UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSE JIMINEZ MORENO and MARIA JOSE LOPEZ, on behalf of themselves and all others similarly situated, Plaintiffs, v. JANET NAPOLITANO, *et al.*, in their official capacities, Defendants.	No. 11-CV-05452 Judge John Z. Lee Defendants' Opposition to Plaintiffs' Motion for Summary Judgment.

DEFENDANTS' MEMORANDUM IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants in their official capacities, by and through their attorneys, Colin A. Kisor, William Silvis, and Katherine Goettel, United States Department of Justice, Office of Immigration Litigation, District Court Section, and Craig Oswald, Assistant United States Attorney, oppose Plaintiffs' Motion for Summary Judgment (ECF No.193).

I. INTRODUCTION

This is a class action case where Plaintiffs broadly challenge U.S. Immigration and Customs Enforcement's ("ICE") authority to issue immigration detainers to federal, state or local law enforcement agencies ("LEAs"). Since Plaintiffs filed this lawsuit, the U.S. Department of Homeland Security ("DHS"), of which ICE is a component, has revised its detainer policies, practices, and forms, particularly, in November 2014, undertaking a major revision. Because the disputed facts regarding ICE's new detainer procedures and practices are both genuine and material, this Court must deny Plaintiffs' Motion for Summary Judgement and set a date for trial.

II. FACTS

ICE is the federal agency charged with identifying and removing criminal aliens from the United States. *See Arizona v. United States*, 132 S.Ct. 2492, 2495 (2012). The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq*., provides ICE with the authority to detain aliens pending removal. *See, e.g.*, 8 U.S.C. §§ 1226, 1231, 1357.

The present case has a long procedural history. Plaintiffs filed a complaint in this case on August 11, 2011. (ECF No. 1.) On October 14, 2011, Defendants moved to dismiss the suit for lack of jurisdiction on standing and mootness grounds. (ECF No. 10.) The Court denied Defendants' Motion to Dismiss on November 30, 2012, (ECF No. 56), and the parties proceeded with discovery (ECF No. 63). Plaintiffs filed an Amended Complaint and Amended Motion to Certify a Class Action in May and June 2013, respectively. (ECF Nos. 78 and 95.) Defendants opposed. (ECF No. 109.) The parties filed partial cross-motions for judgment on the pleadings. (ECF Nos. 107, 115.) The Court denied both parties' motions on Plaintiffs' Administrative Procedure Act ("APA") claim and granted Defendants' motion with respect to Plaintiffs' Tenth Amendment claim, dismissing that claim. (ECF No. 144.) Plaintiffs' Fourth and Fifth Amendment claims were not before the Court. The Court granted Plaintiffs' Amended Motion to Certify a Class on September 30, 2014. (ECF No. 146.)

However, in November 2014, DHS announced that it would implement significant changes to its detention and removal policies and priorities. In most cases, the Secretary of Homeland Security ("Secretary") directed "ICE to replace requests for detention *(i.e.*, requests that an agency hold an individual beyond the point at which they would otherwise be released) with requests for notification *(i.e.*, requests that state or local law enforcement notify ICE of a

pending release during the time that person is otherwise in custody under state or local authority)." Memorandum from Secretary Johnson to ICE, "Secure Communities," Nov. 20, 2014 (Defts' Ex. D) [hereinafter "Secure Communities Memo."]. If ICE does issue a detainer, the Secretary has directed ICE to specify that it has sufficient probable cause to believe that the individual is a removable alien. *Id.* In the absence of probable cause, ICE may still request that the LEA notify ICE before the individual is released.

In order to implement this policy, in July 2015, DHS retired the Form I-247 (Immigration Detainer – Notice of Action), and issued two new forms: the Form I-247N (Request for Voluntary Notification of Release of Suspected Priority Alien) (Def. Ex A.) and Form I-247D (Immigration Detainer – Request for Voluntary Action) (Def. Ex. B). These forms may be used to seek the transfer of individuals falling within a subset of the DHS's new immigration enforcement priorities, including those convicted of certain crimes, those posing a risk to national security, and certain gang members. In November 2015, DHS issued a third new form, the Form I-247X (Request for Voluntary Transfer), which may be used to seek the transfer of other priority aliens into ICE custody from cooperating jurisdictions. (Def. Ex C.) The Form I-247N may only be used to request advance notification of release of a suspected priority alien, and the Form I-247D to request continued detention of a priority alien, but the Form I-247X may be used to serve either purpose. ICE officers have received training on these requirements and forms. Accordingly, because neither the parties nor this Court contemplated the November 2014 Executive Actions on Immigration and the significant revision of DHS's detainer policies and practices, Defendants have now moved this Court to decertify the previously certified class. (ECF No. 199.)

The two named plaintiffs in this case, Jose Jimenez Moreno ("Moreno") and Maria Jose Lopez ("Lopez"), have never been in ICE custody and no longer have ICE detainers lodged against them. Plaintiff Moreno was born in Mexico. He was indicted by the State of Illinois on March 22, 2011, for two felonies including a cocaine charge and threatening a public official. ICE lodged a detainer for him with the Winnebago County Sheriff on March 22, 2011 and cancelled it in August 2011, prior to his release from jail. Plaintiff Lopez is a Guatemalan national who served a federal criminal sentence following her guilty plea in the U.S. District Court for the Southern District of Alabama to misprison of a felony in violation of 18 U.S.C. § 4 in November 2010. ICE lodged a detainer with the Tallahassee Federal Correctional Institution on February 1, 2011, and cancelled it on August 15, 2011. Lopez was sentenced to twelve months and one day of imprisonment and was released from federal prison on November 22, 2011.

