COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. No. SJC-12276

COMMONWEALTH,
Respondent-Appellee,

v.

SREYNUON LUNN,
Petitioner-Appellant

BRIEF AND RECORD APPENDIX FOR PETITIONER-APPELLANT SREYNUON LUNN

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ISSUES PRESENTED

I. WHETHER MASSACHUSETTS LAW ENFORCEMENT OFFICERS AND TRIAL COURTS HAVE AUTHORITY TO ARREST ON AN ICE DETAINER FOR CIVIL IMMIGRATION PURPOSES, WHERE NEITHER MASSACHUSETTS LAW NOR FEDERAL LAW GRANT SUCH AUTHORITY.

II. WHETHER DETAINING A PERSON ON AN ICE DETAINER WITHOUT ANY JUDICIAL SUPERVISION OR PARTICULARIZED FINDING OF PROBABLE CAUSE THAT THE PERSON IS SUBJECT TO REMOVAL VIOLATES THE SUBJECT'S RIGHTS UNDER ART. 14 AND THE FOURTH AMENDMENT.

III. WHETHER DETAINING A PERSON ON AN ICE DETAINER WITHOUT PROVIDING THAT PERSON ADEQUATE NOTICE OF THE DETAINER OR ANY OPPORTUNITY TO BE HEARD VIOLATES THE SUBJECT'S RIGHTS UNDER ART. 12 AND THE FOURTEENTH AMENDMENT.

IV. WHETHER THE COURT SHOULD DECIDE THIS MATTER, THOUGH MOOT FOR PETITIONER, BECAUSE IT PRESENTS A QUESTION OF SIGNIFICANT PUBLIC CONCERN THAT IS LIKELY BOTH TO RECUR AND EVADE REVIEW.

STATEMENT OF THE CASE

On October 24, 2016, Petitioner Sreynuon Lunn was arraigned in the Central Division of the Boston Municipal Court, complaint number 1601CR006888, on the charge of unarmed robbery. Facts ¶40; R.A. 38 (Trial Court Docket Sheet)[1]. At arraignment, the trial court noted that the Department of Homeland Security ("DHS")

[1] Petitioner refers to the parties' Statement of Agreed Upon Facts, at Record Appendix pages R.A.1-15, as "Facts ¶#" and to the Record Appendix as "R.A. pg."

had filed an "Immigration Detainer – Request for Voluntary Action" with Mr. Lunn's custodians. Facts ¶41-42; R.A. 38 (Trial Court Docket Sheet); 35 (Lunn Detainer). The trial court held Mr. Lunn on $1,500 cash bail.[2] Facts ¶44; R.A. 38 (Trial Court Docket Sheet). On January 20, 2017, the Suffolk Superior Court reduced Mr. Lunn's bail to $750. Facts ¶47; R.A. 40 (Trial Court Docket Sheet). On February 6, 2017, Petitioner appeared in the Central Division for a trial date. Facts ¶50; R.A. 40 (Trial Court Docket Sheet). The Commonwealth answered not ready for trial and the trial court dismissed the case against Mr. Lunn for want of prosecution. Facts ¶51; R.A. 50 (Trial Court Docket Sheet). After the case was dismissed, Mr. Lunn moved the court to release him notwithstanding the detention request, citing Santos

[2] The trial court also revoked Mr. Lunn's bail on a matter out of Dedham District Court, to expire January 21, 2017. R.A. 38 (Trial Court Docket Sheet). The Norfolk County Sheriff's Office maintained custody of Mr. Lunn until approximately January 13, 2017, when the Suffolk County Sheriff's Office took custody of Mr. Lunn and held him at Suffolk County Jail on this case, 1601CR006888. Facts ¶48; R.A. 39 (Trial Court Docket Sheet). Mr. Lunn remained at Suffolk County Jail for the remainder of his criminal case. Facts ¶48; R.A. 48 (Aff. Pet. ¶ 2).

Moscoso v. A Justice of the East Boston Division of the Boston Municipal Court, SJ-2016-0168. Facts ¶52-54; R.A. 46-47 (Aff. Def. Counsel ¶ 5-6). The trial court declined to allow his motion and held Petitioner on the immigration detainer. Facts ¶55-56; R.A. 41, 42 (Trial Court Docket Sheet).

On February 7, 2017, Petitioner filed an Emergency Petition for Relief pursuant to G.L. ch. 211, § 3 with the Supreme Judicial Court for Suffolk County. R.A. 50 (Emergency Petition). That morning, however, the Court learned that DHS had already taken Mr. Lunn into custody. R.A. 71 (Reservation and Report). Nevertheless, the Single Justice issued an order reserving and reporting the matter to the full court, observing that while the matter was moot as to Mr. Lunn, "the case raises important, recurring, time-sensitive issues that will likely evade the full court's review in future cases." Id.

STATEMENT OF FACTS

DHS purports to authorize Massachusetts law enforcement officers and Massachusetts trial courts to arrest and detain persons for civil immigration

enforcement purposes through a mechanism known as a "detainer." Facts ¶3; See 8 C.F.R. § 287.7. Immigration and Customs Enforcement (ICE), the immigration enforcement branch of DHS, files a notice currently titled "Immigration Detainer – Request for Voluntary Action" (herein after "ICE detainer") with the person's state custodian that "request[s]" [3] that the custodian "maintain custody of him/her for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released from your

[3] It is clear from the ICE detainer form itself (including the detainer issued in this case) that it is a request and not a command. In fact, DHS takes the position that compliance with any ICE detainer is voluntary. Facts ¶8-9; Galarza v. Szalczyk, 745 F.3d 634, 641-42 (3d Cir. 2014) (holding detainers voluntary and stating "Since at least 1994, and perhaps as early as 1988, ICE (and its precursor INS) have consistently construed detainers as requests rather than mandatory orders."); Letter from Daniel Ragsdale, Acting Director of ICE, to U.S. House of Representatives (Feb. 25, 2014) (R.A. 21); see Jimenez Moreno v. Napolitano, No. 11 C 5452, -- F. Supp.3d --, 2016 WL 5720465, at *4 (N.D. Ill. Sept. 30, 2016) (detainer forms request, but don't require, compliance); Morales v. Chadbourne, 996 F. Supp. 2d 19, 40 (D.R.I. 2014), affirmed 793 F.3d 208 (1st Cir. 2015);); Miranda-Olivares v. Clackamas County, No. 3:12–cv–02317–ST, 2014 WL 1414305, at *4-8 (D. Or. Apr. 11, 2014); see also, Buquer v. City of Indianapolis, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011).

custody to allow DHS to assume custody." Facts ¶4; R.A. 16-19 (DHS Form I-247D & DHS Form I-247X). In short, DHS requests that Massachusetts law enforcement officers and courts detain a person for forty-eight hours after there is no longer a basis under state law to maintain custody.

The process for issuing an ICE detainer is straightforward. A deportation officer, or another rank and file immigration officer, completes and signs the detainer form. Facts ¶11; See 8 C.F.R. § 287.7(b) (authorizing all "deportation officers" and "immigration enforcement agents," among others, to issue detainers); 8 C.F.R. § 287.7(a)(describing the purpose of an immigration detainer). There is no review by a magistrate or other detached, neutral judicial officer. Facts ¶11; See 8 C.F.R. §§ 287.7(a) & (b); R.A. 78 (Gonzalez v. ICE, No. 13 C 4416 (C.D. Cal. Filed June 21, 2013), Def's Resp. to First Set of RFAs). The detainer is unaccompanied by any judicially issued warrant or other evidence in support of the request. Facts ¶13; R.A. 78 (Gonzalez, Def's Resp.), 97 (Jimenez Moreno v. Johnson [replacing Napolitano], No. 1:11-cv-05452 (N.D. Ill. Filed Feb. 9, 2016),

Def's Resp. to Plts' Statement of Facts ¶ 19).

Instead, the deportation officer may check a number of boxes on the detainer form that include boilerplate allegations of removability. Facts ¶12; R.A. 16-19 (Forms I-247D & I-247X). The current form states:

> PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON:
>
> - a final order of removal against the subject;
> - the pendency of ongoing removal proceedings against the subject;
> - biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
> - statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

Id. Finally, the ICE detainer does not allege, let alone include any facts to support the suggestion, that the subject is a flight risk. Facts ¶14; R.A. 16-19 (Forms I-247D & I-247X); see Jimenez Moreno, 2016

WL 5720465, at *6 (DHS concedes that "ICE agents do not make any determination at all" that the subject of a detainer is "likely to escape before a warrant can be obtained for his arrest.") (emphasis in original).

DHS files hundreds of similar detainers in Massachusetts each year. See TRAC Immigration, "Reported ICE Detainers by State, November 2014 - October 2015," available at http://trac.syr.edu/immigration/reports/413/include/table3.html [https://perma.cc/67TY-3BS8]. Once such a detainer is lodged, it is up to the state custodian to decide whether or not to honor the request. Facts ¶8-9. A senior ICE official testified in an on-going class action that a detainer is merely a request that does not legally extend authority to arrest and detain. Facts ¶9; R.A. 30-31 (Gonzalez v. ICE, No. 13 C 4416 (C.D. Cal. filed June 21, 2013), Rapp 30(b)(6) Dep. Tr.133:7-135:24). Massachusetts has no mechanism to provide for review of the detainer request by a neutral magistrate. Facts ¶15. Nevertheless, courts and law enforcement authorities across Massachusetts often choose to honor detainer requests. R.A. 74-75 (Aff. Jennifer Klein ¶ 4); see Facts ¶18-19.

Petitioner's case illustrates the recurring problem. Mr. Lunn was held in state custody on docket no. 1601CR6888 out of the Central Boston Division of the Boston Municipal Court. Facts ¶40, 44, 48; R.A. 38 (Trial Court Docket Sheet). On the day he was arraigned, ICE lodged a detainer against Mr. Lunn. Facts ¶42; R.A. 38 (Trial Court Docket Sheet), 35 (Lunn Detainer). Deportation Officer Cano, a rank and file immigration officer, issued Mr. Lunn's detainer without any review by a neutral magistrate. R.A. 35 (Lunn Detainer). That officer checked off the following boxes indicating that Mr. Lunn is subject to removal based on "a final order of removal against the subject" and "biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law." Id. Though Mr. Lunn learned that he was the subject of an ICE detainer, neither ICE nor any Massachusetts authority provided Mr. Lunn with a copy of the detainer or an opportunity to challenge it. Facts ¶43;

R.A. 48 (Aff. Pet. ¶3, 5-6). Counsel obtained it only after filing this litigation. R.A. 48 (Aff. Pet. ¶3, 5-6). Aware that if he posted bail he would likely remain in custody and face transfer to ICE custody, Mr. Lunn chose not to post bail that he could have otherwise posted and thus faced prolonged detention based on this ICE detainer. Facts ¶49; R.A. 48 (Aff. Pet. ¶4); 39 (Trial Court Docket Sheet) ("Defendant remains held on I.C.E. Detainer").

On February 6, 2017, Mr. Lunn appeared in the Central Division for trial. Facts ¶50; R.A. 40 (Trial Court Docket Sheet). After the trial court dismissed the case for lack of prosecution, Mr. Lunn moved the court to release him notwithstanding the detention request. Facts ¶51-54; R.A. 41, 42 (Trial Court Docket Sheet). The Court declined to allow his motion and held Mr. Lunn in custody, notwithstanding the dismissal of his only pending criminal charge. Facts ¶55-57; R.A. 41, 42 (Trial Court Docket Sheet). Several hours after Mr. Lunn would have normally been released, ICE agents took custody of Mr. Lunn from the trial court. Facts ¶57-58; R.A. 49 (Aff. Pet. ¶12-13).

SUMMARY OF THE ARGUMENT

1. When Massachusetts trial courts or law enforcement authorities honor a request by ICE to hold a person up to forty-eight hours after they would otherwise be released from state custody based on an ICE detainer, these authorities are executing a new arrest for civil immigration purposes. In order for Massachusetts courts and officers to perform an arrest, there must be some authority under Massachusetts law. Massachusetts law does not authorize its courts or law enforcement officers to arrest for civil immigration purposes. (pp. 14-18).

Any attempt by the federal government to unilaterally grant Massachusetts courts and law enforcement officers new authority to arrest for civil immigration purposes would violate the Tenth Amendment to the U.S. Constitution. The scope of arrest authority of local law enforcement is at the core of the “police powers” reserved to the state. In fact, where Congress has permitted state and local officers to make arrests for immigration purposes, it has expressly acknowledged that such arrests must be consistent with state law. (pp. 19-21).

Moreover, even absent the protections of the Tenth Amendment, federal law does not grant state courts or law enforcement agents the authority to arrest based solely on an ICE detainer. The only provisions of the Immigration and Naturalization Act that authorize state and local law enforcement to make civil immigration arrests do not apply to ICE detainers. The only statutory reference to detainers merely provides a mechanism for law enforcement to notify ICE of the release of a person and places an obligation on DHS for enforcement, but does not authorize detention by the state. In fact, arrest based on an ICE detainer exceeds even the warrantless arrest authority of ICE officers, who cannot so arrest unless the subject is likely to escape. ICE issues detainers without regard to flight risk. Finally, the detainer regulations do not grant arrest authority, but only set a time limit on detention. (pp. 22-29).

2. Arrest based on an ICE detainer occurs without any judicial oversight. ICE detainers are signed by ICE officers without review by neutral magistrates and neither ICE nor Massachusetts authorities have any mechanism to allow for judicial review after detainers

are issued. The guarantee of a judicial determination of probable cause extends to any significant pretrial restraint on liberty, including detention on an immigration detainer. The ICE detainer, which purports to authorize custody for up to forty-eight hours and sometimes results in even longer detention without any unbiased review, therefore violates both art. 14 under Jenkins v. Chief Justice of the Dist. Court Dep't and the Fourth Amendment under Gerstein v. Pugh. (pp. 29-37).

3. An ICE detainer must be supported by probable cause to believe that the person is subject to removal. The ICE detainer form includes only boilerplate language that purports to provide a basis for such a probable cause determination, without any supporting affidavit or evidence. Probable cause must be based on facts and circumstances particularized to the person being seized and must not be hidden from review by purely conclusory language. The ICE detainer form fails to provide particularized facts or circumstances, but instead speaks in general, conclusory, and sometimes contradictory terms. Whatever the ICE officer might know, this information

cannot be imputed to Massachusetts authorities under the “collective knowledge” doctrine, because the two are not engaged in a cooperative investigation. The generalities included in the ICE detainer form do not satisfy the Fourth Amendment or the more stringent probable cause analysis under art. 14. (pp. 37-44).

4. A subject of an ICE detainer is not given adequate notice of the detainer – the person is generally not provided with a copy of the detainer – nor any opportunity to meaningfully challenge the detainer – neither Massachusetts nor ICE have a mechanism to review the lodging of a detainer. As such, detention based on an ICE detainer violates the due process provisions of art. 12 and the Fourteenth Amendment. (pp. 45-47).

5. Notwithstanding that Petitioner’s dispute is now moot, the Court should consider the legality of honoring an ICE detainer. The issue is of great importance and extremely likely to recur but to continue to evade review, because of the time limit on detainers. (pp. 47-49).

ARGUMENT

ICE detainers corrupt the administration of justice. When a detainer is accepted, the Commonwealth of Massachusetts seizes a person without the authority of any state or federal law. The seizure is not approved by any judge or magistrate and is unsupported by a particularized showing of probable cause. The person seized has no opportunity to challenge the seizure. Guarantees of both the Massachusetts Declaration of Rights and the federal Bill of Rights are ignored.

Although the state has mooted Petitioner's individual claim by accepting the detainer directed at him, the petition presents an important and frequently recurring issue that, by the nature of ICE detainers, will otherwise evade review.

I. MASSACHUSETTS LAW ENFORCEMENT OFFICERS AND TRIAL COURTS DO NOT HAVE AUTHORITY TO DETAIN FOR A PURELY CIVIL IMMIGRATION PURPOSE.

The act of honoring an ICE detainer – holding a person past the time when he or she would otherwise be released from state custody – constitutes a new arrest solely for a civil immigration purpose. Morales v.

Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes. . . ."); Jimenez Moreno, 2016 WL 5720465, at *6 (DHS concedes "that being detained pursuant to an ICE immigration detainer constitutes a warrantless arrest"); Miranda-Olivares, 2014 WL 1414305, at *11 (holding that where Miranda-Olivares was capable of posting court-ordered bail, but informed she would not be released if she posted bail, her continued detention constituted a new seizure); Galarza v. Szalczyk, No. 10–cv–06815, 2012 WL 1080020, at *10-15 (E.D. Pa. Mar. 30, 2012) (same), rev'd on other grounds, 745 F.3d 634 (3d Cir. 2014). Massachusetts law enforcement agents and officers of the court are without state or federal authority to engage in such an arrest.

A. Massachusetts Law Enforcement Officers And Trial Courts Do Not Have Arrest Authority Under State Law to Detain Based Solely on an Immigration Detainer.

Massachusetts law enforcement officers and trial courts do not have authority under state law to make arrests or detain persons for alleged civil

immigration violations, including based on an immigration detainer.

The power of a Massachusetts law enforcement officer to arrest is granted and enumerated by state statute or common law. See Commonwealth v. Craan, 469 Mass. 24, 33 (2014) ("While State law may authorize local and State police to enforce Federal criminal statutes, it need not do so.") (emphasis in original); Commonwealth v. Grise, 398 Mass. 247, 249-250 (1986) (by statute a police officer with an arrest warrant has the power to arrest state-wide, but common law limits warrantless extra-territorial arrest for a crime to circumstances of fresh pursuit); see also Commonwealth v. Dugan, 53 Mass. 233, 234 (1847) ("The office of a police officer . . . is created by statute, and must be regulated and administered according to the statute."); Michigan v. DeFillippo, 443 U.S. 31, 36 (1979)("Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law."); Miller v. United States, 357 U.S. 301, 305 (1958) (when enforcing federal criminal law the lawfulness of an arrest by a state peace officer is determined by reference to

state law). Absent the express grant of authority, an arrest is unlawful and consequently this Court has repeatedly suppressed evidence obtained as a result of such an unauthorized arrest. See Commonwealth v. LeBlanc, 407 Mass. 70, 75 (1990) (suppressing evidence from unauthorized extraterritorial stop); Grise, 398 Mass. at 253 (suppressing evidence and dismissing charges from unauthorized extraterritorial stop); see also Craan, 469 Mass. at 32-35 (suppressing evidence obtained based on probable cause of federal crime, where Massachusetts Legislature had decriminalized the conduct and so search was unauthorized by state law). The need for arrest authority is not trivial; "The requirement that a police officer have lawful authority when he deprives individuals of their liberty is closely associated with the constitutional right to be free from unreasonable searches and seizures." LeBlanc, 407 Mass. at 75.

Massachusetts law grants authority to arrest persons under suspicion of having committed a crime. See, e.g., G.L. ch. 276, § 28 (authorizing warrantless arrest for certain misdemeanors); G.L. ch. 276, § 23A (authorizing arrest for felonies and misdemeanors);

G.L. ch. 41, § 98 (police authority to maintain order and arrest for purposes of "prosecut[ion]"); G.L. ch. 279, § 3 (arrest without warrant for probation violation); Commonwealth v. Savage, 430 Mass. 341, 346 (1999) (describing common law doctrine authorizing citizen's arrest for felonies). In certain narrow circumstances, law enforcement officers may arrest to enforce civil court judgments, e.g., G.L. ch. 215, § 34A (capias for contempt in support proceedings), or to protect the safety of the arrestee, e.g., G.L. ch. 125, § 35 (commitment of alcoholics or substance abusers). Massachusetts law does not authorize arrest for federal civil immigration violations.[4] See generally, Craan, 469 Mass. at 33 ("[A]lthough the general rule is that local police are not precluded from enforcing federal statutes, their authority to do so derives from State law.") (internal punctuation and citations omitted).

[4] Massachusetts statutes are peppered with specific provisions authorizing arrest for specific criminal offenses, see, e.g., G.L. ch. 260, § 10, G.L. ch. 209A, § 6(7), G.L. ch. 90, § 21, making an exhaustive list unwieldy. A thorough review of Massachusetts statutes uncovered no authority to arrest solely for civil immigration violations and undersigned counsel are aware of no such authority.

The scope of Massachusetts law enforcement's arrest authority is reserved to the exclusive jurisdiction of the Commonwealth. Indeed, the two instances in which the Immigration and Nationality Act authorizes ICE to delegate civil arrest authority, Congress predicated such delegation on existing authority under state law to make such arrests. See 8 U.S.C. § 1252c; 8 U.S.C. § 1357(g)(1).

To the extent ICE is purporting to authorize Massachusetts law enforcement officers to make civil immigration arrests based on an immigration detainer, such delegation, without an enabling state law, would violate the Tenth Amendment to the U.S. Constitution. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., AMEND. X. In upholding our federalist form of government, the U.S. Supreme Court has consistently held that federal usurping of authorities reserved to the states or simply dictating state policy is a violation of the Tenth Amendment. See Printz v. United States, 521 U.S. 898 (1997) (holding the federal

government could not order state law enforcement agents to implement a federal regulatory program); New York v. United States, 505 U.S. 144 (1992) (holding the federal government cannot require states to enact particular legislation). The Tenth Amendment violations presented here are a hybrid of those identified in Printz and New York. Here, through immigration detainers, ICE is usurping one of the most fundamental powers reserved to the Commonwealth's legislature — the scope of arrest authority of law enforcement within Massachusetts. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. _, 132 S. Ct. 2566, 2578 (2012) ("police powers," including local law enforcement, reserved to the states); United States v. Morrison, 529 U.S. 598, 617–19 (2000) ("no better example of the police power, which the Founders denied the National Government and reposed in the States" than the regulation of intrastate criminal law enforcement). Where New York prohibits the federal government from "command[ing]" state legislatures to enact laws, 505 U.S. at 176, ICE has purportedly gone one step further by unilaterally creating new state law expanding arrest authority for state law

enforcement agents. The scope and exercise of police power is perhaps one of the most important public policy issues confronting states and localities nationwide.[5] To permit ICE to simply side-step the Massachusetts legislature, the limits of the Commonwealth's law, and unilaterally authorize Massachusetts law enforcement to make civil immigration arrests is antithetical to our federalist system of government and in violation of the Tenth Amendment to the U.S. Constitution.

Massachusetts law provides no authority for its criminal courts or law enforcement officers to arrest based solely on civil immigration violations. As a consequence, Massachusetts trial courts and law enforcement agencies do not have the authority to hold persons based solely on an ICE detention request.

[5] See, e.g., Martin J. Walsh & William Evans, Police body cameras and the community, Boston Globe, Aug. 24. 2016; J. David Goodman, New York Council Won't Vote on Police Reform Bills, but Agency Agrees to Changes, N.Y. Times, July 13, 2016, at A16; see also FINAL REPORT ON PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, Recommendation 1.9, p. 18, available at http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf[https://perma.cc/L66Z-NAN7] ("whenever possible, state and local law enforcement should not be involved in immigration enforcement").

B. Massachusetts Law Enforcement and Trial Courts Do Not Have Authority Under Federal Law to Detain Based Solely On An Immigration Detainer.

Even absent the Tenth Amendment concerns discussed above, federal law does not in fact authorize Massachusetts law enforcement and trial courts to detain based solely on an ICE detainer. The Supreme Court has held that because generally "it is not a crime for a removable alien to remain present in the United States . . . [i]f the police stop someone on nothing more than possible removability, the usual predicate for an arrest is absent." Arizona v. United States, 567 U.S. ___, 132 S.Ct. 2492, 2506 (2012).

Congress has exclusive authority in structuring the immigration enforcement and removal process, such that state and local law enforcement officers may make civil immigration arrests only in the "specific, limited circumstances" authorized by Congress. Id. at 2505-07 ("[t]he federal statutory structure instructs when it is appropriate to arrest an alien during the removal process" and "Federal law specifies limited circumstances in which state officers may perform functions of an immigration officer."). The U.S.

Supreme Court observed only three instances in the Immigration and Nationality Act (INA) where Congress has authorized state and local law enforcement to make civil immigration arrests, none of which apply to immigration detainers. Id. at 2506 (citing 8 U.S.C. § 1357(g)(1) (permitting designation of civil arrest authority pursuant to a written agreement)[6]; 8 U.S.C. §

[6] 8 U.S.C. § 1357(g)(10)(B) adds that State and local officers may nevertheless "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present," even without a written agreement under § 1357(g)(1). While the phrase "cooperate" is undefined, it cannot serve to vitiate the purpose of the entire statutory scheme of which it is a part. § 1357(g) states that DHS is permitted to enter into written agreements to allow qualified state or local officers "to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States" (§ 1357(g)(1)) and that state and local officers performing such immigration functions "shall be subject to the direction and supervision of [DHS]" (§ 1357(g)(3)). These statutory provisions would be left meaningless and superfluous if ICE were permitted to interpret "cooperate" in § 1357(g)(10)(B) to mean that it could delegate its apprehension and detention authority on an ad hoc basis through immigration detainers. See Chin v. Merriot, 470 Mass. 527, 537 (2015) (when interpreting statutes, this Court will "give effect to all words of a statute, assuming none to be superfluous"). Federal regulations are explicit that only trained immigration agents are permitted to make arrests. 8 C.F.R. § 287.8(c)(1) ("Only designated immigration officers are authorized

1103(a)(10)(Attorney General can authorize in the context of a mass influx); 8 U.S.C. § 1252c (permitting civil arrests of previously deported convicted felons).

In fact, the Supreme Court describes the only statutory reference to immigration detainers, 8 U.S.C. § 1357(d), as a mechanism by which a law enforcement agency may notify ICE regarding the pending release of an individual suspected of being without lawful status — not an authorization to detain. Arizona, 132 S.Ct. at 2507; Galarza, 745 F.3d at 641 (observing that "the Supreme Court has noted that § 1357(d) is a request for notice of a prisoner's release, not a command (or

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to make an arrest."); 8 C .F. R. § 287.5(c)(1)(only "immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the [warrantless] arrest power"). "Cooperate" must therefore mean all the various ways local law enforcement might assist DHS – providing state equipment and facilities, sharing information, coordinating enforcement actions – without extending to arrest authority. Where Congress wants to grant local arrest authority, it does so expressly. See supra; Arizona, 132 S. Ct. at 2506, 2507 (stating "Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer" and describing DHS guidance that "cooperate" under § 1357(g)(10)(B) as support short of apprehension and detention).

even a request) to [state or local law enforcement] to detain suspects on behalf of the federal government" (citing Arizona, 132 S.Ct. at 2507); Jimenez Moreno, 2016 WL 5720465, at *6 ("'detainer' in the [§ 1357(d)] statute simply means a request to a local law enforcement agency for information about an inmate's release date"); see Buquer v. City of Indianapolis, No. 1:11–cv–00708–SEB–MJD, 2013 WL 1332158, at *9 (S.D. Ind. Mar. 28, 2013)(permanently enjoining state law permitting arrests based on immigration detainer requests because, amongst other reasons, such requests far exceed the types of cooperation contemplated in § 1357(d)).

