawyers Guild ("National Immigration Project"), Immigrant Legal Resource Center ("ILRC"), University of Nevada, Las Vegas Immigration Clinic ("UNLV Immigration Clinic"), National Association of Criminal Defense Lawyers ("NACDL"), Washington Defender Association ("WDA"), Brooklyn Defender Services ("BDS"), Bronx Defenders ("Bronx Defenders"), and Immigrant Defense Project ("IDP") (collectively, "*Amici*") have a direct interest in protecting the legal rights of citizens and noncitizens and advocating for the fair and just application of this nation's immigration and criminal laws.

The district court found that ICE violates the Fourth Amendment by issuing immigration detainers to state and local law enforcement agencies in states that lack statutes expressly authorizing civil immigration arrests and issued a permanent injunction. On the narrower issue of whether ICE's immigration detainer practice violates the long-standing rule that a neutral official must promptly review probable cause for an arrest or detention, the district court granted summary judgment in defendants' favor.

[1] Pursuant to Rule 29(a)(4)(E), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

Amici submit this brief to assist the Court with its analysis of whether ICE's detainer practices violate the Fourth Amendment's prohibition against arbitrary detention and its requirement that a person in custody receive a prompt, neutral determination of probable cause. As set forth below, when a person is detained by ICE for a suspected civil violation of immigration laws, they may be detained for lengthy periods of time with no independent review by a neutral officer as to whether ICE had probable cause for the arrest and detention. This practice runs afoul of constitutional safeguards and results in significant harm to those detained.

The National Immigration Project of the National Lawyers Guild ("National Immigration Project") is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrant rights and to secure equality and justice within the immigration system, particularly for those who are accused or convicted of crimes. The National Immigration Project focuses on immigration enforcement and on the intersection of criminal and immigration laws. The National Immigration Project litigates, advocates, publishes books and advisories, and provides technical assistance and training to hundreds of immigration and criminal defense attorneys each year on immigration defense and on the immigration consequences of criminal convictions. The National Immigration Project has a significant interest

in ensuring that the immigration enforcement system does not violate basic constitutional rights and freedoms.

The Immigrant Legal Resource Center ("ILRC") is a national organization that provides trainings, legal resources and advocacy to advance immigrant rights. The ILRC has particular expertise in immigration enforcement and the hotly disputed role of local law enforcement in the immigration system. In particular, the ILRC provides legal and policy expertise to organizations around the country on issues surrounding ICE detainers and ICE arrest authority, as well as maintaining a detailed national map of county-level assistance in immigration enforcement: www.ilrc.org/local-enforcement-map. The ILRC also advises public and private criminal defense attorneys on the immigration consequences of criminal convictions and trains and advises hundreds of organizations on immigration representation and removal defense. The ILRC has a significant interest in protecting the rights of immigrants against unfair and unlawful enforcement and detention.

The UNLV Immigration Clinic is a part of the Thomas & Mack Legal Clinic at the University of Nevada, Las Vegas, William S. Boyd School of Law. The Clinic employs the only attorney in the State of Nevada devoted full time to representing people detained by Immigration and Customs Enforcement on a pro bono basis. It also provides free immigration-related legal services to

unaccompanied minors and students, staff and their families at the University of Nevada, Las Vegas and the College of Southern Nevada. In this work, the Clinic represents many clients who have been arrested by local police and transferred to ICE custody through use of a detainer.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Washington Defender Association ("WDA") is a statewide non-profit membership organization of public defender agencies, indigent defenders and those working to improve the quality of indigent defense in Washington State.

WDA provides support for high quality legal representation, educates defenders, and collaborates with the community and other justice system stakeholders to advance systemic reforms. In 1999, WDA created the Immigration Project to defend and advance the rights of noncitizens in Washington State facing the immigration consequences of criminal justice system involvement. WDA has provided amicus briefs in support of cases at all levels of immigration and federal courts, including this Court.

Brooklyn Defender Services ("BDS") is a public defender organization that represents nearly 30,000 low-income residents of Brooklyn and elsewhere each year in criminal, family, civil, and immigration proceedings, providing interdisciplinary legal and social services since 1996. Since 2009, BDS has counseled or represented more than 15,000 clients in immigration matters including deportation defense, affirmative applications, and advisals, as well as immigration consequence consultations in Brooklyn's criminal court system. Since 2013, BDS has represented more than 1,400 detained immigrants through the New York Immigrant Family Unity Project.

The Bronx Defenders is a nonprofit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 20,000 cases each year and reaches hundreds more

through outreach programs and community legal education. The Immigration Practice of the Bronx Defenders provides advice regarding the immigration consequences of contact with the criminal legal system as part of its holistic model of representation, and frequently assists with legal questions involving detainers. The Bronx Defenders also provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and represents non-detained immigrants in removal proceedings.

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. IDP provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants accused of crimes and has a keen interest in defending them against unconstitutional detention and enforcement practices.

ARGUMENT

I. ICE's Detainer System Is A Gap In Our Constitutional Armor.

A fundamental task for a constitutional system built to defend individual liberty is to establish rigorous checks against the government's ability to arrest

and imprison people. Accordingly, much of criminal law concerns the substantive rules governing when, and under what circumstances, the government may deprive a person of their liberty, and numerous courts have made clear that immigration enforcement actions must conform to the Fourth Amendment. Yet, these standards matter little if, under the auspices of "civil" immigration proceedings, the government can detain a person for long periods of time with little or no cause and no independent review.

