IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSE JIMENEZ MORENO and MARIA JOSE LOPEZ, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	No. 1:11-cv-05452
vs.	)	Judge John Z. Lee
JANET NAPOLITANO, et al., in their official capacities,	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Since 1997, Defendants have issued more than 1.8 million "requests for detention"; today, they issue roughly 7,000 every month.[1] These detainers authorize state and local law enforcement to keep the targeted individuals in jail for up to 48 hours. Despite years of litigation, however, Defendants *still* issue these detainers without complying with the most basic constitutional requirements—including a sworn, particularized statement of facts supporting probable cause, reviewed by a neutral magistrate, with notice and an opportunity to be heard. And Defendants *still* do not make any attempt to assess the individual's flight risk, as required under the INA. These undisputed facts require summary judgment in Plaintiffs' favor.

Most of the arguments in Defendants' opposition boil down to the idea that the detainer program has changed over time. Again and again, Defendants point to a 2014 statement by the Secretary of Homeland Security, announcing that the Department "would implement significant changes to its detention and removal policies and priorities." Defs.' Mem. 2, ECF No. 218.

The mere fact that the policies have changed over time, however, does not mean there is a genuine dispute of material fact for trial. The summary judgment record clearly establishes what the old detainer forms and policies required, and it clearly establishes what the new forms and policies require as well. Indeed, the vast majority of Defendants' citations are to the same forms and documents that Plaintiffs have already provided to the Court, the contents of which are not in dispute. The only "dispute" is about whether these practices are unlawful. But that is not an issue of fact; it is a *legal* issue that this Court can and should resolve on summary judgment.

[1] Pls.' Mem. in Opp. to Defs.' Mot. to Dismiss, ECF No. 30-1, Exs. D & E (INS amended its detainer form in April 1997 to include requests for detention); *see* Transactional Records Access Clearinghouse ("TRAC"), "Detainer Use Stabilizes Under Priority Enforcement Program, " Table 1 (Jan. 21, 2016), *available at* http://trac.syr.edu/immigration/reports/413/ (last visited Mar. 28, 2016).

Further, as Plaintiffs' motion papers explained, the changes Defendants have made to their detainer program since 2014 have failed to cure the defects that are the basis of Plaintiffs' claims. To avoid summary judgment, the nonmoving party must present "evidence 'upon which a jury could properly proceed to find a verdict' in [its] favor." *Modrowski v. Pigatto*, 712 F.3d 1166, 1169 (7th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)). Defendants have not come close to carrying this burden. Even under the "overhauled" policies, there is no evidence that detainers will be supported by:

- sufficient investigative steps to support a finding of probable cause;
- a showing of specific, individualized facts demonstrating probable cause;
- a sworn statement of the issuing officer's belief in the accuracy of those facts;
- prompt review of the probable cause finding by a neutral judicial officer;
- personal service on the detainee;
- a prompt post-arrest hearing to contest probable cause for the arrest; or
- an individualized determination of flight risk.

Thus, for purposes of the claims in this case, the changes simply do not matter. Defendants still have not presented any evidence on which a reasonable jury could base a verdict in their favor.

It is no surprise that the "new" policies remain inadequate. The Secretary explained that "to address the increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment," he was directing ICE to limit requests for detention to "special circumstances"—and then, the detainer "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." *See* Defs.' Ex. D at 3, ECF No. 218-4. With all due respect to the Secretary, however, reducing the number of requests for

detention does not "address" their underlying unconstitutionality. Nor does checking a box on a detainer form address the need for a sworn, particularized statement of facts demonstrating probable cause—much less the need for prompt review by a neutral judicial officer.

Defendants' response brief is substantively identical to—and just as inadequate as—the Secretary's announcement. Defendants insist that their adoption of a new detainer form, a telephone hotline, and other administratively convenient half-measures has "addressed" Plaintiffs' claims. But their brief does not—and cannot—present evidence showing that the changes to the program will avoid the constitutional and statutory problems for future detainers, much less cure the problems infecting the unlawful detainers that were issued in the past and remain outstanding today. This Court should enter summary judgment in favor of Plaintiffs.

