No. 12-3991

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ERNESTO GALARZA,
Plaintiff-Appellant,

v.

COUNTY OF LEHIGH,
Defendant-Appellee.

On Appeal From the March 30, 2012 Order and Opinion of the U.S. District Court for the Eastern District of Pennsylvania (Gardner, J.), No. 10-cv-6815, Granting Defendant County of Lehigh's Motion to Dismiss

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BRIEF OF APPELLANT
and VOLUME I of the JOINT APPENDIX (J.A. 1-64)

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JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction over this case pursuant to 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court issued a final order dismissing the case as to all defendants on September 19, 2012. Plaintiff timely filed a notice of appeal on October 16, 2012. This appeal is from a final order that disposes of all parties' claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues:

1. Whether the district court erred in dismissing Plaintiff Ernesto Galarza's Fourth Amendment claim against Defendant Lehigh County where, pursuant to the County's policy and practice, County officials imprisoned Plaintiff, a U.S. citizen, for three days solely because he was named on a federal immigration "detainer" form, even though the form did not purport to be supported, and was in fact unsupported, by probable cause. (*Raised in Defendant-Appellee's motion to dismiss, see Dkt. #50-1, Galarza v. Szalczyk et al., No. 10-cv-06815, at 8-12, 14 (E.D. Pa. filed Apr. 25, 2011); objected to in Plaintiff-Appellant's opposition, see Dkt. #58, Galarza v. Szalczyk et al., No. 10-cv-06815, at 12-15 (E.D. Pa. filed May 23, 2011); and ruled upon at Joint Appendix ("JA") 55-58.*)

2. Whether the district court erred in dismissing Plaintiff's Fourteenth Amendment due process claim against Defendant Lehigh County where the County did not notify Plaintiff of the reason for his detention and denied him an opportunity to respond or contest the validity of the detainer. (*Raised in Defendant-Appellee's motion to dismiss, see Dkt. #50-1, Galarza v. Szalczyk et al., No. 10-cv-06815, at 12-14 (E.D. Pa. filed Apr. 25, 2011); objected to in Plaintiff-Appellant's opposition, see Dkt. #58, Galarza v. Szalczyk et al., No. 10-cv-06815, at 16-17 (E.D. Pa. filed May 23, 2011); and ruled upon at JA 55-58.)*

STATEMENT OF RELATED CASES OR PROCEEDINGS

Appellant is not aware of any related case or proceeding that is completed, pending, or about to be presented before this Court or any other court or agency, federal or state.

STATEMENT OF THE CASE

This case arises out of the unconstitutional detention of Plaintiff-Appellant Ernesto Galarza, a U.S. citizen whom Defendant-Appellee Lehigh County imprisoned for three days, without probable cause or due process, on the purported authority of a baseless immigration "detainer."

In November 2008, Mr. Galarza was arrested by the Allentown Police Department—on charges of which he was later acquitted—and booked into Lehigh County Prison. After learning of the arrest, U.S. Immigration and Customs Enforcement ("ICE") agents faxed an immigration "detainer" form to Lehigh County, notifying the County that ICE had begun an investigation into Mr. Galarza's immigration status.

The detainer was not based on probable cause to believe Mr. Galarza was a non-citizen subject to detention and removal; nor did it purport to be. In fact, County officials had ample reason to know Mr. Galarza was *not* a removable non-citizen: He had told County officials during the booking process that he was born in New Jersey, and the County had his Pennsylvania driver's license and Social Security card in its possession. Nevertheless, pursuant to the County's policy and practice of automatically treating all immigration detainers as a basis for imprisonment, County officials detained Mr. Galarza on this basis for three additional days after a magistrate judge had ordered his release on bail, and the bail

had been posted. Mr. Galarza was detained without a warrant, without probable cause to believe he was in violation of any law, and without notice or an opportunity to contest the basis for his detention.

On November 19, 2010, Mr. Galarza filed a civil damages action against Lehigh County, the City of Allentown, and various individual federal and municipal defendants. *See* Complaint, Dkt. #1, *Galarza v. Szalczyk*, No. 10-cv-06815 (E.D. Pa. filed Nov. 19, 2010). After conducting expedited discovery to identify individual defendants named as "John Doe(s)"—including the deposition of Lehigh County's Director of Corrections—Mr. Galarza filed an Amended Complaint on April 6, 2011, naming Lehigh County, the City of Allentown, Allentown Police Detective Christie Correa, ICE Agent Mark Szalczyk, and ICE Agent Gregory Marino as defendants. *See* JA 80-81 at ¶¶ 5-11. With respect to Lehigh County, Mr. Galarza pleaded causes of action under 42 U.S.C. § 1983, alleging that the County's policies or practices caused his detention without probable cause in violation of the Fourth Amendment, and the deprivation of his liberty without due process of law in violation of the Fourteenth Amendment's Due Process Clause. *See* JA 96-98 at ¶¶ 125-34.[1]

[1] In his Amended Complaint, Mr. Galarza also alleged that Lehigh County violated his rights under the Fourteenth Amendment Equal Protection Clause. *See* JA 98 at ¶¶ 135-40. He does not pursue that claim on appeal.

In addition, on August 3, 2011, Mr. Galarza filed a complaint against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b). *See* Complaint, Dkt. #1, *Galarza v. United States*, No. 11-cv-4988 (E.D. Pa. filed Aug. 3, 2011). The district court later consolidated the FTCA action with the individual damages action. *See* Order, Dkt. #70, *Galarza v. Szalczyk et al.*, No. 10-cv-06815 (E.D. Pa. filed Nov. 4, 2011).

All defendants except the United States moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). On March 30, 2012, the district court granted in part and denied in part the motions to dismiss. *See* JA 4. The district court held that the complaint stated claims for relief against ICE Agent Szalczyk and Allentown Detective Correa for violations of the Fourth Amendment and the Equal Protection Clause, and that they were not entitled to qualified immunity. JA 32-47. The district court dismissed the procedural due process claim against Agent Szalczyk, JA 52-54, and it dismissed all claims against ICE Agent Marino and the City of Allentown. JA 28-31, 59-62.

As to Defendant Lehigh County, the district court dismissed all of Mr. Galarza's claims. JA 55-58. The district court reasoned that "[t]he only policy or custom which plaintiff attributes to defendant Lehigh County is the policy of detaining any person being held in Lehigh County Prison who is named in an

immigration detainer," and because it viewed this policy as "consistent with the [federal] regulations," it dismissed Mr. Galarza's claims. JA 55.

Mr. Galarza subsequently settled his claims against the individual defendants, the City of Allentown, and the United States. The district court issued a final order dismissing the case as to all defendants on September 19, 2012. JA 107. This appeal regarding Mr. Galarza's claims against Lehigh County followed.

STATEMENT OF FACTS

Plaintiff Ernesto Galarza is a U.S. citizen who was born in Perth Amboy, New Jersey, in 1974. He is a Hispanic man of Puerto Rican heritage. JA 83 at ¶¶ 24-26.

On Thursday, November 20, 2008, Mr. Galarza was performing construction work on a house in Allentown, Pennsylvania. Unbeknownst to him, a contractor on the construction site sold cocaine to an undercover Allentown police detective, Christie Correa. JA 83-84 at ¶¶ 28-30. Detective Correa arrested not only the contractor, but also Mr. Galarza and two other employees who were working at the site, charging them with conspiracy to deliver cocaine in violation of Pennsylvania law. JA 84 at ¶ 31. All four arrestees were Hispanic. *Id.* at ¶ 32. Two of the arrestees were citizens of the Dominican Republic, the third was a citizen of Honduras, and the fourth, Mr. Galarza, was and is a U.S. citizen. *Id.* at ¶¶ 33-35.

After his arrest, Mr. Galarza was initially detained at the Allentown Police Department. *Id.* at ¶ 36. At some point that evening, Detective Correa made a phone call to U.S. Immigration and Customs Enforcement ("ICE"), informing ICE that she had arrested Mr. Galarza and three other men. She provided ICE with Mr. Galarza's name, date of birth, place of birth, ethnicity, and Social Security number. JA 85-86 at ¶¶ 48-51.