Since the 1940s, the Supreme Court has emphasized the need for a neutral officer's review of probable cause, because "[z]eal in tracking down crime is not in itself an assurance of soberness of judgment. . . . The awful instruments of the criminal law cannot be entrusted to a single functionary." *McNabb v. United States*, 318 U.S. 332, 343 (1943) (Frankfurter, J.). *See also Johnson v. U.S.*, 333 U.S. 10, 13-14 (1948) ("The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."); *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971) (finding a warrant issued by the Attorney General to be invalid because he was in charge of prosecution and not a

neutral magistrate). These safeguards exist to protect the rights of persons accused of crimes.

Yet, at this very moment, when ICE issues a detainer to hold a person on the basis of a suspected *civil* violation of immigration law (*e.g.*, being present in the United States without lawful status), days, weeks, and possibly months of detention can ensue without any neutral official reviewing whether there is probable cause to justify the government's case. In the ICE detainer system as presently operated, no neutral decisionmaker reviews the legality of a person's detention either before the issuance of an administrative arrest "warrant," or promptly after the arrest. The result is an enforcement agency with virtually unchecked power to determine the validity of its own actions.

Separation of powers concerns loom large here. When the power to detain a person is concentrated in a single branch of government, the threat to liberty is especially grave. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring). In light of these foundational principles, the mechanisms by which immigration enforcement agencies in the Executive Branch arrest and detain people, and the way in which local law enforcement agencies have become an instrumentality of this system, should cause grave alarm.

Consider, in the first place, how these foundational safeguards against arbitrary detention have been implemented in the normal course of our civil and

criminal legal systems. In *Gerstein v. Pugh*, the Supreme Court found that the Fourth Amendment mandates a neutral determination of probable cause before an "extended restraint of liberty" following an arrest. 420 U.S. 103, 114 (1975). The Court recognized that once a person is in custody, "the suspect's need for a neutral determination of probable cause increases significantly." *Id*. The Court concluded that it was not constitutionally sufficient for a prosecutor to be the sole reviewer of whether police have probable cause for a warrantless arrest. *Id*. at 114, 117.

The only conceivable justification for the exceptional nature of the immigration arrest system—and one that the District Court relied on here—is that it is a civil, administrative procedure rather than part of the criminal justice system. *See People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 41 (N.Y. App. Div. 2018) ("Although administrative arrest warrants are constitutionally valid in the federal immigration law enforcement context, such warrants are civil and administrative, and not judicial, in nature.") (citing *Abel v. United States*, 362 U.S. 217, 234, 236, 238 (1960)). But the fact that a system of detention is classified as non-criminal does not exempt it from constitutional safeguards. As the Supreme Court recognized in *Camara v. Municipal Court*, "the warrant machinery contemplated by the Fourth Amendment" would normally call for even an administrative search or seizure to "be reviewed by a neutral magistrate." 387 U.S. 523, 532 (1967). In *United States v. Salerno*, the Supreme Court made clear that

pre-trial detention in criminal cases is also "regulatory" in nature, and it cited to non-criminal decisions to establish standards for pre-trial detention in criminal matters. 481 U.S. 739, 748 (citing, *inter alia*, *Carlson v. Landon*, 342 U.S. 524 (1952) (immigration); *Wing v. United States*, 163 U.S. 228 (1896) (immigration); *Addington v. Texas*, 441 U.S. 418 (1979) (involuntary commitment)). As such cases demonstrate, "[t]he line between 'criminal' and 'civil' statutes has often proven tricky enough to administer." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156–57 (10th Cir. 2016) (Gorsuch, J., concurring). Here, the formalistic civil-criminal distinction matters little "given the power our modern administrative state already enjoys." *Id*. *See also Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty,' . . . but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process.") (internal citations omitted).

Indeed, immigration enforcement also stands apart from other matters of administrative law. To put matters in the bluntest terms possible, other administrative agencies do not shackle people or lock them in jails. Courts have long recognized the penal nature of civil detention, which often occurs in criminal detention facilities. *See, e.g.*, *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 478 (3d Cir. 2015) ("Yet, we cannot ignore the conditions of

confinement. Chavez–Alvarez is being held in detention at the York County Prison with those serving terms of imprisonment as a penalty for their crimes . . . . [M]erely calling a confinement 'civil detention' does not, of itself, meaningfully differentiate it from penal measures."); *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1221 (11th Cir. 2016) (noting that petitioner's "civil immigration detention is in a prison-like facility and . . . now longer than his prison time for bank fraud"). Also, unlike any other administrative agency, ICE routinely uses local law enforcement to detain and imprison people for extended periods without any neutral review or even significant internal oversight as to the grounds for or propriety of the detention. This contrasts with the procedural safeguards in the Constitution designed to prevent extended detentions after civil or criminal arrest without judicial review or oversight. The lack of pivotal Fourth Amendment protections in the ICE detainer system has profound downstream consequences to those detained, including, quite frequently, long-term imprisonment. ICE's power to detain and imprison people warrants far greater Fourth Amendment checks on its authority than the district court recognized in this case.

II. ICE Uses Detainers to Arrest and Indefinitely Imprison People Without Any of the Most Basic Fourth Amendment Protections.

