



# IMMIGRATION ENFORCEMENT AUTHORITY FOR LOCAL LAW ENFORCEMENT AGENTS

## Introduction

This document seeks to clarify when, if ever, a local law enforcement agency (LLEA) has authority to arrest or prolong detention based on suspected civil immigration violations. Fundamentally, this is a two part question: 1) does the arrest or detention satisfy the requirements of the Fourth Amendment – specifically, probable cause? and 2) even if the Fourth Amendment is satisfied, does the LLEA have legal authority to make the seizure?

The Fourth Amendment requires that an arrest be based on a warrant or probable cause of a crime. This includes an arrest that occurs when a person who would otherwise be released from custody is subject to continued detention at the request of federal immigration officials. Courts have repeatedly held that prolonged detention on an immigration hold constitutes a new arrest and, thus, must be justified by probable cause of a new offense.<sup>1</sup>

However, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP or Border Patrol) regularly ask LLEAs to detain individuals in local jails without meeting these basic Fourth Amendment requirements. ICE and CBP routinely provide LLEAs with immigration detainers (also known as “holds”) with the expectation (or direct request) that the LLEAs will detain individuals after they would otherwise be released, in order for ICE to assume custody.<sup>2</sup> These immigration detainers (DHS Form I-247) do not provide a constitutionally valid basis for an LLEA to arrest or detain an individual beyond release of state custody. An LLEA who agrees to detain an individual based on an ICE detainer or related request bears full responsibility (and liability) for that detention.<sup>3</sup>

LLEAs are generally not authorized to make arrests for civil immigration violations (such as unlawful presence in the United States). The Supreme Court, in *Arizona v. United States*, clarified that local law enforcement agents do not have authority to stop or detain people for suspected violations of civil immigration law.<sup>4</sup> Although authority to arrest is generally a matter of state law,<sup>5</sup> the Supreme Court struck down an Arizona law that sought to authorize detention based on suspicion of immigration violations, finding that such authority was preempted by federal law.<sup>6</sup> LLEAs generally have authority to enforce criminal laws, not civil immigration law.<sup>7</sup>

In light of the requirements of the Fourth Amendment and the states’ lack of authority to enforce civil immigration laws, many LLEAs have enacted new policies against holding individuals for federal immigration officials. By and large, LLEAs have recognized that ICE detainers, administrative warrants, and other civil immigration documents are frequently not based on probable cause, and do not provide a legal basis to detain someone.

This memorandum analyzes the role and limitations of local and state law enforcement agencies’ authority regarding civil immigration enforcement and detention. It describes the legal basis and authority of ICE detainers, administrative immigration warrants, and other immigration documents. It focuses specifically on the legal authority for LLEAs to hold an individual for immigration purposes after they would otherwise be released from state custody.

We conclude that, for the reasons outlined above, LLEAs who hold an individual for immigration after they would otherwise be released are risking liability for unlawful detention and possible violations of the detainee’s constitutional rights. We encourage jails and law enforcement agencies to implement policies consistent with the obligations and restrictions laid out in this research.

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## **1. How do the announcements of changes to immigration enforcement from November 20, 2014 affect local law enforcement agencies?**

**On November 20, 2014, President Obama released a number of policy memos with changes to the immigration system.<sup>8</sup> However, the new enforcement policies do not change any of the laws regarding the authority of local law enforcement agencies (LLEAs). Many LLEAs may see changes in the number or type of requests from ICE, specifically they may see fewer requests to hold an individual and more requests for information. But the underlying legal and constitutional principles still apply, regardless of how ICE may shift its enforcement priorities. This document will make note of any specific instances where LLEAs may be affected by the new policy guidance. For a brief summary of the new enforcement policies, see [http://www.ilrc.org/files/documents/ilrc\\_enforcement\\_2\\_pager-final.pdf](http://www.ilrc.org/files/documents/ilrc_enforcement_2_pager-final.pdf).**

## **2. Is it a crime to be in the U.S. without lawful immigration status?**

**No. Simply being present in the U.S. without lawful immigration status is not a crime.<sup>9</sup> No individual can be criminally prosecuted merely for lacking valid immigration status. Lack of proper immigration status is a violation of *civil* immigration law.<sup>10</sup> Individuals who do not have lawful status or who have violated their status may be subject to civil deportation (a.k.a., removal) proceedings, which will determine whether or not they are allowed to remain in the country.<sup>11</sup> Many individuals who are present without authorized immigration status may in fact be eligible to obtain lawful status.<sup>12</sup>**

## **3. Can LLEAs make stops or arrests for civil immigration violations?**

**No.** Ordinarily, local and state law enforcement can only make a stop or arrest for criminal violations. The United States Supreme Court in *Arizona v. United States* held that there is no basis for LLEAs to arrest on suspicion that the individual is unlawfully present or in violation of other civil immigration laws.<sup>13</sup> LLEAs lack authority to make civil immigration arrests because Congress has assigned that responsibility exclusively to federal agents.<sup>14</sup> Even an investigatory stop must be based on reasonable suspicion that “person apprehended is committing or has committed a crime.”<sup>15</sup> This requirement also applies to prolonged detention after a lawful stop or arrest. “[P]ossible criminality is key to any *Terry* investigatory stop or prolonged detention. Absent suspicion that a suspect is engaged in, or is about to engage in, criminal activity, law enforcement may not stop or detain an individual.”<sup>16</sup> Suspicion or knowledge of unlawful presence does not justify a stop by LLEAs.<sup>17</sup>

## **4. If there is probable cause of civil immigration violations, can an LLEA prolong detention or make an arrest on that basis?**

**No.** Probable cause of immigration violations is not the only question regarding an LLEAs’ authority to arrest or postpone someone’s release based on alleged immigration offenses. A second, more fundamental question is whether an LLEA has authority to make an arrest for civil immigration violations at all, which they generally do not.<sup>18</sup> A determination of whether someone is subject to deportation is a civil immigration issue outside the arrest authority of local law enforcement.<sup>19</sup> LLEAs cannot detain someone based on immigration status; state and local authority to make independent arrests for civil immigration violations is preempted by federal law.<sup>20</sup> As the Supreme Court said in *Arizona v. U.S.*, “Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances...If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.”<sup>21</sup>

Moreover, *Arizona* and subsequent decisions have made clear that even a brief detention on the basis of immigration status following a lawful stop or arrest may be impermissible. The Supreme Court held that

Arizona was permitted to require officials to check the immigration status of someone in their custody, *but not if it would prolong that custody*. Such prolonged detention would “raise constitutional concerns.”<sup>22</sup> And in *Melendres v. Arpaio*, the Ninth Circuit held that LLEAs could not prolong detention at a roadside stop because of known or suspected immigration status.<sup>23</sup>