At approximately 8:00 that evening, Mr. Galarza was transported to Lehigh County Prison. JA 85 at ¶ 40. A few hours later, a magistrate judge set his bail at $15,000. *Id.* at ¶ 41. Mr. Galarza went through the prison admissions process in the early morning hours of Friday, November 21. *Id.* at ¶ 42.

During the booking process, Mr. Galarza told Lehigh County prison officials that he was born in New Jersey. *Id.* at ¶ 44. County prison officials therefore were aware that Mr. Galarza is a U.S. citizen. *Id.* at ¶ 45. Prison officials took his fingerprints and confiscated and stored his wallet, which contained his Pennsylvania driver's license, his Social Security card, his debit card, and his health insurance card. JA 84-85 at ¶¶ 39, 46-47.

At some point on Friday, November 21, ICE Agent Mark Szalczyk, acting on the information relayed by Detective Correa, filled out an immigration "detainer" form and faxed it to Lehigh County. The immigration detainer falsely

described Mr. Galarza as a suspected "alien" and citizen of the "Dominican Republic." JA 87 at ¶¶ 59-61. The detainer form also read, in relevant part:

> Investigation has been initiated to determine whether this person is subject to removal/deportation from the United States . . . .
>
> It is requested that you: Please accept this notice as a detainer. This is for notification purposes only . . . . Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for ICE to assume custody of the alien. You may notify ICE by calling (610) 374-0743 during business hours or 802 872-6020 after hours in an emergency.

JA 105. The detainer was not accompanied by a warrant, an affidavit of probable cause, a removal order, or any other evidentiary support. *Id.*

That same day, a surety company posted bail for Mr. Galarza. JA 88 at ¶ 67. A County prison official told Mr. Galarza that his bail had been posted, and that he would be released. *Id.* at ¶ 68. Shortly thereafter, however, the same official told Mr. Galarza that he would not be released because he was the subject of "a detainer." *Id.* at ¶ 69. The prison official did not specify what kind of detainer was preventing Mr. Galarza's release, provide him with a copy, or give him any additional information. Mr. Galarza protested that there should be no detainer preventing his release, but the prison official told him that he would have to wait through the entire weekend and speak with a prison counselor the following Monday. JA 89 at ¶ 70.

Mr. Galarza alleged that his detention was the result of the County's stated policy and practice of effectuating all immigration detainers received from ICE, regardless whether ICE had—or even claimed to have—probable cause to support the request. *See* JA 89, 91-92, 97 at ¶¶ 71, 95, 128, 131. Indeed, notwithstanding the history of "improper detainers" being "frequently . . . issued at Lehigh County Prison," JA 82-83 at ¶ 22, the County maintained a practice of referring all foreign-born arrestees to ICE in order to facilitate the issuance of such detainers. JA 85 at ¶ 43. The County afforded the targets of detainers no notice or opportunity to contest their detention. And in Mr. Galarza's case, County officials, acting pursuant to County policy and practice, "disregarded evidence close at hand . . . [including Mr. Galarza's] Social Security card, Pennsylvania driver's license and statements that he was born in New Jersey . . . which indicated that Plaintiff is a United States citizen." JA 91-92 at ¶ 95.

Mr. Galarza only learned that he was being held pursuant to an *immigration* detainer on the morning of Monday, November 24, when a County prison counselor finally informed him of that fact. JA 89 at ¶¶ 72-73, 75. Mr. Galarza told the counselor that he is a U.S. citizen and asked the counselor to retrieve his wallet containing his driver's license and Social Security card as proof, but the counselor refused to do so. *Id.* at ¶¶ 76-77.

Later on Monday, November 24, two ICE officers appeared at the prison and questioned Mr. Galarza. Mr. Galarza reiterated that he was born in New Jersey, and he gave the ICE officers his Social Security number and date of birth. After leaving for a short time, the ICE officers returned to inform Mr. Galarza that they would cancel the detainer. The detainer was cancelled at 2:05 p.m. The County finally released Mr. Galarza from prison at 8:28 p.m. that day. JA 89-90 at ¶¶ 78-83.

In total, Mr. Galarza was detained for approximately three days after he posted his court-ordered bail on the basis of the immigration detainer. As a result, he lost a part-time job, lost wages from both his full and part-time jobs, and suffered emotional distress and physical problems. Mr. Galarza was later acquitted by a jury of the criminal charge for which he had been arrested. JA 90 at ¶¶ 84-86.

SUMMARY OF ARGUMENT

A U.S. citizen cannot lawfully be detained for any length of time for immigration purposes. Yet Lehigh County held Mr. Galarza, a U.S. citizen since birth, in jail for three days—without a warrant, without probable cause, and without any due process protections—based solely on an unsupported immigration detainer. The district court erred in dismissing Mr. Galarza's Fourth Amendment unlawful seizure and Fourteenth Amendment due process claims against Lehigh

County. Mr. Galarza has stated cognizable claims that the County, acting pursuant to its established policy and practice of treating all immigration detainers received from ICE as a basis for detention, detained him for three days without probable cause and deprived him of his liberty without due process of law.

In the district court, the County's sole argument was that it was just following orders: The County maintained that it could not be held responsible for Mr. Galarza's unlawful detention because the ICE detainer *required* the County to imprison him. *See* Motion to Dismiss, Dkt. #50-1, *Galarza v. Szalczyk et al.*, No. 10-cv-06815, at 8 (E.D. Pa. filed Apr. 25, 2011).

The district court properly ruled that Mr. Galarza had stated a claim that he was unlawfully "seiz[ed]" and detained in County custody without probable cause, *see* JA 35, 40, and noted the County's stated "policy of detaining *any* person . . . named in an immigration detainer" for up to 48 hours, plus weekends and holidays, beyond the time when he or she was entitled to release from County custody. JA 55 (emphasis added). The district court granted the County's motion to dismiss, however, reasoning that the County's "policy is consistent with the regulations promulgated by the United States Department of Homeland Security governing immigration detainers," *id.*, and that "once the immigration detainer is issued, the local . . . agency . . . 'shall' maintain custody." JA 56.

The district court's conclusion is incorrect. No legal authority *required* Lehigh County to detain Mr. Galarza on the basis of the immigration detainer. Therefore, the County cannot escape liability for its actions when those actions violate someone's constitutional rights. Immigration detainers are not, and cannot legally be, mandatory orders. The County chose to adopt a policy of imprisoning any person named in an immigration detainer for an additional two to five days after the person became entitled to release—even where, as here, probable cause was patently lacking, and without providing even minimal due process protections. The County's policy caused Mr. Galarza's detention and the violations of his constitutional rights. For these reasons, the Court should reverse the district court's order granting Lehigh County's motion to dismiss.

STANDARD OF REVIEW

The Court's review of a district court's dismissal of a claim under Fed. R. Civ. P. 12(b)(6) is plenary. *Byers v. Intuit, Inc.,* 600 F.3d 286, 291 (3d Cir. 2010). The Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 523 (3d Cir. 2009).

ARGUMENT

I. ICE Detainers—Which Seek Custodial Detention Without Warrant, Probable Cause, Judicial Authorization, or Procedural Protections—Are Anomalous in the Criminal Justice System and Lead Predictably to Constitutional Violations.

The document upon which the County stakes its defense is a pre-printed, fill-in-the-blank form called an "Immigration Detainer—Notice of Action" (Form I-247), which it received by fax from ICE. The form listed Mr. Galarza's name, date of birth, gender, and alleged "[n]ationality: Dominican Republic." JA 105. The form stated that "[i]nvestigation has been initiated to determine whether this person is subject to removal/deportation from the United States," and it "requested" that the County "detain . . . [Mr. Galarza] for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays)" after he would otherwise be released, "to provide adequate time for ICE to assume custody of the alien." *Id.*

As is clear from the face of this form, an immigration detainer "is not a criminal warrant." *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011). Immigration detainers differ from warrants in two critical respects.

First, a criminal warrant must be issued by a "neutral and detached magistrate," *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) (internal quotation marks omitted), based on facts "supported by oath or affirmation." U.S.

Const. amend. IV.[2] This requirement "serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963) (citation omitted).