In addition to the lack of congressional authority for ICE to delegate its arrest power, the Supreme Court found that even ICE does not have the authority to make the types of warrantless arrests that it is now requesting Massachusetts officers to conduct. The Court struck down an Arizona statute that provided state law enforcement with unlimited warrantless, civil immigration arrest authority, because ICE's warrantless arrest authority under 8 U.S.C. §

1357(a)(2)[7] is limited only to circumstances when an individual "is likely to escape before a warrant can be obtained for his arrest." Arizona, 132 S.Ct. at 2505-07; Jimenez Moreno, 2016 WL 5720465, at *6. Detainers, by contrast, include no information regarding the subject's risk of flight. Facts ¶6.[8] Such a practice – issuing a detainer without first determining whether the person is a flight risk – has recently been declared unlawful as ultra vires to § 1357. Jimenez Moreno, 2016 WL 5720465, at *5-9 (granting summary judgment to plaintiffs challenging DHS statutory authority to issue detainers without first determining likelihood of escape). Furthermore, it is paradoxical that the detainee could present a risk of flight where he or she is held in state

[7] "Any officer or employee of the Service authorized . . . shall have power without warrant . . . to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest . . ." 8 U.S.C. § 1357(a).

[8] Jimenez Moreno, 2016 WL 5720465, at *6 (DHS concedes that "ICE agents do not make any determination at all" that the subject of a detainer is "likely to escape before a warrant can be obtained for his arrest.") (emphasis in original).

custody. In Mr. Lunn's case, the detainer does not allege any facts related to flight risk and ICE did nothing to obtain a warrant in the three and a half months that he was held in state custody. Facts ¶6, 41; R.A. 35 (Lunn Detainer). Thus, in the context of warrantless detainers, ICE is attempting to circumvent its own limited warrantless arrest authority by instead having Massachusetts law enforcement and the trial courts violate federal law in its stead. See Buquer, 797 F. Supp. 2d at 919-22 (preliminarily enjoining Indiana statute that would permit state law enforcement to arrest based on a detainer and/or removal order because it exceeds the limited civil immigration arrest authority granted to state law enforcement under federal law and exceeds ICE's own limited warrantless arrest authority), permanently enjoined at 2013 WL 1332158 (S.D. Ind. Mar. 28, 2013).

Finally, the detainer regulations, which ICE relies on to make the request for detention on the detainer, also do not extend arrest authority to state officers. 8 C.F.R. § 287.7(d).[9] The detainer

[9] The Supreme Court found that the only reference to immigration detainer in the INA, 8 U.S.C. § 1357(d), does not create an arrest authority. Thus DHS's

regulations merely provide a time limit on detention but do not delegate arrest authority. Villars v. Kubiatowski, 45 F.Supp.3d 791, 806-07 (N.D. Ill. 2014); Miranda-Olivares, 2014 WL 1414305, at *7 (quoting approvingly the legal analysis in Garcia v. Taylor, 40 F.3d 299, 303 (9th Cir. 1994), "We see nothing in the detainer [] that would allow, much less compel, the warden to do anything but release [a detainee] at the end of his term of imprisonment."); see People ex rel. Swenson v. Ponte, 994 N.Y.S.2d 841, 844 (N.Y. Sup. Ct. 2014) (granting state habeas not to honor immigration detainer because detainer did not provide arrest authority under state or federal law). Indeed, in a recent deposition in a class action challenging ICE's use of immigration detainers, ICE's Fed R. Civ P. 30(b)(6) witness testified that a detainer is merely a request that does not legally extend authority to arrest and detain. R.A. 30-31 (Gonzalez v. ICE, Case No. 13-4416 (C.D. Cal. filed June 21, 2013), Rapp 30(b)(6) Dep. Tr.133:7-135:24).

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authority to unilaterally create arrest powers through its detainer regulations is of serious legal doubt.

In sum, the "system Congress created" for immigration enforcement, Arizona, 132 S. Ct. at 2506, is one in which the arrest authority of federal officials is strictly limited; and the civil immigration arrest authority of state and local officials is even more limited and expressly delineated in the statute. Congress simply has not authorized ICE to delegate civil arrest authority through immigration detainers.

II. AN ARREST PURSUANT TO AN ICE DETAINER LACKS ANY JUDICIAL OVERSIGHT AND CONSEQUENTLY VIOLATES ART. 14 AND THE FOURTH AMENDMENT.

At no point in the detention process is an ICE detainer subject to judicial scrutiny. Facts ¶11, 15. ICE issues detainer requests to Massachusetts authorities without any judicial oversight whatsoever. Facts ¶11, 15. Any rank and file deportation officer may issue a detainer without review from a neutral magistrate. 8 C.F.R. § 287.7(b) (authorizing all "deportation officers" and "immigration enforcement agents," among others, to issue detainers). Massachusetts court officers and law enforcement agents similarly do not present an ICE detainer to a neutral magistrate for review before honoring such

request.[10] Facts ¶15. As a result, detention pursuant to an ICE detainer occurs without judicial supervision, leaving those persons subject to a detainer unprotected from "the dangers of the overzealous as well as the despotic" law enforcement agent. Gerstein v. Pugh, 420 U.S. 103, 118 (1975) (quoting McNabb v. United States, 318 U.S. 332, 343 (1943)). Without unbiased oversight, such an arrest violates art. 14 and the Fourth Amendment. Gerstein, 420 U.S. at 118; Jenkins v. Chief Justice of the Dist. Court Dep't, 416 Mass. 221, 233 (1993).

The guarantee of a judicial determination of probable cause extends to "any significant pretrial restraint of liberty," Gerstein, 420 U.S. at 125, including detention on an immigration detainer, see Morales, 793 F.3d at 215 (finding it "clearly established" that the Fourth Amendment applies to immigration detainers), and the federal government has conceded that it encompasses immigration arrests. See INS, Final Rule-Making, "Enhancing the Enforcement

[10] As discussed, infra, the detainer itself does not provide sufficient information to permit a Massachusetts magistrate to evaluate whether it is properly supported by probable cause.

Authority of Immigration Officers," 59 FR 42406-01, 42411 (1994) (discussing final regulations regarding immigration officers' authority to make administrative warrantless arrests under 8 U.S.C. § 1357(a)(2)) ("The commenters suggested that the regulations be amended to incorporate the judicial construction of 'reason to believe,' and to require compliance with outstanding court orders regarding arrest and post-arrest procedures. As stated previously, judicial precedent and other policy standards are subject to revision and are not appropriate to codify. The [Immigration and Naturalization] Service is clearly bound by such interpretations, including those set forth in Gerstein v. Pugh, 420 U.S. 103 (1975)."); see also Arias v. Rogers, 676 F.2d 1139, 1142 (7th Cir. 1982)(explaining that the Fourth Amendment requires and "the immigration laws, specifically 8 U.S.C. § 1357(a)(2) . . . require[] that an alien arrested without a warrant 'be taken without unnecessary delay before an'" immigration judge, who functions as the equivalent to a "committing magistrate in a criminal proceeding"); cf. Buquer, 797 F. Supp. 2d at 918-19

(preliminary injunction), affirmed in Buquer, 2013 WL 1332158, at *10.

"[A]rt. 14 guarantees that control over one's liberty will rest solely in the hands of the judiciary, whose function it is to guarantee that sufficient grounds to justify such deprivation exists." Jenkins, 416 Mass. at 233. Art. 14 consequently requires "a judicial determination of probable cause no later than reasonably necessary to process the arrest and to reach a magistrate," and no more than twenty-four hours after the arrest (absent extraordinary circumstances). Id. at 233, 238. By contrast, the detainer in this case – and all detainers – requests that Massachusetts "maintain custody . . . for a period NOT TO EXCEED 48 HOURS." R.A. 16-19 (Forms I-247D & I-247X); R.A. 35 (Lunn Detainer). Moreover, those persons, like Mr. Lunn, who do not post bail they could otherwise post because of the prospect of continued detention on the ICE detainer, are held for much longer than forty-eight hours based solely on this federal detention request. Facts ¶49; R.A. 48 (Aff. Pet. ¶4). And yet despite the fact that individuals will be detained for longer than

twenty-four hours, no neutral party (federal or state) ever reviews this detention – either before the detainer issues or after it has been lodged – to ensure that it is supported by sufficient justification. This "unchecked control over the liberty" of persons subject to an ICE detainer clearly violates art. 14 of the Massachusetts Declaration of Rights. Jenkins, 416 Mass. at 230, 233.

Similarly under the Fourth Amendment, mere allegations of probable cause are not enough; there must be a "fair and reliable" judicial determination of probable cause made "either before or promptly after arrest." Gerstein, 420 U.S. at 114, 125. To be considered "prompt," a post-arrest judicial determination of probable cause must take place within forty-eight hours of the arrest. See County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (holding that "[w]here an arrested individual does not receive a probable cause determination within 48 hours," the government bears the burden of "demonstrat[ing] the existence of a bona fide emergency or other extraordinary circumstance," and rejecting a county policy of conducting probable cause hearings "within

two days, exclusive of Saturdays, Sundays, or holidays" as unconstitutional). Even within the forty-eight-hour period, a probable cause determination "may nonetheless violate Gerstein if the arrested individual can prove that his or her probable cause determination was delayed unreasonably," such as "for the purpose of gathering additional evidence to justify the arrest . . . ." Id. at 56-57.

The ICE detainer here (as with all ICE detainers) was issued without any independent judicial review, Facts ¶11, 15; R.A. 78 (Gonzalez, Def's Resp.), see 8 C.F.R. § 287.7(b), and purported to authorize detention of Mr. Lunn for forty-eight hours without any hearing at all.[11] In fact, Mr. Lunn (like many others) was held much longer than forty-eight hours on this detainer, because he could have posted bail in

[11] The period of detention caused by a detainer without judicial review is, in fact, much longer than forty-eight hours. Once ICE assumes physical custody of the individual after the initial forty-eight hours, they then have an additional forty-eight hours to decide whether to issue a charging document and another undefined period to file the charging document with the immigration court. 8 C.F.R. § 287.3(d). After ICE files the charging document, it may take much longer before the immigration court even schedules the initial hearing. R.A. 75 (Aff. Jennifer Klein ¶ 6).

the criminal case but did not given the inevitability of further detention as a result of the detainer. Facts ¶49; R.A. 48 (Aff. Pet. ¶4). This detention plainly violates the requirement that a hearing be promptly held. See County of Riverside, 500 U.S. at 57-58; Villars, 45 F. Supp. 3d at 801 ("The forty-eight hour framework set forth in County of Riverside 'governs the length of time which may elapse before a probable cause hearing' in cases involving extended detention."). Indeed, honoring the ICE detention request violates Gerstein because it does not provide any hearing, much less a prompt one, in which a detainee could contest the detention.

This analysis remains the same even when, as here, the detainer form asserts that the subject has a final order of removal. First, assuming that a removal order was issued at some point does not mean that a neutral magistrate ever made a determination of probable cause. Immigration law permits, in certain circumstances, an immigration officer to order removal without any review by a neutral magistrate. 8 U.S.C. § 1225(b) (expedited removal allows an immigration officer to order removal of certain persons seeking

admission "without further hearing or review"); 8 U.S.C. § 1228 (administrative removal allows DHS to order removal of certain persons convicted of aggravated felonies without review by an immigration judge); see American Immigration Council, Removal Without Recourse: The Growth Of Summary Deportations From The United States (May 2014), available at https://www.americanimmigrationcouncil.org/research/removal-without-recourse-growth-summary-deportations-united-states[https://perma.cc/G3WN-S9NC] ("two-thirds of individuals deported are subject to what are known as 'summary removal procedures,' which deprive them of both the right to appear before a judge and the right to apply for status in the United States").[12] Second, the detainer itself is not issued with any judicial supervision, and therefore no unbiased magistrate has confirmed that there is reliable evidence of a removal order. See 8 C.F.R. § 287.7(b). If merely checking a box on a form permits ICE officers to request arrest

[12] DHS, Immigration Enforcement Actions: 2014 (Jan. 2016) at 7, available at https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2014.pdf[https://perma.cc/N2JL-PB2J] (in 2014, 42.6% of removals were expedited and 40.8% were summary reinstatement of removal).

without supervision, then “the dangers of the overzealous as well as the despotic” law enforcement agent remain. See Gerstein, 420 U.S. at 118.

Arrests pursuant to ICE detainers, though a significant deprivation of liberty, operate without any court supervision. In the absence of unbiased review, these arrests are in violation of both art. 14 and the Fourth Amendment.

III. THE DECISION TO HONOR THE ICE DETAINER IS UNSUPPORTED BY INDIVIDUALIZED PROBABLE CAUSE TO JUSTIFY DETENTION IN VIOLATION OF ART. 14 AND THE FOURTH AMENDMENT.

The decision to honor an ICE detention request is based on a single sheet of paper submitted by federal immigration authorities. That form, DHS Form I-247D, is unsupported by an affidavit or other individualized facts to support a finding that the subject is, in fact, subject to removal. Instead, Form I-247D includes boilerplate language that purports to provide the basis for such a probable cause determination, but instead speaks only in generalities and in the alternative. Such language, which includes virtually no facts but instead relies on conclusions, cannot support a finding of probable cause.

It is now clearly established that detention based on an ICE detainer must be supported by probable cause to believe the person is subject to removal. Morales, 793 F.3d at 214-217 ("Because Morales was kept in custody [pursuant to a detainer request] after she was entitled to release, she was subject to a new seizure for Fourth Amendment purposes – one that must be supported by a probable cause justification."); Mendoza v. Osterberg, No. 8:13CV65, 2014 WL 3784141, *6 (D. Neb. July 31, 2014); Galarza, 2012 WL 1080020, *13, reversed on other grounds Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014).

"Probable cause to arrest exists where the facts and circumstances in the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in believing" that a violation has been committed. Commonwealth v. Williams, 422 Mass. 111, 119 n.11 (1996). That belief "must be particularized with respect that person" searched or seized. Ybarra v. Illinois, 444 U.S. 85, 91 (1979); Commonwealth v. Torres, 424 Mass. 153, 158 (1997) (continued detention of passenger of properly stopped

car required "a legally sufficient basis . . . with direct reference to [the passenger]").

Perhaps most importantly, an individual law enforcement officer's probable cause determination must not be hidden from review by purely conclusory language. Illinois v. Gates, 462 U.S. 213, 239 (1983); Commonwealth v. Broom, 474 Mass. 486, 496-497 (2016). Whether seeking an arrest warrant or prompt judicial review following a warrantless arrest, Whiteley v. Warden, 401 U.S. 560, 566 (1971) (probable cause analysis equally stringent for warrantless arrests as for arrests with warrant), the arresting officer must articulate the "facts and circumstances" that form the basis of her probable cause calculus, so that the reviewing magistrate is capable of making an independent review of those facts. Gates, 462 U.S. at 239 (officer's statement that "he has cause to suspect and does believe" or that "affiants received reliable information from a credible person and do believe" the suspect has committed a crime is insufficient for probable cause); Broom, 474 Mass. at 496-97 (officer's "conclusory" statements that he "knows from training and experience that 'cellular telephones contain

multiple modes used to store vast amounts of electronic data,' and that in his opinion, 'there is probable cause to believe that the [defendant's] cell phone and its associated accounts will likely contain information pertinent to this investigation'" is insufficient for search warrant of defendant's phone). The reviewing magistrate's "action cannot be a mere ratification of the bare conclusions of others." Gates, 462 U.S. at 239. Otherwise, the arresting officer can thwart any meaningful judicial oversight, contrary to the commands of both art. 14 and the Fourth Amendment, see supra.

The ICE detainer form fails to provide "facts" or "circumstances" to support a probable cause determination that the subject is removable.[13] Two of

[13] Petitioner recognizes that DHS is likely to alter the ICE detainer form, perhaps in the near future. See Memorandum from John Kelly, DHS Sec'y, Enforcement of the Immigration Laws to Serve the National Interest, at p. 3 (Feb. 20., 2017), available at https://www.dhs.gov/publication/enforcement-immigration-laws-serve-national-interest [https://perma.cc/X4GP-XQ9Q] (stating that detainer forms shall be changed, but authorizing continued use of I-247D and I-247 until new forms are created). In fact, DHS has revised the detainer form five times in the past five years. See Jimenez Moreno, 2016 WL 5720465, at *2. Unless and until DHS issues detainer

the four boxes speak in such sweeping generalities and in the alternative that they provide virtually no information at all. See, e.g., R.A. 16 ("biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable")(emphasis added). A reviewing court could not even determine if the subject did or did not have legal status. The other two boxes – asserting without evidence that the subject has a removal order (a box checked on Mr. Lunn's detainer) or is in removal proceedings – is similarly immune to any review, because the officer provides no facts or evidence to support this assertion. See id. Thus, the appellees are left with "virtually no basis at all for making a judgment regarding probable cause." See Gates, 462 U.S. at 239.

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requests supported by facts and circumstances showing individualized findings of probable cause, and reviewed by neutral magistrates, new forms will not cure these constitutional violations.

To the extent that such generalities might satisfy the Fourth Amendment – which they do not – they certainly do not satisfy the "more substantive protection" provided by art. 14. Commonwealth v. Upton, 394 Mass. 363, 370-377 (1985). Art. 14 rejects a "totality of the circumstances" analysis of probable cause, in favor of a more stringent test, which requires showing both the basis of knowledge and the veracity of any information obtained from informants. Id. (rejected the more flexible Gates standard for the Aguilar-Spinelli test). Both prongs must be satisfied. Id. at 375-76.

Even assuming the veracity of the deportation officer who signs the detainer, the detainer form provides virtually no detail regarding the basis of that officer's knowledge. The detainer form fails even to provide evidence that the subject is not a U.S. citizen or identify one of the enumerated removal grounds listed in the Immigration and Nationality Act at 8 U.S.C. §§ 1182 and 1227, leaving the most seasoned immigration expert guessing at the actual factual basis for the detainer.

Whatever facts and circumstances may be known to the ICE officer, that unidentified knowledge cannot simply be imputed to the Massachusetts custodian choosing to honor the detainer. In short, the collective knowledge doctrine does not apply. First, as discussed, the ICE detainer form does not provide evidence that the deportation officer actually had probable cause to issue the detainer. Second, the collective knowledge doctrine only applies when law enforcement agents are engaged in a "cooperative effort." Commonwealth v. Gullick, 386 Mass. 278, 280-83 (1982) (three Massachusetts state police officers engaged over radio communications in a joint pursuit of suspect were engaged in a "cooperative effort" which justified collective knowledge doctrine); Commonwealth v. Hawkins, 361 Mass. 384, 386-87 (1972) (where no joint investigation, collective knowledge doctrine inapplicable); Commonwealth v. Chaisson, 358 Mass. 587, 590 (1971) (collective knowledge doctrine applies where "police were engaged in a cooperative effort in radio-equipped cars"). By contrast, here Massachusetts law enforcement agents and trial courts are not engaged in any investigation of the subject's

immigration status – nor would such an investigation fall within their mandate – but instead are merely detaining the subject on an unrelated criminal matter.[14] Massachusetts custodians are therefore not permitted to simply accept the conclusory assertions of an ICE officer that the subject of the detainer is, for some reason, removable.

In the absence of specific, particularized facts to establish that there is probable cause to believe the object of the detainer is subject to removal, detention based on an ICE detainer violates art. 14 and the Fourth Amendment.

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[14] A parallel may be drawn to Commonwealth v. Willis, 415 Mass. 814 (1993), where an officer from a Michigan police department sent a notice to the Boston police notifying them that "Marco Willis, a black male, five feet ten inches tall, with short hair . . . should be on a Greyhound bus arriving in Boston at approximately 6:50 p.m. . . . carrying a blue and white pillowcase . . . [and] was said to be armed with a thirty-eight caliber handgun, taken from his grandfather's house, along with five live rounds." Though enough information for a brief stop, the Court held that such a detailed affidavit was insufficient for probable cause. Id. at 819. The detainer in this case lacks any such detail, failing even to identify the removal ground that is the basis for the detainer, and fails under Willis to justify Mr. Lunn's arrest.

IV. PERSONS SUBJECT TO DETAINER REQUESTS ARE NOT PROVIDED WITH NOTICE OR A MEANINGFUL OPPORTUNITY TO CHALLENGE THE DETAINER IN VIOLATION OF THEIR PROCEDURAL DUE PROCESS RIGHTS UNDER ART. 12 AND THE FOURTEENTH AMENDMENT.

"The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (quotations omitted). There can be no doubt that the deprivation of liberty associated with the enforcement of the ICE detainer implicates the subject's rights under the Fourteenth Amendment as well as art. 12 of the Declaration of Rights. See Aime v. Commonwealth, 414 Mass. 667, 676 (1993) ("The right to be free from governmental detention and restraint is firmly embedded in the history of Anglo-American law."). This fundamental liberty interest, when weighed against the government interest – voluntary assistance with federal civil immigration enforcement – compels the conclusion that some measure of notice and an opportunity to be heard must be provided. See Paquette v. Commonwealth, 440 Mass. 121, 131 (2003) ("A fundamental requisite of 'procedural' due process is the opportunity to be heard 'at a meaningful time and

in a meaningful manner.'"); Morales v. Chadbourne, 996 F.Supp.2d 19, 40 (D.R.I. 2014)(holding that arrest and detention on an immigration detainer triggers constitutional notice and opportunity to be heard protections); see Ortega v. U.S. Immigration & Customs Enforcement, 737 F.3d 435, 439 (6th Cir. 2013) cert. denied sub nom. Ortega v. Immigration & Customs Enforcement, 135 S. Ct. 48 (2014) ("prison confinement" due to an ICE detainer "suffice[s] to trigger due process.").

In this case, Mr. Lunn obtained a copy of the detainer only with the assistance of criminal defense counsel in the course of litigating this motion, and only after he had already been unlawfully detained on it by Massachusetts officials and subsequently taken into federal custody. Facts ¶43; R.A. 48 (Aff. Pet. ¶6). As with all those subject to an ICE detainer, neither ICE nor any Massachusetts state actor provided him with a meaningful opportunity to challenge the issuance of the ICE detainer. Facts ¶17; R.A. 48 (Aff. Pet. ¶5). Moreover, the federal regulation authorizing the issuance of a detention request – 8 C.F.R. § 287.7 – does not set forth any process to challenge the

issuance of a detainer. Mr. Lunn and all those subject to ICE detainers are consequently denied their basic due process rights.

V. THE LEGALITY OF HONORING AN ICE DETAINER REQUEST IS AN IMPORTANT, FREQUENTLY RECURRING QUESTION THAT THE COURT SHOULD ANSWER, NOTWITHSTANDING THE FACT THAT THE MATTER IS MOOT FOR THE PETITIONER.

As the Single Justice recognized in her reservation and report, the petitioner, Mr. Lunn, is no longer in state custody pursuant to the ICE detainer. The Justice nevertheless reported the matter to the full bench of this Court, observing that "the case raises important, recurring, time-sensitive issues that will likely evade the full court's review in future cases." R.A. 71 (Single Justice Reservation and Report). Petitioner asks that the Court agree and consider these important issues on the merits.

It is well within the discretion of this Court to consider matters that are moot.[15] Commonwealth v. Pon, 469 Mass. 296, 299–300 (2014); Libertarian Ass'n of

[15] Massachusetts courts, unlike federal courts, are not bound by any "case or controversy" requirement and are therefore "free to reject procedural frustrations in favor of just and expeditious determinations on the ultimate merits." Carpenter v. Suffolk Franklin Sav. Bank, 370 Mass. 314, 318 (1976).

Massachusetts v. Secretary of Com., 462 Mass. 538, 548 (2012). The Court "may answer a question that is no longer important to the parties where the issue is one of public importance, where it was fully argued on both sides, where the question is certain, or at least very likely, to arise again in similar factual circumstances, and especially where appellate review could not be obtained before the recurring question would again be moot." Pon, 469 Mass. at 299 (internal punctuation and citations omitted).

This case readily meets the requirements for review notwithstanding that the particular dispute is moot. First, the issue is one of great public importance. It addresses what role, if any, Massachusetts law enforcement and trial courts may lawfully play in federal immigration enforcement.

Second, the parties are in the process of fully briefing the issue, and Petitioner anticipates amicus support as well.

Third, the issue is extremely likely, if not certain, to recur. According to statistics compiled by TRAC Immigration Project, authorities reported 478 ICE detention requests in Massachusetts between November

2014 and October 2015. TRAC Immigration, Reported ICE Detainers by State and Detention Facility, November 2014 - October 2015, available at http://trac.syr.edu/immigration/reports/413/include/table4.html. In the experience of the Immigration Impact Unit for the Committee for Public Counsel Services, these detention requests are often allowed. R.A. 74 (Aff. Jennifer Klein ¶ 4). Defendants subject to ICE detainers are routinely being held based solely on these civil immigration requests – either because they are choosing not to post bail given the certainty of transfer to immigration custody or because they have been released from state custody and state authorities have chosen to hold them at ICE's request.

And finally, the forty-eight hour time frame inherent in the ICE detainer means that the matter is likely to further evade judicial review.

Faced with such important questions, likely to recur and inevitably to avoid review, this Court should consider the matter on the merits.

CONCLUSION

Based on the foregoing points and authorities, the Court should conclude that is unlawful and unconstitutional for Massachusetts trial courts and law enforcement officers to honor ICE detainer requests by holding individuals in custody beyond the time when they would otherwise be released, including the detainer request brought against Petitioner.

Respectfully Submitted,
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Dated: March ___, 2017

CERTIFICATE OF COMPLIANCE

I, the undersigned, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision), 16(e) (references to the record), 16(f) (reproduction of statutes, rules, regulations), 16(h) (length of briefs), 18 (appendix to the briefs), and 20 (form of briefs, appendices, and other papers).

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U.S. CONST., AMEND. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., AMEND. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

U.S. CONST., AMEND. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts Declaration of Rights Provisions

Mass. Declaration of Rights, art. XII

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Mass. Declaration of Rights, art. XIV

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Federal Statutes

8 U.S.C. § 1103(a)(10)

In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

8 U.S.C. § 1225(b)(1)(A)(i)

(b) Inspection of applicants for admission
(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled
(A) Screening
(i) In general
If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

8 U.S.C. § 1228(b)(1)

(b) Removal of aliens who are not permanent residents
(1) The Attorney General may, in the case of an alien described in paragraph (2), determine the deportability of such alien under section 1227(a)(2)(A)(iii) of this title (relating to conviction of an aggravated felony) and issue an order of removal pursuant to the procedures set forth in this subsection or section 1229a of this title.