Because briefly detaining individuals to ascertain their immigration status is a potential constitutional problem, full custodial arrests for immigration purposes would be obviously outside constitutional bounds.<sup>24</sup> The Supreme Court made abundantly clear that federal officials are the only law enforcement agents responsible for arresting and detaining individuals for immigration violations, and that state authority is preempted (except where it has been specifically delegated under the 287(g) program).<sup>25</sup> LLEAs who prolong imprisonment based only on evidence of civil immigration violations risk liability for unlawful imprisonment and violating the Fourth Amendment.<sup>26</sup>

## **5. Can state law authorize LLEAs to make their own arrests for civil immigration violations?**

**No.** Although some states have attempted to create such authority, that is exactly what the Supreme Court overruled in *Arizona v. United States*.<sup>27</sup> Arizona passed a state law that sought to allow their officers to make immigration arrests, and the Supreme Court held that this was preempted by federal law.<sup>28</sup> Most states authorize law enforcement to make arrests based on evidence of criminal violations of state law, and sometimes based on federal crimes. The scope of authority for a warrantless arrest varies significantly among states, but after *Arizona v. United States*, it is clear that a state law authorizing LLEAs to make arrests for civil immigration violations is invalid.<sup>29</sup>

## **6. What is an ICE detainer (Form I-247)?**

An ICE detainer is a notification request from the federal government.<sup>30</sup> An ICE detainer is the document (Form I-247, Immigration Detainer Notice of Action) that an ICE agent files with the local jail or prison alerting the facility that ICE is considering immigration enforcement actions against the individual named on the detainer form. An ICE detainer is not a warrant and is not reviewed by a neutral magistrate.<sup>31</sup> Rather, it is an administrative document issued by an ICE agent requesting notification of release of the person in question.<sup>32</sup> The statute and regulations addressing immigration detainers do not specify that ICE make particular determinations as to the individual’s immigration status or right to be in the United States before issuing a detainer.<sup>33</sup> Nor is an ICE detainer request indicative of whether ICE will initiate deportation proceedings against the individual or whether the person will actually be deported.<sup>34</sup>

## **7. What is the purpose of an ICE detainer request (Form I-247)?**

An ICE detainer is a mechanism for notification. The I-247 form notifies the receiving LLEA that the individual identified in the detainer may be subject to civil immigration proceedings.<sup>35</sup> It requests that the LLEA notify ICE 30 days prior to the individual’s release, or as far in advance as possible.<sup>36</sup>

The detainer form also requests the LLEA to maintain custody of the identified individual after they would otherwise be released, for a period not to exceed 48 hours (excluding weekends and holidays), while ICE decides whether to take the person into custody and/or initiate deportation proceedings.<sup>37</sup> However, recent federal court rulings have found that an LLEA who engages in this additional 48 hour detention pursuant to an ICE detainer is committing an unconstitutional arrest without probable cause.<sup>38</sup> In fact, several courts have criticized the practice of holding anyone on an ICE detainer, analyzing the detainer as a request for notice, not a mechanism for detention at all.<sup>39</sup>

On November 20, 2014, DHS released new policy guidance directing ICE to change their use of detainers.<sup>40</sup> This guidance directs ICE to replace requests for extended detention with notification requests. However, under undefined 'special circumstances,' ICE may still request a hold. These new directives do not change any governing law regarding ICE detainers. However, the policy announcements may result in a shift toward fewer requests from ICE for LLEAs to hold a person after they would otherwise be released.

## **8. Is a LLEA required under federal law to comply with an ICE detainer request?**

**No.** ICE detainer requests are not mandatory. Federal courts have confirmed that an immigration detainer cannot compel action from an LLEA.<sup>41</sup> Specifically, the Tenth Amendment of the Constitution bars the federal government from enacting any laws or regulations that commandeer the resources of the states to enact and enforce them.<sup>42</sup> An immigration detainer is a mechanism of federal immigration enforcement, and no LLEA is obligated to comply or assist in immigration enforcement. Therefore, a local municipality's decision whether or not to respond to a detainer is entirely discretionary.<sup>43</sup> Further, the federal government itself maintains that ICE detainer requests are voluntarily responded to at the discretion of the LLEA.<sup>44</sup>

*The voluntary nature of ICE detainers is unaffected by the changes announced to the Secure Communities program.<sup>45</sup> Requests from ICE to assist with immigration enforcement remain entirely voluntary and within the discretion of local policy-makers.*

## **9. Is an ICE detainer request the same as a criminal arrest warrant or a criminal detainer?**

**No.** ICE detainer requests are fundamentally different from criminal arrest warrants and criminal detainers.

### *ICE Detainer Request*

An ICE detainer (I-247) is a notification to another law enforcement agency that ICE is investigating an individual in their custody, and a request that the LLEA notify ICE when the person will be released.<sup>46</sup> The detainer form may also request that the LLEA hold the individual beyond the time they would otherwise be released, to allow ICE to take custody, although this detention is in many cases an unconstitutional arrest.<sup>47</sup> Any authorized immigration officer may at any time issue an ICE detainer request to any federal, state or LLEA.<sup>48</sup> A detainer serves to advise another law enforcement agency that ICE may seek custody of the identified individual for the purpose of further investigation, to initiate removal proceedings, or for actual removal of that person.<sup>49</sup> No probable cause determination is required for the issuance of an ICE detainer and it is not reviewed by any court or judicial officer.<sup>50</sup>

### *Criminal Arrest Warrant*

An arrest warrant is a legal order issued by a judge after a determination that there is probable cause to believe that the person has committed an alleged criminal violation.<sup>51</sup> It directs law enforcement officers to deliver a specific individual by means of arrest before the appropriate court. Police may make an arrest pursuant to a valid warrant without making their own determination of probable cause.<sup>52</sup> A criminal warrant will ordinarily identify the name of the judge and the issuing court on the warrant.