ARGUMENT

I. The undisputed facts show several violations of the Fourth Amendment.

Defendants do not deny that their issuance of detainers must comply with the Fourth Amendment. *See* Pls.' Mem. 4–7, ECF No. 193. This is critical, as the undisputed facts show that Defendants' detainer policy violates the Fourth Amendment at every stage: in (a) the officer's determination of probable cause, (b) the officer's showing of probable cause, and (c) the absence of any prompt judicial review of the probable cause determination.

No Required Investigative Steps. As the opening brief explained, a proper detainer would rest on probable cause to believe that the individual is (1) an alien who (2) is not in a lawful status or (3) has a criminal conviction that would make him removable from the United States. *See Galarza v. Szalczyk*, 2012 WL 1080020, at *13 (E.D. Pa. Mar. 30, 2012), *rev'd in part on other grounds*, 745 F.3d 634 (3d Cir. 2013); Pls.' Mem. 8–9. Defendants' detainer policies have never required ICE agents to undertake the investigative steps necessary to meet this test.

As a threshold matter, Defendants concede that they have made no attempt to rescind the thousands of detainers they issued before December 2012 based merely on their officers' "initiat[ion]" of an "investigation." *See* Defs.' Resp. to SOF ("DSOF") ¶¶ 7, 11, ECF No. 219. Those detainers were plainly unlawful, and Defendants do not contend otherwise. Pls.' Mem. 9.

Defendants' current policy is no better. It nominally instructs ICE agents to obtain probable cause to issue detainers, but it does not require them to engage in the inquiries that would be necessary to form a belief that a person is a noncitizen and removable. For example, Defendants concede that the presence of certain "indicia of potential U.S. citizenship" would require further investigation before a detainer could be issued. DSOF ¶¶ 36, 38. Yet Defendants also admit that there is no policy requiring ICE agents to look for the "indicia of potential U.S. citizenship" in the first place. *See id.* ¶¶ 27, 37, 39 (policy simply instructs that officers should "carefully and expeditiously investigate and analyze the [individual's] potential U.S. citizenship"). Similarly, Defendants concede that the criminal grounds for removability are complex, and yet they have no policy to guide officers through that complex analysis, except a general encouragement to consult a supervisor if they have doubts. *See id.* ¶¶ 15, 26, 29.

To be clear, Plaintiffs do not contend that Defendants should be required to "guarantee" the individual's removability before issuing a detainer. Defs.' Mem. 11. But at a minimum, ICE agents should be required to undertake certain investigative steps before asserting that they have probable cause. As a matter of law and logic, an ICE officer cannot have probable cause to believe an individual is a deportable non-citizen if he never asked the relevant questions.

No Sworn, Individualized Showing. The Fourth Amendment also requires an officer to make a documented "showing" of the particularized facts supporting his or her belief of probable cause. *See Barham v. Ramsey*, 434 F.3d 565, 572 (D.C. Cir. 2006); Pls.' Mem. 7. Here,

however, Defendants concede that the issuing ICE officer merely checks a box on a form. *See* Defs.' Mem. 8–10. This procedure is deficient in two respects.

First, Defendants concede that their new detainer forms are devoid of specific facts and note only the officer's "general basis" for finding probable cause. *Id.* at 8, 10. And the third and fourth checkboxes in particular—which are the ones relevant to class members in this case—offer nothing specific about the basis for probable cause at all. Instead, they simply state sources of information that *might* have formed the basis for the detainer, including the catch-all "other reliable evidence." *See id.* at 9. This is obviously not a specific, individualized factual showing.

Second, the probable cause portion of the detainer form continues to be *unsworn*. DSOF ¶ 17. The Fourth Amendment expressly requires that an arrest warrant be based on "probable cause, supported by Oath or affirmation." *See Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985). Defendants note that a detainer is not a "warrant," which might be correct if Defendants used detainers only to request notice of a person's release (as they did until 1997). By permitting their officers to *authorize arrests* based on unsworn detainers, however, Defendants are denying class members a key Fourth Amendment protection.

