No. 12-3991

In the United States Court of Appeals for the Third Circuit

ERNESTO GALARZA,
PLAINTIFF-APPELLANT
v.
COUNTY OF LEHIGH,
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA, NO. 10-CV-06815
HON. JAMES K. GARDNER, PRESIDING

BRIEF OF *AMICI CURIAE* THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF PLAINTIFF-APPELLANT

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 12-3991

Ernesto Galarza, Plaintiff-Appellant

v.

County of Lehigh, Defendant-Appellee

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Nat'l Immigrant Justice Ctr. (amicus) makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

The Heartland Alliance for Human Needs and Human Rights (parent of the Nat'l Imm. Justice Ctr.) has no corporate parent.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

s/ Andrew C. Nichols
(Signature of Counsel or Party)

Dated: March 26, 2013

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

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v.

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Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Nat'l Immig. Project of the Nat'l Lawyers Guild (amicus) makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A

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N/A

s/ Andrew C. Nichols
(Signature of Counsel or Party)

Dated: March 26, 2013

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

Ernesto Galarza is one of many individuals across the country whom U.S. Immigration and Customs Enforcement ("ICE") and municipalities such as the County of Lehigh have detained without due process via an immigration detainer. In response to detainers issued by ICE, local law enforcement agencies and municipalities such as Lehigh County detain individuals beyond the time when they otherwise should be released, merely because an ICE officer sent a form indicating that an "[i]nvestigation has been initiated to determine whether this person is subject to removal from the United States." *See* Form I-247 (Rev. 4-1-97). In this case and elsewhere, these detainers are issued and given effect without any finding or allegation of probable cause, without any oath or affirmation by a law enforcement officer, and without any judicial review. Detention on the basis of an ICE detainer violates the Fourth Amendment.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

The constitutional deficiencies of immigration detainers have real, practical, and harmful consequences. *Amici* are well aware of these consequences from their work on behalf of immigrants around the country.

Amicus National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation with an international reach, headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the nation's leading law firms, NIJC provides direct legal services to more than 10,000 individuals annually. This experience informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage.

The National Immigration Project of the National Lawyers Guild ("NIPNLG") is a national non-profit membership organization composed of immigration attorneys, legal workers, grassroots advocates, and others working to defend the rights of immigrants and to secure a fair administration of the immigration and nationality laws. NIPNLG serves as a source of advocacy-oriented legal support on issues critical to immigrant

rights. As part of its work, NIPNLG has provided legal training to the bar and bench on the immigration consequences of criminal conduct and has authored the treatise *Immigration Law and Crimes*.

Amici have a substantial interest in the issue now before the Court, as advocates working for the rights of immigrants generally, for accountability in the immigration enforcement and detention system, and for the elimination of unlawful detention. Both parties have written on topics closely related to the specific issue presently in front of the Court.[2] Given their experience and perspective, *Amici* are well situated to assist the Court in understanding the deficiencies of the detainer at issue in this case.

STATEMENT OF AUTHORITY TO FILE

Amici have filed a motion for leave to file concurrently with this brief pursuant to Federal Rule of Appellate Procedure 29(b).

[2] *E.g.*, National Immigrant Justice Center, *How Have ICE Immigration Detainers Affected Your Community?*, http://www.immigrantjustice.org/ICEdetainerdata; National Immigration Project, *et al.*, *Understanding Immigration Detainers: An Overview for State Defense Counsel* (March 2011), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Understanding_Immigration_Detainers_05-2011.pdf.

SUMMARY OF ARGUMENT

The detainer at issue in this case, embodied in ICE Form I-247 (Rev. 4-1-97), *reprinted in* JA 105, lacks key prerequisites for the lawful detention of those who fall within its grasp.

First, the detainer calls for an individual to be detained or "seized" without probable cause. An ICE detainer purports to authorize a variety of constraints on an individual's liberty—including physical detention for up to 48 hours after any other lawful basis for holding him or her has elapsed—solely because an ICE officer checked a box on a form indicating that an "[i]nvestigation has been initiated to determine whether this person is subject to removal from the United States." Form I-247 (Rev. 4-1-97). Under the Fourth Amendment, the initiation of an investigation is not a sufficient basis to deprive a person of his or her liberty.