III. STANDARD UNDER FEDERAL RULE OF CIVIL PROCEDURE 56

To prevail on a summary judgment motion, "the movant [must] show[ ] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On a summary judgment motion, a court does not weigh evidence or determine the truth of the matters asserted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Moreover, a court must view all evidence and draw all inferences in favor of the non-moving party. *Michas v. Health Cost Controls of Ill., Inc.*, 209 F.3d 687, 692 (7th Cir. 2000).

IV. ARGUMENT

Genuine issues of material fact remain for trial involving the significant changes DHS has made to its detainer policies, procedures, forms, and practices. After Plaintiffs filed their lawsuit, in 2014, the Secretary engaged in a "rigorous and inclusive review to inform recommendations on reforming our broken immigration system through executive action," which concluded with Secretary Johnson publishing several policy memoranda to implement executive immigration reforms. Department of Homeland Security, *Fixing Our Broken Immigration System Through Executive Action – Key Facts*, http://www.dhs. gov/immigration-action (last visited Feb. 2, 2016). One of these reforms was designed to address what Secretary Johnson acknowledged was an "increasing number of federal court decisions," including by this Court, "that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment." (Ex. D, Secure Communities Memo at 2.) In order to address these decisions, the Secretary directed "ICE to replace requests for detention . . . with requests for notification (*i.e.*, requests that state or local law enforcement notify ICE of a pending release during the time that person is otherwise in custody under state or local authority)." *Id.* And, the Secretary added that if "ICE seeks to issue a request for detention (rather than a request for notification), it must specify that the person is subject to a final order of removal or there is other sufficient probable cause to find that the person is a removable alien, thereby addressing the Fourth Amendment concerns raised in recent federal court decisions." *Id.*

Consequently, the fundamental landscape of this lawsuit has changed since ICE has implemented the reforms announced in November 2014. The new policies, detainer forms, and requirements that DHS has put into place create genuine issues of material fact relating to

whether Plaintiffs' claims remain valid. Plaintiffs' 2013 amended complaint and their motion for summary judgment fail to meaningfully address any of these new detainer procedures, practices, and protections and instead steadfastly proceed with trying to enjoin the program that existed in 2011, which no longer exists today.[1] Plaintiffs' motion essentially doubles down on their 2011 lawsuit, asserting that "this case has gone on long enough," and inexplicably asks this Court to ignore the reality that DHS has implemented new and significantly changed detainer policies, procedures, practices, and forms.[2] (ECF No. 193 at 3.)

Plaintiffs incorrectly state that "this case is about Defendants' policies and procedures for issuing immigration detainers – *none of which are in dispute*." (*Id.* at 4 (emphasis added).) But the many facts regarding DHS's new policies and procedures *are* in dispute:

- Plaintiffs assert that Defendants have no policy or practice of supporting a detainer with an "individual and particularized showing of probable cause." (ECF No. 193 at 7.) But Defendants' evidence shows that DHS and ICE have adopted new policies and procedures to establish and document probable cause. In special circumstances where ICE seeks to issue a request for detention, it must specify that the person is subject to a final order of removal or there is other sufficient probable cause to find that the person is a removable alien. (Declaration of ICE's Assistant Director for Enforcement, Matthew Albence; Ex. B, Form I-

[1] This is not a case where the "voluntary cessation" doctrine could apply because even if the Court enjoins the 2011 policy, it will still need to decide whether the new 2015 policy is constitutional and compliant with the INA. *See e.g.*. *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006) ("[I]f a revised policy passes constitutional muster, a court will not penalize the government for transgressions under an earlier policy."). The new policy obviously raises genuine issues of fact not in existence at the time Plaintiffs filed this lawsuit. With respect to the relief requested in Plaintiffs' amended complaint, an injunction of the 2011 detainer framework would say nothing about whether the present framework is compliant with the law.

[2] Even prior to these new detainer policies and practices coming into existence, this Court recognized that "[d]etermining whether Defendants' exercise of their immigration detainer authority comports with ICE's statutory authority and constitutional parameters will require the Court to resolve material issues of fact regarding Defendants' immigration detainer practices and procedures." (ECF No. 144 at 7.)

247D; Ex. C, Form I-247X.) Further, DHS developed policies and procedures in support of the new forms, and issued instructions to its component agencies, including ICE, on how to implement DHS policies. (*Id.*; *see also*; Pls' MSJ Ex. N.) ICE then issued training to its officers and agents regarding the new policies and use of the new forms, including instructions on how to investigate a person's citizenship or alienage and legal authority to be present in the United States. (*See* DHS 2749; DHS 2750.) Thus, the parties dispute whether DHS has in place policies and procedures for making an individualized finding of probable cause; a factual dispute material to Plaintiffs' Fourth Amendment cause of action.

- The parties also dispute the policies and practices relevant to Plaintiffs' Fifth Amendment claim, including policies and practices regarding the statement on the new 2015 detainer form that it only takes effect upon service on the subject, and the telephone number for detainees to call listed on Forms I-247D and I-247X. At trial, Mr. Albence will explain that ICE has developed procedures for individuals who believe an ICE detainer should not have been issued or they believe their civil rights or civil liberties have been violated. (*Id.*) ICE's Law Enforcement Support Center ("LESC") receives calls from the phone number listed on the Forms I-247D and I-247X, and the LESC has specific procedures for handling calls from persons subject to requests for detention. (*See* Defts' Ex. F, Declaration of Matthew Albence; Plaintiff MSJ Ex. DD.) Contrary to Plaintiffs' statement of facts, the telephone number goes to an office staffed by experienced ICE officers who are tasked with investigating claims that a detainer was improperly lodged and who have the authority to cancel detainers. (*See* Albence Declaration; Defts' Response to SOF ¶¶ 62, 64.)