### *Criminal Detainer*

A criminal detainer is a request from another jurisdiction for custody of an individual in order to prosecute them on an untried criminal indictment, information, or complaint.<sup>53</sup> The Interstate Agreement on Detainers, to which all states are parties, regulates the requirements and obligations for criminal detainees.<sup>54</sup> These requirements include notice to the prisoner, that the detainer be supported by a certified copy of the underlying indictment, and that the request for custody be approved and transmitted by a court.<sup>55</sup> ICE detainees are not covered by the Interstate Agreement.<sup>56</sup> Additionally, ICE detainees are issued by ICE agents and are not subject to review by a court.<sup>57</sup>

*These distinctions have not changed under the November 2014 announcements regarding the Secure Communities program and ICE's use of immigration detainees. ICE detainees are civil administrative documents issued by ICE agents without the review of a neutral magistrate. They do not have the same legal force or authority as a criminal arrest warrant or criminal detainer.*

## **10. Can a LLEA make an arrest or prolong detention pursuant to an ICE detainer?**

**Usually not.** Detaining an individual after they would otherwise be released constitutes a new arrest, which must meet Fourth Amendment requirements.<sup>58</sup> Detaining someone in a jail for a new purpose, after their charges are dispensed with, they have posted bail, or when they otherwise must be released, clearly amounts to a new arrest.<sup>59</sup> Therefore the LLEA must have authority to make such a warrantless arrest, and it must comport with the Fourth Amendment. The detainer itself is not a warrant and does not provide any arrest authority of its own.<sup>60</sup>

Only if the LLEA has a sufficient basis to make its own warrantless arrest for a new or outstanding offense can the LLEA continue to detain someone who should be released. This means that the LLEA must have probable cause to suspect the person of a crime.<sup>61</sup> Civil immigration violations are not crimes, and LLEAs are generally not authorized to make arrests based on civil immigration violations.<sup>62</sup>

Pretextual delays, or release processing delays, designed to slow release in order to permit ICE to arrive in time to encounter and apprehend the individual as he or she is leaving the jail may also create liability to the LLEA for unlawful seizure.<sup>63</sup>

*Because of the policies released on November 20, 2014, LLEAs may see more requests from ICE, in particular seeking ways to transfer individuals to ICE custody when the state or local jurisdiction would otherwise release them. Nonetheless, statutory and constitutional restrictions will apply.*

## **11. Does the most recent (2012) ICE Detainer Form change how LLEAs should respond to detainer requests?**

**No. The most recent detainer form adopted in December 2012 does not make detainees mandatory, and it is still not reviewed by a judge.** Until 2012, the ICE detainer request form advised that “an investigation has been initiated,” into the person named on the detainer, which the federal courts specifically found to lack any indication of probable cause sufficient to detain someone.<sup>64</sup> The current form I-247 states that ICE has “determined that there is reason to believe the individual is an alien subject to removal.”<sup>65</sup> However, this still does not indicate probable cause of a crime for which an LLEA can arrest. Deportability is not a basis for an LLEA to arrest or detain anyone.<sup>66</sup>

The detainer form uses the phrase “reason to believe,” which may imply a lower standard of proof than is required for arrest under the Fourth Amendment. The Attorney General of Maryland noted, in a

memorandum analyzing ICE detainer requests, “Given the talismanic significance of “probable cause,” it would seem meaningful – if not dispositive – that the current Form I-247 does not use the term.<sup>67</sup> In fact, ICE continues to assert that no probable cause is needed for an ICE agent to issue a detainer request to an LLEA.<sup>68</sup> This argument is unlikely to prevail,<sup>69</sup> but even if ICE does not need to establish probable cause before issuing a detainer, that would not relieve an LLEA of its own obligations under law.

## **12. What is an ICE Administrative Warrant and how does it differ from an ICE detainer?**

ICE warrants (Form I-200 and I-205) are administrative documents that identify an individual suspected of being subject to deportation and authorize *designated immigration agents* to take the identified person into custody.<sup>70</sup> These documents are not reviewed or issued by a court or judicial officer.<sup>71</sup>

Unlike an ICE detainer request, which serves to notify a state or local LEA of ICE’s interest in the person, an administrative warrant serves to authorize any *ICE agent* to take custody of an individual.<sup>72</sup> Pursuant to the immigration statute and regulations, only an authorized ICE agent is permitted to issue, serve and/or execute an administrative ICE warrant.<sup>73</sup> Immigration laws and regulations do not authorize state or local LEAs to issue, serve, or execute administrative immigration warrants.<sup>74</sup>

Similar to an ICE detainer request, the immigration statute and regulations for administrative warrants do not specify any probable cause requirement - or any other legal standard - that must be met in order to issue an administrative warrant.<sup>75</sup> They do not provide LLEAs with a basis to prolong detention after state custody is concluded. Such continued detention would constitute a warrantless arrest.<sup>76</sup>

## **13. When an immigration warrant comes up in the National Crime Information Center (NCIC) database, do LLEAs have authority to arrest?**

**Not unless the NCIC entry is based on a *judicial* warrant.** Most NCIC entries related to immigration are administrative warrants entered by ICE (not a judge) and do not reflect a criminal conviction or criminal charge. They may be based on administrative arrest or removal warrants, but both are civil documents actionable only by federal agents.<sup>77</sup> As a result, LLEAs do not have any authority to arrest based on an NCIC hit indicating evidence of an administrative immigration warrant or civil deportation order.<sup>78</sup> These administrative immigration hits can be easily distinguished: an NCIC hit supported by a judicially issued criminal warrant should name the court that issued the warrant, while immigration violators simply notify of an administrative warrant and direct the LLEA to contact ICE’s Law Enforcement Support Center.<sup>79</sup>

## **14. What other documents may a LLEA encounter in connection with an ICE request for prolonged detention beyond the state’s authority?**

In addition to administrative warrants, ICE has numerous additional documents relating to custody and deportation. Below are some of the immigration documents a LLEA may encounter in connection with an ICE detainer request or other prolonged imprisonment request from ICE. However, none of these documents provide a lawful basis for prolonged detention in local custody.

### *I-203 Order to Detain/Release*

An order to detain or release (Form I-203 or I-203A) is an administrative document that accompanies every person who is put into federal immigration detention. Form I-203/ I-203A does not confer any

authority to make an arrest. Its function is to keep track of the custody status of a person who is already legally in ICE's custody.<sup>80</sup> An I-203/I-203A cannot serve as a hold on an individual in local custody while ICE investigates their status.

#### *Notice to Appear (NTA)*

An NTA (Form I-862) is the charging document ICE issues when it intends to seek the person's deportation by placing them in formal removal proceedings before an immigration judge. Removal proceedings are only commenced against an individual once ICE actually files the NTA with the immigration court. An NTA is a prosecutorial charging document that contains allegations made by ICE. The form does not authorize any arrest.<sup>81</sup>

#### *Notice of Action*

Notice of Action (Form I-797): This is a multi-purpose form issued by federal immigration officials that is used to notify a person of a wide variety of administrative actions, including that a petition or application with the agency has been received, that a decision has been made on a petition or application. It may also be used to notify an individual that he or she has been granted lawful status."<sup>82</sup> An I-797 does not authorize arrest.