Immigration detainers, in contrast, are not judicially approved. They are unsworn documents issued by immigration enforcement officials themselves—the same officials who make arrests. *Compare* 8 C.F.R. § 287.7(b) (listing immigration officials who may issue detainers); *with* 8 C.F.R. § 287.5(c)(1) (listing immigration officials who may make arrests). *Cf. Coolidge*, 403 U.S. at 453 (holding that a search warrant signed by a state Attorney General was not a "warrant" for Fourth Amendment purposes because the attorney general "was the chief investigator and prosecutor in this case, [and] . . . not the neutral and detached magistrate required by the Constitution"). In Mr. Galarza's case, his detainer was signed not by a magistrate judge or an immigration judge, but by ICE

[2] *Accord Connally v. Georgia*, 429 U.S. 245, 251 (1977) (holding that "the issuance of [a] search warrant by the justice of the peace," who was paid a fee for each warrant he issued and thus was not a neutral and detached decision-maker, "effected a violation of the protections afforded [defendant] by the Fourth and Fourteenth Amendments"); *Shadwick v. City of Tampa*, 407 U.S. 345, 350-51 (1972) (holding that municipal court clerks, who were authorized to issue arrest warrants for violations of municipal ordinances, were the equivalent of "neutral and detached" magistrates because they were supervised by municipal court judges and had "no connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires").

enforcement agent Mark Szalczyk. JA 105.

Second, a criminal warrant may issue only upon a finding of probable cause to believe that the subject has violated the law. *See* U.S. Const. amend. IV. Mr. Galarza's detainer, in contrast, did not even purport to be based upon probable cause. On its face, the document virtually confesses the absence of probable cause: It asserted only that an "*[i]nvestigation* ha[d] been *initiated*" into whether Mr. Galarza was a non-citizen subject to removal. JA 105 (emphasis added).[3] That is,

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[3] At the time of Mr. Galarza's detention, the "initiat[ion]" of an "investigation" was one of four possible bases for the issuance of an immigration detainer, as indicated by the four check-boxes that appear on the form. Alternatively, ICE could issue a detainer if the individual was the subject of an outstanding "Notice to Appear or other charging document," an outstanding "warrant of arrest," or an outstanding removal order by an Immigration Judge. *See* JA 105.

In December 2012—after the district court's decision in this case—ICE released a memorandum stating that "absent extraordinary circumstances, ICE agents and officers should issue a detainer . . . only where . . . they have reason to believe the individual is an alien subject to removal[.]" John Morton, Director of ICE, Civil Immigration Enforcement, Guidance on the Use of Detainers, at 2 (Dec. 21, 2012), *available at* https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf (last visited March 17, 2013). ICE also amended its detainer form, replacing the phrase "[DHS has] initiated an investigation" with the phrase "[DHS has] [d]etermined that there is reason to believe the individual is an alien subject to removal[.] Form 1-247 (Dec. 2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf (last visited March 17, 2013). Courts have interpreted the phrase "reason to believe" in related immigration contexts to mean probable cause. *See, e.g., Lee v. INS*, 590 F.2d 497, 499-500 (3d Cir. 1979); *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971). By amending the detainer form to specifically incorporate the probable cause standard, ICE has effectively acknowledged that previous versions of the form, like that one issued in Mr. Galarza's case, may have been issued without sufficient evidence to meet that standard.

it indicated not that ICE *had* probable cause, but that ICE sought additional time to *acquire* probable cause. At oral argument before the district court, the federal defendants' counsel explained it this way:

> A detainer is basically a stop gap measure that's designed 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, Dkt. #79. *See also* 8 C.F.R. § 287.7(a) (stating that an immigration detainer may be issued "at any time"; specifying no evidentiary standard for issuance).

The Supreme Court has long held that the Fourth Amendment forbids arrests based on mere investigative interest. *See Dunaway v. New York*, 442 U.S. 200, 216 (1979) (invalidating "detention for custodial interrogation" based on less than probable cause); *Brown v. Illinois*, 422 U.S. 590, 605 (1975) (invalidating an arrest "for investigation" that was not supported by probable cause; noting that "[t]he impropriety of the arrest was obvious") (internal quotation marks omitted). It is equally well settled that the Fourth Amendment's probable cause requirement applies in the immigration context. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) ("The Fourth Amendment applies to all seizures of the person."); *see also Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *Lee v. INS*, 590 F.2d 497, 499-500 (3d Cir. 1979). Indeed, the Supreme Court, relying on Fourth Amendment case-law, recently reiterated in *Arizona v. United States* that

"[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." 132 S. Ct. 2492, 2509 (2012). Yet here, by effectuating the immigration detainer issued by ICE, the County imprisoned Mr. Galarza on precisely this invalid basis—ICE's "investigation" into his immigration status.[4]

In short, immigration detainers are in no way interchangeable with warrants. Nor do they bear any resemblance to *criminal* detainers. A criminal detainer is a formal request that a prisoner who is currently serving a criminal sentence in one jurisdiction be temporarily transferred to another jurisdiction to face pending criminal charges. Critically, criminal detainers may be issued only if criminal charges are *pending* in the requesting jurisdiction. *See United States v. Mauro*, 436 U.S. 340, 343-44 (1978). Immigration detainers lack any comparable protections, and, under the relevant regulations, they may be issued where—as here—no immigration proceedings are pending at all.[5]

Criminal detainers are also subject to multiple procedural safeguards spelled out in the Interstate Agreement on Detainers ("IAD"). *See* 42 Pa. C.S. § 9101 (codifying the IAD in Pennsylvania). Under the IAD, the custodial jurisdiction

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[4] The detention purportedly authorized by an immigration detainer—detention for 48 hours, excluding weekends and holidays—is a full-scale custodial seizure entirely different from a brief stop that may be based on mere reasonable suspicion pursuant to *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

[5] As noted above, *see supra* n.3, there is a space on the detainer form where ICE may indicate whether a "Notice to Appear or other charging document initiating removal/deportation proceedings" has been issued against the subject. JA 105. That box was not checked in Mr. Galarza's case.

agrees to "promptly inform [the individual] . . . of any detainer lodged against him and . . . of his right to make a request" for transfer to the requesting jurisdiction to clear the pending charges against him. 42 Pa. C.S. § 9101, art. III(c); *see also Mauro*, 436 U.S. at 351. Mr. Galarza's immigration detainer came with no such protections. The detainer form itself provided no mechanism for notice or an opportunity to contest the detention.[6] Nor did the County provide Mr. Galarza with any notice or the opportunity to contest the basis for the detainer.

Finally, a criminal detainer does not authorize any additional period of custody beyond that to which the prisoner is already subject under his existing sentence. It serves only to notify the prisoner and the custodial jurisdiction of the pending charges, and to trigger the IAD's procedural protections and timelines. *See United States ex. rel. Esola v. Groomes*, 520 F.2d 830, 838 (3d Cir. 1975) (an IAD detainer is not a "hold order," but rather a "notification" that the subject "is wanted to face pending criminal charges in another jurisdiction") (internal quotation marks omitted); *see also Mauro,* 436 U.S. at 358. Immigration detainers

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[6] Since Mr. Galarza's detention, ICE has amended the detainer form to request that local agencies provide detainees with copies of their detainers, and the form now includes a telephone hotline that U.S. citizens and others subject to erroneous detainers may call. *See* ICE, "ICE Establishes Hotline for Detained Individuals, Issues New Detainer Form" (Dec. 29, 2011), *available at* http://www.ice.gov/news/releases/1112/111229washingtondc.htm (last visited March 17, 2013). The efficacy of these new provisions depends, of course, on local agencies providing detainees with timely notice and access to telephones, among other things. *See infra* Section IV.

like Mr. Galarza's, however, purport to authorize an additional two to five days of detention—48 hours, excluding Saturdays, Sundays, and federal holidays—after the subject would otherwise be released. *See* JA 105; 8 C.F.R. § 287.7(d).

In sum, immigration detainers are unlike anything else in the criminal justice system: They are issued by investigating agents without approval from any neutral authority, and they purport to authorize multiple days of warrantless detention without a showing of probable cause, without any charges pending, and without basic procedural protections.