8 U.S.C. § 1252c

(a) In general
Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who--
(1) is an alien illegally present in the United States; and
(2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.
(b) Cooperation
The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials.

8 U.S.C. § 1357

(a) Powers without warrant
Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant--
(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary

delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;
(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;
(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States; and
(5) to make arrests--
(A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or
(B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony, if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

Under regulations prescribed by the Attorney General, an officer or employee of the Service may carry a firearm and may execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States. The authority to make arrests under paragraph (5)(B) shall only be effective on and after the date on which the Attorney General publishes final regulations which (i) prescribe the categories of officers and employees of the Service who may use force (including deadly force) and the

circumstances under which such force may be used, (ii) establish standards with respect to enforcement activities of the Service, (iii) require that any officer or employee of the Service is not authorized to make arrests under paragraph (5)(B) unless the officer or employee has received certification as having completed a training program which covers such arrests and standards described in clause (ii), and (iv) establish an expedited, internal review process for violations of such standards, which process is consistent with standard agency procedure regarding confidentiality of matters related to internal investigations.

(b) Administration of oath; taking of evidence

Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service; and any person to whom such oath has been administered, (or who has executed an unsworn declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28) under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear (or subscribe under penalty of perjury as permitted under section 1746 of Title 28) to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621 of Title 18.

(c) Search without warrant

Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this chapter which would be disclosed by such search.

(d) Detainer of aliens for violation of controlled substances laws

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)--

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien, the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

(e) Restriction on warrantless entry in case of outdoor agricultural operations

Notwithstanding any other provision of this section other than paragraph (3) of subsection (a) of this section, an officer or employee of the Service may not enter without the consent of the owner (or agent thereof) or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States.

(f) Fingerprinting and photographing of certain aliens

(1) Under regulations of the Attorney General, the Commissioner shall provide for the fingerprinting and photographing of each alien 14 years of age or older against whom a proceeding is commenced under section 1229a of this title.

(2) Such fingerprints and photographs shall be made available to Federal, State, and local law enforcement agencies, upon request.

(g) Performance of immigration officer functions by State officers and employees

(1) Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State,

pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.

(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.

(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.

(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5

(relating to compensation for injury) and sections 2671 through 2680 of Title 28 (relating to tort claims).
(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.
(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.
(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--
(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.
(h) Protecting abused juveniles
An alien described in section 1101(a)(27)(J) of this title who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under section 1101(a)(27)(J)(iii)(I) of this title.
(i) Redesignated (h)

Federal Regulations

8 C.F.R. § 287.3(d)

(d) Custody procedures. Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued.

8 C.F.R. § 287.5(c)(1)

(c) Power and authority to arrest—
(1) Arrests of aliens under section 287(a)(2) of the Act for immigration violations. The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(2) of the Act and in accordance with 8 CFR 287.8(c):
(i) Border patrol agents;
(ii) Air and marine agents;
(iii) Special agents;
(iv) Deportation officers;
(v) CBP officers;
(vi) Immigration enforcement agents;
(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and
(viii) Immigration officers who need the authority to arrest aliens under section 287(a)(2) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP, the Assistant Secretary/Director of ICE, or the Director of the USCIS.

8 C.F.R. § 287.7

(a) Detainers in general. Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I–247, Immigration Detainer–Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.
(b) Authority to issue detainers. The following officers are authorized to issue detainers:
(1) Border patrol agents, including aircraft pilots;
(2) Special agents;
(3) Deportation officers;
(4) Immigration inspectors;
(5) Adjudications officers;
(6) Immigration enforcement agents;
(7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and
(8) Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Act in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner of CBP, the Assistant Secretary for ICE, or the Director of the USCIS.
(c) Availability of records. In order for the Department to accurately determine the propriety of issuing a detainer, serving a notice to appear, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Department of a conviction or act that renders an alien inadmissible or removable under any provision of law shall provide the Department with all documentary records and information available from the agency that reasonably relates to the alien's status in the United States, or that may have an impact on conditions of release.

(d) Temporary detention at Department request. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.
(e) Financial responsibility for detention. No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

8 C.F.R. § 287.8(c)(1)

(c) Conduct of arrests—
(1) Authority. Only designated immigration officers are authorized to make an arrest. The list of designated immigration officers may vary depending on the type of arrest as listed in § 287.5(c)(1) through (c)(5).

RECORD APPENDIX TABLE OF CONTENTS

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss: No. SJC-12276

COMMONWEALTH,
Respondent-Appellee,

v.

SREYNUON LUNN,
Petitioner-Appellant,

STATEMENT OF AGREED FACTS

In compliance with the Reservation and Report order of the Single Justice (Lenk, J.), the parties respectfully submit the following Statement of Agreed Facts:

Overview of ICE Detainers

1. United States Immigration and Customs Enforcement ("ICE") is a federal agency charged with enforcing federal laws governing border control, customs, trade, and immigration.
2. ICE is a part of the United States Department of Homeland Security ("DHS").
3. DHS submits requests to Massachusetts courts and other law enforcement agencies to continue to hold persons for up to forty-eight hours after

they would otherwise be released from the custody of the Commonwealth. The requests are variously referred to as "ICE detainers," "ICE holds," "immigration detainers," or "immigration holds."

4. At all times relevant to this action, DHS would lodge such detention requests with Massachusetts custodians using Form I-247D, "Immigration Detainer – Request for Voluntary Action," available at https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF, or the similar Form I-247X, "Request for Voluntary Transfer," available at https://www.ice.gov/sites/default/files/documents/Document/2016/I-247X.PDF. These forms are attached as Exhibits A and B, respectively.

5. DHS would also lodge requests for notification of the release of certain priority individuals, using Form I-247N, "Request for Voluntary Release of Suspected Priority Alien," available at https://www.ice.gov/sites/default/files/documents/Document/2016/I-247N.PDF. This form is attached as Exhibit C.

6. These forms are likely to change to address new immigration enforcement priorities, but DHS has not yet issued new forms.

7. Currently, Forms I-247D, I-247X, and I-247N are displayed on an "archived" page of the ICE website, related to the now-discontinued Priority Enforcement Program ("PEP"), available at https://www.ice.gov/pep.

8. In a series of identical letters from then-Acting Director of ICE, Daniel H. Ragsdale, to various members of the United States House of Representatives, dated February 25, 2014, Acting Director Ragsdale stated: "By issuing a detainer, ICE requests that an LEA [law enforcement agency] maintain custody of an alien for a period not to exceed 48 hours . . . after he or she would otherwise be released by an LEA, to provide time for ICE to assume custody. While immigration detainers are an important part of ICE's effort to remove criminal aliens who are in federal, state, or local custody, they are not mandatory as a matter of law." Copies of the letters are attached as Exhibit D.

9. During a deposition of Marc Rapp in connection with Duncan Roy, et al., v. Los Angeles County Sheriff's Department, et al., Civil Action No. 12-09012 (C.D. Cal.), and Gerardo Gonzalez, et al. v. Immigration Customs and Enforcement, et al., Civil Action No. 13-04416 (C.D. Cal.), Mr. Rapp testified on behalf of ICE that: "[When it issues an ICE detainer,] ICE is requesting that the law enforcement agency notify us and potentially hold them up to 48 hours, including weekends and holidays. What the law enforcement agency elects to do as it relates to that request is up to the law enforcement agency. We can not compel them to hold them, simply asking." Relevant excerpts from the deposition are attached as Exhibit E.

10. An ICE detainer, once lodged against a subject with his current custodian, generally travels with the subject as he is transferred between state custodians, along with other paperwork, such as booking information, warrants, and any mittimus. For example, a detainer lodged with an arresting police department will follow the subject to court for arraignment and then to the

county or state facility holding the subject pre-trial.

11. Consistent with the regulations governing detainers, 8 C.F.R. § 287.7 (authorizing all "deportation officers" and "immigration enforcement agents," among others, to issue detainers), DHS Forms I-247D, I-247X, and I-247N call for the signature of a DHS "Immigration Officer," not a neutral magistrate.

12. DHS Forms I-247D, I-247X, and I-247N call for DHS officers to complete the ICE detainer form by filling in requested information about the subject of the detainer, checking relevant boxes, and signing and dating the form at the bottom. The forms do not call for the signing officer to swear to the form's contents.

13. ICE detainers are generally, if not always, unaccompanied by affidavits, documents, or other supporting materials.

14. DHS Forms I-247D, I-247X, and I-247N do not call for information or assertions that the subject is a flight risk.

15. There is no mechanism, under either federal or state law, for a neutral magistrate to review an

ICE detainer for probable cause that sufficient facts exist to warrant detaining the individual for violation of federal immigration law.

16. It is common that Massachusetts trial courts and law enforcement agencies do not provide a copy of the ICE detainer to the subject. DHS generally does not serve a copy of the detainer directly on the subject.

17. There is no mechanism, under either federal or state law, to permit the subject of an ICE detainer to meaningfully challenge the detainer.

18. Individual law enforcement agencies in the Commonwealth may or may not have policies on the subject of ICE detainers.

19. Policies and practices vary from one Commonwealth law enforcement agency to another as to whether, or under which circumstances, to honor ICE detainers.

Relevant Policies and Practices of the Suffolk County Sheriff's Department

20. At all times relevant to this action, the practice of the Suffolk County Sheriff was to notify ICE of the release of subjects of ICE detainers, but not to hold subjects of ICE

detainers beyond the time that they would otherwise be released from the custody of the Commonwealth.

21. The Suffolk County Jail, or the Nashua Street Jail (the "Jail"), is run by the Suffolk County Sheriff's Department.

22. The vast majority of the Sheriff's pre-trial detainees are men who are held at the Jail, but some pre-trial men are held at the Suffolk County House of Correction ("HOC").

23. Female pre-trial detainees are held only at the HOC.

24. Bail procedures for pre-trial detainees at the Jail generally proceed in the following manner:

25. A person initiates the bail process by telling the desk officer in the Jail's lobby that he would like to post bail for a detainee. The desk officer then calls the records room to confirm that the Jail is holding that prisoner and to find out whether there are any warrants lodged against him.

26. If there is an ICE detainer in the file, the records officer calls ICE's Burlington, Massachusetts office to alert ICE that the

prisoner will likely be bailed. The desk officer notifies the bail commissioner as well.

27. A bail commissioner should be available to accept bail money between 5:30 p.m. and 9:00 p.m. each evening. There is a commissioner at the Jail each weekday evening, and one is on call during weekends.

28. After hearing from the desk officer, the bail commissioner meets with the person posting bail, shows a picture of the detainee to confirm his identity, and verifies that there are sufficient funds, namely, the mittimus amount plus $40 (the commissioner's fee). The bail commissioner then collects the funds, issues a receipt, and notifies the records officer that bail has been posted.

29. Next, the records officer calls the prisoner's housing unit and property department to tell them that the detainee should be released.

30. After the prisoner packs his belongings, custody staff escort him from his housing unit to the Jail's booking room where he answers some questions and signs for his property. If ICE officers have arrived at the Jail to take custody

of the prisoner, they do so in the booking area after the deputy has finished processing the prisoner's discharge information.

31. If ICE has not arrived, the detainee is brought to the lobby and released.

32. Generally, a single bail should require about twenty minutes to complete, but often there are administrative delays. Most evenings, a number of people are posting bail, so backlogs are typical. The bail process may take closer to an hour under these circumstances.

33. Bail commissioners don't always arrive promptly at the Jail, and sometimes they leave the premises, so this may prolong the process.

34. Prisoners on suicide watch or in segregation cells take longer to move from housing to booking. A minimum of forty-five minutes' transaction time is more common for these prisoners.

35. Bail and release procedures for the HOC differ somewhat from those at the Jail. They generally proceed as follows:

36. Female pre-trial detainees are bailed directly from the HOC to the street. The bail procedure

parallels the Jail's procedures, but bail commissioners are available on an on-call basis only. This can slow the process significantly.

37. If ICE officers arrive to take custody of a bailed female prisoner, they would take custody of her in the HOC booking room.

38. In order to bail a male prisoner held at the HOC, the person posting bail must initiate the process by speaking with the desk officer at the Jail. The HOC procedures then track the Jail's procedures, with some additional steps.

39. More specifically, once the prisoner has been taken from his HOC cell, he must pass through HOC booking so that staff can document his transfer to the Jail. Deputies then transport him from the HOC to the Jail. There he collects his property and is booked out of the Jail. If ICE officers arrive to take custody of the prisoner, that would take place in the Jail's booking room.

Petitioner's Detention on an ICE Detainer

40. On October 24, 2016, Petitioner Sreynuon Lunn was arraigned in the Central Division of the Boston Municipal Court ("BMC"), pursuant to Criminal

Complaint No. 1601CR006888, on the charge of unarmed robbery.

41. At the time of arraignment, DHS had lodged an ICE detainer against Petitioner. That detainer was not accompanied by any warrant, affidavit, or other supporting materials. The detainer is attached as Exhibit F.

42. Both the handwritten and typewritten dockets for the case contain an entry on October 24, 2016, indicating that Petitioner was "held on [an] I.C.E. detainer."

43. Although Petitioner became aware of the ICE detainer lodged against him, neither the BMC nor the Suffolk County Sheriff's Department provided Petitioner with a copy of the detainer.

44. The BMC held Petitioner on $1,500 cash bail.

45. On November 21, 2016, Petitioner moved for reduction of bail, which the court denied without prejudice.

46. Both the handwritten and typewritten dockets for the case contain a notation on November 21, 2016, that Petitioner "remains held on ICE detainer."

47. On January 20, 2017, the Suffolk Superior Court reduced Petitioner's bail to $750.

48. Following his arraignment on Criminal Complaint No. 1601CR006888, Mr. Lunn spent some time held by the Norfolk County Sheriff on another criminal matter. On or about January 13, 2017, Mr. Lunn returned to Suffolk County and was held solely on Criminal Complaint No. 1601CR006888 by the Suffolk County Sheriff's Department at the Suffolk County Jail.

49. After Petitioner's bail was reduced, Petitioner was capable of posting the bail but chose not to because of his belief that he would be held on the ICE detainer.

50. On February 6, 2017, Suffolk County Sheriff's deputies transported Petitioner from the Jail to the BMC for a trial date, pursuant to the court's bail mittimus.

51. The Commonwealth answered not ready for trial, and the trial court dismissed the case against Petitioner for want of prosecution.

52. After the case was dismissed, counsel for Petitioner notified the court of the ICE detainer lodged against Petitioner and asked that Petitioner be "released and not held on the ICE detainer."

53. The court inquired of Petitioner's counsel, "What authority do I have?"

54. Petitioner's counsel referred the court to an order by a Single Justice of the Supreme Judicial Court in Santos Moscoso v. A Justice of the East Boston Division of the Boston Municipal Court, SJ-2016-0168, a copy of which had been provided by counsel to the court. Counsel for Petitioner also noted that "the ICE detainer is a civil detainer. It's not a warrant."

55. In response, the court stated that it "decline[d] to take any action on the detainer."

56. The handwritten and typewritten dockets for the case state, respectively, that on February 6, 2017, Petitioner's "oral request" or "oral motion" for "release . . . from a Federal I.C.E. detainer [was] heard and denied." On February 28, 2016, the following entry was added to the typewritten docket: "After review of the entries and recordings of the proceedings of 2-6-2017[,] [t]he above record is revised in order to correct a clerical error. The words 'heard and denied' are stricken from the record and replaced by the

words ‘No action taken’ to accurately reflect the Court[’]s order.”

57. At this point, Petitioner was in court custody. There was no pending state criminal matter against Petitioner, or other basis to hold Petitioner, beyond the ICE detainer.

58. Several hours later, DHS officers took Petitioner from court custody into immigration custody.

59. At no time after the dismissal of Criminal Complaint No. 1601CR006888 did the Suffolk County Sheriff’s Department regain custody of Petitioner.

Respectfully submitted,

2/28/17

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2/28/17

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Dated: ~~March~~ February 28, 2017

DEPARTMENT OF HOMELAND SECURITY (DHS)

IMMIGRATION DETAINER – REQUEST FOR VOLUNTARY ACTION

Subject ID: File No:
Event #: Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (DHS Office Address)

Name of Subject: _____

Date of Birth: _____ Citizenship: _____ Sex: _____

1. DHS HAS DETERMINED THAT *(mark at least one option in subsection A and one option in subsection B, or skip to section 2)*:
A. THE SUBJECT IS AN IMMIGRATION ENFORCEMENT PRIORITY BECAUSE HE/SHE:
☐ has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to national security;
☐ has been convicted of an offense of which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is at least 16 years old and intentionally participated in an organized criminal gang to further its illegal activities;
☐ has been convicted of an offense classified as a felony, other than a state or local offense for which an essential element was the alien's immigration status;
☐ has been convicted of an aggravated felony, as defined under 8 U.S.C. § 1101(a)(43) at the time of conviction;
☐ has been convicted of a "significant misdemeanor," as defined under DHS policy; and/or
☐ has been convicted of 3 or more misdemeanors, not including minor traffic offenses and state or local offenses for which immigration status was an essential element, provided the offenses arise out of 3 separate incidents.

B. PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON:
☐ a final order of removal against the subject;
☐ the pendency of ongoing removal proceedings against the subject;
☐ biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
☐ statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

2. DHS TRANSFERRED THE SUBJECT TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION.
☐ Upon completion of the proceeding or investigation for which the subject was transferred to your custody, DHS intends to resume custody of the subject to complete processing.

IT IS THEREFORE REQUESTED THAT YOU:

- Serve a copy of this form on the subject and maintain custody of him/her for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. **This request takes effect only if you serve a copy of this form on the subject, and it does not request or authorize that you hold the subject beyond 48 hours. This request arises from DHS authorities and should not impact decisions about the subject's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters.**
- As early as possible prior to the time you otherwise would release the subject, please notify DHS by calling ☐ U.S. Immigration and Customs Enforcement (ICE) or ☐ U.S. Customs and Border Protection (CBP) at _____. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-6020.
- Notify this office in the event of the subject's death, hospitalization or transfer to another institution.

☐ If checked: Please cancel the detainer related to this subject previously submitted to you on _____ (date).

(Name and title of Immigration Officer) (Signature of Immigration Officer)

Notice: If the subject is taken into DHS custody, he or she may be removed from the United States. If the subject may be the victim of a crime or you want the subject to remain in the United States for a law enforcement purpose, please notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS by mailing, emailing, or faxing a copy to _____.

Local Booking/Inmate #: _____ Est. release date/time: _____ Date of latest criminal charge/conviction: _____

Latest offense charged/convicted: _____

This Form I-247D was served upon the subject on _____, in the following manner:

☐ in person ☐ by inmate mail delivery ☐ other (please specify): _____.

(Name and title of Officer) (Signature of Officer)

NOTICE TO THE DETAINEE

The Department of Homeland Security (DHS) has placed an immigration detainer on you. An immigration detainer is a notice to a law enforcement agency that DHS intends to assume custody of you (after you otherwise would be released from custody) because there is probable cause that you are subject to removal from the United States under federal immigration law. DHS has requested that the law enforcement agency that is currently detaining you maintain custody of you for a period not to exceed 48 hours beyond the time when you would have been released based on your criminal charges or convictions. **If DHS does not take you into custody during this additional 48 hour period, you should contact your custodian** (the agency that is holding you now) to inquire about your release. **If you have a question or complaint regarding this detainer, please contact the ICE ERO Detention Reporting and Information Line at (888) 351-4024. For complaints related to alleged violations of civil rights or civil liberties connected to DHS activities, please contact the Joint Intake Center at (877) 2INTAKE (877-246-8253). If you believe you are a United States citizen or the victim of a crime, please advise DHS by calling the ICE Law Enforcement Support Center toll free at (855) 448-6903.**

NOTIFICACIÓN AL DETENIDO

El Departamento de Seguridad Nacional (DHS) ha emitido una orden de detención inmigratoria en su contra. Una orden de detención inmigratoria es un aviso a la autoridad de seguridad pública que DHS tiene la intención de asumir custodia sobre usted (después que normalmente hubiera sido liberado de su custodia) porque existe causa probable que usted esté sujeto a ser removido de los Estados Unidos bajo la ley federal de inmigración. DHS ha pedido que la autoridad de seguridad pública que actualmente lo tiene detenido lo / la mantenga en su custodia por un período que no sobrepase 48 horas después del momento cuando usted hubiera sido liberado basado en sus cargos o condenas criminales. **Si DHS no lo toma bajo su custodia durante este período adicional de 48 horas, usted debe contactar a la agencia responsable por su custodia** (la que actualmente lo tiene detenido) para preguntar acerca de su liberación. **Si usted tiene alguna pregunta o queja concerniente a esta orden de detención, por favor contacte la Línea para Reportar e Información de ICE ERO al (888) 351-4024. Para quejas relacionadas a violaciones alegadas de derechos civiles o libertades civiles conectadas a las actividades de DHS, por favor contacte al Joint Intake Center (Centro de Admisión) al (877) 2INTAKE (877-246-8253). Si usted cree ser un ciudadano de los Estados Unidos o víctima de un crimen, por favor avísele a DHS llamando gratis al ICE Law Enforcement Support Center (Centro de Apoyo de ICE para las Agencias para el Cumplimiento de la Ley) al (855) 448-6903.**

AVIS AU DETENU

Le Département de la Sécurité Nationale (en anglais: DHS) a émis un ordre d'arrêt d'immigration contre vous. Un ordre d'arrêt d'immigration est un avis à un organisme d'application de la loi que DHS a l' intention d'assumer votre garde (après votre libération) car il existe cause probable que vous soyez sujet à l'expulsion des Etats-Unis en vertu du droit fédéral de l'immigration. DHS a demandé à l'agence d'application de la loi qui actuellement vous détient, de vous maintenir sous garde pendant une période n'excédant pas 48 heures après avoir été libéré en fonction des accusations ou condamnations criminelles contre vous. **Si DHS ne vous prend pas en garde à vue au cours de cette période de 48 heures supplémentaires, vous devez contacter votre gardien** (l'agence qui vous retient aujourd'hui) pour enquérir au sujet de votre libération. **Si vous avez une question ou une complainte au sujet de cette demande, veuillez contacter la Ligne pour Rapporter et d'Information de ICE ERO au (888) 351-4024. Pour les plaintes relatives à des violations présumées des droits et libertés civils liés à des activités de DHS, veuillez contacter Joint Intake (Centre d'Admissions) au (877) 2INTAKE (877-246-8253). Si vous croyez que vous êtes un citoyen américain ou victime d'un crime, veuillez prévenir DHS, en appelant gratuitement ICE Law Enforcement Support Center (Centre d'Appui de ICE pour les Organismes d'Application de la Loi) au 855 448-6903.**

AVISO AO DETENTO

O Departamento de Segurança Interna (DHS, pela sigla americana) emitiu uma ordem de custódia imigratória em seu nome. Este documento é um aviso enviado às agências de aplicação da lei de que o DHS pretende assumir a custódia da sua pessoa, caso seja libertad. O DHS pediu que a agência de aplicação da lei encarregada da sua atual detenção mantenha-o sob custódia durante, no máximo, 48 horas após o periodo em que seria libertado pelas autoridades estaduais ou municipais de aplicação da lei, de acordo com as respectivas acusaçoes e penas criminais. **Se o DHS nao assumir a sua custódia durante essas 48 horas adicionais, voce deverá entrar em contato com a agência custodiante** (a agência de aplicação da lei ou qualquer outra entidade que esteja detendo-o no momento) para obter informações sobre sua libertação da custódia estadual ou municipal. **Caso voce tenha alguma reclamação a fazer sobre esta ordem de custódia imigratória ou relacionada a violações dos seus direitos ou liberdades civis decorrente das atividades do DHS, entre em contato com o *Joint Intake Center,* que seja o Centro de Entrada Conjunta da Agência de Controle de Imigração e Alfândega (ICE, pela sigla americana) pelo telefone 1-877-246-8253. Se você acreditar que é cidadao dos EUA ou está sendo vítima de um crime, informe ao DHS, ligando para o *Law Enforcement Support Center,* que seja o Centro de Apoio para Aplicação da Lei do ICE pelo telefone de ligação gratuita (855) 448-6903.**

THÔNG BÁO CHO NGƯỜI ĐANG BỊ GIAM

Bộ An ninh Nội địa Mỹ (DHS) có lệnh giam giữ ông/bà vì lý do liên quan đến luật di trú. Lệnh giam giữ vì lý do liên quan đến luật di trú là thông báo của DHS cho các cơ quan thi hành luật pháp là DHS có ý định dành thẩm quyền để tạm giữ ông/bà (sau khi ông/bà được thả). Lý do là, theo luật di trú của liên bang Mỹ, DHS có lý do chính đáng để xếp ông/bà vào diện có thể bị trục xuất ra khỏi Mỹ. DHS đã yêu cầu cơ quan thi hành luật pháp, nơi đang giam ông/bà, phải tiếp tục giam ông/bà thêm cho đến tối đa không được quá 48 tiếng đồng hồ, thời điểm mà ông/bà coi như đã được thả, căn cứ vào lời buộc tội hoặc bản án kết tội của tòa. **Nếu trong vòng 48 tiếng đồng hồ bổ sung này mà DHS không đến nhận ông/bà, thì ông/bà nên liên lạc với nhân viên quản lý của mình** (nơi đang giam giữ ông/bà) để biết chi tiết về vấn đề được thả ra khỏi nhà giam. **Nếu ông/bà có thắc mắc hoặc khiếu nại về lệnh tạm giữ này, xin liên lạc với ICE ERO Detention Reporting and Information Line ở số (888) 351-4024. Nếu ông/bà có phàn nàn về các hoạc động, công tác của DHS mà ông/bà cho là có vi phạm đến dân quyền hoặc tự do dân quyền, xin liên lạc Joint Intake Center ở số (877) 2INTAKE (877-246-8253). Nếu ông/bà tin rằng mình có quốc tịch Mỹ, hoặc mình là nạn nhân trong vụ tội, xin gọi ICE Law Enforcement Support Center ở số điện thoại miễn phí (855) 448-6903 để báo cho DHS biết.**

對扣留者的通告

美国国土安全部（DHS）已發出一張扣留令，對你進行扣留。 移民扣留令的目的是告訴执法機關現在DHS 有權力扣押你（在你被关押的部门释放之後）因为根据美国联邦移民法，我們有頗能成立的因由可將你遣送出境。DHS 已向扣留你的有關執法機關提出要求在你刑事控罪及定罪後被释放的48小時內對你继续進行扣留。如果在這48小时内DHS没有扣押你，那你可以联络你的保管人（现关押你的部门）查詢有關你釋放的事。 如果你對這扣留令有任何问题或投诉，请联络ICE ERO 拘留报告信息熱线 （888）351-4024。任何有關DHS涉嫌违反民权或民权自由行爲的投訴，请联系美国移民及海关执法局联合接待中心（ICE Joint Intake Center）（877）2INTAKE（877-246-8253）。如果你相信你是美国公民或是受害者，请联系美国移民及海关执法局的执法支援中心（ICE Law Enforcement Support Center）告知DHS，其免费电话号码是（855）448-6903。

DEPARTMENT OF HOMELAND SECURITY (DHS)

REQUEST FOR VOLUNTARY TRANSFER

Subject ID: Event #:	File No: Date:
TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)	FROM: (DHS Office Address)

Name of Subject: _____

Date of Birth: _____ Suspected or Known Citizenship: _____ Sex: _____

A. DHS REQUESTS VOLUNTARY TRANSFER OF THE SUBJECT BECAUSE *(complete box 1 or 2 below)*:

☐ 1. DHS suspects that the subject is an **immigration enforcement priority** because *(mark at least one)*:

- ☐ (s)he was apprehended at the border or ports of entry while attempting to unlawfully enter the United States;
- ☐ (s)he was apprehended in the United States after unlawfully entering or re-entering the United States after January 1, 2014;
- ☐ (s)he has significantly abused the visa or visa waiver programs;
- ☐ (s)he was issued a final order of removal after January 1, 2014; and/or
- ☐ in the judgment of a designated senior DHS official, his/her removal would serve an important federal interest.