#### *Order of Removal/deportation*

Because there are numerous types of removal procedures under immigration law, there are also numerous different types of actual removal orders.<sup>83</sup> Removal orders may or may not be issued by an immigration judge.<sup>84</sup> Regardless of the specific order and procedure, a removal order signifies a legal determination that the person is subject to deportation, due to having been deemed not entitled to lawful admission or to having triggered a ground of deportation after having been lawfully admitted.<sup>85</sup> A removal order is a civil immigration order, not a criminal finding, and LLEAs generally lack any authority to make an arrest on that basis.<sup>86</sup>

### **15.If ICE presents evidence that someone has an outstanding order of removal or deportation, is this a basis to hold someone for ICE?**

**No.** A removal order is not a basis for an LLEA to arrest or detain someone.<sup>87</sup> A removal order (also called a deportation order) indicates that the subject has, at some point in the past, been ordered deported. A removal order is a civil immigration order for deportation, which does not command or authorize arrest or detention.<sup>88</sup> While a removal order might provide evidence that the person does not have lawful status, unlawful presence is a civil violation, not a crime.<sup>89</sup> Deportability or unlawful status is not a lawful basis an LLEA to detain someone.<sup>90</sup>

A removal order may or may not have been issued by an immigration judge. ICE and CBP agents have authority to issue removal orders without any judicial involvement in several circumstances.<sup>91</sup> Even if a prior order or warrant of arrest for removal proceedings was issued by a judge, it can be issued without any probable cause findings. For example, a removal order may be issued without the individual's presence at the hearing.<sup>92</sup>

### **16.Can ICE get a federal warrant where it believes there is probable cause to suspect that someone has committed a federal crime, immigration-related or otherwise?**

**Yes.** The Fourth Amendment requires that officials obtain a warrant for arrest, except in limited circumstances.<sup>93</sup> In fact, ICE's arrest authority for both civil immigration violations and criminal offenses is limited to when there is a warrant, or when the suspect is likely to escape before a warrant can



be obtained.<sup>94</sup> Because ICE databases are checked for matching fingerprints every time anyone is arrested by LLEAs, ICE is generally aware of any person with any immigration history within a very short time of their arrest. A person detained in local custody is unlikely to escape before a warrant can be obtained, so there is ample time for ICE to obtain a federal criminal warrant. Therefore, if ICE has probable cause that someone in the custody of a local law enforcement agency has committed a federal criminal offense, they should present that evidence to a federal judge, who can then issue a warrant. Asking a local jail to hold that person without presenting a warrant puts the risk of liability for erroneous or unlawful arrest on the LLEA.<sup>95</sup>

## ENDNOTES

<sup>1</sup> See *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST \*17 (D.Or. April 11, 2014) (finding that detention pursuant to an immigration detainer is a seizure must comport with the Fourth Amendment); *Morales v. Chadbourne*, No. 12-0301 \*10 (D.R.I. filed February 12, 2014) (same); *Villars v. Kubiawski*, No. 12-cv-4586 \*10-12 (N.D. Ill. filed May 5, 2014) (same); *Galarza v. Szalczyk*, No. 10-06815 \*10 (E.D. Pa. Mar. 30, 2012) *rev'd on other grounds* 745 F.3d 634, 645 (3d Cir. 2014) (same).

<sup>2</sup> See DHS Form I-247 Immigration Detainer – Notice of Action.

<sup>3</sup> *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014); *Morales v. Chadbourne*, No. 12-0301 (D.R.I. filed February 12, 2014); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST (D.Or. April 11, 2014).

<sup>4</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (“If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.”).

<sup>5</sup> See *United States v. Di Re*, 332 U.S. 581, 589 (1948).

<sup>6</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012).

<sup>7</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012); *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) (finding that any detention beyond an initial stop must be supported by reasonable suspicion of criminal activity).

<sup>8</sup> See Department of Homeland Security, Fixing Our Broken Immigration System Through Executive Action, Nov. 20, 2014, available at [www.dhs.gov/immigration-action](http://www.dhs.gov/immigration-action).

<sup>9</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (“As a general rule, it is not a crime for a removable alien to remain present in the United States.”); *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) (“mere unauthorized presence in the United States is not a crime”).

<sup>10</sup> See 8 U.S.C. § 1182, 1226 and 1227; *Arizona v. United States*, 132 S.Ct. 2492, 2499 (2012) (“Removal is a civil, not criminal matter.”) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)).

<sup>11</sup> *Id.*

<sup>12</sup> See Andorra Bruno, “Unauthorized Aliens in the United States: Policy Discussion,” *Congressional Research Service*, May 8, 2014.

<sup>13</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (“If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.”).

<sup>14</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2506 (2012) (“the removal process is entrusted to the discretion of the federal government”). Only under a 287(g) agreement would LLEAs have authority to make stops or arrests for suspected immigration violations. See 8 U.S.C. § 1357(g). See also *Santos v. Frederick County Bd. Of Com’rs*, 725 F.3d 451, 465-66 (4th Cir. 2013); *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012).

<sup>15</sup> *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) (quoting *Arizona v. Johnson*, 555 U.S. 323 (2009)); *Santos v. Frederick County Bd. Of Com’rs*, 725 F.3d 451, 464-65 (4th Cir. 2013) (quoting *Brown v. Texas*, 443 U.S. 47 (1979)).

<sup>16</sup> *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) (internal quotations and citations omitted) (finding that any detention beyond an initial stop must be supported by reasonable suspicion of criminal activity). Although the Supreme Court in *Arizona* left open the possibility that a state could require an immigration check after an otherwise lawful criminal stop, the Ninth Circuit in *Melendres* held that such detention requires reasonable suspicion of *criminal* activity.

<sup>17</sup> *Id.* at 1001; *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (“If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.”); *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (“[the sheriff] may not detain individuals solely because of unlawful presence.”).

<sup>18</sup> *Id.*

<sup>19</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (“If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.”).

<sup>20</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (“[I]t would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision.”); *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (“[the sheriff] may not detain individuals solely because of unlawful presence.”); *Santos v. Frederick County Bd. Of Com’rs*, 725 F.3d 451, 464-65 (4th Cir. 2013) (holding that local police do not have authority to make their own immigration arrests); *Buquer v. Indianapolis*, 797 F. Supp. 2d 905, 919 (S.D. Ind. 2011) (granting preliminary injunction against a state law authorizing LLEAs to make civil immigration arrests).

<sup>21</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (Later describing its holding as “concluding that Arizona may not authorize warrantless arrests on the basis of removability.”) The Court enumerated the limited circumstances where LLEAs might assist with immigration enforcement as: “situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities. State officials can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody.”

