

EXPLAINING THE **GONZALEZ V. ICE** LITIGATION AGAINST ICE DETAINERS

Gonzalez v. ICE is an important class action lawsuit raising fundamental questions about ICE enforcement practices, in particular the use of databases to target people for detainers and arrests. While the litigation is ongoing, it is worth understanding what is at stake in order to evaluate ICE detainers issued against your clients.

I. WHAT DO THE COURTS SAY?

On September 27, 2019, a federal district court judge issued a permanent injunction limiting the issuance of ICE detainers by some ICE offices. The district court held:

1. ICE violates the Fourth Amendment by relying on an unreliable set of databases to make probable cause determinations for its detainers.
2. ICE violates the Fourth Amendment by issuing detainers to state and local law enforcement agencies in states that do not expressly authorize civil immigration arrests under state law.

On September 11, 2020, the Ninth Circuit vacated the injunction and sent the case back to the district court to look more closely at the databases ICE uses and to reassess whether a neutral review of ICE's probable cause determinations is required. The Ninth Circuit held:

1. The district court needs to conduct further fact finding about the databases that ICE uses to make probable cause determinations for its detainers to properly assess whether the databases are insufficient to provide probable cause.
2. State laws that do not expressly authorize civil immigration arrests do not determine whether ICE violates the Fourth Amendment.
3. The Fourth Amendment requirement that arrests be reviewed by a neutral magistrate within 48 hours applies to civil immigration arrests.

II. TAKEAWAYS

1. This case raises fundamental questions about ICE enforcement practices, in particular the use of databases to target people for detainers, and what is required under the Fourth Amendment for immigration arrests.
2. The Ninth Circuit vacated the lower court's injunction against database detainers. Until the district court makes further findings or issues further orders, ICE can resume issuing detainers based solely on database checks. They are no longer required to rescind previously issued database detainers as was ordered in the September 2019 district court ruling. ICE can also continue to issue detainers

if a person is in removal proceedings, has a final removal order, or the person admits that they are removable (finding probable cause based on these were not targeted under this litigation).

3. The Ninth Circuit did not hold that the databases that ICE uses to make probable cause determinations for its detainees are actually reliable. Instead, the court provided a clearer legal standard for determining database reliability and remanded the case to the district court to do further fact finding. This means that it is possible that the district court could still find that the databases are not reliable to establish probable cause for ICE detainees.
4. The Ninth Circuit also held that the law requires a neutral magistrate, such as a judge, to review the basis for civil immigration arrests. This is not something that is currently part of immigration enforcement or procedures, since civil immigration arrests are generally reviewed only by ICE agents, so what this new requirement will look like and how it will be carried out is still unknown.

III. HOW TO ASSESS IF AN ICE DETAINER IS AFFECTED BY THIS LITIGATION

When ICE issues a detainer (Form I-247), they generally mark the reason why they believe a person is removable. The form lists four bases for probable cause of removability:

1. Final order of removal
2. Person is already in ongoing removal proceedings
3. Biometrics and database checks indicate the person is removable
4. The person admitted lack of immigration status/removability or provided other evidence showing removability.

The Gonzalez case is a class-action lawsuit that is focused on ICE detainees issued solely on **Reason 3 - the use of databases** - one of the most commonly checked boxes, to assess whether it is enough to provide ICE with probable cause to issue a detainer. See the section from a sample detainer below.

1. DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON (complete box 1 or 2).

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

IV. GEOGRAPHIC SCOPE OF THE CASE



Image from U.S. District Court, C.D. California

The *Gonzalez v. ICE* litigation is in the Central District of California (Los Angeles and surrounding counties). The district court's previous injunction was limited to ICE offices within the jurisdiction of the district court, which includes the Los Angeles Field Office, several sub-offices, and a national ICE detainer hub called the Pacific Enforcement Response Center.

However, the case has impacts far beyond California because:

1. The legal issues are national.
 - All ICE officers use the same set of databases, which are centralized systems. Defects in these databases are a national issue, not a California issue. If ICE databases used for issuing detainers are unreliable, they are equally unreliable in all parts of the country.
 - The issues in the case are whether ICE violates the Fourth Amendment by issuing detainers without probable cause and by detaining people without review of their arrest by a neutral magistrate. The U.S. Constitution and the Fourth Amendment applies everywhere.
2. The particular ICE offices in this case issue detainers across the country.
 - The Pacific Enforcement Response Center (PERC) is a federal building in Orange County, CA where ICE officers issue detainers 24/7 across the country to 42 states. All detainers issued from PERC are based on database searches. Immigrants across the U.S. are regularly subject to ICE detainers that are directly affected by this litigation.

V. WHAT IS ICE’S USUAL PROCESS FOR ISSUING DETAINERS?

Most detainers are issued locally - a nearby ICE office covers jails in the area. However, the Pacific Enforcement Response Center (PERC) is an ICE detainer hub that issues detainers across the country. Specifically, the PERC provides after-hours coverage to issue detainers in 41 states, and 24/7 coverage in California. This means that across the country (except in 8 states - Alaska, Washington, Oregon, Arizona, New Mexico, Colorado, Oklahoma, and Florida), detainers issued at night or on weekends may likely have come from PERC and will be subject to future rulings in the *Gonzalez* case. The exact balance of when or why a detainer comes from a field office versus the PERC is unknown and may vary from place to place.