- Last, Defendants began to use the Form I-247X, "Request for Voluntary Transfer" on *November 30, 2015*, a mere *eleven days* prior to Plaintiffs filing their Motion for Summary Judgment. This form is specifically designed to serve as a notification in cases where a detainer would not be justified and to serve as a detainer in cases where probable cause exists. Consequently, the factual record has not been developed in regards to ICE's use of I-247X, and such development is appropriate for trial.

The reality of where this case stands now is straightforward. Defendants assert that their new detainer policies and procedures have addressed the gravamen of Plaintiffs' claims. Plaintiffs assert that the facts on the ground indicate otherwise. This is a textbook case study of when genuine issues of material fact preclude the granting of summary judgment to the Plaintiffs. If this lawsuit is even permitted to continue as a class action, the proper mechanism to explore and resolve the myriad factual disputes as to whether the new detainer policies and

practices violate the Constitution is to hold a trial. Accordingly, this Court should deny Plaintiffs' Motion for Summary Judgment.

A. The significant changes to the detainer policies and procedures in November 2014 and thereafter make clear that ICE detainers are supported by probable cause; Plaintiffs' arguments to the contrary create a genuine issue of fact for trial.

The parties dispute the material fact of whether DHS detainers are supported by probable cause, and whether the new policies and procedures brought about significant change to the way in which DHS issues detainers. In their Motion for Summary Judgment, Plaintiffs obliquely acknowledge the existence of the new forms, dismissing them as "cosmetic changes." (ECF No. 193 at 4.) But Plaintiffs incorrectly assert – and this is a genuine issue of material fact for trial – that "ICE's policies and procedures for issuing immigration detainers are substantively unchanged and continue to be applied uniformly." (*Id*.) In fact, ICE's policies and procedures have changed significantly since November 20, 2014, when Secretary Jeh Johnson issued his memoranda implementing the Executive Actions on Immigration. *See* Ex. D, Secure Communities Memo.; Memorandum from Secretary Jeh Johnson, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," Nov. 20, 2014 (Defts' Ex. E.) [hereinafter Apprehension, Detention, and Removal Policies Memo.].

A side-by-side comparison of the now-obsolete Forms I-247 attached to Plaintiffs' 2013 Amended Complaint with the current Forms I-247D and I-247X makes abundantly clear that detainers now only may be issued after a determination that probable cause exists. In fact, both current forms (Form I-247D and Form I-247X), which are signed by the issuing officer, explicitly state "Probable cause exists that the subject is a removable alien." (*See* Defts' Exs. B and C.) Indeed, the general basis for such probable cause is reflected on the forms, and is limited

to the following: (1) that the subject has a final order of removal; (2) there are pending removal proceedings; (3) that biometric confirmation of the subject's identity and a records check of federal databases affirmatively indicate, by themselves or in addition to other information, that the subject lacks immigrations status or is removable under U.S. immigration law; and/or (4) that statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate that the subject lacks immigrations status or is removable under U.S. immigration law.[3] (*See* Defts' Exs. B, C.)

There are obvious genuine issues of material fact concerning how ICE agents determine probable cause prior to documenting it on the new forms, and ICE's current policies and practices. (*See* Defts' Ex. F, Declaration of Matthew Albence.) Plaintiffs' assert that "ICE does not have policies and practices in place that would even make it *possible* for an officer to establish probable cause" (ECF No. 193 at 8), which is patently incorrect. (*See* Defts' Ex. F, Declaration of Matthew Albence.) ICE's Assistant Director for Enforcement Matthew Albence will testify that ICE instituted a number of procedures – and trained its agents on those procedures – for examining the various types of evidence that can evince legal status. *Id*. at 4-5, ¶¶ 7-11; *see also* Defts' Response to SOF ¶¶ 15-16. For example, ICE agents have been trained on how to investigate claims by individuals to U.S. citizenship. (Ex. F, Albence Declaration, at ¶¶ 9-10; Plaintiffs' Ex. S, Email from Director Saldana; *see also* Defts' Response to SOF ¶ 15.) Therefore, Plaintiffs' assertion that the new forms "fall fatally short of requiring an individual,

[3] In contrast, the current Form I-247N does not require probable cause, but that is because the Form I-247N is not used as a detainer, but rather explicitly states (in bold lettering) that "this voluntary notification request does not request or authorize that you detain the subject beyond the time he or she is scheduled for release from your custody." (*See* Def. Ex. A.)

particularized showing" of probable cause is a demonstrably wrong disputed material fact. (ECF No. 193 at 8.)