<sup>22</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (discussing section (2)(b) of the Arizona law); See also *Melendres v. Arpaio*, (“[D]etention beyond the duration of the initial traffic stop must be supported independently by reasonable suspicion of criminality.”)

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<sup>23</sup> *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (“While the seizures of the named plaintiffs based on traffic violations may have been supported by reasonable suspicion, any extension of their detention must be supported by additional suspicion of criminality. Unlawful presence is not criminal.”).

<sup>24</sup> *Id.*

<sup>25</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012) (“[I]t would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision.”). See also *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012); *Utah Coalition of La Raza et al v. Herbert*, No. 211-cv-401 \*19-20 (D. Utah filed June 18, 2014) (voiding the section of the Utah law that “exceed[ed] the four Congressionally authorized scenarios” by allowing warrantless arrests based on deportability).

<sup>26</sup> See *Santos v. Frederick County Bd. Of Com’rs*, 725 F.3d 451, 468 (4th Cir. 2013) (“[T]he deputies violated Santos’s rights under the Fourth Amendment when they seized her after learning that she was the subject of a civil immigration warrant and absent ICE’s express authorization or direction.”); *United States v. Urrieta*, 520 F.3d 569, 574 (6th Cir. 2008) (To justify extended detention, an officer must have a reasonable suspicion that the individual “was engaged in some nonimmigration-related illegal activity”); *Galarza v. Szalczyk*, 745 F.3d 634, 641 (3d Cir. 2014) (LLEAs are free to disregard detainers and cannot use them as a defense of unlawful detention); *El Badrawi v. United States*, 787 F. Supp. 2d 204, 230 & n.17 (D. Conn. 2011) (granting summary judgment on false arrest claim to plaintiff who had been subject of immigration warrant); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST (D.Or. April 11, 2014) (holding county liable for unlawful detention based solely on an immigration detainer); *Morales v. Chadbourne*, No. 12-0301 (D.R.I. filed February 12, 2014) (finding immigration detainer is a “facially invalid request to detain”).

<sup>27</sup> *Arizona v. United States*, 132 S.Ct. 2492 (2012); *Buquer v. Indianapolis*, 797 F. Supp. 2d 905, 919 (S.D. Ind. 2011) (granting preliminary injunction against a state law authorizing LLEAs to make civil immigration arrests).

<sup>28</sup> *Arizona v. United States*, 132 S.Ct. 2492 (2012). See also *Utah Coalition of La Raza et al v. Herbert*, No. 211-cv-401 \*19-20 (D. Utah filed June 18, 2014) (voiding the section of the Utah law that “exceed[ed] the four Congressionally authorized scenarios” by allowing warrantless arrests based on deportability).

<sup>29</sup> *Id.*

<sup>30</sup> Also called “ICE hold,” “immigration hold,” “immigration detainer,” etc.

<sup>31</sup> 8 C.F.R. § 287.7. See also *Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971) (finding that a warrant issued by an executive agency without a neutral magistrate is invalid); *Galarza v. Szalczyk*, 745 F.3d 634, 640 (3d Cir. 2014); *Morales v. Chadbourne*, No. 12-0301 (D.R.I. filed February 12, 2014); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST (D.Or. April 11, 2014).

<sup>32</sup> 8 C.F.R. § 287.7(a); *Arizona v. United States*, 132 S.Ct. 2492, 2506 (2012) (describing detainers as “requests for information about when an alien will be released from their custody”).

<sup>33</sup> See generally 8 U.S.C. § 1357(d); 8 C.F.R. § 287.7. However, ICE is still constrained by the Constitution in making or requesting the seizure of an immigrant. See *United States v. Brignoni-Ponce*, (applying the Fourth Amendment to immigration stops and searches).

<sup>34</sup> See Brief of Federal Defendants-Appellants, *Morales v. Chadbourne*, No. 14-1425, \*27-28 (1st Cir. filed Aug. 13, 2014) (arguing that a detainer allows “time to investigate the status of the person in the State’s custody,” and that an agent issuing a detainer does not “control how quickly, or under what conditions,” ICE might make further investigation or take the subject into ICE custody.)

<sup>35</sup> *Vargas v. Swan*, 854 F.2d 1028 fn. 2 (7th Cir. 1988); *Galarza v. Szalczyk*, 745 F.3d 634, 641 (3d Cir. 2014).

<sup>36</sup> See ICE Detainer Notice of Action – DHS Form I-247. The immigration statute authorizes issuance of ICE detainer requests only at the request of state, local, or federal officers in connection with an individual arrested for a controlled substance violation. 8 U.S.C. § 1357. However, implementing regulations do not limit the issuance of ICE detainer requests to only drug offenses, or to the requests of the custodial LLEA. 8 C.F.R. § 287.7. Consequently, ICE uses them in connection with anyone in any custody, regardless of the basis for their arrest.

<sup>37</sup> See *Galarza v. Szalczyk*, 745 F.3d 634, 641 (3d Cir. 2014).

<sup>38</sup> See *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST \*17 (D.Or. April 11, 2014) (holding county liable for unlawful seizure without probable cause). See also *Morales v. Chadbourne*, No. 12-0301 (D.R.I. filed February 12, 2014) (denying motion to dismiss because the detention on an ICE detainer constituted a new seizure without a valid basis to hold anyone).

<sup>39</sup> See *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (citing 8 U.S.C. § 1357(d) as authority that “[s]tate officials can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody.”); *Galarza v. Szalczyk*, 745 F.3d 634, 641 (3d Cir. 2014) (“§1357(d) is a request for notice of a prisoner’s release, not a command (or even a request) to LLEAs to detain suspects on behalf of the federal government”) (citing *Arizona v. United States*); *Vargas v. Swan*, 854 F.2d 1028 fn 2 (7th Cir. 1988) (“INS argues that the detainer...merely serves to advise the ... facility that the INS may find Vargas excludable and requests that the institution inform the INS of Vargas’s expected release date thirty days beforehand”); *Mendia v. Garcia*, No. 12-16220 (9th Cir. filed Apr. 8, 2014) (“The purpose of such detainers is to notify other law enforcement agencies that the Department of Homeland Security “seeks custody of an alien . . . for the purpose of arresting and removing the alien.”); *Villars v. Kubiowski*, (“The regulation instructs that the custody of an alien is not to exceed 48 hours; nowhere does it authorize the detention of an alien for 48 hours after local custody over the detainee would otherwise end.”); *Arroyo v. Judd*, No. 8:10-cv-911-T-23TBM (M.D. Fla., July 30, 2010) (“[T]he regulation providing for a forty-

eight-hour detainer, 8 C.F.R. §297.7, delegates no authority to the defendants.”); *People ex rel Swanson v. Ponte*, No. 14652, --- N.Y.S.2d ---- (2014), 2014 N.Y. Slip Op. 24304 (“And of course, there is no language directing detention of anyone in 8 USC 1357(d)”). *But see Rios-Quiroz v. Williamson County*, No. 3-11-1168 (M.D. Tenn. filed Sept. 10, 2012) (finding the detainer regulations to mandate detention). The detainer form also clearly states that it is a notification request and that it does not limit and LLEAs’ discretion to make decisions related to the person’s custody classification, work, quarter assignments, or other matters. *See ICE Detainer Notice of Action – DHS Form I-247*; *see also Vargas v. Swan*, (7<sup>th</sup> Cir. 1988) (“the face of the detainer states that it is “for notification purposes only”). Therefore, whether an immigration detainer is meant to request or authorize prolonged detention is in doubt.