While the Fourth Amendment requires a neutral determination of probable cause as a prerequisite to extended restraint of liberty following arrest, *Gerstein*, 420 U.S. at 114, the immigration system is one of "detention by default." *Tijani*

v. Willis, 430 F. 3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring). The dire lack of basic Fourth Amendment protections in the immigration context frequently begins with an ICE detainer.

As described more fully below, ICE officers may issue a detainer at any point after a person is arrested by local law enforcement. While the detainer form contains language asserting that it is based on an individualized determination, the evaluation of probable cause is perfunctory at best, and no evidence substantiating the assertion is required. A person may be detained for two days after they otherwise should have been released, solely on the basis that an ICE officer has checked a box on the detainer form. There is no review of whether the ICE detainer or ICE's subsequent arrest was lawful. This lack of essential review undergirds the disproportionate consequences, outlined below, that follow from the issuance of an ICE detainer.

After arrest by ICE, a person is typically held for weeks or sometimes months before their first audience before an immigration judge, usually a master calendar hearing. At this first hearing, the immigration judge does not review whether the arrest was legal and may not even hear a request for bond. Furthermore, immigration law's sweeping requirements for mandatory detention mean that many detained persons ultimately spend months or years in prison awaiting a merits ruling without having either their initial arrest or continued

custody reviewed at all. In other words, the utter absence of any traditional Fourth Amendment protections attaching to ICE detainers is only amplified by the legal process that follows, with profound ramifications for people detained in both the civil and criminal context.

A. ICE Detainers Result in Additional Detention Time for Hundreds of Thousands of People, Even If They Do Not Result in Arrest by ICE.

ICE arrests hundreds of thousands of people each year. The vast majority of those arrests—an estimated 69% or more—resulted from an ICE detainer.[2] ICE issues around 14,000 detainers per month.[3] As described extensively in this litigation, these immigration detainers request detention for 48 hours after the person named in the detainer would otherwise be eligible for release. *See Gonzalez* Plaintiffs Post-Trial Brief (D.I. 507) at 55, No. 2:12-cv-09012; *see also* 8 C.F.R. § 287.7(d). Until recently, ICE detainers requested that law enforcement agencies detain the person subject to the detainer for 48 hours *excluding* weekends and

[2] *See* Transactional Records Access Clearinghouse ("TRAC"), Immigration and *Customs Enforcement Arrests Tool*, https://trac.syr.edu/phptools/immigration/arrest/ (calculating percent of ICE arrests resulting from programs or arrest methods that primarily use ICE detainers) (accessed June 5, 2020).

[3] TRAC, *ICE Now Issuing 14,000 Detainers Each Month – Numbers Honored Unclear*, https://trac.syr.edu/immigration/reports/511/ (accessed June 5, 2020).

holidays.[4] In practice, this meant that ICE was requesting detention of individuals for *up to five days* based on the detainer alone. *See e.g., Rivas v. Martin*, 781 F. Supp. 2d 775, 777 (N.D. Ind. 2011).

Not all of these detainers result in an ICE arrest. From October 2008 through October 2015, ICE issued 1.76 million detainers, but only subsequently took custody of 20% of those individuals.[5] Yet during most of this period, most counties in the country executed the vast majority of ICE detainers and held people for ICE at least 48 hours beyond when they should have been released, and frequently much longer.[6] In many cases, including several that gave rise to extensive damages litigation against state and local law enforcement authorities, individuals have been held well beyond four or five days—some for weeks and even months—awaiting ICE pickup that never arrived, without charges and without any procedure to challenge the ICE detainer.[7] Such incidents and practices

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[4] *See, e.g.*, https://www.nationalimmigrationproject.org/PDFs/community/detainer-guide-addendums.pdf (accessed June 10, 2020).

[5] *Cross-Appellant/Appellee's Principal and Response Br.* (D.N. 32-1) at 26.

[6] *See Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014).

[7] *See, e.g.*, *Ocampo v. Gusman*, No. 2:10-cv-04309-SSV-ALC (E.D. La. filed Nov. 15, 2010) (habeas petitioner had been held 95 days on an immigration detainer); *Cacho et al. v. Gusman*, No. 11 Civ. 225 (E.D. La. filed Feb. 2, 2011) (civil rights action for detention on ICE detainer of more than 160 days); *Quezada v. Mink et al.*, No. 10 Civ. 879 (D. Colo. filed Dec. 12, 2010) (same for plaintiff held 47 days); *Florida Immigrant Coalition et al. v. Palm Beach County Sheriff*, No. 9 Civ. 81280 (S.D. Fla. 2010) (same for plaintiff held for five months);

underscore ICE's dragnet approach to enforcement even when major deprivations of liberty are at stake.

B. ICE Issues Detainers That Are Not Supported By Probable Cause Or Any Review by a Neutral Official.

Unlike a criminal arrest warrant, which can only be issued by a neutral official upon application by a law enforcement agent attesting under oath to facts demonstrating probable cause, ICE detainers are simple check-box forms that a single ICE agent issues based on nothing more than a review of databases that are incomplete, replete with inaccuracies, and have led regularly to the issuance of detainers against people who are not removable, including U.S. citizens.[8] Previously, ICE regularly issued detainers requesting that state or local law enforcement agencies detain the subject of the detainer after they would otherwise be released merely so that ICE could "initiate an investigation" into their

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Ramos-Macario v. Jones et al., No. 10 Civ. 813 (M.D. Tenn. filed Sept. 28, 2010) (same for plaintiff held for 25 days).