There is no statutory basis for this exceptional detention power. The only federal statute authorizing immigration detainers, 8 U.S.C. § 1357(d), provides that, "[i]n the case of an alien who is arrested . . . for a violation of any law relating to controlled substances," ICE may issue a detainer and, if "the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien." 8 U.S.C. § 1357(d). The statute says *nothing* about detaining the individual for an additional 48 hours, plus weekends and holidays, *beyond the date on which the individual would otherwise be entitled to his freedom.* Notably, the Supreme Court has described 8 U.S.C. § 1357(d) as an information-sharing mechanism only, not as a basis for detention. *Arizona*, 132 S. Ct. at 2507 ("State officials can . . . assist the Federal Government by responding to *requests for information* about when an alien will be released

from their custody. *See* [8 U.S.C.] § 1357(d).") (emphasis added).[7] Yet ICE's practice at the time of Mr. Galarza's arrest was to issue detainers even before it developed probable cause to believe that the subject is a removable non-citizen, and to ask state and local officials to detain people on that patently insufficient basis. *See* JA 82-83 at ¶¶ 22-23.

Unsurprisingly, given the effectively standardless nature of immigration detainers and the lack of due process protections, numerous U.S. citizens in Pennsylvania and elsewhere around the country have been wrongfully imprisoned on immigration detainers—even though U.S. citizens may not lawfully be detained for immigration purposes.[8] *See, e.g.,* Complaint, Dkt. #1, *Makowski v. Holder et al.*, No. 12-cv-05265, at ¶ 10 (N.D. Ill. filed July 3, 2012) (U.S. citizen subjected to immigration detainer and detained for approximately two additional months); Complaint, Dkt. #1, *Morales v. Chadbourne et al.*, No. 12-cv-00301, at ¶¶ 1-2

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[7] *See* Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 Loyola of Los Angeles Law Review 1, 84-85 (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178524 (reviewing regulatory history and the *Arizona* decision and concluding that immigration detainers issued under 8 U.S.C. § 1357(d) should be interpreted as "request[s] for notice of impending release, not as . . . command[s] for continued detention").

[8] *See* 8 U.S.C. § 1357(d) (authorizing the issuance of detainers for "alien[s]"); *id.* § 1357(a)(2) (authorizing warrantless arrests of "alien[s]"); *cf. Flores-Torres v. Mukasey*, 548 F.3d 708, 712 (9th Cir. 2008) ("There is no dispute that if Torres is a citizen the government has no authority under the INA to detain him, . . . and that his detention would be unlawful under the Constitution and under the Non-Detention Act.") (citing 18 U.S.C. § 4001(a) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.")).

(D.R.I. filed Apr. 24, 2012) (U.S. citizen subjected to ICE detainers on two separate occasions); Complaint, Dkt. #1, *Wiltshire v. Fitzgerald et al.*, No. 09-cv-4745, at ¶¶ 13-16, 31-36 (E.D. Pa. filed Oct. 16, 2009) (U.S. citizen subjected to ICE detainer and subsequently held for three months in immigration custody).

Mr. Galarza's unconstitutional three-day imprisonment was egregious, but hardly unforeseeable. Because the County chose to seize and imprison the targets of *all* immigration detainers it received—even if unaccompanied by a warrant, affidavit or even allegation of probable cause—and because it failed to offer even minimal due process protections, the County virtually ensured that the rights of detainees like Mr. Galarza would be violated.

II. Lehigh County Cannot Escape Liability for Its Decision To Imprison Mr. Galarza Based on a Constitutionally Deficient Detainer by Mischaracterizing Immigration Detainers as "Orders."

The district court properly held that Mr. Galarza's detention beyond the time when he posted bail was a "seizure" for which probable cause was required. JA 35. It also held that, taking the allegations as true, Mr. Galarza's seizure was unsupported by probable cause—and thus, ICE Agent Szalczyk and Allentown Detective Correa could be held liable for their role in acting to cause his unconstitutional detention. JA 33. Yet the district court erroneously held that Lehigh County was not liable for *detaining* Mr. Galarza in violation of his rights because it viewed the County's policy of detaining all individuals named in

immigration detainers as mandated by the federal government. *See* JA 55-56 (holding that the County's "policy is consistent with the regulations promulgated by the United States Department of Homeland Security governing immigration detainers," which provide that "once the immigration detainer is issued, the local . . . agency . . . 'shall' maintain custody."). This is simply incorrect.

By imprisoning Mr. Galarza without probable cause or due process, Lehigh County violated the Fourth Amendment and the Due Process clause. An order from the federal government could not have authorized Lehigh County to commit these violations. *Cf. Saenz v. Roe*, 526 U.S. 489, 507 (1999) ("Congress may not authorize the States to violate the Fourteenth Amendment."). And even an individual entitled to qualified immunity—which Lehigh County is clearly not under O*wen v. City of Independence*, 445 U.S. 622, 650 (1980)—cannot claim exoneration from liability by reason of superior orders. As courts have regularly observed, "since World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order." *Kennedy v. City of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010) (quoting *O'Rourke v. Hayes*, 378 F.3d 1201, 1210 n.5 (11th Cir. 2004)) (other internal quotations marks omitted).

But there was in fact no federal order here. The district court's decision was based on a misunderstanding of immigration detainers. Immigration detainers are requests, not orders. The County was not required to comply; rather, it chose to follow a policy of treating all ICE detainers as a basis for imprisonment—even without probable cause or due process—and it imprisoned Mr. Galarza on this basis. The County cannot absolve itself of liability for acceding to unconstitutional requests.

A. The federal regulation and ICE's own statements make clear that ICE detainers are requests.

The district court's error is evident from the plain language of the very regulation on which it relies. The federal detainer regulation specifically provides that an ICE "detainer is a *request*." 8 C.F.R. § 287.7(a) (emphasis added). In relevant part, the regulation states:

> (a) Detainers in general.
> . . . A detainer serves to advise another law enforcement agency that the Department [of Homeland Security] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. *The detainer is a request* that such agency advise the Department, prior to release of the alien, in order for the Department to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.
> . . .
> (d) Temporary detention at Department *request*.
> Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours,

> excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

8 C.F.R. § 287.7(a), (d) (emphases added). The regulation's repeated use of the word "request" makes clear that ICE detainers are just that.[9]

Despite the fact that Section 287.7(a) defines immigration detainers as "request[s]," the district court erroneously concluded that the regulation required the County to imprison Mr. Galarza because the word "shall" appears in subsection (d) of the regulation. JA 56. Subsection (d), however, is clearly labeled "Temporary detention at Department *request*," 8 C.F.R. § 287.7(d) (emphasis added), and it comes only after the regulation's "general" definition of a detainer as a "request" in subsection (a). *Id.* § 287.7(a). *Cf. Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (noting that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute") (internal quotation marks omitted)). Moreover, when read in context, it is evident that the word "shall" in subsection (d) serves not to require detention, but rather to place an outer limit on the length of detention if an agency opts to comply. That is, *if* an agency opts to fulfill a "Department request" to hold the subject of an immigration detainer, the period of custody is "*not to exceed* 48

[9] Nothing in the federal statute governing immigration detainers suggests that such detainers are binding on the recipients. *See* 8 U.S.C. § 1357(d).

hours, excluding Saturdays, Sundays and holidays[.]" 8 C.F.R. § 287.7(d) (emphasis added).

Similarly, the language of Mr. Galarza's detainer confirms that it was a mere request to detain, not an order. The detainer read, in relevant part:

> You are advised that the action noted below has been taken by Immigration and Customs Enforcement, concerning the above-named inmate of your institution:
>
> ☒ Investigation has been initiated to determine whether this person is subject to removal/deportation from the United States. . . .
>
> It is *requested* that you:
>
> Please accept this notice as a detainer. This is for *notification purposes only* and does not limit your discretion in any decision affecting the offender's classification work and quarters assignments, or other treatment which he or she would otherwise receive.
>
> ☒ Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for ICE to assume custody of the alien.