☐ 2. **DHS transferred the subject to your custody** for a proceeding or investigation and, upon completion of that proceeding or investigation, DHS intends to resume custody of the subject to **complete processing**.

B. DHS REQUESTS YOUR COOPERATION AS FOLLOWS *(complete box 1 or 2 below)*:

☐ **1. NOTIFICATION. Please notify DHS** as early as practicable (at least 48 hours, if possible) before the subject is released from your custody to allow DHS an opportunity to determine whether there is probable cause to conclude that (s)he is a removable alien.

NOTE: This voluntary notification request <u>does not</u> request or authorize that you detain the subject beyond the time he or she is currently scheduled for release from your custody.

☐ **2. DETAINER. Please serve a copy** of this form on the subject **and maintain custody** of him/her for a period **<u>NOT TO EXCEED 48 HOURS</u>** beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. **Probable cause** exists that the subject is a removable alien. This determination is based on *(check at least one box below)*:

- ☐ a final **order of removal** against the subject;
- ☐ the pendency of **ongoing removal proceedings** against the subject;
- ☐ **biometric confirmation** of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
- ☐ **statements** made voluntarily by the subject to an immigration officer **and/or other reliable evidence** that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

NOTE: This request takes effect only if you serve a copy of this form on the subject, and it does not request or authorize that you hold the subject beyond 48 hours.

IMPORTANT NOTICES:

- **This request arises from DHS authorities and should not impact decisions about the subject's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters.**
- As early as possible prior to the time you otherwise would release the subject, please notify DHS by calling ☐ U.S. Immigration and Customs Enforcement (ICE) or ☐ U.S. Customs and Border Protection (CBP) at _____. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-6020.
- Please notify this office in the event of the subject's death, hospitalization, or transfer to another institution.

☐ If checked: Please cancel the detainer related to this subject previously submitted to you on _____ (date).

_____ (Name and title of Immigration Officer)

_____ (Signature of Immigration Officer)

Notice: If the subject is taken into DHS custody, he or she may be removed from the United States. If the subject may be the victim of a crime or you want the subject to remain in the United States for a law enforcement purpose, please notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

Please provide the information below, sign, and return to DHS by mailing, emailing, or faxing a copy to _____.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:

Local Booking/Inmate #: _____ Est. release date/time: _____ Date of latest criminal charge/conviction: _____

Arresting agency, if available, and latest offense charged/convicted: _____

If Box B.2. is checked above, please indicate the manner in and date on which this Form I-247X was served upon the subject:

☐ in person ☐ by inmate mail delivery ☐ other _____(please specify) date: _____

_____ (Name and title of Officer)

_____ (Signature of Officer)

DEPARTMENT OF HOMELAND SECURITY (DHS)

REQUEST FOR VOLUNTARY NOTIFICATION OF RELEASE OF SUSPECTED PRIORITY ALIEN

Subject ID: File No:
Event #: Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (DHS Office Address)

Name of Subject: _____

Date of Birth: _____ Suspected Citizenship: _____ Sex: _____

1. DHS SUSPECTS THAT THE SUBJECT IS A REMOVABLE ALIEN AND THAT THE SUBJECT IS AN IMMIGRATION ENFORCEMENT PRIORITY BECAUSE HE/SHE *(mark at least one option below, or skip to section 2)***:**
☐ has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to national security;
☐ has been convicted of an offense of which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is at least 16 years old and intentionally participated in an organized criminal gang to further its illegal activities;
☐ has been convicted of an offense classified as a felony, other than a state or local offense for which an essential element was the alien's immigration status;
☐ has been convicted of an aggravated felony, as defined under 8 U.S.C. § 1101(a)(43) at the time of conviction;
☐ has been convicted of a "significant misdemeanor," as defined under DHS policy; and/or
☐ has been convicted of 3 or more misdemeanors, not including minor traffic offenses and state or local offenses for which immigration status was an essential element, provided the offenses arise out of 3 separate incidents.

2. DHS TRANSFERRED THE SUBJECT TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION.
☐ Upon completion of the proceeding or investigation for which the subject was transferred to your custody, DHS intends to resume custody of the subject to complete processing.

IT IS THEREFORE REQUESTED THAT YOU:

- Provide **notice as early as practicable** (at least 48 hours, if possible) before the subject is released from your custody to allow DHS an opportunity to determine whether there is probable cause to conclude that he or she is a removable alien. **This voluntary notification request <u>does not</u> request or authorize that you detain the subject beyond the time he or she is currently scheduled for release from your custody. This request arises from DHS authorities and should not impact decisions about the subject's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters.**
- As early as possible prior to the time you otherwise would release the subject, please notify DHS by calling ☐ U.S. Immigration and Customs Enforcement (ICE) or ☐ U.S. Customs and Border Protection (CBP) at _____ _____. If you cannot reach a DHS official at the number(s) provided, please contact the ICE Law Enforcement Support Center at: (802) 872-6020.
- Notify this office in the event of the subject's death, hospitalization or transfer to another institution.

☐ If checked: Please disregard the notification request related to this subject previously submitted to you on _____ (date).

(Name and title of Immigration Officer) (Signature of Immigration Officer)

Notice: If the subject is taken into DHS custody, he or she may be removed from the United States. If the subject may be the victim of a crime, or if you want the subject to remain in the United States for a law enforcement purpose, please notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS by mailing, emailing, or faxing a copy to _____.

Local Booking/Inmate #: _____ Est. release date/time: _____ Date of latest criminal charge/conviction: _____

Latest offense charged/convicted: _____

(Name and title of Officer) (Signature of Officer)

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

FEB 25 2014

The Honorable Mike Thompson
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Thompson:

Thank you for your recent letter to the Department of Homeland Security (DHS) regarding immigration detainers.

As you know, Form I-247, Immigration Detainer–Notice of Action, is a notice that U.S. Immigration and Customs Enforcement (ICE), within DHS, has reason to believe that an alien may be subject to removal from the United States. By issuing a detainer, ICE requests that an LEA maintain custody of an alien for a period not to exceed 48 hours (excluding Saturdays, Sundays, and federal holidays) after he or she would otherwise be released by an LEA, to provide time for ICE to assume custody. While immigration detainers are an important part of ICE's effort to remove criminal aliens who are in federal, state, or local custody, they are not mandatory as a matter of law. As such, ICE relies on the cooperation of its law enforcement partners in this effort to promote public safety.

ICE uses detainers to help focus its limited resources on its public safety, national security, and border security missions. ICE's use of detainers is focused on the most serious criminal offenders. ICE limits the use of detainers against individuals arrested for minor misdemeanor offenses (e.g., traffic offenses and other petty crimes) who are not otherwise ICE priorities, helping to ensure that limited available resources are focused on apprehending felons, repeat offenders, and immigration violators who fall under other ICE priorities.

To ensure clarity with law enforcement partners and the public, information about immigration detainers is publically available online at http://www.ice.gov/news/library/factsheets/detainer-faqs/htm. The site also provides a link to Form I-247. Additionally, a short video briefing for front-line state and local law enforcement personnel describing ICE's use of immigration detainers and extensive supporting materials for law enforcement leadership are available at http://www.ice.gov/secure_communities/crcl.htm.

Thank you once again for your letter. The co-signers of your letter will each receive a separate, identical response. Should you need additional assistance, please do not hesitate to contact me at (202) 732-5907.

Sincerely,

Daniel H. Ragsdale
Acting Director

UNITED STATES DISTRICT COURT

DUNCAN ROY; et al.,
Plaintiffs,
vs.
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; et al.,
Defendants.

CASE NO. CV 12-09012
Consolidated with:
CASE NO. CV 13-04416

GERARDO GONZALEZ; et al.,
Plaintiffs,
vs.
IMMIGRATION AND CUSTOMS ENFORCEMENT, et al.,
Defendants.

Deposition of MARC RAPP, taken at 500 South 12th Street SW, Room 9098, Washington, D.C., on Thursday, March 10, 2016, commencing at 10:04 a.m., before Kristy L. Clark, RPR, NV CCR #708, CA CSR #13529.

Job No. 2265180
PAGES 1 - 202
PAGES 62 - 63 ARE CONFIDENTIAL AND BOUND SEPARATELY

APPEARANCES:

For the Plaintiffs:

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For the Defendants U.S. Immigration and Customs Enforcement:

U.S. DEPARTMENT OF HOMELAND SECURITY
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Room 6080
Laguna Niguel, California 92677
(949) 360-3039
chrisopher.miller3@dhs.gov

- AND -

U.S. DEPARTMENT OF JUSTICE
BY: J. MAX WEINTRAUB, ESQ.
Ben Franklin Station
P.O. Box 868
Washington, DC 20044
(202) 305-7551
jacob.weintraub@usdoj.gov

APPEARANCES (CONTINUED):

For the Defendants Los Angeles County Sheriff's Department:

LAWRENCE BEACH ALLEN & CHOI
BY: JUSTIN W. CLARK, ESQ.
100 West Broadway
Suite 1200
Glendale, California 91210
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Also Present: Brandon Kennedy

I N D E X

WITNESS:	EXAMINATION
MARC RAPP	
By Ms. Pasquarella	7, 64

EXHIBITS

NUMBER	DESCRIPTION	MARKED
EXHIBIT 73	Plaintiffs' Notice of Rule 30(B)(6) Deposition	14
EXHIBIT 74	DHS Form I-247	32
EXHIBIT 75	Interim Policy 10074.1. Detainers	44
EXHIBIT 76	DHS Form I-247	49
EXHIBIT 77	Law Enforcement Support Center Standard Operation Procedures	60
EXHIBIT 78	DHS Form I-247	70
EXHIBIT 79	Civil Immigration Enforcement Guidance	74
EXHIBIT 80	DHS Form I-247D	86
EXHIBIT 81	Message from S. Saldaña dated 6/12/15	137
EXHIBIT 82	DHS Form I-247X	152

EXHIBITS (CONTINUED)

NUMBER	DESCRIPTION	MARKED
EXHIBIT 83	Law of Arrest, Search, and Seizure for Immigration Officers, M-69, January 1993 edition	168
EXHIBIT 84	U.S. Immigration and Customs Enforcement Policy 16001.2	192

WASHINGTON, DC, THURSDAY, MARCH 10, 2016;

10:04 A.M.

-oOo-

Thereupon--

MARC RAPP,

was called as a witness, and having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. PASQUARELLA:

Q. Good morning.

A. Good morning.

Q. Please state your name and spell it for the record.

A. Marc, M-a-r-c, Rapp, R-a-p-p.

Q. All right. And, Mr. Rapp, have you ever been deposed before?

A. Yes.

Q. How many times?

A. Two that -- two.

Q. Okay. And what -- when was the last time you were deposed?

A. The last time would have been several weeks ago.

Objection. Calls for legal conclusion and misstates his testimony.

He's never said that an ICE detainer authorized an LEA to hold somebody beyond their release date.

BY MS. PASQUARELLA:

Q. Okay. Well, let me start with that, then.

Does the -- in ICE's view, does the immigration detainer, this current detainer form, authorize a law enforcement agency to hold someone beyond their release date so that ICE can come pick them up?

MR. WEINTRAUB: Objection. Calls for legal conclusion.

MR. CLARK: Also objection. Incomplete hypothetical. Lacks foundation. Calls for speculation.

THE WITNESS: We're requesting simply that the LEA notify us upon completion of their sentence and that they allow us to have a transfer of custody at that time.

BY MS. PASQUARELLA:

Q. And in making that request, is it ICE's view that a local law enforcement agency would be permitted to hold somebody beyond their release date on the

authority of the immigration detainer?

MR. WEINTRAUB: Objection. Calls for legal conclusion. And vague as to the definition of "permitted."

MR. CLARK: Join.

THE WITNESS: ICE is requesting that the law enforcement agency notify us and potentially hold them up to 48 hours, including weekends and holidays.

What the law enforcement entity elects to do as it relates to that request is up to the law enforcement agency. We can not compel them to hold them, simply asking.

BY MS. PASQUARELLA:

Q. Okay. Well, what's ICE's view of what -- what would permit a law enforcement agency to -- to hold somebody beyond their release date for -- for ICE on the authority of the immigration detainer?

MR. WEINTRAUB: Objection. Calls for legal conclusion and lacks foundation.

THE WITNESS: I think that would be up to the individual law enforcement agency to determine what authority or right they have to hold an individual beyond the completion of their -- their criminal process within that law enforcement agency.

/////

doing all along.

MS. PASQUARELLA: We -- we aren't doing that with Schichel, you realize? That's what we had talked about last Friday. Because we aren't -- we don't even have his deposition scheduled, but I'm having to do it because the deposition is scheduled.

MR. WEINTRAUB: Okay. That's fine. Yeah, just -- do me a favor just so that I do -- because I had not remembered that. I remember it now. Just send me an e-mail reminding me not to be stupid and, when it comes in, deal with it right away.

MS. PASQUARELLA: Okay.

MR. CLARK: So stipulated for purposes of today.

MR. WEINTRAUB: So stipulated.

MR. CLARK: We're off.

(Thereupon, the deposition concluded at 4:54 p.m.)

I, Marc Rapp, do hereby declare under penalty of perjury that I have read the foregoing transcript; that I have made any corrections as appear noted, in ink, initialed by me, or attached hereto; that my testimony as contained herein, as corrected, is true and correct.

EXECUTED this _____ day of _____, 2016, at _____, _____.

(City) (State)

_____

Marc Rapp

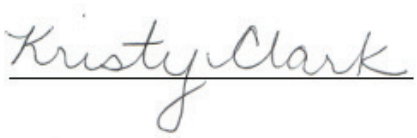
I, the undersigned, a Certified Shorthand Reporter, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney or any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: March 24, 2016



KRISTY L. CLARK

CCR NO. 708

DEPARTMENT OF HOMELAND SECURITY (DHS)

IMMIGRATION DETAINER – REQUEST FOR VOLUNTARY ACTION

Subject ID: 357142477
Event #: WSM1710001012

File No: 027 738 590
Date: October 23, 2016

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)
BOSTON POLICE DEPT, DISTR
1165 BLUE HILL AVE.
DORCHESTER, MA 021240000

FROM: (DHS Office Address)
DRO - Westminster, CA Sub Office
ICE
ERO LAGUNA NIGUEL SUB OFFICE
24000 AVILA RD RM# 3400
LAGUNA NIGUEL, CA 92677

Name of Subject: LUNN, SREYNUON

Date of Birth: 02/02/1985 Citizenship: THAILAND Sex: M

1. DHS HAS DETERMINED THAT *(mark at least one option in subsection A and one option in subsection B, or skip to section 2)*:

A. THE SUBJECT IS AN IMMIGRATION ENFORCEMENT PRIORITY BECAUSE HE/SHE:

- ☐ has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to national security;
- ☐ has been convicted of an offense of which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is at least 16 years old and intentionally participated in an organized criminal gang to further its illegal activities;
- ☐ has been convicted of an offense classified as a felony, other than a state or local offense for which an essential element was the alien's immigration status;
- ☐ has been convicted of an aggravated felony, as defined under 8 U.S.C. § 1101(a)(43) at the time of conviction;
- ☒ has been convicted of a "significant misdemeanor," as defined under DHS policy; and/or
- ☐ has been convicted of 3 or more misdemeanors, not including minor traffic offenses and state or local offenses for which immigration status was an essential element, provided the offenses arise out of 3 separate incidents.

B. PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON:

- ☒ a final order of removal against the subject;
- ☐ the pendency of ongoing removal proceedings against the subject;
- ☒ biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
- ☐ statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

2. DHS TRANSFERRED THE SUBJECT TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION:

- ☐ Upon completion of the proceeding or investigation for which the subject was transferred to your custody, DHS intends to resume custody of the subject to complete processing.

IT IS THEREFORE REQUESTED THAT YOU:

- Serve a copy of this form on the subject and maintain custody of him/her for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. **This request takes effect only if you serve a copy of this form on the subject, and it does not request or authorize that you hold the subject beyond 48 hours. This request arises from DHS authorities and should not impact decisions about the subject's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters.**
- As early as possible prior to the time you otherwise would release the subject, please notify DHS by calling ☒ U.S. Immigration and Customs Enforcement (ICE) or ☐ U.S. Customs and Border Protection (CBP) at 781-359-7500 If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-6020.
- Notify this office in the event of the subject's death, hospitalization or transfer to another institution.

☐ If checked: Please cancel the detainer related to this subject previously submitted to you on _____ (date).

C 7211 CANO - DO
(Name and title of Immigration Officer)

(Signature of Immigration Officer)

Notice: If the subject is taken into DHS custody, he or she may be removed from the United States. If the subject may be the victim of a crime or you want the subject to remain in the United States for a law enforcement purpose, please notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS by mailing, emailing, or faxing a copy to _____.

Local Booking/Inmate #: _____ Est. release date/time: _____ Date of latest criminal charge/conviction: _____

Latest offense charged/convicted: _____

This Form I-247D was served upon the subject on _____, in the following manner:

☐ in person ☐ by inmate mail delivery ☐ other (please specify): _____

(Name and title of Officer)

(Signature of Officer)

MASSACHUSETTS
BMC CENTRAL
Docket Report

1601CR006888
Commonwealth vs. Lunn, Sreynuon

CASE TYPE:	Criminal	**FILE DATE:**	10/24/2016
ACTION CODE:	265/19/C-0	**CASE TRACK:**	
DESCRIPTION:	ROBBERY, UNARMED c265 §19(b)		
CASE DISPOSITION DATE	02/06/2017	**CASE STATUS:**	Closed
CASE DISPOSITION:	Dismissed	**STATUS DATE:**	02/06/2017
CASE JUDGE:		**CASE SESSION:**	

LINKED CASE

1784BP00049	1601AC007998-AR

PARTIES

Defendant
Lunn, Sreynuon
14 Stanford St
Boston, MA 02222

Appointed - Indigent Defendant **676880**
Alyssa Thrasher Hackett
Committee For Public Counsel Services
Committee For Public Counsel Services
1 Congress Street
Boston, MA 02114
Work Phone (617) 209-5500
Added Date: 10/24/2016

PARTY CHARGES

#	Offense Date/ Charge	Code	Town	Disposition	Disposition Date
1	10/22/2016 LARCENY FROM PERSON c266 §25(b)	266/25/A-0	Boston	Dismissed - Lack of Prosecution	02/06/2017

EVENTS

Date	Session	Event	Result	Resulting Judge
10/24/2016	Arraignment - Rm 17, 5th Flr	Arraignment	Held - Bail or Conditions of Release ordered	Kelly
11/21/2016	Arraignment - Rm 17, 5th Flr	Probable Cause Hearing	Held	Horgan
12/19/2016	Pre-Trial - Courtroom 14, 5th Flr	Discovery Compliance & Jury Election	Held	Sinnott
01/17/2017	Motions & Trials - Courtroom 15, 5th Flr	Jury Trial (CR)	Held	Grant
02/06/2017	Motions & Trials - Courtroom 15, 5th Flr	Jury Trial (CR)	Held - Dismiss or to be Dismiss All Charges Held	Coyne Coyne

MASSACHUSETTS
BMC CENTRAL
Docket Report

FINANCIAL SUMMARY

	Fees/Fines/Costs	Assessed	Paid	Dismissed	Balance
	Total	150.00	0.00	0.00	150.00

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
Total				

MASSACHUSETTS
BMC CENTRAL
Docket Report

INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
10/24/2016		Criminal Complaint issued from Electronic Application: Originating Court: BMC Central Case Number: 1601AC007998-AR Receiving Court: BMC Central ;	
10/24/2016		Complaint issued upon new arrest.	
10/24/2016		Complaint/Police Report	
10/24/2016		Event Resulted The following event: Arraignment scheduled for 10/24/2016 09:00 AM has been resulted as follows: Result: Held - Bail or Conditions of Release ordered	Kelly
10/24/2016		Participants at Court Event - Defendant in Court - Assistant District Attorney Borys - Probation Representative Moy - Session Clerk - CP - Courtroom and Time - RM 17 1230--. Atty hackett appears /appointed	Kelly
10/24/2016	1	Defendant arraigned before Court, advised of right to counsel.....As to Count 1:READ	Kelly
10/24/2016		Bail revocation warning (276/58) given to the defendant	Kelly
10/24/2016	3	Appearance filed On this date Alyssa Thrasher Hackett, Esq. added as Appointed - Indigent Defendant for Defendant Sreynuon Lunn Appearance filed for the purpose of Case in Chief by Judge Hon. Sally A Kelly.	
10/24/2016	5	Commonwealth"s motion for protective order filed. --allowed	Kelly
10/24/2016	4	Commonwealth"s motion to revise/revoke bail or conditions of release ON 1654CR1117 filed. ---allowed....expires 1/21/17	Kelly
10/24/2016		Defendant to be transported NO Bail on Outstanding Warrant from Dedham Court for next Court business day. 1654cr1117	Kelly
10/24/2016	6	Defendant is ordered committed to Suffolk County Jail in lieu of having posted bail in the amount ordered: ($0.00 Bond; $1,500.00 Cash), returnable for 11/21/2016 09:00 AM Probable Cause Hearing; mittimus issued. Court location of next event (if not your court): BMC - Central Further Orders: deft in custody	Kelly
10/24/2016		The Court enters the following order: Deft held on a I.C.E. detainer	Kelly
10/24/2016	2	Reasons for ordering bail.	Kelly
10/24/2016		Defendant notified of right to a bail review before the Superior Court (C276 §58).	Kelly

MASSACHUSETTS
BMC CENTRAL
Docket Report

11/21/2016		Event Resulted The following event: Probable Cause Hearing scheduled for 11/21/2016 09:00 AM has been resulted as follows: Result: Held	Horgan
11/21/2016		Commonwealth's Motion to amend count 1 from unarmed robbery to larceny from the person .Motion allowed.	Horgan
11/21/2016		Defendant 's Criminal motion for orally presented to the court Bail reduction is denied without prejudice	Horgan
11/21/2016		Participants at Court Event - Defendant in Court - Assistant District Attorney Nucci - Probation Representative M. Griffin - Session Clerk - CP - Courtroom and Time - 17/926,1046. Attorney Hackett present. Defendant remains held on ICE Detainer.	Horgan
11/21/2016		No action taken on 1654CR1117	Horgan
11/21/2016	7	Defendant is ordered committed to Suffolk County Jail in lieu of having posted bail in the amount ordered: ($0.00 Bond; $1,500.00 Cash), returnable for 12/19/2016 09:00 AM Discovery Compliance & Jury Election; mittimus issued. Court location of next event (if not your court): Further Orders: DEFENDANT REMAINS HELD ON I.C.E. DETAINER .	Horgan
12/02/2016		Habeas Corpus for prosecution issued to Norfolk County Correctional Center returnable for 12/19/2016 09:00 AM Discovery Compliance & Jury Election: Further Orders:	
12/02/2016		Misc Entry: Atty Hackett informs clerks office defendant is now at Norfolk HOC. Request Habe to issue.	
12/19/2016		Event Resulted The following event: Discovery Compliance & Jury Election scheduled for 12/19/2016 09:00 AM has been resulted as follows: Result: Held	Sinnott
12/19/2016		Participants at Court Event - Defendant in Court - Assistant District Attorney Rizzo - Probation Representative Izzo - Session Clerk - jjb - Courtroom and Time - 14 9.14 10.18. Attorney: Hackett, Esq., Alyssa Thrasher	Sinnott
12/19/2016	8	Defendant is ordered committed to Suffolk County Jail in lieu of having posted bail in the amount ordered: ($0.00 Bond; $1,500.00 Cash), returnable for 01/17/2017 09:00 AM Jury Trial (CR); mittimus issued. Court location of next event (if not your court): Further Orders:	Sinnott
12/19/2016		Habeas Corpus for prosecution issued to Norfolk County Correctional Center returnable for 01/17/2017 09:00 AM Jury Trial (CR): Further Orders:	Sinnott
01/13/2017	9	Defendant's request for speedy trial filed.Defendant is now at Nashua street jail. At Atty Hackett's request.	