[8] Bier, David, *U.S. Citizens Targeted by ICE: U.S. Citizens Targeted by Immigration and Customs Enforcement in Texas* (Aug. 29, 2018) https://www.cato.org/publications/immigration-research-policy-brief/us-citizens-targeted-ice-us-citizens-targeted#endnote-024-backlink (accessed June 10, 2020) ("ICE also arrested hundreds of people and then released them after discovering evidence of U.S. citizenship."); ACLU Florida, *Citizens on Hold: A Look at ICE's Flawed Detainer System in Miami-Dade County* (Mar. 20, 2019) https://www.aclufl.org/sites/default/files/field_documents/aclufl_report_-_citizens_on_hold_-_a_look_at_ices_flawed_detainer_system_in_miami-dade_county.pdf; *see also Cross-Appellant/Appellee's Principal and Response Br.* (D.N. 32-1) at 10-12, 21-22.

immigration status. *See Morales v. Chadbourne*, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (finding immigration detainer for investigation is a "facially invalid request to detain") *aff'd in part*, 793 F.3d 208, 211 (1st Cir. 2015) (finding it clearly established that ICE needs probable cause to issue a detainer); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *12 (D. Or. April 11, 2014) (holding county liable for unlawful seizure without probable cause, based on an immigration detainer that indicated ICE had initiated an investigation). On their face, these forms clearly lacked any probable cause for arrest: under the Fourth Amendment, detention for purposes of *initiating* an investigation—prior to any finding that the person is subject to prosecution or removal—is clearly prohibited. *See id.*; *Dunaway v. New York*, 442 U.S. 200, 216 (1979) (rejecting custodial detention for investigatory purposes without probable cause).

DHS has repeatedly revised its detainer request form as it has consistently failed to satisfy constitutional requirements. In 2015, ICE changed the form to create four checkboxes with generalized grounds that ICE claims provide probable cause of removability.[9] But these changes were merely cosmetic: ICE

[9] Immigration Detainer – Request for Voluntary Action, Form I-247D (May 2015) https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF (accessed June 11, 2020).

has made *no* corresponding changes to its underlying process for issuing detainers or investigating probable cause. *See Cross-Appellant/Appellee's Principal and Response Br.* (D.N. 32-1) at 8-11; *see also Hernandez v. United States*, 939 F.3d 191, 204 (2d Cir. 2019) (characterizing the government's argument that ICE had probable cause to issue a detainer because the detainer form "'reflects ICE's determination that [plaintiff] was subject to an order of deportation or removal from the United States'" as "an entirely circular argument, as it amounts to the contention that 'we had probable cause to issue the detainer because we said so.'"). In fact, since the launch of the Secure Communities program in 2008, ICE has used one primary method for issuing detainers: automated systems that check databases and generate a report on a person's possible immigration status followed by issuance of an immigration detainer at the click of a button. *Id.*

Since the Northern District of Illinois's 2016 ruling in *Moreno v. Napolitano* invalidating detainers issued by the Chicago ICE Field Office, 213 F. Supp. 3d 999 (N.D. Ill. 2016), ICE has updated its detainer policy to require an administrative warrant to be attached to the detainers it issues. But administrative warrants suffer from the same defects as the detainer forms they are meant to support: they are issued by a sole ICE agent without any review by a neutral official and do not include a sworn statement of probable cause based on particularized facts or any of the expected features of a constitutionally approved

warrant.[10] Instead, the warrant consists of boilerplate checkboxes for probable cause that are nearly identical to those on the ICE detainer.[11] ICE's remedy for widespread violations of its statutory arrest authority was to have officers send two functionally identical documents, the detainer and the warrant, instead of just one.[12]

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[10] 8 C.F.R. § 287.5(e) (listing officers authorized to issue warrants). *See El Badrawi v. Dep't of Homeland Sec.*, 579 F. Supp. 2d 249, 275-76 (D. Conn. 2008) (treating as "warrantless" an arrest pursuant to an administrative warrant signed by an ICE agent, who was not a "neutral magistrate (or even a neutral executive official)"); *Shadwick v. City of Tampa*, 407 U.S. 345, 348 (1972) ("[S]omeone independent of the police and prosecution must determine probable cause."); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (same). *See also* Federal Law Enforcement Training Center, *Ice Administrative Removal Warrants* https://www.fletc.gov/audio/ice-administrative-removal-warrants-mp3 ("So, in comparing the authority and limitations of an administrative removal warrant to a criminal warrant situation, it would seem as though an officer who has an administrative removal warrant has about the same authority as an officer in a criminal matter who has probable cause, but does not have a warrant issued by a federal judge.") (accessed June 5, 2020).

[11] *Compare* "Immigration Detainer – Notice of Action," Form I-247A, available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf, *with* "Warrant for Arrest of Alien," Form I-200, available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF (accessed June 10, 2020).