Second, unlike a criminal arrest warrant, an immigration detainer does not require any oath or affirmation by the officer who issues it. This too is a critical deficiency; the detainer lacks an important measure of personal accountability that is necessary to ensure that no person is detained arbitrarily or without probable cause.

Third, an ICE agent issues detainers without any review by a magistrate or independent judicial officer. In this respect, too, an immigration detainer contrasts starkly with a valid warrant. Without presentation to a neutral decisionmaker, the detainer lacks the safeguards necessary to avoid abuses and arbitrary or overzealous actions by ICE officers.

These deficiencies have resulted in the wrongful detention of countless individuals across the country—including U.S. citizens like Ernesto Galarza, for whom no basis for removal under the immigration laws could possibly exist. The stories of these individuals demonstrate the grave constitutional defects infecting the detainers and show how—and why—the missing safeguards are so important. In this brief, *Amici* present the stories of a half-dozen individuals, gathered from interviews and court papers filed by these individuals in an effort to remedy the injustice they have suffered and to prevent further injustice in the future. On this basis, *Amici* join with Plaintiff-Appellant in challenging the detainer issued by ICE and given effect by Defendant-Appellee.

ARGUMENT

I. Detention pursuant to an ICE detainer is unconstitutional and harmful because the detainers are issued without probable cause.

A. An ICE detainer like the one in this case violates the Fourth Amendment because it calls for detention based on a mere "investigation," without probable cause.

As the Supreme Court recently explained, "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." *Arizona v. United States*, ___ U.S. ___, 132 S. Ct. 2492, 2509 (2012) (citing *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)); *see also Brown v. Illinois*, 422 U.S. 590, 605 (1975) (arrest for the purpose of investigation or questioning is illegal).

The detainer issued against Mr. Galarza and given effect by the County of Lehigh did precisely what the Supreme Court warned against. The detainer at issue here, Form I-247 (Rev. 4-1-97), *reprinted at* JA 105, called for the seizure of Mr. Galarza without any finding of probable cause to believe that he was, in fact, a non-citizen subject to detention and removal. On its face, the ICE detainer form required Mr. Galarza's detention based merely on an ICE officer's indication that the Department of Homeland Security ("DHS") had "[i]nitiated an investigation to determine whether this person is subject to removal from the United

States." Form I-247 (Rev. 4-1-97) ("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 INS to assume custody of the alien."). The form does not contain or require any assertion of probable cause, let alone any supporting information or documentation.

As the Supreme Court warned, this clearly raises "constitutional concerns." The Fourth Amendment guarantees that no person may be arrested without a determination of probable cause. *See*, *e.g.*, *Michigan v. Summers*, 452 U.S. 692, 700 (1981) ("[E]very arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause."); *Leveto v. Lapina*, 258 F.3d 156, 167 (3d Cir. 2001) (citing *Summers*, 452 U.S. at 700); *Anderson v. City of Philadelphia*, No. CIV.A. 11-6318, 2012 WL 3235163, at *6 (E.D. Pa. Aug. 8, 2012) ("All official seizures of a person, such as a formal arrest, must be supported by probable cause.") (citations omitted). "[A] government official must have probable cause to arrest an individual" and an "arrest without probable cause violates an arrestee's clearly established Fourth Amendment rights." *Cortez v. McCauley*, 478 F.3d 1108, 1117 (10th Cir. 2007) (citations omitted).

A detention on new grounds after the original basis for custody has ended requires a separate probable cause determination. *See Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005) (explaining that an initially justified seizure may be unlawful if prolonged without a new and constitutionally adequate justification). By definition, an immigration detainer commences a new period of imprisonment after the state or municipality no longer has any other legal basis to hold the individual. *See* Appellant's Br. 36-39. So, as the district court determined, Mr. Galarza's detention beyond the time when he posted bail was a "seizure" under the Fourth Amendment for which a separate probable cause determination was required. *Galarza v. Szalczyk,* No. 10-cv-06815, 2012 WL 1080020, at *10-14 (E.D. Pa. Mar. 30, 2012).