01/13/2017		Habeas Corpus for prosecution issued to Suffolk County Jail returnable for 01/17/2017 09:00 AM Jury Trial (CR): Further Orders:	
01/17/2017		Event Resulted The following event: Jury Trial (CR) scheduled for 01/17/2017 09:00 AM has been resulted as follows: Result: Held	Grant
01/17/2017		Participants at Court Event - Defendant in custody in Court - Assistant District Attorney Arcangeli - Probation Representative Regan - Session Clerk - PFM - Courtroom and Time - RM 15 933----1142---. Attorney: Hackett, Esq., Alyssa Thrasher	Grant
01/17/2017		Commonwealth reports not ready for trial.	Grant
01/17/2017		Deft's oral motion to Dismiss ---heard and denied	Grant
01/17/2017		No action taken on deft's oral motion to reduce bail	Grant
01/17/2017	10	Defendant is ordered committed to Suffolk County Jail in lieu of having posted bail in the amount ordered: ($0.00 Bond; $1,500.00 Cash), returnable for 02/06/2017 09:00 AM Jury Trial (CR); mittimus issued. Court location of next event (if not your court): BMC - Central Further Orders:	Grant
01/17/2017		Habeas Corpus for prosecution issued to Suffolk County Jail returnable for 02/06/2017 09:00 AM Jury Trial (CR): Further Orders:	Grant
01/20/2017		Petition for review of bail filed Originating Court: BMC Central Receiving Court: Suffolk County Criminal Case Number: 1784BP00049	
01/26/2017	11	Finding of the Superior Court on Bail Review Petition under G.L. c.276, §58. On Jan. 20, 2017, Bail petition # 1784BP49 is Allowed. Bail set at $750.00 Cash	
02/06/2017		Event Resulted The following event: Jury Trial (CR) scheduled for 02/06/2017 09:00 AM has been resulted as follows: Result: Held - Dismiss or to be Dismiss All Charges	Coyne
02/06/2017		Participants at Court Event - Defendant not in Court - Assistant District Attorney Goheen - Probation Representative Lawlor - Session Clerk - PFM - Courtroom and Time - 15/913. Attorney: Hackett, Esq., Alyssa Thrasher	Coyne
02/06/2017		Commonwealth reports not ready for trial.	Coyne
02/06/2017		Charges Disposed:: Charge # 1 LARCENY FROM PERSON c266 §25(b) On: 02/06/2017 Judge: Hon. Michael J Coyne Dismissed - Lack of Prosecution	

MASSACHUSETTS
BMC CENTRAL
Docket Report

02/06/2017	Defendant's Oral Motion to release the Defendant from a Federal I.C.E. detainer heard and denied.	Coyne
02/13/2017	Misc Entry: Notice of assembly of record on appeal received from the SJC and filed. Reservation and report received from the SJC and filed. (See reservation and report enclosed). Case to be heard at 11am on 03/15/17 in the SJC.	
02/28/2017	Misc Entry: After review of the docket entries and recordings of the proceedings of 2-6-2017. The above record is revised in order to correct a clerical error. The words "heard and denied" are stricken from the record and replaced by the words "No action taken" to accurately reflect the Courts order. pfm	

Boston Municipal Court Department
Central Division

Name	Sieynoun · Lunn	Docket #	16-01-CR-6888

Date	FEB 06 2017	Room#	15	Footage	9:13
Attorney	Hackett	ADA	Cohen	APO	Lawlor
Clerk	Flynn	Judge	Coyne		

Defendant In / Not In Court

10:53

Commonwealth Answers Not Ready For Trial

Dismissed For Want of Prosecution

and All fees and fines waived

Deft's request to release the defendant from a Federal I.C.E. detainer heard & denied Coyne J (Flynn)

Date	FEB 13 2017
Tape#	
Footage	
Defendant In / Not In Court	
Attorney	
ADA	
APO	FEB 13 2017
Judge	
Clerk	

Notice of assembly of Record on appeal received from the Supreme Judicial Court and filed. Reservation and Report received from the Supreme Judicial Court and filed. (See Reservation and Report enclosed). case to be heard at 11:00 am on 3/15/17 in the SJC

Date	
Tape#	
Footage	
Defendant In / Not In Court	
Attorney	
ADA	
APO	
Judge	
Clerk	

Boston Municipal Court Department
Central Division

Name	Sreymuon Lunn	Docket #	1601CR6888

9:14, 10:18

Date	DEC 19 2016	Room#	14	Footage		Defendant In / Not In Court
Attorney	Hackett	ADA	Rizzo	APO	Izzo	
		Clerk	JJB	Judge	Smith	

Dedham

Habeas Corpus To Issue To
~~H.C.C.J. For Appearance~~
At M.C. 1/17 9am

1500 to January 17 (M) (SM)
CASH

(SM)

Rm 15 Trial

JAN 13 2017 ATTY HACKETT INFORMS COURT THAT DEFT IS NOW AT NASHUA Street JAIL

~~HABEAS CORPUS TO ISSUE FOR~~
~~H.C.C.J. FOR APPEARANCE~~
OF DEFT TO ANSWER TO TESTIFY
AT M.C. 1-17-17 9AM issued

Date	JAN 17 2017	~~Commonwealth Answers Not Ready For Trial~~
Tape#	15	Deft's oral motion to dismiss heard
Footage	933 11:42	and denied
Defendant In / Not In Court		Deft's oral motion to reduce bail heard no action taken
Attorney	~~JAN 17 2017~~ Ø	Hackett
ADA	Arcangeli	$1,500 to February 6
APO	Regan	CASH (M) Nashua St
Judge	Grant	Habeas Corpus To Issue To
Clerk	97m	Room 15 - Trial (SM) ~~H.C.C.J. For Appearance~~ At M.C. 2-6-17 9am

Date	JAN 26 2017	Notice of decision on bail petition #
Tape#		1784 BP 49 is received from Superior Court
Footage		on 1-20-17 Bail Petition Allowed. Bail set at
Defendant In / Not In Court		$750.00 cash. (RMS).
Attorney		
ADA		
APO		
Judge		
Clerk		

BOSTON MUNICIPAL COURT-CENTRAL DIVISION

DOCKET ENTRIES

NOV 2 1 2016 Hackett

Tape# 17 Defendant Not In In Court Atty ______ Present

Footage 936/1046 ADA Nucci APO M. Gr[illegible]

CT I - Amended to Larceny from the Person @ request of CW - deft consents

defts oral motion for bail reduction - denied w/o prejudice

$1500 to Dec 19 (M) CASH

Rm 14/CtE

N/A 1654CR1117 Dedham

NO ACTION TAKEN

Deft remains held on ICE detainer

Horgan T/cy

DEC 0 2 2016

Atty Hackett informs clerks office defendant is now at Norfolk HOC Request Habe to issue issued

Commonwealth
vs.
Lunn, Sreynuon

BOSTON [redacted] **CENTRAL DIVISION**

DOCKET ENTRIES		ATTORNEY
Legal Counsel Fee Assessment	150/cs	Hackett 676880
Legal Counsel Fee Contribution	Waive FEB 06 2017 Coyne BM	
Victim/Witness Fund Assessment		
Drug Analysis Fund Assessment		
Supervised Probation Fee		
		BAIL ONLY

RS

OCT 2 4 2016 custody

Tape# 17 Defendant Not In / (In) Court Atty Hackett Present

Stage 1230 ADA Borys APO Moy

Count "1" Read PLEADS NOT GUILTY

Defendant Advised by Court Right to Have Counsel — Bail Warning Given

SEE NO.

Held w/o [redacted] 1654CR1117 — Deft is Held on ICE detainer M

[redacted] Dedham [redacted]

CW files Motion for Protective - Allowed

$1,500 to Nov 21 M CASH

Commonwealths Motion To Revoke
Bail On Docket 1654CR1117/Dedham
Received Filed (Allowed) Denied

to expire 1/21/17

✓ Bail Reasons Filed

Deft. Notif. of right to Pet. S.C. for Review of Bail.

Bail Revocation Faxed to Rm 17/PC Dedham Dist Ct.

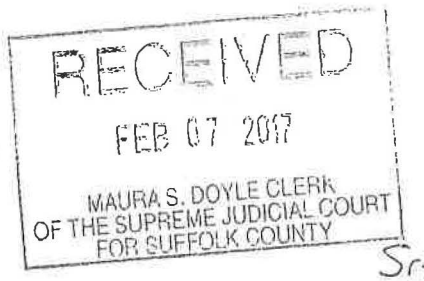
Kelly J/cp

JKK
over

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss:

No. SJ-2017- 0060
Boston Municipal Court
Central Division
No. 1601CR6888



~~SREYNOUN LUNN~~, AH
~~Petitioner~~,
Commonwealth
v.
Sreynoun Lunn
~~A JUSTICE OF THE CENTRAL DIVISION OF THE BOSTON MUNICIPAL COURT~~,
~~Respondent~~ AH

AFFIDAVIT OF DEFENSE COUNSEL IN SUPPORT OF EMERGENCY PETITION FOR RELIEF PURSUANT TO G.L. c. 211, § 3

I, Alyssa Hackett, state the following based upon my own personal knowledge and belief.

1. I represent the defendant in his criminal matter, docket 1601CR6888, in the Central Division of the Boston Municipal Court. The defendant was held on bail during the pendency of this case.
2. On January 17, 2017, Mr. Lunn's case was scheduled for trial. The Commonwealth was unable to initially find its file. Once the file was found, it was reported that the alleged victim had not been summonsed for the court date and the Commonwealth was reporting not ready. The case was continued over the defendant's objection to February 6, 2017.
3. On February 6, 2017, the defendant's case was dismissed for want of prosecution. This was the only criminal matter holding the defendant in custody.
4. The defendant had a piece of paper with his mittimus that indicated there was a request for a forty-eight hour hold on an Immigration and Customs Enforcement detainer. This is commonly referred to as an ICE detainer.
5. The defendant requested release from the courthouse despite the ICE detainer.

6. The court, Honorable Coyne, J., denied the defendant's request.
7. The defendant cited a recent granting of an emergency petition pursuant to Mass. Gen. Laws c. 211 sec. 3, *Santos Moscoso v. A Justice of the East Boston Division of the Boston Municipal Court*, SJ-2016-0168 but holding is not binding authority.
8. The defendant was aware of the ICE detainer prior to February 6, 2017, but was never provided with any process to challenge the detention request or a hearing to be heard regarding its issuance. He has never been provided with notice of the specific allegations related to the issue of the ICE detainer.

Signed under the pains and penalties of perjury this 7th day of February 2017.

Alyssa Hackett, BBO No. 676880

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss: No. SJC-12276

SREYNOUN LUNN,
Petitioner,

v.

AFFIDAVIT OF PETITIONER

I, Sreynuon Lunn, state the following based upon my own personal knowledge and belief.

1. I was charged with a criminal offense in the Boston Municipal Court, Central Division, Docket number 1601CR6888.
2. During the pendency of the criminal case, I was held on a cash bail at the Suffolk County Jail in Boston, Massachusetts. During a portion of that time, I served a sentence at the Norfolk County House of Correction. My sentence expired on or about January 9, 2017. I was then returned to the Suffolk County Jail.
3. At some point during the time I was a pretrial detainee at the Suffolk County Jail, my lawyer told me that I had a detainer from Immigration and Customs Enforcement.
4. On January 20, 2017, my bail was reduced to seven hundred fifty dollars ($750) cash. I was able to post the amount of the cash bail plus the fee, but decided not to because I knew there was a detainer request from Immigrations and Customs Enforcement.
5. I was never given a hearing or any other means to challenge the detainer request by any Massachusetts authority or federal entity.
6. I was never provided with a copy of the detainer request or anything else in writing informing me about the detainer request. My lawyer has requested a copy of the detainer request but I have not yet seen it.

7. On February 6, 2017, I was transported to the Central Division of the Boston Municipal Court for the second scheduled trial date of this case. My attorney informed me that there was still a detainer request included in my transportation paperwork that followed me to court for each appearance.
8. On February 6, 2017, my case was dismissed because the Commonwealth answered not ready for trial due to a witness who did not appear. The case against me was dismissed for want of prosecution.
9. After my case was dismissed, I had no other Massachusetts criminal cases or warrants preventing my release.
10. My lawyer asked that I be released from the courthouse regardless of the detainer request. She provided a copy of the decision in *Moscoso v. A Justice of the East Boston Division of the Boston Municipal Court*, SJ-2016-0168 to the assistant district attorney and cited it to the judge.
11. The judge denied my request to be released from the courthouse.
12. Court officers put me back into the lockup at the courthouse after my case was dismissed.
13. Several hours later, Immigrations and Customs Enforcement agents took me into custody in the courthouse lockup. I have been in Immigration and Customs enforcement custody since February 6, 2017.

Signed under the pains and penalties of perjury this 14th day of February 2017.

Lunn Sreynuon

Sreynuon Lunn

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss:

No. SJ-2017-0060
Boston Municipal Court
Central Division
No. 1601CR6888

~~SREYNOUN LUNN,~~ AH
~~Petitioner,~~
Commonwealth
v.
Sreynon Lunn
~~A JUSTICE OF THE CENTRAL DIVISION OF THE BOSTON MUNICIPAL COURT,~~ AH
~~Respondent~~

EMERGENCY PETITION FOR RELIEF PURSUANT TO G.L. c. 211, § 3

I. INTRODUCTION

The Defendant challenges the lawfulness of a Boston Municipal Court order that he be detained without probable cause of a crime, but instead solely at the request of federal immigration authorities for the purpose of civil immigration enforcement. The order, which is part of a widespread practice of Massachusetts criminal courts and local law enforcement authorities honoring requests to detain persons for federal immigration authorities, violates the Defendant's right under the Fourth Amendment and art. 14 to be free from unreasonable seizures, as well as his right to due process under the Fourteenth

Amendment and art 12. These substantive violations merit extraordinary relief pursuant to G. L. c. 211, § 3. The Defendant respectfully asks that you ALLOW the petition and order that the court release him. The Defendant further requests that should the Single Justice refer this matter to the full bench, that the Single Justice order the Defendant's release upon posting bail pending a final decision on this matter.

II. STATEMENT OF FACTS

The Defendant, Sreynuon Lunn, was held in state custody on docket no. 1601CR6888 out of the Central Boston Division of the Boston Municipal Court.[1] Aff. Defense Counsel ¶ 1. Immigration and Customs Enforcement (ICE), the immigration enforcement branch of the U.S. Department of Homeland Security (DHS), filed a notice titled "Immigration Detainer - Request for Voluntary Action" (herein after "ICE detainer") with Mr. Lunn's state custodians. That detainer "request[s]" that state custodians maintain custody of [Mr. Lunn] for a period not to exceed forty-eight hours. The Defendant has not been provided with an

[1] Mr. Lunn was originally held on bail in the Central Division 1601CR6888 - but on February 6, 2017, the court dismissed three of those cases for lack of prosecution.

opportunity to challenge the issuance of this detainer, Def. Counsel Aff. ¶ 7,-- nor will he because the regulations on which the detainer is based do not allow for such a challenge. 8 C.F.R. § 287.7. The Defendant's detainer, like all ICE detainers, was issued by a rank-in-file immigration officer. See 8 C.F.R. § 287.7(b) (authorizing all "deportation officers" and "immigration enforcement agents," among others, to issue detainers). It was issued without review by a neutral magistrate and without probable cause that the Defendant has committed a crime. See 8 C.F.R. § 287.7(b). In just that past year, DHS has filed hundreds of similar detainers in Massachusetts. TRAC Immigration, Reported ICE Detainers by State and Detention Facility, November 2014 - October 2015, available at http://trac.syr.edu/immigration/reports/413/include/table4.html.

On February 6, 2017, the Defendant appeared in the Central Division for a trial date on docket no. 1601CR6888. Def. Counsel Aff. ¶ 3. The Commonwealth answered not ready for trial and the case against Mr.

Lunn was dismissed for want of prosecution.[2] Def. Counsel Aff. ¶ 3. After the case was dismissed, the Defendant moved the court to release him notwithstanding the detention request. Def. Counsel Aff. ¶ 5-6. The Court denied his motion. See Criminal Docket at 1.

III. ARGUMENT

A. THE TRIAL COURT DOES NOT HAVE AUTHORITY TO HOLD MR. Lunn FOR PURELY CIVIL IMMIGRATION VIOLATIONS.

By announcing that the court would hold the Defendant on the ICE detainer past the time when he would otherwise be released from state custody, the trial court has effectuated a new arrest based solely on a civil immigration detention request. Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes – one that must be supported by a new

[2] The defendant's case was also previously scheduled for trial on January 17, 2017. On that date, the Commonwealth indicated that it had mistakenly failed to summons the alleged victim and requests a continuance. The continuance was granted to February 6, 2017.Def. Aff. ___.

probable cause justification."); Miranda-Olivares v. Clackamas County, No. 12-02317, 2014 U.S. Dist. LEXIS 50340, at *30-31 (D. Or. Apr. 11, 2014) (holding that where Miranda-Olivares was capable of posting court-ordered bail, but informed she would not be released if she posted bail, her continued detention constituted a new seizure). The trial court and Mr. Lunn's local custodian lack authority to make such an arrest.

The authority of Massachusetts courts and law enforcement agents to arrest is defined, and circumscribed, by Massachusetts law. Massachusetts law grants authority to arrest persons under suspicion of having committed a crime. See, e.g., G.L. ch. 276, § 28 (authorizing warrantless arrest for certain misdemeanors); G.L. ch. 276, § 23A (authorizing arrest for felonies and misdemeanors); G.L. ch. 41, § 98 (police authority to maintain order and arrest for purposes of "prosecut[ion]"); G.L. ch. 279, § 3 (arrest without warrant for probation violation); Trial Court XI: Uniform Rule for Probable Cause Determinations for Persons Arrested Without a Warrant (those subject to warrantless arrest entitled to magistrate determination of probable cause of a crime

prior to prolonged detention); Commonwealth v. Gorman, 288 Mass. 294 (1934) (discussing common law authority to arrest for crimes under certain circumstances). Massachusetts law does not authorize arrest for civil immigration violations.[3]

The United States Supreme Court has made clear that because generally "it is not a crime for a removable alien to remain present in the United States . . . [i]f the police stop someone on nothing more than possible removability, the usual predicate for an arrest is absent." Arizona v. United States, 567 U.S. ___, 132 S.Ct. 2492, 2506 (2012). Indeed in Arizona the Court struck down an Arizona statute that provided state law enforcement with unlimited warrantless, civil immigration arrest authority, because ICE's warrantless arrest authority under 8 U.S.C. § 1357(a)(2) is limited only to circumstances when an individual "is likely to escape before a warrant can

[3] Massachusetts statutes are peppered with specific provisions authorizing arrest for specific offenses, see, e.g., G.L. ch. 260, § 10, G.L. ch. 209A, § 6(7), G.L. ch. 90, § 21, making an exhaustive list unwieldy. A thorough review of Massachusetts statutes uncovered no authority to arrest solely for civil immigration violations and undersigned counsel are aware of no such authority.

be obtained for his arrest." Id. at 2505-07. Yet here, through a warrantless detainer, ICE is attempting to circumvent its own limited warrantless arrest authority by having the Commonwealth do it for them. See Buquer v. City of Indianapolis, 797 F. Supp. 2d 905, 919-22 (S.D. Ind. 2011) (preliminarily enjoining Indiana statute that would permit state law enforcement to arrest based on a detainer and/or removal order because it exceeds the civil immigration arrest authority granted to state law enforcement and exceeds ICE's own limited warrantless arrest authority), permanently enjoined at 2013 WL 1332158 (S.D. Ind. 2013).

The detainer regulations, which ICE relies on to make the request for detention on the detainer, also do not extend arrest authority to state authorities. 8 C.F.R. § 287.7(d). As at least one federal district court has observed, the detainer regulation merely provides a time limit on detention but does not in and of itself delegate arrest authority. Villars v. Kubiatowski, 45 F.Supp.3d 791,806-07(N.D. Ill. 2014); see People ex rel. Swenson v. Ponte, 994 N.Y.S.2d 841, 844 (N.Y. Sup. Ct. 2014) (granting state habeas not to honor immigration detainer because detainer did not

provide arrest authority under state or federal law). Indeed, in a recent deposition in a putative class action challenging ICE's use of immigration detainers, ICE's 30(b)(6) witness testified that a detainer is merely a request that does not legally extend authority to arrest and detain. Gonzalez v. ICE, Case No. 13-4416 (C.D. Cal. filed June 19, 2013), Rapp 30(b)(6) Dep. Tr.134:8-135:24 (App. 32-33).

Massachusetts law provides no authority for its criminal courts or law enforcement officers to arrest based solely on civil immigration violations. As a consequence, the trial judge does not have authority to hold Mr. Lunn based solely on an ICE detention request.

B. MR. LUNN'S DETENTION BASED SOLELY ON AN ICE DETAINER IS A VIOLATION OF HIS RIGHTS UNDER THE FOURTH AMENDMENT AND ART. 14 BECAUSE IT IS UNSUPPORTED BY A DETERMINATION OF PROBABLE CAUSE OF A CRIMINAL VIOLATION MADE BY A NEUTRAL MAGISTRATE.

The Defendant's detention based solely on an ICE detainer constitutes an unconstitutional seizure for at least two reasons: (1) the detention is not supported by probable cause that Mr. Lunn has committed a crime, and (2) the determination to issue

the detainer is not subject to review by a neutral magistrate.

1. No Probable Cause Defendant Has Committed a Crime

Detention based solely on an immigration detainer constitutes a "seizure" under the Fourth Amendment and art. 14. Morales, 793 F.3d at 217. Therefore, such detentions must satisfy the requirements of the Fourth Amendment and art. 14. Id. In Morales, the First Circuit affirmed the denial of an ICE motion to dismiss for qualified immunity, finding that it was "clearly established . . . that immigration stops and arrests were subject to the same Fourth Amendment requirements" and "that detention authorized by an immigration detainer would require more than just reasonable suspicion." Id. at 211-12.

"A lawful arrest requires the existence of probable cause to believe that the individual arrested is committing or has committed a criminal offense." Commonwealth v. Jackson, 464 Mass. 758, 761 (2013). By contrast, the ICE detainer does not purport to assert a criminal violation but instead asks state law enforcement to detain the Defendant based solely on an alleged civil violation. Arizona, 132 S.Ct. at 2495

("Removal is a civil matter.") Where there is no authority for state officials to detain for civil enforcement, detention by state officials based solely on a civil ICE detainer constitutes an unconstitutional seizure. See Villars, 45 F.Supp.3d at 807 (holding that plaintiff stated a claim for which relief may be granted, where he alleged that he was held on a detainer that failed to state probable cause for any crime); see also Buquer, 797 F. Supp. 2d at 918-19(finding state statute authorizing arrest for civil immigration infractions violates the Fourth Amendment because it does not require probable cause of a crime).

The instant case is very similar to the facts of Miranda-Olivares, in which Ms. Miranda-Olivares declined to post bail despite having the resources to do so, because county officials assured her that she would not be released if she posted bail, due to the ICE detainer issued against her. 2014 U.S. Dist. LEXIS 50340, *5-6. After her criminal case was resolved she was held for less than forty-eight hours and then transferred to ICE custody. Id. The district court found that the period after the court set bail at an amount she could post (though she chose not to post it

because of the ICE detainer) and before the criminal case was resolved constituted a new seizure for constitutional purposes, because she remained in custody based only on the ICE detainer. Id. at *30-31. This new seizure violated Ms. Miranda-Olivares' Fourth Amendment right because she was held without probable cause of either a criminal or an immigration violation. Id.

Without probable cause to believe that Mr. Lunn has committed a crime, the ICE detainer cannot be used to justify his continued detention.

2. Absence of Determination by a Neutral Magistrate

In addition, detaining the Defendant solely based on an ICE detainer issued without a judicial or quasi-judicial determination of probable cause of a crime violates the Fourth Amendment and art. 14. See Gerstein v. Pugh, 420 U.S. 103, 111-116 (1975) (arrest must be supported by probable cause of a crime and promptly followed by a determination of a neutral magistrate to justify extended detention); Buquer, 797 F. Supp. 2d at 918-19 (stating state statute authorizing arrest on immigration detainers and/or a removal order violates the Fourth Amendment because

"[t]here is no mention of any requirement that the arrested person be brought forthwith before a judge for consideration of detention or release"); Arias v. Rogers, 676 F.2d 1139, 1142-43 (7th Cir. 1982) (finding, pursuant to 8 U.S.C. § 1357(a)(2) and the Fourth Amendment, that subsequent to a warrantless immigration arrest, an arrestee must be brought without unnecessary delay before an immigration judge for a probable cause hearing). Unlike a search warrant or an arrest warrant, an ICE detainer may be issued by virtually all rank-in-file Department of Homeland Security agents, without any intervention by a neutral magistrate. 8 C.F.R. § 287.7(b) (authorizing all "deportation officers" and "immigration enforcement agents," among others, to issue detainers). Without a determination of probable cause that Mr. Lunn has committed a crime made by a neutral magistrate, continued detention based solely on a detainer cannot be justified under either the Fourth Amendment or art. 14.

C. MR. LUNN WAS NOT PROVIDED WITH NOTICE OR A MEANINGFUL OPPORTUNITY TO CHALLENGE THE DETAINER IN VIOLATION OF HIS PROCEDURAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT AND ART. 12.

"The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (quotations omitted). There can be no doubt that the deprivation of liberty associated with the enforcement of the ICE detainer implicates the Defendant's rights under the Fourteenth Amendment as well as art. 12. See Aime v. Commonwealth, 414 Mass. 667, 676 (1993) ("The right to be free from governmental detention and restraint is firmly embedded in the history of Anglo-American law."). This fundamental liberty interest, when weighed against the government interest - voluntary assistance with federal civil immigration enforcement, compels the conclusion that some measure of notice and an opportunity to be heard must be provided. See Paquette v. Commonwealth, 440 Mass. 121, 131 (2003) ("A fundamental requisite of 'procedural' due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); Morales v. Chadbourne, 996 F.Supp.2d 19, 40 (D.R.I. 2014)(holding that arrest and detention on an immigration detainer triggers Fifth Amendment notice and opportunity to be heard protections).

In this case, Mr. Lunn never given an opportunity to challenge the issuance of the ICE detainer. Def. Counsel Aff. ¶ 7. Moreover, the federal regulation authorizing the issuance of a detention request - 8 C.F.R. § 287.7 - does not set forth any process to challenge the issuance of a detainer. Mr. Lunn was consequently denied his basic due process rights.

D. STATE AUTHORITIES HAVE A CHOICE OF WHETHER OR NOT TO HONOR ICE DETAINER REQUESTS AND THERE IS PRECEDENT FOR STATE AUTHORITIES DECLINING TO COMPLY.

As is evident from the face of the Defendant's ICE detainer, DHS takes the position that compliance with ICE detainers is voluntary. Galarza v. Szalczyk, 745 F.3d 634, 641-42 (3d Cir. 2014) ("Since at least 1994, and perhaps as early as 1988, ICE (and its precursor INS) have consistently construed detainers as requests rather than mandatory orders."); Letter from Daniel Ragsdale, Acting Director of ICE, to U.S. House of Representatives (Feb. 25, 2014) (App. __). Moreover, the only federal court of appeals to directly consider the issue has similarly held that ICE detainers are not orders. Galarza, 745 F.3d at

639-42.[4] U.S. district courts have followed suit. Morales v. Chadbourne, 996 F. Supp. 2d 19 (D.R.I. 2014); Miranda-Olivares, 2014 U.S. Dist. LEXIS 50340, *10-24; see also Buquer, 797 F. Supp. 2d 905 (S.D. Ind. 2011).