No Judicial Review. The Fourth Amendment requires that the officer's showing of probable cause be reviewed by a "detached and neutral magistrate" exercising "independent judgment." *Whiteley v. Warden*, 401 U.S. 560, 564 (1971); *see generally* Pls. Mem. 12–15. The undisputed facts show that Defendants' policies do not provide any such review—either before or promptly after the detainer is issued. *See* DSOF ¶¶ 14–15, 18–19, 51, 70–71, 78–80.

Defendants' principal response is to say that judicial authorization should not be required in this context because the period of additional detention is so short—only 48 hours—and is immediately followed by the "larger process" of removal. Defs.' Mem. 12–13. This is wrong as

a matter of law. An inmate is "in custody" on a detainer as soon as it is issued—even if that is months or years before the state or local incarceration would otherwise be scheduled to end. *See* Mem. Op. & Order at 6-9, ECF No. 56. Moreover, Defendants' argument is hopelessly circular. The only people who are placed in removal proceedings are those who ultimately prove to be removable. If the detainer turns out to be wrongful—as it was for the U.S. citizen and LPR named as plaintiffs in this case—there will never be any "larger process." And even for those who do enter the "larger process," it will be too late at that point to challenge the detainer itself.

Further, the period of detention is, in fact, much longer than 48 hours. Once Defendants assume physical custody of the individual after the initial 48 hours, they then have an *additional* 48 hours to decide whether to issue a charging document *and* another undefined period to file the charging document with the immigration court. DSOF ¶ 50; 8 C.F.R. § 287.3(d).[2] That is far too long without a prompt judicial hearing. *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (even 48 hours may be too long).

Incredibly, Defendants also attempt to avoid the requirements of the Fourth Amendment by pointing to limitations in their own regulations. They say that prompt judicial review is impossible because "Immigration Judge[s] lack jurisdiction to review the propriety of detainers prior to removal proceedings being commenced." Defs.' Mem. 12–13. To support this proposition, Defendants cite two administrative decisions expressing doubt about whether ICE regulations give immigration judges the power to review detainers before removal proceedings begin. *Id.* (citing *Matter of L.G.* and *Matter of Sanchez*).[3] But if Defendants' own regulations

[2] And, after ICE files the charging document, it may take much longer before the immigration court even schedules the initial hearing and then ultimately holds the hearing to consider relief. DSOF ¶ 52.

[3] It is far from clear that the regulations do, in fact, prohibit immigration judges from conducting probable cause hearings. *See* 8 C.F.R. § 1236.1(d) (immigration judge has jurisdiction to review ICE's initial custody determination) *and* 8 C.F.R. § 1003.19 (immigration judge may review custody determinations made by ICE under 8 C.F.R. § 1236.1, which includes issuance of detainers).

stand in the way of proper judicial review, that is no defense to unconstitutionality. Defendants should be required to change the regulations—or else stop issuing the detainers.

Besides, Congress itself has vested immigration judges with the necessary power. *See* Pls.' Mem. 6, 13, 15, 24, 25 (citing *Arias v. Rogers*, 676 F.2d 1139, 1142 (7th Cir. 1982)). In *Arias*, the Seventh Circuit determined that 8 U.S.C. § 1357(a)(2) "requires that an alien arrested without a warrant 'be taken without unnecessary delay before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.'" The court explained that "[t]he reference is to a special inquiry officer, also called an immigration judge." The court reasoned that "[s]pecial inquiry officers have judicial authority . . . and therefore correspond to the committing magistrate in a criminal proceeding." *Id.*

This understanding of the INA's warrantless arrest provision gives it the effect Congress intended. Section 1357(a)(2) commands that the alleged alien be taken (1) "without unnecessary delay" (2) "before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States." Both phrases are instructive. By 1952, when the INA was enacted, both the Supreme Court and the Federal Rules of Criminal Procedure had employed derivations of the phrase "taken without unnecessary delay" in the context of an initial criminal appearance before a "Commissioner," or a modern-day magistrate judge. *See, e.g., United States v. Carignan*, 342 U.S. 36, 43 n. 8 (1951). And other sections of the INA indicate that the officers possessing the authority to conduct "examinations" were "special inquiry officers," whom the Seventh Circuit concluded must be immigration judges. *See Arias*, 676 F.2d at 1142.