ICE is required to have probable cause that a person is removable in order to issue a detainer. ICE is frequently alerted of a possible target through Secure Communities, whereby a person’s fingerprints is automatically shared with ICE when they are booked by a local jail. ICE can then do further database research to determine the person’s current immigration status and assess whether person is removable. Where the jail allows it, ICE officers can also frequently question people in local custody about their immigration history in order to try to find probable cause of removability. The PERC only issues detainers based on databases because it is not a field office with ICE agents that can visit the jails or gather other information.

When ICE issues a detainer request, it can ask the law enforcement agency to take several actions, including to hold a person beyond their release time to allow ICE to take custody of the person, to notify ICE of a person’s release date, or to transfer the person over to ICE’s custody.

The top of the ICE detainer shows what ICE office issued it:

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION DETAINER - NOTICE OF ACTION

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

VI. FAQ AND ADVICE ON THE EFFECTS OF THIS RULING IN CALIFORNIA

Who may receive a copy of a detainer request under the California Truth Act?

Under the Truth Act, Gov't Code 7283, when ICE issues a detainer to a California law enforcement agency, the person named in the detainer should always receive a copy of the detainer and be informed of whether the agency intends to comply with ICE's request. The detainer form also states that the request is not valid unless served on the subject of the detainer themselves.

Although receiving a copy of a detainer request (Form I-247) is not directly affected by the *Gonzalez* litigation, receiving copies is important for monitoring whether California law enforcement agencies are responding to potentially invalid database detainers.

Additionally, the Truth Act also requires the California law enforcement agency to provide a written notification to the person's counsel or other designee, if the agency notifies ICE that the person is being, or will be, released on a certain date. Although the Truth Act does not require the agency to provide a copy of the detainer, criminal defense and/or immigration attorneys should request copies from the sheriff's department or ICE. Several counties in California have worked out an agreement to send copies of all detainers to their respective public defender's offices or to have attorneys pick them up on a regular basis.

How does this litigation interact with the California Values Act?

The California Values Act, Gov't Code §§ 7282-7284.12, prevents anyone from being held beyond their time of release on an ICE detainer. A California law enforcement agency that prolongs someone's detention based on an ICE detainer violates state law, whether or not the detainer lacks probable cause because it is based on faulty databases. Therefore, California state law restrictions on such holds are stronger than *Gonzalez*-based arguments about probable cause.

However, the Values Act allows law enforcement agencies to notify ICE of a person's release and transfer that person directly to ICE date in certain circumstances, so long as they are not held beyond the time of their release in order to wait for ICE. It is unclear how the *Gonzalez* rulings affect these practices because the litigation is focused on ICE's actions, not local jails. But ICE is liable for making arrests without probable cause, and local jails may be responsible for helping them do so.

What should I do if DHS has placed an invalid detainer on my client?

If your client is subject to a database detainer, you can and should challenge it if you think ICE did not have probable cause. The I-213 is ICE's record of an immigration arrest, including the issuance of a detainer, and it will typically list the databases that ICE checked in making its assessment of probable cause. If you are a public defender, you may want to partner with an immigration lawyer to get a copy of the I-213. While the overall issue of whether ICE can rely on a set of databases to make probable cause determinations for its detainers is before the district court, the Ninth Circuit did not rule out the possibility that these databases are unreliable. Therefore, advocates should continue to make arguments that database detainers are invalid.

To challenge a detainer, you should contact the law enforcement agency who has custody over your client. If your client is being held in county jail, usually the county Sheriff's office has custody. Inform the agency that the ICE detainer could be invalid, explain why, and provide a copy of the *Gonzalez v. ICE* court decision. Make sure to clearly explain why the ICE detainer could be invalid and request that the agency release your client immediately upon eligibility under state criminal law. Inform the agency that they may be subject to liability if they continue to hold your client on an invalid ICE detainer beyond the time in which they would otherwise be eligible for release from criminal custody. Make the request in



writing and by telephone. Keep records and copies of all communications.

If you are unsuccessful, it may be necessary to file a lawsuit against the jail. It may also be helpful to contact community organizers in your locality and initiate a deportation defense campaign, in order to call public attention to the matter.

Alternatively, you can contact ICE to demand that they lift the detainer. Be careful because they may just seek further evidence from your client or the jail in order to substantiate it from sources outside of their databases.

How does this interact with the new ICE enforcement priorities?

On February 18th ICE Acting Director Tae Johnson issued an interim Memo to ICE (“Johnson Memo”) regarding how the agency will interpret and carry out the DHS enforcement priorities set forth by former Acting DHS Secretary David Pekoske. The Johnson Memo is temporary guidance to ICE to prioritize enforcement actions against people who threaten “National Security,” “Border Security,” and “Public Safety.” These enforcement priorities apply to essentially all discretionary enforcement actions, including when ICE issues detainers.

Although this is a separate issue from those presented in *Gonzalez v. ICE*, it is important for you to keep in mind as an extra tool for advocacy if a person was issued a detainer outside of these priorities.

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