There is precedent for state criminal authorities declining to comply with ICE detainers: after Miranda-Olivares, sheriffs' offices throughout Oregon and beyond (including Colorado), announced they would not be complying with detainer requests. Julia Preston, Sheriffs Limit Detention of Immigrants, N.Y. Times, Apr. 18, 2014, available at http://www.nytimes.com/2014/04/19/us/politics/sheriffs-limit-detention-of-immigrants.html.

Furthermore, there is specific precedent within Massachusetts for state authorities declining to enforce ICE detainers. The cities of Somerville, Boston, Lawrence, Cambridge, Holyoke, Northampton and

[4] The Third Circuit in Galarza further held that were ICE detainers mandatory, it would raise serious concerns under the Tenth Amendment, which limits the power of the federal government to command state officers. 745 F.3d at 643-45.

Amherst have limited the enforcement of ICE detainers.[5] Yadires Nova-Salcedo, Lawrence City Counsel Approves Trust Act, CBS Boston, Aug. 27, 2015, available at http://boston.cbslocal.com/2015/08/27/ lawrence-city-council-approves-trust-act/; Oliver Ortega, City Counsel Oks measure limiting immigration holds, Boston Globe, Aug. 20, 2014, available at http://www.bostonglobe.com_/metro/2014/08/20/boston-city-council-approves-ordinance-limiting-immigration-holds/ 8elMVYhUlaPlRiFr7AkkiK/story.html; Evan Allen, Somerville ends participation in Secure Communities, Boston Globe, May 21, 2014, available at http://bostonglobe.com/metro/2014/05/ 21/somervill-mayor-joseph-curtatone-end-city-participation-federal-secure-communities-program/AmDY0zNPDk5b7snbSrJeO/story.html; Cambridge City Council Policy Order Resolution, June 2, 2014, available at http://www2.cambridgema.gov/cityClerk/PolicyOrder.cfm?item_id=43313&pv=Yes; Mike Plaisance, Holyoke Mayor

[5] Declining to honor ICE detainers does not prevent DHS from enforcing immigration law. Granting Defendant's petition will not prevent DHS officers from pursuing and arresting him, if they so choose, without using Massachusetts courts or law enforcement officers as tools of civil immigration enforcement.

Alex Morse directs police to skip enforcement of federal requests to hold immigrants past normal holding period, Masslive.com, November 19, 2014, available at http://www.masslive.com/news/index.ssf/2014/11/holyoke_mayor_alex_morse_direc.html; Amherst Votes to Opt Out of Controversial Secure Communities, New England Public Radio, May 22, 2012, available at http://nepr.net/news/2012/05/22/amherst-votes-opt-out-controversial-secure-communities/.[6]

E. GENERAL LAWS C. 211, § 3, IS AN APPROPRIATE VEHICLE FOR RESOLVING THIS CASE.

Under G.L. c. 211, § 3, this Court has "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided." To obtain relief under this statute, a criminal defendant generally "must demonstrate both [1] a substantial claim of

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[6] In September 2014, the Massachusetts Executive Office of Public Safety (EOPS) sent a notice to all Massachusetts sheriffs regarding the potential liability risks of honoring ICE detainer requests. Sharman Sacchetti, Questions surround memo sent to Mass. sheriffs about ICE detainers, MyFoxBoston, Sept. 4, 2014, available at http://myfoxboston.com/story/26441946/question-surround-memo-sent-to-mass-sheriffs-about-ice-detainers#.VAhalz_kXRA.email.

violation of his substantive rights and [2] irremediable error, such that he cannot be placed in status quo in the regular course of appeal." Ventresco v. Commonwealth, 409 Mass. 82, 83 (1991) (citation and internal quotation marks omitted). This Court has also granted relief under G.L. c. 211, § 3, where the petition challenges "a repeated or systemic misapplication of the law." Commonwealth v. Tobias T., 462 Mass. 1001 (2012). See, e.g., Commonwealth v. Charles, 466 Mass. 63, 89 (2013) ("We conclude that the legality of these proceedings presents a systemic concern that this court should resolve now through the exercise of its general superintendence powers under G. L. c. 211, § 3."); Simmons v. Clerk-Magistrate of the Boston Div. of the Hous. Court Dep't, 448 Mass. 57, 62 (2006) ("Accordingly, we conclude that the legality of this practice by the Housing Court Department is a systemic concern that this court should resolve through the exercise of its general superintendence powers under G.L. c. 211, § 3.").

The Defendant readily meets the requirements for relief under G.L. c. 211, § 3. First, relief is needed in order to prevent a violation of the Defendant's substantive rights. As discussed above, the trial

judge has ordered that he be held without a judicial determination of probable cause that he has committed any crime and without notice or an opportunity to be heard on the immigration detention request, in violation of his rights under the Fourth and Fourteenth Amendments and articles 12 and 14.

Second, the Defendant "has no adequate alternative remedy." In re. Vaccari, 460 Mass. 756, 758 (2011)(citation and internal quotation marks omitted). The forty-eight hour time frame inherent in the ICE detainer makes a traditional appeal following the resolution of a criminal case essentially useless. By the time even a notice of appeal is filed, the Defendant will likely have been unlawfully detained and then transferred to immigration custody. Before any appeal could be resolved, assuming he is truly subject to removal, the Defendant is likely to have been removed.

Finally, this case presents a repeated, systemic misapplication of the law. According to statistics compiled by TRAC Immigration Project, authorities reported 478 ICE detention requests in Massachusetts between November 2014 and October 2015. TRAC Immigration, Reported ICE Detainers by State and

Detention Facility, November 2014 - October 2015, available at http://trac.syr.edu/immigration/reports/413/include/table4.html. In the experience of the Immigration Impact Unit for the Committee for Public Counsel Services, these detention requests are routinely honored. Aff't J. Klein (App. 22). Defendants subject to ICE detainers are routinely being held based solely on these civil immigration requests - either because they are choosing not to post bail given the certainty of transfer to immigration custody or because they have been released from state custody and state authorities have chosen to hold them at ICE's request. Id. In other words, resolution of the issue presented here would have a "wide-ranging impact beyond this case." Commonwealth v. Hernandez, 471 Mass. 1005, 1007 (2015).[7] Because this case presents "'a systemic issue affecting the proper administration of the judiciary[,] . . . resolution of the issue by this [C]ourt is appropriate and should not await some

[7]Despite the wide-ranging impact, none of the defendants facing an ICE detainer are likely to be in a position to challenge their detention through a traditional appeal, for the same reason that Mr. Moscoso does not have that option - the forty-eight hour time-frame renders a direct appeal fruitless.

fortuitous opportunity of report or ordinary appeal.'" Brantley v. Hampden Div. of the Probate, 457 Mass. 172, 183 (2010), quoting A Juvenile v. Commonwealth, 80 Mass. 552, 556 (1980).

IV. CONCLUSION

For the above-stated reasons, the Defendant, Sreynuon Lunn, requests that this honorable Court allow this petition and order his release notwithstanding the federal immigration detention request.

Respectfully submitted,
Sreynuon Lunn
By his attorney,

Alyssa Hackett (BBO # 676880)
Staff Attorney
Committee for Public Counsel Services
1 Congress Street
Boston, MA 02108
Phone: (617) 209-5500
ahackett@publiccounsel.net

Dated: February 7, 2017

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2017-0060

BOSTON MUNICIPAL COURT
DEPARTMENT
CENTRAL DIVISION
No. 1601CR6888

COMMONWEALTH

vs.

SREYNUON LUNN

RESERVATION AND REPORT

I hereby reserve decision and report this case to the full court. The court has been informed that the petitioner is now in Federal custody, so I recognize that the matter is moot as to him; however, because the case raises important, recurring, time-sensitive issues that will likely evade the full court's review in future cases, I anticipate that the full court will address the issues and decide the matter despite its mootness.

The reservation and report is based on the materials that are presently in the record before me:

a) the petitioner's petition;

b) the trial court and county court docket sheets;

c) the affidavit of the petitioner's attorney filed with the petition; and

d) this reservation and report.

In addition, the parties are to prepare and file in the full court a statement of agreed facts and exhibits sufficient to enable the court to resolve the legal issues raised in the petition. The failure to agree on all the material facts could impair the court's ability to decide the matter.

The case will be heard at 11:00 a.m. on March 15, 2017. The parties shall arrange with the Clerk of the full court, as soon as possible, for a briefing schedule. In addition to working with the petitioner's counsel and counsel for the Commonwealth (both the District Attorney's Office in the underlying criminal action and the Attorney General), the Clerk of the full court shall also immediately notify the following, to insure that they will have an opportunity to intervene in the full court case, or to file an amicus brief, if they wish: the Boston Office of Chief Counsel of the United States Department of Homeland Security, Immigration and Customs Enforcement; the United States Department of Justice, Criminal Division; the United States Attorney's Office for the District of Massachusetts; and the Suffolk County Sheriff's Department.

The petitioner is designated the appellant. The statement of agreed facts shall be finalized in time for inclusion in the record appendix filed with his brief. No extensions of time should be anticipated.

By the Court,

Barbara A. Lenk
Associate Justice

Entered: 2.7.17

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss: No. SJC-12276

COMMONWEALTH,
Respondent-Appellee,

v.

SREYNUON LUNN,
Petitioner-Appellant

I, Jennifer Klein, being a duly licensed attorney in the Commonwealth of Massachusetts, do hereby depose and state the following:

1. I am currently employed as an immigration specialist by the Committee for Public Counsel Services, in the Immigration Impact Unit ("CPCS IIU").

2. In my role as an immigration specialist at CPCS IIU I provide advice in individual cases on the immigration consequences of criminal conduct to CPCS staff attorneys and bar advocates. I also work closely with immigration attorneys who represent immigrants with criminal records by providing advice and exchanging information.

3. While reviewing individual cases, it is the practice of the IIU to assist in determining whether defendants held in state custody have an Immigration and Customs Enforcement ("ICE") detainer lodged against them. Therefore, in my role, I encounter many individuals with ICE detainers.

4. In my experience, when a Defendant has an ICE detainer lodged against him, Massachusetts authorities often honor such requests, notify ICE of the defendant's impending release, and will

hold a defendant for at least 48 hours to enable ICE to take custody.

5. In my experience, the subject of an ICE detainer very rarely, if ever, receives a copy of the ICE detainer. Moreover, I know that defense counsel often have a difficult time obtaining a copy of the ICE detainer on behalf of their clients.

6. Further, in my experience and based on my close work with many immigration practitioners, once a defendant is transferred to immigration custody, the Defendant often waits several weeks before his first appearance before an Immigration Judge.

7. If a defendant with a pending criminal case is held on an ICE detainer and then transferred to immigration custody it is extremely difficult to have the client brought back into criminal court to resolve the pending case. Neither ICE nor Massachusetts sheriffs have an obligation to facilitate the transfer. Arranging transportation therefore generally requires significant work by defense counsel, often without success. In addition, ICE will pursue removal as soon as ICE gains custody of a defendant. In my experience, defendants who have been held on ICE detainers and then transferred to ICE custody are often unable to resolve their pending criminal cases.

8. When a defendant fails to appear in criminal court because they have been held on an ICE detainer and transferred to immigration custody, courts in the Commonwealth will often issue a default warrant.

Signed under the pains and penalties of perjury this 24 day of February 2017.

Jennifer Klein

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GERARDO GONZALEZ, *et al*., Plaintiffs, v. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al*., Defendants,	Case No. 13-CV-4416 BRO (FFMx) Judge Beverly Reid O'Connell

DEFENDANT IMMIGRATION AND CUSTOMS ENFORCEMENT'S RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

Defendant hereby responds to Plaintiffs' First Set of Requests for Admissions as follows:

I.

PRELIMINARY STATEMENT

Defendant has not, at this time, fully completed its discovery and investigation in this action. All information contained herein is based solely upon such information and evidence as is presently available and known to Defendant upon information and belief at this time. Further discovery, investigation, research and analysis may supply additional facts, and meaning to currently known information. Defendant reserves the right to amend any and all responses herein as additional facts are ascertained, legal research is completed, and analysis is undertaken. The responses herein are made in a good faith effort to supply as much information as is presently known to Defendant.

II.

GENERAL OBJECTIONS

1. Defendant objects to the requests that impose or seek to impose any requirement or discovery obligation greater than or different from those under the Federal Rules of Civil Procedure and the applicable Local Rules and Orders of the Court.

2. Defendant objects to the requests to the extent they seek disclosure of information protected under the attorney-client privilege, deliberative process privilege, attorney work-product doctrine, or any other applicable privilege or immunity. Should any such disclosure by Defendant occur, it is inadvertent and shall not constitute a waiver of any privilege or immunity.

3. Defendant objects to the requests to the extent that they seek information protected by the Privacy Act, 5 U.S.C. § 552a, *et seq*. Further, Defendant objects to the extent that they seek information protected by a non-party's constitutional right to privacy.

4. Defendant objects to Plaintiff's definition of "detainer" or "immigration detainer" as overbroad as an ICE detainer and/or Form I-247 serves several purposes, only one of which serves to request another law enforcement agency detain a person beyond when that person would otherwise be eligible for release.

5. Defendant reserves all objections as to the competence, relevance, materiality, admissibility, or privileged status of any information provided in response to these requests, unless Defendant specifically states otherwise.

Subject to and without waiving the foregoing objections, Defendant provides the following responses:

III.

DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS

REQUEST NO. 1

Admit that ICE currently does not require that a judicial official or immigration judge make a determination of probable cause before ICE issues an immigration detainer.

ANSWER NO. 1

Admit.

REQUEST NO. 2

Admit that, from 2003 to the present, ICE did not require that a judicial official or immigration judge make a determination of probable cause before ICE issued an immigration detainer.

ANSWER NO. 2

Admit.

REQUEST NO. 3

Admit that ICE currently does not require that a judicial official or immigration judge make a determination of probable cause for an immigration detainer within 48 hours after ICE issues the detainer.

ANSWER NO. 3

Admit.

REQUEST NO. 4

Admit that, from 2003 to the present, ICE did not require that a judicial official or immigration judge make a determination of probable cause for an immigration detainer within 48 hours after ICE issued the detainer.

ANSWER NO. 4

Admit.

REQUEST NO. 5

Admit that ICE currently does not require that a judicial official or immigration judge make a determination of probable cause for an immigration detainer within 48 hours after the detainer goes into effect.

ANSWER NO. 5

Admit.

REQUEST NO. 6

Admit that, from 2003 to the present, ICE did not require that a judicial official or immigration judge make a determination of probable cause for an immigration detainer within 48 hours after the detainer went into effect.

ANSWER NO. 6

Admit.

REQUEST NO. 7

Admit that ICE currently does not require that a judicial official or immigration judge make a determination of probable cause for an immigration detainer within 48 hours after the individual is taken into ICE custody.

ANSWER NO. 7

Admit.

REQUEST NO. 8

Admit that, from 2003 to the present, ICE did not require that a judicial official or immigration judge make a determination of probable cause for an immigration detainer within 48 hours after the individual was taken into ICE custody.

ANSWER NO. 8

Admit.

REQUEST NO. 9

Admit that ICE interprets the "officer of the Service" mentioned at 8 U.S.C. § 1357(a)(2) to mean an immigration enforcement official, not a judicial official or immigration judge.

ANSWER NO. 9

Admit.

REQUEST NO. 10

Admit that ICE's interpretation of the provision cited in Request No. 9 has not changed from 2003 to the present.

ANSWER NO. 10

Admit.

REQUEST NO. 11

Admit that ICE interprets the "[e]xamination" mentioned at 8 C.F.R. § 287.3(a) as being made by an immigration enforcement official, not a judicial officer or immigration judge.

ANSWER NO. 11

Admit.

REQUEST NO. 12

Admit that ICE's interpretation of the provision cited in Request No. 11 has not changed from 2003 to the present.

ANSWER NO. 12

Admit.

REQUEST NO. 13

Admit that ICE interprets the "prima facie" determination mentioned at 8 C.F.R. § 287.3(b) as being made by an immigration enforcement official, not a judicial officer or immigration judge.

ANSWER NO. 13

Admit.

REQUEST NO. 14

Admit that ICE's interpretation of the provision cited in Request No. 13 has not changed

from 2003 to the present.

ANSWER NO. 14

Admit.

REQUEST NO. 15

Admit that ICE interprets the "determination" mentioned at 8 C.F.R. § 287.3(d) as being made by an immigration enforcement official, not a judicial official or immigration judge.

ANSWER NO. 15

Admit.

REQUEST NO. 16

Admit that ICE's interpretation of the provision cited in Request No. 15 has not changed from 2003 to the present.

ANSWER NO. 16

Admit.

REQUEST NO. 17

Admit that ICE currently does not require that a judicial official or immigration judge make a determination of probable cause before ICE serves a Notice to Appear or other charging document.

ANSWER NO. 17

Defendant objects to this request as not relevant and is not calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Defendant responds as follows:

Admit.

REQUEST NO. 18

Admit that, from 2003 to the present, ICE did not require that a judicial official or immigration judge make a determination of probable cause before ICE served a Notice to Appear or other charging document.

ANSWER NO. 18

Defendant objects to this request as not relevant and is not calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Defendant responds as follows:

Admit.

REQUEST NO. 19

Admit that that ICE currently does not require that a judicial official or immigration judge make a determination of probable cause before ICE serves a warrant of arrest for removal proceedings.

ANSWER NO. 19

Defendant objects to this request as not relevant and is not calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Defendant responds as follows:

Admit.

REQUEST NO. 20

Admit that, from 2003 to the present, ICE did not require that a judicial official or immigration judge make a determination of probable cause before ICE served a warrant of arrest for removal proceedings.

ANSWER NO. 20

Defendant objects to this request as not relevant and is not calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Defendant responds as follows:

Admit.

Date: May 26, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Assistant Attorney General

WILLIAM C. PEACHEY
Director

COLIN A. KISOR
Deputy Director

/s/ J. Max Weintraub
J. MAX WEINTRAUB
Senior Litigation Counsel
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Phone: 202 305 7551, Fax: 202 305 7000
Email: jacob.weintraub@usdoj.gov

Attorneys for Defendant Immigration and Customs Enforcement

CERTIFICATE OF SERVICE

I certify that I served the foregoing on May 26, 2015, via email on counsel of record for Plaintiffs:

/s/ J. Max Weintraub
J. MAX WEINTRAUB
Senior Litigation Counsel
United States Department of Justice
Civil Division

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSE JIMENEZ MORENO and MARIA JOSE LOPEZ, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
	)	No. 1:11-cv-05452
vs.	)	
	)	Judge John Z. Lee
JEH JOHNSON, et al., in their official capacities,	)	
Defendants.	)	

DEFENDANTS' LOCAL RULE 56.1(b) STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 56.1, Defendants submit this response to Plaintiffs' statement of material facts as to which there is no genuine issue, in support of their motion for summary judgment.

I. Parties and Procedural Matters

1. Plaintiff Jose Jimenez Moreno ("Moreno") is a U.S. citizen from birth. At all times relevant to this litigation, he was not—and is not today—removable from the United States. [*See* Defs.' Answer to Am. Compl., Dkt. # 82, ¶ 13; Ex. A, Certificate of U.S. Citizenship for Moreno; Ex. C, Defs.' Resp. to Pls.' First Set of Requests for Admission ("RFA"), Req. No. 8 & 9; Defs.' Mem. in Opp. to Class Certification, Dkt. # 109, at 3.]

Defendants' Response:

Defendants do not dispute this.

2. Plaintiff Maria Jose Lopez has been a Lawful Permanent Resident ("LPR") since 1997. At all times relevant to this litigation, she was not—and is not today—removable from the United States. [*See* Defs.' Answer to Am. Compl., Dkt. # 82, ¶ 14; Ex. B, LPR Application for Lopez (approved Aug. 5, 1997); Ex. C, Defs.' Resp. to Pls.' RFA, Req. Nos. 8 & 9; Defs.' Mem. in Opp. to Class Certification, Dkt. # 109, at 3.]

Defendants' Response:

Defendants do not dispute that Plaintiff Lopez was a lawful permanent resident and had not been convicted of a removable offense at the time ICE issued a detainer against her.

3. Plaintiffs Moreno and Lopez represent the following certified class:

> All current and future persons against whom Immigration and Customs Enforcement (ICE) has issued an immigration detainer [from] the Chicago Area of Responsibility where: (1) ICE has instructed the law enforcement agency (LEA) to continue to detain the individual after the LEA's authority has expired; (2) where ICE has not served a Notice to Appear or other charging documents, has not served a warrant of arrest for removal proceedings, and/or has not obtained an order of deportation or removal with respect to the individual; and (3) where the LEA cooperates with ICE in complying with detainers.

[Mem. Op. & Order on Class Certification, Dkt. # 146, at 24.]

Defendants' Response:

Defendants do not dispute this fact.

4. Defendants DHS Secretary Jeh Johnson (successor to Janet Napolitano), ICE Director Sarah Saldaña (successor to John Morton), ICE Chicago Field Office Director Ricardo Wong, and ICE Law Enforcement Support Center (LESC) Director David Palmatier (and his successors) (collectively "Defendants" or "ICE"), in their official capacities, are responsible for policies and practices regarding the issuance of immigration

detainers against class members. [Defs.' Answer to Am. Compl., Dkt. # 82, ¶ 15-18, Mem. Op. & Order on Class Certification, Dkt. # 146, at 14-18.]

Defendants' Response:

Defendants do not dispute this fact.

5. By definition, in light of the scope of the certified class, a substantial part of the events and omissions giving rise to Plaintiffs' claims occurred in this district, and the custodian for purposes of class members' immigration detainers is located in the district. [*See* Pls.' Am. Compl., Dkt # 78, ¶¶ 10-11.]

Defendants' Response:

Defendants do not dispute this fact.

II. ICE's Immigration Detainer Forms

6. ICE issues immigration detainers (now Form I-247D or Form I-247X) to federal, state, and local law enforcement agencies ("LEAs") to advise the LEA that ICE seeks custody of an individual currently detained by the LEA. [8 C.F.R. § 287.7(a); Mem. Op. & Order on Cross Mots. for J. on Pleadings, Dkt. # 144, at 8.]

Defendants' Response:

Defendants do not dispute this fact as to I-247D forms only. *See* Form I-247D (Plaintiff Ex. D). Defendants note that I-247X forms can serve as a request for detention or request for notification of release. *See* Form I-247X (Plaintiff Ex. HH).

7. Since this litigation was filed, ICE has used five different detainer forms: the August 2010 revision, the December 2011 revision, the December 2012 revision, the June 2015 Form I-247D, and the August 2015 Form I-247X. [Mem. Op. & Order on Class Certification, Dkt. # 146, at 2-3; Pls.' Mem. in Support of Class Certification, Dkt. # 95, at Exs. A-C,

DHS000115-121; Ex. D; Ex. HH.] Despite the multiple revisions—and setting aside the two named Plaintiffs—ICE has not rescinded or replaced outstanding detainers issued using the previous forms. [*See* Ex. E, P. Miller Dep. 105: 4-16, 211:11-24 (designated by Defendants under Rule 30(b)(6)); Ex. F, K. Kauffman Dep. 52:1-53:19, 73:8-19 (also designated by Defendants under Rule 30(b)(6).] ICE views all outstanding detainers, irrespective of which detainer form was used, as continuing to be valid. [*Id.*]

Defendants' Response:

Defendants do not dispute the first sentence, but dispute the last two sentences. While Defendants do not dispute that ICE has not replaced all outstanding detainer issued on previous forms, Defendants dispute that ICE has not rescinded any outstanding detainers. *See* Cancelled Detainer for Plaintiff Moreno (Plaintiff Ex. JJ) and Plaintiff Lopez (Plaintiff Ex. MM). In addition, Defendants dispute the third sentence because new detainers are only effective if served on the subject. *See* PEP Fact Sheet, DHS 2565 ("Detainer form requires that LEA provide a copy to the individual subject to the detainer."); *see also* Form I-247D, DHS 2702 (Plaintiff Ex. D), and Form I-247X, DHS 2834 (Plaintiff Ex. HH) ("This request takes effect only if you serve a copy of this form on the subject").

8. The first three versions of the detainer form contain two main sections: checkboxes at the top of the form that explain the basis for issuing the detainer, and checkboxes at the bottom of the form that request that the LEA take certain actions. [Mem. Op. & Order on Class Certification, Dkt. # 146, at 2-3.] The June 2015 I-247D and the August 2015 I-247X versions maintain the content of these two main sections and then include an additional section to explain why the subject of the detainer is an enforcement priority. [*See* Ex. D, at DHS002702; Ex. HH, at DHS002834.]

Defendants' Response:

Defendants dispute this fact. The forms have evolved significantly since August 2010 and now include information describing what type of probable cause evidence ICE has and what enforcement priority the subject falls into. *See* Aug 2010 I-247 – DHS 115 (Plaintiff Ex. G), Dec. 2011 I-247—DHS 116-118 (Plaintiff Ex. H), Dec. 2012 I-247—DHS 119-121 (Plaintiff Ex. I), I-247D – DHS 2702 (Plaintiff Ex. D), and I-247X—DHS 2834 (Plaintiff Ex. HH).

9. Currently, ICE uses the June I-247D detainer form against individuals that it deems the highest enforcement priorities, while the August I-247X detainer form is used against individuals that ICE has designated as lower enforcement priorities. [*See* Ex. II, at DHS002770-2776, 2785-2787, 2791.] Individuals subject to the August I-247X detainer form are class members only if they are the subject of a detainer issued under Section B.2 of this form. [*See* Ex. HH, at DHS002834; Ex. II, at DHS002788-2790.]

Defendants' Response:

Defendants dispute the first sentence, as Form I-247D is used for aliens falling within Priority 1 (a), (c), (d), and (e) and Priority 2 (a) and (b) of DHS's civil enforcement priorities, and Form I-247X is used for all other priorities and aliens whose removal would serve an important federal interest. *See* DHS Sec. Johnson Memorandum "Secure Communities" (Nov. 20, 2014), DHS 2554, and Nov. 2015 ICE Training PowerPoint Slideshow (Plaintiff Ex. II), DHS 2785. Defendants also dispute the last sentence. See ECF No 199.

10. Under the class definition—and regardless of the particular detainer form used— the class members are all necessarily individuals who are or will be subject to

detainers where ICE has not indicated that the detainer is supported by: (1) service of a Notice to Appear or other charging document; (2) service of a warrant of arrest; or (3) issuance of an order of deportation or removal. [Mem. Op. & Order on Class Certification, Dkt. # 146, at 11-14; Pls.' Mem. in Support of Class Certification, Dkt. # 95, Exs. A-C, DHS000115-121.] While DHS has changed the description of the checkboxes in the June 2015 I-247D and August I-247X versions, individuals who are or will be subject to detainers issued under those new forms would still be members of the class if such detainer is not supported by either a final order of removal or pending removal proceedings (i.e., service of a Notice to Appear and warrant of arrest). [Ex. D, at DHS002702; Ex. HH, at DHS002834; *see* 8 C.F.R. §§ 239.1(b), 236.1(b)(1) (warrant of arrest can be issued only after a Notice to Appear), 1239.1.]