Defendants may think *Arias* is outdated, but the relevant statutes and regulations show otherwise. According to Defendants, "*Arias* was decided in 1982, some twenty years before the Homeland Security Act of 2002," and "[t]he current versions of the regulations make clear that

examination before a 'special inquiry officer does not mean an 'immigration judge' any longer." Defs.' Mem. 22 (citing 8 C.F.R. § 287.3). But *Arias* interpreted the statute that authorizes warrantless immigration arrests, § 1357(a)(2), and that particular statutory provision has not changed. Moreover, the regulation Defendants cite, 8 C.F.R. § 287.3, is not an outgrowth of the 2002 Homeland Security Act. That regulation was codified in 1952 alongside the INA, and its language requiring an examination "by an officer other than the arresting officer" was in force when the Seventh Circuit issued *Arias* and remains in force today. *See* § 287.3 (1952 ed.).[4]

Finally, Defendants try in vain to distance themselves from *Gerstein* (Defs.' Mem. 13), apparently forgetting the INS's prior acknowledgement that it "is clearly bound" by *Gerstein* and other precedents "regarding arrest and post-arrest procedures." *See* INS, Final Rule-Making, "Enhancing the Enforcement Authority of Immigration Officers," 59 FR 42406-01, 42411 (1994). *Gerstein* held "that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." 420 U.S. at 114. That *Gerstein* involved "a prosecutor's filing a criminal information" is irrelevant. Defs.' Mem. 13. By its terms, *Gerstein's* holding reaches "*any* significant pretrial restraint of liberty." 420 U.S. at 125 (emphasis added). And there is no dispute that Defendants' detainer policies—both before 2014 and afterward—fail to provide the judicial review that *Gerstein* requires.

II. The undisputed facts show two separate violations of the Fifth Amendment.

Neither the law nor the material facts supporting Plaintiffs' Fifth Amendment claim are contested. *See* Pls.' Mem. 16–20 (applying *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

[4] Defendants also cite 8 U.S.C. § 1357(a)(1) and 8 C.F.R. § 287.5(a)(1) to show the delegation of authority to "*Any immigration officer*." *See* Defs.' Mem. 21. But both of these provisions refer to the power of an officer *to interrogate* an "alien or person believed to be an alien." The power *to examine* is prescribed in 8 U.S.C. § 1357(a)(2) and extends to immigration judges. *See* 8 C.F.R. § 1003.10. Critically, § 1357(a)(2)—not sub(a)(1)—was interpreted in *Arias* and is the basis for Defendants' warrantless arrest authority and issuance of detainers. *See* Defs.' Mem. 12 ("[I]mmigration officers have statutory authority to make warrantless arrests, and that authority extends to issuing detainers.").

Defendants' central argument is simply that their forms and policies have changed and thus raise "myriad factual disputes." Defs.' Mem. 7, 15.[5] The fact that some of the relevant policies are "only months-old," however, does not mean they cannot be addressed on summary judgment. There is still no genuine dispute about what these new policies do and do not accomplish.

First, as Defendants concede, they still do not require personal service on the detainee—nor do Defendants even know whether such service has been made. DSOF ¶¶ 56–58. "Due process requires" that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" they face. *Gates v. City of Chicago*, 623 F.3d 389, 401 (7th Cir. 2010). Defendants deprive detainees of due process when they issue detainers without either requiring or effecting personal service.

Defendants argue that their new detainer form declares that it is ineffective if not served (Defs.' Mem. 15), but this is no protection at all. For all Defendants know, they have already obtained custody and will continue to obtain custody of individuals who never received service; Defendants are none the wiser because they do not know either way. DSOF ¶¶ 56–58. And Defendants have certainly not come forward with any evidence showing that local law enforcement agencies *do* routinely provide personal service, or that there are mechanisms in place to make sure that an unserved detainer never goes into effect. Thus Defendants have not identified "evidence 'upon which a jury could properly proceed to find a verdict' in [their] favor." *Modrowski*, 712 F.3d at 1169 (citation omitted). While Defendants claim a trial could explore these topics, merely saying so is not enough to avoid summary judgment.