JA 105 (emphases added). The language of the detainer form followed 8 C.F.R. § 287.7(a) and (d), and like the regulation, it used the word "request[]." *Id.* Underneath the general heading "It is requested that you…," the detainer listed certain actions that ICE was asking the County to take, including to "detain" Mr. Galarza. *Id.* The only logical reading of this form is that *if* the County decided to

comply with ICE's request to detain Mr. Galarza beyond his release date, the County was *then* bound by federal regulations which require that the detention be limited to "48 hours (excluding Saturdays, Sundays and Federal holidays)." *Id.*[10]

In addition, ICE's public statements and policy documents confirm that the agency views detainers as requests, not orders.[11] ICE's detainer policy, issued in 2010, describes a detainer as a "*request* that the [law enforcement agency] maintain custody of an alien who would otherwise be released." ICE, Interim Policy Number 10074.1: Detainers, ¶ 2.1 (Aug. 2, 2010) (emphasis added), *available at* http://cironline.org/sites/default/files/legacy/files/ICEdetainerpolicy.PDF (last visited Mar. 17, 2013).[12] This is not a new position. In 1994, the Immigration and

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[10] ICE has since revised its detainer form; it no longer uses the word "require." The current version of the form states: "IT IS REQUESTED THAT YOU: Maintain custody of the subject for a period NOT TO EXCEED 48 HOURS, excluding Saturdays, Sundays, and holidays . . . . This request derives from federal regulation 8 C.F.R. § 287.7." Form I-247 (Dec. 2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf (last visited March 17, 2013) (emphasis in original).

[11] *See Mercy Catholic Medical Center v. Thompson*, 380 F.3d 142, 155 (3d Cir. 2004) (agency policy statements, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (quoting *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)).

[12] ICE's 2010 detainer policy remains in effect, as supplemented by ICE's December 2012 memorandum, *see supra* n.3. *See also* ICE, ICE Detainers: Frequently Asked Questions, *at* http://www.ice.gov/news/library/factsheets/detainer-faqs.htm (last visited Mar. 17,

Naturalization Service ("INS")—the predecessor agency to ICE—stated: "A detainer is the mechanism by which the Service *requests* that the detaining agency notify the Service of the date, time, or place of release of an alien[.]" 59 Fed. Reg. 42406, 42407 (Aug. 17, 1994) (emphasis added).

ICE has repeatedly reiterated this view in internal memoranda and communications with congressional staff and local government officials. For example, in response to a local official's letter asking whether "localities are required to hold individuals pursuant to [ICE detainers]," a senior ICE official responded: "ICE views an immigration detainer as a *request* that a law enforcement agency maintain custody of an alien who may otherwise be released[.]" Letter from David Venturella, Secure Communities Assistant Director, ICE, to Miguel Márquez, Santa Clara County Counsel, ¶ 2(a) (Sept. 27, 2010) (emphasis added), *available at* http://www.scribd.com/doc/38550589/ICE-Letter-Responding-to-SCC-Re-S-Comm-9-28-10 (last visited Mar. 17, 2013). And in a 2010 briefing to the Congressional Hispanic Caucus, agency representatives told congressional staff that "local [law enforcement agencies] are not mandated to honor a detainer, and in some jurisdictions they do not." ICE FOIA 2674.020612,

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2013) (an immigration detainer is a "request that the [law enforcement agency] maintain custody of an alien"); DHS Office of Civil Rights and Civil Liberties, Video: "How to Respond to an Immigration Detainer" at 1:53 (2012) *available at* http://www.ice.gov/news/galleries/videos/immigration_detainers.htm (last visited Mar. 17, 2013) (an "immigration detainer is a formal request").

Draft Memorandum to David Venturella, Assistant Director of Secure Communities, ICE, "Secure Communities Briefing (Congressional Hispanic Caucus)" at 3 (Oct. 28, 2010), *available at* http://altopolimigra.com/wp-content/uploads/2011/12/ICE-FOIA-2674.020612.pdf (last visited Mar. 17, 2013).[13]

In reaching its erroneous conclusion, the district court did not rely on any contrary federal authority—there is none—or on any statements of the federal defendants in the case. Plaintiff presented the district court with many of the above-cited statements by ICE officials. *See* Plaintiff's Opposition, Dkt. #58, *Galarza v. Szalczyk*, No. 10-cv-06815, at 8-9 (E.D. Pa. filed May 23, 2011); Motion for Leave to File Supplemental Authority, Dkt. #89, *Galarza v. Szalczyk*, No. 10-cv-06815 (E.D. Pa. filed Mar. 19, 2012). The federal defendants, for their part, never took the position that the detainer imposed a mandatory duty on the County. On the contrary, they consistently referred to Mr. Galarza's detainer as a "request." *See* Brief of ICE Agent Szalczyk, Dkt. #55, *Galarza v. Szalczyk*, No. 10-cv-06815, at 3 (E.D. Pa. filed May 20, 2011) ("Defendant Szalczyk prepared an

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[13] This document was released as a result of Freedom of Information Act litigation. *See generally NDLON v. ICE*, No. 10-cv-3488 (S.D.N.Y filed Apr. 27, 2010). *See also* ICE FOIA 2674.017695, E-mail from Deputy Chief of Staff to the Deputy Director of ICE, at 1 (Jan. 26, 2011), *available at* http://altopolimigra.com/wp-content/uploads/2011/12/ICE-FOIA-2674.017695.pdf (last visited Mar. 17, 2013) ("[Question:] Is an ICE detainer a request or a requirement? Answer: It is a request. There is no penalty if they don't comply.").

Immigration Detainer . . . requesting Lehigh County Prison staff to detain Galarza."); *id.* at 11 ("[W]hether the detainer required or requested the local government to hold Galarza . . . makes no difference to Galarza's due process claim against Defendant Szalczyk . . . ."); Brief of ICE Agent Marino, Dkt. #62, *Galarza v. Szalczyk*, No. 10-cv-06815, at 15 (E.D. Pa. filed June 17, 2011) (same). The district court reached its erroneous conclusion based on Lehigh County's arguments, not the federal government's. Its conclusion is contrary to the plain language of the detainer regulation and the repeated public statements of ICE officials.

B. The district court's conclusion that detainers are mandatory is inconsistent with settled constitutional law.

If the detainer regulation and the federal government's own statements left any room for doubt that immigration detainers are requests and not orders, constitutional law conclusively establishes that they must be requests. ICE detainers cannot constitutionally order states and municipalities to imprison targets of federal interest. It has been settled for at least a decade and a half that the federal government cannot under its enumerated powers commandeer local authorities "in their sovereign capacity to regulate their own citizens." *Reno v. Condon*, 528 U.S. 141, 151 (2000).

The Supreme Court firmly established the anti-commandeering principle in *Printz v. United States*, 521 U.S. 898 (1997), where it invalidated a federal statute

that required local law enforcement officials to take actions to assist enforcement of the federal Brady Handgun Violence Prevention Act, proclaiming:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id. at 935.

Significantly, one precedent upon which *Printz* relied was the federal government's practice, dating from the founding of the Republic, of framing its directions to local authorities to incarcerate federal prisoners as requests, rather than mandates. *See id*. at 909-10 (noting "when Georgia refused to comply with the request . . . Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made"). Likewise, the Court noted that a late nineteenth century federal statute involving state assistance in inspecting arriving immigrants "did not . . . *mandate* those duties, but merely empowered the Secretary of the Treasury "to *enter into contracts* with such State . . . officers *as may be designated* for that purpose *by the governor* of any State." *Id.* at 916 (emphases in original; internal quotation marks

omitted). Had the statute *required* states' participation, under the Court's reasoning, it would have been unconstitutional. *See id.*[14]

Printz establishes that an immigration detainer cannot legally be construed as an order to detain. ICE, a subdivision of the executive's Department of Homeland Security, may not require states or localities to detain people suspected of immigration violations to help administer the federal government's immigration enforcement program. It may *request* such assistance, but the Constitution requires that the County remain free to refuse. *See also NFIB v. Sebelius*, 132 S. Ct. 2566, 2602-03 (2012) (invalidating Affordable Care Act's Medicaid expansion because it did not give states a "legitimate choice" whether to comply).

In reaching the conclusion that immigration detainers are orders, the district court entirely failed to consider the mandates of the Constitution. *See* JA 55-58 (analyzing whether immigration detainers are mandatory solely with reference to federal regulations). Not only is its conclusion inconsistent with the plain language of the regulation and the agency's own statements, but it also flies in the face of *Printz* and the Tenth Amendment's prohibition on commandeering.