[12] *See* Immigration and Customs Enforcement, Policy Number 10074.2, *Issuance of Immigration Detainers by ICE Immigration Officers* (March 24, 2017) https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf (accessed June 10, 2020). Although ICE has in some internal procedures required a supervisor to sign off on administrative warrants, in 2019, an investigator reported that those supervisor signatures are regularly forged. CNN, *Ice Supervisors Sometimes Skip Required Review of Detention Warrants,*

As a result, the vast majority of ICE arrests commence with a patently lawless procedure wherein an ICE agent issues a detainer based on a peremptory glance at a database, and a person is detained for two additional days or more solely to await ICE's decision about whether it will even take custody. There is no check on ICE's basis for initiating this detention and no clear mechanism for contesting the detainer, either to ICE or to the local custodian.

III. The Issuance Of An ICE Detainer Results In A Wide Range Of Negative Collateral Consequences.

The effects of ICE detention reach beyond federal immigration enforcement. Immigration detainers can also result in a host of negative consequences for a person's criminal proceedings that would not exist but for the issuance of the ICE detainer.[13]

Perhaps the most obvious consequence is the fact of detention itself. The detainer, if honored, directly causes up to 48 additional hours of detention time after an acquittal, dismissal of charges, posting of bail, order of release under personal recognizance, or any other event that eliminates the state or local basis

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Emails Show, https://www.cnn.com/2019/03/13/us/ice-supervisors-dont-always-review-deportation-warrants-invs/index.html (accessed June 5, 2020).

[13] *See generally* Beckett, Katherine & Evans, Heather, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 Law & Soc'y Rev. 241 (Mar. 2015).

for the initial detention.[14] Thus, physical detention can follow a proceeding in which an individual was found to be faultless, or was brought without sufficient evidence or lacked merit. Individuals who ordinarily would not have been detained at all—for example, where initial contact with law enforcement was the result of a traffic violation or other minor infraction—are frequently detained by local law enforcement in anticipation that ICE will issue a detainer once that person is booked into jail.[15] Thus, an unpaid traffic ticket or absentminded failure to use a turn signal can result in detention and lead to deportation.[16] Such wildly disproportionate consequences can result from ICE detainers even though, as discussed above, the detainers are issued without the typical constitutional safeguards that protect persons against deprivation of physical liberty.[17] Studies

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[14] *See* "Immigration Detainer – Notice of Action," Form I-247A, available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf (accessed June 3, 2020).

[15] Gardner, Trevor George, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity (Sept. 1, 2009) ("This study also shows that immediately after Irving, Texas law enforcement had 24-hour access (via telephone and video teleconference) to ICE in the local jail, discretionary arrests of Hispanics for petty offenses—particularly minor traffic offenses—rose dramatically.").

[16] *Id.*; Goldbaum, Christina, *When Paying a Traffic Ticket Can End in Deportation*, The New York Times (June 30, 2019), https://www.nytimes.com/2019/06/30/nyregion/ice-courthouse-arrests.html (accessed June 3, 2020).

[17] *Id.*

also show that people with ICE detainers spend significantly longer in custody than those without ICE detainers, even when factors such as race and severity of offense are controlled.[18]

Immigration detainers can be issued at any point during the criminal legal process and are frequently issued shortly after arrest. The existence of an ICE detainer frequently prompts an increase in the amount of bail, or outright denial of bail by the criminal court, even for individuals who would otherwise have been granted a low bail or released on their own recognizance.[19] This in turn often results in extended pretrial detention that is much longer than it would have been

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[18] *See, e.g.* University of Washington Center for Human Rights, *Unequal Justice: Measuring the Impact of ICE Detainers on Jail Time in Pierce County* (Jan. 30, 2019) https://jsis.washington.edu/humanrights/2019/01/30/unequal-justice-ice-detainers-pierce-county/ (accessed June 10, 2020); Greene, Judith A., *The Cost of Responding to Immigration Detainers in California*, Justice Strategies (Aug. 22, 2012)https://www.justicestrategies.org/sites/default/files/publications/Justice%20Strategies%20LA%20CA%20Detainer%20Cost%20Report.pdf (accessed June 10, 2020); Shahani, Aarti, *New York City Enforcement of Immigration Detainers*, Justice Strategies (Oct. 2010) https://www.justicestrategies.org/sites/default/files/publications/JusticeStrategies-DrugDeportations-PrelimFindings.pdf (accessed June 10, 2020).

[19] *See* National Immigration Forum, *Immigrants Behind Bars: How, Why and How Much?* (Mar. 2011), https://immigrationforum.org/article/immigrants-behind-bars-much/ (accessed June 10, 2020) ("Detainers may also be viewed by a judge or magistrate as evidence of alienage and flight risk, thus making bail or bond unavailable or unattainable. As a result, immigrants with detainers may be held in pre-trial criminal detention for weeks or months on a nonviolent, misdemeanor charge while a citizen with the same charge would have been released pending the outcome of the case.").

absent the ICE detainer, including for people who are ultimately acquitted or have charges dismissed.[20] Even individuals who are granted bail frequently do not post it for fear of being taken into ICE custody, choosing instead to remain in criminal custody to protect their ability to participate in their own defense against the criminal charges.[21] In fact, many individuals who post bail are detained by ICE and subsequently fail to appear for their criminal court dates, because ICE has either deported them prior to the conclusion of their criminal proceedings or refused to provide transportation or transfer back to state court for their hearings.[22] It is well-documented that pre-trial detention makes it much more difficult to defend against charges and increases the likelihood of conviction and economic devastation.[23]

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[20] *See, e.g.,* Trefonas, Elisabeth M., *Access to Justice for Immigrants in Wyoming*, 34-Oct. Wyo. Law. 24 (2011).