Unfortunately, Mr. Galarza's situation—extended detention unsupported by probable cause—has become a recurring problem. *Amici* write to illustrate the magnitude of this problem, using the stories of other detainees who have suffered similar harm.

B. Sergey Mayorov, a U.S. citizen, was unlawfully detained on an ICE detainer that was issued without probable cause.

Like Mr. Galarza, Sergey Mayorov was subjected to an ICE detainer without probable cause. He too was a U.S. citizen, for whom no possible basis for removal could have existed. Had ICE interviewed Mr. Mayorov or carefully reviewed his immigration file before issuing a detainer, it would have realized that there was no basis for holding him. This error had grave and concrete consequences for Mr. Mayorov, as the detainer deprived Mr. Mayorov of the opportunity to complete an early release program and instead left him to serve a four-year prison term in a medium security prison—an outcome that was far longer and more onerous than he would have experienced otherwise.

Sergey Mayorov was born in Belarus and immigrated to the U.S. as a child. He became a U.S. citizen upon his mother's naturalization in 2007. He was a legal permanent resident at the time and was listed as a dependent minor on his mother's N-400 application for naturalization. As a result, he acquired U.S. citizenship by operation of law, under the Child Citizenship Act of 2000, INA § 320, 8 U.S.C. § 1431. Although he never obtained a U.S. passport or his own certificate of citizenship, his mother's

DHS paperwork was sufficient to establish his own U.S. citizenship as a matter of law.

Three years after he became a citizen, at age 20, Mr. Mayorov was arrested in Cook County, Illinois, on a burglary charge, his first offense. He took responsibility for the crime and was recommended for the Illinois Department of Corrections' "impact incarceration" program—a 120-day boot camp for first offenders. Under this program, if he completed boot camp successfully, he would have been released without having to serve any prison time.

Mr. Mayorov was transferred to the Stateville Correctional Center in Joliet, Illinois, for processing. In Joliet, he was interviewed by an ICE officer as a result of his foreign birth. In the interview, Mr. Mayorov confirmed that he had been born in Belarus. The ICE officer reviewed information on her computer and informed Mr. Mayorov that he could not be admitted to boot camp because he was not a U.S. citizen. Mr. Mayorov asked how she knew he was not a citizen and explained that his mother had become a citizen. The officer asked for Mr. Mayorov's mother's name and was able to confirm that she was a citizen who naturalized in 2007. The officer then asked for Mr. Mayorov's age. Based on this information,

the ICE officer confirmed that Mr. Mayorov was a citizen and that he could proceed to boot camp.

Mr. Mayorov entered the Dixon Springs boot camp and completed nearly two months with a clean record. One morning in March 2011, however, he was awoken in the early morning hours, handcuffed, and transferred to an Illinois prison, where he spent two weeks in 24-hour-lockdown segregation. He was informed by a legal counselor that he had been disqualified from boot camp because of an immigration detainer that was issued by ICE two days earlier based on the initiation of an investigation. ICE did not interview Mr. Mayorov again before issuing the detainer, nor did ICE permit him to submit evidence about his mother's naturalization or his own U.S. citizenship. ICE never provided Mr. Mayorov a copy of the immigration detainer, notified him that it had been lodged against him, or provided any mechanism to challenge the detainer.

After the detainer was lodged, the legal counselor at the prison called Mr. Mayorov's mother and provided her with the ICE phone number listed on the detainer form. She called the number numerous times and left multiple voicemail messages. In those messages, she provided her son's biographical information and explained that she believed the immigration

detainer had been wrongfully issued. ICE never responded, and Mr. Mayorov was transferred to a medium security prison to begin serving a four-year prison sentence.