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[14] *See also New Jersey v. United States*, 91 F.3d 463, 466-67 (3d Cir. 1996) (recognizing that the federal government "cannot *require* the states to govern according to its instructions," but holding that "here the federal government has issued no directive to the State of New Jersey" to prosecute immigrants for violations of state criminal law, so the Tenth Amendment was not implicated) (emphasis in original).

C. The district court's decision is in tension with many years of federal court decisions.

The district court's decision in this case was the first judicial decision, to Plaintiff's knowledge, to squarely confront a claim that immigration detainers are mandatory.[15] It is, however, out of step with many years of federal court decisions treating immigration detainers as voluntary requests.

Federal and state court decisions in a variety of contexts—albeit none directly responding to a municipality's argument that immigration detainers are mandatory—have consistently described immigration detainers as requests. This Court has explained, in the habeas context, that

> [f]iling a[n] [immigration] detainer is an informal procedure in which the INS informs prison officials that a person is subject to deportation and *requests* that officials give the INS notice of the person's death, impending release, or transfer to another institution.

Henry v. Chertoff, 317 F. App'x 178, 179 & n.1 (3d Cir. 2009) (emphasis added; internal quotation marks omitted) (citing decisions from other federal courts of appeal). Numerous other courts have described immigration detainers in similar

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[15] Plaintiff is aware of only two other federal court decisions—both recent decisions from the Middle District of Tennessee—concluding that immigration detainers are mandatory. *See Rios-Quiroz v. Williamson County*, No. 11-cv-1168, 2012 WL 3945354, at *4 (M.D. Tenn. Sept. 10, 2012); *Ramirez-Mendoza v. Maury County*, No. 12-cv-00014, 2013 WL 298124, at *7-*8 (M.D. Tenn. Jan. 25, 2013). *Rios-Quiroz,* the first of the decisions, relied heavily on the district court's decision in this case, providing little analysis of its own. *See Rios-Quiroz*, 2012 WL 3945354, at *4 (citing the decision below). *Ramirez-Mendoza*, in turn, relied on *Rios-Quiroz*, again providing little analysis. These decisions are in error for all of the reasons outlined in this brief.

terms. *See, e.g., United States v. Uribe-Rios,* 558 F.3d 347, 350 n.1 (4th Cir. 2009) ("A detainer is a mechanism by which federal immigration authorities may *request* that another law enforcement agency temporarily detain an alien . . . .") (emphasis added); *United States v. Female Juvenile, A.F.S.,* 377 F.3d 27, 35 (1st Cir. 2004) (an immigration detainer "serves as a *request* that another law enforcement agency notify the INS before releasing an alien from detention so that the INS may arrange to assume custody over the alien") (emphasis added); *Orozco v. INS*, 911 F.2d 539, 541 n.2 (11th Cir. 1990) ("The filing of a detainer is an informal process advising prison officials that a prisoner is wanted on other pending charges and *requesting* notification prior to the prisoner's release") (emphasis added); *Buquer*, 797 F. Supp. 2d at 911 ("A detainer is not a criminal warrant, but rather a voluntary *request* . . . .") (emphasis added); *State v. Montes-Mata*, 253 P.3d 354, 370-71 (Kan. 2011) ("The ICE [detainer] in this case is analogous to a call to a sheriff from a law enforcement agency in a neighboring county, expressing interest in one of his or her inmates and *asking* the sheriff for notice when the inmate is to be released. The *request* is for cooperation, not custody.") (emphases added); *People v. Jacinto*, 49 Cal. 4th 263, 273 (Cal. 2010) (compliance with ICE detainers is "a matter of comity"); *State v. Sanchez*, 853 N.E.2d 283, 289 (Ohio 2006) ("[T]he ICE detainer served only to notify the state of Ohio that ICE may seek custody of Sanchez in the future and to *request* that ICE be alerted before her release . . . .")

(emphasis added).

In addition, most courts have held that the issuance of an immigration detainer does not establish ICE custody for purposes of applying the federal habeas statute, 28 U.S.C. § 2241. Instead, a person against whom an immigration detainer has been issued remains legally in the custody of the law enforcement agency receiving the detainer until ICE physically takes him into custody. *See, e.g.*, *Zolicoffer v. U.S. Dept. of Justice*, 315 F.3d 538, 540-41 (5th Cir. 2003); *Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995); *Orozco*, 911 F.2d at 541; *Mohammed v. Sullivan*, 866 F.2d 258, 260 (8th Cir. 1989); *see also Henry*, 317 F. App'x at 179.[16] Although habeas law does not itself establish whether or not immigration detainers are mandatory, it is instructive: The fact that the County remained the legal custodian of Mr. Galarza, and not ICE, supports the conclusion that it was the County's choice to detain Mr. Galarza for three additional days.

Finally, courts considering *criminal* detainers have viewed them as requests, not commands, from one jurisdiction to another. *See Moody v. Daggett*, 429 U.S. 78, 80 n.2 (1976) ("When two autonomous jurisdictions are involved, as for example when a federal detainer is placed against an inmate of a state institution, a

[16] Some courts have concluded that the issuance of an immigration detainer may give rise to federal custody for habeas purposes if the detainer is also accompanied by an outstanding removal order. *See, e.g.*, *Amenuvor v. Mazurkiewicl*, 457 F. App'x 92, 93 (3d Cir. 2012); *Morales v. INS*, 26 F. App'x 830, 831 (10th Cir. 2001).

detainer is a matter of comity."); *see also Mauro*, 436 U.S. at 351-52. Although criminal detainers do trigger certain statutory procedures under the IAD, the "[g]overnor of the [custodial] state may disapprove" the requesting state's request for transfer, "either upon his own motion or upon motion of the prisoner." 42 Pa. C.S. § 9101, art. § IV(a). For example, in *United States v. Pleau*, 680 F.3d 1 (1st Cir. 2012) (en banc), the First Circuit noted that "Rhode Island's governor refused the [federal government's] IAD request because of his stated opposition to capital punishment." *Id.* at 3; *see also id.* at 7-8 (holding that, in contrast to the detainer, a federal court's writ of habeas corpus *ad prosequendum* was a mandatory court order that the state had no power to disobey). As discussed above, criminal detainers are subject to numerous procedural protections that do not apply to immigration detainers. It would be strange indeed if immigration detainers were mandatory while criminal detainers are merely requests.

* * *

In sum, the federal detainer regulation, ICE's own statements, well-settled principles of constitutional law, and many years of analogous case-law all point unequivocally in the same direction: Immigration detainers are requests, not orders. The district court's contrary conclusion must be reversed.

III. The Court Should Reverse the Dismissal of Mr. Galarza's Claim Against Lehigh County for the Violation of His Fourth Amendment Rights.

When Mr. Galarza posted his court-ordered bail on November 21, 2008, he was entitled to release from the County's custody. JA 88 at ¶¶ 68-69. At that moment, the County's initial justification for his detention—assuring that he would appear in court to answer the criminal charge against him—dissolved. County officials nevertheless refused to release him and, instead, kept him imprisoned for three additional days solely on the basis of the immigration detainer.

This new period of imprisonment constituted a new seizure, and as such, it requires an independent justification under the Fourth Amendment. *See* JA 35, 40; *see also Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005) (once the initial reason for a seizure is resolved, officers may not prolong the detention without a new, constitutionally adequate justification); *Rogers v. Powell*, 120 F.3d 446, 456 (3d Cir. 1997) ("Continuing to hold an individual in handcuffs" once it has been determined that the initial seizure was in error, without "some additional basis, independent of that claimed to support the initial seizure," to justify the continued detention, "is unlawful within the meaning of the Fourth Amendment"); *Lee v. City of Los Angeles*, 250 F.3d 668, 677-78, 685 (9th Cir. 2001) (plaintiff stated a Fourth Amendment claim against officers who, after arresting him on unrelated charges, prolonged his detention based on an out-of-state warrant without checking whether

he was the individual identified in that warrant); *Anaya v. Crossroads Managed Care Systems, Inc.*, 195 F.3d 584, 592 (10th Cir. 1999) ("A legitimate-though-unrelated criminal arrest does not itself give probable cause to detain the arrestee [for an unrelated civil purpose]."); *Barnes v. Dist. of Columbia*, 242 F.R.D. 113, 118 (D.D.C. 2007) (plaintiffs were "essentially . . . re-seized" for Fourth Amendment purposes when, "despite being entitled to release, they were taken back into custody").[17]

It has long been established that the Fourth Amendment requires all full-scale seizures to be supported by probable cause. *See, e.g., Dunaway*, 442 U.S. at 213; *see also supra* Section I. Mr. Galarza's imprisonment was no exception. And, as the district court correctly held, there was clearly no probable cause for his detention here. JA 40, 44-47 (rejecting Agent Szalczyk's argument regarding probable cause, and denying him qualified immunity on the Fourth Amendment claim).

