



UPDATE IN THE **GONZALEZ V. ICE** LITIGATION AGAINST ICE DETAINERS

Gonzalez v. ICE is a class action lawsuit raising fundamental questions about ICE enforcement practices, in particular the use of databases to target people for detainers and arrests. The lawsuit challenges the legality of ICE issuing detainers based solely on information from searches of DHS databases. Although the litigation is still pending, important developments in the case may affect people currently subject to ICE detainers, as we explain below. For more about the litigation and the legal filings, see: <https://www.aclusocal.org/en/cases/gonzalez-v-ice>.

UPDATE: On February 17, 2022, ICE agreed to stop issuing I-247A detainers based only on database checks from the Pacific Enforcement Response Center (“PERC”) during a six-month stay in the litigation. It also agreed that Field Offices around the country would not be permitted to issue database detainers that otherwise would have been issued by the PERC. Approximately 50% of all ICE detainers issued nationwide are issued by the PERC. Except for the Los Angeles Field Office, these detainers are issued during after-hours.

This means until at least August 18, 2022, individuals should not receive a I-247A detainers based only on database checks after hours from ICE Field Offices, or at any time by the PERC or Los Angeles Field Office. (However, ICE is not precluded from issuing I-247G detainers. For more on this and other practical implications of the agreement, see below.).

ACTION: Please contact *Gonzalez* class counsel if you encounter an ICE I-247A detainer issued after Feb. 17, 2022 based only on database checks that you believe may violate the agreement. Please email Jennie Pasquarella at jpasquarella@aclusocal.org or Mark Fleming at mflaming@heartlandalliance.org.

NOTE: It does not matter if your local or state law restricts how a local jail may respond to the detainer, nor if it mandates compliance. This lawsuit is about what is required of ICE, regardless of how the receiving jail may respond.

I. BASICS OF THE GONZALEZ CASE

***Gonzalez v. ICE* is a lawsuit challenging the legality of ICE’s use of detainers.** A detainer is a request from ICE (occasionally CBP) to a jail or prison to facilitate transfer of a person in custody directly to immigration authorities. Specifically, the detainer asks the jail (1) to notify ICE as to when the person will be released from criminal custody, and (2) to keep the person in custody for an additional period of up to 48 hours, to give ICE more time to pick the person up. ICE detainers facilitate an estimated 60-70% of ICE arrests that occur around the country.

ICE must have probable cause that a person is legally subject to deportation in order to issue a detainer. ICE often issues detainers based on collected information in various DHS databases. **The *Gonzalez* lawsuit claims that these databases are so full of error and missing information that it is illegal for ICE to issue a detainer based solely on the database records.** However, the lawsuit does not challenge detainers based on removal orders or current removal proceedings, although those records are also stored in DHS databases.

This lawsuit does not affect state and local policies that regulate whether a local jail may or may not comply with ICE detainers. The lawsuit is only against ICE. However, a local or state jail that detains a person based on a database detainer may be liable for unlawful detention in that instance.

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

When ICE issues a detainer (Form I-247A), ICE agents generally mark the reason why they believe a person is removable. The form lists four generalized 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 focuses on ICE detainers issued based on **Reason 3 (biometrics and database checks)**—the most frequently checked box. See the section from a sample detainer below. For a full annotated ICE detainer, see: https://www.ilrc.org/sites/default/files/resources/i-247a_new.pdf.

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.

III. GEOGRAPHIC SCOPE OF THE CASE

The case has impacts far beyond California:

The *Gonzalez v. ICE* litigation is class action that applies to ICE detainers issued out of the Pacific Enforcement Response Center (PERC) and the Los Angeles Field Office. Located in Laguna Niguel, CA, the PERC issues detainers to nearly every state in the country and much of California after hours. The PERC also issues detainers 24 hours a day in the area covered by the ICE Los Angeles Field Office.

PERC detainers account for approximately 42% of all ICE database-only (box 3) detainers nationwide. Specifically, the PERC provides after-hours coverage to issue detainers in some 47 states, plus 24/7 coverage in California. As a result, class members for the litigation include any person anywhere in the

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

country who is subject to a PERC detainer.

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)

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 official. The U.S. Constitution and the Fourth Amendment apply everywhere.

This means that any detainer based on database checks alone, whether or not it was issued by the PERC or is specifically subject to the Gonzalez litigation, might be challenged for lack of probable cause. In local or state custody, this might be a basis to get the detainer lifted or challenge a person's hold. In removal proceedings, this could be a basis to make a motion to suppress or terminate. For more resources and practical advice on the legal issues of ICE detainers, see Section VI.

IV. WHAT IS ICE'S USUAL PROCESS FOR ISSUING DETAINERS?

UPDATE: Under the February 17, 2022 stipulation, the PERC will not issue detainers based solely on database checks. This does not cover people who are already in removal proceedings or have final orders of removal, it only covers detainers based on the third checkbox, as discussed above.