In November 2011, Mr. Mayorov sought to intervene in the lawsuit *Jimenez Moreno v. Napolitano*, No. 11-cv-05452 (N.D. Ill.), a putative class action seeking injunctive relief for ICE's unlawful use of immigration detainers. Five days later, ICE finally cancelled his detainer.

Mr. Mayorov was finally reassigned to boot camp in February 2012. He completed boot camp successfully and has since been released.

Because of the unlawful immigration detainer—issued without probable cause—Mr. Mayorov served 324 days in prison, including two weeks in 24-hour-lockdown segregation, when he should not have served any prison time at all. If ICE had conducted a probable cause analysis before issuing the detainer, none of this would have happened.

C. Ada Morales, a U.S. citizen, was twice unlawfully detained on immigration detainers issued without probable cause.

Like Mr. Galarza and Mr. Mayorov, Ada Morales is a U.S. citizen against whom ICE issued an unlawful detainer without probable cause. In

Ms. Morales' case, ICE issued unlawful detainers against her and caused her prolonged detention on two separate occasions.

Ms. Morales was born in Guatemala and has lived in the United States for more than 30 years. She has been a U.S. citizen since she was naturalized in 1995. In 2004, ICE issued an immigration detainer against Ms. Morales while she was briefly detained in Rhode Island, in spite of the fact that she had been naturalized nine years earlier. As a result of the detainer, Ms. Morales was not released when the charges against her were dismissed. Instead, she was held overnight and missed her flight to visit relatives in Guatemala the next day. After ICE agents took her into custody, she explained that she was a U.S. citizen and was released. Although Ms. Morales demonstrated to ICE officials on that occasion that she was a naturalized citizen and that the detainer had been erroneous, ICE apparently failed to make or change any records about the incident to prevent it from occurring again.

In 2009, Ms. Morales was held on a wrongful immigration detainer for a second time.[3] Despite the fact that ICE must have known she was a

[3] *Amicus* NIJC learned through a Freedom of Information Act ("FOIA") request that ICE does not keep records of detainer cancellations or the

citizen, not only because she had naturalized in 1995, but because she had been erroneously arrested by that same local ICE office a few years before, ICE issued another detainer against her and again caused her to be held overnight after she had been ordered released by a state magistrate judge. *See* Amended Complaint, ¶¶ 12-13, *Morales v. Chadbourne*, No. 1:12-cv-00301-M-LDA, (D.R.I. Apr. 24, 2012).

The detainer stated that an "investigation ha[d] been initiated to determine whether this person is subject to removal from the United States." Yet it was quite evident from the detainer that ICE had conducted minimal investigation prior to issuing it. Without any information to support the allegations, the form identified Ms. Morales's nationality as Guatemalan, and listed her gender as "male." *Id.* Ex. B. (ECF 1-2). ICE never interviewed Ms. Morales or attempted to contact her personally before issuing the detainer. Moreover, the Rhode Island officials did not allow Ms. Morales to have her family bring her passport as proof of her citizenship. Again, ICE caused Ms. Morales's unlawful detention without

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reasons for cancelling a detainer. *See Jimenez Moreno v. Napolitano*, No. 11-cv-05452, Dkt. No. 30, Att. 1, Ex. B (N.D. Ill.). As a result, individuals who were subjected to detainers that ICE later cancelled remain in jeopardy of having to endure similar episodes in the future.

investigating whom it was detaining or whether there was any lawful basis to do so.

If ICE had sought to establish probable cause prior to issuing the detainer, it would surely have encountered Ms. Morales's records of permanent residency and naturalization. Likewise, if the Rhode Island Adult Correctional Center had recognized that the detainer failed to provide any constitutionally adequate basis for detention, it would not have subjected her to further detention.

II. Holding individuals pursuant to ICE detainers is subject to abuse and error because the detainers are not supported by an oath or affirmation.

A. An ICE detainer lacks any oath or affirmation to hold ICE agents accountable.

Unlike a criminal warrant, an ICE detainer is an unsworn document. Without an oath or affirmation, there is no one who can be held accountable under penalty of perjury for allegations and statements contained within the detainer. Moreover, when only the "investigation" box is checked, the detainer lacks ***any*** factual allegations whatsoever, whether sworn or unsworn.