[21] *Id*.

[22] *See, e.g.*, *Big Louie Bail Bonds, LLC. v. State of Maryland*, 78 A.3d 387 (Md. 2013) (reversing the circuit court's denial to strike the forfeiture of bonds and holding deportation to be a reasonable ground for failure to appear).

[23] *See, e.g.*, Dobbie, Will, *et al., The Effects of Pre-Trial Detention on Conviction, Future Crime and Employment: Evidence From Randomly Assigned Judges,* 108 Am. Economic Rev. 201 (Feb. 2018).

The existence of an ICE detainer also often disqualifies defendants from access to diversion programs or non-jail alternatives.[24] The mere fact that ICE has issued a detainer can close off defendants' access to substance abuse or mental health treatment programs while they are in custody. For example, a U.S. citizen in Illinois sued ICE after being wrongfully subjected to an ICE detainer that disqualified him from a 120-day boot camp for a drug offense and caused him to be sent, instead, to a maximum-security prison for a seven-year sentence. *Makowski v. United States*, 27 F. Supp. 3d 901 (N.D. Ill. 2014). ICE's mistake in issuing a detainer directly resulted in devastating consequences for his treatment and his life. In many states, an ICE detainer renders a person ineligible for sentencing alternatives that reduce jail time, prioritize treatment or ensure family relationships can be sustained during incarceration.[25]

Compounding these problems, even though revised ICE detainer forms state that they must be served on the individual, such service is inconsistent at best. Members of amicus the National Immigration Project have reported that in New York, for example, ICE detainers are never served on their clients, and they

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[24] Dill, Sara Elizabeth, *Unbalanced Scales of Justice: How ICE is Preventing Noncitizens from Having Equal Access to Diversion Programs and Therapeutic Courts*, 50 Fam. Ct. Rev. 629 (Oct. 2012).

[25] *See, e.g.*, Revised Code of WA (RCW) 9.94A.660; RCW 9.94A.670; RCW 9.94A.665.

routinely must file state public records requests just to obtain a copy of the detainer request issued against their client. Members in Maryland have similarly reported that their clients never get a copy of the detainer form themselves but can sometimes obtain it in discovery in the pending criminal matter. Members in other states have reported that the practice varies by local jurisdiction and is inconsistent at best. Such systematic lack of service hampers the ability of persons subject to ICE detainers to identify and report errors on the detainer form. It also limits the ability of criminal defense attorneys and public defenders to evaluate immigration consequences, to prepare adequately for bond requests, and to engage in other assessments relating to their criminal proceedings.

The non-existence of any immediate or direct mechanism to challenge the ICE detainer means that these negative collateral consequences exist regardless of the viability of the underlying basis upon which the detainer was originally issued. Constitutional safeguards and other protections against threats to personal liberty and equal access to justice can be, and often are, circumvented due to the low standards and unreviewable practices related to ICE detainer issuance.

IV. ICE Detainers Are A Complete Anomaly Among Comparable Law Enforcement Tools And Provide No Basic Fourth Amendment Protections.

A quick review of how ICE detainers issue and function compared to other law enforcement requests for arrest or detention is instructive. Absent the most

basic Fourth Amendment protections, ICE detainers are a complete anomaly among comparable law enforcement tools.[26]

As described above, an immigration detainer differs from a criminal warrant in several important respects. First, unlike any other law enforcement agents, who must apply for a warrant to be issued by a neutral official, ICE agents regularly issue detainers (and their underlying administrative warrants) unilaterally and at their sole discretion.[27] Second, a criminal warrant of arrest must be supported by a sworn statement setting forth the particularized basis for a probable cause finding, and a finding by the magistrate that such probable cause exists. No such sworn statement or finding exists for immigration detainers; instead, as previously described, ICE agents simply conduct a database query and check a box on the form, and no sworn statement is ever provided on either the detainer itself, or the administrative warrant supposedly supporting its issuance.[28] Third, a person detained by ICE, unlike a criminal defendant, can ultimately be

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[26] Despite the similar nomenclature, immigration detainers are not comparable to criminal detainers. Criminal detainers, which are issued based on pending criminal charges in another jurisdiction, do not call for additional detention time and are subject to extensive procedural safeguards that are completely absent in the immigration detainer context. *See* Letter from Office of the Attorney General, State of Maryland, to Hon. Mullendore, Washington County Sheriff (Aug. 14, 2014).

[27] *Id*. at 5-7.

[28] *See* n.13, *supra*.

imprisoned for months or years awaiting a decision on the merits of their case without even the opportunity to request release on bond and without a neutral official ever reviewing the propriety of their arrest.[29]

V. The Lack Of Basic Protections Continues Once In ICE Custody, Resulting In Prolonged And Ultimately Unexamined Detention Pending Resolution Of Detained Persons' Immigration Cases.

When processing an arrest, ICE has another 48 hours to issue a "Notice of Custody Determination" informing the detained person whether they will be released or continue in ICE custody.[30] ICE must also decide whether to issue a "Notice to Appear" (NTA), which is the charging document that ICE files in immigration court to commence removal proceedings.[31] The NTA, however, is not necessarily issued during that 48 hours, as the time period for issuing the NTA is not specified.[32] People thus often spend at least four days in custody before even being informed of any removal charges against them.