Defendants' Response:

Defendants dispute this. *See* Motion to De-certify the class (ECF No. 199.).

11. Depending on the particular form used, the detainer issued with respect to the class members will necessarily have been based on a checkbox indicating that ICE has either "initiated an investigation" (August 2010 and December 2011), "determined that there is a reason to believe the individual is an alien subject to removal from the United States" (December 2012), or concluded that "[p]robable cause exists that the subject is a removable alien." (June 2015 I-247D and August 2015 I-247X). [Ex. G; Ex. H, at DHS000116; Ex. I, at DHS000119; Ex. D, at DHS002702; Ex. HH, at DHS002834.]

Defendants' Response:

Defendants dispute this fact. All ICE detainers are based on reason to believe

and/or probable cause the subject is a removable alien. *See* ICE Detainer Directive, Aug. 2010, Plaintiff Ex. O, DHS 36-38, ICE Detainer Policy, Dec. 2012, Plaintiff Ex. P, DHS 112-114, and the DHS Memo regarding Secure Communities, Nov. 2014, DHS 2553-2555; Declaration of Matthew Albence. (Defendants' Ex. F)

12. Class members who are subject to the June 2015 I-247D detainer or August 2015 I-247X detainer are further provided generic information implying investigative steps ICE may have undertaken to reach its assertion of "probable cause," namely:

- biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or

- statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

[Ex. D, at DHS002702; Ex. HH, at DHS002834.]

Defendants' Response:

Defendants dispute this fact. Defendants' policies and procedures require probable cause that a person is a removable alien before a Form I-247D or Form I-247X can be issued. *See* DHS Memo regarding Secure Communities, Nov. 2014, DHS 2553-2555 and Implementing DHS Immigration Enforcement Priorities, Plaintiff Ex. N, DHS 2649.

13. All five versions of the detainer form request that the LEA hold the individual for up to 48 hours beyond the time when the individual is otherwise eligible for release from LEA custody—whether the individual has paid bail, been acquitted, received a dismissal of charges, or completed a prison sentence—so that DHS can assume physical custody of the individual. [Mem. Op. & Order on Class Certification, Dkt. # 146, at 3; Ex. D, at DHS 0002702; Ex. HH, at

DHS002834.]

Defendants' Response:

Defendants do not dispute this.

III. ICE's Detainer Policies and Practices

14. Despite changes to the detainer form and changes to ICE's enforcement priorities over the years, ICE's policies and practices for investigating and issuing detainers against class members have remained uniform and unchanged as they relate to class members' legal claims. [Mem. Op. & Order on Class Certification, Dkt. # 146, at 16, 19; Ex. J, at DHS002665-67 (training materials describing the changes to the detainer process after June 2015 as involving only enforcement priorities); *compare* Ex. F, K. Kauffman Dep. 20:1-4,20:18-23, 29:19-30:12, 41:23-51:7, 57:24-59:12, 73:20-74:4 (testifying to standard detainer procedures that rely on biometric fingerprint identification if available, federal database records checks, limited circumstances when ICE agents might speak with a subject, and ICE agents' practice of issuing detainers without any judicial or other review) *and* Ex. K, at DHS000048 (Secure Communities standard operating procedures for issuing detainers dated Dec. 1, 2011) *and* Ex. E, P. Miller Dep. 31:4-21, 184:4-14 (testifying that the only detainer policies that exist are those that are in writing, and that the written policies apply uniformly) *and* Ex. L, J. Antia Dep. 30:21-42:8, 80:15-81:20, 166:17-23 (testifying to standard procedures in issuing a detainer, including biometric fingerprint identification if available, federal database records checks, circumstances when she may interview a subject, and ICE agents' practice of issuing detainers without any judicial or other review) *and* Ex. M, C. Schilling Dep. 25:6-26:10, 139:24-143:1 (same) *with* Ex. N, at DHS002649-2650 (DHS Directives, Instruction No: 044-01-001, "Implementing Department of Homeland Security Immigration Enforcement Priorities" (Issue Date: June 10,

2015) (instruction on investigating and issuing immigration detainers after June 2015, which closely tracks the procedures testified to by ICE officials Kauffman, Antia, and Schilling and does not supersede the written detainer policies from August 2, 2010 (Ex. O), Secure Communities detainer procedures (Ex. K, at DHS000048), and written detainer policy dated Dec. 21, 2012 (Ex. P)) *and* Ex. J, at DHS002670-2673, 2679-2682 (training materials on issuing June 2015 I-247D detainers, which tracks previous detainer procedures) *and* Ex. II, at DHS002788-2790, 2793-2795 (training material on using the I-247X form as a detainer, which tracks the ICE training on use of the June I-247D detainer form and previous detainer procedures).]

Defendants' Response:

Defendants do not dispute insofar as d there is no practical or legal difference between an ICE officer establishing "reason to believe" versus establishing probable cause. However, Defendants dispute the portion regarding issuing detainers as the policy for issuing detainers has changed significantly since 2010.

15. ICE does not have a written policy explaining how an officer is required or advised to conduct his investigation to determine whether to issue a detainer. [Ex. O, August 2, 2010 detainer policy (partially superseded); Ex. P, Dec. 21, 2012 detainer policy (superseding in part August 2, 2010 policy); Ex. K, Secure Communities detainer procedures, at DHS000048; Ex. J, at DHS002670-2673, 2679-2682 (training materials on issuing June 2015 I-247D detainers); Ex. N, at DHS002649-2650 (June 10, 2015 detainer policy); Ex. II, at DHS002788-2790, 2793-2795 (August 2015 I-247X detainer training materials); Ex. E, P. Miller Dep. 31:4-21, 184:4-14 (testifying that the only detainer policies that exist are those that are in writing, and that the written policies apply uniformly), 56:20-64:8.] ICE's only written policy and general practice is to rely on biometric fingerprint checks (if available) and searches for the targeted

individual in four DHS databases (CIS, CLAIMS, TECS, ENFORCE). [*See, e.g.*, Ex. K, at DHS00048, DHS00060 (checklist showing the standard four DHS databases reviewed); Ex. F, K. Kaufmann Dep. 57:5-59:12, 74:5-75:15; 157:23-158:13.] ICE has no policy requiring officers to interview an individual or other relevant individuals before issuing a detainer. [Ex. E, P. Miller Dep. 58:21-59:13; Ex. F, K. Kauffman Dep. 58:7-14; Ex. O, August 2, 2010 detainer policy (partially superseded); Ex. P, Dec. 21, 2012 detainer policy (superseding in part August 2, 2010 policy); Ex. K, Secure Communities detainer procedures, at DHS000048; Ex. J, at DHS002670-2673, 2679-2682 (training materials on issuing June 2015 I-247D detainers); Ex. N, at DHS002649-2650 (June 10, 2015 detainer policy); Ex. II, at DHS002788-2790, 2793-2795 (training materials on using the I-247X form as a detainer).]

Defendants' Response:

Defendants dispute the first two sentences. While ICE has general written ***procedures*** and training describing common investigative techniques the officers can use, such as which databases to check, how to fill out database entries, etc., s*ee* I-247X Training, Plaintiff Ex. II, DHS 2789 (describing what is needed to establish probable cause), CAP Handbook, Plaintiff Ex. R, DHS 2596, DHS Implementing Immigration Enforcement Policy, Plaintiff Ex. N, DHS 2649-2651, PEP Training Slideshow, Plaintiff Ex. J, DHS 2682; Chicago Secure Communities IRC SOP, Plaintiff Ex. K, DHS 48-49, there are no written policies listing all of the investigative methods an ICE officer may use due to the constant evolving national security threats and illegal activities that an ICE officer confronts while enforcing federal law. SDDO Kauffman also testified that ICE CAP officers will generally interview persons before issuing detainers. *See* Kauffman Depo, Plaintiff Ex. F, p.33:8-10 (stating that CAP officers generally interview the subject before issuing a detainer); Declaration of Matthew Albence. (Defendants' Ex. F.)

Defendants do not dispute the last sentence.

A. Determination of Probable Cause

16. ICE's detainer policy does not require its agents to support a determination to issue an immigration detainer with any statement, much less a sworn, particularized statement of probable cause as to why a class member is a noncitizen and removable. [*See* Ex. O, August 2, 2010 detainer policy (partially superseded); Ex. K, at DHS000048; Ex. P; Ex. N, at DHS002649-2650; Ex. J, at DHS002670-2673, 2679-2682; Ex. II, at DHS002788-2790, 2793-2795; Ex. E, P. Miller Dep. 31:4-21, 184:4-14 (testifying that the only detainer policies that exist are those that are in writing, and that the written policies apply uniformly); Ex. F, K. Kauffman Dep. 49:21-50:20 (testifying that ICE agents do not need to explain why they issue a detainer but that there probably should be a written policy); Ex. M, C. Schilling Dep. 139:24-143:1 (testifying that neither before nor after the fact do ICE agents have to explain their basis for issuing a detainer); Ex. L, J. Antia Dep. 164:7-165:6, 166:24-167:4 (same).]

Defendants' Response:

Defendants dispute this. The new detainer forms require that ICE officers check boxes with the specific reasons the detainer is being issued and identifies their name on the detainer. *See* Form I-247D, Plaintiff Ex. D and Form I-247X, Plaintiff Ex. HH. In addition, ICE officers are required to create entries in EAGLE/EARM (ERO databases) to issue detainers. The entries include statements of probable cause evidence. *See* DHS 2713. SDDO Kauffman also testified that ICE officers use the Form I-213, the Enforce database, and Secure Communities Worksheets to capture the information the officer used to support their probable cause determination. *See* Kauffman Depo, Plaintiff Ex. F, p. 40:2-23, and p. 43:22-24, 44:1-7.

17. ICE agents do not follow any practice that requires supporting a determination to

issue an immigration detainer with a sworn, particularized statement of probable cause as to why a class member is a noncitizen and removable. [*See* Ex. O, August 2, 2010 detainer policy (partially superseded); Ex. K, at DHS000048; Ex. P; Ex. N, at DHS002649-2650; Ex. J, at DHS002670-2673, 2679-2682; Ex. II, at DHS002788-2790, 2793-2795; Ex. E, P. Miller Dep. 31:4-21, 184:4-14 (testifying that the only detainer policies that exist are those that are in writing, and that the written policies apply uniformly); Ex. F, K. Kauffman Dep. 49:21-50:20 (testifying that ICE agents do not need to explain why they issue a detainer but that there probably should be a written policy); Ex. M, C. Schilling Dep. 139:24-143:1 (testifying that neither before or after do ICE agents have to explain their basis for issuing a detainer); Ex. L, J. Antia Dep. 164:7-165:6, 166:24-167:4 (same).]

Defendants' Response:

Defendants do not dispute that there is no sworn statement of probable cause made at the time the detainer is issued besides the detainer form itself. Defendants dispute the contention that there is no written justification for issuing a detainer. *See* Chicago IRC SOP, Plaintiff Ex. K, DHS 46 (describing duties of IEAs to include "write results/findings on SC Worksheets) and DHS 50 (describing detainer packet created justifying detainer); CAP Handbook, Plaintiff Ex. R, DHS 2596-2597 and 2622-2625 (describing procedures before issuing detainers); DHS Implementing Immigration Enforcement Priorities Directive, Plaintiff Ex. N, DHS 2651 ("ICE Officers and Agents are to document all encounters regardless of outcome."); ICE Detainer Policy, Dec. 2012, Plaintiff Ex. P, DHS 114 (detainer form revised so that "receiving agency and alien will know the specific basis for the detainer.").

18. ICE's detainer policy does not require its agents to obtain a determination of probable cause from a detached and neutral judicial officer, such as an immigration judge or

federal magistrate, either before seeking a class member's arrest on an immigration detainer (i.e., a valid warrant) or within 48 hours after a class member's arrest on an immigration detainer. [*See* Ex. O, August 2, 2010 detainer policy (partially superseded); Exhibits: K, atDHS000048; Ex. P; Ex. N, at DHS002649-2650; Ex. J, at DHS002670-2673, 2679-2682; Ex.II, at DHS002788-2790, 2793-2795; Ex. E, P. Miller Dep. 31:4-21, 184:4-14 (testifying that the only detainer policies that exist are those that are in writing, and that the written policies apply uniformly); Ex. M, C. Schilling Dep. 141:3- 23; Ex. L, J. Antia Dep. 80:21-81:3, 166:17- 167:4.]

Defendants' Response:

Defendants do not dispute this fact.

19. ICE agents do not follow any practice of obtaining a determination of probable cause from a detached and neutral judicial officer, such as an immigration judge or federal magistrate, either before seeking a class member's arrest on an immigration detainer (i.e., a valid warrant) or within 48 hours after a class member's arrest on an immigration detainer. [*See* Ex. O, August 2, 2010 detainer policy (partially superseded); Ex. K, at DHS000048; Ex. P; Ex. N, at DHS002649-2650; Ex. J, at DHS002670-2673, 2679-2682; Ex. II, at DHS002788-2790, 2793-2795; Ex. E, P. Miller Dep. 31:4-21, 184:4-14 (testifying that the only detainer policies that exist are those that are in writing, and that the written policies apply uniformly); Ex. M, C. Schilling Dep. 141:3- 23; Ex. L, J. Antia Dep. 80:21-81:3, 166:17-167:4.]

Defendants' Response:

Defendants do not dispute this fact, as it pertains to civil immigration arrests only.

20. In its June 2015 I-247D and I-247X detainer training materials, ICE asserts for the first time that an immigration detainer is ***not*** an arrest, thus suggesting that the Fourth Amendment does not apply to immigration detainers as a matter of law. [Ex. J, at DHS 002681

("Although a detainer is not an arrest . . . as a matter of policy DHS requires probable cause. . . ."); Ex. II, at DHS002794 ("Although a detainer is not an arrest, as a matter of policy, DHS requires that prior to issuing a detainer, an immigration officer must possess probable cause that the subject is a removable alien.").] Previously, ICE took a different view on this issue, conceding that a detainer is an arrest that must be supported by probable cause. [Ex. Q, at DHS 000098 ("A detainer [that requests detention] is an arrest that must be supported by probable cause."); Ex. R, at DHS2588 (referring to detainers as proxy arrests).]

Defendants' Response:

Defendants dispute this. Detainers have always served multiple purposes only one of which is to request detention after the person is no longer subject to detention by the criminal justice agency. *See* 8 C.F.R. 287.7; ICE Detainer Directive (Aug. 2010), Plaintiff Ex. O, DHS 36; INS Law of Arrest, Search, and Seizure for Immigration Officers, M-69, Plaintiff Ex. Q, DHS 97-98.

21. As described on the June 2015 I-247D detainer form [Ex. D, at DHS002702] and the August I-247X detainer form [Ex. HH, at DHS002834], and as reiterated in its June 2015 detainer policy and training materials, as well as the I-247X training materials, ICE's only policy with respect to issuing detainers is to provide generic guidance on the types of investigative steps an agent might undertake—including biometric fingerprint identification, federal database searches, and obtaining statements from the individual. [*See* Ex. N, at DHS002649-50; Ex. J, at DHS002682; Ex. II, at DHS2789.]

Defendants' Response:

Defendants dispute this. *See* response to Statement #15 regarding available written procedures and training.

22. ICE concedes that "[a]s a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a USC [U.S. citizen]." [Ex. S; Ex. E, P. Miller Dep. 81:6-19 (testifying that this statement equally applies to immigration detainers).]

Defendants' Response:

Defendants do not dispute this, but note that it is not always clear whether a person is a U.S. citizen, if they were born in a foreign country, and there may exist probable cause of removability in a case in which the individual is ultimately determined to be a U.S. citizen.

23. Likewise, ICE has previously conceded that it must have probable cause to believe that an individual is a noncitizen who does not have legal status or has a criminal conviction(s) that would make her removable, before it can request an LEA to arrest and detain the noncitizen on an immigration detainer. [8 U.S.C. § 1357(a)(2); Ex. T (citing *United States v. Cantu*, 519 F.2d 494 (7th Cir. 1975)).]

Defendants' Response:

Defendants dispute this. *See* Plaintiffs Ex. T (Superseding Guidance on Reporting and Investigation of Claims to United States Citizenship (ICE, July 18, 2008) states "It is imperative that DRO officers establish probable cause to believe that an individual is an alien before making an arrest for a charge of removability." It then cites 8 U.S.C. 1357 to state that courts have interpreted the term "reason to believe" to be the equivalent of probable cause. It says nothing about issuing a detainer. If anything, it supports the Defendants' position that the standard for issuing detainers between Aug. 2010 to Nov. 2014 was the equivalent of probable cause. In any case, the guidance was superseded in Nov. 2008 and not applicable to the class or this case.

24. In its June 2015 detainer training materials, ICE reiterates that "ICE cannot assert its civil immigration enforcement authority to arrest or detain a U.S. citizen (USC) or non-

removable alien" [Ex. J, at DHS 002677.]

Defendants' Response:

Defendants do not dispute this fact.

25. ICE does not have any written policy instructing its agents on how to establish probable cause to believe that a targeted individual is a noncitizen and removable from the United States before issuing a detainer. [Ex. O, August 2, 2010 detainer policy (partially superseded); Ex. P, Dec. 21, 2012 detainer policy (superseding in part August 2, 2010 policy); Ex. K, Secure Communities detainer procedures, at DHS000048; Ex. J, at DHS002670-2673, 2679-2682 (training materials on issuing June 2015 I-247D detainers); Ex. N, at DHS002649-2650 (June 10, 2015 detainer policy); Ex. II, at DHS002788-2790, 2793-2795 (August 2015 I-247X detainer training materials); Ex. E, P. Miller Dep. 31:4-21, 184:4-14 (testifying that the only detainer policies that exist are those that are in writing, and that the written policies apply uniformly), 56:20-64:8.]

Defendants' Response:

Defendants dispute this fact. New detainer forms (Plaintiff Ex. D and HH), PEP training materials (Plaintiff Ex. J and II), and Chicago IRC SOP (Plaintiff Ex. K) give further guidance on evidence needed to issue detainer. *See* response to Paragraph 15 above.

26. For example, ICE does not have a written policy or checklist requiring or advising agents to gather and analyze information showing place of birth; date of birth; whether the individual is an LPR and (if so) when that status was obtained; whether the individual is in another lawful status (asylee, visa holder); whether the individual has a criminal conviction that makes her removable; whether the individual naturalized to U.S. citizenship; whether the individual has a U.S. citizen parent and when the U.S. citizen parent obtained citizenship; or

whether the individual may have acquired or derived U.S. citizenship automatically through a parent's citizenship. [*Id.*; *See* Ex. F, K. Kauffman Dep. 57:5-21, 80:5-17, 92:15-93:12; Ex. E, P. Miller Dep. 48:21-49:1, 56:20-64:8.] An ICE agent might ask questions that elicit this information only after the individual has already been arrested on the detainer and brought into ICE's physical custody. [Ex. E, P. Miller Dep. 210:15-211:5, 213:5-7.]

Defendants' Response:

Defendants dispute this fact. Defendants' policy is for ICE officers to have probable cause before they issue detainers/requests for detention. *See* Sec. Johnson Secure Communities Memorandum, DHS 2554. Defendants' detainer policies do not specify the numerous ways to conduct immigration investigations due to the constantly evolving national security and criminal threats that ICE officers confront as part of their duties. Investigative techniques and methods are generally communicated to ICE officers through training. *See* Albence Declaration. (Def. Ex. F.) SDDO Kauffman also testified that this information is obtained by CAP officers who interview the subjects. *See* Kauffman Depo, Plaintiff Ex. F, p. 33:8-10 (CAP officers generally interview subjects before issuing detainer); Chicago Secure Communities IRC SOP, Plaintiff Ex. K, DHS 48-49 (databases checked contain the information listed in this paragraph). Also dispute that ICE officers only obtain this information after they have been transferred to ICE custody.

27. ICE does not require its agents to investigate whether an individual's parent or parents are U.S. citizens—information necessary to determine whether the individual may have derived or acquired U.S. citizenship automatically through the parents' citizenship—before issuing a detainer. [Ex. N, at DHS002649-2650; Ex. E, P. Miller Dep. 57:25-58:4, 62:14-63:9 (discussing Dec. 21, 2012 detainer policy).]

Defendants' Response:

Defendants dispute this fact. ICE policy is "to carefully and expeditiously investigate and analyze the potential U.S. citizenship of individuals encountered by ICE." ICE Policy No. 16001.2, Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE, Plaintiff Ex. S, DHS 2751; Declaration of Matthew Albence. (Def. Ex F.)

28. ICE admits that there are numerous ways by which a foreign-born individual could acquire or derive citizenship by operation of law through a U.S. citizen parent, either at birth (e.g., named Plaintiff Jose Jimenez Moreno) or while a minor through a parent's naturalization (e.g., proposed intervenor Sergey Mayorov). [Ex. S, at DHS002751 ("[T]he INA and various related statutes codify numerous avenues by which an individual may derive, acquire, or otherwise obtain U.S. citizenship other than through birth in the United States"); Ex. U, Defs.' Resp. to Pls.' Second Set of Req. for Admission, Req. No. 52; *see, e.g.,* 8 U.S.C. § 1401 (a)(7)(1976) (statute under which named Plaintiff Jose Jimenez Moreno acquired U.S. citizenship at birth) and Ex. GG; 8 U.S.C. § 1431 (statute through which proposed intervenor Sergey Mayorov derived U.S. citizenship through his mother's naturalization) and *Mayorov v. United States*, Case No. 13-5249, Defs.' Answer, Dkt. No. 8, ¶¶ 7, 10 (N.D. Ill.).]

Defendants' Response:

Defendants do not dispute this fact.

29. Moreover, ICE concedes that the criminal grounds for removability are "complex" [Ex. J, at DHS002683; *see* Ex. E, P. Miller Dep. 15:24-16:20], and yet it does not require its agents to seek independent confirmation that an LPR or other lawful immigrant's conviction makes her removable. [Ex. E, P. Miller Dep. 48:21- 49:1, 58:16-20; Ex. L, J. Antia Dep. 107:4-10, 140:9-14, 166:24-167:4, 170:2-12 (immigration detainer was issued against Plaintiff Lopez on mistaken belief that conviction for "misprision of a felony" was a controlled

substance offense).]

Defendants' Response:

Defendants dispute this fact. *See* PEP Training (June 2015), Plaintiff Ex. J, DHS 2683 ("criminal grounds of inadmissibility and deportability are complex. If you are uncertain whether a conviction constitutes a removable offense, you should consult with your local Office of Chief Counsel prior to lodging a detainer."); Kauffmann Depo, Plaintiff Ex. F, p. 27:5-8 (supervisors generally need to approve detainers issued to LPRs).

30. The gaps in ICE's policies and practices regarding its investigations to establish probable of cause of alienage and removability are substantial given the number of foreign- born individuals who are either U.S. citizens or otherwise lawfully in the United States.

Defendants' Response:

Defendants dispute this. This is not a factual statement, but a conclusory, argumentative statement.

31. Over 17 million U.S. citizens of foreign birth are currently living in the United States (44% of the U.S. foreign-born population). *See Morales v. Chadbourne*, 996 F. Supp. 2d 19, 35 (D.R.I. 2014); U.S. Census Bureau, The Foreign Born Population in the United States: 2010 (issued May 2012), *available at* http://www.census.gov/prod/2012pubs/acs-19.pdf) (last visited Dec. 1, 2015).

Defendants' Response:

Defendants do not dispute this, but note that it is irrelevant to this litigation.

32. Of the population of U.S. citizens of foreign birth, DHS estimates that since 1980 over 1.4 million minors with LPR status automatically derived U.S. citizenship through a parent's naturalization. [Ex. V.] Additionally, the U.S. Census Bureau estimates that as of 2013,

an additional 2,584,452 U.S. citizens living in the United States were born in a foreign country, but acquired U.S. citizenship at birth through a U.S. citizen parent. [Ex. W.]

Defendants' Response:

Defendants do not dispute this, but note that it is irrelevant.

33. Individuals who derive or acquire U.S. citizenship through a parent are citizens by operation of law, such that they are not required to file an application for a certificate of citizenship or passport. *See Matter of Fuentes-Martinez*, 21 I. & N. Dec. 893, 896 (BIA 1997) ("A child's acquisition of citizenship on a derivative basis occurs by operation of law and not by adjudication. No application is filed, no hearing is conducted, and no certificate is issued when such citizenship is acquired. The actual determination of derivative citizenship . . . may occur long after the fact in the context of a passport application . . . .").

Defendants' Response:

Defendants do not dispute this.

34. ICE's own data indicates that between FY2008 and FY2012, at least 834 U.S. citizens have been subjected to immigration detainers, and there are indications that the number of U.S. citizens subject to detainers could be significantly higher. [Ex. X.] ICE's Rule 30(b)(6) witness also conceded that ICE has consistently issued immigration detainers against non-removable LPRs. [Ex. E, P. Miller Dep. 49:11-51:15.]

Defendants' Response:

Defendants dispute this fact. ICE data indicates that the number of potential U.S. citizens issued detainers was significantly less during this time period when over one million detainers were issued by ICE. In addition, the 2011 and 2012 Forms I-247 contained check boxes stating "Consider this request for a detainer operative only upon the subject's conviction." *See* 2012

Form I-247, Plaintiff Ex. I, DHS 119, and 2011 Form I-247, Plaintiff Ex. H, DHS 116. This check box allowed ICE officers to inform a LEA that the ICE detainer would only become effective and/or valid upon the subject's conviction, as in the case where a lawful permanent resident was charged with a crime, which would make them removable from the United States. As such, because the effect of the check box was to make the detainee contingent upon conviction; absent a conviction there was no operative detainer against the individual. *See* Miller Deposition, Plaintiff Ex. E, p. 108-110 and p. 197, ln: 20-23 (stating that ICE officers were required to check box indicating detainer is contingent when issuing a detainer for a lawful permanent resident who was only charged with a removable offense).

35. As of January 2013, there were roughly 13.1 million LPRs living in the United States [Ex. V], and another 61 million individuals in another lawful status. [Ex. Y.]

Defendants' Response:

Defendants do not dispute this, although it is irrelevant.

36. In its June 2015 detainer training materials and the I-247X training materials, ICE includes a 10-point bullet list of "red flags"—such as information about a subject's biological or adoptive parent's U.S. citizenship—that may indicate that the subject may be a U.S. citizen and thus warranting further review and investigation to establish probable cause of alienage and removability. [*See* J, at DHS002684-2685; Ex. II, at DHS002797-2798.]