The existence of an oath or affirmation ensures the presence of adequate factual allegations in a case to enable a determination of probable cause by a neutral and detached magistrate. *See Giordenello v. United States*, 357 U.S. 480, 485-87 (1958) (finding a complaint insufficient where "[t]he complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."); *Aguilar v. State of Texas*, 378 U.S. 108, 112 (discussing *Giordenello*, 357 U.S. at 485 (1964)), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213 (1983). Probable cause must be supported by "facts or circumstances presented [to the magistrate] under oath or affirmation." *Nathanson v. United States*, 290 U.S. 41, 47 (1933). "Mere affirmance of belief or suspicion is not enough." *Id.*

The oath or affirmation requirement guarantees that there is someone accountable for the specific information that is alleged to support a determination of probable cause. The requirement further ensures that the person undertaking the obligation is subject to penalties for perjury. *See*, *e.g.*, *United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir. 2002) (citations

omitted). An oath or affirmation is typically in the form of a sworn affidavit. *See*, *e.g.*, *United States v. Bansal*, 663 F.3d 634, 662 (3d Cir. 2011).

The lack of any oath or affirmation requirement avoids even the most minimal check on the actions of immigration officers. And the absence of any oath or affirmation on the detainer form also makes it clearly evident to a receiving agency from the face of the form that the detainer is not a warrant or issued pursuant to normal Fourth Amendment requirements.

B. Rennison Castillo, a U.S. citizen, was unlawfully subjected to an immigration detainer that the ICE agent would likely not have issued if an oath or affirmation were required.

Rennison Castillo was born in Belize and came to the United States when he was seven years old. He obtained lawful permanent resident status through the Family Unity Program in 1992, and in 1996, he enlisted in the United States military. While serving in the military, Mr. Castillo applied for American citizenship, and he was sworn in as a U.S. citizen on October 28, 1998. In 2003, Mr. Castillo was honorably discharged from the military.

In September 2005, while Mr. Castillo was detained in Pierce County jail in Washington state, an ICE agent interviewed him regarding his immigration status. Although Mr. Castillo told the ICE agent that he had

been naturalized while serving in the military and had been sworn in as a citizen in the local INS office in Seattle, Washington, the ICE agent ignored this information. She filled out a Form I-213 "Record of Deportable/ Inadmissible Alien," alleging that there was no record to indicate that Mr. Castillo had applied for any immigration status or relief, but did not mention his detailed responses about his naturalization process. The ICE agent also issued an immigration detainer against Mr. Castillo. Compl. at 5, *Castillo v. Swarski*, No. C08-5683 (W.D. Wa. Nov. 13, 2008).

Although two months remained on Mr. Castillo's sentence in Pierce County before he could be released or taken into ICE custody, ICE completed the I-213 report and issued the immigration detainer the day of the interview, without taking any time to investigate his claim to citizenship. ICE had Mr. Castillo's alien number, social security number, fingerprints, permanent residency papers, N-400 application for citizenship, and naturalization certificate in its databases. Even though ICE's records from the interview listed the same social security number Mr. Castillo had received when he became a permanent resident, ICE issued a detainer against Mr. Castillo. And when Pierce County was supposed to release Mr. Castillo, it did not do so, but informed him that he

would have to wait. Instead of regaining his freedom, Mr. Castillo was taken by ICE agents, detained, and put into removal proceedings. *Id.*

As a result of the unlawful immigration detainer and the subsequent commencement of removal proceedings, Mr. Castillo spent 226 days in immigration detention before DHS acknowledged that all of his claims to citizenship were correct and his case was terminated. The ICE agent who issued Mr. Castillo's unlawful detainer and initiated his unlawful detention would likely never have issued the detainer if an oath or affirmation were required.

C. James Makowski, a U.S. citizen, was wrongfully subjected to a detainer that would in all likelihood not have been issued had the ICE form required an oath or affirmation.