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[29] *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013); *Rodriguez v. Robbins*, 804 F.3d 1060, 1072 (9th Cir. 2015).

[30] 8 C.F.R. § 287.3(d) (2003).

[31] *Id*.

[32] *See* Kessler, Bridget. "In Jail, No Notice, No Hearing . . . No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights." *American University International Law Review* 24, no. 3 (2009): 571-607. https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer= https://www.google.com/&httpsredir=1&article=1096&context=auilr (accessed June 11, 2020). A wide

In making custody determinations after initial arrest, ICE's decision-making process involves shockingly little oversight. The law and regulations require only that the person arrested "shall be taken without unnecessary delay for examination before an officer of the Service."[33] Corresponding regulations provide that this examination should be performed by an officer other than the arresting officer, but only if one is readily available; otherwise it is conducted by the arresting officer.[34] This is a completely inadequate substitute for neutral review. "The mere requirement that another ICE officer review an arrest would be analogous to allowing police detectives to have their warrantless arrests reviewed by fellow detectives in the same department."[35]

In stark contrast to criminal proceedings, people taken into ICE custody *never* have the probable cause for their arrest presented to a judge for independent review. Even though a significant number of cases in immigration court result in

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variety DHS agents and officers are authorized to issue a notice to appear, without having it reviewed by an attorney for sufficiency. 8 C.F.R. § 239.1(a) (2016).

[33] 8 U.S.C. § 1357(a)(2) (2016). The "Service" refers to the legacy Immigration and Naturalization Service, and now applies to ICE.

[34] 8 C.F.R. § 287.3(a) (2003) ("If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him or her, may examine the alien.").

[35] Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 Geo. L.J. 125, 157 (2015).

either termination of proceedings because the person was not legally subject to deportation to begin with, or a grant of lawful status or some other permission to remain in the country,[36] detained persons are frequently held for weeks or months before they even see an immigration judge.[37] A class action in New York, for example, revealed that persons detained by ICE spent an average of 80 days in detention before their first appearance in immigration court, and that extended detention period was only decreased under intense supervision by the federal courts.[38] New York is not an outlier; another detention facility in Louisiana reported a median 140-day wait to see an immigration judge, and numerous others exceeded median wait times of two months for their first hearing.[39] Compounding this delay, ICE typically takes several days, and sometimes even weeks, to file the

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[36] Approximately 7% of cases are terminated, while another 9% result in relief from deportation. *See State and County Details on Deportation Proceedings in Immigration Court*, https://trac.syr.edu/phptools/immigration/nta/ (accessed on June 11, 2020) (reporting data on immigration court outcomes since 2001).

[37] *See Vazquez Perez v. Decker*, No. 18-cv-10683, 2019 WL 4784950, at *2-3 (S.D.N.Y. Sept. 30, 2019).

[38] *Id*. In 2018, for people detained by ICE in New York, average wait times between arrest and first appearance in immigration court averaged eighty days. By late 2019, as a result of the litigation and various responsive measures from EOIR, including a policy of scheduling first hearings within 21 days of the court's receipt of an NTA, that time period was reduced.

[39] Paul Moses, *'The Bizarro-World' Immigration Courts Where the Constitution Isn't Applied*, The Daily Beast, https://www.thedailybeast.com/the-bizarro-world-immigration-courts-where-the-constitution-isnt-applied?ref=author (accessed on June 11, 2020).

Notice to Appear with the immigration court. During this time, there is no meaningful opportunity to challenge detention.[40] If ICE wrongfully arrests someone and detains them for weeks before bringing the case in immigration court, the legality or propriety of that delay will only rarely be considered. *See Immigration and Naturalization Service v. Lopez-Mendoza,* 468 U.S. 1032, 1043 (1984) (holding that the exclusionary rule does not normally apply in removal proceedings because, *inter alia*, "regardless of how the arrest is effected, deportation will still be possible.")

Once their case is finally received in immigration court, persons detained by ICE are not automatically entitled to a bond hearing. Rather, they must request one, either in writing or orally to the judge during their court appearance[41]—which frequently occurs by videoconference from their detention center and is usually uncounseled.[42] Only about 16% of detained persons are represented by counsel at

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[40] *See Vazquez Perez*, 2019 WL 4784950, at *2-3; *Padilla*, 559 U.S. at 365-66; *R.I.L.R v. Johnson*, 80 F.Supp.3d 164, 185 (D.D.C. 2015) ("While it is true that an alien who is denied release by ICE may seek de novo review of that denial from an immigration judge, . . .this potential redetermination ignores the fact that it occurs weeks or months after ICE's initial denial of relief. It thus offers no adequate remedy for the period of unlawful detention members of the class suffer before receiving this review—the central injury at issue in this case.")

[41] *See* 8 C.F.R. § 1003.19(b) (2006).