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[17] *Accord* INS, The Law of Arrest, Search, and Seizure for Immigration Officers at VII-2 (1993), *available at* http://www.scribd.com/doc/21968268/ICE-M-69-Law-of-Arrest-January-1993 (last visited Mar. 17, 2013) ("A detainer placed under [8 C.F.R. § 287.7] is an arrest which must be supported by probable cause."); Congressional Research Service, Immigration Detainers: Legal Issues at 18 (Aug. 31, 2012), *available at* http://www.fas.org/sgp/crs/homesec/R42690.pdf (last visited Mar. 17, 2013) (noting that "holds pursuant to [ICE] detainers would appear to involve seizures of the alien's person," implicating the Fourth Amendment).

Because ICE lacked probable cause to believe that Mr. Galarza was a non-citizen subject to detention and removal, Mr. Galarza's seizure was unconstitutional. *See Berg v. County of Allegheny,* 219 F.3d 261, 271 (3d Cir. 2000) ("Because the government officials who issued the warrant here did not have probable cause to arrest [the plaintiff], the arrest violated the Fourth Amendment."); *Rogers*, 120 F.3d at 453 ("The legality of a seizure based solely on statements issued by fellow officers depends on whether the officers who issued the statements possessed the requisite basis to seize the suspect.") (emphasis omitted); *see also United States v. Hensley,* 469 U.S. 221, 231 (1985); *Whiteley v. Warden*, 401 U.S. 560, 568 (1971).

As the executing agency, Lehigh County bears the responsibility for this unconstitutional seizure. This Court made clear in *Berg* that, where one law enforcement agency requests an arrest and a different agency executes the arrest, *both* agencies may be liable for damages:

> [A] person who, acting under color of state law, directly and intentionally applies the means by which another is seized in violation of the Fourth Amendment can be held liable under § 1983. As a general rule, a government official's liability for causing an arrest is the same as for carrying it out.

Berg, 219 F.3d at 271-72. So, in *Berg*, a constable who executed another county's warrant could be liable where the warrant was erroneously issued, provided he was not entitled to qualified immunity. *Id.* at 272-74. Lehigh County, of course, can

assert no immunity for the constitutional violations caused by its policy of detaining individuals at ICE's request regardless of the absence of a warrant or probable cause. A "municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983." *Owen*, 445 U.S. at 638.

The County's liability for Mr. Galarza's unlawful seizure is clear: The County's agents, acting on the basis of the County's policy of honoring all ICE detainers, seized Mr. Galarza unconstitutionally. *See Berg*, 219 F.3d at 276. As the district court recognized, the amended complaint alleges that the County has a "policy of detaining *any* person being held in Lehigh County Prison who is named in an immigration detainer" for an additional two or more days beyond the time when the person is entitled to release. JA 55 (emphasis added).[18] The complaint further alleges that "Lehigh County Prison officials agreed to imprison Plaintiff on less than probable cause and disregarded evidence close at hand . . . which

[18] At one point later in its decision, the district court stated that "Plaintiff does not allege that it is Lehigh County's policy to detain persons named in immigration detainers without probable cause." JA 56. By this, the district court appears to mean that the complaint does not allege the County had a policy of effectuating *only* those detainers that lacked probable cause. (Reading this statement to mean, instead, that the County's alleged policy was to effectuate detainers only if they *were* supported by probable cause would contradict the court's earlier characterization of the allegations, *see* JA 55, and would be plainly incompatible with the allegations themselves.) Of course, Mr. Galarza need not allege that *every* detainer the County honored under its policy lacked probable cause; he need only allege that the County applied its policy with deliberate indifference to the existence or absence of probable cause in any particular case. The amended complaint alleges precisely that. *See* JA 89, 91-92, 97 at ¶¶ 71, 95, 99, 128, 131, 133.

indicated that Plaintiff is a United States citizen." JA 91-92 at ¶ 95.

The County's policy was to effectuate all detainers *regardless* whether ICE had—or even claimed to have—probable cause to support the request. Indeed, there was a history of "improper detainers" being "frequently issued at Lehigh County Prison," JA 82-83 at ¶ 22, and the County maintained a practice of referring all foreign-born arrestees to ICE in order to facilitate the issuance of such detainers. JA 85 at ¶ 43. Here, as discussed above, *see supra* Section I, the pre-printed language on Mr. Galarza's detainer form asserted only that an "*[i]nvestigation has been initiated* to determine whether this person is subject to removal/deportation." JA 105 (emphasis added). The detainer was not accompanied by a warrant, an order of removal, or an affidavit of probable cause. Yet despite the detainer's facial inadequacy, County officials, following the County's policy or practice, re-imprisoned Mr. Galarza without asking either him or ICE any additional questions. Had it not been for the County's policy, no reasonable official would have imprisoned Mr. Galarza for three days, without a warrant, based solely on ICE's unsupported expression of investigative interest. Indeed, the County's blanket practice applied even though County officials knew Mr. Galarza was born in New Jersey, and his Pennsylvania driver's license and Social Security card were in their possession the entire time. JA 84-85 at ¶¶ 39, 44-45, 47.

The amended complaint therefore alleges that the County maintained a policy or practice of detaining people on the basis of immigration detainers with deliberate indifference to the easily foreseeable risk that such detentions would violate detainees' Fourth Amendment rights, JA 97 at ¶¶ 128, 133, and that this policy is "direct[ly] causal[ly] link[ed]" to his unlawful detention. *City of Canton v. Harris,* 489 U.S. 378, 385 (1989); *see also Bielevicz v. Dubinon*, 915 F.2d 845, 851-53 (3d Cir. 1990). That is sufficient to state a claim against the County at the motion to dismiss stage, and the district court's dismissal of Mr. Galarza's Fourth Amendment claim must be reversed.[19]

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[19] All parties below agreed that the Fourth Amendment is the correct framework through which to view Mr. Galarza's seizure and three-day detention. *See Graham v. Connor*, 490 U.S. 386, 395 (1989). The district court therefore did not specifically address Mr. Galarza's alternative substantive due process claim. If the Court concludes that Mr. Galarza's claim should be analyzed as a substantive due process claim rather than a Fourth Amendment claim, however, Mr. Galarza has stated a claim against the County for essentially the same reasons as discussed above.

The constitutional right to substantive due process protects individuals from "arbitrary, wrongful government actions." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (internal quotation marks omitted). Here, the complaint alleges that the County maintained a detainer policy that virtually ensured that arbitrary, unjustified detentions of U.S. citizens like Mr. Galarza would occur. This is sufficient to state a claim. Courts have held that unlawfully detaining an individual after he is entitled to release may constitute a substantive due process violation. *See, e.g., Dodds v. Richardson*, 614 F.3d 1185, 1193 (10th Cir. 2010); *Davis v. Hall*, 375 F.3d 703, 713-14 (8th Cir. 2004); *Cannon v. Macon County*, 1 F.3d 1558, 1562-63 (11th Cir. 1993); *Holder v. Town of Newton*, 638 F. Supp. 2d 150, 153-56 (D.N.H. 2009); *Barnes*, 242 F.R.D. at 117-18.

IV. The Court Should Reverse the Dismissal of Mr. Galarza's Claim Against Lehigh County for the Violation of His Procedural Due Process Rights.