James Makowski, a U.S. citizen, was subjected to not one but ***two*** improper ICE detainers. As a result of the second detainer, Mr. Makowski served 70 days in prison, having been disqualified from the state's boot camp program. Had an immigration official taken the time to review his file, as would have been required for an officer to swear an oath or affirmation, it would have become readily apparent that he was in fact a citizen—and the detainers would never have been issued.

Mr. Makowski was born in India and adopted by U.S. citizens when he was a baby. He acquired U.S. citizenship through his parents and received a certificate of citizenship in 1989. He obtained a U.S. passport through the State Department at an early age and has always maintained a current passport. He enlisted in the U.S. Marines while in high school and entered active duty in 2005. As part of the Marine application process, Mr. Makowski had to pass a federal background check, which noted that he was a U.S. citizen.

In October 2009, Mr. Makowski was arrested in DuPage County, Illinois, for a probation violation, having failed a drug test and tested positive for marijuana. When his father posted bail, DuPage officials said he could not be released because of an immigration hold. Mr. Makowski spoke by phone with someone he believed to be an immigration official and explained that he was a U.S. citizen. He was released a few hours later. Just as with Ms. Morales, this did not prevent ICE from issuing a second detainer against him.

In 2010, Mr. Makowski was arrested again in DuPage County on a drug charge. The next day, ICE lodged another immigration detainer against him. ICE never provided Mr. Makowski a copy of the immigration

detainer, never notified him that it had been lodged against him, and never provided any mechanism to challenge it. The detainer was issued on the ground that DHS had initiated an "investigation" into whether Mr. Makowski was removable from the United States. The detainer instructed state and local law enforcement to detain him for an additional 48 hours after his period of lawful state incarceration was over.

Mr. Makowski first learned of the unlawful detainer in October 2010, when the detainer disqualified him from employment in the DuPage County Jail. He asked to speak with ICE officials multiple times to prove his U.S. citizenship, but he received no response.

Later that year, Mr. Makowski accepted responsibility for his crime and, like Mr. Mayorov, was recommended for the IDOC's boot camp program. Once completing that program, Mr. Makowski would have been released without having to serve prison time.

After sentencing, Mr. Makowski was transferred to the Stateville Correctional Center for processing into IDOC. Because of his foreign birth, he was interviewed by an ICE officer at Stateville. Mr. Makowski showed the ICE officer at Stateville a copy of the biographical page of his U.S.

passport, as well as his social security card. The ICE officer made copies of the documents, but failed to cancel Mr. Makowski's detainer.

Mr. Makowski thought he was going to be transferred into boot camp, but he soon learned by written communication from the jail that he was disqualified because of the detainer. He was then transferred to the Pontiac Correctional Center, a maximum-security prison. His father then sought assistance from an attorney to force ICE to lift the patently erroneous detainer. The attorney made phone calls to ICE to have the detainer canceled, but ICE refused to take the necessary action. Ultimately, the attorney was required to go in person to ICE's Chicago offices to persuade ICE to correct its mistake.

Mr. Makowski ultimately spent 70 days in prison—first in a maximum-security facility, and then under medium security—before he was properly sent to boot camp. He completed boot camp successfully and has since been released.

This story, too, illustrates the practical importance of the Fourth Amendment's protections. No federal or state official could have asserted under oath that there was any basis for removing Mr. Makowski—nor even that an investigation had begun in earnest. A straightforward review of his

file would have discovered the certificate of citizenship already issued by immigration authorities. If an oath or affirmation had been required—as the Fourth Amendment indicates—that simple personal accountability would in all likelihood have avoided the issuance of detainers against Mr. Makowski.

III. ICE detainers lack a critical safeguard: review by a magistrate or independent judicial officer.

A. The ICE detainer does not call for review of the alleged justification for detention by an independent judicial officer.

The ICE detainer in this case, in contrast to a valid warrant, requested that the County of Lehigh detain Mr. Galarza without any review by a neutral magistrate. ICE agents issue detainers without review by any judge or independent judicial officer. *See* 8 C.F.R. § 287.7(b) (listing the immigration officials who may issue detainers). And the County held Mr. Galarza on the ICE detainer in spite of its facial and procedural invalidity.