Defendants' Response:

Defendants do not dispute this.

37. Still, ICE has no policy or practice requiring or advising its agents to gather and analyze the information that ICE concedes are "red flags" requiring further review and investigation to establish probable cause of alienage and removability. [*See* Ex. J, at

DHS0002689-2700 (hypotheticals).]

Defendants' Response:

Defendants Dispute this. ICE policy is "to carefully and expeditiously investigate and analyze the potential U.S. citizenship of individuals encountered by ICE." ICE Policy No. 16001.2, Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE, Plaintiff Ex. S, DHS 2751.

38. On November 10, 2015, ICE issued superseding guidance for "Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE"—in which ICE includes a new detainer policy for how ICE agents are to conduct a further investigation when the "red flags" of possible U.S. citizenship are discovered, defined as "Indicia of Potential U.S. citizenship" in the new guidance (hereinafter "Nov. 10, 2015 USC guidance"). [Ex. S; *compare* Ex. S, at DHS002752 *with* Ex. J, at DHS002684-2685 *and* Ex. II, at DHS002797-2798.]

Defendants' Response:

Defendants do not dispute this.

39. According to the November 10, 2015 USC guidance, it is only when an "Indicia of Potential U.S. Citizenship" is uncovered that ICE agents are advised to conduct a more thorough investigation that "may include a review of the A-file and other pertinent documents, an interview of the individual, searches of vital records databases, interviews of family members and other individuals in possession of relevant information, and other appropriate investigation." [Ex. S, at DHS002754.]

Defendants' Response:

Defendants Dispute this. ICE policy is "to carefully and expeditiously investigate and analyze the potential U.S. citizenship of individuals encountered by ICE." ICE Policy No.

16001.2, Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE, Plaintiff Ex. S, DHS 2751.

40. However, unless an ICE agent conducts an interview of the subject individual and/or other relevant individuals, ICE's standard detainer investigative practices—relying on a fingerprint or manual search of the subject in four DHS databases (CIS, CLAIMS, TECS, ENFORCE) [*see, e.g.*, Ex. K, at DHS00048, DHS00060 (checklist showing the standard four DHS databases reviewed); Ex. F, K. Kauffman Dep. 57:5-59:12, 74:5-75:15; 157:23-158:13]—would never uncover sufficient evidence to satisfy at least 7 out of the 10 "Indicia of Potential U.S. Citizenship" to trigger the more thorough investigation. [*See* Ex. S, at DHS 002752.]

Defendants' Response:

Defendants dispute this. Most indicia can be obtained through database searches; Decl of Matthew Albence. (Def. Ex. F)

41. The 10 "Indicia of Potential U.S. Citizenship" from the Nov. 10, 2015 USC guidance with the information in bold that cannot be found based on a fingerprint or manual search of a targeted individual in the four DHS databases are:

i. An immigration judge, legal representative, or purported family member indicates to ICE that the individual is or may be a U.S. citizen;

ii. There is some information suggesting that the individual was born in the United States, as defined in INA § 101(a)(38), or a past or present U.S. territorial possession such as the Panama Canal Zone;

iii. There is some information suggesting that one or more of the individual's parents, grandparents, or foreign-born siblings are or were U.S. citizens, particularly when the timeline for the physical presence of these family members in the United States is incomplete;

iv. The individual entered the United States as a lawful permanent resident when he or she was a minor and has at least one parent who is a U.S. citizen;

v. There is some information suggesting that the individual was adopted by a U.S. citizen;

vi. An application for naturalization, a U.S. passport, or a certificate of citizenship has been filed by the individual or on the individual's behalf and remains pending;

vii. The individual has served in the U.S. Armed Forces;

viii. The individual equivocates (or is unsure) about his or her date and/or place of birth and appears to be under the age of 21 years old;

ix. The individual has been present in the United States since before his or her fifth birthday and does not know who his or her parents are; and/or

x. The individual was born abroad out of wedlock and there is information suggesting that one or both of his or her parents may have been U.S. citizens, but the initially available information is inconclusive regarding physical and legal custody and/ or legitimation.

[*See* Ex. S, at DHS 002752.]

Defendants' Response:

Defendants dispute this. Most indicia can be obtained through database searches.

42. A search of a targeted individual in the four DHS databases will reveal at most the first names of the individual's parents. [*See* Ex. F, K. Kauffman Dep. 153:11-155:7.]

Defendants' Response:

Defendants dispute this. It mischaracterizes Kauffman deposition testimony. Last name of the child is generally the same as the last name of the parents, so only first name shown on CIS page for child. ICE officers can conduct further searches within CIS and EARM/EAGLE for parents' information. *See* Pl. Ex. F, K. Kauffman Dep. 153:11-155:7.]

43. ICE has no policy regarding when officers should or must interview an individual or parents before issuing a detainer. [Ex. E, P. Miller Dep. 58:21-59:13; Ex. F, K. Kauffman Dep. 58:7-14; Ex. O, August 2, 2010 detainer policy (partially superseded); Ex. P, Dec. 21, 2012 detainer policy (superseding in part August 2, 2010 policy); Ex. K, Secure Communities detainer procedures, at DHS000048; Ex. J, at DHS002670-2673, 2679-2682 (training materials on issuing

June 2015 I-247D detainers); Ex. N, at DHS002649-2650 (June 10, 2015 detainer policy); Ex. II, at DHS002788-2790, 2793-2795 (training materials on using the I-247X form as a detainer).]

Defendants' Response:

Defendants do not dispute that ICE has no written ***policy*** requiring officers to interview an individual or parents before issuing a detainer. ICE has general written ***procedures*** and training describing common investigative techniques the officers can use, such as which databases to check, how to fill out database entries, etc., s*ee* I-247X Training, Plaintiff Ex. II, DHS 2789 (describing what is needed to establish probable cause), CAP Handbook, Plaintiff Ex. R, DHS 2596, DHS Implementing Immigration Enforcement Policy, Plaintiff Ex. N, DHS 2649-2651, PEP Training Slideshow, Plaintiff Ex. J, DHS 2682; Chicago Secure Communities IRC SOP, Plaintiff Ex. K, DHS 48-49, there are no written policies listing all of the investigative methods an ICE officer may use due to the constant evolving national security threats and illegal activities that an ICE officer confronts while enforcing federal law. SDDO Kauffman also testified that ICE CAP officers will generally interview persons before issuing detainers. *See* Kauffman Depo, Plaintiff Ex. F, p.33:8-10 (stating that CAP officers generally interview the subject before issuing a detainer) *see also* Stateville Monthly Stats showing number of interviews conducted, DHS 183-220. SDDO Kauffman also testified that Secure Communities ICE officers may also conduct interviews. *See* Kauffman Depo, Plaintiff Ex. F, p. 45:12-16.

44. In many circumstances, as a matter of practice, ICE agents simply do not conduct interviews before issuing detainers. [Ex. F, K. Kauffman Dep. 33:12-18, 34:15-18, 58:7-14, 141:25-142:1.] In other circumstances, ICE agents are unable to conduct interviews in LEA custody. [Ex. L, J. Antia Dep. 120:2-12; Ex. S, at DHS002755 ("subparagraph g").]

Defendants' Response:

Defendants dispute this. SDDO Kauffman testified that CAP officers located in jails routinely interviewed subjects before issuing detainers. *See* Kauffman Depo, Plaintiff Ex. F, p. 33:8-10. SDDO Kauffman also testified that while interviews are not routine for IRC detainers because those are mostly based on biometric matches, IRC officers may interview the subjects. *See* Kauffman Depo, Plaintiff Ex. F, p. 45:12-16 and 58:9-14.

45. ICE agents usually do not review an individual or his parents' immigration files (a/k/a Alien file or A-file) before issuing a detainer. [Ex. F, K. Kauffman Dep. 75:2-15; Ex. L, J. Antia Dep. 141:15-144:17 (showing Plaintiff Lopez's detainer was issued without review of her Alien file).]

Defendants' Response:

Defendants do not dispute this.

46. ICE concedes that the completeness and accuracy of DHS's database information becomes increasingly unreliable from the 1990s going backward. [Ex. F, K. Kauffman Dep. 150:2-152:4; *see* Ex. Z, DHS, Privacy Impact Assessment, "Central Index System," at 10 (June 22, 2007) ("All information in the system that is shared in DHS serves as an initial screening process to provide a quick look at a person's basic information . . . to determine if there is a need to request the physical file").]

Defendants' Response:

Defendants dispute this. It mischaracterizes SDDO Kauffman's testimony. He stated "For the most part the records are kept fairly well updated, but depending on the specific timeframe, there can be big gaps." Kauffman Depo, Plaintiff Ex. F, p. 151:9-11.

B. Statutory Requirements for Warrantless Arrests

47. As part of the process of issuing immigration detainers, ICE's policies and

practices do not require any individualized determination that the class member is "likely to escape before a warrant can be obtained for his arrest." [Ex. E, P. Miller Dep. 59:18-60:24; Ex. F, K. Kauffman Dep. 66:2-18; Ex. O, August 2, 2010 detainer policy (partially superseded); Ex. P, Dec. 21, 2012 detainer policy (superseding in part August 2, 2010 policy), DHS000112-114; Ex. K, Secure Communities detainer procedures, at DHS000048; Ex. J, at DHS002670-2673, 2679-2682 (training materials on issuing June 2015 I-247D detainers); Ex. N, at DHS002649-2650 (June 10, 2015 detainer policy); Ex. II, at DHS002788-2790, 2793-2795 (training materials on using the I-247X form as a detainer).]

Defendants' Response:

Defendants do not dispute this fact.

48. As part of the process of issuing immigration detainers, ICE agents do not make any determination at all that the class member is "likely to escape before a warrant can be obtained for his arrest." [Ex. E, P. Miller Dep. 59:18-60:24; Ex. F, K. Kauffman Dep. 66:2-18; Ex. O, August 2, 2010 detainer policy (partially superseded); Ex. P, Dec. 21, 2012 detainer policy (superseding in part August 2, 2010 policy), DHS000112-114; Ex. K, Secure Communities detainer procedures, at DHS000048; Ex. J, at DHS002670-2673, 2679-2682 (training materials on issuing June 2015 I-247D detainers); Ex. N, at DHS002649-2650 (June 10, 2015 detainer policy); Ex. II, at DHS002788-2790, 2793-2795 (training materials on using the I-247X form as a detainer).]

Defendants' Response:

Defendants do not dispute this fact.

49. Nevertheless, the legacy Immigration and Naturalization Service ["INS"] manual on arrests, searches, and seizures advised with regard to detainers that "[s]ince it is difficult to

establish that these aliens are likely to abscond before a warrant can be obtained to support an arrest without warrant under section 287(a)(2) of the Act [8 U.S.C. § 1357(a)(2)], a warrant of arrest should be issued and served upon the alien." [*See* Ex. Q, at DHS000098.]

Defendants' Response:

Defendants do not dispute this fact.

50. Upon having a class member arrested on a detainer, ICE does not follow any practice or policy of having the class member brought "without unnecessary delay" before an immigration judge. [8 U.S.C. § 1357(a)(2); Ex. E, P. Miller Dep. 71:4-7; Ex. F, K. Kauffman Dep. 114:13-22; Ex. L, J. Antia Dep. 166:17-167:4; Ex. M, C. Schilling Dep. 141:3-24.]

Defendants' Response:

Defendants dispute this fact. Aliens must be issued NTAs within 48 hours of arrest by ICE. *See* 8 C.F.R. 287.3(d) (a determination will be made within 48 hours of arrest as to whether alien will remain in custody or released and whether a notice to appear and warrant of arrest will be issued.).

51. Upon having a class member arrested on a detainer, ICE does not follow any practice or policy of bringing the class member before an immigration judge within 48 hours after the arrest. [8 U.S.C. § 1357(a)(2); Ex. E, P. Miller Dep. 71:4-7; Ex. F, K. Kauffman Dep. 114:13-22; Ex. L, J. Antia Dep. 166:17-167:4; Ex. M, C. Schilling Dep. 141:3-24.]

Defendants' Response:

Defendants do not dispute this fact.

52. Rather, ICE requests that the LEA arrest and detain the class member for up to a full 48 hours beyond when he should have been released so that ICE can assume custody of the individual, without any contemplation of promptly bringing the class member before an

immigration judge. [*See* Memo. Op. & Order on Class Certification, Dkt. # 146, at 3; Ex. D, at DHS 0002702; Ex. N, at DHS002650; Ex. HH.]

Defendants' Response:

Defendants dispute this. The assertion regarding "without any contemplation of promptly bringing the class member before an immigration judge" is wrong. 8 C.F.R. 287.3(d) requires service of NTA within 48 hours of arrest. Scheduling of hearings before IJ is controlled by EOIR which is not a defendant in this lawsuit. There is no legal authority for IJs to hold probable cause hearings.

C. ICE's Policies & Practices Regarding Service and Opportunity to Challenge

53. ICE's policies and practices regarding service of a detainer on a class member and an opportunity to challenge the detainer have evolved somewhat over the course of this class action but have not materially changed.

Defendants' Response:

Defendants dispute this. Current DHS policy requires that detainers be served on subject in order to be effective. *See* PEP Fact Sheet, DHS 2565 ("Detainer form requires that LEA provide a copy to the individual subject to the detainer in order for the request to be effective."), Form I-247D, Plaintiff Ex. D, DHS 2702, and Form I-247X, Plaintiff Ex. HH, DHS 2834.

54. ICE agents typically do not serve a copy of a detainer on a class member, instead usually faxing or delivering it to the LEA where the class member is in custody. [Ex. F, K. Kauffman Dep. 86:15-18, 170:16-171:17; Ex. M, C. Schilling Dep. 48:14-19; Ex. AA, at DHS000232; Ex. BB.]

Defendants' Response:

Defendants do not dispute this.

55. Under the August 2010 detainer form, there was no requirement or provision contemplating that the detainee would receive a copy of the detainer and no mechanism to challenge the detainer. [*See* Ex. G.]

Defendants' Response:

Defendants dispute that there was no mechanism to challenge detainer. *See* 2011 Form I-247, Plaintiff Ex. H, DHS 116-118, 2012 Form I-247, Plaintiff Ex. I, DHS 119-121, Form I-247D, Plaintiff Ex. D, DHS 2702, I-247X, Plaintiff Ex. HH, DHS 2834. Individuals can directly contact ICE to dispute detainer, or file a lawsuit. *See* examples of cases where ICE detainers were challenged, *Vargas v. Swan*, 854 F.2d 1028 (7th Cir. 1988) and *Makowski v. United States*, 27 F.Supp.3d 901, 908 (N.D. Ill. 2014) ("With the assistance of an attorney, Makowski's father had the detainer canceled on January 25, 2011").

56. Under the December 2011 and December 2012 detainer forms, ICE requested but did not require that LEAs provide individuals with a copy of their detainers [Exs. H & I] or track whether this occurred. [Ex. C, at RFAs No. 4-6; Ex. E, P. Miller Dep. 129:16-130:22, 137:4-16; Ex. F, K. Kauffman Dep. 111:4-114:12.]

Defendants' Response:

Defendants do not dispute this. ICE has no legal authority to require LEAs to provide individuals with a copy of their detainers.

57. Under the June 2015 I-247D and August 2015 I-247X detainers, ICE still requests but does not require that LEAs serve class members with copies of their detainers, and the request does not expressly include the addendum "Notice to Detainee" on page 2 and 3. [Ex. D; Ex. HH.] ICE advises LEAs that its request to detain "only takes effect if you serve a copy of this form on the subject." [Ex. D; Ex. HH.]

Defendants' Response:

Defendants do not dispute the first part of sentence, because ICE has no legal authority to require LEAs to serve detainers under the 10th Amendment, but dispute last part of sentence. Forms I-247D and I-247X are both 3 pages long and the first page states "Page 1 of 3." *See* Form I-247D, Plaintiff Ex. D, DHS 2702, and Form I-247X, Plaintiff Ex. HH, DHS 2834. Defendants do not dispute the second sentence.

58. ICE has no written policy for tracking service of detainers or the consequences if an LEA detains a class member on a detainer without serving the class member with a copy. [*See generally* Exs. N, J, CC, and II.]

Defendants' Response:

Defendants do not dispute that ICE has no written policy for tracking service of detainers, but dispute that there are no consequences since Forms I-247D and I-247X state the detainer only takes effect if served on the subject. *See* Form I-247D, Plaintiff Ex. D, DHS 2702, and Form I-247X, Plaintiff Ex. HH, DHS 2834.

59. Under the December 2011, December 2012, June 2015 I-247D, and August I-247X detainer forms, ICE developed a "Notice to Detainee" addendum to the detainer form, which includes (after a lengthy advisal) a telephone number by which individuals who claim to be U.S. citizens could "advise" DHS. [hereinafter "USC telephone number"]. [Exs. H, I, D, and HH.] In practice, the "Notice to Detainee" (on pages 2 & 3 of the sample December 2011, December 2012, June 2015 I-247D and August I-247X detainers) is reduced down to one page when a detainer is issued. [Ex. F, K. Kauffman Dep. 112:4-20.]

Defendants' Response:

Defendants do not dispute this.

60. Although the form purports to offer a telephone number for U.S. citizens, it does not describe any telephone number available to individuals who might have other claims against a detainer, such as named Plaintiff Maria Jose Lopez, who is a nonremovable LPR. [*See* Exs. H, I, D, and HH; Ex. E, P. Miller Dep. 137:17-138:4.]

Defendants' Response:

Defendants dispute this. The forms provide a telephone number for complaints regarding any detainer. *See* 2011 Form I-247, Plaintiff Ex. H, DHS 117, 2012 Form I-247, Plaintiff Ex. I, DHS 120, Form I-247D, Plaintiff Ex. D, DHS 2703 ("if you have a question or complaint regarding this detainer, please contact the ICE ERO Detention Reporting and Information Line at (888) 351-4024."), and Form I-247X, Plaintiff Ex. HH, DHS 2835 (same).

61. There is no ICE policy that requires the subjects of detainers to be informed of the telephone number for U.S. citizens. [Ex. E, P. Miller Dep. 141:10-13.] In order to contact the U.S citizen telephone number, the subject must either have access to a telephone free of charge through the LEA or have sufficient funds to make calls. [*See generally* Ex. DD.]

Defendants' Response:

Defendants dispute. DHS requires that the detainer be served in order to be effective. *See* PEP Fact Sheet, DHS 2565 ("Detainer form requires that LEA provide a copy to the individual subject to the detainer in order for the request to be effective."), Form I-247D, Plaintiff Ex. D, DHS 2702, and Form I-247X, Plaintiff Ex. HH, DHS 2834. The ICE Law Enforcement Support Center number, which is listed on the detainer forms, is toll free. The subject can also contact their criminal defense attorney, family member, or others to contact ICE on their behalf. *See Makowski v. United States*, 27 F.Supp.3d 901, 908 (N.D. Ill. 2014) ("With the assistance of an attorney, Makowski's father had the detainer canceled on January 25,

2011").

62. Through the telephone number, individuals speak with DHS contractors, not with any DHS official with authority to cancel a detainer or with training in immigration and citizenship law. [Ex. E, P. Miller Dep. 136:10-24, 142:24-143:18; *see generally* Ex. DD.]

Defendants' Response:

Defendants dispute. Miller testified that there are ICE officers available who have authority to cancel detainers. *See also* LESC SOP, Plaintiff Ex. DD, DHS 133 ("Instructions to IEA/Officer: Upon learning the subject believes that they may be a U.S. Citizen, complete all necessary systems checks to determine the claim's viability. If the claim is substantiated, immediately contact the detention or state/local facility where the caller is being held, lift the detainer and notify the field office of the action.").

63. After the DHS contractor conducts a short interview of the caller, DHS's written policy instructs the contractor: "If the caller responds positively to any of the questions or, based on the information the caller provides, **you believe they have a viable claim** to U.S. Citizenship, immediately refer the call to an [ICE Agent] to validate the claim." [Ex. DD, at DHS000133 (emphasis added).]

Defendants' Response:

Defendants do not dispute this.

64. DHS policy does not instruct the ICE agent to interview the caller, request the individual or his parents' Alien files, or conduct any other further interviews or investigations into vital records. [Ex. DD, at DHS000133.] Instead, DHS instructs the ICE agent to repeat the same database checks that supposedly occurred prior to issuing the detainer. [*Id.*] If the database records are inconclusive, the ICE agent is simply to transfer the claim of citizenship to the Field

Office that issued the detainer. [*Id.*]

Defendants' Response:

Defendants dispute this. *See* Investigating the Potential U.S. citizenship of Individuals Encountered by ICE, Plaintiff Ex. S, DHS 2754-57 (detailing factual examination and review process for persons making claims of U.S. citizenship to ICE).

65. DHS has no policy of notifying individuals of the results of its inquiries into their claims of U.S. citizenship. [Ex. E, P. Miller Dep. 158:2-14.]

Defendants' Response:

Defendants do not dispute this.

66. DHS never involves an immigration judge or other detached and neutral judicial officers in any detainer challenge placed through the telephone number. [*See generally* Ex. DD.]

Defendants' Response:

Defendants do not dispute this.

IV. Named Plaintiffs and Their Detainers

67. Although he was born in Mexico, Plaintiff Moreno acquired U.S. citizenship at birth from his U.S. citizen father. [*See* Exs. A & GG.]

Defendants' Response:

Defendants do not dispute this.

68. Plaintiff Moreno always believed that he was a U.S. citizen but did not know how to prove it to government officials. [Ex. EE, J. Moreno Dep. 12:16-14:3, 40:19-41:10, 42:2-44:22, 48:13-49:16, 80:15-81:24.]

Defendants' Response:

Defendants dispute this. *See* ICE Response to Interrogatory 10, *see also* Schilling Depo,

Plaintiff Ex. M, p. 80:14-19 ("during your investigation Mr. Moreno stated he was a Mexican citizen born in Durango, Mexico, and admitted to illegally entering the United States across the Arizona border in 2000, correct? A. Correct.") and 81:4-11, I-213 created by Schilling during Moreno interview, DHS 229. Moreno also admitted he had a Mexican passport (Moreno Depo, Plaintiff Ex. EE, p. 10:11-23) and he illegally entered the United States by walking across the border instead of entering through a port of entry (Moreno Depo, Plaintiff Ex. EE, p. 4:4-7). *See* 19 U.S.C. 1459 (requiring all individuals to enter the United States through ports of entry).

69. Prior to his arrest, Plaintiff Moreno had hired an immigration attorney and gathered substantial evidence of his U.S. citizenship. [*See* Ex. EE, J. Moreno Dep. 40:19-41:10, 42:2-44:22 48:13-49:16, 52:5-20.]

Defendants' Response:

Dispute as to "substantial evidence." In Moreno's response to Interrogatory No. 15, it states "Plaintiff Moreno hired Hinshaw & Culbertson LLP in or about May 2009 to investigate his claim to U.S. citizenship. Prior to Plaintiff Moreno's arrest, Plaintiff Moreno obtained evidence of his U.S. citizenship, but was still awaiting a Freedom of Information Act (FOIA) request from the Social Security Administration to complete the evidence of his citizenship."

70. On March 22, 2011, the morning after his arrest by the LEA, ICE faxed an immigration detainer to the Winnebago County Sheriff requesting that the LEA arrest Plaintiff Moreno pursuant to the detainer once the LEA's detention authority expired. [Ex. AA.]

Defendants' Response:

Dispute as to whether the detainer requested that the LEA "arrest" the Plaintiff. Actual language on the detainer requested that the LEA "maintain custody." See Plaintiff Ex. AA.

71. The detainer against Plaintiff Moreno was issued pursuant to ICE's standard

detainer policies and practices. [*See supra* ¶¶ 14-66; Ex. M, C. Schilling 139:24- 141:23; 151:3-152:21; Ex. AA.]

Defendants' Response:

Defendants do not dispute this.

72. Within days of Plaintiff Moreno's filing the present lawsuit, ICE cancelled his detainer due to the substantial evidence of his U.S. citizenship. [*See* Ex. JJ; Ex. F, K. Kauffman Dep. 188:1-14.]

Defendants' Response:

Defendants do not dispute this.

73. Plaintiff Moreno has subsequently obtained a certificate of U.S. citizenship that demonstrated that he was a citizen from the date of his birth on September 15, 1976. [Ex. A.]

Defendants' Response:

Defendants do not dispute this.

74. Plaintiff Lopez entered the United States as a Lawful Permanent Resident on August 5, 1997, at the age of 15 years old. [*See* Ex. KK.]

Defendants' Response:

Defendants do not dispute this.

75. Plaintiff Lopez is the mother and primary caregiver to three U.S. citizen children. [Ex. FF, M. Lopez Dep. 29:4-16, 55:14-56:7.]

Defendants' Response:

Although irrelevant, Defendants do not dispute this.

76. On November 10, 2010, Plaintiff Lopez pled guilty to one count of "misprision of felony," which Plaintiff Lopez explained at her deposition means "giv[ing] false information to

law enforcement." [Ex. LL; Ex. FF, M. Lopez Dep. 20:15-21:9; 18 U.S.C. § 4.]

Defendants' Response:

Defendants do not dispute this. Defendants note the underlying case involved narcotics.

77. At no time was Plaintiff Lopez removable from the United States based on her conviction for "misprision of felony" or any other reason. [*See* Defs.' Answer to Am. Compl., Dkt. # 82, ¶14; Ex. C, at Request No. 9; Defs.' Mem. in Opp. to Class Certification, Dkt. # 109, at 3.]

Defendants' Response:

Defendants do not dispute this.

78. On February 1, 2011, ICE issued an immigration detainer against Plaintiff Lopez, requesting that the LEA arrest Plaintiff Lopez pursuant to the detainer once the LEA's detention authority expired. [Defs.' Answer to Am. Compl., Dkt. # 82, ¶14; Ex. BB.]

Defendants' Response:

Dispute as to the term "arrest" since detainer requested BOP to "maintain custody" of Plaintiff Lopez. *See* Plaintiff Ex. BB.

79. The detainer against Plaintiff Lopez was issued pursuant to ICE's standard detainer policies and practices. [*See supra* ¶¶ 14-66; Ex. L, J. Antia 164:7-167:4, 169:20-170:12, 201:9- 202:21; Ex. BB; Ex. LL.]

Defendants' Response:

Defendants do not dipute this.

80. In issuing the detainer, ICE agent Antia mistakenly believed that "misprision of felony" was a drug offense. [Ex. L, J. Antia 201:9- 202:21.] On August 12, 2011, the day after Plaintiff Lopez filed the present lawsuit, ICE cancelled her detainer. [Ex. MM.]

Defendants' Response:

Defendants do not dispute this.

Date: February 9, 2016

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