Furthermore, the purposes of the new detainer forms (Form I-247D and Form I-247X) are to clearly document that a probable cause determination has been made by ICE, and indicate the general basis for that determination. *See Pittman v. City of New York*, No. 14-CV-4140, 2014 WL 7399308 at * 3 (E.D.N.Y. Dec. 30, 2014) ("Reliance on commonly used electronic databases is generally reasonable and sufficient to establish probable cause."); *see generally Mendoza v. Osterberg*, No. 8:13-cv-65, 2014 WL 3784141, *6 (D. Neb. July 31, 2014) (district court listed "record checks" as a type of "objective" fact that might cause an officer to "doubt the person's immigration's status.); *Acosta v. Ames Dep't Stores, Inc.*, 386 F.3d 5, 9 (1st Cir. 2004) ("The test for probable cause does not require the officers' conclusion to be ironclad, or even highly probable. Their conclusion that probable cause exists need only be reasonable."); *Reynolds v. Jamison*, 488 F.3d 756, 765 (7th Cir. 2007) ("The reasonableness of the seizure turns on what the officer knew, not whether he knew the truth or whether he should have known more."); *Payne v. Pauley*, 337 F.3d 767, 775 (7th Cir. 2003) ("The test is an objective one and evaluates whether probable cause existed on the facts as they appeared to a reasonable police officer, even if the reasonable belief of that officer is ultimately found to be incorrect."); *United States v. Williams*, 627 F.3d 247, 253 (7th Cir. 2010) (applying collective knowledge doctrine where federal agents asked local law enforcement to stop a vehicle and "the local officers had no knowledge of the facts underlying the [federal agents'] probable cause"). Probable cause is a low standard, less than preponderance of the evidence. *See United States v. Bentley*, 795 F.3d 630, 636 (7th Cir. 2015);*see also United States v. Jones*, 72 F.3d 1324 (7th Cir.1995.)

Plaintiffs' motion appears to conflate "probable cause" with some desired higher standard. Implicit in Plaintiffs' motion for summary judgment is their idea that the Court should view the issuance of a detainer as the first step in a chain of causation that inevitably leads to erroneous removal of individuals like the two named plaintiffs. But this is not true, and the conduct of removal proceedings is outside the scope of this lawsuit. There are due process requirements and protections that are part of the removal process that are neither challenged here nor are factually disputed (including a right to retained counsel and three layers of review).

Second, this case is only about the brief period in which an alien is in custody with an LEA. For example, nothing Plaintiffs seek here regarding detainers asks the Court to prevent ICE from placing these same aliens in the removal proceedings. Rather, the remedies Plaintiffs want this Court to order DHS to adopt would essentially require DHS to guarantee that an alien is removable before issuing a detainer. This is not now and has never been constitutionally or statutorily required. First, the law on removability is constantly changing in the courts; and second, claims of derivative U.S. citizenship often depend on issues such as foreign law and documents available in foreign countries that an alien would need to provide as a defense for removal. DHS is not required to chase down the viability of every possible legal defense for an alien in order to try to secure the ability to commence the removal process on that alien. All that is needed to issue a detainer is "probable cause," which is a reasonable basis to determine that a person is an alien and is also removable. Thus, this Court should deny Plaintiffs' Motion for Summary Judgment, and hold a trial.

Plaintiffs also contend that the new detainer forms are unconstitutional because they are not sworn. Plaintiffs correctly point out that the Constitution requires an arrest warrant to be

based on probable cause, supported by oath or affirmation. (ECF No. 193 at 7.) However, an immigration detainer is not a warrant. *See* 8 C.F.R § 236.1(a); § 287.7(a). Without question, immigration officers have statutory authority to make warrantless arrests, and that authority extends to issuing detainers.[4] *See* 8 U.S.C. § 1357(a); *see also* 8 C.F.R. 287.7; 8 C.F.R. § 236.1(a). As civil warrantless arrests must be supported by probable cause,[5] a summary of the probable cause is documented on the new Forms I-247D and I-247X. (*See* Defts' Exs. B and C; *see also* Ex. E, Apprehension, Detention, and Removal Policies Memo.)

Plaintiffs also contend that ICE detainers are invalid because they lack a "judicial" determination of probable cause. (ECF No. 193 at 12.) Plaintiffs' legal argument is based upon the erroneous factual premise that ICE's issuance of a detainer causes the immediate commencement of an alien's immigration detention by an LEA, as opposed to simply serving as the first step in a larger process that is compliant with both the Constitution and the INA. This claim also misunderstands the role of an Immigration Judge in the detention process. The Board of Immigration Appeals has stated, "it is well established . . . that the Immigration Judges only have the authority to consider matters that are delegated to them by the Attorney General and the Immigration and Nationality Act." *Matter of A-W-*, 25 I. & N. Dec. 45 (BIA 2009). Plaintiffs point to no statute or regulation that vests an Immigration Judge with the power to review detainers. (ECF No. 193.) The powers of Immigration Judges are listed in 8 C.F.R. § 1003.10. The Board of Immigration Appeals has found that an Immigration Judge lacks jurisdiction to

[4] ICE's detainer authority derives from 8 U.S.C. 1357(d); *see, e.g., Committee for Immigrant Rights of Sonoma County v. County of Sonoma*, 644 F. Supp. 2d 1177, 1197-98 (N.D. Cal. 2009); its statutory detention and arrest authority, *see, e.g.*, 8 U.S.C. §§ 1226 and 1357; and its authority to administer and enforce immigration law, *see, e.g.*, 8 U.S.C. § 1103.

[5] *See United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir 2010).

review the propriety of detainers prior to removal proceedings being commenced. *See Matter of L.G.*, 20 I. & N. Dec. 905 (BIA Nov 3, 1994); *see also Matter of Sanchez*, 20 I. & N. Dec. 223 (BIA Sep. 21, 1990.)