The lack of judicial review demonstrates that an immigration detainer is not equivalent to a warrant and violates the Fourth Amendment principle that an order for arrest must be issued by a neutral and detached magistrate. *See, e.g., Connally v. Georgia*, 429 U.S. 245, 250-51 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971). The neutral magistrate

requirement helps to ensure that a "disinterested determination" establishes probable cause, rather than the incentives of an enforcement officer. *Wong Sun v. United States*, 371 U.S. 471, 497-98 (1963) (Douglas, J. concurring) (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). As Justice Douglas, and Justice Jackson before him, explained long ago, "'[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Id.* It also ensures that a determination of probable cause is made, period.

B. Dorian Nava, a U.S. citizen, was wrongfully subjected to an ICE detainer that would not have been issued had a judge reviewed it before the fact, rather than after.

Like Mr. Galarza, Dorian Nava, a citizen of the U.S., was a victim of an unlawful ICE detainer that would not have survived judicial review. As a result of the unlawful immigration detainer, Mr. Nava was denied the ability to participate in diversionary programs in prison and was

unlawfully detained in DHS custody for a period of ***five weeks*** after the completion of his state prison sentence.

Dorian Nava was born in Mexico. He became a lawful permanent resident of the United States in 2001, at the age of 11. His father, who is married to his mother and with whom he has always resided, became a naturalized citizen in 1998. Thus, Mr. Nava automatically became a citizen under INA § 320 because, prior to his 18th birthday, he was residing in the United States as a lawful permanent resident in the legal and physical custody of his U.S. citizen father. Although Mr. Nava had not filed for a certificate of citizenship or U.S. passport, the relevant federal agency had all the necessary data in its possession to establish his citizenship and easily could have done so with a minimal amount of questioning and investigation.

In November 2009, Mr. Nava was arrested for a probation violation and spent the weekend in Cook County Jail. On the following Monday, he was taken to Stateville Correctional Center for processing to serve a sentence for the probation violation. During processing, Mr. Nava was asked where he was born, and he explained that he had been born in Mexico. As a result, he was directed to an ICE officer for further

questioning. Mr. Nava gave the ICE officer his parents' names and stated that he knew that his father was a citizen and believed that his mother was a citizen also. The officer was able to confirm that Mr. Nava's father was a citizen and that his mother was a lawful permanent resident. The officer asked Mr. Nava when his father became a citizen, and Mr. Nava answered that he believed this had occurred sometime in 2001. The officer informed Mr. Nava that this fact could help him.

Notwithstanding that the officer likely had all the information necessary to confirm Mr. Nava's citizenship, ICE issued a detainer against him. The detainer stated that DHS had initiated an investigation and requested IDOC to detain him for an additional 48 hours beyond his state prison sentence. As a result of this detainer, Mr. Nava was designated as a "higher security risk" inmate by the Illinois prison system.[4] Accordingly, while he was serving his nine-month sentence for the probation violation, he did not qualify for diversionary programs such as early work release and education classes.

[4] This is a frequent side effect of immigration detainers. *See*, *e.g.*, *Villegas v. Metro. Gov't of Nashville*, __ F.3d __, No. 11-6031, 2013 WL 776798, *2 (6th Cir. Mar. 4, 2013) (immigration detainer leads to pregnant woman's reclassification as medium-security inmate and left her to give birth in shackles).

In August 2010, Mr. Nava was released from IDOC custody and immediately entered the physical custody of DHS. Five weeks later, Mr. Nava had his first appearance before an immigration judge. He informed the judge that he believed he was in fact a U.S. citizen because his father was a citizen. The judge told him that if that was the case, he should retain an attorney. He retained NIJC to represent him, which secured his prompt release from ICE custody. Removal proceedings were terminated. In June 2011, DHS issued Mr. Nava's certificate of citizenship, acknowledging his citizenship since January 2001.