[5] For example, Defendants correctly point out that Plaintiffs cited the "older testimony" of Defendants' Rule 30(b)(6) witness, Phillip Miller. Yet Defendants have presented the Court with no reason to think that the changes to the detainer form and policies affect Mr. Miller's testimony in any material way. For example, it makes no difference if "ICE officers field [] calls" and "have authority to cancel a detainer." *See* Defs.' Mem. 17. Plaintiffs predicate their Fifth Amendment claim on Defendants' failure to guarantee notice of the detainer and provide a hearing before a detached, neutral magistrate. Those material facts remain undisputed.

Defendants' argument about the service requirement actually underscores the constitutional invalidity of their detainer program as a whole. Defendants assert that Plaintiffs "ironically . . . 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 program.'" Defs.' Mem. 17. But Defendants have the irony backwards. It is Defendants who decided to enlist state and local law enforcement to carry out the work of the federal government. They cannot hide behind the Tenth Amendment to excuse their own failure to make sure their program complies with the Due Process Clause.

Second, Defendants also violate the Fifth Amendment by failing to provide a hearing before a "detached, neutral magistrate." Here, too, the material facts are undisputed. Defendants' 2015 detainer form "provides a phone number for detainees to call." Defs.' Mem. 15. That phone number connects to ICE's Law Enforcement Support Center ("LESC"). *Id.* at 16 (citing Declaration of Matthew Albence). Through Mr. Albence's Declaration, Defendants assert that the "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.* (citing Albence Decl. ¶ 11) (emphasis added). If LESC hotline operators cannot "determine whether a detainer should be canceled," they will "forward the information" on hand "to the local field office" to conduct a further investigation into a claim of U.S. citizenship. *Id.*[6]

Even if these facts are true, however, they are immaterial and do not preclude entering summary judgment in Plaintiffs' favor. The Fifth Amendment requires a proceeding before a neutral, detached magistrate who can determine whether a detainer (or other type of warrantless

[6] Curiously, Mr. Albence's source for this information is the same document (Pls.' Ex. DD) on which Mr. Miller's testimony was based. There is no dispute of fact as to the contents of that document.

arrest) was supported by probable cause and without error. *See Shadwick*, 407 U.S. at 349–50. Regardless of how Defendants spin it, their hotline lacks the touchstone that makes a due process hearing: the presence of a neutral, detached judicial officer. *Id.*

By substituting an ICE officer for a magistrate judge, Defendants have *removed* the quintessential protection that gives due process. Unlike a member of the judiciary, an ICE officer is neither "detached" nor "neutral." The ICE officer is essentially a prosecutor in the agency charged with overseeing and enforcing the immigration laws. Out of the entirety of U.S. criminal and civil detention proceedings, only in this context does a colleague of the charging officer act as a "judge" over a challenge to the confinement.

Worse still, Defendants do not contest any of the logistical flaws that render their hotline inadequate. Above all, Defendants presume that a detainee receives service of the full detainer (including the "notices to detainees"), is able to read the form, *and* has access to a telephone (that permits toll-free calls). *See* DSOF ¶¶ 57, 59, 61. But Defendants neither guarantee nor track whether any detainees are served in the first place. Further, Defendants mistakenly assume that the only challenges to detainers will come from *U.S. citizens* or *crime victims*. Defendants' current "Notice to Detainee" provides: "If you believe you are *a United States citizen or the victim of a crime*, please advise DHS by calling the ICE Law Enforcement Center at (855) 448-6903." *See* Pls.' Exs. D & HH (emphasis added). Yet there are nearly 75 million non-citizens lawfully in the United States. SOF ¶¶ 30–35. Defendants' policies fail to account for the risk that these people will be unlawfully detained and need access to a means of review. And finally, there is still no mechanism for reporting back on the results of a hotline call. DSOF ¶ 65.