<sup>40</sup> *See Jeh Johnson, Secretary of the Department of Homeland Security*, Memorandum re: Secure Communities, November 20, 2014, available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf).

<sup>41</sup> *See Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) (holding that detainers are voluntary requests and that LLEAs can be held liable for unlawfully holding someone on a detainer). The Third Circuit held that settled constitutional law clearly establishes that immigration detainers must be deemed requests because the federal government cannot “compel state and local agencies to expend funds and resources to effectuate a federal regulatory scheme,” citing the Tenth Amendment, as interpreted by the Supreme Court in *New York v. United States*, 505 U.S. 144, 161 (1992), and *Printz v. United States*, 521 U.S. 898, 923-24 (1997). *See also Morales v. Chadbourne*, No. 12-0301 (D.R.I. filed February 12, 2014) (detainer is “a facially invalid request to detain”); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST (D.Or. April 11, 2014); *Villars v. Kubiowski*, No. 12-cv-4586 \*10 (N.D. Ill. filed May 5, 2014) (federal courts and all relevant federal agencies and departments consider ICE detainers to be requests).

<sup>42</sup> *Printz v. United States*, 521 U.S. 898, 923-24 (1997); *Galarza v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014).

<sup>43</sup> *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014).

<sup>44</sup> In a February 25, 2014, letter to Congressional Representatives Adam Smith and Mike Thompson, Acting ICE Director Daniel H. Ragsdale expressly stated that ICE detainers “are not mandatory as a matter of law.” *See* [http://immigrantjustice.org/sites/immigrantjustice.org/files/2014\\_02\\_25%20Thompson-signed-response-ICE.pdf](http://immigrantjustice.org/sites/immigrantjustice.org/files/2014_02_25%20Thompson-signed-response-ICE.pdf). *See also* Letter from David Venturella, Assistant Director, U.S. Immigration and Customs Enforcement, to Miguel Márquez, County Counsel, County of Santa Clara, available at <http://media.sjbee.org/files/2011/10/4-ICE-response-to-SCC.pdf>.

<sup>45</sup> *See Jeh Johnson, Secretary of the Department of Homeland Security*, Memorandum re: Secure Communities, November 20, 2014, available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf).

<sup>46</sup> 8 U.S.C. § 1357(d); 8 C.F.R. § 287.7(a); *Arizona v. United States*, 132 S.Ct. 2492, 2506 (2012).

<sup>47</sup> 8 C.F.R. § 287.7(d); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST \*17 (D.Or. April 11, 2014) (finding that detention pursuant to an immigration detainer is a seizure without probable cause); *Morales v. Chadbourne*, No. 12-0301 \*10 (D.R.I. filed February 12, 2014) (same); *Villars v. Kubiowski*, No. 12-cv-4586 \*10-12 (N.D. Ill. filed May 5, 2014) (same). Additionally, many courts have questioned whether the statute or regulations for ICE detainers offer any authority for such detention. *See supra* fn 38.

<sup>48</sup> 8 C.F.R. § 287.7(a).

<sup>49</sup> 8 C.F.R. § 287.7(a).

<sup>50</sup> *See id.* *See also* Brief of Federal Defendants, *Ortega v. ICE*, 737 F.3d 435 (6th Cir. filed Apr. 10, 2013) (stating, in a case involving a U.S. citizen held on a detainer, “the purpose of issuing the detainer was to allow [ICE] time to conduct an investigation that could have discovered whether Plaintiff-Appellant was removable or was, in fact, a U.S. citizen.”); Brief of Federal Defendants-Appellants, *Morales v. Chadbourne*, No. 14-1425, \*27-28 (1st Cir. filed Aug. 13, 2014) (arguing that a detainer allows “time to investigate the status of the person in the State’s custody.”). *But see Galarza v. Szalczyk*, No. 10-06815 \*36 (E.D. Pa. Mar. 30, 2012) (holding that in order to issue a detainer, ICE must have probable cause that the person is not lawfully present in the United States.)

<sup>51</sup> *Johnson v. United States*, 333 U.S. 10, 13-15 (1948); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

<sup>52</sup> *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (warrant provides a safeguard of “an objective predetermination of probable cause”).

<sup>53</sup> 18 U.S.C. App. § 2, Art. III.

<sup>54</sup> 18 U.S.C. App. § 2.

<sup>55</sup> 18 U.S.C. App. § 2, Art. IV.

<sup>56</sup> *Vargas v. Swan*, 854 F.2d 1028 fn 2 (7th Cir. 1988).

<sup>57</sup> *Compare* 8 U.S.C. § 1357(d) with 18 U.S.C. App. § 2, Art. IV (providing that a transfer of custody pursuant to a detainer must be based on an untried information, complaint, or indictment where a court has “approved, recorded, and transmitted the request”).

<sup>58</sup> *See Illinois v. Caballes*, 543 U.S. 405, 406 (2004). *Galarza v. Szalczyk*, 745 F.3d 634, 640; *Morales v. Chadbourne*, No. 12-0301 \*28 (D.R.I. filed February 12, 2014); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST. \*17 (D.Or. April 11, 2014); *Villars v. Kubiowski*, No. 12-cv-4586 \*10-12 (N.D. Ill. filed May 5, 2014).

<sup>59</sup> *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST \*17 (D.Or. April 11, 2014) (finding that detention pursuant to an immigration detainer is a seizure must comport with the Fourth Amendment); *Morales v. Chadbourne*, No. 12-0301 \*10 (D.R.I. filed February 12, 2014) (same); *Villars v. Kubiowski*, No. 12-cv-4586 \*10-12 (N.D. Ill. filed May 5, 2014) (same); *Galarza v. Szalczyk*, No. 10-06815 \*10 (E.D. Pa. Mar. 30, 2012) (same).