For Mr. Nava, judicial involvement made all the difference. Unfortunately, it took nine months, missed opportunities for diversionary programs, and five weeks of wrongful detention before the matter was reviewed by an independent magistrate. Had a magistrate or judge reviewed the matter ***before*** the detainer was issued—as the Fourth Amendment requires—none of this would have happened.

C. Conway Wiltshire, a U.S. citizen, was deprived of his liberty by an unlawful immigration detainer that would likely not have issued if a neutral magistrate had reviewed it in advance.

Like Dorian Nava, Conway Wiltshire is a U.S. citizen who was subjected to an unlawful immigration detainer that would never have issued if a neutral magistrate had reviewed it beforehand.

Mr. Wiltshire was born in Jamaica in 1966. He entered the United States as a permanent resident in 1970, when he was four years old, and became a citizen in 1978 when both of his parents were naturalized.

In October 2007, while Mr. Wiltshire was serving a sentence for issuing a bad check in Bucks County, Pennsylvania, ICE agents came to interview him to determine whether he was subject to deportation. Mr. Wiltshire informed them that he was a U.S. citizen and had been since he could remember. Nonetheless, ICE issued a detainer against him that afternoon.

The alien files of Mr. Wiltshire and both of his parents were available to the ICE officers; if the agents had reviewed them, they would have discovered that Mr. Wiltshire was a U.S. citizen. But ICE instead made the cursory and incorrect assumption that Mr. Wiltshire was not a derivative

citizen and issued a detainer against him. The unlawful detainer prevented Mr. Wiltshire from participating in work-release programs during the remainder of his criminal sentence, even though Mr. Wiltshire repeatedly informed officials that he was a citizen and should not be subjected to a detainer or to removal proceedings. After Mr. Wiltshire completed his sentence, the immigration detainer resulted in Bucks County refusing to release him and, instead, transferring him to ICE custody. Mr. Wiltshire spent three months in immigration custody until removal proceedings were terminated because there was no legal basis to detain or deport him. Compl. at 3-5, *Wiltshire v. United States*, Nos. 09-4745, 09-5787 (E.D. Pa. Oct. 16, 2009).

In Mr. Wiltshire's case, if an independent judicial officer had been required to review the immigration detainer and ascertain probable cause, Mr. Wiltshire would never have suffered such deprivations of his liberty. His citizenship was easy to ascertain. As in the cases of Dorian Nava and Ernesto Galarza, the application of standard Fourth Amendment protections would likely have prevented constitutional violations and unlawful detention.

CONCLUSION

The protections conferred by the Fourth Amendment make a real difference to the lives of immigrants and could prevent or minimize the kinds of injustices experienced by Ernesto Galarza, Sergey Mayorov, Ada Morales, Rennison Castillo, James Makowski, Dorian Nava, and Conway Wiltshire. For all these reasons, to the extent the Court addresses the constitutional infirmities of the detainer at issue in this appeal, it should hold that the detainer violates the Fourth Amendment and fails to protect the rights of those who come within its grasp.

Dated: March 26, 2013

Respectfully submitted,

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COMBINED CERTIFICATIONS

Undersigned counsel certifies the following:

1. Typeface, word count, and page limit. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as it contains 5,878 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as it has been prepared in a 14-point, proportionally spaced typeface, Book Antiqua, by using Microsoft Word 2010.

2. Identical copies. The PDF and paper versions of this brief are identical.

3. Virus check. A virus check of the PDF version has been performed and no virus was detected, using Trend Micro OfficeScan Client for Windows, version 10.5.2122.

4. Bar certification. I am admitted to the bar of the Third Circuit.

5. Service and Filing. I have this day caused one copy of this brief, as an exhibit to the motion for leave to file, to be served on counsel of record listed below via FedEx to the following addresses:

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I have also this day caused a digital version of this brief, as an exhibit to the motion for leave to file, to be uploaded to this Court's website and

caused ten copies of the brief and the supporting motion to be sent by FedEx to the Clerk of the Court.

Dated: March 26, 2013 /s Andrew C. Nichols
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