Defendants try defending their refusal to provide a due process hearing by noting that the new detainers "expire[] after 48 hours of causing any custody. . . ." Defs.' Mem. 18. Defendants

then suggest that there is no harm, no foul, because—in their view—48 hours "is unquestionably a constitutionally permissible period for detention before a hearing is required." *Id.* As discussed above, however, this understates the actual period of time before a hearing is provided. Further, the Court in *County of Riverside* "did not grant law enforcement officials carte blanche to detain criminal suspects for forty-eight hours after their arrest." *Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 801 (N.D. Ill. 2014) (assessing the constitutionality of detention on an immigration detainer).[7] Rather, the Court "explicitly said that 'unreasonable delays, even within the forty-eight hour period, may be constitutionally troublesome.'" *Id.* (citing *County of Riverside*, 500 U.S. at 56). "Examples of unreasonable delay," the Court noted, "are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *County of Riverside*, 500 U.S. at 56.

Defendants' policy is more unreasonable than any of these examples. A "delay" in this context implies waiting for an unexpected period of time before receiving a probable cause hearing. Here, however, *there is no probable cause hearing at all.* This is a deprivation, not a mere "delay." The significance of such a deprivation cannot be brushed off as "brief."

III. Plaintiffs have demonstrated several independent violations of the INA.

Before addressing their statutory claims, Plaintiffs must correct Defendants' misunderstanding of the Court's September 29, 2014 memorandum opinion and order. *See* ECF No. 144. In that decision, the Court rejected cross-motions for judgment on the pleadings, in part because "[d]etermining whether Defendants' exercise of authority used to issue detainers" was unconstitutional would "require this Court to look beyond the pleadings and resolve material issues of fact regarding Defendants' policies and practices." *Id.* at 7 n.7. Plainly, the Court was

[7] *See also Rivas v. Martin*, 781 F. Supp. 2d 775, 780 (N.D. Ind. 2011) (applying *County of Riverside* to an immigration detainer).

explaining that the pleadings themselves were insufficient, and discovery was necessary to flush out the facts that are material to Plaintiffs' claims. That process is now complete. By no means did this Court predetermine the merits of an unfiled, at-the-time hypothetical motion for summary judgment.

Now that the record has matured, there is no longer a contest over the material facts. Plaintiffs have established three separate violations of the INA, any one of which would entitle them to summary judgment under the APA.

Failure to Comply with the Fourth Amendment. Defendants concede that a violation of the Fourth Amendment is actionable under 8 U.S.C. § 1357(a)(2). That section of the INA proscribes a warrantless arrest unless the arresting officer "has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation . . . . " *Id*. The parties agree that this language incorporates the requirements of the Fourth Amendment. *Compare* Pls.' Mem. 20–21 *with* Defs.' Mem. 19.

Because Defendants' detainer program contravenes the Fourth Amendment at every stage, Plaintiffs are entitled to summary judgment on their APA claim. *See supra* at 3–8. Of course, Defendants argue that substituting "probable cause" for "reason to believe" on their detainer forms satisfies the Fourth Amendment. *See* Defs.' Mem. 19. But this cosmetic change—and Plaintiffs do mean "cosmetic," *see* Pls.' Decertification Opp. Br., ECF No. 220—is insufficient. Defendants still do not require the issuing officer to undertake sufficient investigative steps, provide a sworn statement of facts, or submit his or her probable cause determination to judicial review. Defendants' detainer program is thus ultra vires under the INA.

Failure to Provide a Hearing. Similarly, there is no question that Defendants' detainer policies do not comply with the statutory requirement that the individual 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." 8 U.S.C. § 1357(a)(2). Defendants concede that they do not present a detainee to a judge until after they file a charging document—at which point it is too late to challenge the warrantless arrest itself. *See* DSOF ¶¶ 50–52. Although Defendants argue that § 1357(a)(2) does not refer specifically to an immigration judge, Plaintiffs have already explained the flaws in that argument. *See supra* at 5–8. As the facts showing the violation are uncontested, Plaintiffs are entitled to summary judgment on this basis as well.

Failure to Make Individualized Determination of Flight Risk. Section 1357(a)(2) allows a warrantless arrest only if, in addition to probable cause, the officer has reason to believe that the individual "is likely to escape before a warrant can be obtained for his arrest." *Id.* There is no dispute that Defendants issue detainers without any such individual determinations of flight risk. DSOF ¶¶ 47–49. Instead, Defendants *presume* that class members pose a sufficient risk of flight simply by virtue of their detention by state or local authorities. *See* Defs.' Mem. 20 n. 9.