A detainer's operation is brief (48 hours), and once a person enters ICE's physical custody, the detainer is extinguished. (*See* Defts' Exs. B and C, I-247X and I-247D.) An alien in ICE custody is either brought before a United States Magistrate Judge, if the arrest is a criminal arrest, *see* 8 C.F.R. § 287.2 and § 287.8(c)(2)(vi), or (if the alien will be placed into civil removal proceedings) the case is referred to an immigration judge. *See* 8 C.F.R. § 287.3(b). In the administrative process, a custody and bond determination is made by ICE in the first instance within 48 hours (absent extraordinary circumstances). *See* 8 C.F.R. § 287.3(d); 8 C.F.R. 236.1(c)(8). An alien may appeal ICE's custody and bond determination to an Immigration Judge. *See* 8 C.F.R. § 236.1(d)(1). Plaintiffs do not, in this lawsuit, challenge any period of detention that occurs after the person enters ICE's physical custody and the detainer is no longer in effect. Nor can they, as a district court lacks jurisdiction to enjoin removal proceedings. *See* 8 U.S.C § 1252(g); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

Plaintiffs cite cases which discuss the constitutional requirements surrounding criminal arrest warrants, but those cases are inapposite. (ECF No. 193 at 12.) *Gerstein v. Pugh* is readily distinguishable because, in that case, a class of people arrested for crimes were held in pre-trial detention for prolonged periods of time solely on the basis of a prosecutor's filing a criminal information, as Florida law did not provide for pre-trial probable cause hearings. *See Gerstein v. Pugh*, 420 U.S. 103 (1975). In contrast, removal proceedings are civil in nature, and the speedy

trial protections afforded criminal defendants do not apply. *See e.g. United States v. Dyer*, 325 F.3d 464 (3d Cir 2003) (holding that civil detention by the former Immigration and Naturalization Service did not trigger the rights under the Speedy Trial Act).[6] Regardless, and in stark contrast to the class in *Gerstein*, the Plaintiff class here challenges the comparatively short period of LEA detention, which in most cases is substantially less than 48 hours, prior to entering ICE physical custody. In their Amended Complaint, Plaintiffs do not challenge the constitutionality of their detentions for the period of time beginning when the alien enters ICE physical custody (which obviously extinguishes the ICE detainer) to when they first appear before an Immigration Judge, and so that is completely outside the scope of this lawsuit. (*See generally* Amended Complaint, ECF No. 78.)

In sum, this Court should, regardless of what ICE's detainer policies and practices were prior to November 20, 2014, find that genuine issues of material fact remain in dispute as to what ICE's detainer policies and practices are now. Accordingly, this Court should deny Plaintiffs' Motion for Summary Judgment.

B. This Court must resolve disputed factual issues regarding whether the signifcant changes to ICE's detainer policies and procedures, announced in November 2014 and refined thereafter, satisfy the Fifth Amendment.

Hoping to avoid trial by improperly conflating the policies that existed in 2011 with the policies that exist today, Plaintiffs ask this Court to resolve disputed issues of material fact and conclude that the detainer policies and procedures, some of which are only months-old, violate

[6] *United States v. Noel,* 231 F.3d. 833 (11th Cir 2000); *United States v. Tejada,* 255 F.3d 1 (1st Cir. 2001) (stating that the requirement that a magistrate judge evaluate the alien's detention within 48 hours of his arrest is inapplicable in civil immigration detention.); *United States v. Cepeda-Luna,* 989 F.2d 353 (9th Cir. 1993) (noting that deportation proceedings are civil rather than criminal).

the Fifth Amendment. However, to support their contention that "little has changed," Plaintiffs point to an obsolete I-247 detainer form, noting that ICE requests that the detainer be served on the subject. (ECF No. 193 at 17.) Plaintiffs' SOF ¶ 56 explicitly references the dramatically different I-247 forms in use in 2011 and 2012. Plaintiffs even cite to this Court's September 2014 ruling for their proposition that "none of the modifications" (prior to 2015) are "sufficient to satisfy due process requirements." (ECF No. 193 at 17, citing ECF No. 146 at 20.)

Plaintiffs, however, selectively quote this Court. What this Court actually stated was:

> Similarly, the crux of Plaintiffs' due process claim is that the procedures created by Defendants to permit individuals to contest I-247 detainers (to the extent any procedures exist) are insufficient to satisfy due process requirements. The revisions to the detainer form requesting that the LEA provide a copy of the form to the detained individual and indicating a telephone number to call may have some relevance in assessing the question, but defendants have not argued (nor can they) that these changes in and of themselves were sufficient to satisfy due process requirements.

(ECF No. 146 at 20.) Today, however, the Court cannot assess whether the 2015 detainer form – which added additional procedural protections – "satisf[ies] due process requirements" without the benefit of a trial to develop the facts surrounding ICE's use of the form and its due process protection *Id.*

The 2015 detainer form not only provides a phone number for detainees to call, but it explicitly states, "This request takes effect only if you serve a copy of this form on the subject." (*See* Defts Exs. B and C; *see also* ECF No. 193 at 19 (recognizing the addition of this language in the 2015 form)). Although Plaintiffs assert that "this change still does not go nearly far enough" (ECF No. 193 at 19), this is a factual dispute for trial. As the Court pointed out in its Motion to Dismiss Order, "a telephone number does not prove what if anything was done when individuals called it." (ECF No. 146 at 20, n.13.) Thus, a factual record must be created to

determine how ICE uses that phone line and what is done after an individual calls the telephone number listed on Form I-247D and Form I-247X. As the Court stated, "the spotlight of the due process inquiry then remains on the overall policies and procedures that Defendants employed to hear and resolve objections to the detainers by the individuals who were subject to them." *Id.* at 20.