[42] *See* TRAC, *Use of Video in Place of In-Person Immigration Court Hearings*, https://trac.syr.edu/immigration/reports/593/ (reporting average times for custody and detained master hearings) (accessed June 11, 2020); Department of Justice, Immigration Court Practice Manual,

these hearings, since immigrants in removal proceedings must obtain and pay for their own representation.[43] Such bond requests, if a detained person even knows to make one, need not be heard within any particular time frame, and may not be ruled on for many weeks thereafter—sometimes not until after the merits hearing in the case.[44] Even if a bond request is heard more promptly, DHS can continue detaining the person simply by appealing the bond decision.[45] Notably, respondents bear the burden of proof at a bond hearing to demonstrate that they are not a danger or flight risk—yet the substantial amount of evidence required to meet this burden is difficult or impossible to collect while detained.

Moreover, by statute, many classes of immigrants are ineligible for bond, and will remain in detention throughout their proceedings.[46] Remarkably, it is ICE agents themselves who make the initial determination as to whether a person is subject to mandatory detention: on the Notice of Custody Determination, ICE simply marks a box stating the detained person "*may not* request a review of this

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https://www.justice.gov/eoir/page/file/1084851/download (accessed June 11, 2020).

[43] Eagly, Ingrid V. & Shafer, Steven, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 1 (2015).

[44] TRAC, *Immigration Court Bond Hearings and Related Case Decisions*, https://trac.syr.edu/phptools/immigration/bond/ (accessed June 11, 2020).

[45] 8 CFR 1003.14(a) (2003); Kessler, *supra* note 32.

[46] 8 U.S.C. § 1226(c) (1996).

determination by an Immigration Judge because the Immigration and Nationality Act prohibits your release from custody."[47]

These procedures mean that in immigration enforcement, the police agency that makes the arrest also has the power to determine access to what little neutral review is even available.[48] To contest this determination, the detained person must first divine—again, usually in the absence of legal counsel—that they have the right to challenge ICE's analysis, in spite of having received an official form telling them that they may not request review by a judge, and must then present a complex legal argument as to why they are not, in fact, subject to the statutory mandatory detention categories.

An estimated 71% of people in ICE custody are held under these mandatory detention procedures.[49] Because of mandatory detention or high bonds that they are unable to pay, people may remain in immigration detention for months and

[47] Form I-286 (emphasis added).

[48] An immigration judge does not have power to determine an immigrant's custody status sua sponte. *See Matter of P-C-M-*, 20 I. & N. Dec. 432, 434 (BIA 1991) (noting that the regulations "only provide authority for the immigration judge to redetermine custody status upon application by the [alien] or his representative"). *See also* Kagan, *supra*.

[49] Tidwell Cullen, Tara, National Immigrant Justice Center, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming*, https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet (accessed June 11, 2020).

even years while awaiting resolution of their removal cases. *See, e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013); *Rodriguez v. Robbins*, 804 F.3d 1060, 1072 (9th Cir. 2015). No neutral arbiter will ever review whether their arrest or prolonged detention that followed was lawful. In fact, this prolonged detention is more common for those who have meritorious defenses to deportation and are fighting their case, as those who accept deportation or have no defense to pursue will typically be removed much faster.[50]

* * *

From their very inception, ICE detainers and the chain of legal proceedings that follow suffer from a dire lack of basic Fourth Amendment protections that is unique among law enforcement tools. Yet the repercussions of an ICE detainer, often including long-term imprisonment and negative impacts on criminal proceedings, are indistinguishable from criminal proceedings in which strong Fourth Amendment safeguards like neutral review of probable cause determinations are guaranteed. The "civil" nature of removal proceedings should

[50] *See Nadarajah v. Gonzalez*, 443 F.3d 1069, 1071 (9th Cir. 2006) ("[T]he government continues to detain Nadarajah, who has now been imprisoned for almost five years despite having prevailed at every administrative level of review[.]"); *see also Ayala-Villanueva v. Holder*, 572 F.3d 736, 737 (9th Cir. 2009) ("On three occasions, the Immigration Judge . . . terminated the removal proceedings, concluding that Ayala had presented substantial, credible evidence of his citizenship[.]").

not be used to circumvent crucial Fourth Amendment protections designed to prevent precisely this abuse. The Fourth Amendment mandates that a person subject to an immigration detainer be entitled to a prompt, neutral determination of probable cause.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to uphold the district court's injunction and reverse the grant of summary judgment to Defendants on this issue.

Dated: June 12, 2020

Respectfully submitted,

/s/ Susan M. Krumplitsch

Susan M. Krumplitsch
DLA Piper LLP (US)
2000 University Avenue
East Palo Alto, CA 94303
Telephone: (650) 833-2000
Fax: (650) 687-1230
susan.krumplitsch@us.dlapiper.com

Alexis Burgess
DLA Piper LLP (US)
2000 Avenue of the Stars
Suite 400 North Tower
Los Angeles, CA 90067
Telephone: (310) 595-3000
Fax: (310) 595-3300
alexis.burgess@us.dlapiper.com

Counsel for *Amici Curiae*
National Immigration Project of the National Lawyers Guild; Immigrant Legal Resource Center; University of Nevada, Las Vegas Immigration Clinic; National Association Of Criminal Defense Lawyers; Washington Defender Organization; Brooklyn Defender Services; Bronx Defenders; And Immigrant Defense Project

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June 12, 2020

Respectfully submitted,
DLA PIPER LLP (US)

/s/ Susan M. Krumplitsch
Susan M. Krumplitsch

Counsel for Amici Curiae

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I hereby certify that on June 12, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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