



EXPLAINING *GONZALEZ V. ICE*

A GUIDE FOR ADVOCATES IN TEXAS



UPDATE: On September 11, 2020, the [Ninth Circuit issued a decision](#) in the *Gonzalez v. ICE* litigation and made some important changes, explained below:

1. The Ninth Circuit reversed the permanent injunction (district court's order) that prevented ICE offices in the Central District of California (including the PERC) from issuing detainers based solely on federal database searches. This means that now ICE is allowed to issue detainers based on federal database checks again. The implication for Texas is that the PERC facility in Laguna Niguel, CA can now resume issuing detainers to Texas based on federal database checks.
2. The Ninth Circuit sent the case back to the federal district court to look at specific questions about the reliability of the databases. The court ruled that more fact-finding is needed before determining if the databases are too error-ridden for ICE to rely on. It is possible that, after further fact-finding, the district court will reach the same conclusion as before and reinstate the previous court order.

What remains important:

1. We know that ICE often issues wrongful detainers. Therefore we must continue reviewing detainers and challenging ones that may be invalid. We should also continue monitoring and challenging detainer violations, like holding someone on a detainer for more than 48 hours beyond the date/time of their release from criminal custody.
2. The district court's prior decision carefully analyzed the shortcomings of the most important and relevant databases that ICE uses. Therefore, the district court's findings of facts on all those databases, such as all the errors related to U.S. citizens, may still be relevant to challenging an ICE detainer or arrest in an individual case, or possibly arguing that ICE cannot meet its burden to show alienage in removal proceedings.
3. Local advocacy around issues like implementing a detainer review procedure, providing "know your rights" information to people in jail, and data transparency is still as important as ever.

Keep an eye out for further decisions. The district court litigation is ongoing.

PREVIOUSLY...

On February 5, 2020, a federal judge issued a final judgment and order limiting the issuance of [U.S. Immigration and Customs Enforcement \(ICE\) detainers](#) by some ICE offices. The court in [Gonzalez v. ICE](#) held:

ICE violates the Fourth Amendment by relying on an unreliable set of databases to make probable cause determinations for its detainers. The court ruled that ICE cannot issue detainers based only on database checks¹ because these checks don't provide probable cause for arrest.

The Court issued an order of final judgment barring all ICE offices in the Central District of California from issuing detainers based solely on ICE's search of databases and requiring that ICE affirmatively withdraw all detainers previously issued on the basis of database checks alone. Even though this is directed at California, it is relevant for Texas because the Pacific Enforcement Response Center (PERC) is located in the Central District of California. PERC is an ICE facility that issues "after hours"² detainers to 42 states, including Texas.

TAKEAWAYS

- » **The court's direct orders only apply to ICE offices in the Central District of California, but that includes the PERC, which issues detainers across the country.**



TEXAS IMPLICATIONS: Any detainer from the PERC based on database searches (except detainers based on prior removal orders) is illegal and in direct violation of the Court's order.³ If you see a detainer in Texas that was issued from PERC or Laguna Niguel, you should advocate with the Sheriff's office for the ICE hold to be lifted based on the illegality of the detainer.

- » **The court's legal analysis can be applied nationwide because ICE is a federal agency and its databases are centralized. All ICE offices in the country use the same federal databases to issue detainers, and these have been found to be insufficient for establishing probable cause.**



TEXAS IMPLICATIONS: Although the court order does not directly restrict ICE offices outside of the Central District of California from issuing detainers based on database checks, you can use the court's analysis to demonstrate that all detainers based on database checks are illegal under the Fourth Amendment, and therefore the Sheriff's office could be held liable for complying with them. The Fourth Amendment supersedes state laws, including the SB 4 detainer compliance mandate.

WHAT SHOULD WE DO NOW?

1. If a person is in local criminal custody with an ICE hold, get a copy of the ICE detainer. If the person did not receive their detainer, you can help them advocate for a copy from the Sheriff's office. Per ICE's own policy and the detainer form itself (Form I-247A), an ICE detainer is not valid unless served on the subject of the detainer.
2. Review the detainer.⁴ First, check the basis of the detainer. Under section 1 of Form I-247A, a box should

1 ICE detainers based on database checks account for a significant number of all ICE detainers.

2 There is no clear definition of "after hours," but we understand it to mean nights and weekends when the local ICE offices may be closed.