This makes no sense. By definition, every person who is subjected to a detainer is, at the time, in law enforcement custody. Such a person is necessarily *less* likely and able to flee than a person walking free on the street. If the "flight risk" requirement could be satisfied by such a facile presumption, it would have no meaning at all.

Moreover, the critical question is *not* whether the individual will flee before ICE has time to "come to the jail and obtain physical custody." Defs.' Mem. 19. Nowhere in 8 U.S.C. § 1357(a)(2) is there any consideration of ICE's ability to assume physical custody. The dispositive inquiry is whether the issuing officer has reason to believe that the detainee "is likely to escape" *before the officer can obtain a warrant*. Throughout this case, Defendants have maintained that their officers *always* base their issuance of detainers upon probable cause. If that

really is the case, then there is no reason why an officer could not obtain and serve a proper warrant instead, particularly given that the subject of the warrant would necessarily be incarcerated at that time. *See* Pls.' Mem. 21–23 (citing authorities).

Finally, Defendants try to plant an ambiguity in § 1357(a)(2) that does not exist. They suggest that the term "escape" is vague, so this Court should defer to Defendants' judgment about how to proceed. Defs.' Mem. 20 (citing *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984)). But that is not how *Chevron* works. Defendants never actually identify any ambiguity, nor do they explain how their current policies reflect a reasonable interpretation of an ambiguous term. Indeed, to make thousands of warrantless arrests based merely on a belief that aliens "released from jail *may* '*escape*'" (Defs.' Mem. 20) (emphasis added) ignores the statute's plain language, which requires that escape be "likely," not a mere possibility.

At bottom, § 1357(a)(2) does not authorize a warrantless arrest—much less tens of thousands of warrantless arrests—based merely on possibilities and presumptions. Instead, it requires a finding that the particular individual is likely to escape before a warrant can be obtained. It is undisputed that Defendants' policies do not call for any such finding.

CONCLUSION

After nearly five years, it is time to bring this litigation to a close. As Plaintiffs' motion explains, Defendants' detainer program *still* does not provide the basic protections guaranteed by the Fourth and Fifth Amendments, and it *still* goes beyond the warrantless arrest authority conferred by the INA. Defendants have not identified any genuine dispute of material fact, and they have certainly not presented any "evidence 'upon which a jury could properly proceed to find a verdict' in [their] favor." *Modrowski*, 712 F.3d at 1169 (citation omitted). This Court should enter summary judgment and enjoin Defendants from issuing such unlawful detainers.

Dated: March 30, 2016

By: /s/ Linda T. Coberly

Linda T. Coberly
Lee B. Muench
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600
lcoberly@winston.com
lmuench@winston.com

Claudia Beatrice Valenzuela Rivas
Mark M. Fleming
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle Street, Suite 1300
Chicago, Illinois 60604
Telephone: (312) 660-1370
Fax: (312) 660-1505
cvalenzuela@heartlandalliance.org
mfleming@heartlandalliance.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JOSE JIMENEZ MORENO and MARIA JOSE LOPEZ, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	No. 1:11-cv-05452
vs.	)	Judge John Z. Lee
JANET NAPOLITANO, et al., in their official capacities,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I, Linda T. Coberly, hereby certify that on March 30, 2016, I caused a true and correct copy of PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT to be served via electronic mail upon the following:

Colin A. Kisor
William C. Silvis
U.S. DPT. OF JUSTICE, CIVIL DIVISION
OFFICE OF IMMIGRATION LITIGATION,
DISTRICT COURT SECTION
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
colin.kizor@usdoj.gov
william.silvis@usdog.gov

Craig Arthur Oswald
UNITED STATES ATTORNEY'S OFFICE
NORTHERN DISTRICT OF ILLINOIS
219 South Dearborn Street, Suite 500
Chicago, Illinois 60604
craig.oswald@usdoj.gov

/s/ Linda T. Coberly