- If the PERC officer would like to issue a detainer but has only database information to justify it, they may issue a Form I-247G, which is a modified detainer form that requests only that the jail give ICE notice of the person's release and does not request 48 hours of detention. See the redacted I-247G below. They may notify the local ICE Field Office, but the Field Office may not issue its own database detainer.
- However, the local ICE office could go to the jail to extract admissions from the person about their immigration status, and then issue a regular I-247A detainer. ICE is probably more likely to do this in jurisdictions that still hold a person extra time on an ICE detainer.
- No case that would otherwise be routed through interoperability to the PERC will be re-routed through interoperability to a field office. This means that ICE must not redirect any automatic Secure Communities results that would have been sent to the PERC to be sent to a different ICE Field Office that is not covered by the lawsuit, in order have that Field Office issue a database detainer.

ICE is automatically notified of all arrests in the country through Secure Communities, whereby a person's fingerprints are automatically shared with ICE when they are booked into local, state or federal criminal custody. The resulting information from this fingerprint check is then sent to the PERC and/or the relevant ICE Field Office. ICE agents, either at the Field Office or the PERC, may then do further database research to determine the person's current immigration status and assess whether person is removable. Beyond Secure Communities, many ICE Field Offices have relationships and arrangements with local jails to give ICE access to the local jail databases or to provide ICE with regular lists of everyone brought into custody, which ICE may also use to issue a detainer. Where the jail or prison allows it, ICE agents also frequently question people in custody about their immigration history in order to try to find probable cause of removability. In contrast, the PERC only issues detainers based on database information, because it is not a Field Office with agents that can visit the local jails or work with local agencies.

ICE is required to have probable cause that a person is removable to issue a detainer, and evidence of foreign birth combined with a lack of any other information in DHS databases, is insufficient to provide probable cause.

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

REQUEST FOR ADVANCE NOTIFICATION OF RELEASE

Subject ID: [REDACTED] *BOOKING #* [REDACTED] File No: [REDACTED]
Event #: [REDACTED] Date: **March 16, 2020**

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency) LOS ANGELES CO CENTRAL JA 441 BAUCHEST ST LOS ANGELES, CA 900120000	FROM: (Department of Homeland Security Office Address) LOS ANGELES, CA, DOCKET CONTROL OFFICE ICE IRO Los Angeles Field Office 300 N Los Angeles Street, Room 7621 Los Angeles, CA 90012
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Name of Subject: [REDACTED]
 Date of Birth: [REDACTED] Suspected Citizenship: **MEXICO** Sex: **M**

DHS SUSPECTS THAT THE SUBJECT IS A REMOVABLE ALIEN AND SEEKS AN OPPORTUNITY TO DETERMINE WHETHER THERE IS PROBABLE CAUSE TO BELIEVE THAT THE SUBJECT IS A REMOVABLE ALIEN.

STD #: [REDACTED]

IT IS THEREFORE REQUESTED THAT YOU:

- 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 he or she is a removable alien. Please notify DHS by calling U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP) at **213-830-4925**. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at (802) 872-6020.
- This request for notification **does not** request or authorize that you detain the subject beyond the time he or she is currently scheduled for release from your custody.
- This request should not impact decisions about the subject's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters.
- Relay this request to any other law enforcement agency to which you transfer custody of the subject.
- 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 alien previously submitted to you on _____ (date).

DANIEL CHEVEZ - DO *9924*

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

Notice: 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, 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)

Interim Form I-247G (1/2020) Page 1 of 1

Sample I-247G - ICE requests notification of release only, likely because they do not have probable cause for arrest.

V. MORE ON THE LEGAL ISSUES AND COURT DECISIONS

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.

On February 17, 2022, ICE stipulated to following the original terms of the district court injunction, essentially that the PERC and Los Angeles ICE office will not issue detainers based solely on database checks, while the litigation is ongoing.

TAKEAWAYS ON THE LEGAL ISSUES OF ICE DETAINERS

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 did not hold that the databases that ICE uses to make probable cause determinations for its detainers 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 detainers.
3. 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

VI. HOW SHOULD ATTORNEYS REPRESENT SOMEONE SUBJECT TO AN ICE DETAINER?

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

Please contact Gonzalez class counsel at jpasquarella@aclosocal.org or mflaming@heartlandalliance.org.

- For more background on handling ICE detainers generally, see: <https://www.ilrc.org/ice-detainers-advice-and-strategies-criminal-defense-counsel>.



- For California practitioners, specific advice including California state laws and practices is available here: https://www.ilrc.org/sites/default/files/resources/note_5a_ice_detainers_2021_final.pdf
- For a short summary of significant court rulings on detainers, see: <https://www.ilrc.org/ice-detainers-are-illegal-so-what-does-really-m>

How does this interact with the new DHS enforcement priorities?

On September 30, 2021, DHS released a new memorandum on immigration enforcement priorities, which took effect on November 29, 2021. Broadly, the policy prioritizes immigration enforcement actions against people DHS alleges are threats to “National Security,” “Border Security,” and “Public Safety.” These enforcement priorities apply to essentially all discretionary enforcement actions, including when ICE issues detainers and whether they decide to arrest someone whom they have put a detainer on.

Practice advisories on these enforcement priorities are available at:

- For Immigration Practitioners: <https://www.ilrc.org/practice-advisory-immigration-advocates-final-enforcement-priorities>
- For Criminal Defense Attorneys: <https://www.ilrc.org/practice-advisory-criminal-defense-attorneys-final-enforcement-priorities>