The district court also erred in dismissing Mr. Galarza's claim that the County imprisoned him without due process of law in violation of the Fourteenth Amendment. The amended complaint alleges that, pursuant to the County's policy, Lehigh officials imprisoned Mr. Galarza for three days without providing him with the most basic due process protections: notice of the reason for his detention and a meaningful opportunity to explain that he was a U.S. citizen not subject to detention. JA 89, 97-98 at ¶¶ 70-73, 75-77, 131, 133.

Detention violates the due process clause where, as here, it is imposed without adequate procedural protections. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 81-82 (1992) (invalidating statute that allowed for commitment without requiring governmental proof or adversarial hearing); *Sample v. Diecks*, 885 F.2d 1099, 1111, 1115-16 (3d Cir. 1989) (holding unconstitutional new term of imprisonment unaccompanied by due process protections). Here, Mr. Galarza inarguably has a protected liberty interest in being free from detention, and the amended complaint alleges that, pursuant to County policy, he was not afforded any process at all before being deprived of his liberty. JA 88-89 at ¶¶ 69-75. County officials, acting pursuant to policy, imprisoned him without providing the most basic notice. Mr. Galarza was not even told *why* he was being detained until

three days later, when a prison counselor finally met with him. JA 89 at ¶ 75. Nor was Mr. Galarza afforded any pre-deprivation opportunity to challenge the detainer's validity or to show proof of his citizenship to County officials or ICE.

Importantly, post-deprivation process and pre-deprivation process are not interchangeable, and the County may not credibly argue that the notice given to Mr. Galarza on the *last* day of his detention provided sufficient process. The Supreme Court has recognized that "the root requirement of the Due Process Clause [is] . . . that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis in original; internal quotation marks omitted). In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Supreme Court held that a patient who had been civilly committed to a mental health facility, without being offered any pre-deprivation safeguards to ensure he was competent to give informed consent, stated a claim for a violation of his due process rights. *Id*. at 132-39. The Supreme Court explained that pre-deprivation process may be required where the deprivation of the plaintiff's liberty is caused by a standard practice (not a random and unpredictable occurrence), *id*. at 136, where the government is "in a position to provide for predeprivation process," *id.* at 130 (internal quotation marks omitted), and where such "predeprivation procedural

safeguards could address the risk of deprivations" that the plaintiff suffered, *id.* at 132.

Following *Zinermon*, this Court held in *Higgins v. Beyer*, 293 F.3d 683 (3d Cir. 2002), that a prisoner stated a due process claim where he alleged that prison officials deducted funds from his inmate account without providing pre-deprivation notice and a hearing. *Id.* at 694. Because the officials were "acting under the authority of an established state procedure for seizing a prisoner's funds to satisfy court-ordered fines," they were in a position to provide the prisoner with "notice and hearing *before* the[y] . . . deducted money from his account." *Id.* (emphasis added). The availability of *post*-deprivation remedies to retrieve the money was not constitutionally sufficient. *Id.*

And even before *Zinermon*, this Court held in *Sample v. Diecks* that a prisoner was entitled to "predeprivation process" to contest his erroneous detention beyond his scheduled release date. 885 F.2d at 1116.[20] Applying the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court reasoned that "[t]he risk of error in calculating a release date . . . is . . . substantial," and the

[20] In *Sample*, the prisoner's over-detention was the result of an unforeseeable mistake by the records officer who calculated his release date, 885 F.2d at 1102-03, not of a request for detention in advance of release, as in Mr. Galarza's case. In practice, therefore, the inmate "could not have asserted his claim prior to" the date on which he should have been released. *Id.* at 1116. The Court emphasized, however, that due process demanded "expeditious[] consider[ation]" of his claim, because "[e]very day" after his release date, the prisoner "faced the prospect of a fresh deprivation of his liberty." *Id.* at 1116.

prison could "reduc[e] the risk" by implementing simple procedures to ensure that inmates can tell their "'side of the story'" when they believe a mistake has been made. *Id.* at 1115-16. Given this balance, and the prisoner's "obviously . . . strong" interest in "avoiding wrongful detention," *id.* at 1115, the Court held that post-deprivation "judicial remedies" were insufficient, and that "to the extent possible the inmate [must] be afforded predeprivation process." *Id.* at 1116.

In the present case, it is clear that some pre-deprivation process was required before Mr. Galarza could be subjected to three days of unwarranted imprisonment. First, Mr. Galarza inarguably has a weighty liberty interest in freedom from confinement. Second, the risk of erroneous detention was high—particularly given ICE's use of a detainer form that on its face purports to be based on nothing but investigative interest, *see* JA 88 at ¶ 66, the history of "improper detainers" being "frequently issued at Lehigh County Prison," JA 82-83 at ¶ 22, and the County's practice of referring all foreign-born arrestees to ICE in order to facilitate the issuance of such detainers. JA 85 at ¶ 43. And third, the County, as Mr. Galarza's jailer, was plainly "in a position" to provide pre-deprivation safeguards, such as informing him of the basis for the detainer and providing him an opportunity to contact ICE and contest the detainer's validity. *Zinermon*, 494 U.S. at 135.

Of course, Plaintiff does not contend that the County should have provided a full-blown pre-deprivation hearing to ascertain his citizenship and immigration

status. *Cf. Arizona*, 132 S. Ct. at 2499 (noting that "governance of immigration and alien status is extensive and complex" and is committed to the federal government). But certainly, once it had decided to effectuate ICE's detainer requests, the County was obligated to implement some due process safeguards to prevent unlawful detentions.

First, the County should have notified Mr. Galarza of the basis for his detention. By withholding that information from him, the County made it impossible for him to contest his imprisonment. This lack of notice "violated the most rudimentary demands of due process." *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). While "[q]uestions [may] . . . arise as to the adequacy of a particular form of notice in a particular case," there can be no question that the absence of *any* notice here was unlawful. *Id.*

Second, at a minimum, upon the provision of notice, the County should have given Mr. Galarza an opportunity to contact the federal government to explain that he was being held erroneously. Because Mr. Galarza was in the County's custody and control, it was the County that was required to give him that opportunity. *See Cooper v. Lockhart*, 489 F.2d 308, 313, 315 (8th Cir. 1973) (holding that "the cooperating custodial state denies the prisoner due process by continuing the effects of a [criminal] detainer placed on him solely on the strength of a request for one made by a sister state," because "[r]ealistically . . . it is the custodial state" that

chose to take action based on the detainer).[21] The County controlled Mr. Galarza's phone access, and County officials held his driver's license, Social Security card, and other identification documents in their possession. *See* JA 84-85 at ¶¶ 39, 47. Thus, unless the County provided the means, Mr. Galarza would have had no way to contest his detention.

These steps would have imposed only a minimal administrative burden on the County, but if offered promptly after the receipt of Mr. Galarza's detainer, they would have enabled Mr. Galarza to avoid three days of unwarranted imprisonment. Yet, in dismissing Mr. Galarza's procedural due process claim against the County, the district court failed to engage in any balancing at all. *See* JA 56. The district court's decision must be reversed. Because the County chose to effectuate all immigration detainers without providing any pre-deprivation procedures to reduce the obvious risk of erroneous detentions, and because County officials detained Mr. Galarza pursuant to this policy, the County caused the violation of Mr. Galarza's due process rights and is liable. *See Bielevicz*, 915 F.2d at 851.

[21] The fact that ICE, too, failed to provide Mr. Galarza with due process protections does not negate the County's liability. *Cf. Honey v. Distelrath*, 195 F.3d 531, 534 (9th Cir. 1999) (holding that both Chief of Police and City Manager were liable for wrongful termination without due process; both "had the authority to effect the very deprivation complained of, and the duty to afford Honey procedural due process").

CONCLUSION

The district court's decision granting Lehigh County's Motion to Dismiss should be reversed because it rests on the legally incorrect conclusion that the County was required to continue Mr. Galarza's detention on the basis of an immigration detainer. The County's policy of imprisoning any person named on an immigration detainer form, regardless of whether the detainer has been issued upon probable cause and without providing any due process protections, violated Mr. Galarza's Fourth and Fourteenth Amendment rights. Mr. Galarza should be permitted to proceed with discovery in support of his claims.

Respectfully submitted,

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