Defendants expect to call Matthew Albence, ICE's Assistant Director for Enforcement, at trial to testify about ICE's telephone line listed on the detainer form, and what actually happens in cases where the subject of the detainer calls it. (*See* attached Declaration, Defts Ex. F.) Mr. Albence will explain that ICE's Law Enforcement Support Center ("LESC") fields all phone calls from the toll-free number on the Forms I-247D and X, and that "[t]he LESC has specific procedures on handling the calls from persons subject to requests for detention." (*Id.* at p. 5, ¶ 11.) He will further explain that "[t]he LESC is staffed by ICE officers who have the authority to cancel detainers if sufficient evidence is presented or uncovered during the course of the call." *Id.* If the officer is unable to determine whether a detainer should be cancelled, the officer will "forward[] the information it has to the local field office to conduct the investigation in accordance with ICE policy on investigating claims of U.S. citizenship. This further investigation may include interviews of the subject and/or the subject's family members, requesting and reviewing documents, and consulting with ICE counsel." *Id.*

Plaintiffs also erroneously rely on the older testimony of Phillip Miller, who Plaintiffs deposed as Defendants' Rule 30(b)(6) witness on June 6, 2013, prior to the November 2014 Executive Actions on Immigration, including the overhaul of the detainer policies and

procedures. (Pls' Ex. E, ECF No. 195-6; *see also* SOF ¶¶ 59-62; 64.)[7] Mr. Miller's deposition does not discuss and did not contemplate the 2014 overhaul to the Department's detainer policies and procedures. Specifically, Plaintiffs erroneously rely on Mr. Miller's testimony to state that "individuals speak with DHS contractors, not with any DHS official with authority to cancel a detainer or with training in immigration and citizenship law." (SOF ¶ 62.) As discussed above, Mr. Albence will testify to the contrary: that ICE officers field these calls, and that they have authority to cancel a detainer. (*See* Attached Declaration, Defts' Ex. F.) The parties also have conflicting views of the policy directives and the degree to which ICE officers answering the telephone line must investigate claims of citizenship. (*See* Defts' Resp. to SOF ¶ 64.) The parties' conflicting evidence, and their conflicting view of that evidence, creates an issue of material fact for trial.

Plaintiffs further complain that Defendants do not *require* LEAs to serve a copy of the detainer on the subject. (ECF No. 193 at 19.) But, as stated above, Plaintiffs do acknowledge that the detainer cannot take effect unless served on the subject. (*Id*.) Also, ironically, Plaintiffs do not explain how ICE could require the LEA to undertake a practice to serve all detainers on the subjects of them without violating the anti-commandeering principle of the Tenth Amendment, which would (in their view) "conscript state and local LEAs to enforce a federal regulatory program." (Amend. Compl., ECF No. 178 at ¶ 54.) Plaintiffs' dissatisfaction that "there is simply no consequence if a LEA detains a class member on a detainer without ever serving the class member with a copy" obviously invites this Court to speculate on disputed

[7] In October 2015, Defendants offered Plaintiffs the opportunity to re-depose a Rule 30(b)(6) witness to testify about the 2015 detainer changes, but Plaintiffs declined.

issues of fact as to whether this has ever happened, is likely to happen, or what the consequence or result would be in order to determine whether there was a due process violation. (ECF No. 193 at 19.); *see generally Matthews v. Eldridge*, 424 U.S. 319 (1976). A trial is the appropriate mechanism to resolve such disputed issues of material fact as exist in this case. Accordingly, this Court should deny Plaintiffs' Motion for Summary Judgment.

Plaintiffs also contend that the absence of a hearing to review the propriety of a detainer violates due process. (ECF No. 193 at 18.) However, by its own terms the detainer expires after 48 hours of causing any custody, which is unquestionably a constitutionally permissible period of time for detention before a hearing is required. (*See* ECF No. 193 at 14, citing *County of Riverside v. McLaughglin*, 500 U.S. 44 (1991); *Villars v. Kubiatowski*, 45 F. Supp. 3d 791 (N.D. Ill. 2014.)). Plaintiffs do not challenge the policies or procedures regarding ICE custody determinations or detention which occur post-detainer, after ICE has assumed physical custody of the detainer subject.

C. ICE's detainer policies and practices are not *ultra vires* to the INA.

Plaintiffs ask this Court for summary judgment because "the detainer program also exceeds statutory limits placed on Defendants' warrantless arrest authority." (ECF No.193 at 20.) As a preliminary matter, even before the new detainer policies and procedures were announced in November 2014 and further refined and implemented through 2015, this Court had stated that "[d]etermining whether Defendants' exercise of their immigration detainer authority comports with ICE's statutory authority and constitutional parameters will require the Court to resolve material issues of fact regarding Defendants' immigration policies and procedures." (ECF No 144 at 7.) That remains true.

Plaintiffs' first argument is that detainers are issued without probable cause. Although Defendants do not concede that the now obsolete Form I-247's language "reason to believe" standard violated the Constitution, it is clear now that the Form I-247D and Form I-247X are issued only after an immigration officer has made a probable cause determination, which is documented on the form. (*See* Defts' Exs. B and C.) Accordingly, this Court should deny Plaintiffs' Motion for Summary Judgment on that issue, and could, if no material issue of fact remains as to that particular issue, grant partial summary judgment for Defendants. *See* Fed. R. Civ. P. 56(f).