<sup>60</sup> See *Morales v. Chadbourne*, No. 12-0301 (D.R.I. filed February 12, 2014) (finding the detainer a “facially invalid request to detain”); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST \*17 (D.Or. April 11, 2014) (holding the county liable for unlawful detention based on an ICE detainer).

<sup>61</sup> *Beck v. Ohio*, 376 U.S. 89, 91 (1964); U.S. Const. Amend. IV.

<sup>62</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012); *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012); *Santos v. Frederick County Bd. Of Com’rs*, 725 F.3d 451, 465 (4th Cir. 2013). See also *People ex rel Swanson v. Ponte*, No. 14652, --- N.Y.S.2d ---- (2014), 2014 N.Y. Slip Op. 24304 (“There is no allegation that the Department has actually obtained a removal order and, if in fact they had, there is still no authority for a local correction commissioner to detain someone based upon a civil determination, as immigration removal orders are civil, not criminal, in nature.”)

<sup>63</sup> *Illinois v. Caballes*, 543 U.S. 405, 406 (2004) (“[a] seizure that is justified ... can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”); *Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012) (“Detaining individuals solely to verify their immigration status would raise constitutional concerns.”); *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) (“detention beyond the duration of the initial traffic stop must be supported independently by reasonable suspicion of criminality”); *Berry v. Baca*, 379 F. 3d 764, 771 (9th Cir. 2004) (individuals have to be released in a timely fashion).

<sup>64</sup> *Morales v. Chadbourne*, No. 12-0301 (D.R.I. filed February 12, 2014); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST \*17 (D.Or. April 11, 2014).

<sup>65</sup> See DHS Form I-247 (2012). Some checkboxes on the new detainer form reflect possible criminal offenses for which an LLEA might, if there is probable cause, have a basis to arrest. However, the detainer does not indicate any probable cause or standard of proof for those allegations. Moreover, if an ICE agent has probable cause of a criminal violation, they must seek a warrant unless the subject is likely to escape before a warrant can be obtained. See 8 U.S.C. § 1357(a)(5).

<sup>66</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (“If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.”); *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (“[the sheriff] may not detain individuals solely because of unlawful presence.”).

<sup>67</sup> Legal Opinion from the Office of the Attorney General of Maryland, August 14, 2014, *on file with author*. The analysis also noted that Court decisions have interpreted “reason to believe” to be, by necessity, the same standard as probable cause in the context of warrantless arrests, but this does not mean that any time an ICE agent uses the phrase “reason to believe” that it actually means “probable cause.”

<sup>68</sup> In a recent federal lawsuit about the wrongful detention of a U.S. citizen on an ICE detainer, ICE asserted that it uses detainers as “a stop gap measure . . . to give ICE time to investigate and determine whether somebody’s an alien, and/or subject to removal, before local law enforcement releases that person from custody.” Oral Argument Transcript, ECF #79, *Galarza v. Szalczyk*, No. 10-06815 (E.D. Pa. Jan. 10, 2012). See also Brief of Federal Defendants, *Ortega v. ICE*, 737 F.3d 435 (6th Cir. filed Apr. 10, 2013) (stating that “the purpose of issuing the detainer was to allow [ICE] time to conduct an investigation that could have discovered whether Plaintiff-Appellant was removable or was, in fact, a U.S. citizen.”); Brief of Federal Defendants-Appellants, *Morales v. Chadbourne*, No. 14-1425 (1st Cir. filed Aug. 13, 2014) (arguing that ICE detainers do not cause arrest, but “facilitates access” to arrange an interview and investigate). And although some courts have interpreted “reason to believe” as an equivalent of probable cause, ICE points to contrary authority. See Brief of Federal Defendants in support of Motion to Dismiss, *Gonzalez v. ICE*, No. 2:13-cv-04416 fn. 9 (C.D. Cal. filed March 10, 2014) (“The Ninth Circuit and some other courts have interpreted the “reason to believe” standard as being analogous to the “probable cause” standard normally associated with criminal proceedings... *But see United States v. Pruitt*, 458 F.3d 477, 483 (6th Cir. 2006) (holding that “reasonable belief is a lesser standard than probable cause” in the context of the “limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within”); *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005) (same); *United States v. Route*, 104 F.3d 59, 62-63 (5th Cir. 1997) (same); *United States v. Risse*, 83 F.3d 212, 216-17 (8th Cir. 1996) (same); *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995) (same).”).

<sup>69</sup> The Eastern District of Pennsylvania rejected this argument, finding that ICE must have “probable cause to believe that the subject of the detainer is (1) an “alien” who (2) “may not have been lawfully admitted to the United States” or (3) “otherwise is not lawfully present in the United States”. *Galarza v. Szalczyk*, No. 10-06815 \*36 (E.D. Pa. Mar. 30, 2012).

<sup>70</sup> See DHS Form I-200 or Form I-205; 8 C.F.R. § 287.5; 8 C.F.R. § 241.2.

<sup>71</sup> 8 C.F.R. § 287.5; see also *El Badrawi v. Dept. of Homeland Sec.*, 579 F. Supp. 2d 249, 275–76 (D. Conn. 2008) (treating arrest pursuant to administrative warrant as warrantless arrest under Connecticut tort law and federal constitutional law for purposes of false arrest claim).

<sup>72</sup> 8 C.F.R. § 287.5; 8 C.F.R. § 241.2.

<sup>73</sup> See 8 C.F.R. § 287.5(e). See also 287(g) MOUs specifically designating this federal authority to certain trained local agents.

<sup>74</sup> 8 C.F.R. § 287.5; 8 C.F.R. § 241.2; *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (“the warrants are executed by federal officers who have received training in the enforcement of immigration law”). See also *United States v. Toledo*, 615 F. Supp. 2d 453, 455, 459–60 (S.D. W. Va. 2009) (citing immigration officer’s testimony that he advised local sheriff that sheriff had no authority to execute administrative warrant); *El Badrawi v. Dept. of Homeland Sec.*, 579 F. Supp. 2d 249, 275–76 (D. Conn. 2008).

<sup>75</sup> ICE internal policies and procedures for issuance of an administrative warrant require only that the preparation of a Notice to Appear alleging the factual and legal basis for an arrest be drafted and presented to the authorizing agent. *United States v. Abdi*,

463 F.3d 547, 551 (6th Cir. 2006). Only if the arrest is based on a national security threat does ICE incorporate a procedure for “probable cause review for legal sufficiency purposes prior to the issuance” of an administrative warrant or Notice to Appear. *Id.*

<sup>76</sup> See *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (holding that where search warrant was not issued by “the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all”); *El Badrawi v. Dept. of Homeland Sec.*, 579 F. Supp. 2d 249, 275–76 (D. Conn. 2008) (treating arrest pursuant to administrative warrant as warrantless arrest under Connecticut tort law and federal constitutional law for purposes of false arrest claim); *El Badrawi v. United States*, 787 F. Supp. 2d 204, 230 & n.17 (D. Conn. 2011) (granting summary judgment on false arrest claim to plaintiff who had been subject of administrative warrant); *United States v. Toledo*, 615 F. Supp. 2d 453, 455, 459–60 (S.D. W. Va. 2009).