3 PERC generally only issues detainers based on database searches or prior orders of removal. Detainers based on prior orders of removal are not affected by the *Gonzalez* decision.

4 For guidance on what to look for on an ICE detainer, see our annotated ICE detainer: <https://www.ilrc.org/annotated-detainer-form-2019>.

be marked which indicates how ICE has determined that probable cause exists that the subject of the detainer is a “removable alien.” If box 3 (“**biometric confirmation of the alien’s identity and a records check of federal databases**”) is checked, the detainer lacks probable cause. Next, look at the “from” box to see if it was issued by PERC/Laguna Niguel. If so, it is an illegal detainer and a direct violation of the court’s order. Contact the ACLU of Southern California to let them know that ICE has violated the court’s order. If issued by another ICE office, you should advocate with the Sheriff’s office to lift the hold because all detainers based on database checks are illegal under *Gonzalez v. ICE*, except for people who are alleged to have prior removal orders.⁵ Even in states like Texas, where honoring detainers is mandatory, holding someone without probable cause violates the Fourth Amendment and is illegal.

3. Reinforce that people should not submit to ICE interviews, as they are voluntary, even if ICE uses coercive tactics. Because of this decision, ICE will likely become more reliant on other ways to obtain probable cause of removability. Therefore, it is more important than ever that individuals do not voluntarily provide any information to ICE.



FREQUENTLY ASKED QUESTIONS ABOUT *GONZALEZ V. ICE*'S IMPLICATIONS FOR TEXAS

Who may request a copy of an issued detainer request?

The subject of the detainer and the subject’s attorney(s), including criminal defense and immigration counsel. Others may request a copy of the detainer as well, but at a minimum, the subject should be entitled to a copy.

What should I do if I cannot get a copy of the detainer?

Let the law enforcement agency know that the detainer is invalid unless served on the subject of the detainer (the detained person). On the detainer form itself, Form I-247A, it states “the alien must be served with a copy of this form for the detainer to take effect.” This is also stated in [ICE’s policy guidance](#).

So, all detainers based on database checks issued by PERC to Texas are now illegal. How often does PERC issue detainers to Texas law enforcement agencies?

This information was not part of the litigation. We recommend filing a Public Information Act request with your local Sheriff’s office requesting that information. Keep in mind that PERC might still issue valid detainers based on a prior removal order; these detainers were not covered in the litigation.

What if the detainer was issued from an ICE office in Texas, or anywhere besides PERC - is it still illegal?

Yes, if the detainer is based on database searches (Section 1, Box 3 of Form I-247A) alone, then it lacks probable cause for arrest, and the person should not be held for ICE. The *Gonzalez v. ICE* court held that ICE cannot issue detainers based only on database checks because these databases are unreliable and error-ridden, and so they do not provide probable cause for arrest under the Fourth Amendment. Even if SB 4 mandates holding people on detainers, Texas law cannot order a sheriff to violate the Fourth Amendment.

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

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 is invalid, explain why, and provide a copy of the *Gonzalez v. ICE* court decision. Make sure to clearly explain why the ICE

⁵ People with prior removal orders have a different box (box 1) checked on ICE Form I-247A.

detainer is 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 the law enforcement agency indicates they will continue to hold your client pursuant to the ICE detainer request, consider contacting the nearest ICE processing center or field office with jurisdiction over your client. Advise the ICE office that you are representing someone subject to an unlawful detainer and that you are requesting ICE lift the detainer, which is invalid pursuant to the *Gonzalez v. ICE* injunction. **But think carefully about how and when to do this because the local ICE office is not bound by the court's order, and might issue a replacement detainer instead.**

Lastly, if contacting the law enforcement agency and/or ICE is unsuccessful, it may be necessary to file a lawsuit against the jail and/or ICE. It may also be helpful to initiate a community deportation defense campaign, in order to call public attention to the matter.

Are there ways to advocate more broadly than on an individual case-by-case basis?

Yes. Per the decision, we should advocate for local law enforcement agencies in Texas to immediately stop enforcing all ICE detainers based only on database checks, and to adopt a detainer review procedure to ensure that the county does not violate individuals' constitutional rights by complying with illegal ICE detainers. The ILRC has created a template letter to send to Sheriffs in Texas explaining the decision and warning them of potential liability if they continue to honor illegal ICE detainer requests. Contact Anita Gupta at agupta@ilrc.org for further information.