Next, Plaintiffs contend that, prior to issuing a detainer, an immigration officer must make an individualized flight risk assessment. (ECF No. 193 at 21.) Title 8 U.S.C. § 1357(a)(2) states that an immigration officer may make a warrantless arrest if he has reason to believe that the alien is in the United States illegally and "is likely to escape before a warrant can be obtained for his arrest." In the INA, Congress also directs the Secretary to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. § 1103(a)(3). In the case of aliens who are arrested for violating controlled substances laws, and for whom ICE issues a detainer, ICE is explicitly required to "effectively and expeditiously take custody of the alien." 8 U.S.C. § 1357(d).[8] Without question, a detainer is issued exactly because the alien who is the subject of the detainer may be released before ICE can come to the jail and obtain physical custody. For example, a

[8] Congress enacted 8 U.S.C. § 1357(d) as part of the Anti-Drug Abuse Act of 1986, 99 P.L. 570; 100 Stat. 3207 (Oct. 27, 1986). Rather than limiting the use of detainers, § 1357(d) imposes additional requirements on the agency in drug cases to promptly determine whether to take custody of an alien held by another law enforcement agency and, if the detainer is issued, to promptly take custody of the alien. *See* 8 U.S.C. § 1357(d).

criminal alien illegally present in the United States may likely "escape" (within the meaning of the statute) when released from state or local custody. To the extent that the term "escape" in the statute is vague, the agency's interpretation of the statutes relating to the administration of immigration laws and the powers to detain illegal aliens is entitled to deference under *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984).[9] To the extent that there is any ambiguity as to whether or not the statutes authorize ICE to issue detainers because an alien released from jail may "escape" prior to entering ICE custody in the absence of a detainer, *Chevron* requires a federal court to accept an agency's construction of an ambiguous statute if the particular statute is within the agency's jurisdiction to administer, and the agency's construction is reasonable. *See National Cable & Telecommunications Assn., et al. v. Brand X Internet Services et al.*, 545 U.S. 967, 980 (2005); *see also Arobelidze v. Holder*, 653 F.3d 513 (7th Cir. 2011.)

[9] DHS's interpretation of "escape" is further informed and supported by Congress's finding that "[o]ver 20 percent of nondetained criminal aliens fail to appear for deportation proceedings," S. Rep. No. 104–48, p. 2 (1995), and by the Supreme Court's finding that "one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings," *Demore v. Kim*, 538 U.S. 510, 520 (2003). As recognized by the Supreme Court, these statistics constitute "an unacceptable rate of flight." *Id.* Consequently, when DHS becomes aware of the exact date, time, and location upon which it is guaranteed to find and apprehend a criminal alien that Congress has instructed should be mandatorily detained if apprehended, it is incumbent upon DHS to act quickly, even without a warrant, to gain custody of that alien who is a clear priority for removal in order to prevent the kind of escape that Congress sought to prevent in enacting IIRIRA, generally, and 8 U.S.C. § 1226(c), specifically. *See* S. Rep No. 104-48 at p. 3 (enumerating Congress's concern that criminal aliens would be difficult to remove if they were permitted to be released into the community prior to their removal); *see also* Ex. C, Secure Communities Memo ("However, ICE should only seek the transfer of an alien in the custody of state or local law enforcement through the new program when the alien has been convicted of an offense listed in Priority 1(a), (c), (d), and (e) and Priority 2(a) and (b) of the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum, or when in the judgment of an ICE Field Office Director, the alien otherwise poses a danger to national security."); Ex. D, Apprehension, Detention, and Removal Policies Memo, November 20, 2014 (implementing immigration enforcement and removal priorities, including criminal aliens).

Without question, it is within DHS's jurisdiction to administer the INA. Similarly, it is reasonable for the Secretary to authorize ICE to issue detainers for removable aliens for a brief 48-hour period so that ICE may arrest the alien and assume physical custody, because the Secretary explicitly has both the power and the duty to enforce the immigration laws. *See* 8 U.S.C. § 1103(a)(4).

Plaintiffs' further claim that "it is undisputed that Defendants' detainer program shirks § 1357(a)(2)'s flight risk requirement." (ECF No. 193 at 22.) This is a question of material fact for trial and, indeed, Defendants dispute this.

Finally, Plaintiffs claim that Defendants have exceeded statutory authority by "creating a regime for detainers that does not require that the individual be brought "without unnecessary delay" before an Immigration Judge. (ECF No. 193 at 24.) Title 8 U.S.C. § 1357(a)(2) requires that an alien arrested without a warrant be "taken for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States." Congress has specified that "*Any Officer or employee of the Service, authorized under regulations proscribed by the Attorney General*, shall have the power without warrant . . . to interrogate any alien or person believed to be an alien, as to his right to be or to remain in the United States." 8 U.S.C. § 1357(a)(1). In turn, the current regulations promulgated under that statute provide that "*Any immigration officer*" "is hereby authorized . . . to interrogate, without warrant, any alien or person believed to be an alien, as to his right to be or to remain in the United States." 8 C.F.R § 287.5(a)(1)(emphasis added.). This includes ICE agents, Border Patrol Agents, and other Immigration Officers, and is not restricted to Immigration Judges. *See* 8 C.F.R § 287.5.

Plaintiffs' reliance on *Arias v. Rogers*, 676 F.2d 1139 (7th Cir. 1982), is therefore misplaced. *Arias* was decided in 1982, some twenty years before the Homeland Security Act of 2002.[10] The current versions of the regulations make clear that examination before a "special inquiry officer" does not mean an "immigration judge" any longer. (ECF No. 193 at 24): *see* 8 C.F.R. § 287.3(a)("An alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Act will be examined by an officer other than the arresting officer."). Thus, the INA does not contemplate that an alien subject to a detainer be brought before an immigration judge for examination on his right to be in the United States. Accordingly, Defendants have not exceeded statutory authority and this Court should Deny Plaintiffs' Motion for Summary Judgment.

V. CONCLUSION

Plaintiffs' Amended Complaint predates ICE's current detainer policies, procedures, practices, and forms by almost two years. Defendants do not concede that the prior detainer policies and practices were in any respect either *ultra vires* to the INA or constitutionally infirm. Plaintiffs would not be entitled to summary judgment even if the prior detainer policies and practices were still in existence, but fewer of the material facts would be disputed. Significantly, Defendants do not bear the burden of proof on any issue in this case.