<sup>77</sup> See 8 C.F.R. § 287.5, 241.2.

<sup>78</sup> *Santos v. Frederick County Bd. Of Com’rs*, 725 F.3d 451, 465 (4th Cir. 2013) (local arrest based on civil immigration warrant in NCIC violated the Fourth Amendment because it lacked direction or approval from ICE); *United States v. Toledo*, 615 F. Supp. 2d 453, 455, 457 n.2 (S.D. W. Va. 2009) (an administrative warrant in the file did not mean that local officers had authority to arrest).

<sup>79</sup> In 2002, when ICE began entering deportation orders into the NCIC database, many police chiefs spoke up against it, pointing out that their officers lacked authority to enforce civil immigration law, and that ICE entries would be confusing in an otherwise criminal records database. See Major Cities Chiefs Immigration Committee, Recommendations for Enforcement of Immigration Laws by Local Police Agencies, 2008 (“The N.C.I.C. system had previously only been used to notify law enforcement of strictly criminal warrants and/or criminal matters... This initiative has created confusion due to the fact that these civil detainees do not fall within the clear criminal enforcement authority of local police agencies and in fact lays a trap for unwary officers who believe them to be valid criminal warrants or detainees.”) Indeed, that was exactly the result, as officers expecting NCIC entries to be criminal warrants have not known how to proceed with entries of administrative removal orders. However, following the Supreme Court’s decision in *Arizona*, the answer is clear: “If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.” *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012).

<sup>80</sup> ICE custody may include rented bed-space in a local jail, under an Intergovernmental Services Agreement (IGSA). However, for detention in local jail under an IGSA, ICE must comply with the regulatory requirements at 8 C.F.R. § 287.3 and 287.8 (requiring, inter alia, either a warrant or a post-arrest examination, charging decision, and bond determination within 48 hours).

<sup>81</sup> *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012).

<sup>82</sup> See *Buquer v. City of Indianapolis*, 797 F.Supp.2d 905, 921 (S.D. Ind. 2011).

<sup>83</sup> Compare 8 U.S.C. § 1229a(a) and 8 U.S.C. § 1228(b).

<sup>84</sup> 8 U.S.C. § 1225, 8 U.S.C. § 1228(b).

<sup>85</sup> See 8 U.S.C. § 1182 (inadmissibility grounds); 8 U.S.C. § 1227 (deportation grounds).

<sup>86</sup> See *People ex rel Swanson v. Ponte*, No. 14652, --- N.Y.S.2d ---- (2014), 2014 N.Y. Slip Op. 24304 (“There is no allegation that the Department has actually obtained a removal order and, if in fact they had, there is still no authority for a local correction commissioner to detain someone based upon a civil determination, as immigration removal orders are civil, not criminal, in nature.”). See also *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012).

<sup>87</sup> *Id.* Additionally, California state law prevents holding an individual on a detainer in most circumstances, even if it is supported by probable cause. The Trust Act does not allow detention on an ICE hold unless the subject is charged with or convicted of certain criminal offenses. A removal order does not fall into any of the exceptions in the Trust Act. Therefore, no LLEA in California can hold someone on a detainer, even if it is supported by a removal order. In California, holding someone for ICE is unlawful unless the circumstances fall in one of the explicit exceptions of the Trust Act.

<sup>88</sup> 8 U.S.C. § 1229a(a)(3); 8 U.S.C. § 1226(a). There are several types of removal orders, reflecting different procedures and consequences, and there is no single form or format for removal orders. Compare the removal process pursuant to 8 U.S.C. § 1229a with the removal process under 8 U.S.C. § 1228. Even where there is a removal order for someone, it could be invalid or no longer in effect. 8 U.S.C. § 1229a(a)(6) and (7); 8 U.S.C. § 1252(b) and (d); 8 U.S.C. § 1182(a)(9)(A).

<sup>89</sup> See *Arizona v. United States*, 132 S.Ct. 2492, 2505 (2012) (“If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.”); *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (“Defendants may not detain individuals solely because of unlawful presence... [D]etention beyond the duration of the initial traffic stop must be supported independently by reasonable suspicion of criminality.”)

<sup>90</sup> *Id.*; *People ex rel Swanson v. Ponte*, No. 14652, --- N.Y.S.2d ---- (2014), 2014 N.Y. Slip Op. 24304 (“There is no allegation that the Department has actually obtained a removal order and, if in fact they had, there is still no authority for a local correction commissioner to detain someone based upon a civil determination, as immigration removal orders are civil, not criminal, in nature.”). But see *Morales v. Chadbourne* at 28 (“In this case, a finding of probable cause would require specific ‘facts and circumstances to warrant a prudent [person] in believing’ that Ms. Morales was a non-citizen who was subject to detention and removal.”); *Miranda-Olivares v. Clackamas County* at 19 (“Miranda-Olivares was not charged with a federal crime and was not subject to a warrant for arrest or order of removal or deportation by ICE.”); *Galarza v. Szalczyk*, No. 10-06815, fn 75 (E.D. Pa. Mar. 30, 2012) (“Probable cause exists where the facts and circumstances within [an officer’s] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that ... Mr.

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Galarza was (1) an "alien" who (2) may not have been lawfully admitted to the United States or (3) otherwise is not lawfully present in the United States).

<sup>91</sup> 8 U.S.C. § 1225, 8 U.S.C. § 1228(b).

<sup>92</sup> 8 U.S.C. § 1229a(a)(5). Between 15-33% of deportation orders issued by judges are ordered *in absentia*, without the immigrant's presence or knowledge. See U.S. Dept. of Justice, Executive Office for Immigration Review, FY2013 Statistics Yearbook, available at <http://www.justice.gov/eoir/statspub/fy13syb.pdf>.

<sup>93</sup> Exceptions to the warrant requirement should be "jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499 (1958); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948). And there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948).

<sup>94</sup> 8 U.S.C. § 1357(a).

<sup>95</sup> In addition, when an LLEA makes a warrantless arrest, they must bring arrestee before a judge for a probable cause determination within 48 hours. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991); *Villars v. Kubiowski*, No. 12-cv-4586 \*10 (N.D. Ill. filed May 5, 2014).