At trial, Defendants will call Mr. Albence, ICE Assistant Director for Enforcement, Office of Enforcement and Removal Operations. (*See* Defts' Ex. F.) He has never been deposed

[10] The Homeland Security Act of 2002 created the Department of Homeland Security and abolished the former INS. Public Law 107-296, Section 1512, 116 Stat. 2310 (Nov. 25, 2002). Former INS regulations were republished in 2003 as DHS regulations, via DHS final rules, *See* 68 Fed. Reg. 35,273 (Jun. 13, 2003).

in this case, and will testify that Secretary Johnson directed ICE to replace requests for detention (i.e., requests that an agency hold an individual beyond the point at which they would otherwise be released) with requests for notification (i.e., requests that state or local law enforcement notify ICE of a pending release during the time that person is otherwise in custody under state or local authority). (*Id.*) Mr. Albence will testify that in special circumstances where ICE seeks to issue a request for detention (rather than a request for notification), it must specify that the person is subject to a final order of removal or there is other sufficient probable cause to find that the person is a removable alien. (*Id.*) Mr. Albence will further testify that on June 10, 2015, DHS has issued instructions to its component agencies, including ICE, on how to implement DHS policies for the apprehension, detention, and removal of aliens in the United States. ((*Id.*); *see* DHS 2634-2660 Plaintiff MSJ Ex. N.) It included instructions on the implementation of the Priority Enforcement Program ("PEP"). (*See id*.) The instructions contain procedures on the investigation of a person's citizenship and/or alienage and legal authority to be present in the United States and assessment of whether the individual falls within DHS civil immigration enforcement priorities. *See id*. It also contained specific instructions to ICE on what forms to use when making requests for notification and/or requests for detention to other law enforcement agencies, i.e. the Form I-247D and/or Form I-247N, and how those requests should be documented. *See id.*

Mr. Albence will testify that ICE, working with DHS, developed PEP training for its employees and a PEP fact sheet. (*See id.*; DHS 2562-65.) ICE employees were required to complete the PEP training by June 26, 2015. *See id*; DHS 2562. The training addressed when an immigration officer could lodge a Form I-247N (Request for Voluntary Notification of Release

of Suspected Priority Alien) or a Form I-247D (Immigration Detainer – Request for Voluntary Action). (*See* DHS 2662, Plaintiff MSJ Ex. J.) The training gave examples of evidence which can be used by immigration officers to demonstrate probable cause to issue a Form I-247D. *See id.* Mr. Albence will further testify that while the evidence examples cover most of the evidence used by immigration officers to demonstrate probable cause, the examples are not intended to limit the discretion of immigration officers to investigate suspected removable aliens due to constantly changing investigative techniques and illegal conduct encountered by ICE immigration officers. (*See id.*)

Mr. Albence will testify that on November 13, 2015, ICE developed additional training for the use of Form I-247X, which was implemented by DHS to allow its component agencies, including ICE, to arrange for the transfer of non-PEP priority aliens from a cooperating state or local law enforcement agency. (*See id.* DHS 2749.) Further, on November 23, 2015, ICE Director Sarah R. Saldaña issued an updated policy on investigating the potential U.S. citizenship of people encountered by ICE. (*See id;* DHS 2750.) The policy explicitly applies to individuals subject to ICE detainers. (*Id.*) It also requires ICE employees to assess individuals' potential U.S. citizenship even in the absence of an affirmative claim to citizenship, when certain indications are present in a case, and clarifies the evidentiary threshold at which ICE should refrain from apprehending, detaining, or lodging a detainer against a potential U.S. citizen. (*See id.*) Mr. Albence will explain how the updated policy applies to the investigation of persons who may become subject to an ICE request for detention. If during an investigation before a request for detention is issued an ICE officer discovers indicia of potential U.S. citizenship, the updated policy requires the ICE officer to perform a further factual examination and legal analysis. The

indicia of potential U.S. citizenship can be discovered through database searches, reviews of alien files, interviews of the person and/or the person's family or representatives, and any other appropriate investigation methods, which are available to ICE immigration officers who issue requests for detention. (*See id.*)

Mr. Albence will explain that ICE has developed several procedures for persons subject to requests for detention or detainers to contact the agency if they believe an ICE detainer should not have been issued against them or they believe their civil rights or civil liberties have been violated. (*See also* Defts' Responses to Pls' First Set of Interrogatories, Response No. 6.) They include toll free numbers listed on the Form I-247D and X and contacting the ICE office that issued the request for detention directly.) ICE's Law Enforcement Support Center ("LESC") receives calls to the ICE Law Enforcement Support Center toll free number on the Form I-247D and X. The LESC has specific procedures on handling the calls from persons subject to requests for detention. (*See* Defts' Ex. F; Pl. MSJ Ex. DD.)

Thus, judgment for either party in this case – and in particular the issue of prospective declaratory and injunctive relief requested in Plaintiffs' Amended Complaint – turns on disputed issues of material fact. Because the new detainer policies and procedures first announced on November 20, 2014, and further refined and implemented through 2015 postdate the operative complaint in this case, this Court should deny Plaintiffs' Motion for Summary Judgment on that basis as well. *See generally Rembert v. Sheahan*, 62 F.3d 937 (7th Cir. 1995). Further, this Court should also decertify (or at minimum, narrow) the class of plaintiffs in this case. (*See* ECF No. 199.) This Court should hold a trial on the remaining factual issues.

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Respectfully submitted,

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